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Counsel for Plaintiffs

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

ST. LUKE'S HEALTH SYSTEM, LTD; ST.
LUKE'S REGIONAL MEDICAL CENTER,
LTD; CHRIS ROTH, an individual;
NATASHA D. ERICKSON, MD, an
individual; and TRACY W. JUNGMAN, NP,
an individual,

Plaintiffs,

vs.

AMMON BUNDY, an individual; AMMON
BUNDY FOR GOVERNOR, a political
organization; DIEGO RODRIGUEZ, an
individual; FREEDOM MAN PRESS LLC, a
limited liability company; FREEDOM MAN
PAC, a registered political action committee;
and PEOPLE'S RIGHTS NETWORK, a
political organization and an unincorporated
association,

Defendants.

Case No. CV01-22-06789

**SUPPLEMENTAL BRIEF RE:
DISCLOSURE OF PROTECTED
HEALTH INFORMATION DURING
TRIAL**

COME NOW Plaintiffs, by and through their attorneys of record, Holland & Hart LLP, and submit this Supplemental Brief regarding Disclosure of Protected Health Information During Trial.

I. INTRODUCTION

Plaintiffs bear the burden of proof on damages in this trial. The use or disclosure of protected health information (“PHI”) of the Infant is required to prove the amounts of their damages for emotional distress, reputational harm, and punitive damages, as explained in more detail below.

Federal regulations and guidance permit the use or disclosure of PHI when the covered entity is a party to litigation. As always, Plaintiffs will make reasonable efforts to limit the use or disclosure only to what is necessary to prove their damages. But it would be fundamentally unfair to permit Defendants an advantage by prohibiting or so limiting use or disclosure of PHI that Plaintiffs cannot advocate for their full damages.

II. BACKGROUND

In the trial status conference on July 11, 2023, this Court permitted Plaintiffs to use as exhibits content created by Defendants that include the name of the Infant. The Court also requested supplemental briefing on the use or disclosure of PHI in evidence at trial, which Plaintiffs now provide.

Plaintiffs intend to offer testimony from (1) Rachel Thomas, the emergency department physician who examined the Infant when he was brought to the Meridian St. Luke’s emergency department; (2) Plaintiff Natasha Erickson; (3) Plaintiff Tracy Jungman; and (4) expert witness Michael Wheaton, head of pediatrics at Saint Alphonsus. Each will offer testimony regarding the medical condition and care of the Infant while in St. Luke’s care. The testimony is not

duplicative of one another. The intended testimony will introduce the Infant’s medical records.

III. ARGUMENT

A. LEGAL STANDARD

HIPAA provides that a covered entity may use or disclose PHI when a party to litigation. *See* 45 CFR 164.506(a) (permitting use or disclosure of PHI as part of “health care operations”); 45 CFR 164.501 (defining “health care operations” to include “arranging for . . . legal services”).

Excerpted below, the guidance published by the Department of Health and Human Services confirms this principle:

May a covered entity that is a plaintiff or defendant in a legal proceeding use or disclose protected health information for the litigation?

Answer: Yes. Where a covered entity is a party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose protected health information for purposes of the litigation as part of its health care operations. The definition of “health care operations” at 45 CFR 164.501 includes a covered entity’s activities of conducting or arranging for legal services to the extent such activities are related to the covered entity’s covered functions (i.e. those functions that make the covered entity a health plan, health care provider, or health care clearinghouse). Thus, for example, a covered entity that is a defendant in a malpractice action, or a plaintiff in a suit to obtain payment, may use or disclose protected health information for such litigation as part of its health care operations.

U.S. DEP’T OF HEALTH & HUMAN SERVS., 705 JUDICIAL & ADMIN. PROCEEDINGS (2022), *available at* <https://www.hhs.gov/hipaa/for-professionals/faq/705/may-a-covered-entity-in-a-legal-proceeding-use-protected-health-information/index.html> (last visited July 12, 2023) (hereinafter “Guidance”).

The covered entity has a responsibility to “make reasonable efforts to limit such uses and disclosures to the minimum necessary to accomplish the intended purpose.” *Id.* (citing 45 CFR 164.502(b), 164.514(d)).

Moreover, as referenced in the Guidance, covered entities regularly use PHI in litigation, particularly in malpractice cases, where the treatment provided must be analyzed. *See, e.g.,*

Mattson v. Idaho Dep't of Health & Welfare, 529 P.3d 731, 736 (Idaho 2023) (examining PHI in medical records on motion for summary judgment); *Secol v. Fall River Med., P.L.L.C.*, 168 Idaho 339, 353, 410 (2021) (holding that medical expert would be permitted to testify consistent with the medical records and his observations during the expert's treatment of the plaintiff).

Here, as described below, Plaintiffs' damages involve the same issue as malpractice cases—health condition and treatment—at their crux.

B. PLAINTIFFS SHOULD BE PERMITTED TO USE PHI IN SUPPORT OF THEIR CLAIMS.

This case involves (among other things) defamation claims, reputational harm damages, emotional distress damages, and punitive damages. The Defendants in this lawsuit have published online in videos and across numerous websites and extremist media platforms false statements that Plaintiff Dr. Erickson “misdiagnosed” the Infant, that Plaintiff St. Luke’s was inappropriately treating the Infant, that Plaintiff NP Tracy Jungman wrongfully advised law enforcement of the Infant’s health condition, and many other falsehoods. *See, e.g.*, Trial Ex. 127 (Idaho Press article quoting Mr. Bundy saying that Dr. Erickson “misdiagnosed” the Infant); Trial Ex. 418 at p. 6 (transcript of video found at Trial Ex. 197 in which Mr. Bundy states Dr. Erickson misdiagnosed); Trial Ex. 224 at 12 (Mr. Bundy states on PRN website that Dr. Erickson misdiagnosed); Trial Ex. 369 at p. 1769 (calling St. Luke’s treatment “incompetent”); Trial Ex. 737 at p. 6 (stating that St. Luke’s was trying to run up the bill); Trial Ex. 450 (accusing Ms. Jungman of “personally benefiting from this Child Trafficking,” stating that she “look[s] at every part of your child’s body;” and accuses her of “diagnos[ing]” the Infant wrongfully because she had not personally seen him (she had reviewed his medical records)).

While the falsity of these statements is established by Defendants’ default, the remaining issues of emotional distress, reputational harm, and punitive damages call for the strong

refutation of these misrepresentations. First, refuting the misrepresentations shows why
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INFORMATION DURING TRIAL - 4

emotional distress and reputational harm are direct and natural consequences. Defendants' statements are so far from the truth and also so cruelly tailored to each of the Plaintiffs' livelihoods and passions that emotional distress and reputational harm result.

Second, and relatedly, Plaintiffs should be able to put on evidence demonstrating that the statements are so far from the truth that they must be knowingly false (or at the very least reckless). Knowing or reckless conduct supports the award of punitive damages.¹ *See, e.g., Vendelin v. Costco*, 140 Idaho 416, 424, 95 P.3d 34, 42 (2004) (holding that evidence of reckless disregard for standards of care was sufficient to permit amendment of complaint to add punitive damages). Mr. Rodriguez published on the Freedom Man website misleading excerpts of the Infant's medical records and claimed that there was "zero evidence" that the Infant was in imminent danger. The publishing of medical record excerpts shows that Mr. Rodriguez and the Freedom Man entities had possession of the records, and strongly indicates that they thus had full knowledge of the Infant's actual medical condition but were intentionally publishing misleading and false information in pursuit of their scheme.

Third, the degree of the wrongful conduct drives the jury's punitive damages decision. The statute provides that "fraudulen[ce]" is one way to establish the state of mind component of punitive damages. Idaho Code § 6-1604(1). And according to the pattern jury instructions, Plaintiffs must prove that Defendants' conduct was an "extreme deviation from reasonable standards of conduct." IDJI 9.20. While default establishes that the statements were false, it does not provide the jury the full foundation for how fraudulent the statements were—or what an

¹ And knowing or reckless falsehood is additionally relevant, should this Court determine that St. Luke's is a public figure, a question the Court raised in the status conference and for which Plaintiffs will provide supplemental argument. *See Irish v. Hall*, 163 Idaho 603, 607, 416 P.3d 975, 979 (2018).

extreme deviation from reasonable standards the smear campaign truly was. This is especially true when considered alongside the evidence that Defendants used the defamatory statements to repeatedly target the Plaintiffs and identify them as enemies to Defendants' base, which includes violent extremists.

C. PLAINTIFFS HAVE MADE AND WILL CONTINUE TO MAKE REASONABLE EFFORTS TO LIMIT THE USE OR DISCLOSURE.

Plaintiffs have always been careful about the use or disclosure of PHI in this litigation. Earlier in this case, before it was reassigned, Plaintiffs sought and obtained a Protective Order for confidentiality in discovery, to permit the protection of confidential information including PHI. 4-19-23 Protective Order for Confidentiality in Discovery. They did this in order to limit the use or disclosure of PHI, and the Court agreed that protecting PHI in this manner was appropriate, entering the proposed order. *See id.*; 4-3-23 Memo. ISO Mot. to Enter Protective Order for Confidentiality in Discovery at 2-4. At that point, the litigation was still in the discovery phase, and Plaintiffs produced thousands of pages of documents, including many designated confidential. The Protective Order did not address trial, see Confidentiality Protective Order at 1-8, but the use of such evidence at trial was assumed, given the production in discovery was intended to serve the purposes of trial. Moreover, Plaintiffs have always been careful not to name the Infant in their briefing and pleadings.

In line with their prior efforts, Plaintiffs will continue to make reasonable efforts to limit use or disclosure.

D. DEFENDANTS SHOULD NOT BE GRANTED AN ADVANTAGE THROUGH BARRING INTRODUCTION OF THIS CRUCIAL EVIDENCE, PARTICULARLY WHEN PLAINTIFFS BEAR THE BURDEN OF PROVING PUNITIVE DAMAGES BY CLEAR AND CONVINCING EVIDENCE.

Plaintiffs now must put on their evidence. They have the burden to prove their damages to the jury. They cannot do so without using and disclosing PHI. And it would be fundamentally

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unfair to permit Mr. Bundy to appear on the front page of the Idaho Press stating that Dr. Erickson “misdiagnosed” the Infant and not permit her to explain, with detail, why that statement is patently and knowingly false, when that misrepresentation has caused her so much harm, including fear for her family’s safety. Likewise, NP Jungman must be permitted to explain how her actions were appropriate, in detail, and in the context of the Defendants’ false statements. St. Luke’s needs to put on evidence refuting Defendants’ misrepresentations.

Plaintiffs are entitled to a full and fair trial on the amount of their damages, for which they bear the burden of proof—including clear and convincing evidence of punitive damages. *See* Idaho Code § 6-1604(1). Defendants should not be permitted to further gain an advantage from their default strategy by Plaintiffs not being permitted to fully refute the misrepresentations Defendants have made, which have caused Plaintiffs so much harm.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs request that this Court permit the use of PHI in support of Plaintiffs’ case for damages.

DATED: July 12, 2023.

HOLLAND & HART LLP

By: */s/Erik F. Stidham*

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2023, I caused to be filed via iCourt and served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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