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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
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| COUNTY OF CHARLESTON | ) | C.A. No.: 2021-CP-10-04772 |
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| Mark Waller and Donna Berry-Waller, | ) | |
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| Plaintiffs, | ) | **DEFENDANTS LOWCOUNTRY INFECTIOUS DISEASES, P.A. AND KENT STOCK, D.O.'S COMPOSITE MOTIONS IN LIMINE** |
| | ) | |
| vs. | ) | |
| | ) | |
| Lowcountry Infectious Diseases, P.A. and Kent Stock, D.O., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

Defendants Lowcountry Infectious Diseases, P.A. ("LID") and Kent Stock, D.O. ("Dr. Stock"), by and through undersigned counsel, hereby move in limine to exclude and/or limit the following evidence, testimony, and presentation. These Motions are made pursuant to the South Carolina Rules of Civil Procedure and other further applicable law.

## BACKGROUND

This is a medical malpractice case about the proper identification and treatment of a lumbar spine infection that Plaintiff Mark Waller developed after sustaining a back injury at work on February 5, 2018 and receiving injections from providers in Alabama and dry needling at physical therapy provider in South Carolina. Dr. Stock is an infectious disease physician with LID who first became involved in Mr. Waller's care on February 12, 2018 when he was asked to see him by a hospitalist, Dr. Conway, during Mr. Waller's February 9, 2018 – February 13, 2018 hospitalization. Roper's lab initially reported Mr. Waller's February 9, 2018 and February 10, 2018 blood cultures as positive for MRSA. However, the hospital lab subsequently corrected the result to MSSA and, suspecting he had diskitis, Dr. Stock began treating Mr. Waller with MSSA-effective antibiotics as an inpatient at Roper and then as an outpatient with a PICC line at LID.

Notably, even before Mr. Waller's discharge from Roper, on February 12, 2018, his blood cultures returned negative for any bacteria.

Between February 14, 2018 – February 23, 2017, Mr. Waller treated with Dr. Stock and LID as an outpatient and presented with normal vitals and reported improvements in pain. However, on February 27, 2018, Mr. Waller returned to Roper's ER with complaints of increased back pain. He was not ultimately admitted and, instead, referred back to Dr. Stock and LID. His cultures from this day were also negative.

Between February 28, 2018 – March 7, 2018, Mr. Waller returned as an outpatient at LID with normal vitals and negative blood cultures. However, on March 21, 2018, Mr. Waller presented with worsening back pain and constipation, so Dr. Stock admitted Mr. Waller to former Defendant Roper St. Francis Healthcare. There, Dr. Stock ordered a biopsy aspiration and neurosurgery consultation. The aspiration revealed "scant growth of MRSA," so Mr. Waller's antibiotic was changed to treat the secondary MRSA infection. However, neurosurgery recommended against surgery. In spite of this, on March 26, 2018, the same day that Plaintiff Donna Berry-Waller presented to South Carolina for the first time since Mr. Waller's work injury, the Wallers flew to New York where Ms. Berry-Waller lived and worked and transferred Mr. Waller's care to Dr. Benjamin Cohen at NYU Winthrop. Waller's discharge was against the medical advice of his physicians at Roper Hospital.

While in New York, Mr. Waller again had negative blood cultures and the neurosurgeon who evaluated him initially saw no need for surgical intervention. However, Waller nonetheless eventually underwent two surgeries with Dr. Cohen: March 29, 2018 laminectomy and vertebral corpectomy with hardware, followed by an April 10, 2018 spinal fusion. Within a month of his last surgery with Dr. Cohen, at Ms. Waller's insistence, Mr. Waller sought a second opinion with

another provider, Dr. Qureshi at Hospital for Specialized Surgery ("HSS"). On February 25, 2020, Dr. Qureshi removed Mr. Waller's hardware and performed a new spinal fusion. Two years later, Mr. Waller underwent a second fusion surgery with Dr. Qureshi on July 28, 2022 due to significant degenerative changes caused by the hardware that had been placed there previously. Mr. Waller has not undergone any additional surgeries or antibiotic therapy since.

His activities are no longer restricted by any physician or provider either. However, he has not worked since his initial work injury. He also reached the mandatory retirement age for his position as an ATF Agent in June 2021 (i.e. at 57 years old). While Ms. Berry-Waller lived and worked in New York as tax preparer while Mr. Waller was treated in South Carolina, as of this year, she now lives full-time with Mr. Waller in South Carolina. She claims that caring for Mr. Waller caused her personal injuries and to lose clients.

## LEGAL ARGUMENT

### I. THE COURT SHOULD EXCLUDE EVIDENCE, TESTIMONY, AND PRESENTATION OF LAY WITNESS MEDICAL OPINIONS.

In order to prove a medical malpractice claim such as this, Plaintiffs must present expert medical testimony to establish the standard of care, a divergence from the standard of care, and that such divergence was the proximate cause of the alleged injury. *Dawkins v. Union Hosp. Dist*., 408 S.C. 171, 176, 758 S.E.2d 501, 504 (2014) (internal citations omitted). Moreover, "[b]ecause medical knowledge is generally outside of a juror's common knowledge," expert testimony is generally required for a party to offer opinions on other aspects of medical treatment and care that are not "within a layman's common knowledge or experience." *Id.*, 408 S.C. at 177, 758 S.E.2d at 504. "Expert testimony assists the jury in making a more accurate determination of fault regarding whether a physician's negligence in rendering medical care proximately caused the patient's injury." *Id.* An expert witness is a witness who provides "scientific, technical, or other specialized

knowledge" and who is qualified to do so by "knowledge, skill, experience, training, or education." Rule 702, SCRE. Lay witnesses cannot offer opinion testimony unless that testimony does not require special knowledge, skill, experience, or training. Rule 701, SCRE. Moreover, and more generally, no witness can offer testimony unless they have personal knowledge of the matter under Rule 602, SCRE.

None of Plaintiffs' three fact witness, Mr. Waller, Ms. Berry-Waller, or Ms. Betty Waller, qualify as an expert witness. Indeed, they all acknowledge that they have never worked in healthcare or are doctors. Exhibit A – M. Waller Dep. pp. 38, 104; Exhibit B – D. Waller Dep. p. 38; Exhibit C – B. Waller Dep. p. 22. However, based on deposition testimony, we nevertheless expect these witnesses to offer medical opinion testimony. Specifically, we expect these witnesses to testify that:

- Dr. Stock prescribed the wrong antibiotic for Mr. Waller;
- Dr. Stock did not perform appropriate testing after Roper initially reported his cultures as positive for MRSA;
- One of Mr. Waller's providers at Roper gave him MRSA;
- Mr. Waller had MRSA prior to his March 21, 2018 hospitalization;
- Mr. Waller had an abscess before and/or during the March 21, 2018 hospitalization;
- MRSA caused Mr. Waller's discitis;
- Dr. Stock violated the standard of care;
- Mr. Waller had to undergo surgery with Dr. Cohen and/or Dr. Qureshi; and
- Ms. Berry-Waller incurred medical damages as result of caring for Mr. Waller, including suffering from PTSD.

Ex. A – M. Waller Dep. pp. 50, 103; Ex. B – D. Waller Dep. pp. 24-25, 28, 38, 45, 121.

These are opinions that are not within the ambit of common knowledge. They concern nuanced diagnoses, treatment plans, and what is required of physicians (i.e., the standard of care). Accordingly, they may only be offered by expert witnesses. Rule 702, SCRE. This alone warrants their exclusion.

Moreover, allowing Plaintiffs' fact witnesses to offer the foregoing medical opinions – especially those lacking foundation – risk misleading the jury on issues central to liability. *See* Rule 403, SCRE. Therefore, they are highly prejudicial. This would be true of any other lay witness medical opinion elicited by Plaintiffs. Therefore, Defendants respectfully request that the Court preclude Plaintiffs from offering the foregoing testimony in any way at trial and preclude them from eliciting any other lay witness medical opinions.

## II. THE COURT SHOULD EXCLUDE EVIDENCE, TESTIMONY, AND PRESENTATION OF ALLEGED HEARSAY STATEMENTS BY PLAINTIFF DONNA BERRY-WALLER'S SISTER.

Ms. Berry-Waller's sister, Patty Nugent, is purportedly a nurse in New York who communicated with Plaintiffs on the phone during some of the relevant time period as family-friend. At their depositions, Plaintiffs testified that Ms. Nugent advised (i) them to engage a hospital advocate while Mr. Waller was hospitalized at Roper St. Francis; (ii) that the representation that Mr. Waller could not discharge without a physician order was a "scare tactic;" and (iii) that multiple tests are required once a patient's cultures reveal MRSA. Ex. A – M. Waller Dep. p. 126; Ex. B – D. Waller Dep. p. 24. Ms. Nugent's alleged out of court statements are clearly hearsay and do not qualify under any exception. Rules 801, 802, SCRE.

Importantly, Ms. Nugent is not testifying as a witness, is not a South Carolina nurse, and Mr. Waller never treated where Ms. Nugent allegedly works at Good Samaritan Hospital on Long Island in New York. Ex. A. – M. Waller Dep. pp. 126-127. Thus, she lacks personal knowledge to testify regarding the practices of any of the providers in this case, including at Roper St. Francis.

Rule 602, SCRE. She is not an infectious disease physician and does not possess the requisite education, training, and experience to opine on infectious disease issues, such as the testing required by the standard of care for suspicion of MRSA. Rule 702, SCRE. As a result, her hearsay statements only stand to mislead the jury and confuse the issues and are inadmissible on multiple grounds, including as being more prejudicial than probative. Rule 403, SCRE.

## III. THE COURT SHOULD PRECLUDE PLAINTIFF DONNA BERRY-WALLER FROM TESTIFYING THAT PLAINTIFF MARK WALLER WAS MOVED TO THE "RESTING ROOM [] WHERE PEOPLE GO TO DIE" AT ROPER ST. FRANCIS.

Although Ms. Berry-Waller was not present for any portion of Mr. Waller's treatment in South Carolina until the day of his discharge, at her deposition, she testified that Mr. Waller was moved to the "resting room [] where people go to die" after the neurosurgeons recommended against surgery. Ex. B – D. Waller Dep. p. 29. She based her testimony solely on the presence of priests or pastors, at a Catholic affiliated hospital, allegedly being in the room. *Id.* Even accepting her account as true, her observation alone is not sufficient to make a leap about where Mr. Waller allegedly was in the hospital, particularly because clergymen visit people in the hospital even under the best circumstances. Therefore, as an initial matter, this testimony lacks foundation. Second, this testimony can only be offered to inflame the passions of the jurors and suggest that Dr. Stock and the other providers were going to let Mr. Waller die. Indeed, that was Ms. Berry-Waller's suggestion at her deposition. *Id.* at p. 30. Such a suggestion is not based in fact, is speculative, is misleading, is substantially more prejudicial than probative of any issue in the case, and should be excluded. Rule 403, SCRE.

## IV. THE COURT SHOULD EXCLUDE SPECULATIVE EVIDENCE, TESTIMONY, AND PRESENTATION THAT DR. STOCK WAS ON VACATION DURING ANY PART OF MR. WALLER'S TREATMENT.

Although Dr. Stock was present for and intimately involved in all of Mr. Waller's care in

South Carolina, including during his final hospitalization in South Carolina during March 27, 2018, and Plaintiffs do not have any personal knowledge of Dr. Stock's whereabouts when not with Mr. Waller, Plaintiffs have nevertheless speculated that Dr. Stock was on "vacation" during Mr. Waller's final hospitalization and at other unspecified times.

Specifically, Mr. Waller testified that Dr. Stock would be "gone for a week or two" during his treatment for what Mr. Waller described as "vacation" and Dr. Stock's pro bono practice. Ex. A – M. Waller Dep. pp. 50-51. He based this on a conversation with his mother. *Id.* at p. 51. Ms. Berry-Waller testified that unidentified individuals at the nursing station at Roper St. Francis told her that Dr. Stock was on vacation. Ex. B – D. Waller Dep. p. 115. Therefore, any testimony that Plaintiffs offer on this subject would be based on nothing more than conjecture, assumption, or inadmissible hearsay. Allowing such baseless speculation would invite the jury to make findings of fact on information that is unreliable and unverified. Therefore, any such testimony must be excluded for lack of foundation. Rule 602, SCRE.

Furthermore, whether Dr. Stock was on vacation is not a fact of consequence to the determination of this action. Rule 401, SCRE. Plaintiffs' Complaint does not contain any allegations related to a breach of the standard of care for continuity of care, patient abandonment, or failure to arrange for a covering physician. The central issues in this case are related to the medical judgment and treatment of Dr. Stock, not his whereabouts at times when he was not providing direct care.

Finally, the word "vacation" is a potentially emotionally charged term in this context. It is not being offered to prove a relevant fact, but rather in an attempt to inflame the jury and paint a picture of a physician who was callously enjoying leisure time while his patient was suffering. This is precisely the type of unfair prejudice that Rule 403, SCRE is designed to prevent. It

encourages the jury to decide the case on an improper emotional basis rather than on the facts and evidence as they relate to the applicable standard of care. Accordingly, Plaintiffs should be precluded from offering the foregoing testimony and otherwise suggesting that Dr. Stock was on vacation during Mr. Waller's treatment in South Carolina.

## V. THE COURT SHOULD EXCLUDE SPECULATIVE EVIDENCE, TESTIMONY, AND PRESENTATION OF PLAINTIFF DONNA BERRY-WALLER'S CLAIMED ECONOMIC DAMAGES.

Ms. Berry-Waller is seeking $25,297.20 for medical bills that she alleges that she incurred after being injured while caring for Mr. Waller. She is also seeking an unspecified amount for lost future earnings because she alleges that she lost tax preparation clients while caring for Mr. Waller. However, under South Carolina law, damages must be affirmatively proven. Specifically, evidence regarding damages "must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) (emphasis added).

Moreover, to recover medical damages under South Carolina law, a plaintiff must show that they are a "necessary and reasonable expense" caused by the unlawful act. *Sossamon v. Nationwide Mut. Ins. Co.*, 243 S.C. 552, 135 S.E.2d 87, 91 (S.C. 1964); *see also Woodberry v. United States*, 2015 U.S. Dist. LEXIS 92468 (D.S.C. July 16, 2015) (non-precedential) (excluding medical damages unsupported by expert testimony as necessary). In medical malpractices cases like this one, this requires expert testimony. *See Brouwer v. Sisters of Charity Providence Hosps*., 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014) (internal citation omitted) (explaining that expert testimony is required where the subject matter is not common knowledge); *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006) (citing *Green v. Lilliewood*, 272 S.C. 186, 193, 249 S.E.2d 910, 913 (1978) ("[T]he plaintiff must show that the defendants' departure

from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and *damages*.") (emphasis added). However, Ms. Waller does not have any expert support for her medical damages.

Her medical bills also lack foundational support. Instead, her production included a Google search that Ms. Berry-Waller performed on the effects of PTSD on the body. Exhibit D – Google search. The search results are hearsay. Rule 801, SCRE. Furthermore, as discussed above, Ms. Berry-Waller is not permitted to offer medical opinions, which would include testifying about any perceived causal relationship between her bills and any alleged negligence by Dr. Stock. Rule 702, SCRE. She cannot backdoor expert support through other forms of hearsay either. Rule 802, SCRE. Regardless, at her deposition, she could not testify that any of her providers have diagnosed her with any conditions as a result of Mr. Waller's treatment, including PTSD.

Ms. Berry-Waller also lacks sufficient support for her claimed lost future earnings. She has not produced a single client that she has allegedly lost due to Mr. Waller's treatment with Dr. Stock versus any other reason. Plus, she acknowledged that she may have lost clients for unrelated reasons, such as the client being audited. Ex. B – D. Waller Dep. p. 86. Similarly, she has not identified a specific dollar amount that she has allegedly lost, let alone the basis for her calculation. Indeed, at her deposition, she said that she was not able to testify to a dollar amount because of all of the variables involved, including her changing prices, the different types of services that she offers, and how long a customer had been working with her, and because she is not sure if she actually lost any income. Ex. B – D. Waller Dep. pp. 54, 83-86. Thus, the type of lost future earnings that she is claiming requires an expert economic – in addition to foundation. Allowing Ms. Berry-Waller to speculate through her own self-serving testimony is misleading and violates

the South Carolina law described above and should be excluded as speculative prior to her testimony. Rules 403, 602, SCRE.

## VI. THE COURT SHOULD EXCLUDE SPECULATIVE EVIDENCE, TESTIMONY, AND PRESENTATION OF PLAINTIFF MARK WALLER'S MEDICAL BILLS INCURRED IN ALABAMA AND SOUTH CAROLINA AND HIS CLAIMED LOSS OF FUTURE EARNINGS.

Mr. Waller is seeking to recover medical bills arising from his care in Alabama and South Carolina, totaling $69,641.10. As an initial matter, Mr. Waller is not permitted to recover bills incurred prior to Dr. Stock's involvement in his care on February 12, 2018 as there can be no causal relationship, a prerequisite to recovery. *Sossamon* (cited *supra*). Mr. Waller's bills incurred before Dr. Stock's involvement include:

- American Family Care (urgent care) – 2/5/18: $339.00
- Huntsville Hospital – 2/6/18: $1,433.07
- Carolina PT – 2/8/18: $258.00
- Roper St. Francis Primary Care – 1/18/18: $1,098.00

  Total: **$3,128.07**

Next, Mr. Waller is not permitted to recover the cost of any care for which his expert is not critical because, as discussed above, expert testimony that a medical bill was reasonable and necessarily incurred due to negligence is required for medical specials. Plaintiffs' expert, Dr. Allison, is only critical of Dr. Stock's care *after* February 27, 2018. Exhibit E – Allison Dep. pp. 31-33. In fact, she explicitly testified that she thought Mr. Waller's care prior to February 27, 2018 was "very appropriate." *Id.* at pp. 62-63. Therefore, Mr. Waller is not permitted to present any medical bills incurred during his February 9, 2018 – February 13, 2018 hospitalization at Roper Mt. Pleasant to the jury, which total **$31,176.35**.

In addition to those Roper bills, Mr. Waller is also not permitted to recover the bills for any

other care provided in South Carolina because he was going to incur those damages irrespective of any negligence. Stated another way, the other South Carolina bills stem from the underlying conduct that Mr. Waller alleges was negligent and caused him to seek medical care in New York so they cannot be both the cause and effect. Moreover, Waller left Roper Hospital against his providers' medical advice and assumed the risk of all future care upon doing so. Accordingly, Mr. Waller is not permitted to present any of his bills incurred in South Carolina, totaling **$66,513.03.**[1]

Mr. Waller likewise claims that he has an unspecified amount of lost future earnings because he has not been able to accept consulting jobs in retirement. However, this claim lacks foundational support. Of note, he is 4 years past the mandatory retirement age of his job at the time. Beyond hearsay, Mr. Waller has not produced any evidence to substantiate that he was offered any specific positions. Similarly, he has not produced any evidence to support that a physician or other provider has placed him on any restrictions that would prevent him from taking said jobs. Ex. A – M. Waller Dep. p. 90. Therefore, presentation of any claimed lost future earnings should be precluded at the outset of trial.

## VII. THE COURT SHOULD EXCLUDE PLAINTIFFS' INFECTIOUS DISEASE EXPERT, GENEVE ALLISON, M.D.'S UNQUALIFIED RECKLESS OR GROSS NEGLIGENCE OPINION.

At her deposition, Plaintiffs' expert, Dr. Allison, opined that Dr. Stock did not intend to harm Mr. Waller but also claimed that Dr. Stock's interpretation of Mr. Waller's February 27, 2018 MRI was "reckless." Exhibit E – Allison Dep. pp. 59-60. Specifically, she testified that "[t]he piece that concerns me for reckless, I hadn't used that word before, but it does ***sort of*** fit, is attributing the MRI findings of 2/27/18 to lag." *Id.* (emphasis added). While not initially confident in this opinion anyway, she later seemingly walked it back by clarifying, "[s]o ***if*** anything is

[1] This total includes the **$31,176.35** bill referenced above for the February 9, 2018 – February 13, 2018 hospitalization.

reckless it's seeing increased enhancement around the epidural space and the psoas muscles and attributing that to clinical lag. So it's a very small piece that I'm at issue with." *Id.* at 63 (emphasis added). First, Dr. Allison is not qualified to offer a legal opinion, particularly in South Carolina. Dr. Allison is an infectious disease physician, not a radiologist so interpretation of MRI results is outside of her stated area of expertise. Furthermore, she acknowledged in the foregoing that she has never used the term "reckless" before meaning it is a concept of which she has little or no understanding, particularly in the legal setting. She also has never testified in a South Carolina court. *Id.* at 23. Second, her wavering opinion does not rise to the South Carolina standard to introduce gross negligence to the jury.

In South Carolina, gross negligence is the intentional, conscious failure to act with slight care, or the conscious doing of something one should not do, exhibiting a reckless disregard for the safety of others. *See Clyburn v. Sumter Cty. Sch. Dist. #17,* 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) (internal citation omitted). It is a severe form of negligence that goes beyond ordinary carelessness and involves a conscious indifference to the potential consequences of one's actions. *Id.*; *see also Richardson v. Hambright,* 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988). Furthermore, In South Carolina, "medical malpractice actions require a greater showing than generic allegations and conjecture." *McLeod*, 367 S.C. at 249, 626 S.E.2d at 4. Clearly, Dr. Allison does not believe Dr. Stock was grossly negligent but allowing her to use the term "reckless," even in a hypothetical, risks the jury perceiving her opinion as one of gross negligence. This would have serious implications for Dr. Stock and his potential exposure and without a sufficient legal basis. Therefore, the risk of prejudice far outweighs any benefit Plaintiffs may derive by Dr. Allison attempting to bolster her negligence opinion by using the term "reckless" and the Court should preclude her unqualified use of the term. Rule 403, SCRE.

## VIII. THE COURT SHOULD EXCLUDE PLAINTIFFS' NEUROSURGERY EXPERT, MICHEAL COHEN, M.D.'S UNQUALIFIED INFECTIOUS DISEASE OPINION.

Dr. Cohen operated on Mr. Waller in New York and now serves as his neurosurgery expert. Although Dr. Cohen admits that he is not an infectious disease expert and will not testify that Dr. Stock breached the standard of care for Dr. Stock's specialty, at his deposition, he nonetheless attempted to criticize Dr. Stock for not being more "proactive" in obtaining a spine surgery consult. Exhibit F – Cohen Dep. pp. 70-71. He based his criticism on his own practices in New York, which he concedes may differ from standards in South Carolina. *Id.* at p. 71. Furthermore, when asked directly if his criticism of Dr. Stock rises to the level of a breach of the standard of care for an infectious disease provider, Dr. Cohen did not say yes. Instead, he stated that only rises to the "standard that [he has] come to accept and practice in [his own] practice." *Id.* In other words, he confirmed that this was merely his personal opinion. Moreover, he also testified that in his hospital, it is the hospitalist who would seek and order a neurology consult if needed, not the infectious disease consultant which further belies his assertion.

Dr. Cohen's personal infectious disease opinion is not admissible. Expert testimony is admissible only if the witness is qualified as an expert by knowledge, skill, experience, training, or education and the testimony will assist the trier of fact. Rule 702, SCRE. Dr. Cohen acknowledged that he was not qualified to opine on the standard of care for an infectious disease physician. Also, an expert's opinion must be based on a proper standard—in a medical malpractice case, that is the relevant standard of care. An expert's personal opinion of what they would do differently does not establish the standard of care. *See McCourt by & Through McCourt v. Abernathy*, 318 S.C. 301, 307-08, 457 S.E.2d 603, 607 (1995).

Allowing Dr. Cohen to testify that Dr. Stock should have been more "proactive" would be highly prejudicial and confusing to the jury. It invites the jury to find fault based on a

neurosurgeon's personal preference rather than the applicable medical standard of care for an infectious disease physician, especially considering that Dr. Cohen refuses to similarly opine about the ER physician and hospitalist involved in Mr. Waller's South Carolina. *Id.* at pp. 73-75. Dr. Cohen already testified that Dr. Stock's treatment with IV antibiotics was appropriate for an infectious disease doctor and that he was not qualified to render a standard of care opinion as to an infectious disease provider. To then allow him to speculate that a different course of action "may have" changed the outcome, without linking it to any breach of duty, is improper under *McCleod* (cited *supra*) and the Rules of Evidence. Rule 403, SCRE. Accordingly, Dr. Cohen's opinion on Dr. Stock should be excluded and Plaintiffs should be precluded from eliciting other infectious disease opinions from Dr. Cohen.

## IX. THE COURT SHOULD EXCLUDE EVIDENCE, TESTIMONY, AND PRESENTATION THAT PLAINTIFFS' CHILDREN MOVED DUE TO PLAINTIFF MARK WALLER'S HEALTH.

Individually, Mr. Waller and Ms. Berry-Waller have two adult daughters, both from prior marriages, that do not live in South Carolina and neither of who are going to testify at trial. At her deposition, Ms. Berry-Waller testified that her daughter, Cloe, represented that she was moving away due to difficulty observing Mr. Waller's pain and that Mr. Waller's daughter, Melissa, had to get away because she was becoming more depressed during Mr. Waller's health complications. Ex. B – D. Waller Dep. 143:15-144:9. At a minimum, this testimony should be excluded as hearsay.

The statements by Cloe ("for sure" I moved because of his pain) and Melissa ("it was a lot," "I need to get away") are inarguably out-of-court statements. They will be offered for the sole purpose of proving the truth of the matter asserted—that the daughters did, in fact, move away because of Mr. Waller's condition. Rule 801, SCRE. The testimony does not fall under any recognized hearsay exception and should be excluded. Rule 802, SCRE.

The testimony should also be excluded as lacking foundation. Ms. Berry-Waller cannot testify as to *why* they moved; she can only testify as to *what they allegedly told her*. Her knowledge is limited to the contents of an out-of-court conversation. Allowing her to testify about the "why" would invite speculation and hearsay, as demonstrated in her deposition. Because she does not have personal knowledge of their reasoning, her testimony on this subject is inadmissible.

Finally, the probative value of Ms. Berry-Waller's secondhand account is exceptionally low. It is an unreliable repetition of alleged statements from non-parties. In contrast, the danger of unfair prejudice is high. This testimony is emotionally charged and designed to elicit sympathy from the jury by painting a picture of a family torn apart by Dr. Stock's care. Therefore, Rule 403, SCRE, further supports the exclusion of this testimony.

Respectfully submitted,

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August 29, 2025
Charleston, South Carolina