IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ANTHONY GLOEDE, Plaintiff, v. SKYLAR THOMAS MEINECKE, Defendant.	))))))))))	CASE NO. LACL146209 **PLAINTIFF'S MOTION IN LIMINE AND RESISTANCE TO DEFENDANT'S MOTION IN LIMINE**

COMES NOW the Plaintiff, Anthony Gloede, by counsel, and for his Motion in Limine and Resistance to Defendants Motion in Limine states as follows:

I. TESTIMONY REGARDING PLAINTIFF "SPEEDING" IS INADMISSABLE.

Defendant has conceded the issue of liability in this case. Prior to conceding liability, Defendant claimed Plaintiff had been speeding without any factual basis for such claim. As such, any testimony regarding Plaintiff allegedly speeding at the time of the accident would be irrelevant and likely to confuse the jury, confuse the issues, and be unduly prejudicial to Plaintiff. Iowa Rules of Evidence 5.402 and 5.403.

In addition, during the Defendant's deposition he made a comment that he believed the Plaintiff was speeding. However, he also stated that he did not see Plaintiff until immediately before the car crash, meaning he has no factual basis to support his conclusion. A lay witness's conclusions are only proper if the lay witness has a factual basis for his conclusion, as he is not an expert witness able to testify to technical information or give general hypotheses. Iowa R. Evid. 5.701; 5.702. Such testimony would be speculative at best, and confuse the jury and

prejudice the plaintiff. As such, any testimony regarding an allegation that Plaintiff was speeding must be excluded from testimony.

II. EVIDENCE REGARDING PLAINTIFF'S INVOLVEMENT IN ANY PRIOR LITIGATION AND/OR CITATIONS OR CRIMINAL CHARGES IS INADMISSABLE

Plaintiff has several citations both prior to and after the motor vehicle accident for various moving violations. Defendant has admitted liability in this case, and regardless evidence of prior citations would be improper and would most likely confuse the jury and would be improper propensity/character evidence. Iowa R. of Evid. 5.404(a). None of the citations or prior lawsuits relate to the Plaintiff's credibility, nor have any relevance in the case before the Court. Iowa Code Section 321.489 and 321.490. ("No record of the conviction of any person for any violation of this chapter shall be admissible as evidence in any court in any civil action.") Iowa Rules of Evidence 5.402, 5.403, 5.404(a).

Iowa Rule of Evidence 609(a)(1) provides in pertinent part: "Evidence that a witness . . . has been convicted of a crime shall be admitted subject to Rule 403, if the crime is punishable by death or imprisonment in excess of one year . . . and the probative value of admitting the evidence outweighs its prejudicial effect. . . ." Iowa. R.Evid. 609(a)(2) also provides: "Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." Iowa R. Evid. 609(a)(2).

As such, none of the Plaintiff's prior citations or lawsuits have any bearing on this case and evidence or testimony regarding the same must be excluded. Iowa Rules of Evidence 5.402.

III. ARGUMENTS THAT NON-PARTIES ARE AT FAULT MUST BE EXCLUDED—INCLUDING ANY REFERENCES TO PLAINTIFF'S PRIOR AND SUBSEQUENT ACCIDENT

The motor vehicle accident giving rise to this case occurred on November 3, 2017. Plaintiff was in a subsequent motor vehicle accident on January 18, 2018. In addition, Plaintiff was in a previous motor vehicle accident on June 2, 2017. Plaintiff anticipates that Defendants will elicit testimony and evidence and otherwise suggest or argue that a portion of Plaintiff's damages are attributable to his other motor vehicle accidents. These arguments are highly inappropriate and must be excluded.

Iowa follows the comparative fault theory of recovery for liability in tort. *See* Iowa Code Chapter 668 (2017). Section 668.2 defines a party as:

> As used in this chapter, unless otherwise required, "party" means any of the following:
> 1. A claimant.
> 2. A person named as a defendant.
> 3. A person who has been released pursuant to section 668.7.
> 4. A third-party defendant.

Iowa Code § 668.2 (2017).

Section 668.3(2)(b) then lists the person to whom a jury can attribute fault. This list is exhaustive, and only includes: "each claimant, defendant, third-party defendant, person who has been released from liability under section 668.7, and injured or deceased person whose injury or death provides a basis for a claim to recover damages for loss of consortium, services, companionship, or society." Iowa Code § 668.3(2)(b) (2017). In this case, the only persons to whom the jury may attribute fault is the tortfeasor driver responsible for the September 29, 2017 accident.

The Iowa Supreme Court has "repeatedly interpreted these statutory provisions to preclude allocation of fault to nonparties whether they be unidentified, dismissed prior to trial, known parties to an occurrence from whom no relief was sought, or acts of God." *Selchert v. State*, 420 N.W.2d 816, 819 (Iowa 1988). Because a jury may not attribute fault to any other person or entity, it is highly inappropriate and prejudicial to the Plaintiffs for Defendants to argue or insinuate that the tortfeasor drivers involved in the other motor vehicle accidents are responsible for any of Plaintiff's damages. If Defendants believed the tortfeasor drivers from the other accidents bore responsibility for Plaintiff's damages they should have brought them into this case as a third-party Defendant.

In addition, it is extremely prejudicial to the Plaintiffs to allow Defendants to point the finger at any person or entity who is not currently a party. Therefore, this Court should preclude Defendants from making any argument or insinuation that the second motor vehicle accident is responsible for Plaintiff's damages. In addition, Defendant Expert Witness Dr. Kimmelman stated in his expert report that Plaintiff was in other car accidents and did not attribute any injury to those accidents. *See* Report of Dr. Kimelman. Defendant has no expert testimony to link any of these other accidents to Plaintiff's injuries by Defendant and therefore any testimony or argumentation on this subject would be inappropriate. Iowa R. of Evid. 5.701; 5.702. As those accidents are not relevant to Plaintiff's injuries their mention would be far more prejudicial than probative and likely to confuse the jury, and they must therefore be excluded. Iowa Rules of Evidence 5.402 and 5.403.

As a result, Defendant's Expert Report must have redactions of any mentioning of Plaintiff's prior and post accidents, Plaintiff's medical records must be redacted for any mention

of any post or prior accidents, and Plaintiff's Expert Report on any post/prior accidents must be redacted.

IV. EVIDENCE OR TESTIMONY REGARDING THE PASSENGER IN PLAINTIFF'S VEHICLE NOT BEING INJURED MUST BE EXCLUDED

The issue in this case is the damages and injuries sustained by Plaintiff as a result of the motor vehicle accident. Evidence that the passenger in Plaintiff's vehicle was not injured as a result of the collision is not relevant to any issue in the case, and is prejudicial as it is likely to confuse the jury on the issues of the case. Whether any other person was injured as a result of the accident has no bearing on the severity of the injuries suffered by the Plaintiff. Iowa Rules of Evidence 5.402 and 5.403. The impact to the vehicle was on the Plaintiff's side of the vehicle, and whether or not his passenger was injured is not relevant and prejudicial.

V. EVIDENCE OR TESTIMONY REGARDING THE DEFENDANT OR HIS PASSENGER NOT BEING INJURED MUST BE EXCLUDED

The issue in this case is the damages and injuries sustained by Plaintiff as a result of the motor vehicle accident. Evidence that the Defendant was not injured as a result of the collision is not relevant to any issue in the case, and is prejudicial as it is likely to confuse the jury on the issues of the case. Whether any other person was injured as a result of the accident has no bearing on the severity of the injuries suffered by the Plaintiff. Iowa Rules of Evidence 5.402 and 5.403. The Defense Medical Examiner agrees that Plaintiff was injured from the car accident in question – the only issue for the jury to decide is the severity of the injuries. The Defendant's vehicle was significantly larger than the Plaintiffs, and whether or not Defendant was injured is not relevant and prejudicial.

VI. DEFENDANT SHOULD NOT BE ABLE TO TESTIFY TO PLAINTIFF'S MEDICAL INJURIES FROM THE CAR CRASH

It is expected Defendant will attempt to testify to his observations of Plaintiff immediately after the car crash on November 3, 2017, including his thoughts on Plaintiff's medical condition. Defendant is not a medical expert and cannot speak to Plaintiff's injuries at the time of the crash. Iowa R. 5.702. In the alternative, if Defendant is able to testify to his observations of Plaintiff's medical condition, Plaintiff should be allowed to test or impeach Defendant's qualifications/testimony/recollection, such as Defendant's lack of training, his work/sleep schedule, his driving for a long period of time that day prior the crash, his alcohol consumption just prior to the crash, his future intent/destination, and other impeachment. Iowa R. of Evid. 5.607.

VII. EVIDENCE OR TESTIMONY THAT NEITHER PARTY RECEIVED A CITATION FOR THE MOTOR VEHICLE ACCIDENT MUST BE EXCLUDED

Defendant has admitted liability for the motor vehicle accident that is the subject of this case. Thus, any testimony or evidence regarding citations or lack thereof for the accident, which would be used to prove fault are not relevant. Evidence regarding citations or lack thereof would prejudice Plaintiff in that jury may believe that the issue of liability has not been resolved and as that issue is not being presented to the jury, that information has no probative value. Iowa Rules of Evidence 5.402 and 5.403.

VIII. DEFENDANT'S REPETITIOUS, DUPLICATIVE, AND GRATUITOUS PARADE OF PLAINTIFF'S EXERCISE REGIME AND DEFENDANT'S ATTEMPT TO EMBARRASS AND PREJUDICE PLAINTIFF MUST BE EXCLUDED

From the submitted defense exhibits, it is apparent that Defendant will attempt a "red herring" argument about Plaintiff's injuries, namely that because he has lifted weights after the

crash, he is not injured. Plaintiff has never argued his injuries have precluded him all out from his weight lifting activities, but that his wrist becomes sore after completing these activities. Parading around photographs (Ex. C, F, G, H) of Plaintiff working out is merely an attempt to confuse the jury, be duplicative, waste time, and unduly prejudice the jury. Iowa R. of Evid. 5.402. Plaintiff requests this evidence be excluded.

In addition, Defendant has filed an Exhibit I, one of Plaintiff's Facebook comments - "you might not be able to unsee it, but those legs and ass look pretty good in the sexy short-shorts". This evidence is being used to unduly prejudice Plaintiff and is not relevant to any claim or defense here. Iowa R. Evid. 5.403. In addition, plaintiff has already admitted that this is him in the photograph. This type of evidence and exhibit should be excluded.

RESISTANCE TO DEFENDANT'S MOTION IN LIMINE

I. PLAINTIFF DOES NOT RESIST DEFENDANT'S MOTION IN LIMINE WITH REGARD TO THE FOLLOWING PARAGRAPHS

Plaintiff does not Resist Defendant's Motion in Limine with regard to paragraphs: 1, 2, 3, 5, 6, 7, or 8 with the following qualifications:

1. Settlement Negotiations – Plaintiff does not object unless Defendant introduces improper evidence that would require at Plaintiff's election to admit evidence of settlement negotiations (such as an accusation Plaintiff never attempted to resolve this case).

2. Liability Insurance - Plaintiff does not object unless Defendant waives this argument by submitting evidence of liability insurance or introduces improper evidence that would require the admission of liability insurance evidence (accusation Defendant will have to

file for bankruptcy or will be personally liable for the judgment – or Defendant introduces evidence of liability insurance).

5. Undisclosed Evidence – Plaintiff agrees if this applies to Defendant as well.

II. ¶ 4 Medical Opinions Through Lay Persons - DEFENDANT IS REQUESTING A PRETRIAL ORDER REGARDING HEARSAY OBJECTIONS

Plaintiff resists ¶ 4 of Defendant's Motion in Limine in that it is merely a pretrial objection to hearsay. Hearsay objections are properly made at trial and in the context of the testimony and question presented. Without context, the Court is not in a position to rule on questions or testimony. Plaintiff agrees that generally hearsay is inadmissible, but the Rules of Evidence also provide various exceptions and exclusions to the rule, and the Court may rule on those objections in context and during trial rather than in a pretrial Motion in Limine.

III. ¶ 9 Use of the Word "Victim" - VERBIAGE CHOICE IS NOT PROPERLY DEALT WITH PRETRIAL

Defendant seeks to limit Plaintiff's word choice during voir dire and trial. Defendant does not have the right to control how Plaintiff tries his case. Defendant's cite no case law nor any rule of evidence to support the proposition that Plaintiff should be limited in their word choice and thus the request should be denied. Statements made by Plaintiff or his counsel can be assessed on a case by case basis at trial.

IV. ¶ 10 and 11 Future Medical Expenses and Full Mind and Body Damages - THE JURY CAN CONSIDER PLAINTIFF'S FUTURE DAMAGES

Defendant seeks to limit Plaintiff from requesting: future medical expenses (paragraph 10), future loss of function (paragraph 11), and future pain and suffering (paragraph 12).

With regard to future medical expenses, Defendant's claim to have no way of knowing the amount sought by Plaintiff, however Defendant admits Plaintiff provided in discovery a calculation of Plaintiff's future medical costs at $40 a month indefinitely. Using the Iowa Mortality Tables, a total figure could have been easily calculated by the Defendant. However, out of an abundance of caution, Plaintiff has supplemented his discovery to Plaintiff attached as Ex. 1. Plaintiff will be seeking no more than $30,000 in past and future medical expenses as a result of Defendant's negligence.

In arguing that Plaintiff should be precluded from asking the jury for future damages Defendant relies heavily on the *Lawson v. Kurtzhals* case. 792 N.W.2d 251 (Iowa 2010). They argue that there has been a failure to disclose. The *Lawson* case is entirely distinguishable, and frankly devoid of similarity to the case at bar. In the *Lawson* case, the Plaintiff provided no figure for damages in response to the Defendant's interrogatories, provided no figure for damages at Plaintiff's deposition, and event refused to send Defense counsel a figure for damages in the form of a settlement demand. In *Lawson,* the parties were once week out from trial before Plaintiff asked and was granted a continuance at the resistance of Defendant, and then only provided a supplement 5 days before the trial after it was rescheduled after Plaintiff's continuance. Truly, in that case, Defense counsel had no idea what Plaintiff was seeking. In this case, the parties have had settlement discussion in this case, and Plaintiff thoroughly answered Defendant's interrogatories. Out of an abundance of caution, Plaintiff has supplemented his discovery answers to limit the amount Plaintiff is seeking to a maximum of $35,000 in past pain/suffering and loss of full mind/body and $90,000 in future pain/suffering and loss of full mind/body. Ex. 1.

Defendant also argues there is insufficient expert testimony regarding future damages. In arguing this, they cite the report prepared by Plaintiff's treating physician. They then attempt to split hairs and parse words and through the guise of a Motion in Limine they seek a partial Motion for Summary Judgment. At the outset, it should be noted that Dr. England's report contains "All answers given above are within a reasonable degree of medical certainty." Def's Ex. A, pg. 3. Defendant has had every opportunity to depose the Plaintiff's expert if they had questions or concerns regarding his report. They never took that opportunity and now seek to argue that their questions regarding what the expert's wording means, now precludes Plaintiff from seeking multiple forms of damages as some type of drastic sanction. The report states that within a reasonable degree of medical certainty that Plaintiff appears to have permanent injury. That is sufficient evidence to submit the claims for future damages to the jury, and if Defendant has questions of the verbiage of the report prepared by Plaintiff's expert they can ask him at trial. Plaintiff will certainly clarify any questions in the report if necessary for the jury and it should be up to the jury to decide if the evidence is sufficient to sustain a verdict for Plaintiff's damages.

As the Defendant specifically quoted in their Motion in Limine the amount that Plaintiff seeks in future medical costs, the Court must deny the Defendant's request that the jury not be provided the opportunity to consider future medical expenses. Likewise, there is sufficient evidence contained in the report prepared by Dr. England for Plaintiff to submit to the jury a request for future loss of function and future pain and suffering.

V. PLAINTIFF CAN ASK THE JURY FOR PAST LOSS OF FUNCTION

Expert testimony is not required to address past loss of function, and the Plaintiff is capable of testifying as to his past loss of function. Iowa R. Evid. 5.701. As such, there is no legal argument to preclude Plaintiff from seeking damages for past loss of function.

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