IN THE IOWA DISTRICT COURT IN AND FOR BLACK HAWK COUNTY

Francesco Sgambellone, Plaintiff, vs State of Iowa, Defendant.	LAW NO. LACV135736 **PLAINTIFF'S FIRST SET OF MOTIONS IN LIMINE**

Plaintiff, by and through undersigned counsel, respectfully requests the Court enter an order restricting the Defendants, its counsel, and its witnesses from entering into evidence, or mentioning in voir dire, opening statement, testimony, or argument the following matters, unless and until Defendant has obtained permission from the Court:

Subjects Referenced in Recorded Video Testimony

Numerous video depositions have been taken with the intent to use them at trial. Plaintiff's counsel needs approximately 24-hours' notice to edit these videos. Plaintiff respectfully asks that the court rule on the following issues to ensure there is sufficient time for editing before the depositions are played for the jury.

1. **Any testimony or questions relating to witness Ronald Gross' criminal convictions for operating a vehicle while intoxicated (OWI), driving with a suspended license or for attempted burglary in the third degree.** During videotaped depositions already taken, defense counsel questioned eyewitness Ronald Gross about his criminal history:

Q. Okay. And, RJ, have you ever been arrested?

A. I've had my checkered past in my past. I've done some stupid things in my past. Since then I've really, really tried to become a better person than what I was.

. . .

A. . . . I was 19 years old in the wrong place at the wrong time with the wrong crowd, hanging out with the wrong kids. And I got roped into an attempted burglary in the third degree . . . Other than that really just some driving charges that I've had from my past.

Q. What sorts of driving charges?

A. Driving without a license, speeding. I had – my early twenties I had some issues with a heavy foot, lost my license a few times because of that. I had two first offense OWIs. That's really about it. I can't think of anything else.

See Exhibit 1.1 at 50:19 through 51:17.

Attempted burglary in the third degree is an aggravated misdemeanor that carries a maximum prison sentence of two years. Iowa Code Ann. § 903.1(2). Operating a vehicle while intoxicated and operating a vehicle with a suspended license are serious misdemeanors that carry a maximum sentence of one year. § 903.1(b). We anticipate that defense counsel will attempt to use this evidence to attack the credibility of Mr. Gross.

A conviction is admissible if it involves dishonest or false statements. Iowa R. Evid. 5.609(a)(2). In the event that the conviction does not involve a crime of dishonesty, Rule 5.609(a)(1) permits a party to attempt to impeach credibility through crimes "punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted." The Court is given discretion under Rule 5.609(a)(1) to weigh the probative value of a witness' prior conviction against the risk of unfair prejudice. *State v. Redmond*, 803 N.W.2d 112, 122 (Iowa 2011).

Mr. Gross' prior convictions of operating a vehicle while intoxicated, driving while barred, and attempted burglary do not call his ability to testify honestly about a workplace injury that he observed into question. Mr. Gross is a neutral third-party with no vested interest in the outcome of this case. The admission of these convictions as character evidence would offer little probative value to the court. This minimal probative value would be substantially outweighed by the risk of confusing or distracting the jury, along with creating unfair prejudice towards the witness.

2. **Any testimony or questions relating to witness Ronald Gross not having a valid driver's license at the time Plaintiff's injury.** During the deposition of Mr. Ronald Gross, defense counsel questioned him about whether he would have had a valid driver's license at the time of Plaintiff's workplace injury:

   Q. Do you have a valid driver's license right now?

   A. I do, yes. Have had a –

   Q. And how long have you had your license back?

   A. Well, I can look. Have to pull it out and look at it. Since January 16th, 2018.

   Q. And how long have you been without your license prior to January of 2018?

   A. It was a few years. It was quite some time. I can't tell you exact amount of time, but it was quite some time, few years.

   Q. Would you have had a valid driver's license in 2016 at the time this incident occurred?

   A. No. I wouldn't have.

   See Exhibit 1.1 at 51:18 through 52:5.

   Iowa Rule 5.401 states that evidence is relevant if it has a tendency to make some fact at issue in the case more or less likely than it would be without that evidence. *See State v. Knox,* 536 N.W.2d 735 (Iowa 1995). The fact must also be of consequence. Iowa R. Evid.

5.401. The fact that Mr. Gross did not have a driver's license at the time he witnessed Plaintiff's injury is not relevant to any issue to be decided by the jury in this case.

Whatever shred of probative value the defense believes this testimony will provide; it is substantially outweighed by its potential to confuse the jury or cause a prejudicial effect on the witness. *See* Iowa R. Evid. 403.

Subjects Referenced in Proposed Exhibits

3. **Any reference to Plaintiff's worker's compensation benefits or any other benefits coming from a collateral source.** Any evidence or argument about worker's compensation benefits or other collateral source evidence should be excluded as prejudicial and irrelevant. Referring to workers' compensation in any manner will be extremely prejudicial to Plaintiff. *See Schonberger v. Roberts*, 456 N.W.2d 201 (Iowa 1990) (holding evidence of workers' compensation benefits is not permissible regardless of Iowa Code section 668.14, which allows evidence of collateral sources along with the cost associated with obtaining the collateral source and any subrogation rights because another statutory provision, section 85.22, gives workers compensation insurers a right of indemnity for amounts paid under the Workers Compensation Act from recoveries received by the worker in tort actions for the same injury); *see also Loftsgard v. Dorrian*, 476 N.W.2d 730,734 (Iowa 1991) (holding that evidence of collateral sources is allowed under Iowa Code section 668.14 when subrogation and indemnity rights *are not* statutorily prescribed). In *Schonberger*, the Iowa Supreme Court held that a literal application of section 668.14 would lead to an absurd result. *Schonberger*, 456 N.W.2d at 203. The Court reasoned that:

> The only conceivable purpose of informing the jury of those benefits is to invite the jury to reduce [the plaintiff's] recovery because of them. But to any extent the jury does reduce the damage award because of the benefits, [the plaintiff] is in effect paying, not once, but twice. We are convinced the legislature did not intend to call for this double reduction. *Id.*

In addition, Defendant should not be allowed to assert medical expenses have been paid for and therefore Plaintiff does not need a verdict, a certain amount of damages, or a certain item of damages. Any such argument is an attempt to inject the issue of workers' compensation into the trial because it allows the jury to know that the Plaintiff's care is already being paid for by an outside source; therefore, the jury need not compensate the Plaintiff for that care.

4. **Any reference to an unnamed third party bearing comparative fault to Plaintiff's injuries.** In a signed report by defense expert Professor David C. Pecoraro, Professor Pecoraro made statements insinuating that third parties not mentioned in the suit bear some fault for the injuries that occurred to Plaintiff:

> The supervisory chain of command was clear; the tour stage manager, Mr. Gary Chrosniak was the person responsible for safety. He and the Co-Stage Manager, "J.T." (Full name not disclosed) were the event organizers and were responsible for safety.
> . . .
>
> Mr. Ames testified . . . Co-Stage Manager, "J.T." said, "Trent, you've helped us out before, can you jump in a fork truck and help load this truck so we can get going faster?"
> . . .
>
> "Going faster" than necessary can contribute to an unsafe work environment.

See Exhibit 1.2 at 3-4, 6.

Iowa Code § 668.1 defines "fault" as any act or omission that is in any measure negligent, reckless, or that subject a person to strict tort liability. Therefore, as

contemplated by chapter 668, "fault" includes negligence, but fault may also include other forms of culpable conduct.

Iowa Code § 668.3(2)(a) states that the chapter covers a trial involving the "fault" of more than one party to a claim, including "third-party defendants and persons who have been released…" Section 668.3(2)(b) specifically delineates those parties whose "fault" can be considered, explicitly naming, "each claimant, defendant, third-party defendant, person who has been released, and injured or deceased person whose injury or death provides a basis for the claim." The plain language of chapter 668 makes it apparent that if a person or entity's "fault" is to be considered by a jury, that party or entity must be a party to the present case.

Iowa Code § 668.5 codifies comparative fault in Iowa as a statutory right to contribution where there is "common liability." *McDonald v. Delhi Sav. Bank*, 440 N.W.2d 839, 841 (Iowa 1989)); *see also* Jeffrey A. Stone, *The Law of Contribution and Tort-Based Indemnity in Iowa*, 55 Drake L. Rev. 113, 131-35 (2006). "Common liability" exists when the injured party has a cause of action for the same harm against multiple defendant parties. *Shonka v. Campbell*, 152 N.W.2d 242, 245 (Iowa 1967); *Rees v. Dallas County*, 372 N.W.2d 503, 505 (Iowa 1985)). There is no common liability when one of the putative defendants has a "special defense." *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 706 (Iowa 1995)). "The classic example of a special defense is Iowa's workers' compensation statute." Stone, *supra*, at 134 (citing at fn. 145 IOWA CODE § 85.20 (commonly referred to as, "the exclusive remedy rule")). There is no common liability between a third-party tortfeasor and an employer because of the exclusive remedy rule. *Id.* (citing at fn. 146 *Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131, 136 (Iowa

1984); *Larimer v. Raque Mfg. Co.*, 498 F. Supp. 37, 38-39 (S.D. Iowa 1980); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 310 (Iowa 1966)).

We anticipate that defense counsel will attempt to use the written report of Professor Pecoraro to allege that another party breached a duty of care, was "at fault," and that the negligence or fault of this unnamed party should be considered by the jury. Defendant's argument is precluded by the fact that Defendants have failed to name the aforementioned tour stage members as a party to this case. Even if the Plaintiff's co-employees had been named as parties, legal scholarship and case law demonstrates that there is no basis for comparative fault in this case because the exclusive remedy rule precludes employers from sharing liability with Defendant in a tort action.

5. **Any testimony, reference, argument, or suggestion by Defendant that Plaintiff's injury may have been less serious had he been wearing steel-toed shoes.** In a signed report by defense expert Professor David C. Pecoraro, Professor Pecoraro suggested that Plaintiff's injury would have been less severe if he had been wearing steel-toed shoes:

> Everyone working a concert has a responsibility for the safety of each other and their own safety. Mr. Sgambellone testified that he was wearing sneakers that night. In my experience, steel-toed shoes are required for personnel working an event like this one. If Mr. Sgambellone had been wearing steel-toed shoes, his injuries may have been less.

See Exhibit 1.2 at 7.

Iowa Code § 668.1 indicates that "fault" can be defined as an "unreasonable failure to avoid an injury or to mitigate damages." In order for a defendant to demonstrate that a plaintiff failed to mitigate their damages, they must prove 1) there was something plaintiff could do to mitigate his damages, 2) requiring the plaintiff to do so was reasonable under the circumstances, 3) plaintiff acted unreasonable in failing to undertake

the mitigating activity; and 4) plaintiff's failure to undertake the mitigating activity caused an identifiable portion of his damages. *Greenwood v. Mitchell*, 621 N.W.2d 200, 205 (Iowa 2001).

Before submitting a mitigation instruction, the Court must first determine that the defendant presented "substantial evidence" on each of the four (4) elements. *Id.* Also, there must be evidence of "an identifiable portion of damages" that a plaintiff could have mitigated and the jury is not left to speculate. *Id.*, at 205-207.

In the present case, Defendant offers no substantial evidence that Plaintiff's injuries could have been somehow lessened by wearing steel-toed shoes rather than sneakers when he was hit by a forklift. Professor Pecoraro's opinion that Plaintiff would have suffered less severe injuries had he worn different shoes span far beyond his area of expertise, as he lacks the scientific, technical, or specialized knowledge necessary to make such an assessment as an expert witness under the Iowa Rules of Evidence. Iowa R. Evid. 702. Defendant has not offered any opinions by medical experts that would substantiate the assertions made by Professor Pecoraro. Thus, the opinions of Professor Pecoraro on this matter should be deemed irrelevant for not having any tendency to make the fact more or less probable. Iowa R. Evid. 5.401. Even if the Court were to find this opinion relevant, it would be far more prejudicial than probative because of its potential to confuse or mislead the jury. Iowa R. Evid. 5.403.

6. **Any reference to speculative opinions found in Professor Pecoraro's signed report.** There are portions of Professor Pecoraro's signed report that introduce

opinions with elements of conjecture or speculation. These statements include but are not limited to:

[Plaintiff's] sudden and unpredictable move contributed to this accident.

Due to the height of the equipment being loaded, Mr. Sgambellone was not visible to Mr. Ames when he looked behind him before backing up.

It is unknown if Mr. Sgambellone was within the line-of-sight for the truck driver to see him when he directed Mr. Ames to back up by saying "Clear."

See Exhibit 1.2 at 8.

The Iowa Rules of Evidence permit expert witnesses to offer opinion testimony if it will aide the jury and is based on special training, experience, or knowledge with respect to the issue in question. Iowa R. Evid. 5.702; *see also Haumersen v. Ford Motor Company*, 257 N.W.2d, 7, 11 (Iowa 1977). Iowa courts have held that in order for an expert's opinion to be competent, sufficient data must be present upon which an expert judgement can be made. *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326 (Iowa Ct. App. 1983); *see also Haumersen*, 257 N.W.2d at 11; *see also Holmquist v. Volkswagen of America, Inc.*, 261 N.W.2d 516, 524 (Iowa Ct. App. 1977). These facts must be sufficient for the witness to reach a conclusion which is more than mere conjecture or speculation. *Id*.

In the present case, the summation section of defense expert Professor Pecoraro's signed report contains opinions that are not rooted in his training, experience, or specialized knowledge as a safety expert. For instance, Professor Pecoraro opined that Plaintiff contributed to his injury through "sudden and unpredictable movement." Professor Pecoraro appears to base this opinion on the deposition of Trent Ames, and employee of

Defendant. A deposition in itself is not sufficient for Professor Pecoraro to make an expert judgement concerning liability in this case. Reviewing the depositions of Mr. Ames, Plaintiff, and others only allow Professor Pecoraro to speculate on how the incident in question occurred. These speculative opinions possess little probative value and are outweighed by their potential of misleading or confusing the jury. Iowa R. Evid. 5.403.

Subjects Related to Trial Argument

7. **Any testimony, argument or suggestion by the Defendant or their counsel that they are sorry or extend sympathy to Plaintiff or that they feel compassion for Plaintiff.** Under Iowa Rule of Evidence 5.401, evidence is relevant if it has a tendency to make some fact at issue in the case more or less likely than it would be without that evidence. A fact at issue is a fact related to the claims or defenses of the case, along with any mitigating factors that could have an effect on the outcome of the case. Any comment by Defendant's lawyer, witnesses, etc. regarding sorrow, sympathy or compassion towards the Plaintiff is inadmissible because it is irrelevant to any issue to be decided by the jury.
8. **Any testimony, argument or suggestion about the defendant's good character, the defendant's reputation in the community, and the defendant's background and roots in the community.** Character evidence is presumed to be inadmissible unless character is in issue. Iowa. R. Evid. 5.404(a). Character evidence is not admissible to prove action in conformity therewith. Id. In a civil case, a defendant may not offer good character evidence to raise a presumption or inference he did not commit the legal wrong that is the subject of the suit. *Porter v. Whitlock*, 120 N.W. 649, 650-51 (Iowa 1909). The defendant's good character, reputation in the community, and background and roots in the community should

be excluded because the defendant's character is not in issue in this trial. The defendant's good character has no bearing on the issues of causation and Plaintiff's injuries and damages.

9. **Any testimony, argument, or suggestion that this lawsuit has been hard on the defendant or caused difficulties for them.** The difficulties this case has created for the defendant should be excluded as not relevant to the present lawsuit. The central issues to the lawsuit are causation and Plaintiff's injuries and damages. The difficulties the defendant has experienced defending this lawsuit has no bearing on any of those issues.

   Even if the defendant's burden in defending this lawsuit is relevant, it should be excluded as more prejudicial than probative. Under Iowa Rule of Evidence 5.403, relevant evidence may be excluded if it is substantially more prejudicial than probative. Prejudicial evidence is evidence that would tend to make the finder of fact base their decision on an improper reason, such as sympathy or empathy, rather than the facts of the case and the law. *State v. Hall*, 297 N.W.2d 80, 87-88 (Iowa 1980). This evidence is likely to make the jury sympathize with the defendant for a reason unrelated to the merits of the case and should therefore be excluded as substantially more prejudicial than probative.

10. **Any testimony, argument, or suggestion regarding the circumstances under which the attorneys for the Plaintiff were employed or the contingent contract under which the attorneys have been retained.** This would include, but not be limited to, any advertising or material produced by Plaintiff's attorneys. Any such reference is irrelevant and would be unduly prejudicial. Iowa R. Evid. 5.401; 5.403. Plaintiff's attorneys recognize potential jurors in the voir dire venire may discuss advertising material as part of the natural

discussion of issues in a jury trial. However, counsel should not use the circumstances of employment or advertising material in argument or for evidentiary purposes.

11. **Any exhibit, testimony, argument, or reference by counsel for the Defendant and their witnesses that some form of medical treatment other than what Plaintiff received would have helped and/or improved his outcome.** Experts, who are going to offer opinions regarding causation, are required to be disclosed as experts pursuant to Iowa Rule of Civil Procedure 1.508. *See Morris-Rosdail v. Schechinger*, 576 N.S.2d 609, 612 (Iowa Ct. App. 1998). Defendants have not designated any medical experts. They have no witnesses who can testify that some form of medical treatment other than what Plaintiff received would have helped and/or improved Plaintiff's outcome. Without expert testimony to establish such a relationship, any reference or testimony that some form of medical treatment other than what Plaintiff received would have helped Plaintiff and/or improved Plaintiff's outcome is irrelevant and prejudicial. Iowa R. Evid. 5.401; 5.403. *See also Kilker v. Mulry*, 437 N.W.2d 1, 4, (Iowa Ct. App. 1988); *Hoekstra v. Farm Bureau Mut. Ins. Co.*, 382 N.W.2d 100, 109 (Iowa 1986).
12. **Any suggestions by counsel as to what would have been the testimony of any witness not actually called to testify**. Counsel should be entitled to comment on the witnesses – or lack thereof, however, informing the jury of the contents of missing testimony would be creating evidence through argument. Iowa R. Evid. 5.401; 5.403.
13. **Any reference to settlement, negotiation, or other offers to compromise**. Evidence of any negotiation or offers to compromise any claims of Plaintiff should be excluded under Iowa R. Evid. 5408. *See Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569-70 (Iowa 1997).

14. **Any testimony or comment by Defendant's lawyer concerning the effect the verdict would have on the Defendant.** Any such testimony, argument or comment would be irrelevant and highly prejudicial to Plaintiff. Iowa R. Evid. 5.401; 5.403.

Other motions are reserved based upon proposed witness and exhibit lists of defendant and other matters that become known during the process of the trial and related rulings.

WHEREFORE, Plaintiff respectfully requests the Court grant Plaintiff's Motions in Limine and prays for such further relief which the Court deems fair and equitable under the circumstances.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleading on March 26, 2021

By: _____ U.S. Mail _____ Facsimile
_____ Hand delivered _____ Overnight courier
_____ eMail ___X___ ECF

Signature _____/s/_____
Andrea Yelden