

1 Purpose of a Motion in Limine: Is not only to exclude during the voir dire examination and  
opening statements references to anticipated evidence claimed to be objectionable...to also  
restrict opposing counsel from asking questions or making statements and offering such  
matters until the admissibility of questionable evidence can be determined during the course of  
trial by presenting to the Court in the absence of the jury such evidence by offering an  
objection. Its objective is to control such matters in advance and thus avoid disclosing to the  
jury prejudicial material which may compel declaring a mistrial. Twyford v. Weber, 220 N.W.2d  
919, 922-23 (Iowa 1974).

and the Defendants should be precluded from providing any additional supplemental opinions.

2. **Character of Defendant:** Any testimony or comments to the effect that Defendant, Val O. Lyons, M.D. is a "good doctor" or the like. Such testimony or commentary is inadmissible because (1.) it is irrelevant and (2.) it constitutes improper character evidence. Iowa R. Evid. 5.404 provides that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion....." Comments by counsel or testimony by witnesses that Defendant, Val O. Lyons, M.D. is a "good doctor" or similar comments are nothing more than evidence of character. The character or reputation of Defendant is not at issue. The sole issue is whether Defendant was at fault with respect to the care he provided Donna Lubahn.

3. **Expressions of Sympathy:** Any testimony or comments by Defendants, Defendants' lawyers or witnesses amounting to expressions of sympathy, sorrow or sadness. Any such expressions of sympathy, sorrow or sadness by Defendant Val O. Lyons, M.D. his attorneys or witnesses are irrelevant and more prejudicial than probative. Counsel for Defendants should be instructed not to make such statements on this topic at any point during this trial, including jury selection.

4. **Present Value Argument Without Proper Foundation:** Any comments or statements regarding the present value of any damage award. Iowa law states that evidence of present value of damage awards, the effect of inflation rate on such awards, and the fact that the inflation rate may be offset by the discount interest rate may be

introduced through expert testimony. Beeck v. Aquaslide N'Dive Corp., 350 N.W.2d 149, 163-64 (Iowa 1984). Counsel's comments or statements, without such testimony at trial, as to the present value of any damage award and/or the effect of inflation or investment income as such amounts, would be creation of evidence which is improper. Plaintiff requests that counsel be foreclosed from references to the future value of any damage awards until such evidence is introduced by an appropriate witness and/or through appropriate exhibits.

5. Creation of Evidence: Any comments or statements that amount to creation of evidence during argument. Under Iowa law, counsel cannot create evidence during an argument, nor can counsel create evidence by argument. State v. Deases, 479 N.W.2d 597, 601 (Iowa Ct. App. 1991). Plaintiff requests that counsel be limited in their argument to the jury to statements concerning the evidence in the case, the applicable Law of Iowa, and to reasonable inferences drawn from those facts or law.

6. Effect of Verdict: Any comment, statements, or augment of counsel designed to make the jury reach their verdict in this case based on how a decision would affect their own lives. Such references could include using the "Golden Rule" or other augments concerning how an award in this case could affect themselves and/or others. Of particular importance in this case would be a suggestion that a verdict in favor of the Plaintiff would limit healthcare opportunities, or raise the cost of healthcare. The jury is required to decide this case based upon the evidence that is admitted by the court and the law which it will be given. Counsel should not be

allowed to unduly influence the jury by references to the effect their judgment in this matter could have upon themselves or other persons.

7. **Evidence not Provided in Discovery:** Any evidence or information that was requested of Defendants in discovery and that was objected to on the basis of relevance or any other ground and that has not been previously produced to Plaintiff.

8. **Expert Testimony of Plaintiff's Treating Physicians:** The Defendant should be precluded from seeking standard of care, causation or any other form of expert opinion from any treating physician or any other witness not designated as an expert. The testimony of any non-expert witness should be limited to their personal observations regarding relevant facts, including treatment provided. See Iowa Code Section 668.11, Iowa Rule of Civil Procedure 1.508, Carson v. Webb, 46 N.W.2d 278, 280-81 (Iowa 1992).

9. **Medical Records that Predate Dr. Lyons' Procedure by More Than 5 Years.** Any medical records that predate Dr. Lyons' May 1, 2013 procedure by more than 5 years. Iowa Code 1.500(1)(a)(b)(3) serves as a general limitation on the ability of the defense to obtain medical records for care that is more than 5 years prior to the date of injury. In this matter any attempt to introduce records that predate Dr. Lyons' May 1, 2013 procedure would only serve to mislead the jury and is thus inadmissible under Iowa Rule of Evidence 5.403.

10. **Misleading Comments on the Burden of Proof:** Any argument, or reference by counsel for the Defendants that if the jurors have "doubts" or are not "convinced" by the evidence, then Plaintiff can't satisfy the burden of proof. The jury will be instructed that "whenever a party must prove something they must do so by the

preponderance of the evidence.” Iowa Civil Jury Instruction 100.3 further instructs the jury that “preponderance of the evidence is evidence that is more convincing than opposing evidence.” Statements by defense counsel that it the jurors have “doubts” or are not “convinced” by the evidence without qualification of those terms (through the use of the word “more” before “convinced” or the use of the phrase “more likely than not” or “more probable than not” after “convinced”) to reflect the requisite degree of certainty required by the preponderance of the evidence standard, it is a misstatement of Iowa law.

As noted in *State v. Kollasch*, 778 N.W. 2d 218 (Iowa Ct. App. 2009), the preponderance of evidence standard involves a degree of certainty slightly greater than 50%. The use of terms “doubts” and “convinced” by defense counsel, without further qualification, does not accurately convey the requisite degree of certainty required by the preponderance of the evidence standard and are therefore misstatements of Iowa law.

The sole purpose for any argument or reference by Defendants’ counsel that if the jurors have “doubts” or are not “convinced” by the evidence, then Plaintiff can’t satisfy the burden of proof is to suggest that the burden of proof is even more than “beyond a reasonable doubt,” which is clearly something other than what is the proper burden of proof. Such comments by Defendants’ counsel would necessarily be confusing and misleading to the jury and highly prejudicial.

**11. Plaintiffs’ Comparative Fault.** Defendants have generally pled in their


Answer the comparative fault of Plaintiffs. However, Defendants have provided no factual basis or expert medical testimony to establish that any action or inaction of Ms. Lubahn caused Ms. Lubahn's damage. Defendant bears the burden of proving this defense. See Baker v. City of Ottumwa, 560 N.W.2d 578, 583-84 (Iowa 1977) (the Defendant who asserts the defense bears the burden of proving it, for the concept rests on the notion that some third party or other independent event was the sole proximate cause of Plaintiff's injuries) (citations omitted). Based on the Iowa Supreme Court decisions in Wolbers v. Finley Hospital, 673 N.W.2d 728, 731-33 (Iowa 2003) and DeMoss v. Hamilton, 644 N.W. 2d 302, 305 (Iowa 2002) it is clear that under Iowa law "comparative fault" is generally not a proper defense in a medical negligence case. In this case the evidence shows that the Plaintiff always complied with the directions given by Defendant Val O. Lyons, M.D. as indicated in the medical records. The Defendant's affirmative defense fails under this burden and all references thereto should be precluded.

More specifically, Iowa Code Section 668.1(2) provides "The legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and contributory fault." A patient's negligence must have been an active and efficient contributing cause of the injury, must have cooperated with the negligence of the malpractitioner, must have entered into proximate causation of the injury, and must have been an element in the transaction on which the malpractice is based. Wolbers v. Finley Hospital, 673 N.W.2d 728, 732 (Iowa 2003) (citing DeMoss v. Hamilton, 644 N.W.2d 302, 306 (Iowa 2002)). Therefore, all references to any comparative fault of the

plaintiff should not be allowed and Ms. Lubahn should not receive a line on the verdict form.

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CERTIFICATE OF SERVICE

I hereby certify that on January 23 2017, I electronically filed this document with the Clerk of Court using the EDMS system, which will serve it on the appropriate parties or by mail.

**/s/ Mike H. Biderman**