IN THE IOWA DISTRICT COURT IN AND FOR CERRO GORDO COUNTY

MARIA O'BRIEN, Individually, STEPHANIE PROHASKI, Individually, ANTHONY SAVAS, Individually, THEODORE SAVAS, Individually, and KRIS CHRISTENSEN, Individually, Plaintiffs, vs. GOOD SHEPHERD, INC. d/b/a GOOD SHEPHERD HEALTH CENTER, DIANE HORNING, Individually, MIKE SVEJDA, Individually, IAN STOCKBERGER, Individually and NURSES "JANE DOE" 1-3, Defendants.	)	LAW NO. LACV069306 **PLAINTIFFS' FIRST MOTION IN LIMINE**

PLAINTIFFS HEREBY REQUEST THE COURT enter an Order restricting Defendants' witnesses or its counsel from entering into evidence, or mentioning in voir dire, opening statement or closing argument, the following matters, unless and until Defendants have obtained permission from the Court:

1. Any claim, argument or implication, that any third party or non-party bears any fault. All claims, arguments, or implications of fault should be directed towards the individual parties of this lawsuit. This would include any allegation of negligence, sole proximate cause, or fault against parties determined by the Court to be properly dismissed from the lawsuit. Specifically, Defendants should not be able to argue that any doctor was at fault for any damages suffered by the Plaintiffs. Defendants did not sue any treating physicians, or any additional parties. The deadline for adding additional parties has expired.

In addition any claim, argument or implication of "comparative fault" on the part of Stephanie Prohaski, Anthony Savas, Theodore Savas, Kris Christensen, or any other member of

the O'Brien family, or any other person. Furthermore, the Iowa Supreme Court has addressed the issue of comparative fault in medical malpractice cases. *Wolbers v. Finley Hospital*, 613 N.W.2d 728, 731-733 (Iowa 2003) and *DeMoss v. Hamilton*, 644 N.W.2d 302, 305 (Iowa 2002). Based on those cases, it is clear that there is no legitimate defense of "comparative fault" in this case and the Defendants should be prevented from arguing or implying that the actions of any of the O'Brien family contributed to her harms, injuries, or death.

2. The circumstances under which the attorney for the Plaintiff was employed or the contingent contract under which the attorney has been retained. This would include, but not be limited to, any advertising or material Plaintiff's attorneys produce. Any such reference is irrelevant and would be unduly prejudicial. I. R. Evid. 5.401; 5.403.

3. Any exhibit, argument, or reference by counsel for the Defendants that if the jurors have "doubts" or are not "convinced" by the evidence, then Plaintiffs 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 if 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, is a misstatement of Iowa law.

In *State v. Kollasch*, the Iowa Court of Appeals discussed the preponderance of evidence standard and cited 32A C.J.S. Evidence § 1627, a7 713-14 (2008), which provides:

> A preponderance of evidence is evidence that is of **greater weight**, or is more convincing, than that offered in opposition to it. The term does not mean preponderance in amount, but implies an overbalancing in weight, and it means, in the last analysis, "probability of the truth." A preponderance is such proof as leads the trier of fact to find that it is **more probable than not**, or **more likely than not**, that a contested fact exists. A preponderance is attained where the evidence in its quality of credibility destroys and overbalances the equilibrium.

2009 Iowa App. LEXIS 1659 at *10-11 (emphasis added). As noted by the Court in *State v. Kollasch*, the preponderance of evidence standard involves a degree of certainty slightly greater than 50%. The use of the 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 Plaintiffs 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.

4. Use of Marie O'Brien's trust and probate documents to imply any damage award is unnecessary or will only go to his beneficiaries. The same is irrelevant and prejudicial. Rules of Evidence 5.402 and 5.403.

5. Any claim or defense that was not pled. Iowa R. Civ. P. 1.421. "Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to the answer made within 20 days after service of the answer, or if no responsive pleading is required, then at trial." *Id*.

6. Any expert opinion, fact known, or basis for opinions, not disclosed in response to discovery. Plaintiff served expert discovery. Defendant responded to the same. Defendant should not now be allowed to present any opinions or related evidence or testimony not properly and fully disclosed or otherwise unsubstantiated. I.R.Civ.P. 1.508.

7. Any evidence or information that was requested of Defendants in discovery, but was objected to on the basis of relevance or any other ground, and that has not been produced to Plaintiff.

8. Any fact witness who has not been fully disclosed in response to discovery. Plaintiffs asked for the name and related information of any witness. Plaintiff also asked to depose all witnesses. Defendant cannot now produce a witness at trial that it did not produce for discovery depositions.

9. Any testimony or comment by Defendant's lawyers concerning the effect the verdict would have on the Defendant or its standing in the community. Such arguments would be improper and prejudicial.

10. Any argument of counsel designed to imply that a verdict in favor of the Plaintiff would limit or impair access to healthcare 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 they will be given. Counsel should not be able to unduly influence the jury by references

to the effect their judgment in this matter could have upon the members of the jury, or other persons of the community in general.

11. 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.

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order restricting Defendants or its counsel from entering into evidence, mentioning in voir dire, opening statement or closing argument, any of the above-mentioned matters unless and until Defendants have obtained permission from the Court to do so.

/s/ Pressley Henningsen
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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on August 30, 2016, by Iowa EDMS.

David E. Schrock

By: /s/ Pressley Henningsen