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CASE NUMBER: 2015-CV-001979-TC

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IN THE EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS, DISTRICT COURT
CIVIL DIVISION

PHILLIP L. HUGGINS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. 15 CV 1979
	)	
CATHY L. ESPOSITO,	)	
	)	
Defendant.	)	
	)	

Pursuant to K.S.A. Chapter 60

PLAINTIFF'S MOTION IN LIMINE AND MEMORANDUM IN SUPPORT

COMES NOW the Plaintiff by and through counsel, Bradley A. Pistotnik and William L. Barr, Jr. of Brad Pistotnik Law, P.A., and respectfully moves the Court for an Order *in Limine* to prevent the Defendant from introducing any of the following matters before the jury by argument, exhibit, reference, implication, innuendo, question, or otherwise due to the fact that the matters are either irrelevant or their probative value is substantially outweighed by the risk that the introduction of them will unfairly prejudice the Plaintiff's case in chief since the evidence is irrelevant, immaterial, and would otherwise confuse or prejudice the jury.

ARGUMENTS AND AUTHORITIES

1. MOTION IN LIMINE STANDARDS

The Court's pretrial authority permits it to entertain motions *in limine*. *State v. Quick*, 226 Kan. 308, 310-11, 597 P.2d 1108 (1979), overruled on other grounds, *State v. Jackson*, 244 Kan.

621, 772 P.2d 747 (1989); *see also* K.S.A. 60-216 (addressing the Court's pretrial authority). A motion *in limine* serves to assure a fair and impartial trial to all parties by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel. *Quick,* 226 Kan. at 311. In general, "the motion is seen as a manner by which to exclude inflammatory, prejudicial, immaterial and irrelevant evidence which if inquired about at trial, despite an objection, would so prejudice the side objecting as to preclude a fair trial." *U.S.A. No. 464 v. Porter,* 234 Kan. 690, 694, 676 P.2d 84 (1984). Such an order is temporary in nature and is entered before trial when no one knows exactly what will turn up later during trial. "It is possible events during the trial, bearing directly on questions of relevance, may support a change in the protective order." *Quick,* 226 Kan. at 312.

"Unfair prejudice in the context of balancing evidence means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. *Fed. R. Evid. 403,* Notes of advisory Committee. Evidence is prejudicial if it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or triggers other mainsprings of human action.' *Weinstein's Evidence Section 403[3],* pp. 37-41. . ." *U.S. v. Blackstone,* 56 Fed. 3d 1143, 1146 (9th circuit 1995). (*See also, F.R.E. 403).*

II. STATEMENT OF FACTS

This case arises from a motor vehicle rear-end crash that occurred on or about the 23rd day of October, 2014. The Plaintiff, Phillip L. Huggins, was operating a motor vehicle northbound with his family and was stopped for an intersection traffic control signal at Oliver Avenue waiting to turn left or west onto E. Kellogg Wichita. At that time and place Defendant, Cathy L. Esposito, was looking at her cellphone in her lap while driving her motor vehicle northbound on Oliver. She drove into the back of Plaintiff, Phillip L. Huggins' stationary vehicle. This resulted in a violent rear-end collision in which Plaintiff, Phillip L. Huggins, his passengers, Keilani Hubbard and his step-daughter Nakaya Hubbard-Johnson were injured.

Keilani Hubbard, and Nakaya Hubbard-Johnson, were removed from the scene by Sedgwick County EMS personnel and taken by ambulance to Wesley Medical Center. Their injury claims have since been resolved.

Mr. Huggins stayed at the scene of the crash with his son, Phillip, Jr., (age 1) while the

Wichita Police Department completed their investigation. He and his son then went to Wesley Medical Center's emergency room to join Keilani and Nakaya. After several hours Keilani and Nakaya were discharged from Wesley's Emergency Room.

The following morning, Mr. Huggins was generally stiff and sore but, most alarming, his left hand was extremely swollen. He went back to Wesley Medical Center where the Emergency Room doctors X-Rayed his hand and determined that he had suffered an oblique fracture of the fourth metacarpal of his left hand in the crash. The impact had been so powerful that Phillip Huggins' left hand had been broken on the steering wheel he was gripping when the crash occurred.

Defendant's vehicle was badly damaged by the crash such that it was deemed a total loss. At the scene of the crash and at her deposition, Defendant, Cathy Esposito, admitted fault by stating that she was looking at her cell phone when she drove into the back of the Huggins' vehicle.

III. MATTERS SOUGHT TO BE EXCLUDED

1. **Any reference to irrelevant or undisclosed medical, psychological, psychiatric, chiropractic or other records not identified and produced during discovery.**

Plaintiff served interrogatories and requests for production of documents upon Defendant during discovery in this case. Only those records and documents that have been produced as required by the rules of discovery should be allowed for use in the trial of this case.

Plaintiff submitted Requests for Production of Documents to the Defendant at the time that the Petition and Summons were served. Request number ten (10) requested, "Any and all documents which the Defendant intends to use at the trial of this action." Request number twenty-one (21) requested Defendant:

Provide copies of any medical records that you have acquired or acquire in the future on the Plaintiff for any treatment at any time by any medical provider.

Defendant responded to this document request as follows:

RESPONSE: None at this time, other than what Plaintiff provided Shelter Insurance in his April 10, 2015, settlement demand. It is assumed that Plaintiff retained a copy of his settlement demand, but if not, one will be provided upon request. Additionally, once the Order for Records is filed in this matter, collection of medical records will be ongoing. Said records may be viewed at the offices of Foulston Siefkin LLP, at a mutually convenient time.

During the course of discovery Defendant did not advise Plaintiff's counsel of its receipt of any additional medical records other than that which Plaintiff had already produced with his April 10, 2015 settlement demand. Nevertheless, at his deposition Mr. Huggins' was asked:

> Q: Do you remember now going to Wesley for that? A: Yes.
> Q: What happened to your shoulder? A: I was pushing a box out of the way and my right shoulder kind of, I guess it just gave out on me but it wasn't like no major injury. They prescribed me like ibuprofen but I'm a big baby sometimes because my right hand is all I got. I can't utilize my left hand so without this I'm basically useless.
> Q: Do you remember going to Wesley 10 days later after the shoulder injury, I guess it looked like you went through a glass door? A: I went through a glass door?
> Q: Did that happen? A: I never went through a glass door ever.
> Q: You don't recall going to Wesley and saying you were in a fight and went through a glass door? A: No. I was never in a fight through a glass door, but I did go to Wesley and had stitches but it wasn't from going through a glass door.
> Q: What was it? A: I cut myself.
> Q: Where did you cut yourself at? A: I think I was doing dishes or something.
> Q: You didn't say you were in a fight? A: No.
> Q: Did you have a head injury? A: No, not that I can recall, no.
> Q: Okay. Do you know why there would be a medical record that says--
> A: My girlfriend was with me. Maybe she told them. I don't know.
> Q: Do you know why she would say that you were in a fight and hit your head?
> A: I have no idea.
> Q: You weren't hit in the face? A: No.
> (Huggins' deposition pp. 57-59)

Plaintiff is not making a claim in this case for injury to his head, face, right shoulder or for lacerations or scarring as a result of the subject crash. Therefore, the introduction of this line of questioning by the defense before the jury concerning purported hearsay statements contained in undisclosed Wesley Medical Center records concerning Plaintiff would serve only to confuse and prejudice the jury unfairly against Plaintiff, Phillip Huggins. For this reason and, additionally, because, if the purported records referenced by counsel actually exist, they were not

disclosed or produced in a timely manner during the regular course of discovery and by rule should be excluded to prevent unfair and prejudicial surprise at trial. Wherefore, Plaintiff prays the Court exclude all reference by the defense to these matters during *voir dire*, opening statements, testimony and final argument in the trial of this case.

2. **Any reference to collateral sources of payments including, but not limited to Medicaid benefits, Social Security benefits, Medicare benefits, unemployment benefits, and any other collateral source of payment including, but not limited to any document from the Social Security office, Medicaid office, Medicare office or any other branch of State or Federal government that could in any manner be construed to be a record, bill, document or other tangible item of evidence that would thrust collateral source information in front of the jury.**

The purpose for the collateral source rule is to prevent the tortfeasor from escaping from the full liability resulting from his or her actions by requiring the tortfeasor to compensate the injured party for all of the harm he or she causes, not just the injured party's net loss. *Bates v. Hogg,* 22 Kan.App.2d 702, 709, rev. denied 260 Kan. (1996) (dissenting opinion citing 2 Minzer, Nates, Kimball, Axelrod, and Goldstein, Damages in Tort Actions § 9.60, p. 9-88 (1991); Restatement (Second) Torts § 920A, comment b (1977). A benefit secured by the injured party either through insurance contracts, advantageous employment arrangements, or gratuity from family or friends should not benefit the tortfeasor by reducing his or her liability for damages. If there is to be a windfall, it should benefit the injured party rather than the tortfeasor. *Bates,* 22 Kan.App.2d at 709, 921 P.2d 949.

The collateral source rule is a common-law rule preventing the introduction of certain evidence, summarized in the Restatement (Second of Torts § 920A (1977) as "payments made to or benefits conferred on the injured party from other sources which are not credited against the tortfeasor's liability although they cover all or a part of the harm for which the tortfeasor is liable."

In *Allman v. Holleman,* 233 Kan. 781, Syl. ¶ 8, 667 P.2d 296 (1982) the Court stated the rule as: 'The collateral source rule provides that benefits received by the Plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." 241 Kan. at 665-66, 740 P.2d 1058.

Plaintiff is an unemployed house husband who makes no claim in this cause for past or

future lost wages or lost income. Although no evidence has been adduced to date concerning any other sources of income, it would be improper and irrelevant for Defendant to suggest by argument or innuendo that he has received or will receive income from some collateral source, governmental or otherwise during any phase of this trial.

3. **Any reference to Plaintiff's past (1995 & 1999) convictions of crimes that do not involve dishonesty.**

Plaintiff anticipates that Defendant will attempt to introduce his prior convictions for possession of a prohibited weapon in 1995 and possession of a controlled substance in 1999 to prejudice the jury against him. These crimes do not involve dishonesty or false statements.

Plaintiff served his sentences for these crimes and is not on parole or probation. None of this evidence is relevant to any fact before the jury. Introducing these convictions for crimes that do not involve an element of deceit, untruthfulness or lack of integrity in principle before the jury would result in unfair and undue prejudice to his case.

Moreover, this evidence is inadmissible based upon the following statutes:

K.SA. 60-421 provides: Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility . . . The phrase "dishonesty or false statement" in Kan. Stat. Ann. § 60-421 means crimes such as perjury, criminal fraud, embezzlement, forgery, or any other offense involving some element of deceit, untruthfulness, or lack of integrity in principle. The issue in determining the admissibility of prior convictions is whether dishonesty is an inherent element of the offense. State v. Marble, 21 Kan. App. 2d 509, 901 P.2d 521, 1995 Kan. App. LEXIS 136 (Kan. Ct. App. 1995); Drug offenses per se do not involve dishonesty or false statement; convictions therefore inadmissible as affecting credibility. State v. Belote, 213 K. 291, 294. 295, 516 P2nd 159; State v. Robinson, Lloyd & Clark, 229 K. 301, 308, 624 P 2nd 964.

K.S.A. 60-422(c) provides: (c) evidence of traits of his or her character other than honesty or veracity or their opposites, shall be inadmissible.

K.S.A. 60-422 (d) provides that evidence of specific instances of his or her conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible."

K.S.A. 60-447 provides that ". . . (a) specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible. . ."

K.S.A. 60-455(a) provides, "subject to K.S.A. 60-477, an amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit a crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion..."

In *State v. Belote,* 213 Kan. 291, 516 P.2d 159 (1973) the Kansas Supreme Court held: "Evidence of traits of a witness' character other than honesty or veracity or their opposites, as well as evidence of specific instances of the witness' conduct relevant only to prove such traits of character, are inadmissible as affecting credibility."

"For the purpose of discrediting a witness, evidence is not admissible to show that he is a user of drugs, or to show the effect of the use of such drugs, unless it is shown that the witness was under their influence at the time of the occurrences as to which he testifies, or at the time of the trial, or that his mind or memory or powers of observation were affected by the habit."

There has been no suggestion in the record that Phillip Huggins was under the influence of drugs at the time of the crash or at any other time relevant to this case. Evidence of Plaintiff's prior convictions for these crimes not involving dishonesty should be excluded as irrelevant and unfairly prejudicial because it does not bear on Plaintiff's credibility as a witness and would unfairly prejudice the fact finders against him.

4. Any reference to past claims against Plaintiff for child support or the existence of child support lien against Plaintiff.

In addition to Mr. Huggins' son, Phillip, Jr. and his step-daughter, Nakaya Hubbard-Johnson, Plaintiff has three children, Cayden Mitchell, (2 yrs.), Martell (22 yrs.), and Mykiea (19 yrs.). Martell and Myykiea have both reached majority and live with their parents in Wichita. Plaintiff's son, Phillip Huggins, Jr. and his step-daughter, Nakaya Hubbard-Johnson, live with him and their mother, Keilani Hubbard. Cayden Mitchell (2 yrs.), lives with his mother in Wichita, but stays with and is cared for by Phillip Huggins and Keilani Hubbard in their household every other weekend.

Plaintiff has been unemployed since the subject crash. He has fallen behind in child support payments for Cayden Mitchell. A notice of lien from the Department of Children and Families for child support arrearage of $4,135.50 has been forwarded to Defendant's insurer, Shelter Mutual Insurance Company, and to Plaintiff's counsel.

Plaintiff is not making a claim in this cause for past or future lost wages or lost income. Plaintiff's inability to pay past child support has no relevance to the instant personal injury claim and in no way bears on the fact issues of this case. Nevertheless, Plaintiff's counsel believes that Defendant will attempt to discredit Plaintiff and impugn his character by introducing evidence of his arrearage in child support payments. Any attempt to introduce or suggest such evidence to the jury during the trial of this case would be irrelevant, highly prejudicial and unfair to Phillip Huggins. Accordingly, Plaintiff moves *in limine* to bar Defendant from attempting to introduce or suggest such matters to the venire during voir dire or to the jury during any phase of this trial. The same should excluded as inadmissible under the following statutes:

K.S.A. 60-422(c) provides: evidence of traits of his or her character other than honesty or veracity or their opposites, shall be inadmissible.

K.S.A. 60-422 (d) provides: evidence of specific instances of his or her conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible."

K.S.A. 60-455(a) provides: subject to K.S.A. 60-477, an amendments thereto, evidence that a person committed a crime **or civil wrong on a specified occasion,** is inadmissible to prove such person's disposition to commit a crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion. . ." **(Emphasis** added.)

5. Any reference as to who referred Plaintiff, Phillip Huggins, to Dr. Aly Gadalla

At the deposition of Plaintiff's treating physician, Aly Gadalla, M.D., defense counsel asked Dr. Gadalla:

Q: And who referred him to you?

A: I believe the Brad Pistotnik Law Firm.

Mr. Huggins testified at his own deposition that his grandmother had been going to Dr. Gadalla for years and had referred him. There has been no showing that the issue of who referred Plaintiff to Dr. Gadalla's care is relevant to the issues of this case. Nevertheless, Plaintiff's counsel is concerned that Defendant's counsel may try to impeach Plaintiff's testimony on this issue with Dr. Gadalla's testimony concerning his "belief" or may question Dr. Gadalla on this issue to discredit him. This would be done simply to embarrass and unfairly undermine Mr.

Huggins' and Dr. Gadalla's testimony concerning Mr. Huggins' broken hand and the treatment rendered. For this reason, Plaintiff moves to bar Defense counsel during *voir dire*, opening statements, testimony or closing arguments from referring to the issue of who referred Phillip Huggins to Dr. Gadalla absent a prior *in camera* showing that such questioning is relevant to the issues of this case.

6. Any reference in the police report to injury or lack of injury in this accident.

It is believed that the Defendant may attempt to elicit testimony from law enforcement officers or attempt to introduce evidence of the accident report in this case. In *Smith v. Estate of Hall,* 215 Kan. 262, 524 P.2 684 (1974) the Kansas Supreme Court held that a police report of an accident investigation which contains statements of a hearsay character and conclusions on the part of the officer preparing **the report** is not admissible as substantive evidence. It was quoted approvingly in *Lollis v. Superior Sales Co.*, 224 Kan. 251, 258.

Lay witnesses are not competent to provide reliable testimony about medical matters beyond the common knowledge of laypersons, or those that are not readily apparent such as medical diagnoses or the effects of possible medical conditions. *State v. McFadden*, 34 Kan. App. 2d 473 (2005) citing *Smith v. Prudential Ins. Co.*, 136 Kan. 120, 124, 12 P.2d 793 (1932).

Strong reliance must be placed on expert, rather than lay testimony for determining causation. *Pope v. Ransdell,* 251 Kan. 112 (1992). In *Knowles v. Burlington N. R.R. Co.*, 18 Kan. App. 2d 608, 856 P.2d 1352 (1993) the Court specifically held that expert testimony on medical causation is required.

> Where the conclusion of causation is not one within common knowledge, expert testimony may provide a sufficient basis for it, but in the absence of such testimony it may not be drawn. W.P. Keeton, *The Law of Torts* 269 (5th ed. 1984). *Moody v. Maine* Cent. R. Co., 823 F.2d 693, 695 (1st Cir. 1987); *Knowles* at 611.

Defendant should not be allowed to argue, imply or infer that the police report and officer's opinion of non-injury to Plaintiff be admitted before the jury due to a lack of proper foundation.

WHEREFORE, the Plaintiff prays that the court grant this Motion *in Limine* and for such other and further relief as the court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed with the Clerk of the District Court using the e-filing system, causing notification of same to be sent by electronic mail to counsel of record on this 10th day of May, 2016.

William L. Barr, #26775