IN THE IOWA DISTRICT COURT FOR LINN COUNTY

KARIN S. WHEELER AND JEFFREY WHEELER, **Plaintiffs,** **v.** **DEREK SCOTT SWENSON; REINHART TRANSPORTATION, LLC; AND REINHART FOODSERVICE, L.L.C.,** **Defendants.**	**CASE NO: LACV080261** **DEFENDANTS' REPLY AND RESISTANCE TO PLAINTIFFS' MOTION IN LIMINE**

COME NOW the Defendants, Derek Scott Swenson, Reinhart Transportation, LLC and Reinhart Foodservice, LLC, and in Resistance and Reply to the Plaintiff's Motion in Limine states:

A. PRIOR MEDICAL TREATMENT

In their Motion in Limine, the Plaintiffs seek to exclude evidence of all medical treatment of Karin Wheeler prior to the date of the accident. In support of their argument, the Plaintiffs merely claim that the records are not relevant under Iowa Rules of Evidence 5.402 and 5.403. While there are many of the Plaintiff's prior medical records that may not be relevant to this cause of action, there are some that are clearly relevant due to the nature of the claims.

Specifically, in this case the Karin Wheeler is claiming the accident caused a traumatic brain injury which resulted in her having cognitive problems including difficulty in speaking and impaired memory. Several of the Plaintiff's medical records indicate that she had problems of this nature prior to the accident. For instance she was previously evaluated at the University of Iowa Hospitals and Clinics for complaints of headaches and slurred speech. While the doctors, recommended that she stop taking her birth control pills, it does not appear that the doctors ever discovered a clear reason for the complaints. Likewise, only a year prior to the accident while

treating at the University of Iowa Hospitals and Clinics, Wheeler filled out a medical record in which she indicated that she had a history of memory problems. Obviously, both of these instances are directly relevant to her current condition in which she makes similar, if not identical, complaints. As a result, these records are valid subjects of cross-examination for both the Plaintiff and the Plaintiffs'experts.

In the unpublished case of Baetke v. IMT Ins. Co., 2005 WL 1750408 (Iowa App. 2005) the Court of Appeals addressed a situation in which a plaintiff sustained injuries to her shoulder and hands in a motor vehicle accident. Upon the plaintiff's Motion in Limine, the trial court excluded medical evidence of the plaintiff's history of depression, hernia operations and sleep apnea. The trial court reasoned that this evidence was either irrelevant or its probative value is substantially outweighed by the danger of its unfair prejudice. In reversing the lower court's ruling and remanding the case for a new trial, the Court of Appeals held that it was "unable to find any unfair prejudice from the jury's consideration of [the Plaintiff's] complete medical history. The adverse effect of relevant evidence due to its probative value is not unfair prejudice." Id. at 2. *Citing* Pexa v. Auto Owners Insurance Company, 686 N.W.2d 150, 158 (Iowa 2004)(where the Iowa Supreme Court affirmed trial court's decision to include plaintiff's pre and post-accident history of cancer and treatment in his UIM claim against his insurer citing that it impacted the plaintiff's physical and mental well-being and was relevant to his claims solving enjoyment of life).

In the case at bar, Karin Wheeler's medical condition before the accident is relevant in that the Plaintiff must prove that the accident caused her current claimed limitations. Her prior medical condition goes to both issues of causation and impact on the enjoyment of life. Because

the Plaintiff's prior medical complaints are similar to her current complaints, they are probative on both issues and should be admitted.

B. CRIMINAL HISTORY

The Defendants do not resist the Plaintiff's Motion in Limine as to the Plaintiff's criminal history. The Defense does not intend on questioning the Plaintiff or presenting evidence of the Plaintiff's previous criminal history at the time of trial.

C. REFERENCE TO INSURANCE

The Defendants do not resist the Plaintiff's Motion in Limine as to the Defendant AMCO. Furthermore, the Defendants would assert that any reference to liability insurance would be in direct violation of Iowa Rule of Evidence 5.411 and would result in a mistrial if violated.

D. RELIGIOUS BELIEFS

The Defendants do not resist the Plaintiff's Motion in Limine as to the Plaintiffs' religious believes. The Defense does not intend on questioning the Plaintiffs or presenting evidence of the Plaintiffs' religious beliefs.

E. GAMBLING

The Plaintiff argues that gambling records are not relevant and are unfairly prejudicial under Iowa Rule of Evidence 5.403. The Iowa Supreme Court has held that evidence is unfairly prejudicial when it "appeals to the jury's sympathy's, rouses its sense of horror, provokes its instinct to punish, or triggers other intense human reactions." Watts v. United Fire and Casualty Co., 572 N.W.2d 565, 569 (Iowa 1997). In this case, the Plaintiff has not shown, and cannot show, that evidence of the Plaintiffs play of slot machines is the type of information that would invoke such a reaction in the jury. The mere fact that evidence of gambling could damage the Plaintiff's case, and at a jury could conclude that the Plaintiff's injuries and damages are not as

extensive as claimed, does not make this evidence unfairly prejudicial. As stated by the Iowa Supreme Court, "the adverse effect of relevant evidence due to its probative value is not unfair prejudice." Pexa, 686 N.W.2d at 159.

In the case at bar, the Plaintiffs gambling activity is relevant to two crucial areas. First, the Plaintiff has contended during the course of discovery that she is unable to handle the family finances due to her injury. Gambling records secured by the Defendants indicate that Karin Wheeler regularly gambles significant amounts of money. This simple fact cuts against her contention that she is unable to handle finances as contended. Second, the Plaintiff claims that she is suffered an impairment to her enjoyment of life as a result of the accident. The significant amount of time spent in this recreational activity before and after the accident tends to prove that the Plaintiff continues to lead a life full of recreation. The Plaintiff tries to contend that gambling is in some way loathsome and should not then be admissible. The simple fact is that gambling within the State of Iowa is a lawful activity in which thousands of islands participate every day. There is no prejudicial effect to participating in this activity. In contrast, the probative value is significant. Evidence of the Plaintiff's gambling activity should be admitted.

F. MEDIATION/SETTLEMENT DISCUSSIONS

The Defendants do not resist the Plaintiffs' Motion in Limine as to mediation and settlement discussions. Furthermore, the Defendants would assert that the Offer to Confess Judgment filed by the Defense would similarly be irrelevant and immaterial and in violation of Iowa Rule of Evidence 5.408.

G. PLAINTIFFS' MOTION OF MARCH 22, 2016 AND SUPPLEMENT OF APRIL 22, 2016

The rules of discovery are liberally construed to promote disclosure of all material and relevant information. Hutchinson v. Smith Laboratories, Inc., 392 N.W.2d 139, 141 (Iowa 1986).

Reflecting this broad access to discovery, Iowa Rule of Civil Procedure 1.701(1) provides that "any party may take the testimony of any person . . . by deposition upon oral examination."

Despite this broad access, the Plaintiffs contend that the depositions of treating physicians should be excluded, citing Mason v. Robinson, 340 N.W.2d 236 (Iowa 1983). In Mason the Iowa Supreme Court outlined the extent to which a litigant could compel "an unwilling expert witness, who is a stranger to the litigation, [to] provid[e] opinion testimony during a pretrial discovery deposition. Id. at 237 (emphasis added). Ultimately, the Court concluded that an expert can be compelled to testify as to a pre-formulated opinion when "a litigant establishes a compelling need for the testimony." Id. at 243. The Court emphasized the issue before it involved the elicitation of "expert testimony from an unwilling witness not acquainted with the facts." Id. at 241. In doing so the Court highlighted the difference between a fact witness and an expert:

> In contrast to factual witnesses who possess knowledge which is unique and many times irreplaceable, expert testimony is not based on any singular personal knowledge of the disputed events. Rather, it depends upon specialized training or other acquired knowledge which allows the expert to draw inferences and form conclusions. Since in most areas of expertise, many individuals possess the necessary qualifications to render expert opinions, this kind of testimony is usually duplicable. Consequently, unlike factual testimony, expert testimony is not unique and a litigant will not be usually deprived of critical evidence if he cannot have the expert of his choice.

Id. at 242. In fact, the trial court in Mason had already ordered the expert to testify as to his personal knowledge and this was not an issue on appeal. Id. at 238.

The Plaintiffs furthermore site Kush v. Sullivan, 836 N.W.2d 152 (Iowa 2013) to support their contention. Like Mason, Kush does not apply to the case at bar. In Kush the plaintiffs were attempting to use the doctor as a designated expert over his own objection. They asked him to render opinions that he had not yet formulated concerning the standard of care of another doctor.

The Court of Appeals denied the appeal of the District Court's refusal to require the opinion based upon the fact that the appellant had not adequately preserve the issue for appeal.

The rule formulated in Mason and discussed in Kush has no application to the present case. Here, the treating doctors are being called as facts witness. Each has personal knowledge of the facts and circumstances of their evaluation and treatment of the Plaintiff. For instance, during the deposition of Dr. Shivapour, which has already been taken, the defense inquired as to his evaluation, assessment and treatment of the Plaintiff. All opinions offered by Dr. Shivapour were conclusions that he had drawn during the course of his normal treatment of the Plaintiff. In fact, he refused to opine as to Dr. Hines' conclusions and he was not forced to do so. As such, use of Dr. Shivapour as a witness is warranted and the Plaintiff's objections to his testimony are unfounded based upon the cases cited.

WHEREFORE, to the extent outlined above the Defendants Resist the Plaintiffs' Motion in Limine and request that it be denied.

PEDDICORD, WHARTON, SPENCER, HOOK, BARRON & WEGMAN, L.L.P.

/s/ Scott J. Beattie

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PROOF 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 pleadings on May 9, 2016, via Electronic Filing.

Signature: /s/ Scott J. Beattie