

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>CHERYL BRONSON,  Plaintiff,  v.  RYAN T. FOLEY and THOMAS W. FOLEY,  Defendants.</p>	<p>CASE NO. LACL133402</p> <p><b>ORDER RE: FOLEYS' MOTION FOR A CONTINUANCE, MOTION IN LIMINE AND OTHER PRE-TRIAL MOTION ISSUES AND BRONSON'S MOTION IN LIMINE AND MOTION TO ALLOW JURORS TO ASK QUESTIONS</b></p>
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The court held a final pre-trial conference on September 30, 2016. In attendance were Travis Burk and Dominic Pechota counsel for plaintiff, Cheryl Bronson (“Bronson”). Nick Rowley, also counsel for Bronson appeared by telephone. Sharon Greer and Mark Brownlee appeared as counsel for defendants Ryan and Thomas Foley (“Foley”). Jannae Towne, media coverage coordinator for Judicial District 5 and David Siegel for Court View Network were present for a portion of the conference to address expanded media coverage issues. Siegel appeared by telephone. The court addressed a motion to continue file by Foleys, motions in limine filed by the parties, a motion related to other pre-trial issues filed by the Foleys and a motion to allow jurors to ask questions filed by Bronson. The court made oral rulings on the record at the pre-trial conference and the basis and reasoning of the court’s ruling are summarily set forth below. The court’s comments on the record are incorporated into this order as if they were set forth below.

### **THE LAW OF MOTIONS IN LIMINE**

The court advises counsel to review the following cases regarding the law of motions in limine under Iowa law. The court's order here incorporates the law from these cases. Specifically counsel should review *Twynford v. Weber*, 220 N.W.2d 919 (Iowa 1974) and *Quad City Bank & Trust v. Jim Kircher & Associates, P.C.*, 804 N.W.2d 83 (Iowa 2011). These cases are not exclusive of any other decision our appellate courts have rendered but simply give counsel a basis to under the Iowa law with regard to motions in limine and their impact in the trial process.

### **FOLEYS' MOTION TO CONTINUE**

Foleys' filed a motion to continue the trial on the basis that Dr. Megan Brady, the orthopedic surgeon for Bronson changed her opinions regarding Bronson's future treatment during her video deposition on September 27, 2016. The Foleys alleged that in a report dated August 30, 2016 Brady indicated that Bronson had a "high probability of developing left knee arthritis, pain, and stiffness as the direct result of the injury. The patient may require subsequent hardware removal and possible total knee replacement in the future."

Bronson argued that they previously indicated in January 2016 when Dr. Brady's expert opinions were disclosed that Bronson faced a knee replacement in the future. They also argued that Dr. Stoken, a physician who examined Bronson in 2015, opined in her September 2015 report. that Bronson would need a total knee replacement. Also Bronson's counsel argued that in mid-August they sent an email to Foleys' counsel indicating that Bronson would require future knee surgery.

Foleys argue that Brady in her deposition opined for the first time that Bronson would need one total knee replacement and because of her age a revision as a later date. Foleys argue these are new opinions not disclosed in her August 30, 2016 report.

After considerable discussion the court indicated that the court was inclined to grant the motion to continue on the basis that while all indications from Bronson's counsel were that Bronson would need future knee surgeries, the report that Brady provided on August 30, 2016, indicated that was only a possibility. A possibility of future treatment is not sufficient to generate a jury question on that issue.<sup>1</sup> The court also indicated that it could limit Brady's testimony to her report of August 30, 2016 eliminating her opinions about the probability of future knee surgery since it was not timely disclosed. The court felt eliminating those opinions would remove the prejudice that the late disclosure caused to the Foleys.

Bronson's counsel rather than have the case continued opted for the latter and agreed that Brady's opinions that there was a probability of future knee surgery would be eliminated from her testimony. Bronson's counsel in support of their resistance to the motion indicated that they did not intend to request an award of future medical expenses for the knee surgeries that Brady discussed in her video deposition. Accordingly, Foleys' motion to continue is denied. Further Dr. Brady's testimony regarding future knee surgeries is limited to her statement in her August 30, 2016 report.

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<sup>1</sup> *Mossman v. Amana Society*, 494 N.W.2d 676, 679 (Iowa 1993) ("To recover the cost of future medical treatment, a plaintiff must furnish substantial proof of the necessity for future treatment and the cost thereof."); *Strub v. Stillmunkes Salvage and Trucking, Inc.*, 669 N.W.2d 261, 2003 WL 21458400, at \*4 (Iowa Ct. App. 2003) ("The rule is clear that opinion testimony of a physician or medical expert as to the future consequences or effects of an existing injury or condition is admissible only as to those which are reasonably certain to occur, or which are medically probable. Consequences or effects which are a mere possibility are not admissible. \* \* \* As Dr. Mulderig testified, there is only a "good possibility" that Strub would require future medical care. We find Strub failed to provide substantial proof of the necessity of such care, and therefore the district court erred by submitting the question of future medical expenses to the jury.")

**FOLEYS' MOTION IN LIMINE**

Foleys' counsel filed a motion in limine in multiple counts. Bronson's counsel indicated they had no objection to the following issues raised by the Foleys in their motion. Bronson agreed that there would be no comments or testimony by counsel or its witnesses on the following issues.

Paragraph 1 – liability insurance the Foleys may have which could pay for any compensatory damages the jury may award.<sup>2</sup>

Paragraph 4 – the contents of Ryan Foley's law school applications.

Paragraph 5 – the contents of his Facebook pages, although Bronson's counsel reserved the right to present Facebook postings or pages once they completed their review of the recent Facebook information provided by the Foleys. The court ordered Bronson's counsel to provide that information as soon as possible to Foleys' counsel but no later than Monday morning.

Paragraph 6 – the Foleys' offer to confess judgment

Paragraph 7 – any text messages Ryan Foley may have made during depositions in this case.

Paragraph 9 – use of any other substances by Ryan Foley

Paragraph 14 – Foleys' requested that Bronson admit the amount of medical bills actually paid and Bronson's counsel agreed to that request. The court interprets that to mean comments and/or testimony to the amount of medical bills that may have been higher than the amount actually paid will not be discussed or commented upon. The court is aware that Bronson had medical insurance and the court is aware that medical health insurance companies negotiate rates

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<sup>2</sup> The court is unaware of whether the Foleys have liability insurance that may pay for an award of punitive damages.

with medical providers to pay an amount less than what was initially charged. It is the initial charge that Bronson, her counsel and her witnesses will not be commenting upon.

Paragraph 15 – Bronson agreed not to seek an award for future medical expenses thus there will be no comments or testimony about future medical expenses that Bronson might incur.

Paragraph 17 – Bronson does not object to the sequestration of witnesses. The court orders that witnesses shall be sequestered. Since there is expanded media coverage the court orders counsel for the parties to instruct their witnesses that they may not watch and or listen to any television, radio or internet based broadcast of any portion of the trial until after they have testified in court.

Paragraph 18 – Bronson agreed that there would be no comments or testimony regarding any previous medical conditions related to cancer or related conditions.

Paragraph 19 – Bronson agreed that there would be no comments or testimony regarding any pleading or the amendment of Foleys' answers in this case prior to their admission of fault.

Paragraph 20 – Bronson agreed that there would be no comments or testimony with regard to lost earning capacity either for past losses or future. Bronson is not seeking any recovery for past lost wages or future loss of earning capacity.

Paragraph 22 – Bronson agreed that there would be no comments or testimony regarding the police reports filed in this matter related to the automobile accident or any investigation related to it.

Paragraph 27 – Bronson's counsel agreed that they would not make "golden rule" arguments or comments during any phase of the trial nor would they elicit testimony that would violate this rule.

The following paragraphs were resisted by Bronson and the court entered the following rulings on these issues.

Paragraph 2 – There will be no references, comments or testimony related to Thomas Foley as a high powered attorney or that because of his standing in the legal community he was able to obtain a “sweetheart” or better deal for his son’s criminal charge. Bronson’s counsel may disclose that Thomas Foley is an attorney, that he works for the Whitfield & Eddy Law Firm in Des Moines for the purpose of determining whether any prospective jurors know Mr. Foley, have retained him or other members of his law firm.

Paragraph 3 – Ryan Foley pled guilty to the charge of OWI –First offense a serious misdemeanor under Iowa law. Because he pled guilty this is an admission against interest and Bronson’s counsel may comment on this plea and elicit testimony concerning the plea. There shall be no comments or testimony that Ryan Foley was previously charged with a Class D felony.

Paragraph 8 – Bronson’s counsel and their witnesses may refer to Ryan Foley’s actions on the day of the accident as “drunk driving” or “driving drunk.” The court will sustain objections where language used to characterize Ryan Foley’s condition that would quantify or establish a degree of intoxication, such as “falling down drunk” and so forth. The latter comment suggest a degree of impairment that is improper. The witnesses may testify to their observations of Ryan Foley without the conclusory adjectives.

Paragraph 10 – A photograph of Ryan Foley consuming beer from a keg was placed on his Facebook page. The testimony indicated that photo was taken at a home Ryan Foley lived at in Eugene, Oregon several years prior to the accident. The photograph or any reference to it is not admissible.

Paragraph 11 – Foleys object to any reference to the blood alcohol concentration obtained the day of the accident. The BAC was .146. Foleys argue that Bronson must lay the proper foundation for admission of this test and Bronson listed no witness capable of laying the proper foundation for the admission of the BAC. Our supreme court in *Lessenhop v. Norton*,<sup>3</sup> set forth the elements necessary to lay a proper foundation for the admission of blood alcohol analysis in a civil proceeding. The party wishing to introduce this evidence must establish that:

Unless waived, this foundation must show that the specimen was taken by a duly-authorized person using proper sterile equipment, that it was properly labeled and preserved, that its care and transportation were proper, and also the identity of persons processing it so as to give the opposing party the opportunity to cross-examine as to the care and procedure used in the test.<sup>4</sup>

These elements were affirmed in *Henkel v. Heri*.<sup>5</sup> Consequently, unless the foundational elements are made to establish the result of Ryan Foley’s BAC the BAC result are not admissible and may not be commented upon or testimony elicited regarding it.

Paragraph 12 – Foleys’ requested that the court direct a verdict on whether Ryan Foley’s conduct was directed specifically at Bronson since there is no evidence that will support such a conclusion. The court reserved ruling on this motion until the court has heard the evidence in the plaintiff’s case-in-chief.

Paragraph 13 – Foleys’ request that testimony regarding other medical conditions that Bronson suffers from not be discussed until the proper medical testimony has been elicited establishing that the medical condition was caused by the accident. The issue raised here is whether treatment by Dr. Amr Kamhawy for tremors, anxiety and depression may be presented to the jury absent testimony from a medical provider.

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<sup>3</sup> 261 Iowa 44, 153 N.W.2d 107 (Iowa 1967)

<sup>4</sup> *Id.* at 51, 153 N.W.2d at 111.

<sup>5</sup> 274 N.W.2d 317, 322 (Iowa 1979)

This court has long been “committed to a liberal rule [that] allows opinion testimony if it is of a nature which will aid the jury and is based on special training, experience, or knowledge [as] to the issue in question.” *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326, 330 (Iowa App.1983). However, medical testimony regarding whether an accident caused an injury is not within the knowledge and experience of ordinary laypersons. *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 382–83, 101 N.W.2d 167, 171 (1960) (holding that in patient's action for personal injury allegedly resulting from a fall in defendant hospital, medical testimony that it was possible that plaintiff's subsequent physical condition was caused by the fall was insufficient, standing alone, to take the issue of causation to the jury). Such testimony is essentially within the domain of testimony from a medical expert. *Id.* at 383, 101 N.W.2d at 171. Before such testimony can be considered competent, there must be sufficient data upon which the expert judgment can be made. The facts must be sufficient to allow the expert to reach a conclusion that is “more than mere conjecture or speculation.” *Stortenbecker*, 334 N.W.2d at 330–31. Without the medical testimony, a jury is left to resort to conjecture in determining causation. *Chenoweth v. Flynn*, 251 Iowa 11, 16, 99 N.W.2d 310, 313 (1959).<sup>6</sup>

Thus, unless a medical provider testifies that Bronson suffers from tremors, anxiety and depression as a result of the accident with Foley this testimony is inadmissible.

Bronson may testify regarding her general feelings of pain, discomfort, her emotions, and her inability to engage in certain activities that she was previously able to perform prior to the accident. However, she cannot testify that her medical treatment for tremors, anxiety or depression were caused by the accident. This requires testimony from a medical provider to establish that the medical condition was caused by the accident. Since Dr. Kamhawy was not designated as a witness for trial, Bronson, her counsel or other witnesses may not comment upon or testify that her tremors, anxiety or depression were caused by the accident.

In addition, the issue of Dr. Stoken's testimony regarding a future knee replacement cannot be commented upon or testimony elicited on this subject until the court has made a decision that Dr. Stoken is qualified to make this opinion.

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<sup>6</sup> *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 774–75 (Iowa 2006)



Paragraph 16 – Foleys’ request that Bronson, her counsel and witness refrain from commenting on or eliciting testimony regarding medical provider’s statements regarding Bronson’s treatment unless the physician provides that testimony. Bronson may testify as to treatment recommendations for those medical conditions that a physician has testified are causally connected to the accident but may not testify regarding physician’s statements about her medical condition. An example of a comment or testimony that is precluded is Dr. X told me that my likelihood of being pain free is 10%. That is heresay testimony and would not allow Foleys’ counsel the ability to question the doctor regarding this statement. There shall be no comments or testimony on the issue unless medical testimony is provided.

Paragraph 21 – Bronson’s counsel purchased a stationary bike for her use which she apparently will testify she utilizes as part of her recovery. Bronson may testify that she utilizes the stationary bike but the fact it was purchased by her counsel is irrelevant to any issue the jury must decide and therefore inadmissible. There shall be no comments or testimony on the issue of who purchased the stationary bike.

Paragraph 23 – Foleys request that Bronson’s counsel be restricted from speaking to the jury during voir dire and/or during opening statement regarding the amount of money he may ask the jury to award. The court finds that it is appropriate for Bronson’s counsel to inquire whether a particular juror would have an aversion to providing a large amount of money to Bronson if the evidence established she was entitled to that amount. Counsel for both parties are advised that they may not inject prejudicial matter during voir dire.<sup>7</sup> Counsel may not turn voir dire into an opening statement or argument.<sup>8</sup>

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<sup>7</sup> *Mead v. Scott*, 256 Iowa 1285, 1293, 130 N.W.2d 641, 645 (1964)

<sup>8</sup> *Sauer v. Scott*, 238 N.W.2d 339, 344 (Iowa 1976)

Paragraph 25 – Foleys’ object to the use of any exhibit, video deposition transcript or power point presentation until it has been offered or admitted into evidence. Bronson objects to showing her counsel’s power point presentation that will be utilized in their opening statement. The court finds that the power point presentation similar to demonstrative evidence consequently Bronson’s counsel shall show their power point presentation to Foleys’ counsel prior to the beginning of trial on Monday so that Foleys’ counsel can lodge any objection they may have regarding its contents before it is shown to the jury.

Paragraph 26 – Foleys’ counsel provided to the court newspaper articles, a California court ruling and a partial transcript from a recent Iowa district court case involving alleged inappropriate comments by Bronson’s counsel in other cases. The court reminded both counsel that they are to abide by the Iowa Rules of Professional Conduct, the Iowa Rules of Evidence and the court’s pre-trial orders concerning their conduct during trial. The court reminded counsel that they are members of a profession, that they have ethical obligations to follow, they are to act civilly and professionally to each other, the parties, the witnesses and the court. The court will not tolerate improper, inappropriate, disparaging, or improper characterization of the evidence or a particular counsel’s comments about the evidence or how another attorney may have characterized the evidence. Appropriate objections will be considered by the court. The court instructed counsel that if the actions objected to meet the criteria for the granting of a mistrial the court would grant the motion.

#### **FOLEYS’ MOTION FOR OTHER PRE-TRIAL ISSUES**

Based upon discussions regarding Foleys’ motion in limine the parties felt the court’s rulings on Foleys’ motion in limine addressed paragraphs 1-4 of this motion so the court will make no additional ruling on these paragraphs.

Paragraph 5 -With regard to paragraph 5 the court finds that the testimony of Nathan Denge and Benjamin Wright who were apparently in the vehicle with Bronson at the time of the accident regarding the extent of their injuries, was appropriate on the issue of punitive damages. Likewise, depending upon the testimony elicited from these witnesses Foleys' counsel would be allowed to cross-examine these witnesses regarding any issue raised by their direct testimony.

Paragraph 6 – Foleys' object to the playing of the video discovery depositions of Bronson or Ryan Foley. They are parties to the case and will provide testimony during trial. Any question Bronson's counsel has should be elicited from these parties when they are on the witness stand.

Bronson's counsel argues that Iowa Rule of Civil Procedure 1.704(2) allows them to play these video depositions. Ryan Foley's deposition may be read or played by Bronson provided the requirements of the rule are met. The first requirement is that the rules of evidence all its admissibility,<sup>9</sup> the second rule is that it can be used to impeach or contradict the deponent's testimony.<sup>10</sup> Bronson's counsel cannot read or play Bronson's deposition to cumulate her testimony.<sup>11</sup> During the hearing the court ordered Bronson's counsel provide to Foleys' counsel by Monday page and line of the depositions for Ryan Foley's so that Foleys' counsel can lodge any objection they believe is appropriate and allow the court the opportunity to rule on those objections prior to playing the depositions. Bronson's counsel previously identified page and lie of Foley's deposition they intended to read. The court is unaware whether those designations meet the requirements of the rule. Further since Ryan Foley has not testified there can be no

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<sup>9</sup> Iowa R. Civ. P. 1.704

<sup>10</sup> Iowa R. Civ. P. 1.704(1)

<sup>11</sup> Iowa R. Civ. P. 1.704 Official Comment (referring to rule 1.704(2) – “The broad use authorized by this provision is available only to an adverse party. It would not allow a party to use his own deposition to cumulate evidence.”)

determination at this time whether he can be impeached by these designations. References to these particular pages and lines of testimony are precluded until after Ryan Foley has testified.

Paragraph 7 – Foleys’ counsel objected to Bronson providing testimony about a concussion, mild traumatic brain injury, neurological condition, back pain and anxiety. Foleys’ argue that Bronson cannot discuss these conditions but must be presented by medical testimony. The ruling here is the same as set forth in paragraph 13 of Foleys’ motion in limine. However, the court finds that Bronson can testify she suffered a concussion that she is suffering from back pain or is anxious.

Paragraph 8 – Bronson is making no request for lost wages or future lost earning capacity so there shall be no comments or testimony regarding any depletion of loss of paid time off.

#### **BRONSON’S MOTION IN LIMINE**

Paragraph I – Bronson requested that Foleys’ counsel and witnesses refrain from discussing the fact that Bronson consumed alcoholic beverages at a basketball prior to the accident. Foleys’ counsel agreed that there would be no comments or testimony on this issue.

Paragraph II – Bronson requested that Foleys’ counsel and witnesses refrain from discussing Bronson’s smoking. Foleys’ counsel agreed that there would be no comments or testimony on this issue.

#### **BRONSON’S MOTION TO ALLOW JUROR QUESTIONS**

Bronson requested that the jurors be allowed to ask questions that would be screened by the court and counsel of any witness. Foleys’ resisted. The court will grant this motion and the procedure for asking questions by jurors will be developed in a preliminary jury instruction that will be read to the jury prior to the commencement of opening statements.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number**      **Case Title**  
LAACL133402      CHERYL BRONSON VS RYAN AND THOMAS FOLEY

So Ordered

A handwritten signature in black ink, appearing to read "L. P. McLellan". The signature is written in a cursive, flowing style.

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Lawrence P. McLellan, District Court Judge,  
Fifth Judicial District of Iowa