STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

BARBARA COLLINS,

Plaintiff,

and

DEPARTMENT OF HEALTH AND HUMAN SERVICES and
UNIFIED HEALTHCARE PLAN,

Involuntary Plaintiffs,

v.

BLUFF VIEW SENIOR LIVING CENTER and
PROTECT WISCONSIN INSURANCE COMPANY,

Defendants.

Case No. 12-CV-9999
Case Code: 30107

BRIEF IN SUPPORT OF MOTIONS IN LIMINE

NOW COME the defendants, Bluff View Senior Living Center and Protect Wisconsin Insurance Company, by their attorneys The Defense Firm LLP, and hereby provide the following factual and legal support for their motions in limine:

1. The Court should not allow expert testimony from any witness not previously identified and opinions disclosed pursuant to a written report as ordered by the Court or by way of deposition.

The plaintiff disclosed expert witnesses pursuant to the Court's Scheduling Order. The purpose of a scheduling order is to allow for exchange of information and the orderly discovery of expert opinions in advance of trial. To allow the plaintiff to call an expert

witness, either in his case in chief or in rebuttal, who has not been disclosed would be prejudicial to the defendants, and inappropriate under the law and the Court's scheduling order.

2. The Court should prevent any witness from testifying to the truth, veracity or accuracy of the testimony of any other witness.

Wisconsin law is clear that it is inappropriate for one witness to testify to the credibility of truthfulness of another. Credibility of a witness is for the jury to decide. An expert witness should not testify about the credibility or truthfulness of any witness. See State v. Pittman, 174 Wis. 2d 255, 267-68, 496 N.W.2d 74 (1993); State v. Jensen, 147 Wis. 2d 240, 249, 432 N.W.2d 913 (1988); State v. Ross, 203 Wis. 2d 66, 81, 552 N.W.2d 428 (Ct. App. 1996); State v. Bednarz, 179 Wis. 2d 460, 465, 507 N.W.2d 168 (Ct. App. 1993); State v. Haseltine, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

The holdings of Haseltine and its progeny indicate that witnesses, expert or otherwise, cannot comment on the truthfulness of another witness: "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." Haseltine, 120 Wis.2d at 96.

Consequently, the defendants request this Court to bar any testimony of the plaintiff's witnesses commenting on the truth or veracity of another witness's testimony.

3. Plaintiff's counsel be barred from questioning with regard to possibilities, but defendants should be allowed to offer expert opinions to reasonable possibilities.

If plaintiffs' counsel asks a possibility question designed to help establish plaintiffs' case in chief, then the question is improper. This is because the plaintiffs have the burden

of proof. It is the plaintiffs' burden to produce expert testimony based upon reasonable medical probabilities. An expert opinion expressed in terms of possibility or conjecture is insufficient and, therefore, it is error to allow such testimony. McGherty v. Welsh Plumbing Company, 104 Wis. 2d 414, 430, 312 N.W.2d 37 (1981); Pucci v. Rouch, 51 Wis. 2d 513, 519, 187 N.W.2d 138 (1971).

However, it is appropriate for defense counsel to ask plaintiffs' experts possibility questions. Opinions couched in terms of possibilities based upon adequate data or proof are admissible to defeat a claim by suggesting explanations other than those propounded by the plaintiffs. In other words, contrary opinion may be expressed in terms of possibilities. Hernke v. Northern Ins. Co., 20 Wis. 2d 352, 360, 122 N.W.2d 395 (1963); Milbauer v. Transport Employees' Mut. B. Soc., 56 Wis. 2d 860, 864, 203 N.W.2d 135 (1973); Peil v. Kohnke, 50 Wis. 2d 168, 183, 184 N.W.2d 433 (1977). The Court in Peil, citing Mallare, Wisconsin Civil Trial Evidence, ch. 4, § 4.46 at 133 (1967) held:

> "Although the party with the burden of proof must produce testimony based upon reasonable medical probabilities, the opposing party is not restricted to this requirement and may attempt to weaken the claim for injuries with medical proof couched in terms of possibilities. Thus, it is proper to cross-examine a plaintiff's medical witness on matters which do not rise to the dignity of 'reasonable medical probability.'"
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> Peil, 50 Wis. 2d at 183.

A close examination of the Peil case indicates that an objection was made on direct examination of the expert for the defense and also on redirect examination of the defense expert. The Peil case states at 183 as follows:

> "After objections, including one by appellant that 'he is being asked to point out where something possibly could have taken place. . .,' the professor was allowed to point out these 'marks' on a photograph and he did so. General Casualty now contends that it was prejudicial error to permit this

> testimony since it was framed in terms of mere possibility, *i.e.,* 'could very well be a mark, scuff mark, left by the right rear wheel . . . ' We find no merit in this contention for several reasons:
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> 1. The witness was not offering an opinion that these marks were in fact made by the right rear wheel; nor did it in any way affect his opinion with respect to the collision lane or the skid mark.
> 2. It is clear that a contrary opinion to that presented by an opposing party may be presented in terms of possibilities.
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> '(1) **Contrary Opinion May be in Terms of Possibility**. Although the party with the burden of proof must produce testimony based upon reasonable medical probabilities, the opposing party is not restricted to this requirement and may attempt to weaken the claim for injuries with medical proof couched in terms of possibilities. Thus, it is proper to cross-examine a plaintiff's medical witness on matters which do not rise to the dignity of "reasonable medical probability."'"

The law in Wisconsin is that contrary opinion may be offered in terms of possibility. Although the party with the burden of proof must produce testimony based upon reasonable medical probabilities, the opposing party is not restricted to this requirement and may attempt to weaken the claim for injuries with medical proof couched in terms of possibility. Direct examination on possibilities is proper. The opinion to which the expert is asked to opine to a reasonable possibility must be presented in opposition to an opinion presented by the plaintiffs, and there must be some scientific or medical basis for the opinion.

It is clear that Wisconsin authority allows not only cross-examination of plaintiffs' experts as to "possibilities" but also direct examination of defense experts is appropriate where offered to counter an opinion expressed by an expert presented by the plaintiffs. Thus, defendants may ask possibility questions of their own expert witnesses for the reasons set forth above. Defendants do not have the burden of proof; accordingly, they may attempt to weaken plaintiffs' claim with proof couched in terms of possibility.

4. Plaintiff's counsel is precluded from asking any witness whether any party to this litigation was negligent or at fault.

No witness, lay or expert, should be allowed to testify the negligence or fault of a party.

Under Wis. Stat. § 907.01, opinion testimony by lay witnesses is defined as follows:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

According to Wis. Stat. § 907.01, lay witness testimony in the form of opinions or inferences is limited to those opinions or inferences rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. The statute will allow a lay witness to testify to facts that can be perceived by their senses, such as appearance, presence of blood, drunkenness and handwriting. Freuen v. Brenner, 16 Wis.2d 445, 114 N.W.2d 782 (1962); Cullen v. State, 26 Wis. 2d 652, 133 N.W.2d 284 (1965); State v. Bailey, 54 Wis.2d 679, 196 N.W.2d 664 (1972); Jax v. Jax, 73 Wis. 2d 572, 243 N.W.2d 831 (1976). This is quite different than testifying as to fault or negligence.

Expert witnesses are also prohibited from testifying as to the fault or negligence of any party. See Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct.App.1990). While Wis. Stat. § 907.04 provides that testimony is not objectionable because it embraces an ultimate issue, Courts have consistently restricted opinion testimony to those terms not explained to the jury by an instruction. See Lievrouw, 157 Wis.2d at 351-52 (finding that a witness could comment on whether a situation was an "emergency," because that term,

unlike "negligent," is not defined for the jury in an instruction.) However, Lievrouw emphasizes that terms such as "negligent," which the Court defines for the jury through an instruction, cannot be defined by witnesses:

> Thus, for example, a witness' opinion that there was an 'emergency' (which is permissible under Rule 907.04) differs from a conclusion that someone was 'negligent' (which is not permissible under Rule 907.04) because, unlike 'emergency,' which the law does not define for juries, see Wis JI-Civil 1015, Negligence in an Emergency, 'negligence' has prerequisite terms-of-art elements about which the jury must be instructed, see Wis JI-Civil 1005, Negligence: Defined. Lievrouw, 157 Wis.2d at 352.

Wisconsin case law has long supported the proposition that a lay witness is to state the facts and the jury is to draw conclusions. Gordon v. Sullivan et al., 116 Wis. 543, 93 N.W. 457 (1903). Testimony as to fault/negligence is a legal conclusion the jury must determine by its verdict. Therefore, the plaintiff should not be allowed to elicit testimony from any witness concerning the relative fault or negligence of any party.

5. Plaintiff's counsel should not be allowed to reading from the medical records unless the appropriate foundation is laid.

It is settled law in Wisconsin that a medical record containing a diagnosis or opinion is admissible but may be excluded if the entry requires explanation or a detailed statement of judgmental factors. See Pophal v. Siverhus, 168 Wis. 2d 533, 484 N.W.2d 555 (Ct. App., 1992). In this case, the plaintiffs must be barred from reading diagnoses or opinions from the medical record at trial unless it is read by the author of said diagnoses or opinions.

A trial judge is to use sound judicial discretion in determining whether the circumstances dictate that the particular record should be admitted. Noland v. Mutual of Omaha Insurance Co., 57 Wis. 2d 633, 641, 205 N.W.2d 388, 392 (1973). The factors a

trial judge should follow in determining whether to admit a hearsay medical opinion or diagnosis are:

> If it is a routine diagnosis, readily observable, and one which in the judgment of the trial court competent physicians would not differ, the time and inconvenience of requiring the author to testify outweighs the need for producing him. If the entry requires explanation and is a matter of discriminating judgment, then the author should be present for cross-examination. Id. at 641, 2056 N.W.2d at 392. (citing Holz, Judge Marvin C., A Survey of Rules Governing Medical Proof in Wisconsin – 1970, Wisconsin Law Review, Volume 4, pp. 989, 1024, 1025).

Therefore, "evidence may be excluded in the exercise of the trial judge's discretion if the entry requires explanation or a detailed statement of the judgmental factors upon which the diagnosis or opinion is based." Id.

6. Plaintiff should be prevented from offering any evidence of negligence that is not causal.

It is anticipated that the plaintiff will offer evidence that defendant did not timely plow and salt, respond to tenant complaints after other snow falls, have a written policy or procedure for inspecting the premises and/or for moving vehicles in the parking lot to allow for more complete plowing and salting of the lot and did not keep records of related to inspections and snow removal.

Evidence of non-causal negligence is "other acts" evidence. In determining whether other acts evidence should be admitted, the trial court must consider: (1) whether the evidence is being offered for an acceptable purpose, such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence substantially outweighs the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time or needless

presentation of cumulative evidence. State v. Anderson, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1999) "Other acts" evidence should be used sparingly and only when reasonably necessary; it may not be used to demonstrate that the accused has a certain character and acted in conformity with that trait. State v. Veach, 255 Wis. 2d 390, 648 N.W.2d 447 (2002)

Wis. Stat. § 904.04 identifies the acceptable purposes for evidence of "other acts" which provides:

> **904.04 Character evidence not admissible to prove conduct; exceptions; other crimes**
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> **(1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, Except:
> (a) *Character of accused*: Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;
> (b) *Character of the victim*. Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of a peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
> (c) *Character of witness*. Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.
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> **(2)** OTHER CRIMES, WRONGS, OR ACTS.
> (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of non-causal negligence by the defendant is evidence of other wrongs or acts and is expressly forbidden by Wis. Stat. § 904.04. This evidence is not offered to prove any of the enumerated exceptions and would simply be used to show that the defendant had a character or trait for did not timely plowing and salting, responding to

tenant complaints after other snow falls, having no written policy or procedure for inspecting the premises and/or for having tenants moving vehicles in the parking lot to allow for more complete plowing and salting of the lot and/or keeping records related to inspections and snow removal.

Furthermore, non-causal criticisms are not relevant. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Wis. Stat. § 904.01. The only fact at issue in this case is whether the defendants were negligent with respect to the problem with regard to snow plowing and salting the parking lot where the plaintiff fell.

Finally, non-causal criticisms should be precluded because the evidence will mislead the jury, confuse the issues, result in trial of additional issues that are unnecessary and unfairly prejudice the jury. If evidence of other complaints is allowed, testimony will be necessary to refute the lack of attention to the repair of the premises with regard to issues that have no bearing on the state of repair of the railing that allegedly failed in this case. Under the circumstances, the Court should prevent evidence of any allegedly negligent acts on the part of the defendant that did not cause harm to the plaintiff.

7. <u>Plaintiff should be prevented from calling rebuttal witnesses.</u>

Rebuttal witnesses may only address new facts put in evidence by the defendants. Evidence is not rebuttal unless it purports to show something beyond that which is known as the case in chief. This objection is set forth in *Karl v. Employers Ins. of Wausau*, 78 Wis. 2d 284, 254 N.W.2d 255 (1997) and *Rausch v. Buisse*, 33 Wis. 2d 154, 146 N.W.2d

801 (1966) and Sections 904.03 and 906.11 of the Wisconsin Statutes and Warshafsky's "Trial Handbook for Wisconsin Lawyers" Section 104.

Currently, the defendants are unsure whether the plaintiff is calling any rebuttal witnesses. The defendants do not object to rebuttal evidence assuming it is truly rebuttal evidence that is being offered as opposed to further efforts by the plaintiff to support his case in chief or to account for a failure by the plaintiff to offer evidence that should have been offered in the case in chief.

The general rule is that the plaintiff, in rebuttal, may only meet the new facts put in by the defendants in their case and reply. This rule is not inflexible and the court may in its discretion allow or refuse to receive such evidence. An exception is generally made when the evidence is necessary to achieve justice. *Karl,* at 296; *Rausch,* at 167.

Evidence is not rebuttal evidence unless it purports to show something beyond that which was shown in the case in chief. Accordingly, the trial court should refuse to admit cumulative evidence. *See* Wis. Stat. §§ 904.03 and 906.11 and "Trial Handbook for Wisconsin Lawyers", Section 104, Warshafsky.

Where evidence relates to the main contention of the plaintiff, it is the plaintiff's duty to produce that evidence as part of their case in chief as evidence that sustains the contention. *Brockman v. Wisconsin Power & Light Co.,* 197 Wis. 374, 222 N.W.2d (1928). In *McGowan v. Chicago & N.W. Ry. Co.,* 91 Wis. 147, 64 N.W. 891, 893 (1895) the court said:

The plaintiff, or party holding the affirmative, must try his case out when he commences and is bound to introduce all the evidence on his side, except that which operates merely to answer, avoid, or qualify the case as made out by his adversary's proof. At this alone the evidence in reply must be directed, but for sufficient reasons it may be found advisable to depart from the rule in order to attain complete justice. When this ought to be done, must be left to the sound discretion of the court, and in general its action in this respect cannot be assigned as error.

The Court has the right to control its own calendar. As such, the Court can exclude witnesses in order to keep the trial on pace. To date, the defendants are unaware of any rebuttal witnesses that the plaintiff is planning on calling. If the plaintiff does call a rebuttal witness, the defendants respectfully request that they be granted time to depose that witness before he/she testifies. Since the plaintiff has not named any rebuttal witnesses, any person named during trial would be a surprise to the defendants. Therefore, requesting time to depose said witness would be fair and just.

Dated this _____ day of _____, _____.

THE DEFENSE FIRM LLP

_____

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