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September 16, 2015

**VIA ELECTRONIC MAIL (Pamela\_A\_Armstrong@ohnd.uscourts.gov)**

Magistrate Judge James R. Knepp, II  
James M. Ashley and Thomas W.L. Ashley U.S. Courthouse  
1718 Spielbusch Avenue, Room 318  
Toledo, OH 43604-1363

Attention: Pam Armstrong, Courtroom Deputy Clerk

Re: Jean A. Terek v. Winfield J. Finkbiner, et al.  
Case No. 3:14-CV-1391

Dear Judge Knepp:

In connection with the above-styled matter, the parties intend to offer the trial testimony of certain of the witnesses in this case, either by videotape or read-in. The Plaintiffs have filed these depositions transcripts with the Court. During the course of these depositions, counsel made certain objections that will need to be addressed by the Court so as to allow for editing of the videotapes and transcripts prior to trial. The purpose of this letter is to advise the Court of Plaintiff's position with respect to the various objections asserted.

As an initial matter, Plaintiff would ask that the "housekeeping" portions regarding appearances, review and signature, tape changes, "off-the-record"(s), "no more questions", etc. be redacted since they are of no substantive value to the jury and needlessly prolong the time the jury will have to spend viewing these videos.

With respect to defense counsels' objections, a fundamental problem is that in many instances counsel does not articulate any basis, at all, for any of the objections. Counsel simply stated "Object", "Objection" or "Move to Strike". The basis for defense counsel's objections were far from readily apparent during the deposition leaving Plaintiff's counsel without an adequate opportunity to rephrase the question in a manner that defense counsel deemed unobjectionable.

The Plaintiff's position with respect to specific objections is more fully articulated below.

**Dr. Candage's Testimony:**

Page 40, lines 4 and 10 – Defense counsel lodges an “Objection” to plaintiff’s counsel’s question of Dr. Candage whether he believed a doctor who operated on Jean’s back would be committing malpractice by performing the surgery Dr. Gerszten recommended and regarding his having a difference of opinion with Dr. Gerszten. These are appropriate questions for cross-examination on Dr. Gerszten’s opinions and plaintiff respectfully requests that these objections be overruled.

**Thomas Engle's Testimony:**

Page 10, line 2 – Defense counsel interjects an “Objection. Move to Strike” into Jean Terek’s former boss’s testimony about helping Jean to continue work with her injuries and helping her. This is eyewitness testimony under direct observation regarding the impact of Ms. Terek’s injuries on her life. It is clearly admissible under F.R.E. 401 and plaintiff respectfully requests that this objections be overruled.

Page 12, lines 6-7 – Plaintiff’s objection is withdrawn and needs redacted.

**Peter C. Gerszten's Testimony:**

Page 13, line 22 – Defense counsel logs an “Objection” to Plaintiff’s counsel’s qualifications question to Dr. Gerszten regarding his inclusion of a book chapter on Management of Spine Injuries, in a seventh edition of a textbook titled Current Surgical Therapy.

Page 15, lines 10 – Defense counsel offers another leading objection to Plaintiff’s counsel’s qualifications question referencing research Dr. Gerszten has done into various treatment modalities for low back pain that appears on his c.v.

With regards to these objections, leading questions of an expert are permissible under the Rules, and the plaintiff would respectfully request that these objections be overruled.

Page 24 lines 4 – 16 – Plaintiff’s question is withdrawn and needs redacted.

Page 28, lines 2 – 6 – Plaintiff’s question is withdrawn and needs redacted.

Page 40, line 24 – Page 41, line 12 – Plaintiff’s question is withdrawn and needs redacted.

Page 45, line 14 - 20 – Plaintiff’s question is withdrawn and needs redacted.

Page 53, line 8 – Defense counsel offers another leading objection to Plaintiff’s counsel’s question simply recounting Dr. Gerszten’s earlier testimony to refocus on the issue in order to ask some follow-up questions. The plaintiff would respectfully request that this objection be overruled.

Page 54, line 23 – Page 55, line 6 – Plaintiff’s question is withdrawn and needs redacted.

Page 62, lines 7 - 16 – Plaintiff objected to Defense counsel’s question recounting Jean Terek’s medical history on the grounds of relevance. Defendants have no expert testimony to even suggest that any of the conditions in Mr. Lynch’s question have any bearing, at all, on Ms. Terek’s current condition. Defendants are required to prove their affirmative defenses, including superseding or intervening causes, by a preponderance of the evidence. See *e.g.*, *Prudential v. Zimmer*, 119 N.E. 136, 97 Ohio St. 14 (1917). Here they have failed to do so. Accordingly plaintiff’s respectfully request that their objection be sustained and this line of questions be redacted.

Page 69, line 4 – Page 70, line 1 – Plaintiff objected to Defense counsel’s questions recounting Jean Terek’s history of diabetes on the grounds of relevance. Defendants have no expert testimony to even suggest that Ms. Terek’s neuropathy was caused by diabetes. Solicitation of this testimony is unfairly misleading and prejudicial without any underlying any evidentiary support. Defendants are required to prove their affirmative defenses, including superseding or intervening causes, by a preponderance of the evidence. Here they have failed to do so. Accordingly plaintiff’s respectfully request that their objection be sustained and this line of questions be redacted.

Page 74, lines 3-10 – Plaintiff’s objected to the form because the question was asked and answered in the question and answer immediately preceding this testimony. This testimony is unfairly cumulative and duplicative, and the plaintiff respectfully requests that the objection be sustained.

Page 78, line 9 – Page 79, line 16 – Plaintiff objected to the form because the question was asked and answered in the question and answer immediately preceding this testimony. This testimony is unfairly cumulative and duplicative, and the plaintiff respectfully requests that the objection be sustained.

**Barbara Long:**

Page 12, line 7 – Defense counsel lodged an “Objection” to Ms. Long’s testimony about Ms. Terek leaning on the counter at times to try and relieve pressure on her back. This testimony is based on Ms. Long’s eyewitness account and foundationally supported by her interactions with Ms. Terek, which she established in advance of this testimony. Accordingly, Plaintiff would respectfully request that Mr. Lynch’s objection be overruled.

Page 18, lines 4-6 – Plaintiff’s objection is withdrawn and needs redacted.

Page 18, line 20 – Page 19, line 10 - Plaintiff’s objected to the form because the question was asked and answered in the question and answer immediately preceding this testimony. This testimony is unfairly cumulative and duplicative, and the plaintiff respectfully requests that the objection be sustained.

Page 23, Lines 1 – 2 – Defense counsel (mistakenly identified in the transcript as Plaintiff’s counsel) lodged an “Objection” to the question whether she knew if Jean Terek’s father passed away before or after the August 2012 collision. The question was proper as phrased and was simply a follow-up based on Ms. Long’s prior testimony that she first went over to Ms. Terek’s house when her father died. The plaintiff respectfully requests that the objection be overruled.

In order to aid the Court’s decision-making on these issues, and for the Court’s use during trial, I am enclosing a complete copy of the above-referenced deposition transcripts. For the reasons articulated herein, I have highlighted the portions of the depositions which Plaintiffs contend should be redacted. For quick reference, the following chart identifies the page and line numbers of the redactions.

**Michelle Mayes' Testimony:**

Page 9, lines 7, 11 and 17 – Defense counsel logs an “Objection” to Plaintiff’s counsel’s questions to Ms. Mayes if her mom was injured in the wreck and whether Michelle has an understanding of the injuries her mom sustained in the wreck. The general fact of whether Jean Terek was injured is not disputed by the defendants. In fact their own expert has testified that Ms. Terek was injured in the wreck. Michelle works and lives with her mother, was present during the collision and its aftermath and was treated by the same doctor as her mom. She certainly possesses the requisite foundational knowledge to testify to her understanding regarding her mom’s injuries. The plaintiff respectfully requests that these objections be overruled.

Page 11, line 23 - Defense counsel logs an “Objection” to Plaintiff’s counsel’s follow-up question to Ms. Mayes about the nature of her grandfather’s condition that required Jean Terek to care for him prior to her being hurt in the collision. This was a natural follow-up to Ms. Maye’s testimony describing her mother as someone who helps others. The plaintiff respectfully requests that this objection be overruled.

Page 23, lines 15-17; Page 26, lines 3-4 – Defense counsel logs an “Objection” to Ms. Mayes response, to a question about what other changes she’s noticed with her mom since the wreck, that Ms. Terek’s marriage went down hill and Michelle’s basis for saying that. Ms. Mayes lived with her mother and step-father both before and following the wreck and testified that her mother’s inability to engage in marital relations following the wreck was a cause. Ms. Terek is convinced that her injuries played a significant part in the break-up of her marriage. Ms. Mayes’ testimony goes to damages and, therefore, plaintiff respectfully requests that these objections be overruled.

Page 26, line 20; Page 27, lines 5-6 and 12 - Defense counsel logs an “Objection” to Ms. Mayes testimony that her mother is downgrading fast and needs back surgery. However, lay witness opinions are permissible in this instance under F.R.E. 701 where Ms. Mayes is offering the same based on her rational, eyewitness perception of the incident and first-hand knowledge and observation of her mother’s condition before and after the wreck. Ms. Mayes does not need any specialized qualifications to opine that her mom’s condition continues to deteriorate. She can see it with her own eyes. With respect to the back surgery, this is a statement made for the purposes of medical treatment. Michelle is close with her mother.

They live and work together, and Michelle is well aware of Dr. Gerszten's treatment recommendations for Jean Terek. Ms. Mayes' testimony on these issues is proper under the Rules and, therefore, plaintiff respectfully requests that these objections be overruled.

Page 28, line 9 – Defense counsel logs an “Objection” to Ms. Mayes testimony that her mother would have back surgery if she could afford it. Again, lay witness opinions are permissible in this instance under F.R.E. 701 where Ms. Mayes is offering the same based on her rational, eyewitness perception of the incident and first-hand knowledge and observation of her mother's condition before and after the wreck. Ms. Mayes does not need any specialized qualifications to opine that her mom would have surgery. A large part of the defense case is likely to be centered on the fact that Jean Terek has not yet had the surgery her doctors recommend, and the plaintiff should be permitted to rebut that premise with an explanation of why Ms. Terek has not yet had surgery. To preclude any rebuttal on this issue would most certainly unfairly prejudice the plaintiff's case. Ms. Mayes' testimony on these issues is proper under the Rules and, therefore, plaintiff respectfully requests that this objection be overruled.

Page 30, lines 8-9 – Defense counsel logs an “Objection” to counsel's question about how Ms. Mayes felt knowing the Mr. Finkbinder failed to stop at the scene. That issue is relevant to Jean Terek's damages and Ms. Mayes was also an injured passenger in the incident. The question and answer are proper under W.V.R.E 401, and plaintiff respectfully requests that this objection be overruled.

Page 31, lines 7-8, the statement “No. We work outside, and in the winter it's even worse on her.” – Defense counsel logs an “Objection” to counsel's question to Ms. Mayes whether her mom will continue to be able to work in her job without getting the help recommended by her doctors. Ms. Mayes' answer also contains a hearsay statement and, because Mr. Lynch does not articulate a basis for his objection, it is difficult to decipher to what he is objection. However, Ms. Mayes works in the same position and is well-versed in the nature of the physical requirements of being a greyhound handler and should be permitted to offer her opinion based on her understanding of the job under W.V.R.E. 701. Counsel does not object to the hearsay statement “She's even said she doesn't believe she can do it much longer.” That portion can be redacted. But with respect to the question and remainder of the answer, plaintiff respectfully submits that this question and partial answer are proper and defendants' objection

should be overruled as to the question and first sentence of Ms. Mayes' answer.

Page 31, line 15 – Defense counsel logs an “Objection” to Ms. Mayes testimony that it will put her mother in a depression if she’s not able to continue to work in her job. Again, lay witness opinions are permissible in this instance under F.R.E. 701 where Ms. Mayes is offering the same based on her rational, eyewitness perception of the incident and first-hand knowledge and observation of her mother’s condition before and after the wreck, along with first-hand knowledge of her mom’s disposition and the things that are important to Jean Terek. Ms. Mayes does not need any specialized qualifications to offer her opinion on this topic and plaintiff respectfully requests that this objection be overruled.

Page 38, lines 8-9 – Plaintiff’s objection is withdrawn and needs redacted.

Page 39, lines 15 – 23 – Plaintiff objected to Defendants’ questions regarding health insurance on the grounds of relevance. This particular line of questions violates the collateral source rule. It is misleading and highly prejudicial and plaintiff respectfully requests that this objection be overruled.

**Dr. Nolan’s Testimony:**

Page 12, line 17 – Defense counsel logs an “Objection” to Plaintiff’s counsel’s question to Dr. Nolan regarding whether the particular cause of a patient’s hormone deficiency is an important consideration in Dr. Nolan’s clinical practice. While plaintiff’s counsel is unsure of the basis for this objection, the question as posed is a basic foundation question and relevant to the issues raised in this matter. Accordingly, the plaintiff respectfully requests that the objection be overruled.

Page 13, line 10 – Page 12, line 17 – Defense counsel logs an “Objection. Lack of Foundation” to Plaintiff’s counsel’s question to Dr. Nolan regarding whether he has studied and investigated the literature on growth hormone deficiency. This is simply a basic qualification question to move Dr. Nolan’s admission as an expert under Rule 702. Accordingly, the plaintiff respectfully requests that the objection be overruled.

Page 26, lines 7 - 11 – Plaintiff’s question is withdrawn and needs redacted.

Page 29, line 18 – Defense counsel logs an “Objection to Form” to Plaintiff’s counsel’s question to Dr. Nolan regarding whether he is familiar with the term “posttraumatic hypopituitarism”. While plaintiff’s counsel is unsure of the basis for this objection, the question as posed is relevant to Ms. Terek’s diagnosis and proper as phrased. Accordingly, the plaintiff respectfully requests that the objection be overruled.

Page 30, lines 2 - 9 – Plaintiff’s question is withdrawn and needs redacted.

Page 33, lines 7 - 15 – Plaintiff’s question is withdrawn and needs redacted.

Page 39, line 3 – Defense counsel lodged an “Objection. Leading” to plaintiff’s counsel’s question regarding the nature of the arginine stimulation test he ordered to determine whether Ms. Terek had growth hormone deficiency. The question simply recounts Dr. Nolan’s prior testimony in lay terms and is proper as posed. Accordingly, the plaintiff respectfully requests that the objection be overruled.

Page 44, line 12; Page 45, lines 4, 21 – Defense counsel lodges a form objection to plaintiff’s counsel’s follow up question regarding the results of the arginine stimulation test. The test requires an expert to interpret and explain it to a lay person and the questions were intended to help the jury and Court understand how to interpret the test results. Accordingly, the plaintiff respectfully requests that the objection be overruled.

Page 46, line 21 – Defense counsel lodged an “Objection” to plaintiff’s counsel’s question simply recounting Dr. Nolan’s prior testimony regarding his diagnosis of adult growth hormone deficiency in the context of when he made the diagnosis. Dr. Nolan had previously provided a proper foundation for this question. Accordingly, the plaintiff respectfully requests that the objection be overruled.

Page 48, lines 18 – 19 – Defense counsel lodges a foundation objection to Plaintiff’s counsel’s hypothetical question to Dr. Nolan whether Ms. Terek would have been able to do the things she did in her life before the August 2, 2012 collision if she had a growth hormone deficiency that preceded the wreck. Hypothetical questions to experts are proper under the Rules and Dr. Nolan had provided an appropriate foundation for this question through his testimony regarding his clinical treatment of patients with growth hormone deficiency as well as his knowledge, education and study of this condition.

Page 49, lines 15, 19 - Defense counsel lodged an "Objection" to plaintiff's counsel's foundation question to Dr. Nolan regarding whether there is literature into whether growth hormone replacement therapy is effective for individuals with growth hormone deficiency. Plaintiff's counsel then simply asks for Dr. Nolan's understanding of that literature. Accordingly, the plaintiff respectfully requests that these objections be overruled.

Page 52, lines 22 - 23 - Defense counsel lodged a leading objection to Plaintiff's counsel's follow-up question expounding on Dr. Nolan's testimony that growth hormone replacement therapy will be a "lifetime deal". Leading questions of an expert are permitted and the question as posed simply helps explain the doctor's prior testimony. Accordingly, the plaintiff respectfully requests that the objection be overruled.

Page 53, line 8; Page 54, line 11 - Defense counsel lodged an "Objection" to plaintiff's counsel's follow-up questions to Dr. Nolan about growth hormone therapy being critical for Jean, and whether she was at risk for dying prematurely without it. Premature aging and premature death are well-recognized consequences of growth hormone deficiency, and Dr. Nolan, as an expert endocrinologist, is certainly well-educated on this issue. Accordingly, the plaintiff respectfully requests that the objection be overruled.

Page 55, line 21. Defendant lodges an Objection to a question to Dr. Nolan about the cost of growth hormone. Dr. Nolan responds that the basis for his knowledge of the cost is what he has been told by patients and from industry and mentions hearsay. But these are statements he has received in the course and for the purpose of medical treatment of his patients. His testimony meets F.R.E. 803(4) and should be allowed. However, Dr. Nolan's "Hearsay" answer and Mr. Lynch's response of "thank you" should be stricken under F.R.E. 403 as unfairly confusing and/or prejudicing the jury.

Page 57, line 7 from "you know, because they come and - whichever growth hormone formulation was acceptable to insurance . . ." through line 15 - Here, Dr. Nolan deviates into a discussion of insurance with respect to growth hormone therapy. Such testimony is inappropriate in the context of this case and, accordingly, the plaintiff respectfully requests that the objection be sustained and the testimony stricken.

Page 66, lines 9 – 20 – Plaintiff objects to testimony regarding Jean’s past medical history on the basis of the argument set forth in Plaintiff’s Motion in *Limine* No. 2.

Page 67, lines 4 -5 – Plaintiff’s objection is withdrawn and needs redacted.

Page 70, line, 17 through Page 73, line 11 - Plaintiff objects to testimony regarding Jean’s past medical history on the basis of the argument set forth in Plaintiff’s Motion *in Limine* No. 2. This line of questioning is unfairly prejudicial without any underlying evidentiary support. Defendants are required to prove their affirmative defenses, including superseding or intervening causes, by a preponderance of the evidence. Here they have failed to do so. Accordingly plaintiff’s respectfully request that their objection be sustained and this line of questions be redacted.

Page 77, lines 14 through 18 – Plaintiff’s counsel objected to the form on the grounds that it was asked and answered on Page 75 and Mr. Lynch misdefines idiopathic to mean “without a cause”. Idiopathic is defined as a cause being unknown, which is an important distinction. As phrased the question is unfairly prejudicial to the plaintiff, and the plaintiff respectfully requests that her objection be sustained.

Page 78, line 23 – Plaintiff’s objection is withdrawn and needs redacted.

Page 81, line 14 – Page 82, line 2 - Plaintiff objects to testimony regarding Jean’s smoking history and Mr. Lynch’s question about “some pretty serious medical conditions” in Jean’s history on the grounds of relevance and form, in part, on the basis of the argument set forth in Plaintiff’s Motion in *Limine* No. 2. This line of questioning is unfairly prejudicial without any underlying evidentiary support. Defendants are required to prove their affirmative defenses, including superseding or intervening causes, by a preponderance of the evidence. Here they have failed to do so. Accordingly plaintiff’s respectfully request that their objections be sustained and these questions be redacted.

Page 82, line 24 – page 83, line 11 – Plaintiff objected to the question as asked and answered immediately preceding it at Page 82, lines 19-23.

Page 84, line 8 - Page 87, line 5 – Plaintiff objects to testimony regarding Jean’s past medical history on the basis of the argument set forth in Plaintiff’s Motion in *Limine* No. 2. This line of questioning is unfairly prejudicial without any underlying evidentiary support. Defendants are

required to prove their affirmative defenses, including superseding or intervening causes, by a preponderance of the evidence. Here they have failed to do so. Accordingly plaintiff respectfully request that their objection be sustained and this line of questions be redacted.

Page 87, line 16 – Page 88, line 20 – This is a line of questions subject to Defendant’s Motion in Limine regarding defendants not paying for her surgery.

Page 89, line 16 – line 90, line 19 – This is a line of questions regarding a brief suspension of Dr. Nolan’s license for a completely unrelated matter involving a patient of his who abused a Vicodin prescription at least 15 years ago. It’s irrelevant and highly prejudicial to the plaintiff and should be excluded under F.R.E. 401 and 403. Accordingly plaintiff respectfully request that their objection be sustained and this line of questions be redacted.

Page 94, lines 1 – 7 - Plaintiff’s question is withdrawn and needs redacted.

**Rose Witt’s Testimony:**

Page 15, line 1 – Defendants’ objection is cleaned up by plaintiff’s counsel after defense counsel makes it. Plaintiff would respectfully request that Mr. Lynch’s objection simply be redacted.

Page 16, line 17 – Defendant offers only an “Objection”, without stating a basis therefore, to Ms. Witt’s testimony about what she said to the 911 operator while she was chasing the defendant, Mr. Finkbinder. Ms. Witt’s testimony was clearly an excited utterance and present sense impression and admissible under Rule 803. Accordingly, Plaintiff would respectfully request that Mr. Lynch’s objection be overruled.

Page 16, line 25 – Similarly Defendant offers only an “Objection”, without stating a basis therefore, to Ms. Witt’s testimony about her and her husband’s motives for following Mr. Finkbinder after the collision. That testimony is not being offered for the truth of the matter asserted, but instead to explain why the Witt’s took the action they did in the wake of the collision. This testimony is also admissible under Rule 803 as a then-existing mental condition. Accordingly, Plaintiff would respectfully request that Mr. Lynch’s objection be overruled.

Page 18, line 11 – Again Defendant offers only an “Objection”, without stating a basis therefore, to Ms. Witt’s testimony about the 911 operator Mrs. Witt that she had dispatched the incident and state troopers were on their way. That testimony is not being offered for the truth of the matter asserted. Mrs. Witt explained that the operators were telling her this trying to calm her down after being involved in a high speed chase with Mr. Finkbiner trying to get the information 911 told the Witts it needed. This testimony is also admissible under Rule 803 as an excited utterance and was clearly made while the Witts were under the stress of the incident. Accordingly, Plaintiff would respectfully request that Mr. Lynch’s objection be overruled.

Page 25, line 25 – Again Defendant offers only an “Objection”, without stating a basis therefore, to Ms. Witt’s identification of the point of impact of the red Honda with the guardrail on I-80. Mrs. Witt had already provided a proper foundation of having witnessed the Honda strike the guardrail and a reasonable basis existed to ask her to simply identify a picture of the scene. Plaintiff would respectfully request that Mr. Lynch’s objection be overruled.

Page 27, line 24; Page 28, line 4; Page 28, line 13; Page 29, line 1 and Page 29, line 14 – Again Defendant offers only an “Objection”, without stating a basis therefore, to counsel’s questions to Mrs. Witt for her opinion on who was at fault for the collision and her opinion on Winfield Finkbiner’s contention that he did not know he hit the truck. Lay opinion is permissible in this instance under F.R.E. 701 where Mrs. Witt is offering the same based on her rational, eyewitness perception of the incident and is not based on any specialized knowledge.

Page 29, lines 15 - 22 – Plaintiff’s question is withdrawn and needs redacted.

Page 31, lines 9-10 – Plaintiff’s objection is withdrawn and needs redacted.

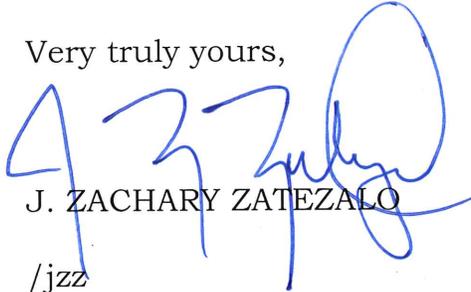
Page 32, lines 10-11 – Plaintiff’s objection is withdrawn and needs redacted.

In order to aid the Court’s decision-making on these issues, and for the Court’s use during trial, I am enclosing a complete copy of the above-referenced deposition transcripts. For the reasons articulated herein, I have highlighted the portions of the depositions which Plaintiffs contend should be redacted.

The Honorable Judge James R. Knepp, II  
September 16, 2015  
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Thank you for your courteous attention to these matters. Please do not hesitate to contact me with any questions.

Very truly yours,



J. ZACHARY ZATEZALO

/jzz

Enclosure -Deposition Transcripts with Highlighted Redactions

CC: Robert Lynch, Esq. - via email only

Pam Armstrong - via email only