IN THE CIRCUIT COURT FOR THE CITY OF SAINT LOUIS,
STATE OF MISSOURI

KAYLA HURLEY,	)	
	)	
Plaintiff,	)	Case No. 1822-AC12890-01
	)	
v.	)	
	)	
KAREN BURTON,	)	DIV. 24/29
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT FOR MOTION FOR NEW TRIAL ON ALL ISSUES

COMES NOW Plaintiff by and through her undersigned counsel pursuant to Rule 78.01 of the Missouri Rules of Civil Procedure moves this Court to set aside the verdict herein and to grant her a new trial on all issues. In support of her Motion for New Trial, Plaintiff states as follows:

I. Procedural History

1. On October 3, 2018, Plaintiff filed her Petition for Damages against Defendant for her negligence arising out of an automobile crash.

2. On October 24, 2018, Defendant filed her answer to Plaintiff's Petition denying all allegations of negligence. (Exhibit 5)

3. Thereafter, on February 3, 2020, Defendant was granted leave from Court to file an Amended Answer Out of Time wherein the Defendant admitted she was negligent in her crash involving Plaintiff. (Exhibit 6)

4. In significant advance of trial, on January 23, 2020, Plaintiff filed her Motions in Limine. Plaintiff's Motions in Limine are attached hereto as Exhibit 1 and incorporated by reference herein. (Exhibit 1)

5. Plaintiff's Motion in Limine #5 is entitled "**Commenting on plaintiff's use of the legal system.**" (Exhibit 2)

6. Plaintiff's Motion in Limine #5 stated, in part, "Defense counsel should be completely prohibited from commenting on Plaintiff hiring plaintiff's counsel and use of the legal system. To allow otherwise would expose the result of the case to reversal for materially affecting the outcome of the trial and being prejudicial." (Exhibit 1)

7. The parties consented to Plaintiff's Motion in Limine #5.

8. The Court, on February 7, 2020, called, heard, and entered an order granting Plaintiff's Motion in Limine #5.

II. Introduction

Plaintiff sought damages as a result of a rear-end crash after being rear-ended by Defendant Karen Burton on eastbound Interstate 44. Plaintiff presented evidence of an eye-witness. Plaintiff presented evidence of her thoracic spine/mid-back injuries through the testimony of medical doctors, Patricia Hurford, MD, and Helen Blake, MD. Plaintiff further presented evidence of her damages through witnesses Emily Magers, Jackie Jones, and Patrick Paynter. Defendant presented no evidence. The Defendant admitted negligence for the crash via her amended answer which answered the following with unqualified admissions: defendant, by using the highest degree of care, knew of should have known that plaintiff was slowed and stopped for traffic in front of her; defendant negligently failed to yield the right-of-way to plaintiff; defendant negligently [failed] to stop for traffic congestion; and defendant's vehicle negligently came into collision with the rear of plaintiff's vehicle. The jury assessed Plaintiff's damages at fifteen-thousand-dollars ($15,000.00).

In the spirit of cooperation to expedite the issues at trial, the parties on February 7, 2020, came together and consented to Plaintiff's Motion in Limine #5 regarding a fundamental right of the Plaintiff. The right for a person to seek legal counsel is so sacred, the law and the constitution advances considerable effort to protect it. This right to seek legal counsel is a right that is so sacred that anyone making comment on this right in the presence of the finder of fact prejudices that person and inhibits that person from receiving a fair fight.

During Defendant's opening statement, the Defendant's counsel made comments about the timing of when Plaintiff met her lawyer, signed a contract for legal representation, and sought a referral from her lawyer for medical treatment. The Court denied Plaintiff's timely request for a mistrial, denied Plaintiff's request that defense counsel be admonished in front of the jury, and denied Plaintiff's offered curative instructions. The Court denied Plaintiff's request to offer rebuttal evidence after Defendant's counsel's comments in opening statement. Instead, the Court did nothing. The Court failed to cure the defect of a comment on a fundamental right of a party to seek the advice of a lawyer. The Court failed to read any curative instruction or to formally admonish the Defendant's counsel. Thereafter, the Court permitted evidence of un-related medical treatment relating to body parts not plead nor at issue in the case and allowed argument by the Defendant in reference to pre-existing injury without causation testimony by a medical expert. Lastly, the Court denied Plaintiff's request to recall the Defendant seeking to impeach the Defendant about a subsequent "prior" inconsistent statement about defendant's responsibility for the crash. The required remedy to preserve the sanctity of a fundamental right to engage a lawyer for guidance through the legal system is a new trial on all issues. Together with the other errors outlined above, the required remedy for Plaintiff is for this Court to grant her a new trial on all issues.

III. Analysis

The trial Court has wide discretion in ruling on a motion for a new trial and is vested with substantial discretion over matters of fact in ruling on new trial motions. *Oventrop v. Bi-State Dev. Agency*, 521 S.W.2d 488, 492 (Mo. Ct. App. 1975). The discretion for a new trial also includes the trial Court's power to determine whether its ruling throughout the course of the trial "was prejudicial and substantially influenced the verdict and to grant a new on the basis of that determination." *Id*. "A trial court has the right, in the proper exercise of its discretionary power, to grant a new trial on account of any erroneous ruling…" *Wagner v. Mortgage Information Services, Inc.*, 261 S.W.3d 625, 636 (Mo. Ct. App. W.D. 2008). "The purpose of a motion for new trial is to allow the trial court the opportunity to reflect on its action during the trial." *Nguyen By and Through Nguyen v. Haworth*, 916 S.W.2d 887, 889 (Mo. Ct. App. W.D. 1996) *citing Farley v. Johnny Londoff Chevrolet, Inc.*, 673 S.W.2d 800, 804 (Mo. Ct. App. 1984).

1. Because the Court erred in overruling Plaintiff's Motion for Mistrial after the Defendant's counsel, in opening statement, made comments about when the Plaintiff met her lawyer, signed a contract for representation with her lawyer, and was referred by her lawyer for medical treatment.

Defendant through her counsel during opening statement utilized a calendar representing the months of July and August 2017 as a demonstrative exhibit to prepare a visual representation of a timeline for the jury. (Tr. 132). Defendant circled pertinent days on the calendar with an ink pen. (Tr. 133-135). These circled days included the day of the crash, the day Plaintiff first went to urgent care, the day Plaintiff provided notice to her employer, the days Plaintiff attended a gym for a workout, and the day Plaintiff again went to an urgent care for complaints of pain. (Tr. 133-135). Defendant referenced calendar days for when Plaintiff sought treatment with a chiropractor and a physical therapist. (Tr. 135 L:3 – 136, L:1-10). Then, in constructing the timeline for the jury, Defendant's counsel stated, while circling on a calendar in front of the jury:

> "Now, what – what happens next is where things get interesting. Ms. Hurley does not go for any additional treatment for about another seven weeks or so and who she goes to see is Josh Borgmeyer. This is the physical therapist that her attorney referred her to. So at this point she has been discharged from PT, been discharged from chiropractic care, **she meets her lawyer, she signs up with the lawyer, and she gets referred by the lawyer**" (Tr. 138, L:2-10).

The Court acknowledged that Defendant's counsel had a date in front of the jury by way of a calendar. (Tr. 139, L:24-25) Plaintiff objected to this comment by Defendant's counsel and stated Defendant violated a pre-trial Motion in Limine, which was granted by this Court through the consent of the parties. (Tr. 138)(Exhibit 1). Plaintiff timely requested a curative instruction. (Tr. 139) At the time of the objection the Court merely instructed the Defendant's counsel to "move on for now." (Tr. 140, L:20) Plaintiff moved for a mistrial. (Tr. 148-150, 180). Plaintiff further requested a curative instruction and an admonishment of defense counsel. (Tr. 150, L: 2; 180, L:3; Tr. 201-202). The Court denied the curative instruction and admonishment request. (Tr. 202, L: 15; Tr. 317, L:11) At the time, the Court delayed ruling on Plaintiff's Motion for Mistrial. (Tr. 150, L:4-5, 180, L:5-7) Plaintiff again moved for a Motion for Mistrial, which was denied by the Court. (Tr. 202) Again, Plaintiff moved for a mistrial, which the Court promptly denied. (Tr. 317). In her closing argument, Defendant's counsel proceeded to re-reference the prejudicial dates from the opening statement. (Tr. 357) Defendant's counsel stated "here's the Monday that we talked about since the beginning. September 19th, discharged from PT." (Tr. 357, L:8-9) These statements were permitted in Defendant's closing even after the Court ruled that it would "not allow him to mention it again." (Tr. 179, L: 22)

Comments, statements, or testimony about when a party engages with a lawyer are prejudicial and constitute reversible error. *Carlyle v. Lai*, 783 S.W.2d 929 (Mo Ct. App. W.D.

1989).[1] Attempts to discredit a party for exercising their constitutional rights under the legal system in this country constitute reversible error and warrant a new trial. Defendants counsel's remarks enflamed the jury and prevented Plaintiff from obtaining a fair and just trial. As a result, Plaintiff has been prejudiced. "Exercising one's right to utilize the legal system should not normally be used to attempt to discredit a litigant before a jury." *Id*. There is paramount importance on preserving a person's freedom to exercise fundamental rights to or granted by the legal system. *Yingling v. Hartwig*, 925 S.W.2d 957 (Mo. Ct. App. W.D. 1996). "The exercise of a party's rights is not a proper issue for examination and is grounds for reversal." *Carlyle v. Lai*, 783 S.W.2d at 931.

In *Carlyle*, the Court of Appeals deemed questioning of the plaintiff on cross-examination about when the plaintiff first contacted an attorney to sue the defendant reversible error and ordered a new trial. *Id*. at 929. The Court held that the line of questioning was not relevant to an issue in the case and was reversible error. *Id*. In reaching this conclusion, the Court stated that "attempts to discredit plaintiffs for exercising rights fundamental to or granted by the legal system…is not normally to be discouraged and, exercising one's right to utilize the legal system within established rules and procedures should normally not be used to attempt to discredit a litigant with a jury." *Id*. Stating further, "the right to seek the advice of counsel is so fundamental that, absent a justifiable reason and supporting evidence, counsel risk reversal when attempting to discredit a litigant by cross-examining him about the time and circumstances of his having consulted an attorney to discuss and exercise his legal rights." *Id*. As this issue before the Missouri Court of Appeals was an issue of first impression, the *Carlyle* court relied on *Martinez*

[1] **See Exhibit 1, Plaintiff's Motion in Limine**. *Carlyle v. Lai*, *supra*, was cited in Plaintiff's Motion in Limine #5. Any argument that the Defendant was not aware of the exact issue Plaintiff feared by injecting the timing of when the Plaintiff hired or engaged is mis-guided and misplaced. Defendant had enough time to prepare a response to Plaintiff's Motion in Limine or to distinguish *Carlyle*. Instead, Defendant consented to this Motion in Limine.

v. Williams, 312 S.W.2d 742 (Tex. App. 1958). There, the Texas Court of Appeals held it improper and prejudicial for the defendant to question the plaintiff about the time and circumstances under which plaintiff hired counsel. *Martinez v. Williams*, 312 S.W.2d at 752. "But where the defendant merely seeks to show that the plaintiff is a chronic personal injury litigant the evidence will be excluded on the theory that its slight probative value is outweighed by the danger of unfairly prejudicing the claim on an innocent litigant." *Id*.

The *Carlyle* court also relied on *Hungate*. In *Hungate*, the Missouri Supreme Court reversed a judgment because the defendant's cross examination of the plaintiff about choice of venue was prejudicial. *Hungate v. Hudson*, 185 S.W.2d 646 (Mo. 1945). In so reasoning, "if such inquiries are wholly immaterial and can have no effect other than their general tendency to prejudice the jury against the witness or party they are not the subjects of legitimate interrogation and are not permissible." *Id.* at 649. Then, in *Edgell v. Leighty*, the Court of Appeals held that the trial court did not abuse discretion in refusing to permit the defendant from cross-examining the plaintiff or offering evidence about the date in which plaintiff filed a lawsuit. 825 S.W.2d 325 (Mo. Ct. App. SD 1992). The court relied on *Carlyle* in affirming the trial court's order, again asserting that access to the legal system should not be discourage and exercising a right to use the legal system should not be used to discredit a party before a jury. *Carlyle v. Lai*, *supra*. Later, in *Nguyen By and Through Nguyen v. Haworth*, the Court of Appeals held the trial court did not abuse discretion in granting a new trial after improper questioning on the plaintiff. 916 S.W.2d at 889. There, the trial court, over the plaintiff's objection, permitted questioning by the defendant of the plaintiff on cross-examination, regarding the plaintiff's plans to sue the defendant. *Id*. at 888. Defendant's counsel then later argued in closing that the plaintiffs were trying to profit from their child's injury. *Id*. at 889. The comment about plaintiff's plans to sue

the defendant for injury "may have affected the entire case…" *Id*. Moreover, reversal is warranted where the trial court admitted evidence of a physician stating there is a difference in the length of time subjective complaints of injury continue with a patient involved in litigation as compared to a patient not involved in litigation. *Yingling v. Hartwig*, 925 S.W.2d at 956. The Court of Appeals held the error in admitting this testimony was "erroneous and extremely prejudicial." *Id*. at 957. Improperly injecting a party's exercise of their rights in the legal system before a jury constitutes reversible error and compels a new trial. *Id*.

Plaintiff recognizes the trial procedure for motions in limine in the State of Missouri. First, a trial court's ruling on a motion in limine is interlocutory, is subject to change in the course of a trial, and provides no preservation for appellate review. *State v. Purlee*, 839 S.W.2d 584, 592 (Mo. banc 1992). Second, the act of a trial court sustaining a motion in limine "does not act as an automatic, permanent bar to the evidence sought to be excluded." *State v. Albanese*, 9 S.W.3d 39, 51 (Mo. Ct. App. W.D. 1999). The procedure for a party seeking to offer evidence that has been excluded subject to a sustained motion in limine is outlined in *State v. Albanese*, *supra*. The *Albanese* court notes in dicta, "Hence, in order to afford the trial court with an opportunity to reconsider its previous ruling, the proponent of the excluded evidence may attempt to present the excluded at trial." *Id*. "Of course, such an attempt would be subject to any restrictions imposed by the trial court as to the manner in which this is to be done, for example, requiring counsel to approach the court, outside the hearing of the jury, and to advise the court that he or she intends to introduce the excluded evidence and why it is now admissible." *Id*. (emphasis added) This specific procedure permits the opponent to such evidence to renew an objection to the previously excluded evidence. *Id*. The *Albanese* court then expanded on the purpose behind a motion in limine. First, "to exclude inadmissible evidence at trial." *Id*.

Second, the motion in limine also serves the purpose of "prohibiting a party from placing an improper and prejudicial issue before the jury through voir dire, opening statement, or questions during trial, which are not evidence." *Id*. The rationale behind the second purpose is premised on the fact that "certain circumstances the mere act of raising the issue, regardless of the fact that no inadmissible evidence is admitted, is so prejudicial that the prejudice cannot be removed by refusing to admit the evidence being offered." *Id*. "Stated another way, **once the bell is rung, it cannot be unrung**." *Id*. (emphasis added) The rational outline for the second purpose behind a motion in limine is applicable to the prejudicial comments made here.

The bell of Defendant's counsel's comments cannot be un-rung. Plaintiff's only opportunity to un-ring this bell rung by the Defendant's violation of a motion in limine is for a new trial. Defendant improperly interjected before the jury the issue of Plaintiff engaging in legal representation. These statements enflamed the jury and prejudiced the Plaintiff. Moreover, the jury was directed to re-focus on these statements in Defendant's closing argument. The Court of Appeals has consistently held that such comments are prejudicial, are reversible error, and warrant a new trial. *See e.g., Carlyle v. Lai, supra*; *Yingling v. Hartwig, supra.* Any argument that Plaintiff opened the door in her deposition to remarks about the hiring of counsel is misguided and not support by the evidence. (Exhibit 3)[2] The testimony in Plaintiff's deposition was solely limited to attorney referred care, which is clearly distinguishable from Defendant's counsel's comments about meeting her lawyer and signing up with her lawyer. As such, a new trial is required to remedy this reversible error.

[2] Exhibit 3 is an excerpt from Plaintiff's deposition take on May 6, 2019. "A: So then it was Josh Borgymeyer. I went to – so I was fine for a little while, and then my back started hurting again, and I went to see Josh Borgmeyer. Q: Why did you go to him? A: I don't know the dates Q: No. Why did you go to him? Oh, I think that was when I had met Chris and we – he recommended Josh. Q: Your attorney Chris? A: Yes." (Exhibit 3 – L: 1-11)

2. Because the Court erred in refusing to grant Plaintiff's request for a curative instruction, to instruct the jury to disregard, and to admonish Defendant's counsel regarding Defendant's counsel comments in opening statement regarding Plaintiff's engagement with a lawyer.

Plaintiff drafted a curative instruction, Exhibit Z, and presented it to the Court (Tr. 201)(Exhibit 7). The Court read Plaintiff's proposed instruction into the record. (Tr. 201, L:1-18). The Court read Plaintiff's Exhibit Z into the record which states:

> "Plaintiff's proposed instruction and admonishment. Yesterday during opening statement the attorney for the defendant said, the plaintiff had been discharged from PT, discharged from chiropractic care, she meets her lawyer, she signs up her lawyer and she gets referred by the lawyer. (with regard to physical therapist Josh Borgmeyer). You must disregard this improper statement and not consider it in arriving at your verdict. Not only did the statement violate the Court's pretrial rulings, it also – it's also false and it misrepresents the true facts. The Court reminds you that opening statements are not evidence. And then it says, Mr. Lester, the Court admonishes you for violating the pretrial order on this subject. There should be no further reference." (Tr. 201)

The Court denied Plaintiff's request to have Exhibit Z read to the jury. (Tr. 201, L: 19). Plaintiff again drafted a curative instruction, Exhibit ZZ, presented it to the Court, and the Court again refused to read to the jury. (Tr. 317)(Exhibit 8). The Court did not draft nor read its own curative instruction to the jury.

Cautionary/curative instructions are accepted and well-respected part of jurisprudence in Missouri. *French v. Missouri Highway and Transp. Com'n*, 908 S.W.2d 152 (Mo. Ct. App. W.D. 1995). The trial Court has discretion to determine whether a cautionary instruction should be given and to determine the proper kind. *Morris v. E.I. Du Pont De Nemours & Co.*, 173 S.W.2d 39, 42 (Mo. 1943). Here, the trial Court failed to cure the defect of the Defendant interjecting a collateral issue of the Plaintiff engaging a lawyer for assistance with her personal injury claim. The Court had discretion to either offer Plaintiff's Exhibit Z, Plaintiff's Exhibit ZZ, or any other curative instruction. Instead, the Court took no action, leaving the jury with the impression that the Plaintiff's claim and subsequent lawsuit were a product of her lawyer's encouragement. This

inaction by the Court prejudiced the Plaintiff and thrust the issue of Plaintiff exercising her constitutional rights before the jury. The required remedy for the Plaintiff is a new trial.

3. Because the Court erred in denying Plaintiff's request to offer rebuttal evidence after Defendant's counsel comments in opening statement.

After the Court denied Plaintiff's Motion for Mistrial, Plaintiff moved the Court for an order allowing her to offer rebuttal evidence. (Tr. 203) The Court denied this request. (Tr. 204) Plaintiff sought to offer this evidence in response to the admission of improper evidence, the remarks during Defendant's opening statement, prior in the case. (Tr. 203) Additionally, Plaintiff sought to offer evidence about the actions of representatives of the Defendant that lead Plaintiff to believe she would need to engage a lawyer. (Tr. 203) Plaintiff incorporates by reference correspondence from Defendant's representatives. *See* (Exhibit 4)[3]

Missouri courts permit curative admissibility evidence. *See e.g. State v. Shockley*, 410 S.W.3d 179, 194 (Mo. 2013) "Otherwise inadmissible evidence can nevertheless become admissible because a party has opened the door to it with a theory presented in an opening statement, or through cross examination." *Id.* "Where the defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *Id*. Here, the Defendant injected the issue of the Plaintiff hiring a lawyer. (Tr. 138) Prior to this remark, the Defendant's counsel stated, "Now, what – what happens next is where things get interesting. Ms. Hurley does not go for any additional treatment for about another seven weeks or so and who she goes to see is Josh Borgmeyer. This is the physical therapist that her attorney referred her to." (Tr. 183, L:2-6). When this comment was made within the context of Defendant's opening statement, the jury

[3] Exhibit 4 is correspondence from AAA, the insurance company for Defendant. Plaintiff acknowledges that Exhibit 4 is otherwise inadmissible evidence as it references a collateral source and is inadmissible under existing Missouri law.

was left with the impression that Plaintiff had stopped all medical treatment, then decided to meet with a lawyer. The jury is left to believe that the Plaintiff exercising a fundamental right to seek counsel for guidance with a legal claim is what lead to her additional medical treatment. By making this prejudicial statement, the Defendant opened the door. The Plaintiff should have been permitted to admit otherwise inadmissible evidence such as Exhibit 4[4], in order to count this inference made in Defendant's opening statement. The Court's refusal to allow the Plaintiff to offer rebuttal evidence of why the Plaintiff hired a lawyer was prejudicial and warrants a new trial.

4. Because the Court erred in admitting evidence of un-related medical treatment to body parts not at issue in the case.

The trial Court erred in admitting evidence of unrelated medical treatment of the Plaintiff as the body parts previously treated were not at issue in the case. The Court previously denied Plaintiff's Motion in Limine with respect to prior un-related medical treatment. (See the Court's Order of February 7, 2020) Plaintiff renewed her Motion in Limine during the trial proceedings in a hearing outside the presence of the jury to exclude any mention of unrelated medical treatment or unrelated injures. (Tr. 208) The Court again denied Plaintiff's Motion in Limine (Tr. 209) Defendant's counsel then was permitted to cross examine the Plaintiff about a prior neck issue. (Tr. 260) Plaintiff timely objected. (Tr. 260, L:20) Defendant was permitted to inquire of the Plaintiff about 32 treatments for parts of the body other than the Plaintiff's mid-back/thoracic spine. (Tr. 262) Plaintiff objected and was overruled by the Court. (Tr. 262, L: 16-17) Next, Defendant's counsel was permitted to read from the Young Chiropractic Record from 2015 involving the Plaintiff. (Tr. 274) Plaintiff, again timely objected and was subsequently overruled

[4] Exhibit 4: Pursuant to the doctrine of curative admissibility permitted in *State v. Shockley*, *supra*, Plaintiff seeks to offer this correspondence from AAA, the Defendant's liability insurance carrier. This Exhibit evidences the reason why Plaintiff engaged a lawyer.

by the Court. (Tr. 274, L: 12) Defendant then offered Exhibit S, an urgent care medical record from April 2019, while cross examining the Plaintiff. (Tr. 284) Plaintiff objected on the grounds that such treatment was unrelated medical treatment and was subsequently overruled by the Court. (Tr. 285, L: 5-10) The treatment sought by the Plaintiff in April 2019 was for a viral infection commonly known as the flu. (Tr. 284) Plaintiff confirmed on her redirect examination that the visit to Young Chiropractic in 2015 had nothing to do with her low back. (Tr. 287, L: 8) Plaintiff testified her treatment was for her IT band and sciatic nerve. (Tr. 287, L: 10, 12) Lastly, Defendant was permitted in her closing argument to show the jury summary exhibits of Plaintiff's medical records, Defendant's Exhibits T and U. Plaintiff renewed her objection with reference to Exhibit T and U, which contained evidence of medical treatment to unrelated body parts. (Tr. 300, L: 22-23)

The trial Court erred in permitting the Defendant to offer evidence of Plaintiff's unrelated medical treatment involving unrelated body parts. Plaintiff sought damages for injuries to her middle back/thoracic spine, specifically T9-T10. Evidence of Plaintiff's prior treatment for her left hip, sacral region, toes, and the flu were not relevant and should have been excluded. Plaintiff plead and specifically sought and claimed damages for injuries to her middle back/thoracic spine. Evidence of injuries or medical conditions unrelated to the injuries claimed are irrelevant, immaterial, and inadmissible. *Senter v. Ferguson*, 486 S.W.2d 644 (Mo. App. 1972). In *Senter*, the plaintiff claimed injuries as a result of a crash to the left wrist, as well as lacerations, bruises, and black eyes. *Id*. at 647. On direct examination, the plaintiff said she was in good health prior to the crash. *Id*. Then, on cross examination, the defendant questioned the plaintiff about prior injuries including various prior hospitalizations, thyroid operation, bruises, dizziness, headaches, as well as a prior back surgery… *Id*. On appeal, the Court of Appeals

rejected the argument by the defendant that the evidence was admissible for "purpose of affecting the plaintiff's credibility, based on her statement of prior good health." *Id*. at 647. The court reasoned that such evidence was irrelevant and inadmissible holding that "a witness may not be cross-examined as to a distinct collateral fact for the purpose of impeaching his testimony by contradicting him." *Id*.

The trial Court erred in permitting the Defendant to offer evidence regarding unrelated medical treatment to body parts wholly unrelated to the Plaintiff's cause of action. Assuming arguendo that the Defendant offered the unrelated medical treatment evidence to show that Plaintiff made various admissions about her well-being, this purpose was rejected by the *Senter* court, *supra*. The medical records for unrelated treatment are a distinct collateral matter as the records involving treatment to other parts of the Plaintiff's body—left hip, IT band, sciatic nerve, and a viral infection. Just as the Court of Appeals in *Senter* feared, evidence of unrelated medical treatment is irrelevant and inadmissible. Thus, the trial Court erred in admitting this evidence and as a direct result Plaintiff was prejudiced.

5. Because the Court erred in permitting argument by Defendant's counsel of pre-existing injury without any expert testimony establishing the casual connection to the injuries and without any evidence of pre-existing injury.

The trial Court permitted the Defendant to argue that the Plaintiff's injury could have been caused by something other than the Defendant's negligence. The Defendant presented no evidence at trial. Defendant presented to the jury no expert testimony to aid the trier of fact in understanding Plaintiff's injuries. (Tr. 338, L:17-19) The Defendant was then permitted to argue that Plaintiff's disc herniations had other potential causes other than Defendant's negligence in the automobile crash including degeneration, lifting, the gym, or posture. To establish a causal link between other potential causes of injury, an expert is required. "Where proof of causation

requires a certain degree of expertise, an expert's opinion is necessary and a lay opinion is not sufficient." *Brickey v. Concerned Care of Midwest, Inc.*, 988 S.W.2d 592, 597 (Mo. Ct. App. E.D. 1999). Sophisticated injuries are not within a layperson's understanding and require establishing the causal relationship through expert medical testimony. *Brown for Estate of Kruse v. Seven Trails Investors, LLC*, 456 S.W.3d 864, 870 (Mo. Ct. App. E.D. 2014). Here, Plaintiff's injury is of a sophisticated nature that requires a medical expert to provide a causal link. The specific injury in her spine, a cranially extruded thoracic disc, required magnetic resonance imaging to diagnose. The nature and type of the disc extrusion further required an expert to testify as to its cause, the traumatic event of the car crash involving the Defendant. The trial Court erred in permitting the Defendant to interject other causes of the Plaintiff's sophisticated injury because a medical expert is required to establish causation.

6. Because the Court erred in overruling Plaintiff's request to recall the Defendant for impeachment testimony after Defendant's subsequent inconsistent statement stating she never tried to shirk responsibility.

Plaintiff filed her Petition in this action on October 2, 2018 alleging Defendant was negligent in rear-ending Plaintiff's vehicle. On October 24, 2018, Defendant filed her Answer denying all allegations of negligence. (Exhibit 5 – Defendant's Answer) Days before trial on this matter on February 3, 2020, the Defendant filed an Amended Answer. (Exhibit 6) Days before trial Defendant admitted various allegations of negligence for the crash involving the Plaintiff. In the Defendant's opening statement, however, she told a different story, that she never tried to shirk responsibility for causing this accident. (Tr. 128, L: 11-12). In examining the Defendant, Plaintiff's counsel asked the Defendant whether it was true that she never tried to avoid responsibility. (Tr. 166) The Defendant stated, "that's absolutely true." (Tr. 166, L: 10) Plaintiff then sought to offer evidence of when the Defendant accepted responsibility. (Tr. 166-168)

Outside of the hearing of the jury, the Plaintiff made an offer of proof on the grounds that up until a week before trial the Defendant had a pleading denying they (Defendant) was ever negligent. (Tr. 168-69) The Court made a ruling stating that neither was party was to mention accepting responsibility. (Tr. 169) Thereafter, Plaintiff made a request to recall the Defendant and re-open cross-examination to impeach her about a prior abandoned pleading. (Tr. 182) The Court denied the request to recall the Defendant. (Tr. 183)

Pleadings are ordinarily inadmissible as evidence. *Littell v. Bi-State Transit Development Agency*, 423 S.W.2d 34, 39 (Mo. Ct. App. 1967)("pleadings are addressed to the court, not the jury") An exception exists, however, for abandoned pleadings. *Id*. "Abandoned pleadings may be used in evidence when they contain admissions against interest and may be used to impeach a witness or as admissions against a party's interest." *Jimenez v. Broadway Motors, Inc*., 445 S.W.2d 315, 317 (Mo. 1969). "The basis for receiving in evidence the pleading admission, later abandoned, is its inconsistency with the position taken at trial." *Countess v. Strunk*, 630 S.W.2d 246, 254 (Mo. Ct. App. W.D. 1982). Here, the Defendant abandoned her pleading from October 24, 2018 where she denied Plaintiff's allegations of negligence by filing her amended answer on February 3, 2020 where she admitted negligence in the rear-end collision with Plaintiff. Then, at trial, the Defendant stated she "never tried to shirk responsibility." (Tr. 128) This statement is wholly inconsistent with Defendant's prior position and Plaintiff was entitled to impeach the Defendant as to her credibility which is solely within the province of the jury to determine. Defendant's version of the severity of the impact and how it occurred was different from the testimony of the Plaintiff and the independent eye witness, Karen Dunn. Thus, the trial Court erred in overruling Plaintiff's request

7. Cumulative effect of the errors outlined above warrants a new trial.

The trial Court has the authority to grant a new trial based on the cumulative effects of errors even without a specific finding that any single error would constitute grounds for a new trial. *See Koontz v. Ferber*, 870 S.W.2d 885 (Mo. Ct. App. W.D. 1993). Assuming arguendo, that any of the errors outlined above does not constitute a basis for a new trial, the cumulative effect of the errors above warrants a new trial.

III. Conclusion

Plaintiff is entitled to a new trial pursuant to Rule 78.01 on all issues. After an opportunity to reflect on the issues presented at trial on this matter, the Plaintiff respectfully moves this Court for a new trial on all issues.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on March 13, 2020, I electronically filed the foregoing with the Clerk of the Court using the Missouri Courts electronic filing system, which sent notification of such filing to all counsel of record. I further certify that I signed, or caused my electronic signature to be placed upon, the original of the foregoing document.