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IN THIS ISSUE

Together We Rise

The Crucible of Crisis: The Blinding Impact of Privilege on Access to Justice

Will COVID-19 Be the Perfect Storm to Help Form a More Perfect Union?

by Starr Linette Brookins, Esq.

Starr Linette Brookins

Do you consider yourself to be privileged – whether that privilege was afforded to you by doing nothing at all, or by sacrificing everything in order to accomplish a particular goal?

I distinctly remember the moment when I learned that my great-grandmother was illiterate. I had to have been no older than 7. We had taken the city bus to Winn-Dixie and were standing in a practically empty aisle when she picked up a canned good, and instantly became fixated upon it. I watched her as she continuously turned the can around – pausing – staring at it with bewilderment in her eyes. She hesitated in returning the can back to its shelf. At that very moment, a bespectacled clerk who couldn't have been older than 16 walked by us, attempting to avoid eye contact. She tapped on his shoulder and demurely asked him for a particular item. He pointed to the very can that she had just returned to the shelf, with a smug smirk on his face. She lowered her head in shame as she retrieved the can. Her pain and embarrassment were palpable. I then realized that all of the cans in our cart had pictures on them. I learned a lot about privilege that day.

So, again, I ask: Do you consider yourself to be privileged? Privilege is "a right, immunity, or benefit enjoyed by a particular person or a restricted group of people beyond the advantages of most," or a "… societal advantage that a restricted group of people has over another group."[1] Many of us tend to think of privilege as an "invisible package of unearned assets," as described by Peggy McIntosh.[2] However, I also believe that privilege includes things that we have earned and/or accomplished. Even we first-generation lawyers of color have to answer the question of whether we are privileged, with a resounding "yes."

My great-grandmother's story is not unique, especially considering the fact that she was born in 1923. In fact, "[m]ore than 30 million adults in the United States cannot read, write, or do basic math above a third-grade level."[3] Illiteracy is not an aberration – it is a direct reflection, and consequence, of American history. Our history is riddled with inequity, and literacy was initially reserved for only the most privileged within our society. It was a means by which to control and oppress particular socioeconomic classes and races. The ability to read is the ability to access information and education.[4] It would be shortsighted to believe that this history did not invade our legal system.

This pandemic has created a severe test for our society but also has created an environment ripe for change. We must take this opportunity to ensure true access to justice for all. COVID-19 has taken the entire world by storm, and our sense of normalcy has crumbled around us. Although this pandemic has disrupted our lives, we can learn from it in order to ensure an exceedingly bright future of which all of us can be a part.

Our legal system, once replete with antiquated and outdated concepts, is now bending its "strong adherence to tradition" in order to do what our constitution compels – to ensure access to the courts for all.[5] Our courts have worked tirelessly and expeditiously to adapt to the challenges that came along with COVID-19. The implementation of virtual and telephonic hearings, and the release of a panoply of administrative orders as to procedures in light of COVID-19, seemingly appeared overnight. However, it is critical that we not stop here. It is critical that we are cognizant of privilege – and lack thereof – during these changes and ensure that the changes move the needle toward

more and increased access to justice and do not unwittingly create additional burdens and barriers for those less privileged.

The digital divide exists, and it is a reality faced by many. Recently, a photograph went viral of two children sitting on the pavement outside of a Taco Bell using its free Wi-Fi in order to complete their homework. This digital divide is not just an impediment to children engaged in virtual learning. It is also an impediment to those who may not have access to the internet in order to join virtual hearings. It also serves as an impediment to those without a phone who are unable to attend telephonic hearings. We must do everything in our power to ensure that this is not a barrier to justice and access to the courts. How can one who is illiterate read these administrative orders? What are we doing to ensure that all individuals are able to access the courts? Some counties have turned unused space into a locale where individuals can access reliable internet and telephones in order to attend their hearings. Some counties are ensuring that closed captioning is enabled for all virtual hearings, or that a telecommunications relay service is utilized for telephonic hearings. Some counties have audio recordings explaining their administrative orders in plain language.

While many of us view telephonic and virtual hearings as easing our burdens associated with the practice of law, we have not stopped to opine as to the reality of those without access to technology. The burdens from COVID-19 are being borne disproportionately by impoverished people.[6] This pandemic, and surely its aftermath, has been particularly detrimental to those in the most vulnerable of situations – the impoverished, persons with disabilities, non-English speakers, and those whose voices have been suppressed, and even silenced, like children and the elderly.[7]

In order for justice in Florida to be accessible, fair, responsive, and accountable, we must ensure that the justice system is convenient, understandable and affordable to everyone, that it respects the dignity of every person, that it anticipates and responds to the needs of all members of society, and that it uses resources in a way that the public can understand.[8]

Let's create a new paradigm where justice is for all, not just a few.

Starr Linette Brookins is a first-generation lawyer who currently serves as a hearing officer with Hillsborough County, as well as associate general counsel/legal advisor with the Property Appraiser's Office. A recent recipient of the Best Lawyers®: Ones to Watch, Ms. Brookins has received a panoply of accolades that span over two decades, related to her leadership, commitment to public service as well as both her litigation and appellate acumen. Ms. Brookins obtained her Juris Doctor from the George Washington University School of Law as a Presidential Scholar and her bachelor's degree in criminology from the University of Tampa, magna cum laude.

References:

[1] *Dictionary.com. "Privilege." www.dictionary.com/browse/privilege (last visited September 13, 2020).*

[2] *Peggy McIntosh. "White Privilege: Unpacking the Invisible Knapsack." www.racialequitytools.org/resourcefiles/mcintosh.pdf (last visited September 14, 2020).*

[3] *"Crisis Point: The State of Literacy in America." resilienteducator.com/news/illiteracy-in-america/ (last visited September 13, 2020).*

[4] *Id.*

[5] *Sheller Center for Social Justice, Temple University Beasley School of Law. "Access to Justice in the Time of COVID-19." www2.law.temple.edu/csj/access-to-justice-in-the-time-of-covid-19 (last visited September 14, 2020); Fla. Const. Art. I, §21.*

[6] *United Nations, Department of Economic and Social Affairs. "Everyone Included: Social Impact of COVID-19." www.un.org/development/desa/dspd/everyone-included-covid-19.html (last visited October 28, 2020).*

[7] *United Nations Department of Economic and Social Affairs, Social Inclusion. "The Social Impact of COVID-19." www.un.org/development/desa/dspd/2020/04/social-impact-of-covid-19 (last visited September 14, 2020).*

[8] *Florida Courts. "Mission & Vision." www.flcourts.org/florida-courts/mission-vision (last visited September 14, 2020).*

HILLSBOROUGH COUNTY

BEZALEEL PINE,

PVDL No.: 639025

Appellant,

v.

HILLSBOROUGH COUNTY,

Appellee.
_____/

ORDER UPHOLDING APPELLEE'S DENIAL OF APPELLANT'S PUBLIC VEHICLE DRIVER'S LICENSE RENEWAL

THIS CAUSE was heard on February 11, 2019. Having heard argument from both parties, and being otherwise fully advised in the premises, it is hereby:

ORDERED and ADJUDGED:

1. Reasonable cause exists, by a preponderance of the evidence, to support Appellee's decision to deny Appellant's application for renewal of his PVDL.
2. The denial of Appellant's renewal of his PVDL is hereby **UPHELD**.
3. As is evidenced in the Clerk's Certificate of Disposition, admitted into evidence without any objection, Appellant plead guilty to the offense of felony battery, and adjudication was withheld, on October 27, 2008 (Case No.: 08-CF-010351-A).

4. Per Section 10-585(e)(3) of Ordinance 18-25, amending Ordinance 17-22, "[a]ny applicant/driver must not have been found guilty or been convicted of or pled guilty or nolo contendere, regardless of whether adjudication was withheld, to any disqualifying offenses as specified below…[a]ny violent crime felony or attempted violent crime felony, including, but not limited to:…any other felony battery…"

5. No evidence was presented that Appellee's denial of Appellant's renewal of his PVDL was unsupported by the Code. In fact, the Code mandates that a renewal not issue if any driver, applicant, or license holder has a disqualifying offense.

DONE AND ORDERED this 24th day of February, 2019.

/s/ Starr L. Brookins
STARR BROOKINS
HEARING OFFICER

Per section 50-195, "[e]ither party may appeal an Order of the Hearing Officer by means of Petition for Writ Certiorari to the circuit court within thirty (30) days following the issuance of the Order. The responsibility for, and the costs associated with, preserving a written record of the hearing for appeal and providing such written records to the circuit court shall rest with the party appealing the order."

cc: Appellant, Mr. Bezaleel Pine, Tampa; Appellee, Hillsborough County; Hillsborough County Board of County Commissioners.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LISA N. BOSTICK,

Plaintiff,

Case No.: 8:16-cv-1400-VMC-AAS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.
_____/

DEFENDANT'S RESPONSE, AND MEMORANDUM OF LAW, IN OPPOSITION TO PLAINTIFF'S MOTION TO LIMIT THE TESTIMONY OF DEFENDANT'S EXPERT, RONALD J. FIJALKOWSKI, Ph.D.

Defendant, **STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**, by and through its undersigned counsel, hereby files its Response, and Memorandum of Law, in Opposition to Plaintiff's Motion to Limit the Testimony of Defendant's Expert, Ronald J. Fijalkowski, Ph.D., (Doc. 60), and states the following in support therein:

1. This is a case involving a rear-end automobile accident that occurred on November 14, 2013, wherein Plaintiff is seeking underinsured/uninsured motorist benefits.

2. Liability for the accident has never been in dispute, and rests with a non-party tortfeasor, Blair Alsup.

3. One of the most critical issues within this case is whether the forces involved in this rear-end motor vehicle accident could have resulted in the type of injuries that the Plaintiff claims to have sustained.[1]

[1] In fact, this Court very recently denied Defendant's motion to strike Plaintiff's expert, Stephen Koontz, PE, whose opinions included those of forces in the subject accident. (Doc. 71.)

4. In order to assist the jury's understanding of the forces generated in the rear-end motor vehicle accident at issue, as well as due to Plaintiff's disclosure of an accident reconstruction expert, Mr. Koontz, the Defendant retained Ronald J. Fijalkowski, Ph.D., to analyze the case and offer opinions within his areas of expertise, which include: injury causation biomechanics; brain injury biomechanics; spinal biomechanics; human injury mechanisms; human tolerance thresholds; vehicular accident reconstruction; and diffuse brain injury. *See* Exhibit A, Ronald J. Fijalkowski's, Ph.D., Professional Biographical Outline.

5. Ronald J. Fijalkowski, Ph.D., was initially disclosed in Defendant's Expert Disclosure on or about March 10, 2017. Defendant subsequently provided Plaintiff with the Analysis Report on April 3, 2017, which is attached herein as Exhibit B.[2] On May 17, 2017, Plaintiff's counsel deposed Dr. Fijalkowski, the transcript of which was attached to Plaintiff's Motion to Limit the Testimony of Defendant's Expert, Ronald J. Fijalkowski, Ph.D. (Doc. 60).

MEMORANDUM OF LAW AND ARGUMENT IN OPPOSITION TO PLAINTIFF'S MOTION TO LIMIT THE TESTIMONY OF DR. RONALD FIJALKOWSKI, Ph.D.

This Court has broad discretion in how *Daubert* issues are reviewed in its determination as to relevance and reliability. *Daubert v. Merrel Dow Pharm.*, 509 U.S. 579, 589, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The admissibility of expert testimony is governed by the Federal Rules of Evidence Rule 702, which states that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

[2] Dr. Fijalkowski's opinions are summarized on page 17 of his report.

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

"The rejection of expert testimony is the exception rather than the rule." *See* Advisory Committee Notes to the 2000 Amendment to Fed. R. Evid. 702.

In *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291-92 (11th Cir. 2005), the Eleventh Circuit adopted a three-part analysis that this Court must utilize to determine if the strictures outlined in the Fed. R. Evid. 702 and *Daubert* are met. Therefore, this Court must determine whether:

(1) the expert is qualified to testify competently regarding the matters he intends to address;

(2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and

(3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Rink v. Cheminova, Inc., 400 F.3d 1286, 1291-92 (11th Cir. 2005).

A. Dr. Fijalkowski is Qualified to Offer Opinions Within His Field of Expertise - Biomechanical/Biomedical Engineering

Plaintiff concedes in her motion that "[a]s a biomechanical engineer, Dr. Fijalkowski may be able to render an opinion as to general causation…[t]hus, he may testify as to the fact of the rear end impact forces on the human body and the types of injuries that may result from exposure to various impact levels." *See* Plaintiff's Motion to Limit the Testimony of Defendant's Expert

Ronald J. Fijalkowski, pg. 7, ¶ 19. However, Plaintiff then argues that Dr. Fijalkowski should not be permitted to testify as to a mechanism of injury, nor causation, which is contradictory to long-standing and well-settled case law, as well as Plaintiff's aforementioned concession. *Id.* at pg. 19, ¶ 45. It is well-settled that biomechanical engineers are qualified to render opinions "describing forces generated in… rear-end collisions, and to speak about the types of injuries those forces would, or could, generate, [as well as]…how [those] forces may affect or injure an individual." *Berner v. Carnival Corp.*, 632 F.Supp.2d 1208, 1211, 1213 (S.D. Fla. 2009). Further, Florida courts have consistently held that "[i]t is undisputed that biomechanical opinions as to the general causation of a type of injury are admissible," and have "recognized that a biomechanical expert is qualified to opine on the general mechanism of an injury." *Maines v. Fox*, 190 So.3d 1135, 1141 (Fla. 1st DCA 2016)(citing *Gregory Council v. State*, 98 So.3d 115, 116 (Fla. 1st DCA 2012)(holding that a biomechanical expert was qualified to testify as to causation wherein he opined that: "(1) a child of the victim's height and weight could have sustained similar brain injuries by falling out of a day bed; and (2) shaking alone could not have caused such injuries")); see also *Boyles v. Dillards, Inc.,*199 So. 3d 315 (Fla. 1st DCA 2016).

Dr. Fijalkowski's biomedical and biomechanical engineering expert opinions outlined in his Report, and to which he testified during his deposition, do not require medical expertise, nor do they require that he be a medical doctor. Dr. Fijalkowski explained the distinction between medical causation and biomechanical causation, specifically related to the work that he performed in this case:

> …a medical point of view would focus on the diagnosis, maybe offer an alternative diagnosis based on her symptomology. So[,] whatever pathologies she had, and they would associate that with the symptoms and then offer a diagnosis. I certainly am not doing that in this case. I'm focusing on -- **I'm taking the diagnosis at face value and trying to**

> **identify the appropriate injury mechanism. So[,] how does a force have to be applied to Dr. Bostick and how hard does that force have to be applied to her body to cause that injury? And then I'm doing an analysis of this particular event specifically in the context of her biomechanical attributes to ultimately determine whether or not that diagnosis is linked to this motor vehicle collision.**

Dr. Fijalkowski Dep. 37:11-38:3.

Plaintiff continues her argument by articulating the unsupported assertion that "this Court should limit [Dr. Fijalkowski's] opinion as to whether the impact from the accident with the tortfeasor, Mrs. Alsup, caused [Plaintiff's] injuries…[as] [t]he latter aspect of such an opinion would require the identification and diagnosis of a medical condition…demand[ing] the expertise and specialized training of a medical doctor." *See* Plaintiff's Motion to Limit the Testimony of Defendant's Expert Ronald J. Fijalkowski, pg. 7, ¶ 19. The rationale within Plaintiff's argument is clearly erroneous and contrary to *Berner* and its progeny, as well as long-standing Florida jurisprudence, such as *Maines, Boyles,* and *Council,* supra. Dr. Fijalkowski need not be a medical doctor to access medical records, read them, and record Plaintiff's alleged diagnoses, as contained therein. *See* Exhibit B, pgs. 3-4. Dr. Fijalkowski does not indicate that he has, in any way, diagnosed any medical condition, nor that he has conducted any action(s) that would "demand[] the expertise and specialized training of a medical doctor." In fact, Dr. Fijalkowski testified as to the distinction between biomedical/biomechanical injury causation and medical causation during his deposition, as follows:

> … I make a distinction between medical causation and biomedical analyses of injury causation. Because medical causation is often confused with what I do, and medical causation the scientific community recognizes, typically deals with diagnosis and prognosis and treatment plans, as opposed to what I do, which is **in this case, I readily accept what's written in the medical records. I'm not here to offer an alternative diagnosis or anything like that.** My sole focus is the severity of the collision, how Dr. Bostick responded in terms of her moment (sic)

> and the forces applied to her body, the injury mechanisms associated with the specific diagnoses, and whether or not those injury mechanisms were present to cause those injuries. That's altogether different than what medical causation typically means, which is, you know, a patient comes into a medical hospital or treatment center and is diagnosed with a set of injuries. I certainly don't do that.

Dr. Fijalkowski Dep. 23:21-24:22.

It appears that the crux of Plaintiff's argument is that Dr. Fijalkowski is not qualified to offer an opinion as to a mechanism of injury and/or biomedical/biomechanical causation solely because he is not a medical doctor; however, the law is clear that one need not be a medical doctor to opine as Dr. Fijalkowski does throughout his deposition testimony, and within his Report. Plaintiff is correct that Dr. Fijalkowski is not a medical doctor, and he will not be opining as to prognosis, diagnosis, nor treatment for same. Dr. Fijalkowski will opine as to biomechanical/biomedical causation of injury, as well as mechanism of injury; however, he will not "go beyond the typical expertise of a biomechanical engineer" by rendering impermissible opinions that require medical expertise, such as permanency, extent, or severity of injury. *Maines v. Fox*, 190 So.3d 1135, 1141 (Fla. 1st DCA 2016)(citing *Mattek v. White*, 695 So.2d 942 (Fla. 4th DCA 1997)); *see also Stockwell v. Drake*, 901 So.2d 974 (Fla. 4th DCA 2005).

"This Court herself has repeatedly held that while 'a biomechanics expert is not qualified to give a medical opinion regarding the extent of any injury,' he 'is qualified to offer an opinion as to causation if the mechanism of injury falls within the field of biomechanics.'" *Boyles* at 318 (Fla. 1st DCA 2016)(citing *Council* at 116-17 (Fla. 1st DCA 2012)(citations omitted)(holding that "because the mechanism of injury [falls and shaking] fell within the field of biomechanics," a biomechanics expert who was not a medical doctor was qualified to opine that a child of the victim's height and weight could have sustained certain types of brain injuries by falling out of a

day bed and that shaking alone could not have caused such injuries)).

Dr. Fijalkowski is a biomechanical and biomedical engineering expert; therefore, he is permitted to opine as to the mechanism of injury, and whether, or not, the multitude of injuries diagnosed by the treating physicians are related to the minor rear-end accident at issue in this case.[3] *See Berner v. Carnival Corp.*, 632 F.Supp.2d 1208, 1211-1213 (S.D. Fla. 2009)(finding that a biomechanical engineer was qualified to testify as to sufficiency of given force to cause alleged brain injury…). An injury mechanism is the fundamental mechanical process responsible for injury, and injury mechanism analyses lie at the heart of any scientific biomedical investigation of injury causation. As testified to during his deposition, and articulated within his Report, his opinions are based upon peer-reviewed and generally accepted scientific methodology.

As is apparent from his Analysis Report, as well as his deposition testimony, Dr. Fijalkowski's opinions are that the forces and physics involved in the minor rear-end accident that occurred on November 14, 2013, were not sufficient to create the mechanism required for the type of injuries that the Plaintiff claims to have sustained. Federal courts have found that a biomechanical expert "may opine whether the forces applied to the plaintiff's body at the time of the accident were **sufficient to have caused injury**, but may not opine as to whether the plaintiff actually has the injury complained of." *Berner v. Carnival Corp.*, 632 F.Supp.2d 1208, 1211-1213 (S.D. Fla. 2009). Dr. Fijalkowski will not be offering any opinions as to whether, or not, Plaintiff "actually has the injuries" that she is claiming to have sustained from this accident. The focus of Dr. Fijalkowski's specialty is to ascertain whether or not the forces from the subject

[3] For example, Dr. Fijalkowski will testify that there was not sufficient force in the subject accident to create the injury mechanism responsible for causing the diagnoses related to Plaintiff's alleged: diffuse brain injury (traumatic brain injury); temporomandibular joint injuries; cervical spine injuries; acute onset, aggravation, and/or exacerbation of lumbar spine injuries; nor acute onset, aggravation, and/or exacerbation of bilateral knee injuries.

accident that occurred on November 14, 2013, were sufficient to have caused the injuries with which Plaintiff has been diagnosed.

B. Dr. Fijalkowski's Opinions & Utilized Methodology are Sufficiently Reliable

Plaintiff argues that Dr. Fijalkowski's testimony should be excluded because it is based on insufficient facts or data, and that it is the product of unreliable principles and methods that were not reliably applied to the facts of the case because his "methodology…is focused on medical causation and inaccurate application of data not specific to this collision and case."

However, Plaintiff's argument is erroneous and Plaintiff does not provide any authority to support that these matters render Dr. Fijalkowski's opinions inadmissible due to a valid reliability issue. This Court need only look to Dr. Fijalkowski's Report, as well as his testimony, to determine that the data applied and utilized was specific to this collision and this case. Dr. Fijalkowski applied reliable, peer-reviewed and scientifically accepted methodologies (the sources of which are outlined in approximately 137 footnotes contained his report, Exhibit B to this filing) to the specifics of this cause of action after having reviewed case-specific photographs of the property damage to the involved vehicles, the subject accident traffic crash report, property damage estimates, Plaintiff's medical records and reports, Plaintiff's deposition and examination under oath transcripts, and multiple other case-specific items. *See* Exhibit B, pgs. 2-3.

Dr. Fijalkowski did not utilize a "one size fits all" statistical analyses in the matter sub judice – he utilized a Plaintiff-specific analysis. As Plaintiff "is a unique individual… [with a] unique…and complicated anatomy and physiology," he "had to account for her [specific] biomechanical attributes." Dr. Fijalkowski Dep. 43:12-14; 102:13-22; 103:5-16. Further, in performing his analyses, he performed what he refers to "as a personal tolerance evaluation. So,

one of [his] tasks was to evaluate the forces applied to [Plaintiff], as well as consider those in the context of what she normally experienced. So, it's a force-to-force comparison that the scientific community often performs, and I provided a couple of different papers that do that type of analysis in my report." Dr. Fijalkowski Dep. 44:8-16.

Dr. Fijalkowski's opinions and conclusions are based upon sound, well-reasoned, and established peer-reviewed methodologies, and are not "merely...ipse dixit." See *Berner* at.1215. Dr. Fijalkowski's Report clearly and specifically outlines the analyses utilized and the sources of the peer-reviewed and generally-accepted methodology as a bases for same, to include the following analyses: fault-tree or failure analysis; evaluation of vehicular damage from inspecting an exemplar Honda, the traffic crash report, photographs, testimony, and repair records; photogrammetry analyses to evaluate the residual crush imparted; energy-based crush analyses that were performed parametrically to determine the severity of vehicular collisions; Newton's Third Law of Motion; as well as further scientific data to support his conclusions/opinions. *See* Exhibit B.

Further, Dr. Fijalkowski testified as to the methodology utilized in performing his assessment, as follows:

> To perform this type of injury causation analysis, you have to abide by a peer reviewed and generally accepted methodology, which I did in this case. I outlined it for you in my report. It's been accepted by the scientific community, and it involves five general steps.
>
> The first of which is to evaluate how severe that collision is and then focus in on identifying the injuries that were diagnosed by the treating physicians. So[,] in this case, it's just simply reviewing the medical records to identify those diagnoses. The third step is to evaluate the response of Dr. Bostick in response to those forces; so how did her body move, how much force was applied to different components of her body, and did those forces – were they applied in the right direction and were

> they hard enough to create the injury mechanism to cause those injuries in the context of human tolerance and her unique biological attributes.

Dr. Fijalkowski Dep. 34:2-23.

Plaintiff's presentation of a sole "clinical commentary" related to potential other factors in assessing a cervical injury as to a general population is an insufficient basis to request that his opinions be limited or stricken, for multiple reasons, the most glaring of which is that this commentary attacks an approach/methodology not even utilized by Dr. Fijalkowski in this cause of action. In this case, Dr. Fijalkowski performed peer reviewed and generally accepted methodology wherein he performed analyses of variables specific to Plaintiff, including variables such as the fact that she was a female, while also taking into account various factors, to include her age and body type inside of the specific vehicle that she was utilizing at the time of the subject accident. This "clinical commentary" presented by Plaintiff was a statistical (not a specific) analyses discussing the probability of injury amongst the general population, rather than a specific individual as Dr. Fijalkowski did in this case. To adopt this statistical analysis as to risk factors in analyzing probability of injuries amongst the general population would constitute a "one size fits all" analysis, which is contrary to what Dr. Fijalkowski performed in this matter.

Dr. Fijalkowski's Report references 137 footnotes worth of peer-reviewed sources that constitute "sufficient factual inundation," and any minor aberration, if any, merely constitutes fodder for cross-examination, which may potentially go to credibility of testimony - not admissibility. Plaintiff gives no indication that this sole clinical commentary connotes a major evisceration of, nor does it undermine, any of the peer reviewed studies and/or methodologies utilized by Dr. Fijalkowski.

Within her Motion, Plaintiff specifically takes issue with the fact that Dr. Fijalkowski:

(1) did not know Plaintiff's torso height or the precise starting posture of the Plaintiff at the time of initial impact;

(2) did not perform any testing of her "body size" (despite knowing her weight and height);

(3) did not perform any testing of Plaintiff's "other unique features," a statement undefined in Plaintiff's Motion;

(4) did not review the primarily speculative deposition testimony of before and after witnesses, which was saturated with impermissible hearsay and wholly unrelated to the necessity of rendering his opinion as their testimony related to alleged symptomology – not diagnoses (Dr. Fijalkowski will not be offering any opinions as to symptomology allegedly experienced. *See* Dr. Fijalkowski Dep. 113:16-23.);

(5) did not provide the year, source, or background of the Honda S2000 exemplar (which he was not asked to provide during his deposition).

(6) did not specifically articulate within his Report whether Plaintiff's sex played a role in his analysis.

The aforementioned issues are simply the usual fodder for a typical, well-prepared and vigorous cross-examination - not a reason to exclude, or limit, Dr. Fijalkowski's testimony. Absolute certainty is not a requirement that the Courts impose in exercising their gatekeeping function, nor are they a necessity for a reliable methodology, as "[t]here are no certainties in science." *Navelski v. Int'l Paper*, No. 3:14-cv-445, 2017 WL 1132569, at *6 (N.D. Fla. March 25, 2017)(citing *Daubert*, 509 U.S. at 590).

"As a general rule, the factual basis of an expert opinion goes to the credibility of the

testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. **Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded**," which is clearly not the case in the matter before this Court. *Kearney v. Auto-Owners Ins. Co.*, No. 8:06-CV-595T-24-TGW, 2007 WL 3231780, at *3 (M.D. Fla. Oct. 30, 2007)(e.s).

Dr. Fijalkowski's testimony is reliable and the aforementioned areas with which Plaintiff takes issue are not matters that would render his opinion inadmissible. Rather, they constitute fodder for cross-examination. As this Court articulated in *Taylor, Beach & Whitaker Mortg. Corp. v. GMAC Mortg. Corp.*, No. 5:05-cv-260-Oc-GRJ, 2008 WL 3819752, at *5 (M.D. Fla. Aug. 12, 2008), "these arguments go more to the weight of the evidence, than the admissibility of the evidence under *Daubert*. The Court need not determine that the expert [defendant] seeks to offer into evidence is irrefutable or certainly correct. The certainty and correctness of [the expert's] opinion will be tested through cross-examination and presentation of contrary evidence and not by a *Daubert* challenge. Indeed, the Court's role as gatekeeper is not intended to supplant the adversary system or the role of the jury."

This Court should rely upon *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999), wherein it was held that the "traditional and appropriate means of attacking…admissible evidence… [is through] …[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" – not just striking, or limiting, expert witness opinion testimony. This same standard is applicable to Plaintiff's argument that Dr. Fijalkowski made "random statements…that imply scientific basis when none exists." The proper course of action in this instance is for Plaintiff's counsel to inquire as to the bases of these statements, which Plaintiff failed to do during the deposition; however, Plaintiff can still inquire

during cross-examination at the trial, rather than assuming that no bases exist.

C. Dr. Fijalkowski's Testimony Will Assist the Trier of Fact to Understand the Evidence or Determine a Fact in Issue

The Eleventh Circuit has held that expert testimony assists and is helpful to the trier of fact "if it concerns matters that are beyond the understanding of the average lay person," which is clearly the case here. *United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004). Dr. Fijalkowski has been a biomedical/biomechanical engineer for over fourteen (14) years, and Plaintiff does not specifically contest his qualification as a biomechanical/biomedical engineering expert.

It is unlikely that the average lay juror possesses the requisite education, experience, training, or skill necessary to understand the analyses and peer-reviewed methodology utilized by Dr. Fijalkowski; therefore, courts have routinely accepted biomechanical expert opinion testimony concerning mechanism of injury, forces of impact, occupant kinematics, and physics involved in motor vehicle accidents because these issues are scientific and require expert testimony in order for a layman to understand them.

Plaintiff offers no authority to support her conclusory assertion that Dr. Fijalkowski's opinions will not assist the jury. Plaintiff merely parrots the statutory language, without performing any legal analysis or providing any specific support, in making the conclusory argument that Dr. Fijalkowski's testimony may potentially confuse or mislead a jury as to medical causation. Dr. Fijalkowski's opinion is related to a key issue within this cause of action and the probative value of his expert opinions are significant. The significance of his testimony is not substantially outweighed (nor is it even outweighed) by the mere potential of confusion or misleading of a trier of fact. Any potential confusion or misleading can be remediated during

trial by this Court through a jury instruction, if necessary. Medical opinions and testimony deal with prognosis, diagnosis, and rendering medical treatment. Here, Dr. Fijalkowski simply accesses and takes as accurately reported Plaintiff's diagnoses from her medical records, and opines as to whether sufficient forces existed as a result of this rear-end accident to cause these alleged diagnoses/injuries, which he is permitted to do. "Biomechanical engineers are qualified to testify about how forces may affect or injure an individual." *Berner v. Carnival Corp.*, 632 F.Supp.2d 1208, 1213 (S.D. Fla. 2009)(holding that a "biomechanical engineer was qualified to testify as to sufficiency of given force to cause alleged brain injury…") Further, biomechanics are qualified to determine what injury causation forces are in general and can tell how a hypothetical person's body will respond to those forces…" *Id.* at 1212. Dr. Fijalkowski will not be offering any opinions as to whether or not Plaintiff "actually has the injuries" that she is claiming to have sustained from this accident. The focus of Dr. Fijalkowski's specialty is to ascertain whether or not the subject accident that occurred on November 14, 2013 provided sufficient forces to have applied to Plaintiff's body at the time for the subject accident to have caused the injuries with which Plaintiff has been diagnosed.

Dr. Fijalkowski was even asked during his deposition how his testimony would be helpful, and/or assist, the trier of facts, to which he replied as follows:

> …the way in which it would be helpful to a jury is that I'm focusing on, first, the severity of the collision in terms of the speeds of the vehicles, the accelerations of the vehicles…that I think would really help them ascertain the severity of the collision more objectively as opposed to subjective descriptions such as severe or hard. So[,] that's first and foremost.
>
> Second, I'm really trying to understand how Dr. Bostick responded to the motor vehicle collision in terms of how she moved, what occupant protection system was afforded to her, how her body would realign with that occupant protection system, how different parameters such as her

> being completely braced for the collision could potentially affect her response, what that means in terms of her particular diagnoses.
>
> Also, I'm the only one that's really identifying from an engineering perspective how the forces have to be applied to the body and how hard the forces have to be applied to the body to cause those particular sets of injuries, and whether or not the forces she experienced really amount to that in the context of human tolerance and her biomechanical attributes.
>
> So[,] I think I'm probably the only one involved in the case that is offering opinions in those particular areas. So[,] I think all of that information would nec -- would be very helpful to someone who is trying to determine whether or not these injuries are truly related to this motor vehicle collision.

Dr. Fijalkowski Dep. 75:1-76:21.

CONCLUSION & REQUESTED RELIEF

Based upon the foregoing, Defendant requests that this Court deny Plaintiff's Motion to Limit the Testimony of Defendant's Expert, Ronald J. Fijalkowski, Ph.D., (Doc. 60).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Mail this 3rd day of July, 2017, to the following: Michael P. Maddux, P.A.; mmaddux@madduxattorneys.com; jsalter@madduxattorneys.com; ctonski@madduxattorneys.com; Alejandro D. Blanco, Esquire; ablanco@theblancolawfirm.com and Dorothy Clay Sims, Esquire; dcs@dorothyclaysims.com.

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIVIL DIVISION

MICHELENE JENKINS A/K/A
MICHELENE CHIRELLE BETTIS, Case No.: 16-CA-000114

Plaintiff,

v.

KENNETH EUGENE MYERS,

Defendant.
_____/

MOTION TO DISMISS BASED ON FRAUD BY PLAINTIFF AND SUPPORTING MEMORANDUM OF LAW

NOW COMES the Defendant, KENNETH EUGENE MYERS, by his undersigned counsel, and pursuant to Rule 1.420, Florida Rules of Civil Procedure, moves this Court to dismiss Plaintiff, MICHELENE JENKINS a/k/a MICHELENE CHIRELLE BETTIS (hereinafter referred to as "Jenkins" or "Plaintiff"), action against Defendant with prejudice, and as grounds therefor shows unto the Court that based on the pleadings and evidence in this cause, including Plaintiff's deposition, Plaintiff's answers to interrogatories, and the medical records and exhibits attached thereto and filed herein, that the Plaintiff has perpetrated a fraud upon this Court. The grounds for this motion and the substantive matters of law to be argued are as follows:

1. This lawsuit arises from a motor vehicle accident that occurred November 8, 2014, on southbound I-75 near its intersection with US 301, in Manatee County, Florida. It was a two vehicle accident, wherein a car owned and driven by Defendant Myers was

attempting to change lanes and subsequently struck a car in which Plaintiff was a passenger. For purposes of this motion, liability for the accident is not in dispute.

2. On January 8, 2016, Plaintiff filed this lawsuit naming Myers a defendant for his alleged active negligence in causing damages to Plaintiff.

3. Plaintiff claims that as a result of the subject accident, she sustained injuries to her neck, back, bilateral shoulders, and head, and that she has accumulated past medical bills and will need future medical treatment.

4. This motion focuses on the causation of Plaintiff's alleged injuries and damages, as those injuries and damages, as well as the causation of same, are the central issue of this case.

5. Throughout the course of this litigation, Plaintiff has repeatedly and deliberately misrepresented and concealed her medical history.

6. These repeated misrepresentations on the part of Plaintiff, which were given under oath in sworn answers to interrogatories and deposition testimony, amount to a fraud perpetrated on the Court.

7. These misrepresentations on the part of Plaintiff concern injuries and damages that are the central issue of this case.

8. These misrepresentations, should they had been successful, would have interfered with the jury's ability to adjudicate the issues in this case: namely, that the subject accident caused Plaintiff's injuries and damages.

9. Based on this fraud perpetrated by Plaintiff, her action is due to be dismissed in holding with the long standing laws of this State. *See Ramey v Haverty Furniture Companies, Inc.,* 933 So. 2d 1014 (Fla. 2d DCA, 2008)(dismissal of personal injury action affirmed

where plaintiff concealed prior injuries that were the same as those alleged to have arisen from subject incident); *Diaz v. Home Depot USA, Inc*., 196 So. 3d 504 (Fla. 3d DCA 2016)(dismissal of personal injury action affirmed where the plaintiff claimed she injured her neck and back, and concealed prior injuries and treatment to her neck and back); *Middleton v. Hager*; 179 So.3d 529 (Fla. 3d DCA 2015); *Morgan v. Cambell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002)(dismissal of personal injury action arising out of an automobile accident affirmed where plaintiff failed to reveal prior chiropractic treatment); *Bass v. City of Pembroke Pines*, 991 So. 2d 1008 (Fla. 5th DCA 2008)(dismissal of personal injury action affirmed where plaintiff failed to disclose in discovery significant medical history); *McKnight v. Evancheck*, 907 So. 2d 699 (Fla. 4th DCA 2005)(the plaintiff's misrepresentations concerning whether he had ever been hospitalized or had prior medical problems constituted a fraud on the court that warranted dismissal with prejudice); *Long v Swofford*, 805 So. 2d 882 (Fla 3d DCA 2002)(dismissal of personal injury lawsuit affirmed where during her deposition the plaintiff concealed pre-existing injury that was the central issue of the case); *Baker v. Myers Tractor Services, Inc*., 765 So. 2d 149 (Fla. 4th DCA 2000)(dismissal of personal injury action affirmed where plaintiff failed to reveal prior knee injuries); *Metropolitan Dade County v. Martinsen*, 736 So. 2d 794 (Fla. 3d DCA 1999)(appellate court reversed trial court's decision not to dismiss case where plaintiff, who was allegedly injured in an automobile accident, failed to disclose history of similar injuries previously sustained, despite being queried on same during deposition and through interrogatories).

WHEREFORE, based on the above stated grounds and supported by the memorandum of law, below, Defendant respectfully urges this Honorable Court to dismiss Plaintiff's action with prejudice, and requests an evidentiary hearing on the motion.

MEMORANDUM OF LAW

NOW COMES the Defendant, KENNETH EUGENE MYERS, by his counsel undersigned, and for his memorandum of law in support of this motion to dismiss, states:

This lawsuit arises from a motor vehicle accident that occurred November 8, 2014, on southbound I-75 near its intersection with US 301, in Manatee County, Florida. It was a two vehicle accident, wherein a car owned and driven by Defendant Myers was attempting to change lanes and subsequently struck a car in which Plaintiff was a passenger. (*See* Exhibit A, Plaintiffs' Complaint.)

On January 8, 2016, Plaintiff filed this lawsuit naming Myers as defendant. Plaintiff claims that as a result of the subject accident, she sustained injuries to her neck, back, bilateral shoulders, arms, legs, and head (to include headaches and dizziness), and that she has accumulated past medical bills and will need future medical treatment. Plaintiff has sworn and testified repeatedly throughout this lawsuit that she has **never** sustained, complained of, or received medical treatment for any injury to her neck, arms, or either shoulder. Plaintiff has also sworn and testified repeatedly throughout this lawsuit that prior to this accident, she has **never** suffered a loss of consciousness, **never** undergone any MRI(s) of her lower back, neck, shoulder (to include x-rays), or arms, **never** undergone any CT or MRI scans of her head, and that she had **never** received treatment at Tampa General Hospital prior to the subject accident. Plaintiff has also consistently testified, under oath, that prior to the subject accident, she was only involved in

a fall that occurred 3-4 years ago, which required medical treatment for a low back injury that she sustained for "a couple of weeks" that then "went away."

I. Plaintiff's Claim of Injuries and Damages

Specifically, as a result of the subject accident, Plaintiff claims to have sustained injuries to her neck, back, bilateral shoulders, head, arms, and legs. *(See* Ex. B, Plaintiff's Answers to Initial Interrogatories, #11; *see also* Plaintiff's deposition, pgs. 67-70, 78, 111-114.) Plaintiff was asked to describe the injuries she was relating to the subject accident:

> Interrogatory #11: Describe each injury for which you are claiming damages in this case, specifying the part of your body that was injured, the nature of the injury, and, as to any injuries you contend are permanent, the effects on you that you claim are permanent.
>
> Plaintiff's Response: Objection, this question calls for a medical opinion/diagnosis. Plaintiff is not qualified to answer this question and Defendants should refer to the medical records that are provided in response to Defendant's Request to Produce and Plaintiff's treating physicians. Without waiving said objection, my injuries are neck pain with central disc protrusion at C6-7, headaches, dizziness, tinnitus, trouble concentrating and memory loss, left shoulder pain, back pain which radiates into my buttocks and thigh. I have received cervical injections.

(*See* Ex. B.)

Plaintiff was also asked to list any accidents, prior to the subject accident, where she sustained any injury and she only listed a single incident in which she was injured prior to the accident that is the subject of this lawsuit:

> Interrogatory #23: Please enumerate and describe any accidents, automobile or other kinds, prior or subsequent to the incident in the Complaint, in which you were injured, and include in your answer the name, address and telephone number of each hospital, physician or other health care provider who treated you or examined you for said injuries.
>
> Plaintiff's Response: Worker's compensation claim due to a fall where I injured my low back 3-4 years ago. I do not recall who I treated with. Auto accident on 2/20/16 in Hillsborough County. I went to Brandon Regional Hospital and Your Place Medical Center.

(*See* Ex. B.)

Plaintiff was further asked in interrogatories if she has ever injured, had symptoms, or received treatment in the areas where she was claiming injuries from the accident:

> Interrogatory #27: With respect to any injuries or symptoms which you claim to have sustained as a result of this accident, please state whether you at any other time ever had any similar injury to, or similar symptom of the same or similar area of your body and if so, itemize each such injury or symptom, the part of your body involved, the date and duration of such injury or symptom and the names and address of any physicians or hospitals that treated you for it.
>
> Plaintiff's Response: I injured my low back in a fall at work approximately 3-4 years ago and I have been receiving medical treatment for my 2/20/16 auto accident due to low back pain.

(*See* Ex. B.)

On September 1, 2016, Plaintiff was deposed by counsel for the Defendant in this action wherein she testified in regards to prior injuries and treatment. In regard to her low back, Plaintiff testified as follows:

Q Prior to this accident, had you ever sustained an injury to your low back at all?

A I'm trying to think. Not that I can remember.

Q Okay. Prior to this accident, had you ever been to a doctor at all complaining about your low back? Pain? Problem moving it? Anything?

A Well, when I had that accident with the – the comp thing, they – I was – I asked them about my back, but it wasn't bad or anything. It just like – they just – it -- it came and went.

Q What – what does that mean, it came and went?

A The pain just – it was, like, there, and then it left. You know, it wasn't there

that long.

Q **Okay. How – how long – how long is not that long? Just –**

A **Oh, about –**

Q **-- so I understand.**

A **-- a couple of weeks or something.**

Q **Okay. A couple of weeks right after the fall?**

A **Right.**

Q **And then it went away?**

A **And then it went away.**

Q **And then you didn't have any problem with your low back again until the accident that this lawsuit's about?**

A **Right.**

Q **Okay. You work in the health care industry. Do you know what an MRI is?**

A **Right, uh-huh.**

Q **You know what that is?**

A **Uh-huh.**

Q **Yes?**

A **Yes. Ye – oh, sorry. Yes, yes.**

(Plaintiff's deposition, p. 70:15-72:8.)

Q **What I'm asking is, you've told me you've had an MRI on your low back sin – since the accident happened. Okay? All right. So –**

A **That's it.**

Q **So after this accident. What I'm asking, before the accident this lawsuit is –**

lawsuit's about, before this accident, had you ever had an MRI on your low back before?

A **No, this – this it.**

Q **Okay. So the only MRIs you've ever had on your low back, your lumbar spine, have been after the November 2014 accident?**

A **Right.**

(Plaintiff's deposition, p. 72:22-73:9.)

In regards to her arm and shoulders, Plaintiff testified as follows:

Q **Okay. Prior to this accident, did you ever sustain an injury to your left arm or shoulder?**

A **No.**

Q **Okay. Had you ever been to a doctor complaining at all about your left arm or your shoulder before this accident?**

A **No.**

Q **Okay. Ever receive any type of medical treatment on your left arm or your shoulder after this accident – before this accident?**

A **No.**

Q **Okay. Ever get an x-ray or an MRI on your left arm or your left shoulder before this accident?**

A **No.**

(Plaintiff's deposition, p. 87:5-18.)

In regards to her neck, Plaintiff testified as follows:

Q **Okay. Prior to the November 2014 accident, had you ever injured your neck before?**

A **Now, that – no.**

Q Okay.

A I – I can answer that. No.

Q All right. Had you ever hurt your neck in any way before November of 2014?

A Before – no. No.

Q Okay. Had you ever been to a doctor or a hospital or any type of clinic or medical provider at all, making any complaints about your neck?

A No.

Q All right. Had you, before the November 2014 accident, ever had an MRI on your neck?

A No.

Q All right. So all the MRIs on your neck have been since the November of 2014 accident?

A Right, that's true.

(Plaintiff's deposition, p. 114:25-115:7.)

In regards to her head, Plaintiff testified as follows:

Q In your life have you ever had a situation where you've lost consciousness or have – have been knocked out or blacked out for – for a period of time?

A No.

Q Okay. So that was the only time in your life was this accident that you've lost consciousness or blacked out?

A That – yes.

(Plaintiff's deposition, p. 128:18-25.)

Q Okay. Any -- have you -- you've had MRIs and CAT scans on your head since the accident?

A Yes, yes –

Q Okay.

A -- I believe.

Q Before the accident, before the No -- now, when I say "the accident," I'm talking about the accident that this lawsuit is about, the November 2014 accident. Before the November 2014 accident, any MRIs or CAT scans on your head or your brain before then?

A Not that I can remember, no.

(Plaintiff's deposition, p. 117:10-20.)

In regard to Plaintiff's pre-accident treatment at Tampa General Hospital, she testified as follows:

Q How many times prior to the accident we're here about had you been to Tampa General Hospital before?

A Well, three – two, three times.

Q Two or three times?

A Yeah.

Q Okay.

…

Q All right. So before the November of 2014 accident, you had been to Tampa General Hospital two or three times in the past?

A Uh-huh.

Q Yes?

A Yes.

Q And would those have been in the six years that you've lived in Tampa since you moved from Illinois?

A Yeah, but that wasn't for me.

Q Okay. I'm only talking -- that -- well, that's a good point. Had you –

A Oh.

Q -- taken some other people there before?

A Yes.

Q Okay. Very good point. Had you ever been to Tampa General Hospital for you before November of 2014?

A No.

Q Okay. So the first time you were ever treated at Tampa General Hospital was in this November 2014 accident?

A Correct.

…

Q Okay. And the first time you had ever been there was November 8, 2014, the day of our accident?

A That's correct.

(Plaintiff's deposition, p. 118:8-119-25.)

Therefore, based on Plaintiff's sworn testimony, both during her deposition and in response to interrogatories, the Defendant and Court were lead to believe:

- Plaintiff sustained injuries to her neck, back, left shoulder, and head in the subject accident.

- Prior to the subject accident, the Plaintiff never had, nor complained of, any issues in her neck or either shoulder, including prior pain, injury, or symptoms.

- Prior to the subject accident, the Plaintiff never sought or underwent treatment for complaints in her neck or either shoulder, or anything related to same.

- Prior to the subject accident, the Plaintiff never had an x-ray or MRI on her left or

right shoulder, back, lumbar spine, or neck.[1]

- That the extent of Plaintiff's prior low back/lumbar pain only lasted for a couple of weeks following a prior fall and that she did not have any additional back pain until the subject accident.

- That Plaintiff has never experienced blacking out or a loss of consciousness prior to the subject accident.

- That Plaintiff had no prior CT scans on her head.

- That Plaintiff first received medical treatment at Tampa General Hospital as a result of the subject accident in November 2014 and that she had never been a patient at Tampa General Hospital beforehand.

However, these allegations and claims made by Plaintiff - which were made through sworn testimony and are the central issue of this case - are *void of any truth*. As can be seen below and through the attachments hereto, Plaintiff has repeatedly and deliberately concealed, as well as misrepresented, her past medical history, including the providers with whom she has received medical treatment. These repeated lies, omissions, and misrepresentations - made under oath - amount to fraud, and were uttered with the purpose of gaining an unfair advantage in this litigation by thwarting the Defendant's discovery efforts, **with the ultimate goal of misleading the jury and this Court.**

II. The Plaintiff's Actual, Undisclosed Medical History[2]

Despite making no mention of it throughout this lawsuit, and directly contradictory to Plaintiff's sworn testimony, Plaintiff, in fact, does have a recent and consistent medical history of chronic pain, to include pain in her neck, bilateral shoulders, legs, arms, back, head (to include

[1] On cross-examination by Plaintiff's counsel, Plaintiff stated that it was "possible" that she may have had prior MRIs with Dr. Chowdhari here in Tampa. (Plaintiff's Deposition, p. 131-132.)

[2] Plaintiff's actual, undisclosed medical records are attached herein as Composite Exhibit C.

dizziness and headaches), including scans and treatment of same; as well as having previously lost consciousness and having visited Tampa General Hospital on multiple occasions as a patient prior to the subject accident. Plaintiff's low back pain did not "come and go" as she asserts during the sworn testimony provided in her deposition, but instead was continual and chronic for a period of over two (2) years. In fact, fifteen (15) days prior to the subject accident, Plaintiff received treatment and was diagnosed with chronic pain in her low back, neck, and upper back, along with cervical disc disease. Further, Plaintiff failed to disclose previous medical providers with whom she received treatment.[3]

> October 12, 2012: Plaintiff underwent **cervical and lumbar spine MRIs** at Cancer Treatment Centers of America, revealing **degenerative changes**, worst at C6-7 and L4-5, as well as **disc bulges** at C3-C4, C4-C5, L2-L3, L3-L4, L4-L5, and L5-S1. (*See* Composite Ex. C, pgs. 1-2).
>
> December 17, 2012: Plaintiff presented to Midwestern Region Medical Center ER due to a "**head injury**" and **headache** after she "slipped and fell and hit her head on the floor," resulting in a contusion to her forehead. Per the fall risk scale, Plaintiff has a history of falling. (*See* Composite Ex. C, pgs. 3-8).
>
> January 5, 2013: On January 4, 2013, Plaintiff **slipped** on a patch of ice **and fell** on her back, while using her left arm to break her fall, resulting in acute **upper and lower back strain/spasm and left arm strain** diagnoses. She has a history of whiplash injury and the **pain at the base of her neck is worse than what she normally feels.** (*See* Composite Ex. C, pgs. 9-10).
>
> February 3, 2013: Plaintiff was **diagnosed with back, neck, and leg pain** and received **lumbar and cervical facet block procedures** at Great Lakes Pain Physicians. (*See* Composite Ex. C, pg. 11).

[3] Plaintiff failed to disclose having received medical treatment from at least seven (7) medical providers where she received prior treatment within the past five (5) years for the injuries she alleges were sustained as a result of the subject accident, including: Dr. Robert Martinez, Chambers Medical Group, Cancer Treatment Centers of America, Midwestern Region Medical Center, Vista Medical Center, Great Lakes Pain Physicians, and Spine, Pain & Ortho Injury Center. The aforementioned health care providers are noticeably void from Plaintiff's Response to Defendant's Interrogatories. *See* Exhibit B, #16.

February 5, 2013: Plaintiff complained of slipping on, and hurting, her **lower back, left arm,** and fingers on February 4, 2013. (*See* Composite Ex. C, pg. 12).

February 7, 2013: Plaintiff presented to Vista Medical Center for **bilateral L2, L3, L4, and L5 lumbar facet block and cervical steroid procedures**, with the following diagnoses: (1) increasing **cervicalgia**, (2) **cervicogenic headache**, (3) bilateral arm C6 radiculopathy secondary to a herniation, **C6-7** and whiplash syndrome due to fall, (4) **low back pain**, (5) whiplash syndrome, and (6) bilateral lumbar facet and several **lumbar disc bulging**. (*See* Composite Ex. C, pgs. 13-14).

February 13, 2013: Plaintiff presented to Great Lakes Pain Physicians where she was diagnosed with **back, neck, and leg pain** and received **lumbar and cervical facet block procedures**. (*See* Composite Ex. C, pg. 15).

March 12, 2013: Plaintiff presented to Vista Medical Center for **bilateral cervical facet medial branch block** (C2, C3, and C4) procedures, with the following diagnoses: (1) **cervicalgia**, (2) **cervicogenic headache**, (3) **occipital neuralgia** secondary to whiplash syndrome, and (4) **herniated cervical disc.** (*See* Composite Ex. C, pgs. 16-17).

April 4, 2013: Plaintiff presented to Vista Medical Center for **cervical epidural steroid and bilateral lumbar facet injections** (L3, L4, C5), with the following additional diagnoses: left C5-6 radiculopathy due to **cervical disc herniations at C5-6**, and **low back pain** due to lumbar facet arthopathy. Further, Lidoderm patch was placed in lumbar area on each side. (*See* Composite Ex. C, pgs. 18-19).

August 5, 2013: Plaintiff received $5,000 settlement (Illinois Workers Compensation Commission Settlement Contract Lump Sum Petition and Order) due to incidents on December 17, 2012 (trip over rug) and February 4, 2013 (slip and fall on ice) wherein she sustained **injuries to her back, neck, and left arm**, to-wit: sprains/strains/contusions and aggravation of pre-existing degenerative condition**.** (*See* Composite Ex. C, pgs. 20-21).

August 23, 2013: Plaintiff presented to Tampa General Hospital (Rachel Semmons, M.D.) with a c-collar, reported a same day **trip and fall**, and complained of **loss of consciousness, neck pain, head pain, and left shoulder pain.** Plaintiff was also diagnosed with a **closed head injury with brief loss of consciousness**. (*See* Composite Ex. C, pgs. 24, 28).

A CT of Plaintiff□s Head/Brain revealed □no acute intracranial findings and mild mucosal thickening in maxillary sinuses.□

A CT of Plaintiff□s **cervical spine** revealed **mild degenerative changes** at C5-6, C6-7, and C7-T1, as well as **cervical spondylosis**.

An x-ray of Plaintiff's left shoulder revealed no evidence of acute fracture or dislocation and mild AC joint arthropathy.

(*See* Composite Ex. C, pgs. 26-27, 29-30, 36-37).

August 30-31, 2013: Plaintiff presented to Tampa General Hospital with **persistent left arm (anterior shoulder) pain, neck pain, right leg pain (which is a shooting pain starting in right lateral hip/buttock and radiating down lateral leg into right foot), and left shoulder pain,** and was diagnosed with **lumbar strain, right lumbar radiculitis, left shoulder contusion, and neck strain**. Plaintiff's history includes **chronic low back pain with corticosteroid injections**. (*See* Composite Ex. C, pgs. 32-36, 38-39).

An **x-ray** of Plaintiff's **lumbar spine** revealed no acute fracture or dislocation.

(*See* Composite Ex. C, pg. 41).

September 5, 2013: Plaintiff presented to Chambers Medical Group (Edward Jacobson, D.O.) after she "slipped in a hole with her left foot landing in the hole" and she "**fell forward onto her face**" on August 23, 2013. Since the incident, Plaintiff complains of: **headaches, neck, upper and lower back pain**, numbness in the hands and feet, pain in the right hip, as well as bilateral pain in her wrists, knees, and ankles, resulting in cervical, thoracic, and lumbar sprain; headache; neuralgia of upper and lower extremities; right hip pain; right and left wrist, ankle, and knee pain diagnoses **"as a direct result of a slip-and-fall that occurred on August 23, 2013."** Plaintiff disclosed a past surgical history of injections in the lumbar spine. (*See* Composite Ex. C, pgs. 42-44).

Plaintiff's records indicate that she is represented by counsel, Morgan & Morgan, and that she executed a letter of protection. (*See* Composite Ex. C, pgs. 45-46).

September 9, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with complaints of **headaches, neck pain, mid and low back pain**, **bilateral shoulder pain** (with decreased range of motion), bilateral knee and ankle pain, and right hip pain, for which to initiate chiropractic care. (*See* Composite Ex. C, pgs. 47-50).

September 11, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions, as well as subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 51).

September 12, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) **"doing the same"** with objective findings of **hypertonicity in her cervical,**

thoracic, and lumbosacral regions, subluxation complexes in her cervical, thoracic, and lumbar joints, as well as **decreased cervical and lumbar spine range of motion**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 52).

September 16, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with symptomatic **neck pain** and **low back pain**, with an unchanged diagnosis, including **subluxation complexes in the cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 53).

September 18, 2013: Plaintiff presented to Tampa General Hospital with **back pain (chronic and severe)**, with **cervicalgia, C6/C7 disc herniation** with radiculopathy, **whiplash syndrome**, lumbar facet and **severe lumbar bulging discs**, as well as **cervicogenic headache** diagnoses. (*See* Composite Ex. C, pgs. 54-57).

September 19, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) due to the pain in her **low back** and a **headache** (back of head), with **lumbosacral hypertonicity, and subluxation complexes in the cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 58).

September 23, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with **neck** and **back** pain and objective findings of: **hypertonicity in her cervical, thoracic, and lumbosacral regions, as well as subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 59).

September 26, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with **neck pain, upper to mid-back pain (shooting down left arm),** an exacerbation of the lumbar spine, and complaints that she cannot sit too long. Objective findings of: **hypertonicity in lumbosacral region, decreased cervical and lumbar spine range of motion, and subluxation complexes noted in the cervical, lumbar, and thoracic joints,** for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 60).

September 30, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with **low back pain** and objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions, as well as subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 61).

October 2, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) due to: hands cramping, **getting up every night due to pain, head pain, neck pain, and back pain.** Objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions, as well as subluxation complexes in her cervical, thoracic, and**

lumbar joints, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 62).

October 4, 2013: Plaintiff underwent a cervical spine MRI, which revealed **disc protrusion/herniation** (C3-C4, C6-C7), **disc bulge** (C4-C5), right **foraminal narrowing** (C6-C7), and **straightened cervical lordosis** suggesting musculoligamentous injury or sprain. (*See* Composite Ex. C, pgs. 63-64).

Plaintiff also underwent a lumbar spine MRI, which revealed **disc herniation with annular disc tear** (L4-L5), **disc bulges** (L4-L5, L5-S1), bilateral **foraminal stenosis** (L4-L5, L5-S1), and **straightened lumbar lordosis** suggesting musculoligamentous injury or sprain. (*See* Composite Ex. C, pg. 65).

October 7, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with pain in her **legs, neck, shoulder, and back,** with objective findings of **hypertonicity in her cervical and lumbosacral regions, as well as subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 66).

October 9, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with **hypertonicity in her cervical, thoracic, and lumbosacral regions, as well as subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 67).

October 14, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with **bilateral arm pain**, **neck pain, back pain**, **hypertonicity in her cervical, thoracic, and lumbosacral regions, as well as subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 68).

October 16, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with **hypertonicity in her cervical, thoracic, and lumbosacral regions and subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 69).

October 17, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) □doing the same,□with **hypertonicity in her cervical, thoracic, and lumbosacral regions and subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 70).

October 23, 2013: Plaintiff presented to Chambers Medical Group (Stefanie Francis, D.C.) with **low back pain, occipital headaches**, weakness in both hands, numbness in both feet/toes, and **decreased cervical and lumbar spine range of motion, as well as**

myofascitis of the cervical, thoracic, and lumbosacral regions, for which she received treatment. (*See* Composite Ex. C, pg. 71).

October 24, 2013: Plaintiff presented to Chambers Medical Group (Scott Tashman, D.C.) with complaints of **upper and low back pain**, thigh pain, **occipital headaches**, and buttocks pain, with **decreased cervical and lumbar spine range of motion, as well as muscle spasm/myofascitis in the cervical, thoracic, and lumbosacral regions**, for which she received treatment. (*See* Composite Ex. C, pg. 72).

October 28, 2013: Plaintiff presented to Chambers Medical Group (Scott Tashman, D.C.) with complaints of **bad headaches, right neck pain,** right arm/shoulder pain, **and low back pain, decreased cervical and lumbar spine range of motion, as well as muscle spasm/myofascitis in the cervical, thoracic, and lumbosacral regions**, for which she received treatment. (*See* Composite Ex. C, pg. 73).

October 29, 2013: Plaintiff presented to Antonio Farrales, M.D., with **chronic pain**, noting that she has been to **Tampa General Hospital on three occasions,** as well as a history of **C6-7 herniated disc with radiculopathy, lumbar facet, and disc bulging**. Dr. Farrales noted that he asked Plaintiff several times whether she had a prescription filled in Florida, which she denied, after which he showed her the Florida Drug Monitoring Online and she eventually stated that she got the prescription filled and that she was not trying to lie to him. (*See* Composite Ex. C, pgs. 74-76).

October 30, 2013: Plaintiff presented to Robert Martinez, M.D., with **ongoing neck pain; arm and leg pain and numbness; midback back between her shoulder blades, low back pain**, (with her pain level ranging between an 8 and a 9), as well as insomnia, and an **inability to function fully**. She was referred to Dr. Martinez for a neurological evaluation, consultation, and treatment by Chambers Medical Group where she has been receiving therapy for three times per week. Plaintiff stated that she "**never fully recovered**" after work-related slip and fall where she injured her **neck and back** and received some epidural steroid injections and that her slip-and-fall on August 23, 2013 made everything "significantly worse." (*See* Composite Ex. C, pgs. 77-83).

Dr. Martinez's neurological impression is as follows: (1) **chronic severe cervical, thoracic, and lumbosacral strain** with palpable fibromyositis, (2) chronic insomnia, and (3) **chronic pain syndrome**, with Plaintiff's symptoms being a direct result of, and aggravated by, the fall on August 23, 2013. (*See* Composite Ex. C, pg. 82).

October 31, 2013: Plaintiff presented to Chambers Medical Group (Scott Tahman, D.C.) with **decreased cervical and lumbar spine range of motion, as well as paravertebral muscle spasm/myofascitis in the cervical, thoracic, and lumbosacral regions,** of which Plaintiff received chiropractic treatment. (*See* Composite Ex. C, pg. 84).

November 6, 2013: Plaintiff presented to the Spine, Pain & Ortho Injury Center with **neck pain** (onset gradual following no specific incident [increased with fall] and has been occurring in a persistent pattern **for 4 years), back pain** (**continuous pattern for 4 years), arm pain, leg pain, bilateral shoulder pain**, bilateral hand pain/numbness/tingling, **headaches**, **neck stiffness**, **dizziness,** decreased musculoskeletal range of motion, and numbness/tingling in bilateral feet. Plaintiff diagnosed with facet syndrome, lumbar spondylosis without myelopathy, cervical spondylosis without myelopathy, cervical disc degeneration, lumbar radiculopathy, paresthesia, muscle spasm, cervical HNP without myelopathy, as well as cervical and lumbar myofascial. (*See* Composite Ex. C, pgs. 85-87).

November 11, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with objective findings of **subluxation complexes noted in the cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 88).

November 12, 2013: Plaintiff presented to Rose Radiology for bilateral hip and ankle x-rays, which revealed no fracture or acute bony abnormality. (*See* Composite Ex. C, pgs. 89, 91-92).

Plaintiff's bilateral knee x-rays revealed no fracture or acute bony abnormality, but "some increased density in the infrapatellar fat which could represent some post traumatic changes," with a question of small joint effusion in Plaintiff's right knee x-ray. (*See* Composite Ex. C, pg. 90).

November 13, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with low back and neck pain, as well as objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions and subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 93).

November 14, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions, subluxation complexes in her cervical, thoracic, and lumbar joints**, as well as **decreased range of motion in her cervical and lumbar spine**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 94).

November 18, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions, subluxation complexes in her cervical, thoracic, and lumbar joints**, as well as **decreased range of motion in her cervical and lumbar spine**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 95).

November 19, 2013: Plaintiff presented to Spine, Pain, & Ortho Injury Center (Gloydian Cruz, M.D.) wherein she was diagnosed with **limb pain and paresthesia**. (*See* Composite Ex. C, pg. 96).

November 20, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) "still hurting all over and can't lift arms over head," with objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions, subluxation complexes in her cervical, thoracic, and lumbar joints**, as well as **decreased range of motion in her cervical and lumbar spine**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 97).

November 21, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with objective findings of **hypertonicity, as well as subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 98).

November 25, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with pain in her **neck and low back**, as well as objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions and subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 99).

November 27, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with pain in her **neck and low back,** "still [has] trouble putting shirt on," and objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions and subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 100).

December 4, 2013: Plaintiff presented to Chambers Medical Group (Stephen Glaros, D.C.) with **neck and low back pain,** as well as objective findings of **hypertonicity in her cervical, thoracic, and lumbosacral regions and subluxation complexes in her cervical, thoracic, and lumbar joints**, for which she received chiropractic treatment. (*See* Composite Ex. C, pg. 101).

December 5, 2013: Plaintiff presented to Rose Radiology for MRIs of her right hip (no bony contusion or fracture), right knee (post traumatic tears/defects; horizontal tear on medial meniscus; thinning and irregularity of medial portion of cartilage overlying lateral tibial plateau with some signal changes of bone representing post traumatic osteochondral lesion; fluid in deep patella bursa which could reflect a bursitis), and left knee (joint effusion; baker's cyst; osteochondral changes of patella which could be post traumatic). (*See* Composite Ex. C, pgs. 102-107).

December 5, 2013: Plaintiff presented to Chambers Medical Group (Edward Jacobson, D.O.) with continual "**neck pain, upper and lower back pain, pain radiating down her legs and arms**" and "**pretty much hurts all over**." (*See* Composite Ex. C, pg. 108).

December 12, 2013: Plaintiff presented to Chambers Medical Group (Edward Jacobson, D.O.) with **back pain**, bilateral knee pain, and right hip pain. Plaintiff states that therapy is "no longer helping." It is also noted that Plaintiff consulted with Dr. Martinez who diagnosed Plaintiff with: **chronic severe cervical, thoracic, and lumbosacral stain**, chronic insomnia, and chronic pain syndrome, with **disc protrusions and herniations of the cervical and lumbar spine.** (*See* Composite Ex. C, pgs. 109-110).

December 17, 2013: Plaintiff presented to Spine, Pain, & Ortho Injury Center with complaints of **pain in back** (bilateral), right and left anterior thigh, **neck, and upper shoulders**. The pain rate without medication is reported as a 10. Bilateral lumbar TPIs performed. (*See* Composite Ex. C, pgs. 111-112).

January 1, 2014: Plaintiff presented to Tampa General Hospital, with **back pain (off and on for 18 months) and neck pain.** (*See* Composite Ex. C, pgs. 113-118).

January 8, 2014: Plaintiff presented to Spine, Pain, & Ortho Injury Center with increased pain in her **back, neck, upper shoulder**, right and left anterior thigh, and **headaches**. Plaintiff is no longer a candidate for opioids due to violations of agreement wherein hydrocodone filled on multiple occasions. (*See* Composite Ex. C, pgs. 119-120).

January 15, 2014: Plaintiff presented to Spine, Pain, & Ortho Injury Center with increased pain in her **back, neck, upper shoulder**, right and left anterior thigh, **dizziness**, and **headaches**. (*See* Composite Ex. C, pgs. 121-122).

October 6, 2014: Plaintiff presented to Tampa Family Health Center with **low back pain that radiates down legs** (which she states has lasted for the past 6 months.) (*See* Composite Ex. C, pgs. 123-127).

October 24, 2014: Plaintiff presented to University Pain Management with **constant low back pain, upper back pain, headaches, as well as pain in her neck, leg, and shoulder**. Per the initial consultation paperwork, **Plaintiff stated that her pain started 3 years ago when she was involved in a MVA and her pain worsened when she fell in August 2014.** Plaintiff's diagnoses included: (1) **chronic intractable lower back pain**, (2) **chronic upper back and neck pain – cervical disc disease** and radiculopathy to extremities, and (3) para spinal muscle spasm. (*See* Composite Ex. C, pgs. 128-130).

Despite Plaintiff's sworn statements and testimony to the contrary, her medical records indicate that she, in fact, has: (1) sustained injuries (and complained of same) to her neck, back,

shoulders, head (including headaches and dizziness), arms, and legs prior to this subject accident, for which she underwent radiological scans and received medical and/or chiropractic treatment, including procedures, (2) a well-documented and continual history of chronic back and neck pain that has persisted for over two years, up to and including fifteen (15) days prior to the subject accident (contrary to her testimony that she only endured low back pain for a couple of weeks, it went away, and she did not experience low back pain until the subject accident), (3) experienced, and complained of, sustaining a loss of consciousness prior to the subject accident, and that she has (4) received treatment at Tampa General Hospital on several occasions prior to the subject accident.

III. Applicable Law and Argument

Throughout this litigation, Plaintiff Jenkins has knowingly misrepresented, omitted, and concealed her significant medical history, which amounts to fraud, with the purpose of gaining an unfair advantage in this litigation by thwarting the defendant s discovery efforts, **with the ultimate goal of misleading the jury**. Honesty is not a luxury to be invoked at the convenience of the litigant. Instead, complete candor must be demanded in order to preserve the ability of this court to effectively administer justice. *Baker v. Myers Tractor Services, Inc.*, 765 So. 2d 149, 150 (Fla. 4th DCA 2000). This fraud on the part of Plaintiff warrants dismissal of this case, with prejudice. [A] party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [his] ends. *Metropolitan Dade County v. Martinsen*, 736 So. 2d 794, 795 (Fla. 3d DCA 1999)(quoting *Hanono v. Murphy*, 723 So 2d 892, 895 (Fla. 3d DCA 1998)).

The trial court has the "inherent authority" to dismiss an action as a sanction when the plaintiff, such as in this case, "has perpetrated a fraud on the court." *Morgan v. Cambell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002). The trial court has broad discretion to impose this sanction and **it long has been the continual and repeated practice of the courts of this State to dismiss actions where the plaintiff has given false testimony concerning the "central issue" of the case**, such as the alleged neck, back, head, and shoulder injuries, as well as a loss of consciousness, in the present matter. *See e.g.: Ramey v Haverty Furniture Companies, Inc.,* 993 So. 2d 1014 (Fla. 2d DCA 2008)(dismissal of personal injury action affirmed where **plaintiff concealed prior injuries that were the same as those alleged to have arisen from subject incident**); *Diaz v. Home Depot USA, Inc.*, 196 So. 3d 504 (Fla. 3d DCA 2016)(dismissal of personal injury action affirmed where the plaintiff claimed she injured her neck and back, and **concealed prior injuries and treatment to her neck and back**); *Middleton v. Hager*; 179 So.3d 529 (Fla. 3d DCA 2015); *Morgan, supra* (dismissal of personal injury action arising out of an automobile accident affirmed where **plaintiff failed to reveal prior chiropractic treatment**); *Bass v. City of Pembroke Pines*, 991 So. 2d 1008 (Fla. 5th DCA 2008)(dismissal of personal injury action affirmed where **plaintiff failed to disclose in discovery significant medical history, including failing to provide prior doctors names in response to interrogatories**); *Baker, supra* (dismissal of personal injury action affirmed where **plaintiff failed to reveal prior knee injuries**); *McKnight v. Evancheck*, 907 So. 2d 699 (Fla. 4th DCA 2005)(**plaintiff's misrepresentations concerning whether he had ever been hospitalized or had prior medical problems constituted a fraud** on the court that warranted dismissal with prejudice); *Long v Swofford*, 805 So. 2d 882 (Fla 3d DCA 2002)(dismissal of personal injury affirmed where

during her deposition, the plaintiff concealed pre-existing injury that was the central issue of the case); *Metropolitan Dade County v. Martinsen*, *supra* (appellate court reversed trial court's decision not to dismiss case where **plaintiff, who was allegedly injured in an automobile accident, failed to disclose history of similar injuries previously sustained despite being queried on same during deposition and through interrogatories**); *Hogan v. Dollar Rent A Car Systems, Inc.*, 783 So. 2d 1211 (Fla. 4th DCA 2001)(dismissal of personal injury action affirmed where **plaintiff "lied under oath at his deposition"** about accidents or injuries that occurred subsequent to the accident forming the basis of the lawsuit); *Desimone v. Old Dominion Ins. Co.*, 740 So. 2d 1233 (Fla. 4th DCA 1999)(dismissal of personal injury action affirmed where **plaintiff made "numerous and repeated misstatements of fact designed to intentionally thwart defendants from conducting discovery"** and that such conduct amounted to "a perpetration of fraud upon the court"); *Savino v. Florida Drive in Theatre Management, Inc.*, 697 So. 2d 1011 (Fla. 4th DCA 1997)(dismissal of personal injury action where **plaintiff "lied" about his educational background and ability to work**).

The requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *McKnight*, at 700 (quoting *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998)). In the present matter, Plaintiff Jenkins has met this requisite level of fraud by testifying that:

- The Plaintiff sustained injuries to her neck, back, bilateral shoulders, and head in the subject accident.

- Prior to the subject accident, the Plaintiff **never** had, nor complained of, any issues in her neck or either shoulder, including prior pain, injury, or symptoms.

- Prior to the subject accident, the Plaintiff **never** sought or underwent treatment for complaints in her neck or either shoulder, or anything related to same.

- Prior to the subject accident, the Plaintiff **never** had an x-ray or MRI on her left or right shoulder, and that she **never** had an x-ray on her back/lumbar spine, or neck.

- That the extent of Plaintiff's prior low back/lumbar pain only lasted for a couple of weeks following a prior fall and that she did not have any additional back pain until the subject accident.

- That Plaintiff has **never** experienced blacking out or a loss of consciousness prior to the subject accident.

- That Plaintiff first received medical treatment at Tampa General Hospital as a result of the subject accident in November 2014.

These claims and allegations - given as sworn testimony by Plaintiff Jenkins - are simply *not true.* In fact, the evidence obtained by the Defendant makes it clear that:

- In October of 2012, Plaintiff underwent cervical and lumbar spine MRIs, which revealed degenerative changes, worst at C6-7 and L4-5.

- In December of 2012, Plaintiff tripped on a rug and fell forward on her head, resulting in a contusion to her forehead, resulting in a head injury, dizziness, and a headache.

- In January of 2013, Plaintiff slipped on a patch of ice and fell on her back, while using her left arm to break her fall, resulting in acute upper and lower back strain/sprain and left arm strain diagnoses. She has a history of whiplash injury and the pain at the base of her neck is worse than what she normally feels.

- In February of 2013, Plaintiff complained of pain in her lower back, left arm, and fingers. She was also diagnosed with back, neck, and leg pain and received lumbar and cervical facet blocks.

- In February and April of 2013, Plaintiff received cervical epidural steroid block and lumbar facet blocks.

- In March of 2013, Plaintiff received bilateral cervical facet medial branch blocks.

- In August of 2013, Plaintiff received a $5,000 settlement for injuries sustained to her back, neck, and left arm as a result of the December 2012 and February 2013 incidents where she slipped or tripped and fell.

- In August of 2013, Plaintiff presented to Tampa General Hospital twice where she complained of a brief loss of consciousness, closed head injury, neck pain, left arm pain, right leg pain, low back pain, and left shoulder pain.

- In August of 2013, Plaintiff underwent a cervical spine CT, which revealed mild degenerative changes at C5-6, C6-7, and C7-T1, as well as cervical spondylosis.

- In August of 2013, Plaintiff underwent an x-ray of her left shoulder, which revealed mildly AC joint arthropathy.

- In August of 2013, Plaintiff underwent an x-ray of her lumbar spine, as well as a CT scan of her head, which revealed "no acute intracranial findings and mild mucosal thickening in maxillary sinuses.

- In September of 2013, Plaintiff's medical record indicated chronic back pain and her diagnoses included: (1) back pain, (2) cervicalgia C6/C7 disc herniation with radiculopathy, (3) whiplash syndrome, and (4) B lumbar facet and severe lumbar bulging discs.

- In September of 2013, Plaintiff presented to Tampa General Hospital with diagnoses of back pain (chronic), cervicalgia C6/C7 disc herniation with radiculopathy, whiplash syndrome, lumbar facet and severe lumbar bulging discs, and cervicogenic headaches.

- From September of 2013 until December of 2013 (when she was released from therapeutic care as treatment was "no longer helping"), Plaintiff presented to Chambers Medical Group with headaches (including occipital headaches), neck pain, bilateral shoulder pain, as well as upper, mid, and lower back pain (shooting down left arm), left arm tingling, bilateral leg pain, bilateral arm pain, buttocks pain, for which she received treatment. Throughout her course of treatment, Plaintiff's injuries remained symptomatic, her pain was interfering with her sleep, as well as perform her daily living activities. She was also represented by counsel, Morgan and Morgan, during this time.

- In October of 2013, Plaintiff underwent a cervical spine MRI, which revealed disc protrusion (C3-C4, C6-C7), disc bulge (C4-C5), right foraminal narrowing (C6-C7), and straightened cervical lordosis suggesting musculoligamentous injury or sprain.

- In October of 2013, Plaintiff also underwent a lumbar spine MRI, which revealed disc herniation with annular disc tear (L4-LS), disc bulges (L4-LS, LS-S1), bilateral foramina stenosis (L4-LS-S1), and straightened lumbar lordosis suggesting musculoligamentous injury or sprain.

- In October of 2013, Plaintiff presented to Robert Martinez, M.D., with ongoing neck pain; arm and leg pain and numbness; upper, mid, and low back pain, as well as insomnia, and an inability to function fully. Plaintiff stated that she "never fully recovered" after work related slip and fall where she injured her neck and back; however, she started to improve until her slip-and-fall on August 23, 2013.

- In November and December of 2013, as well as January of 2014, Plaintiff presented to the Spine, Pain & Ortho Injury Center with neck pain (occurring in a specific pattern for 4 years), back pain (occurring in continuous pattern for 4 years), arm pain, leg pain, bilateral shoulder pain, headaches, neck stiffness, dizziness, right and left anterior thigh, and numbness/tingling in bilateral feet. Plaintiff was diagnosed with limb pain, paresthesia, facet syndrome, lumbar spondylosis without myelopathy, cervical spondylosis without myelopathy, cervical disc degeneration, lumbar radiculopathy, paresthesia, muscle spasm, cervical HNP without myelopathy, as well as cervical and lumbar myofascial.

- In December of 2013, Plaintiff presented to Rose Radiology for MRIs of her right hip, right knee, and left knee.

- In January of 2014, Plaintiff again presented to Tampa General Hospital with neck pain, as well as back pain that has persisted on and off for 18 months.

- In October of 2014, within fifteen (15) days of the subject accident, Plaintiff complained of neck pain, shoulder pain, constant low back pain (that radiates down her legs), and headaches. Per the initial consultation paperwork, Plaintiff stated that her pain started 3 years ago when she was involved in a MVA and her pain worsened when she fell in August 2014. Plaintiff's diagnoses included: (1) chronic intractable lower back pain, (2) chronic upper back and neck pain – cervical disc disease and radiculopathy to extremities, and (3) para spinal muscle spasm.

This fraud is clearly an attempt to "improperly influence the trier of fact" by relating injuries and damages, which pre-existed the subject accident, on the subject accident. Such fraud warrants dismissal of this action.

In *Morgan,* 816 So. 2d 251, the plaintiff sued for personal injuries that she allegedly

sustained as a result of an automobile accident. During her deposition, plaintiff denied that she had ever experienced neck or low back pain prior to the subject accident. *Id.* at 252. While she did testify that a chiropractor had given her preventative treatment for scoliosis over a two-year period, she denied that the chiropractor had treated her for neck or low back pain or that she had ever seen any other chiropractor. *Id*. However, contrary to her deposition testimony, it was revealed that the plaintiff had treated with her chiropractor sixteen times based on complaints of neck and low back pain, and that she had sought treatment from another chiropractor approximately five years before the subject accident. *Id*. Based on this revelation, the trial court dismissed the action. *Id*. at 253. In affirming the trial court's dismissal in *Morgan*, the Second District found that plaintiff had "extensive and ongoing treatment" for the same injuries she was claiming resulted from the accident, and further stated that the plaintiff's false testimony "was directly related to the central issue in the case - whether the accident in question caused her neck and low back injuries." *Id.*

The medical records in this case, just as they did in *Morgan*, reveal a prior history of "extensive and ongoing treatment" of the neck, back, head, arms, legs, and shoulder injuries that Plaintiff is now complaining resulted from the subject incident. Just as in *Morgan*, these lies and misrepresentations by Plaintiff go to the central issues of this case, and the fraud committed by Plaintiff calls for the dismissal of this action.

In *McKnight,* 907 So. 2d 699, the plaintiff filed suit claiming that he sustained injuries as a result of an automobile accident - namely, injuries to his neck, back, and headaches. Both in his deposition and in his responses to interrogatories, the plaintiff denied any prior hospitalizations or prior medical problems (other than a high school injury). *Id.* The defendants in *McKnight*,

however, discovered and produced prior medical records showing that the plaintiff had received prior medical treatment for back pain and headaches. *Id.* These medical records were directly contrary to the plaintiff's sworn testimony. *Id.* The trial court dismissed the plaintiff's action because the plaintiff had committed fraud upon the court. In affirming the dismissal, the district court of appeals held:

> "In this case, [McKnight's] misrepresentations, if they had been successful, would have interfered with the jury's ability to adjudicate the issues. To prevail on his claim, McKnight must prove that the accident caused the injuries raised in his complaint, namely neck pain, low back pain, and headaches. Evidence that these injuries existed prior to the accident would create an issues as to McKnight's claim that the injuries resulted from the accident. Thus, **by keeping evidence of his medical history from the jury, McKnight would be interfering with the jury's ability to adjudicate the pertinent issues.**"
>
> *McKnight* at 701, emphasis added.

As in *McKnight*, Plaintiff Jenkins in the present case denied, under oath, prior medical issues or treatment for conditions identical or similar to those she is directly relating to the subject accident. **These misrepresentations, should they had been successful, would have interfered with the jury's ability to adjudicate the issues in this case - namely, that the subject accident caused the Plaintiff's claimed injuries and damages**. By attempting to keep this evidence of prior injuries from the jury in this case, Plaintiff has attempted to intentionally interfere "with the jury's ability to adjudicate the pertinent issues."

In *Ramey*, 993 So. 2d 1014, the plaintiff alleged that a piece of an entertainment system, sold to the plaintiff by Haverty's Furniture Company, fell on him causing injuries to his head and neck. The plaintiff claimed that his injuries caused him to suffer from "severe headaches." *Id*. at

1015. During discovery, both in response to interrogatories and during his deposition, the plaintiff repeatedly asserted that he had never injured his neck and that he never treated for headaches before the subject incident. *Id.* at 1015-1016. However, during the course of litigation and prior to trial, it was discovered that starting in 1988 - 13 years before the subject incident - the plaintiff treated for neck complaints for a two-year period and headaches for an eight-year period. *Id*. at 1016-1017.

During an evidentiary hearing on Haverty's motion to dismiss, the plaintiff attempted to explain his false testimony concerning his prior injuries in treatment by telling the trial court that he simply "forgot." *Id.* at 1017. The trial court did not accept that explanation, and in granting Haverty's motion to dismiss stated:

> This is not a one-shot incident where he had a headache one time, and I think that's where the latitude that plaintiffs are allowed is if it's a one-shot thing that happened over a short period of time, that's what the case law is talking about.
>
> ...
>
> This is not a situation that has been presented on this record of a one isolated or two isolated incidents but, as it's been represented here, an eight-year period of time of at least 13 medical entries of complaints about neck, back pain, headaches, neck pain and a variety of treatments associated therewith.
>
> I find it disturbing that under oath, being asked specific questions, the answer is unequivocally "No" rather than "I don't recall." *Id.*

In affirming the trial court's dismissal, the Second District Court of Appeals in *Ramey* held:

> In providing perjurious testimony, Mr. Ramey engaged in **highly culpable misconduct**. "**Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system** as well as to private individuals." *United States v. Holland*, 22 F.3d 1040, 1047 (11th

> Cir. 1994). "Tampering with the administration of justice in the manner shown here involves for more than an injury to a single litigant. **It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society**." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944); *Ramey*, 993 So. 2d at 1020-1021 (emphasis added).

As in *Ramey*, Plaintiff Jenkins in this action did not have one or two isolated doctor's visits prior to the subject accident where he complained of neck and shoulder pain; it is not the case of a "one-shot" complaint or treatment for pain. Rather, Plaintiff has a history of injuries and treatments that were regular and ongoing for more than two (2) years, up to and including fifteen (15) days prior to the subject accident, which included: cervical epidural steroid blocks, lumbar facet blocks, bilateral cervical facet medal branch blocks, more than 8 doctor visits related to leg and arm issues/pain, over 10 doctor visits related to bilateral shoulders issues/pain, and over 45 doctor visits related to neck, head, and back issues/pain, as well as two MRIs on her cervical and lumbar spine, a CT scan of her head and cervical spine, and x-rays of her left shoulder and lumbar spine. Her conduct amounts to fraud, "which fraud cannot complacently be tolerated." *See Ramey* at 1021 (*citing Hazel-Atlas Glass Co.*, 322 U.S. at 246).

As was held in all the above cited cases, this action must be dismissed due to Plaintiff lying about, concealing, and failing to disclose her medical history, which is the central issue of this case. This Honorable Court should enforce the "principle that "where a party perpetrates a fraud on the court which permeates the entire proceedings, dismissal of the entire case is proper." *Desimone*, 740 So. 2d at 1234 (quoting *Savino*, 697 So. 2d at 1011)(emphasis added).

WHEREFORE, based on the above motion, the supporting memorandum and case law, and the depositions and exhibits contained herein, the defendant, Kenneth Myers, respectfully urges this Honorable Court to dismiss Plaintiff, Michelene Jenkins a/k/a Michelene Chirelle Bettis' action with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Mail this 20th day of January, 2017, to the following: Ryan B. Cappy, Esquire; litserv@ligoricappylaw.com.

Electronically signed after review

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