

**The Trial of a Soft Tissue Case:
Strategies for Obtaining the Final Closing Argument.**

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I. INTRODUCTION.

The final closing argument is a position which all trial lawyers relish. It offers the opportunities to rebut the arguments of your adversary, reinforce the merits of your client's case, and persuade the jury to deliver a verdict in your client's favor without any rebuttal. In a typical civil case in which both sides offer evidence, the right to open and close the argument to the jury will usually be given to the plaintiff. However, if a defendant offers no evidence during the trial, then the defendant will be entitled as a matter of right to deliver both the first and final closing arguments. Rule 10, *General Rules of Practice for Superior and District Courts* (2003); State Trust Co. v. Braznell, 227 N.C. 211, 41 S.E.2d 744 (1947); Hord v. Atkinson, 68 N.C. App. 436, 315 S.E.2d 339 (1984).

Insurance defense attorneys have recognized the importance of securing the final argument to the jury in soft tissue cases. In an effort to obtain the final argument as a matter of right, many defense attorneys pursue an aggressive line of cross-examination so as to avoid offering evidence during the defendant's case-in-chief. The defendant's cross-examination of both the plaintiff and the treating doctor will typically involve numerous references to medical records, which have often not been offered into evidence. Under the guise of refreshing the recollection of the witness, the opposing counsel may succeed in reading the un-admitted records to the jury as substantive evidence.

The purpose of this manuscript is to prepare counsel for the plaintiff to deal with a defense attorney who may intend to defend a soft-tissue case by obtaining the opening and concluding arguments to the jury without the offer of evidence. This paper will recommend strategies and techniques which may be used from discovery through the end of trial to force your opponent to put on evidence, and therefore waive the right to deliver the final closing argument.

II. TECHNIQUES TO USE DURING DISCOVERY TO FORCE THE DEFENSE ATTORNEY TO PRESENT EVIDENCE AT TRIAL.

An attorney who accepts representation of a plaintiff with a soft tissue case should expect that the matter will be tried before a jury. In anticipation of a trial, the attorney should litigate the case during discovery with the intent to force the defense counsel to present evidence at trial. The following paragraphs will present some techniques to use during discovery which may lead

to the presentation of evidence by your adversary at trial.

A. DEFENSE COUNSEL'S REQUEST FOR MEDICAL RECORDS.

The primary manner in which the defense counsel will defend a soft tissue case is through your client's own medical records. Essentially, the defense attorney will examine the records from the perspective of casting doubt on the severity of your client's injuries as well as your client's credibility. Therefore, before you file suit, you need to request all of your client's medical records from each and every provider for a ten year period preceding the injury. Once you have possession of the medical records, then you must closely scrutinize each and every record to determine whether the records will be produced voluntarily or by court-order, and if so, then what entries might be used during depositions and at trial. The plaintiff's attorney should control the dissemination of all medical records, and should never allow one's soft-tissue client to execute an authorization allowing the insurance company or defense attorney to request the records directly.

1. What medical records should be produced?

The standard soft tissue discovery request from the defendant will read as follows:

1. Please produce the medical records of each physician, physical therapist, occupational therapist, chiropractor, social service worker, or other ancillary medical personnel consulted by or who rendered treatment to the plaintiff within ten (10) years next preceding the accident to the present.

Obviously, all of your client's medical records and the corresponding medical bills which are related to his or her claim for personal injury should be produced. The real issue concerns which pre-accident medical records should one produce voluntarily, and which records will the court order your client to produce.

The plaintiff's attorney must respond to the discovery request in a manner which protects your client, but also appears reasonable to the court, in the event of a motion to compel. The court will balance your client's privacy interests with the defendant's right of defense. Customarily, the court will determine, depending on the severity of your client's injuries, that the plaintiff should produce any and all medical records relating to orthopaedic and neurologic complaints, treatment and care during the five year preceding the accident at issue. However, if the court is forced to order your client to produce orthopaedic and neurologic records, additional punishment may be imposed upon your client for necessitating the motion hearing, i.e., an order to produce all records of medical treatment for a set term preceding the accident.

Therefore, the plaintiff's attorney should craft a reasonable response to the typical soft tissue discovery request, such as the following:

Response: The plaintiff respectfully objects to the request for production on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence, is overly broad, and unduly burdensome. The plaintiff further objects to the request on the grounds that it seeks the discovery of confidential information in violation of the physician-patient privilege as codified at G.S. §8-53. Without waiving the foregoing objections, the plaintiff responds as follows:

The plaintiff will produce all of his medical records related to the collision at issue. In addition, the plaintiff will produce any and all records reflecting orthopaedic or neurological care or treatment rendered within the last five years.

The form of this response will alert the court to the fact that you and your client have been reasonable. In turn, the defense attorney will have great difficulty convincing the court that he or she is entitled to additional records. Furthermore, the defense attorney will be precluded from fishing for additional records which might contain some reference, no matter how small and otherwise insignificant it may appear, which could be used at trial.

B. THE DEFENDANT'S DEPOSITION OF THE PLAINTIFF.

Once you have effectively controlled the production of your client's medical records, you must next focus on prepping your client to be deposed by the defense attorney. The purpose of deposition of your soft-tissue client is to allow the defense attorney to develop a cross-examination which will eliminate the need to present evidence at trial. You must keep this principle in mind when preparing your client, and then defending the deposition.

1. Preparation of the soft-tissue plaintiff for the deposition.

Counsel should reserve 1-2 hours of time to adequately prepare the client for the deposition. Obviously, you should prepare the client to handle any liability issues which may exist. Assuming that liability is fairly clear, then you will need to spend the majority of the time with your client reviewing the medical records which have been produced.

Before the meeting, counsel should review the records, and make notes of the medical entries which are ripe for cross-examination. Alert your client to the problematic entries in the medical chart, and begin exploring appropriate ways to respond during the deposition. Walk through a standard defense deposition examination with the client, and interpose leading questions, as well as questions which require the client to speculate. Instruct the client on how to properly respond to both leading questions and speculative questions. You should also alert the client to be wary of any questions involving "Never" or "Always", etc., and to avoid getting boxed in on answers. Once the client understands the potential pitfalls, then he or she will be better prepared for the deposition.

2. Defending the deposition of your client.

The defense attorney will customarily act in a very friendly manner towards your client. Despite the friendly demeanor, you should remain on-guard, and not allow counsel to ask leading questions on direct or any other questions which are not proper in form. In addition to making objections to the form of the question, you should also object during the deposition to questions which call for speculation, which are intended to elicit inadmissible hearsay answers, and which are not relevant. The purpose of making the objections is to alert your client to the impropriety of the question, and also to create a clear record for the trial judge (and you) of the objectionable question and answer.

Objectionable questions will frequently arise when the defense attorney examines your client about his or her medical records and medical history. The defense attorney will ask questions based upon the medical chart, so that he or she may cross-examine your client at trial with the deposition transcript, and not the actual records. The attorney may also use the transcript to cross-examine the treating doctor. However, these questions are often not appropriate because they force your client to speculate about entries in a medical chart which he or she did not make. The questions are also inappropriate because they often concern un-related medical treatment, and constitute inadmissible hearsay, i.e., the statements of medical personnel who will not be called as witnesses at trial. Proper objections during the deposition will force the opposing counsel to offer evidence at trial via the use of un-admitted medical records for cross-examination, or through the presentation of evidence during the defendant's case.

Typically plaintiff's attorneys do not ask questions on cross during the deposition of their client. However, you should be prepared to ask questions of your client as necessary to allow him or her to properly explain any answers which might be susceptible to cross-examination at trial. You should also prepare questions for your client which will create a clear record that your client has been honest and truthful, and testified at the deposition to all elements of his or her claim for damages. A clear record will allow you to rehabilitate your client on re-direct, as necessary, at trial, and force the opposing attorney to consider offering the transcript of the plaintiff's deposition during the defendant's case.

C. THE PLAINTIFF'S *DE BENE ESSE* DEPOSITION OF THE TREATING PHYSICIAN.

Very few treating doctors are able or willing to appear at trial. As a result, you will need to take a *de bene esse* deposition of the treating physician for use at trial. The *de bene esse* deposition will typically occur before the commencement of trial. Therefore, you will need to properly prepare your doctor in advance of the deposition, and anticipate the cross-examination which will be done by the defense attorney.

The testimony of the treating physician is very important in a soft tissue case on the issues of causation and damages. The defense attorney recognizes the importance of the treating doctor's testimony, and will attempt rebut the plaintiff's case through an effective cross-examination. Before the deposition begins, plaintiff's counsel should meet in-person with the doctor and confer with him or her regarding all the opinions which you will need. The doctor should be provided all medical records which you would like for him to rely upon in rendering his opinions. You should also alert the doctor to the anticipated cross-examination, and review with him any medical records which could be used to impeach his testimony. Also, counsel should examine the official medical chart, and give the doctor guidance on whether or not to bring the chart to the deposition.

Before the deposition, you should prepare a detailed direct examination so as to encourage fluidity in the testimony. You should also prepare to lay the proper foundation for the admission of the necessary medical records through the business records exception to the hearsay rule, or Rule 703 of the North Carolina Rules of Evidence (documents reasonably relied upon by physicians in forming opinions as to diagnosis, causation, permanency, etc.). Make sure that you have dotted all of your i's and crossed your t's, so that you can force counsel to lay the proper foundations for authentication and admissibility at trial. Finally, only offer into evidence sufficient medical records to support the doctor's opinions and your client's claim for damages.

Once you complete your direct examination, then you must be ready to diligently defend the cross-examination. In a *de bene esse* deposition, counsel must assert an objection or it will be waived. Therefore, you should be ready to object to the improper use of un-admitted medical records to cross-examine the doctor. If the opposing counsel reads to the doctor, or has the doctor read un-admitted medical records, note your objection on the record to the offer of the evidence without its admission as an exhibit. Also, ask your opposing counsel to mark any medical records which he discusses with the doctor or reads as part of a question.

Having noted your objections on the record, you can re-evaluate before or during trial as to whether or not to enforce the objection. If you intend to pursue the objection, you should alert the court to the issue by motion *in limine* or outside of the presence of the jury before the presentation of the doctor's testimony. The plaintiff's attorney may also consider withdrawing the objection and argue that the defense has offered evidence by reading it to the doctor during the cross-examination.

A sample motion *in limine* which addresses some customary issues which arise in a soft tissue case has been included with this manuscript.

III. TECHNIQUES TO USE DURING TRIAL TO FORCE THE DEFENDANT TO OFFER EVIDENCE, AND WAIVE THE RIGHT TO THE FINAL CLOSING ARGUMENT.

When preparing for trial, counsel should begin considering how the evidence will be presented during both the plaintiff and the defendant's cases-in-chief. If you believe that the opposing attorney will not offer evidence, then the following techniques might be used to force the defense attorney to offer evidence, and waive the right to make the final closing argument.

A. TECHNIQUES TO USE DURING JURY SELECTION.

Jury selection is an opportunity to select a fair and impartial panel of twelve to hear and decide your client's case. It is also an opportunity to educate the jurors about your case, your theme, and the instructions which the judge will give at the end of the evidence.

Use jury selection as an opportunity to inform the jurors about which witnesses will testify. Tell the jurors who the plaintiff intends to call so as to satisfy the plaintiff's burden of proof on the negligence and damage issues. Also, tell the jurors that the defendant has the burden of proof on any affirmative defenses, i.e. contributory negligence, mitigation of damages, etc. Ask the jurors to express their opinions and sentiments in the event that the defendant did not testify. Make sure that your questions are open-ended, so that you might elicit sentiments that would suggest to the defense attorney that if he does not call his client, then the jury will consider the defendant liable.

The plaintiff's attorney should consider injecting themes into the jury selection process. Talk to the potential jurors about taking responsibility for one's actions, and doing the right thing. If liability has been admitted, then speak with the jurors about the civil justice system which allows twelve jurors to determine what is fair, reasonable, and just compensation. Hopefully, you will solicit feedback from the jury panel which will cause your adversary to present evidence for the purpose of justifying the defense of the case.

B. TECHNIQUES TO USE DURING THE PLAINTIFF'S CASE-IN-CHIEF.

Counsel for the plaintiff should carefully consider the witnesses and documentary evidence which will be offered during the plaintiff's case-in-chief. Typically, the first witness will be the plaintiff. Counsel should avoid the urge to subpoena all of your client's medical records to court, and to offer all of his or her medical records during direct examination. The attorney might also consider offering into evidence only a summary (Rule 1006) of the course and cost of the plaintiff's medical treatment, instead of the medical records and bills.

By limiting the medical records which have been authenticated by the records custodian, and offered into evidence on direct examination, you effectively reduce the scope of the cross-examination unless the opposing counsel offers evidence. If the opposing counsel decides to offer evidence, then you are likely to have the final closing.

During the plaintiff's case-in-chief, your opposing counsel may offer evidence and waive the right to final argument, without realizing that evidence had been offered to the jury. The North Carolina appellate courts have articulated the following test as to whether an object was put into evidence:

[T]he proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence.

State v. Hall, 57 N.C. App. 561, 564, 291 S.E.2d 812, 814 (1982). The courts have found that evidence was offered in the following circumstances:

- Defendant offered evidence when on cross-examination, the defendant had the prosecuting witness identify a television interview he had given and then showed the interview to the jury for the purpose of impeaching the witness. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964);
- Defendant offered evidence when defense counsel, on cross-examination, asked a law enforcement officer to read to the jury his notes of the defendant's statements to the police given shortly after the events at issue. The notes had not previously been offered into evidence by the State. State v. Macon, 346 N.C. 109, 114, 484 S.E.2d 538, 541 (1997).

The appropriate way to force the opposing counsel to offer evidence, or to alert the trial court to the tender of evidence, is illustrated in the following exchange which occurred after a defense attorney attempted to impeach the State's witness using a supplementary police report made by the witness:

MR. NIFONG [prosecutor]: Your Honor, I am going to object to his reading it, unless he introduces it into evidence. If he wishes to do that, I have no objection to it being read. If he wants to read a document that is not in evidence, I object to that as long as it is not in evidence.

COURT [Judge Giles R. Clark]: I think he would be right, sir.

MR. FISHER [defense attorney]: If your Honor please, then, I believe the appropriate foundation has been laid, and I would move the defendant's exhibit one into evidence.

MR. NIFONG: NO Objection.

State v. Parker, 66 N.C. App. 293, 297, 311 S.E.2d 321, 324 (1984)(Holding that it was not reversible error to require the defendant to offer to police report into evidence); See also, State v. Skipper, 337 N.C. 1, 31-32, 446 S.E.2d 252, 268-69 (1994)(Defendant offered photograph into evidence after objection by prosecutor to its use before the jury unless

introduced into evidence); State v. Mitchell, 17 N.C. App. 1, 193 S.E.2d 400 (1972)(Trial court did not abuse its discretion when it ruled that defendant had to offer a picture into evidence in order to use it to illustrate the testimony of a witness on cross examination).

Plaintiff's attorneys often use the defendant's deposition transcript during the plaintiff's case-in-chief. The transcript may allow plaintiff's counsel to successfully move for a directed verdict on the liability issues. However, the transcript may also allow the defense counsel to avoid calling the defendant as a witness due to the rule of completeness as noted in Rule 106 of the Rules of Evidence. Instead of using the deposition transcript, counsel should consider offering clear interrogatory answers or admissions if necessary to establish the plaintiff's case.

Finally, counsel should refrain from calling minor eye-witnesses, who might otherwise be called by the defense as a witness. Utilizing these techniques may force the defendant to put on evidence, and waive his or her right to open and close the arguments to the jury.

C. TECHNIQUES TO USE IN CLOSING WHEN THE DEFENSE ATTORNEY HAS THE RIGHT TO BOTH OPEN AND CLOSE THE ARGUMENTS TO THE JURY.

In a soft tissue case, you will often discover that despite your best efforts to force the defense to offer evidence, your adversary simply prefers to open and close the arguments to the jury in order to argue for a minimal verdict. You can still earn your client an appropriate verdict despite having to deliver the middle argument.

1. Some suggestions for the plaintiff's closing argument.

Counsel should make every effort to not appear emotional or over-reaching. You should outline the evidence in a coherent, but succinct story, which allows the jury to appreciate the facts which favor the plaintiff. Don't get excited or try to appeal to the jurors' emotions; rather, just deliver the facts in a persuasive manner.

Use the themes which you developed in jury selection, and the opening statement. Talk about responsibility; talk about the defendant's absence or failure to testify; talk about the witnesses who did testify, including the plaintiff.

Anticipate your adversary's final arguments. Ask the jurors what proof has the defense attorney offered to support his arguments. Ask the jurors whether the opposing attorney is appealing to bias, or sympathy; whether the attorney is asking the jury to speculate on matters, and to violate the jurors' oath.

Use the court's jury instructions, including the following;

- Pattern Instruction 101.05: Function of the Jury “It is absolutely necessary that you understand and apply the law as the judge instructs you, and not as you thought it was or as you might like it to be.”
- Pattern Instruction 150.10: Jury Should Consider All Contentions “Members of the Jury, it is your duty to consider all of the evidence, all contentions arising from that evidence, and the arguments and positions of the attorneys.” “You must weigh all of these in light of your common sense and determine the truth of this matter.” “You are to perform this duty fairly and objectively, and without bias, sympathy, or partiality toward any party.”
- Pattern Jury instruction 150.12: Jury Should Render Verdict Based on Facts, Not Consequences. “You should not be swayed by pity, sympathy, partiality or public opinion. You must not consider the effect of a verdict on the plaintiff or defendant, or concern yourself as to whether it pleases the court.” “Both the plaintiff and defendant expect that you will carefully and fairly consider all the evidence in this case, follow the law as given to you by the Court and reach a just verdict, regardless of the consequences.”

Anticipate the greed arguments by the opposing attorney, and defuse them. If liability has been admitted, then force your adversary to place a dollar value on the case. Have faith in the jury, and do not suggest a concrete number to award. Instead, suggest appropriate awards for each element of damages suffered by your client; or suggest coefficients which take the plaintiff's damages into account, i.e., 3x special damages. You should make it clear to the jury that your client simply wants a reasonable, fair, and just verdict, and not one penny more.

2. Improper closing arguments.

When the defense attorney makes his or her final closing argument, be prepared to object to improper arguments based upon materials not in evidence. Some examples of improper arguments include the following:

- Improper to humiliate and degrade a party by denouncing his character when the party had not been impeached by witnesses, by his answer to the complaint, or by his conduct in the defense of the case. In particular, counsel stated that “no man who had lived in defendant's neighborhood could have anything but a bad character; that defendant polluted everything near him, or that he touched; that he was like the upas tree shedding pestilence and corruption all around him.” Coble v. Coble, 79 N.C. 589 (1878).

- Improper to argue the financial situation of the defendants, so far as capacity to respond in damages. Yost v. Hall, 233 N.C. 463, 64 S.E.2d 554 (1951). See also, Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955)(In a court of justice neither the wealth of one part or the poverty of the other should be permitted to affect the administration of the law.); Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983)(Improper to refer to ability of defendant to pay even small verdict).
- Improper for a lawyer to assert his opinion that a witness is lying. State v. Miller, 271 N.C. 646, 157 S.E.2d 335 (1967). Accord, State v. Thompson, 278 N.C. 277, 179 S.E.2d 315 (1971); Couch v. Private Diagnostic Clinic, 351 N.C. 92, 520 S.E.2d 785 (1999)(Counsel for the plaintiff engaged in a grossly improper jury argument that included at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars.)
- Improper for counsel by argument to place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).
- Improper for defendant to imply to the jury that the defendant had no insurance coverage and that the award of substantial damages would constitute a significant burden on the young defendant. Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843 (1982) (Holding that it is reversible error for the trial court to instruct the jury that damages awarded in a wrongful death action are exempt from federal and state income taxes.)
- Improper to argue in closing that verdict would go to lawyers; that it was unchristian and against the ten commandments for step-daughter to sue her step-father; and that there would be reckoning on judgment day for greedy persons. Corwin v. Dickey, 91 N.C. App. 725, 373 S.E.2d 149 (1988).
- Improper to imply in closing argument that a verdict for the defendant would help to hold down automobile insurance costs, and to curb the “lawsuit crisis.” Smith v. Bohlen, 95 N.C. App. 347, 382 S.E.2d 812 (1989).
- Improper to make arguments which do not arise by a reasonable inference from the facts in evidence. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).
- Improper for defense counsel to argue in closing that counsel for the plaintiff had an agenda of obtaining money. O’Carroll v. Texasgulf, Inc., 132 N.C. App. 307, 511 S.E.2d 313 (1999).

IV. CONCLUSION

Soft-tissue cases can be difficult matters to litigate. Hopefully, the techniques described above will assist the practicing trial attorney with navigating the potential pitfalls of a soft-tissue case, and obtaining a reasonable, fair and just verdict for the client.

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. _____ CVS _____

JOHN DOE,

Plaintiff,

vs.

JANE DOE,

Defendant.

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MOTIONS IN LIMINE

NOW COMES the Plaintiff, by and through the undersigned counsel of record, and requests that the Court issue an Order on the following evidentiary issues.

1. That the defendant be prohibited from offering evidence that the plaintiff's medical expenses have been paid in part by her health insurance company.

Argument:

Evidence as to the payment of medical expenses by the plaintiff's health insurance company is inadmissible under the Collateral Source rule, because the payments are from a source wholly independent of, and collateral to the defendant and the liability insurance carrier. Brown v. Griffin, 263 N.C. 61, 138 S.E.2d 82 (1964); Young v. Baltimore and Ohio R.R. Co., 266 N.C. 458, 146 S.E.2d 441 (1966). The plaintiff requests that he be permitted to remove all references to insurance from the medical records, and medical expenses.

2. That the defendant be prohibited from offering any evidence that the former defendant, Joan Doe, was a party to this action, and has been dismissed by the plaintiff. The plaintiff further requests that the defendant not be allowed to refer to Joan Doe as a defendant or former defendant in this action.

Argument:

Any references to the former defendant may lead the jury to conclude that the plaintiff settled his claims against Mrs. Joan Doe and has received some amount of compensation for his personal injuries. Such evidence is not relevant under Rules 401-402, under Rule 408 (“Compromises and Offers of Compromise”), and contravenes the strong public policy of favoring the settlement of controversies out of court. *See Cates v. Wilson*, 83 N.C. App. 488, 350 S.E.2d 898 (1986), *modified*, 321 N.C. 1, 361 S.E.2d 734 (1987).

3. That the defendant be prohibited from offering evidence or arguing to the jury that the plaintiff is a malingerer or has exaggerated his personal injury claims for the purpose of secondary gain.

Argument:

The terms “malingerer” or “secondary gain” are medical diagnoses which suggest that a person has fabricated or exaggerated his or her personal injury claims. Such evidence has only been allowed by the North Carolina appellate courts when supported by medical testimony. *Johnson v. Johnson*, 23 N.C. App. 449, 209 S.E.2d 420, *cert. denied*, 286 N.C. 335, 211 S.E.2d 212 (1974). There is no medical testimony or other evidence to support any claim or argument by the defendant that the plaintiff is either a malingerer or that his claims are motivated by secondary gain. In the absence of medical testimony, the evidence is neither relevant nor reliable, and should be excluded under Rules 401-402.

Furthermore, any probative value which the evidence may have is substantially outweighed by the dangers of unfair prejudice to the plaintiff, that it will mislead the jury, and confuse the issues for determination. Any arguments of secondary gain and malingering without

supporting evidence demeans the judicial process. Thus our Supreme Court has noted that “[w]hen the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere.” In re Will of Farr, 277 N.C. 86, 93, 175 S.E.2d 578 (1970); *see also*, O’Carroll v. Texasgulf, Inc., 132 N.C. App.307, 511 S.E.2d 311, *cert. denied*, 350 N.C. 834, 538 S.E.2d 198 (1999) (Holding that it was improper for defense counsel to argue that the plaintiff’s attorney had an agenda of obtaining money through litigation). The plaintiff submits that the defendant should be prohibited from offering evidence or arguing that he is a malingerer, or that his claims are motivated by reasons of secondary gain.

4. That the defendant by prohibited from offering evidence that the plaintiff contacted legal counsel three to four days after this motor vehicle accident.

Argument:

The plaintiff testified in his deposition that he saw a doctor on the day following the motor vehicle accident. The plaintiff further testified that three to four days after the accident, he contacted an attorney about possible legal representation.

This evidence is not relevant to a determination of the outstanding issues concerning liability and damages for personal injury. The North Carolina Court of Appeals has stated that evidence concerning when a litigant seeks legal counsel is relevant only in those circumstances when the party contacts an attorney before his or her doctor. See Thompson v. James, 80 N.C. App. 535, 342 S.E.2d 577 (1986) (plaintiff contacted attorney before doctor); Williams v. McCoy, 145 N.C. App. 111, 550 S.E.2d 796 (2001) (plaintiff saw attorney before chiropractor). These facts are not present in this case and consequently this evidence should be excluded under

Rule 402.

In the alternative, if this evidence is relevant, its probative value is substantially outweighed by the dangers that its admission will substantially prejudice the plaintiff and/or mislead the jury. Therefore, it may be excluded under Rule 403.

Furthermore, this evidence violates the public policy of North Carolina which favors allowing an injured party to contact an attorney in order to fully understand one's rights and to make inquire about possible legal representation.

If this evidence is not excluded, plaintiff requests the opportunity to present evidence concerning when he was contacted by the defendant's insurance company following this accident, under Williams v. McCoy.

5. That the Defendant be prohibited from offering evidence that no one was criminally charged in connection with the collision at issue.

Argument:

The North Carolina Court of Appeals has held that a driver's testimony that he has never been convicted of a traffic offense is inadmissible in a civil action for negligence arising out of an automobile collision. Hinnant v. Holland, 92 N.C. App. 142, 150, 374 S.E.2d 152, 157 (1988). The Court stated that "a danger exists that the jury in a civil action will give undue weight to evidence that the defendant was never criminally charged or convicted for his role in the incident at issue." Id. (*citing* Beanblossom v. Thomas, 266 N.C. 181, 185-86, 146 S.E.2d 36, 40 (1966)). "It is error to admit such evidence since it is 'incompetent . . . to exonerate [the defendant] of negligence in [a] civil action.'" Id.

Under these rulings by the North Carolina appellate courts, any evidence relating to the

absence of criminal charges or convictions arising out of this collision is inadmissible.

Defendant's attorneys should not be permitted to question any witnesses regarding whether or not they were cited, charged, or convicted of any criminal offense in relation to this collision.

6. That the Defendant be prohibited from offering evidence of the defendant's wealth or making any arguments to the jury concerning the wealth or poverty of the defendant.

Argument:

The wealth or poverty of the defendant is not an issue before the Court. The argument that the defendant would be obligated to pay every single dollar of the damage award may be interpreted by the jury as meaning that the defendant was not protected by an automobile liability insurance. The presence or absence of insurance is not an issue before the Court, and any argument concerning the defendant's wealth or poverty would be unfair and prejudicial to the plaintiff and improper under existing case law. Scallon v. Hooper, 293 S.E.2d 843, 58 N.C.App. 551, *cert. denied*, 306 N.C. 744, 295 S.E.2d 480 (1982).

Furthermore, the North Carolina appellate courts have held that in a court of justice neither the wealth of one party nor the poverty of the other should be permitted to affect the administration of the law. Lutz Industries, Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955); Yost v. Hall, 233 N.C. 463, 64 S.E.2d 554 (1951). Thus, it has been held that it was error as a matter of law for a trial court to permit remarks which injected extraneous considerations concerning a defendants' financial situation so far as their capacity to respond to damages was concerned. Watson v. White, 308 S.E.2d 268, 309 N.C. 498 (1983). The plaintiff requests that the defendant not be permitted to offer evidence or make any arguments concerning the defendant's ability to satisfy a judgment.

7. That the defendant be prohibited from offering evidence that the medical records of the plaintiff, dated March 17, 1989, note that he had muscle spasms in his lower back. The notes are attached hereto as Exhibit A.

Argument:

The plaintiff suffered musculoskeletal injuries (strain) to his neck, left shoulder, upper left arm, and upper back as a result of this accident.

The probative value of these records is substantially outweighed by the dangers of undue prejudice to the plaintiff. These records are fifteen years old. They were created by a Dr. Johnson in the course of a new patient examination concerning a variety of physical complaints expressed by the plaintiff. Furthermore, this plaintiff has never claimed lower back injuries from this accident. This evidence is remote in time, will unduly prejudice this plaintiff, and will mislead the jury.

This evidence is not proper impeachment evidence as well. At his deposition, Mr. Doe truthfully testified that he had experienced lower back problems in the past. Consequently, there has been no inconsistent testimony.

In a similar case, Sitton v. Cole, 135 N.C. App. 625, 521 S.E.2d 739 (1999), the plaintiff was seeking damages for an injury to her thoracic spine from a motor vehicle accident in 1995. At trial, the plaintiff claimed that the accident caused her injury and that before the accident, she had never experienced any problems with her thoracic spine. The defendant sought to introduce a 1988 medical record which noted that the plaintiff had long-standing mid-thoracic pain and paraspinal muscle pain. The trial court excluded this evidence under Rule 403 finding that any probative value was substantially outweighed by the danger of prejudice to the plaintiff. The

court also did not allow the evidence to be offered for impeachment purposes. The Court of Appeals upheld the trial court's rulings. With regard to the interplay between Rule 403 and Rule 608, the Court of Appeals stated that "[i]t is clear, however, that 'impeachment by prior inconsistent statement may not be permitted where employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible.'" Sitton v. Cole, 135 N.C. App. at 627, 521 S.E.2d at 741 (*quoting, State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989)).

Therefore, this evidence should be properly excluded under Rule 403 and the controlling appellate decisions.

WHEREFORE, the plaintiff requests that the Court issue an Order as to each of the evidentiary issues raised above.

This the ____ day of May, 2004.

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