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Antithetical Antics: New and Unusual Tactics from the Plaintiff's Bar

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ANTITHETICAL ANTICS:

NEW AND UNUSUAL TACTICS FROM THE PLAINTIFF'S BAR

"In preparing for battle I have always found that plans are useless, but planning is indispensable." This statement came from President Dwight D. Eisenhower, the man who was the Supreme Commander of the Allied Forces in Europe during World War II; the man who planned, coordinated, and carried out the Invasion of Normandy; and a man considered by some as one of the greatest military strategists of all time.

Litigators know from personal experience that trial plans are often useless because opposing counsel is always attempting new and unusual trial tactics and techniques. That being said, effective planning prepares counsel to address these new techniques before they arise, even before trial with motions *in limine*.

The purpose of this report is to help with your trial planning process by providing an update on a variety of unique and emerging trial techniques and courtroom trends.

A. Foregoing Past Medical Expenses as an Element of Damages.

There is an emerging trend among the plaintiffs' bar to not proffer medical bills as part of the damages in a personal injury case when the amount accepted in satisfaction of those medical bills is significantly lower than the amount charged by the plaintiff's health care providers. While for many, the idea that plaintiff would forego medical expenses seems unthinkable, the theory behind this tactic is that the amount of medical expenses may serve as an "anchor" to lower the value of the case, as opposed to allowing plaintiff's

counsel the freedom to suggest pain and suffering damage amounts to the jury which are not tethered to the cost of the actual care received by the plaintiff.

An argument can certainly be made that a plaintiff's medical expenses, while irrelevant to past medical damages which a plaintiff does not seek, are relevant to show the severity of the plaintiff's alleged injuries, the extent of the treatment received by the plaintiff, and the potential for future damages. See *Melaver v. Garis*, 138 S.E.2d 435 (Ga. App. 1964); *Brice v. Nat'l R.R. Passenger Corp.*, 664 F. Supp. 220 (D. Md. 1987); *McGee v. River Region Med. Ctr.*, 59 So. 3d 575 (Miss. 2011); *Chapman v. Mazda Motor of Am., Inc.*, 7 F.Supp.2d 1123 (D. Mont. 1998); and, *Barkley v. Wallace*, 595 S.E.2d 271, 274 (Va. 2004). Still, many judges are inclined to defer to the wishes of plaintiff's counsel on this topic since medical bills are normally the domain of the plaintiff's case.

Defense counsel should anticipate this strategy particularly if plaintiff indicates in written discovery that plaintiff's damages do not include medical expenses, or if plaintiff's counsel seeks a stipulation that plaintiff's damages are in excess of the state's minimum tort threshold. If defense counsel anticipates this strategy will be used, defense counsel may seek an order *in limine* with regard to the admissibility of plaintiff's medical bills to confirm the contours of admissible evidence prior to trial and to avoid the potential for a mistrial.

B. Using Voir Dire to Shift the Burden of Proof.

There are three opportunities for counsel to directly communicate with the jury. The first opportunity, and arguably the most powerful, is during voir dire. Unlike opening statements – in which argument is frowned upon by the Court – and closing statements

– in which the jury expects argument – counsel usually has free reign during voir dire to communicate with the jury and to craft counsel's message for the jury in a persuasive manner.

It is during this time that plaintiff's counsel may utilize the reptile theory and suggest that the defendant is required to meet certain minimum standards of conduct, and that the failure to do so should result in an adverse verdict. More difficult to overcome is the argument that plaintiff need not prove their case in chief, but that defendant must prove that certain conduct did or did not happen. In the criminal context, this would be akin to a defendant being guilty until proven innocent, rather than innocent until proven guilty.

To avoid the impact of this strategy, defense counsel should be clear from the start of trial who has the burden of proof, and what the appropriate standards of care are for each party.

C. Using Written Discovery as a Weapon.

It is not unusual for counsel on both sides of a case to provide stock answers to written discovery, electing to provide vague or incomplete responses rather than specific, direct responses. Whether this is intentional, or simply a product of growing weary of the written discovery process, the responses should be supplemented by counsel in advance of the close of discovery to avoid opposing counsel from using the lack of a response as evidence against the opposing party during trial.

For instance, in a comparative fault case, a standard interrogatory may ask the defendant to identify any and all ways in which the plaintiff is at fault. A defendant may respond to such a question by stating that discovery is not complete and will be

supplemented following additional discovery and depositions. In these circumstances, if the written response is not thereafter supplemented, plaintiff's counsel may argue that the written discovery response is admissible to show the defendant did not identify any ways in which the plaintiff is at fault. Even if there is testimony and evidence to the contrary, it is easy to see how a jury may become confused and punish the defendant for this lack of responsiveness.

Counsel should also be wary of responses to written discovery and disclosures that are made after the close of discovery and on the eve of trial. Pursuant to the Federal Rules of Civil Procedure, Rule 37(c)(1), "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless*." Certainly the party seeking admission of the discovery will argue that the failure was "substantially justified" or "harmless". In evaluating whether a disclosure is "harmless", the Fifth Circuit has identified the following four factors: "(1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose." *Tex. A & M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir. 2003).

When such evidence is produced at the last minute, counsel should be prepared to file motions *in limine* or motions to exclude such evidence so that the court can make a determination on its admissibility for trial and at a minimum, preserve the issue for appeal.

D. Using the Media to Poison the Well.

In high profile cases, plaintiff's counsel may utilize the media to attempt to influence potential members of a jury. In these cases, there is usually a comprehensive media approach utilizing a variety of traditional media and social media forms, including television, print media, radio, and internet sources.

Defense counsel's initial reaction may be to ignore the media, hoping that in the twenty-four hour news cycle the story will soon be forgotten. However, defense counsel should also consider utilizing the aggressiveness of plaintiff's counsel against plaintiff, by moving for a change of venue. The motion for change of venue should cite as many examples of media reporting as possible, which may convince the court that a fair and impartial jury is impossible in the present venue, and that a change of venue is appropriate. Even the potential for a change of venue may cause plaintiff's counsel to cease the media campaign being waged against the defendant.

E. Using Day in the Life Videos to Persuade the Jury.

Courts have recognized that video presentations may demonstrate for jurors – "better than words" – the effect of an injury on a plaintiff's life, leaving an unforgettable impression on a jury as it weighs the evidence. As such, there is no doubt day in the life videos can be an incredibly persuasive tool.

Day-in-the-life videos are not a new creation, but the prevalence of these videos has increased as the cost and equipment necessary to produce them has dramatically decreased. Courts have previously addressed the admissibility of these videos, noting

that “the powerful impact of this type of evidence requires the trial judge to examine carefully into its authenticity, relevancy, and competency, and – if he finds it to be competent – to give the jury proper limiting instructions at the time it is introduced.” State v. Strickland, 173 S.E.2d 129, 135 (N.C. 1970).

The means for accomplishing this examination vary on a case by case basis. For instance, in *Roberts v. Sisters of St. Francis Health Services, Inc.*, 556 N.E.2d 662 (Ill.App.3d 1990), the trial court denied the defendants’ motion *in limine* to bar plaintiff’s introduction of a day in the life video. In denying the motion, the court noted that because the video carried such a high potential for arousing sympathy, passion, and prejudice for the injured plaintiff, the defendants should be able to make prospective jurors aware of the condition which may be presented to them during the course of the trial. As such, the trial court allowed counsel to play the video during *voir dire* and ask the potential jurors whether anyone felt that what they saw would cause them to be biased or prejudiced in such a way that they would be unable to render a fair verdict on evidence.

In another case – *The Estate of Joseph Robert Lafarge v. Kyker*, Case No. 1:08-CV-00185 (N.D. Miss. 2011), the court addressed a day in the life video that was produced by plaintiff after the close of discovery. The video was fairly straightforward but was of significant importance because the plaintiff had died before trial. The court allowed the video to be played during trial, after agreeing to allow defense counsel an opportunity to depose witnesses about the content of the video. The court also did not allow plaintiff to play the sound from the video.

In *Bannister v. Town of Noble*, 812 F.2d 1269 (10th Cir. 1987), the Tenth Circuit set forth four factors for determining the admissibility of a day-in-the-life video under Fed.R.Civ.P. 403. The first factor is whether the video fairly represents the facts with respect to the impact of the injuries on the plaintiff's day-to-day activities. *Bannister*, 812 F.2d at 1269 (citing *Bolstridge v. Cent. Me. Power Co.*, 621 F. Supp. 1202, 1203 (D. Me. 1985)). In other words, a typical "day in the life" video would not depict a victim performing improbable tasks. *Id.* at 1269. In order for the video to have the least amount of prejudicial value, the video must portray ordinary, day-to-day situations. *Id.* The second factor is whether the plaintiff is aware he or she is being videotaped for the purpose of litigation, and is therefore likely to cause self-serving behavior, consciously or otherwise. *Bannister*, 812 F.2d at 1269. Although this behavior is of course inevitable to some extent, the court cautioned against the admission of such evidence. *Id.* The third factor is whether "a jury will better remember, and thus give greater weight to, evidence presented in a film as opposed to more conventionally elicited testimony." *Id.* This issue primarily focuses on whether the video is duplicative of other demonstrative evidence or testimony. For example, in *Helm v. Wismar*, 820 S.W.2d 495 (Mo. 1991), the court found that a videotape showing a day in the life of a plaintiff who was injured in an automobile accident was properly excluded where the plaintiff was present in court for the jury's observation. However, in *Long v. Missouri Delta Med. Ctr.*, 33 S.W.3d 629 (Mo. App. 2000), the court of appeals found that the trial court's allowance of multiple displays of an infant's condition was not prejudicial, reasoning that the infant's brief presence in the courtroom could not illustrate the care she required as well as a day in the life video and photographs could. Lastly, the court will consider whether the information in the video is subject to cross-

examination. See *McCloud v. Goodyear Dunlop Tires North Am., Ltd.*, 2008 WL 2323792, at *9-10 ((C.D. Ill. June 2, 2008) (allowing “day in the life” video which depicted the plaintiff’s daily routine and noting the plaintiff’s caretaker could be cross examined at trial).

F. Conclusion.

The tactics and strategies being used by the plaintiff’s bar are constantly evolving. By being prepared for these unique strategies, counsel can effectively defend against their impact both before and during trial.