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IN THE CIRCUIT COURT OF THE COUNTY OF ST. CHARLES
STATE OF MISSOURI

JEREMIAH L. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 1911-cc00960
	)	
PUNDMANN MOTOR COMPANY, d/b/a PUNDMANN FORD,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF AMENDED MOTIONS IN LIMINE

COMES NOW Defendant Pundmann Motor Company d/b/a Pundmann Ford ("Defendant"), by and through undersigned counsel, and for its Memorandum of Law in Support of its Amended Motions in Limine, states as follows:

INTRODUCTION

Defendant anticipates that Plaintiff Jeremiah L. Johnson ("Plaintiff") will attempt to admit improper and irrelevant evidence and argument regarding legally unsupportable and highly prejudicial issues at trial. Accordingly, to prevent confusion of the jury, and unfair prejudice and surprise to Defendant, the Court should preclude Plaintiff and his witnesses from attempting to offer any such evidence or argument at trial in any manner.

A. TESTIMONY AND/OR EVIDENCE THAT DEFENDANT HAS LIABILITY INSURANCE

Upon information and belief, Defendant anticipates that Plaintiff may attempt to introduce evidence or offer argument that Defendant has liability

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insurance. However, under Missouri law, it is fundamental that it is improper and prejudicial to inject a defendant's insurance coverage into a case. *Taylor v. Republic Auto. Parts, Inc.*, 950 S.W.2d 318, 321 (Mo. Ct. App. W.D. 1997). When insurance is improperly injected into the mind of the jurors, "the ensuing prejudicial effect deprives the defendant of his right to a fair trial." *Saint Louis University v. Geary*, 321 S.W.3d 282, 293-94 (Mo. 2009). Further, any such evidence is not probative as to any issues of liability, causation or damages. *Means v. Sears, Roebuck and Co.*, 550 S.W.2d 780, 787 (Mo. 1977); *Hamilton v. Slover*, 440 S.W.2d 947, 956 (Mo. 1969).

Moreover, any such evidence should be excluded because any probative value would be greatly outweighed by the prejudicial effect. *See, e.g., Jone v. Coleman Corp.*, 183 S.W.3d 600, 608 (Mo. Ct. App. E.D. 2005). Therefore, the Court should exclude any evidence and/or argument regarding the fact that Defendant has liability insurance.

B. TESTIMONY AND/OR EVIDENCE OF THE SIZE, WEALTH, ASSETS AND POWER OF DEFENDANT

Upon information and belief, Defendant anticipates that Plaintiff may attempt to offer evidence and/or argument regarding the perceived size, wealth, assets and power of Defendant as comparatively greater than Plaintiff's. This evidence and/or argument would be irrelevant and prejudicial to Defendant.

Under Missouri law, "it is fundamental to our jurisprudence that rich and poor stand alike in our courts and that neither the wealth of one nor the poverty of the other shall be permitted to affect the administration of the law." *Lewis v.*

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Hubert, 532 S.W.2d 860, 866 (Mo. App. 1975). Therefore, "[t]he financial status of the parties to a litigation, therefore, is not admissible except when relevant to the issues joined." *Id.* "A comparison between the size, power or wealth of the litigants is wholly extraneous and should not be made by counsel." *Green v. Ralston Purina Co.*, 376 S.W.2d 119, 127 (Mo. 1964).

In *Green*, plaintiff's attorney made inflammatory remarks about the financial resources of the defendant. *Id.* at 126-127. The *Green* court reversed a verdict in favor of plaintiff finding that "[t]he richman-poor-man argument, in which counsel consciously and deliberately array the size, wealth or power of a corporation on the one hand against the position of an individual on the other . . . could have no other effect than to prejudice the corporation in the eyes of the jury and deprive it of its right to a fair and impartial trial." *Id.* at 127. The *Green* court further noted that "[s]uch statements are dangerous and harmful indulgences, potent in exciting sympathy or prejudice, and should be discouraged, especially when apparently used for that purpose." *Id.*

Here, Defendant's size, wealth, assets, and power are not germane to any of the issues presented by Plaintiff's pleadings. Therefore, the Court should exclude any evidence and/or argument regarding the perceived size, wealth, assets and power of Defendant.

C. TESTIMONY AND/OR EVIDENCE THAT DEFENDANT IS LIABLE FOR PUNITIVE DAMAGES

Upon information and belief, Defendant anticipates that Plaintiff may attempt to argue or infer during voir dire, opening statement, or some other part

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of trial that Defendant should be made to pay punitive damages as a result of the incident in this case. However, such argument or inference would be improper as Plaintiff has failed to produce any evidence which could support a case for punitive damages, and therefore, he should be barred from making any mention or reference to punitive damages during trial.

To recover punitive damages under the Missouri Merchandising Practices Act, "the plaintiff must present substantial evidence that the defendant's conduct was 'outrageous because of [the] defendant's evil motive or reckless indifference to the rights of others.'" *Walsh v. Al W. Chrysler, Inc.*, 211 S.W.3d 673, 676 (Mo. App. 2007) (*citing Cohen v. Express Financial Services, Inc.,* 145 S.W.3d 857, 865–66 (Mo. App. 2004)).

"Punitive damages are extraordinary and harsh, so the evil motive or reckless indifference must be proven by clear and convincing evidence." *Gibbs v. Blockbuster, Inc.*, 318 S.W.3d 157, 171-72 (Mo. App. E.D. 2010). In the absence of a substantial evidentiary basis, facts essential to submissibility may not be inferred. *May v. AOG Holding Corp.*, 810 S.W.2d 655, 657 (Mo. App. 1991).

Here, Plaintiffs have failed to produce evidence of any sort of outrageous conduct on the part of Defendant, much less outrageous conduct that shows "evil motive or reckless indifference to the rights of others." The evidence, **at best**, demonstrates that Defendant negligently repaired the subject vehicle prior to returning it to Plaintiff. **None** of Plaintiff's allegations demonstrates an evil motive or reckless indifference.

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Plaintiff has not, and cannot, make any credible argument that punitive damages should be awarded against Defendant, much less produce the necessary "clear and convincing" evidence to make a submissible case for punitive damages at trial. Therefore, because there is absolutely no evidence to support it, Plaintiff should be barred from making any reference to punitive damages in voir dire, opening statement, closing argument, or any other portion of trial.

D. Testimony and/or Evidence of Settlement Discussions and Negotiations

Upon information and belief, Defendant anticipates that Plaintiff may attempt to offer evidence and/or argument of settlement discussions and negotiations between the parties. This evidence and/or argument would be irrelevant and prejudicial to Defendant.

In Missouri, the general rule is that "evidence of settlement agreements is not admissible." *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 392 (Mo. App. E.D. 1998) (citing *O'Neal v. Pipes Enterprises, Inc.*, 930 S.W.2d 416, 423 (Mo. App. W.D. 1995). "Offers of settlement are inadmissible to prove liability for or invalidity of the claim or its amount." *Id.* (citing *In re Marriage of Clark*, 801 S.W.2d 496, 499 (Mo. App. E.D. 1990)); *see also Tripp v. Harryman*, 613 S.W.2d 943, 949 (Mo. App. S.D. 1981) ("Missouri case law holds that evidence and argument concerning settlement negotiations are to be excluded at trial for the reason that such efforts should be encouraged and a party should not be penalized if the negotiations fail to materialize.").

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Here, any settlement negotiations between Plaintiff and Defendant are irrelevant, immaterial and not admissible. Therefore, the Court should exclude any evidence and/or argument regarding such settlement negotiations and discussions.

E. TESTIMONY AND/OR EVIDENCE OF OTHER CUSTOMERS OF DEFENDANT

Upon information and belief, Defendant anticipates that Plaintiff may attempt to offer evidence and/or argument of experiences of other customers of Defendant's business. This evidence and/or argument would be irrelevant and prejudicial to Defendant.

In Missouri, the standard for evidence is that "[e]vidence in any suit should be relevant, and evidence that throws no light on the controversy should be excluded as it tends to confuse the issues and operate to prejudice a party before a jury." *Haffey v. Generac Portable Products, L.L.C.*, 171 S.W.3d 805, 809 (Mo. Ct. App. 2005). Additionally, in Missouri "evidence must be logically and legally relevant." *Whelan v. Missouri Public Service, Energy One*, 163 S.W.3d 459, 462 (Mo. Ct. App. 2005). Evidence is tested for legal relevance when "the probative value of the evidence (its usefulness) is weighed against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence (the cost of evidence)." *Id.*

Here, any evidence of Defendant's other customers proffered by Plaintiff would likely be a hand-picked set of customers who were dissatisfied with their experience at Defendant's business. Defendant can only respond to this type of evidence with similar evidence of customers who have been satisfied with their

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experience with Defendant's business. This type of evidence would serve only to confuse the issues, lead to undue delay, and unduly prejudice Defendant in the eyes of the jury in this case. Therefore, this Court should exclude any evidence or argument of Defendant's other customers.

F. TESTIMONY AND/OR EVIDENCE OF ONLINE OR PRINT REVIEWS OF DEFENDANT'S BUSINESS

Upon information and belief, Defendant anticipates that Plaintiff may attempt to offer evidence and/or argument of online or printed reviews of Defendant's Business. This evidence and/or argument would be hearsay, irrelevant and prejudicial to Defendant.

In Missouri, hearsay involves "extrajudicial statements offered to prove the truth of the statement asserted." *State v. Green*, 575 S.W.2d 211, 212 (Mo. Ct. App. 1978). The rule exists for the purpose of "ensure[ing] documents admitted in evidence are trustworthy by giving the party against whom the document are offered the opportunity to cross-examine the preparer." *State ex rel. Hobbs v. Tuckness*, 949 S.W.2d 651, 653 (Mo. Ct. App. 1997).

In *Peters*, the Missouri Court of Appeals rejected the use of consumer complaints as business records and upheld their exclusion as hearsay. *See Peters v. Johnson & Johnson Products, Inc.*, 783 S.W.2d 442, 444 (Mo. Ct. App. 1990). The court found no abuse of discretion in not applying the business records exception to the "unsolicited letters and unsubstantiated reports" from consumers of the products at issue finding that they "do not stand as to their trustworthiness". *Id.* at 444–45.

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Here, just like the consumer complaints in *Peters*, any online or print reviews are hearsay and would be highly prejudicial to Defendant. Without an opportunity for Defendant to cross-examine the creators of such reviews, there is no method of verifying that the reviews were created by legitimate customers of Defendant, or to address whether the statements made within the reviews are legitimate. Therefore, this court should exclude any evidence or argument regarding online or print reviews of Defendant's business.

G. TESTIMONY AND/OR EVIDENCE REGARDING THE CAUSE OF DAMAGE TO THE SUBJECT VEHICLE'S C-PILLAR

Upon information and belief, Defendant anticipates that Plaintiffs may attempt to offer evidence and/or argument regarding damage to the subject vehicle's C-Pillar including evidence and/or argument that such damage is related to the repairs performed on the subject vehicle by Defendant. This evidence and/or argument would be irrelevant, based solely on speculation and prejudicial to Defendant.

Under Missouri law, "[i]n terms of admissible evidence, fact is preferred to opinion for purposes of proof of an issue because fact is more concrete than opinion, and so allows a more direct inference of what is to be proven than does opinion." *Am. Family Ins. Co. v. Lacy,* 825 S.W.2d 306, 311–12 (Mo. Ct. App. 1991). Thus, "[s]tatements that are opinion, conclusions and speculations are neither admissible nor useable at trial. . . ." *Leeuwen v. Lowery*, 491 S.W.3d 618, 627 (Mo. Ct. App. 2016) (Citing *Lacy*, 825 S.W.2d at 311). IF a statement is intended to be used as an admission, "its quality of conjecture, opinion and

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supposition [may] deprive it of that certainty that marks a statement of an existing fact, and hence, competent evidence." *Lacy*, 825 S.W.2d at 311 (citing *Donnelly v. Goforth*, 284 S.W.2d 462, 465 (Mo. 1955). Although, there are some opinions that are "so usual, natural or instinctive as to accord with general experience," such as "the speed of a moving vehicle." *Id.* at 312. Such opinions "nevertheless may not be guesswork or speculation. *Id.*

In *Meyer v. City of Walnut Grove*, a landowner sued the trustee of the neighboring property for negligence alleging that one of its agents caused a sewer backup by breaking a manhole cover on the trust property with a brush hog. 505 S.W.3d 331, 335 (Mo. Ct. App 2016). The trial court granted summary judgment for the trustee, and the landowner appealed arguing a genuine issue of material fact as to whether trustee breached a duty to landowner by causing the sewer backup. *Id.* The Court of Appeals affirmed the trial court finding that the evidence amounted to the landowner's "assertion that it was Trustee's conduct at some unknown time through the unspecified act or acts of some unknown agent that caused the backup is 'mere conjecture and speculation.'" *See id.* at 337.

In his deposition, Plaintiff's expert Kyle Motzkus illustrates the speculative nature of any allegation regarding damage to the C-Pillar in Plaintiff's case. Mr. Motzkus on cross examination by Plaintiff's counsel stated as follows:

Q. And as far as what happened to the vehicle from January 11th, 2019, until you saw the vehicle, you're relying upon Mr. Johnson

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and/or Peggy as far as the information as to location and what's happened to the vehicle; correct?

A. Yes, that is correct.

Q. So, in other words, as Corey asked you, had – besides Pundmann, between January 11th, 2019, and the time you saw the vehicle, had any other repair shop seen the vehicle, the only reason you said no is because of what Mr. Johnson and Peggy represented to you; correct?

A. Absolutely. I have to assume that my customer's not lying.

(Deposition of Kyle Motzkus, 150:8–21). When asked if Mr. Motzkus was "saying that Pundmann cut into [the quarter panel]" he responded, "I mean unless anyone else did the repairs." (*See* Deposition of Kyle Motzkus 121:18–22).

In Plaintiff's deposition, he showed that his own statements are merely speculating when it comes to the cause of damage to the C-pillar in the subject vehicle.

Plaintiff provides no substantive evidence that shows Defendant was the cause of any damage to the C-pillar of the subject vehicle. Instead, Plaintiff provides his own speculative testimony and an expert who speculates exclusively based on Plaintiff's statements to him.

E. Expert Testimony of Kyle Motzkus

Mr. Kyle Motkzus should be wholly disqualified from testifying as an expert in this matter because he is biased and not impartial. Under Missouri law, "[t]he

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term 'bias' includes all varieties of . . . favor to the proponent personally . . ." *State v. Clark*, 364 S.W.3d 540, 544 (Mo. 2012). "Evidence showing bias includes circumstances of the witness's situation that make it probable that he or she has partiality of emotion for one party's cause." *Id.* at 244-45 (external citations omitted). Such circumstances include a witness's pecuniary interest in testifying for a particular party. See e.g., *Dodson v. Ferrara*, 491 S.W.3d 542, 564–65 (Mo. 2016).

Plaintiff alleges Hunter Auto Body, Mr. Motzkus' employer, has charged Plaintiff $4,400.00 in storage fees and $850.00 in administrative fees in connection with his evaluation of the vehicle. (*See* Exhibit A, Plaintiff's Petition, ¶ 19). Therefore, Mr. Motzkus's employer has the potential to financially gain from Plaintiff's potential settlement or award in this case.

As such, Mr. Motzkus cannot be fair and impartial because his employer stands to gain from a favorable judgment for the Plaintiff; thus, his testimony should be excluded.

WHEREFORE Defendant Pundmann Motor Company d/b/a Pundmann Ford respectfully requests that this Court enter an Order barring Plaintiff Jeremiah L. Johnson from offering any evidence, mentioning, or otherwise attempting to convey to the jury in any manner, either directly or indirectly, during voir dire, opening statement, direct or cross examination of any witness, closing argument, or at any other time the above-described items, and any other relief that this Court deems just and appropriate.

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Respectfully submitted,

/s/ Corey L. Kraushaar
Corey L. Kraushaar #51792
BROWN & JAMES, P.C.
800 Market Street, Suite 1100
St. Louis, MO 63101
(314) 421-3400 Telephone
(314) 421-3128 Facsimile
ckraushaar@bjpc.com

Attorney for Defendant

CERTIFICATE OF SERVICE AND
CERTIFICATE OF COMPLIANCE WITH RULE 55.03(a)

I hereby certify that a copy of the foregoing pleading was served by the Court's electronic filing system on this 21st day of November 2023, on the counsel of record listed below. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he has signed the original of this Certificate and the foregoing pleading.

Mr. Mark L. Williams
Meyer & McClamroch Law, LLC
1003 E. Jefferson
Kirksville, MO 63501
mlwilliamsmmw@gmail.com

Attorney for Plaintiffs

/s/ Corey L. Kraushaar

28124700