******* MPT 1 STARTS HERE *******

I. Caption

II. Statement of Facts

II. Legal Argument

1. The court should exclude Doris Gibbs' testmony because the statement was made in a social setting and under the circumstances surrounding the statement, a person in Mr. Dobson's position would not necessarily be expected to respond and it is highly prejudicial to Mr. Dobson's case.

The issue is whether testimony from Doris Gibbs describing Mr. Dobson's failure to respond to the her statement is admissible under the non-hearsay exception of acquiescence by silence.

Under Franklin Rules of Evidence [FRE] 801(d)(2), a statement is not hearsay if it was offered against an opposing party and was made by the party. According to *Reed v. Lakeview Advisors (Reed)*, if through silence, a party acquiesces in a statement made by another, that statement may be introduced against the party. The court in Reed enumerated four preconditions that must be met for a statement to be acquiesced by silence: (1) the party must have heard the statement, (2) the party must have understood the statement, (3) the circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and (4) the party must not have responded.

Here, Doris Gibbs made the statement, "I bet you were trying to get to the store quickly. And I would guess, like most off us, you were on your phone at the time." The statement was directed at Mr. Dobson and Mr. Dobson remained silent for about one minute. However, the other people at the table also remained silent. Thus, it is not at issue that Mr. Dobson remained silent.

At issue is whether Mr. Dobson heard, understood, and would have denied the statement under the circumstances if they were false.

Brooks will argue that these circumstances alone show that Mr. Dobson heard, understood, and should have responded if the statement were untrue. Brooks will argue this based upon the statement that Doris Gibbs gave, evidenced by Mr. Dobson putting down his glass and looked at her while she was speaking, and subsequently remaining silent. Brooks will argue that a reasonable person in Mr. Dobson's situation would have responded if it were untrue.

However, as the *Reed* court notes in its reference to *State v. Patel*, context is exceedingly

important to determining whether a party acquiesced by silence. In *Patel*, the court found that a statement made at a loud social event with many persons present does not create the presumption that someone in the defendant's position would have responded.

Mr. Dobson was in a crowded restaurant with usual noises coming from the kitchen, other tables, and in a primarily social setting. There was nothing serious about the conversation and it likened more to the circumstances in *Patel*, rather than the serious and private conversation in *Reed*. This not only shows that Mr. Dobson may not have heard the statement, but that he should not have been expected to respond to it. The statement by Doris Gibbs was made in social conversation and was not accusatory in nature. Although a court could find that Mr. Dobson heard the statement, he may not have understood that he was expected to respond if it was made in a lighthearted manner. Brooks will argue that a person would have responded or laughed if it were in a lighthearted manner. However, it is unclear if the statement was directed only at Mr. Gibson and not the rest of the table. Given that this case, the court should not allow Doris Gibson to testify since Brooks cannot satisfy the four part test of *Reed*.

In the alternative, the court exclude Doris Gibbs' testimony because its prejudicial effect outweighs the probative value. Brooks will argue that the testimony is probative of Mr. Dobson's own negligence that may have caused his injuries and could be exculpatory for Brooks' liability. However, this testimony will most likely mislead the jury to thinking that Mr. Dobson admitted guilt. The circumstances of the statement being made and Mr. Dobson's silence are misleading because it is unclear if he heard, understood, and should have responded. Thus, the court should not admit this evidence under FRE 403.

Thus, the court not admit the testimony of Doris Gibbs.

2. The court should exclude the deposition testimony of the ER physician who examined Mr. Dobson after fall because a similar motive and opportunity did not exist between Mr. Dobson's two claims and it would be highly prejudicial to his case.

The issue is whether the court should admit the testimony of an unavailable witness from a prior case arising out of the same injuries.

Under FRE 804(b)(1), to admit former testimony, the proponent must satisfy three requirements of the rule: (1) the witness must be currently unavailable; (2) the former testimony was given as a witness as trial, hearing, or lawful deposition; and (3) the testimony is being offered against a party who had a similar motive and opportunity to develop the challenged testimony at earlier proceedings.

Here, the physician is currently unavailable because they are deceased. Additionally, the former testimony was given at a lawful deposition. Thus, the disputed issue is whether there was a similar motive and opportunity to develop the challenged testimony at earlier proceedings.

(a) Similar motive did not exist because Mr. Dobson's two claims did not have similarity of interest.

According to *Thomas v. Wellspring Pharmaceuticals Co*. [*Thomas*], there must be some similarity of interest between the party in the instance case against whom the testimony is sought to be introduced and the party against whom the testimony was introduced in the prior manner. The court in *Thomas* found that identical claims for relief can meet the predecessor in interest requirement to allow the testimony. The court in *Thom*as references *State v. Williams* in forming a test for whether there was similar opportunity and motive. In *Williams*, the court had a similar motive two part test: (1) whether questioner is on the same side of the same issue at both proceedings, (2) whether the questioner had a substantially similar interst in asserting that side of the issue. To determine if there was opportunity, the court says that the issue is whether party in the earlier case had the opportunity to develop testimony - not whether party did indeed develop the testimony.

Here, the Mr. Dobson's two claims are not identical. The source and causation of Mr. Dobson's injuries were not at issue in his claim against the City. At issue in the presence case is a negligence claim, while the issue in the case against the City is a disability discrimination claim. This differs from Thomas because the cases were identical in claims. Additionally, the questioner was on the same side of the issue, but the attorneys and claims are wholly different in this matter. Specifically, Attorney Chen was not litigating the negligence claim, so Attorney Chen chose not to develop that testimony. Brooks may argue that the Mr. Dobson had the opportunity to develop the testimony and chose not to, but since the attorney's and claims differ greatly, strategy may be required to differ as well.

Thus, the court should find that prior testimony from an unavailable witness in this case should not be admissible.

Under FRE 403, the court should find that this evidence is not relevant because the prejudicial effect would outweigh its probative value. Here, Mr. Dobson has not had the opportunity to cross examine the physician as a witness, and the jury may take his statements regarding Mr. Dobson's pain at face value without the ability to question him further on this. This testimony is highly prejudicial and would mislead the jury to awarding less damages for Mr. Dobson.

Thus, the court should exclude the deposition testimony.

3. The court should admit the insurance policy because it is probative of Brooks' control over the sidewalk and relevant to a material fact.

The issue is whether the court should admit Brooks' insurance policy as evidence of proving agency, ownership, or control.

Under FRE 411, evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. However, it may be admitted for another purpose such as proving a witness's bias or prejudice, or proving agency, ownership or control.

Here, the evidence is relevant to whether or not Brooks had an obligation to clear the sidewalk of

ice. The liability agreement shows that Brooks did that have that obligation and admitting the agreement into evidence would show that Brooks had control over the sidewalk and thus had an obligation to maintain it. By offering this into evidence, Mr. Dobson is not trying to prove fault, but control. Brooks will argue that FRE 403 should exclude the liability insurance agreement due to prejudice. The prejudicial effect does not outweigh its probative value. Control is at issue in the present case and the agreement goes towards proving Brook's control over the document. Brooks can rebut this evidence with documents showing lack of control.

Thus, the court should admit this evidence under FRE 411 and FRE 403.

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III. Legal Argument

1) Testimony by Doris Gibbs is inadmissible because Mr. Dobson did not acquiesce to a statement by another.

Under Rule 801, hearsay is defined as an out of court assertion offered to prove the truth of the matter asserted in the statement. Statements by a party opponent that are offered against that party are exempted from the definition of hearsay and are therefore admissible. Under Rule 801(d)(2), if a party, by silence, acquiesces in a statement made to them by another, then that fact may be introduced against the party if four conditions are met. First, the party must have heard the statement. Second, the party must have understood the statement. Third, a person in the party's position would likely have responded to the statement. Fourth, the party who it is being offered against did not respond. *Reed v. Lakeview Advisers*.

The context and the circumstances in which the statement were made are exceedingly important, and the court should carefully consider the circumstances surrounding the purported admission. *Id*. Courts have excluded statements under this exception (i.e. ruled that the silence was not acquiescence) where the statement was made at a gathering of over 100 people, so it was unclear whether the party heard and understood the statement. *State v. Patel*. In comparison, where it is clear that the party heard and understood the statement, and should have noticed the serious nature of the conversation, courts have ruled the silence was an acquiescence. (*See Reed* - admitted statement where employee was called into boss's office and had private conversation with boss; and *Hill* - husband was deemed to have acquiesced where his wife accused him of having an affair in the middle of a serious conversation about their marriage).

Here, Mr. Dobson did not acquiesce by silence. Ms. Gibbs intends to testify that, while at a group dinner out at a restaurant with she, Mr. Dobson, and each of their wives, she made comments to Mr. Dobson about being 'clumsy' and being on his 'phone' when he fell and Mr. Dobson did not respond. Brooks will argue that Mr. Dobson's failure to respond should be deemed silence by acquiescence; however, that would ignore several exceedingly important facts about the dinner. First, Mr. Dobson and Ms. Gibbs were out to dinner at a restaurant, in a group, with each of their wives. Second, the restaurant was not silent nor private, as the usual background sound of conversation at the restaurant permeated in the background. Lastly, each person in the group had already consumed alcohol, as each of them had already drank a beer, thus impairing their judgment. Ms. Gibbs will also testify that nobody said anything for about a minute after she made her comment - notably, *nobody* said anything. Ms. Gibbs did not say anything else, Mr. Dobson did not say anything else, Ms. Gibbs' wife did not say anything else, and Mr. Dobson's wife did not say anything else. Thus, Mr. Dobson was not the only one who was silent in the interim. Lastly, Ms. Gibbs will also testify that she did not make her statements in an accusatory way. Rather, she was just talking about it as a statement of fact and understanding. Based on that knowledge, a reasonable person in Mr. Dobson's position would not be expected to respond because they were not being met with an accusation.

Due to these facts, it is unclear whether Mr. Dobson even heard the statement at the restaurant while at a group dinner with three other people, much less understood its significance in a way that would lead a reasonable person to respond. Therefore, the testimony from Ms. Gibbs should be excluded under 801(d)(2).

All evidence still has to pass through the 403 balancing test. Under Rule 403, relevant evidence will not be admitted if the probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice includes inviting the jury to make a decision based on emotion. Here, the probative value, if any, of Ms. Gibbs' testimony is exceedingly low, whereas the danger of unfair prejudice is exceedingly high. Ms. Gibbs was not present when the accident occurred, she did not witness Mr. Dobson fall, and she has no personal knowledge whatsoever about anything related to the accident. The probative value therefore, if any, is simply based on her speculation

of what may have occurred and her speculation of why Mr. Dobson did not respond. The danger of unfair prejudice, however, is exceedingly high because the jury may simply make an assumption that Mr. Dobson is at fault for the fall without any facts to support it. Therefore, the testimony from Ms. Gibbs should be excluded.

2) The deposition testimony of the emergency room physician is inadmissible because Mr. Dobson did not have a similar opportunity and motive to develop testimony.

Under Rule 801, hearsay is defined as an out of court assertion offered to prove the truth of the matter asserted in the statement. Under Rule 804(b)(1), a hearsay declarant's former testimony is admissible if three requirements are met. First, the witness must be unavailable. Second, the former testimony must have been given as a witness at a trial, hearing, or lawful deposition. Third, the testimony must now be offered against a party who had - or in a civil case, whose predecessor in interest had, a similar motive and opportunity to develop the challenged testimony at the earlier proceeding. *Thomas v. Wellspring*.

In the present case, it is not disputed that the physician is unavailable nor is it disputed that the physician gave testimony at a deposition. However, Mr. Dobson argues that the physician's former testimony is inadmissible because Mr. Dobson is did not have a similar opportunity and motive to develop the testimony.

Rule 804(b)(1) allows the introduction of former testimony to be offered against the same party or a predecessor in interest in a civil case. A 'predecessor in interest' requires a degree of similarity of interest between the parties that justifies treating them as, effectively, the same party for purposes of the rule. There must be some similarity of interest, but the courts have not limited the relationship to the literal meaning of 'predecessor in interest.' *Wellspring*. Failing to require a similarity of interest would nullify the predecessor in interest requirement. *Jacobs v. Klein*. As such, courts have found parties to be predecessors in interest where the parties were suing the same defendants and making the same claim for relief. Here, Mr. Dobson is the same party as in the previous case, and therefore meets the requirement for being a 'predecessor in interest.'

However, Rule 804(b)(1) also requires that the party who the testimony is offered against have had the similar opportunity and motive to develop testimony. Courts use a two-part test when analyzing whether a party had a similar opportunity and motive to develop testimony. First, the courts ask whether the questioner is on the same side of the same issue at both proceedings. Second, courts ask whether the questioner had a substantially similar interest in asserting that side of the issue. Wellspring.

Here, Mr. Dobson does not meet the second prong of two-part test because the claims Mr. Dobson is making are completely distinct, relying on different areas of law, different claims, different issues, and asking for different relief. Most notably, the source of Mr. Dobson's injuries and the cause of his injuries are not at issue in the other case. In the other case, Mr. Dobson is suing a different defendant (the City) and making a claim of employment disability discrimination. He is arguing that the City failed to give him the appropriate amount of time off and that they failed to give him appropriate accommodations. He is not asserting a claim about the reasons why he was injured, but rather he is asserting a claim based on the lack of accommodations he was given after the fact. Additionally, the deposition testimony from the doctor in the previous case did not even touch on the source and causation of the injuries. The doctor simply opined on the severity of the issues because the severity of issues was at the center of the other case. In contrast, the severity of Mr. Dobson's injuries is merely one element of the present claim. At the center of Mr. Dobson's current claim is, rather, the source and causation of the injuries.

Brooks Realty will argue that the deposition is admissible because Mr. Dobson had the 'opportunity' to develop testimony, and because such an 'opportunity' does not require the party to actually develop the testimony. However, although having an 'opportunity' to develop testimony does not actually require the party to develop the testimony, Mr. Dobson's other counsel did not develop cross-examination about the source of Mr. Dobson's injuries because it simply was not in issue in that case. Mr. Dobson's prior counsel simply asked the doctor about other malpractice claims because his motivation for developing that testimony was not similar in

nature to the present case. These cases are entirely distinct, making entirely separate claims and demands for relief.

Lastly, even if the deposition were admissible under the hearsay exception, it is still inadmissible under Rule 403. Rule 403 requires relevant evidence to be excluded when the probative value is substantially outweighed by the danger of unfair prejudice. Here, the probative value of the doctor's testimony, if any, is extremely low. As previously mentioned, the doctor simply recited Mr. Dobson's injuries. It is not an issue in the present case whether Mr. Dobson was injured. Rather, the issue in the present case is how Mr. Dobson was injured, a fact that was not investigated in the other case. The danger of unfair prejudice and risk of confusion of the issues, however, is extremely high. The doctor opined that Mr. Dobson's injuries were not quite as severe as he let on, all the while the severity of Mr. Dobson's injuries is the critical issue in his case that is being litigated. Additionally, the jury in this case would be confused about the issues. Therefore, the low probative value is substantially outweighed by the danger of unfair prejudice.

3) The insurance policy on the property of Brooks Real Estate Agency is admissible to prove that Brooks owned the sidewalk Mr. Dobson was injured on.

Under Rule 411, liability insurance is not admissible to prove fault, but it is admissible for *any other purpose*, including to prove *ownership* (emphasis added). The Advisory Committee Notes broadly allow the introduction of liability insurance, if relevant, "to prove any fact other than fault or lack of fault." Thus, a court may admit evidence for any permissible purpose other than to prove the person acted negligently.

Still, even if the evidence is admissible under Rule 411, the evidence has to pass muster under Rule 403. Under Rule 403, relevant evidence is excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. 'Unfair prejudice' tends to suggest leading the jury to make a decision on an improper basis, namely, though not necessarily, an emotional basis. (Reed; Advisory Committee Notes).

As applied to this case, Mr. Dobson is offering evidence of Brooks' insurance policy on the sidewalk simply to prove that Brooks owned the sidewalk. Brooks' has injected to issue of ownership into this case by claiming that it does not control the sidewalk, and the issue of ownership is directly relevant to Mr. Dobson's negligence claim (duty and breach). Because Mr. Dobson is. offering the evidence to prove ownership, the liability insurance is admissible under Rule 411. Similarly, because it is contended who controls the sidewalk, the insurance policy is directly relevant to prove ownership. Lastly, the policy passes the 403 balancing test because the probative value is not substantially outweighed by the danger of unfair prejudice. The probative value of the policy is incredibly high due to the dispute regarding ownership, and any prejudice that may ensue is not unfair but simply a natural consequence of adverse litigation. This is not the type of prejudice 403 was designed to protect against.

Accordingly, this Court should admit the evidence of liability insurance to prove ownership of the sidewalk.

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