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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES, UNLIMITED JURISDICTION**

JOANN MACKENZIE,  
  
Plaintiff,  
  
vs.  
  
CHARLES SOLOMON, JR., A-LIST  
LIMOUSINE SERVICE, LLC, and DOES 1 to  
100 inclusive,  
  
Defendants.

CASE NO. BC660851  
[Assigned to the Hon. Stephen Goorvitch,  
Dept. 5, Spring Street]

**PLAINTIFF'S MOTION *IN LIMINE* # 2  
TO EXCLUDE REFERENCE TO  
PLAINTIFF'S IRRELEVANT  
PREEXISTING SHOULDER INJURY;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATION OF  
ALAN VAN GELDER; EXHIBIT**

Complaint Filed: May 12, 2017  
FSC Date: April 5, 2019  
Trial Date: April 15, 2019

TO THE HONORABLE COURT AND ALL PARTIES OF RECORD HEREIN:

PLAINTIFF JOANN MACKENZIE brings the following Motion *in Limine* for:

An Order preventing attorneys for all parties, and all witnesses who may be called in this trial, from offering any evidence and/or making any references in the presence of jurors or prospective jurors concerning any argument or references to Plaintiff's irrelevant pre-existing shoulder injury.

1 An Order that the attorneys for all parties shall instruct all parties, and any persons who may  
2 be called as witnesses, of the Court’s exclusionary Order on this Motion.

3 This Motion is made and based on the following grounds:

4 1. Plaintiff’s unrelated pre-existing shoulder injury is entirely irrelevant to this action.  
5 Plaintiff is only claiming specific injuries due to Defendant’s negligence. As such, her preexisting  
6 shoulder injury is irrelevant to the current action. *California Evidence Code* § 350

7 2. Introduction of Plaintiff’s pre-existing irrelevant medical conditions violates Plaintiff’s  
8 right to privacy. *California Constitution*, Art. I, § 1

9 3. Pursuant to *California Evidence Code* section 352, evidence of Plaintiff’s pre-existing  
10 shoulder injury should be excluded because it creates a substantial danger of undue prejudice, of  
11 confusing the issues, of misleading the jury, and will necessitate an undue consumption of time.

12 This Motion is made and based upon all pleadings and papers on file in this action, upon the  
13 Memorandum of Points and Authorities attached hereto, the accompanying Declaration of Alan Van  
14 Gelder, and upon such further oral and documentary evidence as may be presented at the hearing of  
15 this Motion.<sup>1</sup>

16  
17 DATED: April 4, 2019

GREENE BROILLET & WHEELER, LLP

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Alan Van Gelder, Esq.  
Christian T.F. Nickerson, Esq.  
Attorneys for Plaintiff

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28 <sup>1</sup> Prior to filing the motion, Plaintiffs met and conferred with Defendant. The process was unsuccessful,  
requiring the filing of this Motion. *See* Declaration of Alan Van Gelder.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION.**

3 This case arises out of a violent collision caused by the negligence of Defendants Charles  
4 Solomon, Jr. and A-1 List Limousine Service, LLC, which resulted in severe and permanent injuries  
5 and damages to Plaintiff JoAnn MacKenzie’s neck and spine. This incident occurred on June 26,  
6 2015. In September of 2017 Ms. MacKenzie was required to undergo disc replacement surgery in  
7 her spine at C5/6 and C6/7. Although the surgery has helped with Plaintiff’s pain, Plaintiff will  
8 more likely need future surgery and pain management to deal with the permanent damage to her  
9 spine.

10 In February of 2015 (four months prior to the Subject Incident), plaintiff injured her right  
11 shoulder while in the course and scope of her employment. Accordingly, she filed a worker’s  
12 compensation claim and received treatment for that injury through worker’s compensation.<sup>2</sup> This  
13 injury has nothing to do with the injuries and damages to Plaintiff’s neck and spine that are being  
14 claimed in this case.<sup>3</sup>

15 Defendant has retained only one expert on Plaintiff’s injuries, Dr. Kendall Wagner. He was  
16 deposed on April 2, 2019. In deposition Mr. Wagner testified that Plaintiff’s current problems  
17 related to her neck and spine have nothing to do with her shoulder injury.

18 Even though that Defendant’s own expert concedes that Plaintiff’s prior shoulder injury is  
19 irrelevant, Plaintiff anticipates that defense counsel will improperly attempt to introduce this  
20 unrelated injury to the jury to somehow try to argue that Plaintiff is entitled to less damages because  
21 the symptoms she is currently experiencing in her neck and back are somehow caused by her prior  
22 shoulder injury. Such an attempt would be improper, as said evidence is irrelevant, unduly

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24 <sup>2</sup> After meeting and conferring, defense counsel has stipulated that they will not refer to, or introduce evidence  
25 regarding, the fact that Plaintiff filed this worker’s compensation claim or received worker’s compensation  
benefits.

26 <sup>3</sup> It should be noted that in a medical exam of Plaintiff with respect to her shoulder conducted in April of  
27 2015, two months before the incident, the shoulder doctor examined her back and neck and found nothing  
28 wrong with her back and neck. (See Exhibit 1). In the event it becomes necessary to refer to this record at  
trial, Plaintiff would only reference this record as a doctor’s examination and make no reference to the  
shoulder injury.

1 prejudicial, violative of plaintiff’s privacy rights, and will only serve to confuse and mislead the  
2 jury. Accordingly, the fact that Plaintiff had a preexisting shoulder injury should be excluded at  
3 trial.

4 **II. EVIDENCE OF PLAINTIFF’S PRE-EXISTING SHOULDER INJURY IS**  
5 **IRRELEVANT, VIOLATES PLAINTIFF’S PRIVACY RIGHTS, IS UNDULY**  
6 **PREJUDICIAL, AND SHOULD THEREFORE BE EXCLUDED.**

7 **A. Irrelevant.**

8 Under *Evidence Code* § 350 “[n]o evidence is admissible except relevant evidence.”  
9 “Relevant evidence” is “[e]vidence, including evidence related to the credibility of a witness or  
10 hearsay Declarant, having any tendency in reason to prove or disprove any disputed fact that is of  
11 consequence to the determination of the action.” *Evid. Code* § 210. Thus, the test of relevancy is  
12 whether the evidence logically tends to establish a material fact. *People v. Yu* (1983) 143  
13 Cal.App.3d 358, 376. Evidence that is not related to a material fact is irrelevant and therefore not  
14 admissible. *Morocco v. Ford Motor Co.* (1970) 7 Cal.App.3d 84, 91. In *Wade v. Southwest Bank*  
15 (1962) 211 Cal.App.2d 392, the Court held that evidence of collateral facts is excluded as being  
16 incapable of affording any reasonable presumption or inference as to the principal fact or matter in  
17 the case.

18 It is error to admit evidence of dissimilar injuries which are not relevant. **In *Downing v.***  
19 ***Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 525, the trial court erred in**  
20 **allowing evidence of an injury from a prior accident where plaintiff was not claiming the**  
21 **injury was caused by subject incident.** The appellate court held that the evidence had no probative  
22 value. *Id.* at 525. See also *California Trial Practice: Civil Procedure During Trial* (CEB 1999)  
23 Section 7.12, p. 350-51 (evidence of a party's poor health, where irrelevant to a fact in issue, is a  
24 proper item for in limine exclusion).

25 Here, Plaintiff’s pre-existing shoulder injury, which Defendant’s own expert admits is  
26 irrelevant, is wholly collateral to the issues in this case, and is not related to any material fact or  
27 claimed injury. Whether or not Plaintiff injured her shoulder in the past has absolutely no tendency  
28 to prove or disprove any fact of consequence to Plaintiff’s case against Defendants. What is at issue

1 in this case is the conduct of Defendants, and Plaintiff’s injuries to her neck and spine resulting  
2 therefrom. Further, the medical record related to the worker’s compensation treatment for the  
3 shoulder injury in April 2015 states that Plaintiff’s “Cervical spine range of motion appears to be  
4 essentially normal in rotation, lateral tilt, and flexion and extension. The patient does not complain  
5 of pain with rang of motion of the neck.” See Exhibit 1. This further proves that the prior shoulder  
6 injury has no relevance to this case. Accordingly, that evidence should be excluded.

7 **B. Violation of Plaintiff’s Right to Privacy.**

8 California *Constitution*, Art. I, § 1, specifically states:

9 “All people are by nature free and independent and have inalienable rights. Among  
10 these are enjoying and defending life and liberty, acquiring, possessing, and  
11 protecting property, and pursuing and obtaining safety, happiness, and privacy.”

12 “Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her  
13 mantle of privacy.” *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841 -842. See also *Britt v.*  
14 *Superior Court* (1978) 20 Cal.3d 844, 849 (seeking recovery for injuries in an accident “does not  
15 automatically open all of a plaintiff’s past medical history to scrutiny.”)

16 “California voters in 1972 amended article I, section 1 of our state Constitution to include  
17 among the various “inalienable rights” that of “pursuing and obtaining . . . privacy.” The “zones of  
18 privacy” created by this amendment “extend to the details of one’s medical history” (citation  
19 omitted)’ . . . an area of privacy infinitely more intimate, more personal in quality and nature than  
20 many areas already judicially recognized. . . .” (citation omitted) *Gross v. Recabaren* 206  
21 Cal.App.3d 771, 782 (Cal.App.2d Dist. 1988). “Although the amendment to article I, section 1 of  
22 our Constitution “does not purport to prohibit all incursion into individual privacy [,] . . . any such  
23 intervention must be justified by a compelling interest” (citation omitted) *Id.* at 783. Defendants  
24 cannot make a showing of a “compelling interest” to parade Plaintiff’s unrelated shoulder injury in  
25 front of the jury. Accordingly, it is clear that the prior shoulder injury is protected by the right of  
26 privacy and should be excluded from evidence.

1           **C. Plaintiff’s Irrelevant Pre-Existing Shoulder Injury Has No Probative Value and Will**  
2           **Cause Undue Prejudice to Plaintiff.**

3           Even if the prior shoulder injury had some remote relevancy (it does not), it should still be  
4 excluded because the danger of undue prejudice to plaintiff plainly outweighs its probative value.  
5 *Evidence Code* § 352 provides, “The court in its discretion may exclude evidence if its probative  
6 value is substantially outweighed by the probability that its admission will . . . (b) create substantial  
7 danger of undue prejudice, of confusing the issues, or of misleading the jury.” The Supreme Court  
8 defines “prejudice” under *Evidence Code* § 352 as meaning “evidence which uniquely tends to  
9 evoke an emotional bias against. . . an individual and which has very little effect on the issues.  
10 *People v. Karis* (1988) 46 Cal.3d 612, 638. “In other words, evidence should be excluded as unduly  
11 prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use  
12 the information, not to logically evaluate the point upon which is relevant, but to reward or punish  
13 one side because of the jurors’ emotional reaction.” *Vorse v. Sarasy* (1997) 53 Cal.App.4<sup>th</sup> 998,  
14 1009.

15           As explained in *Kessler* 77 Cal.App.3d at 291: “That balancing process requires  
16 consideration of the relationship between the evidence and the relevant inferences to be drawn from  
17 it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the  
18 evidence to the proponent’s cause as well as reasons we cited in section 352 for exclusion.”

19           Here, evidence regarding Plaintiff’s prior shoulder injury is highly prejudicial and will only  
20 confuse and mislead the jury, and waste this Court’s valuable time. Plaintiff will undoubtedly suffer  
21 undue prejudice if the jurors hear evidence that Plaintiff had a shoulder injury in prior to the incident,  
22 or if the defendants are permitted to make unfounded arguments that this shoulder injury is somehow  
23 contributing to Plaintiff’s current symptoms caused by Defendants’ negligence. If the evidence is  
24 admitted, the jury also may improperly speculate regarding whether Plaintiff’s shoulder injury is  
25 somehow related to her current symptoms, or speculate that Plaintiff is entitled to less damages or  
26 that Defendant’s liability is somehow reduced because of this irrelevant and remote injury, as  
27 opposed to basing its verdict only upon the relevant evidence.  
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Finally, if Defendant is permitted to present this irrelevant evidence, and to argue that evidence as Plaintiff anticipates, then time will be spent explaining, among other things, the complex facts of the shoulder injury, and why it has absolutely no bearing in this case against the Defendants. Getting into these issues will only waste time and confuse the jury. Given the foregoing, it is clear that admission of evidence that plaintiff had a prior shoulder injury would undoubtedly consume the valuable time of an already overburdened Court.

**III. CONCLUSION.**

For the above reasons Plaintiffs’ Motion *in Limine* should be granted in full.

DATED: April 4, 2019

GREENE BROILLET & WHEELER, LLP

\_\_\_\_\_  
Alan Van Gelder, Esq.  
Christian T.F. Nickerson, Esq.  
Attorneys for Plaintiff

**DECLARATION OF ALAN VAN GELDER**

I, ALAN VAN GELDER, declare and say that:

I am an attorney at law licensed to practice before all of the courts of the State of California, and am a member of the law firm of Greene Broillet & Wheeler, LLP, attorneys of record for plaintiff JoAnn MacKenzie. As such, I have personal knowledge of the facts surrounding the present action and all facts herein stated. If called as a witness, I could testify competently to the following:

1. Prior to filing this motion, I met and conferred with Counsel for Defendants pursuant to the Local Rules. The parties were not able to informally resolve this dispute requiring Plaintiff to file this motion.

2. This Motion is necessary to ensure that Plaintiff will be accorded a fair trial and that the trial record will not be tainted with reversible error to the prejudice of Plaintiff. If this motion is not granted, Plaintiff will be prejudiced because her unrelated, irrelevant preexisting shoulder injury will be introduced to the jury. If this unduly prejudicial injury is introduced to the jury, Plaintiff's privacy rights will also be infringed.

3. Attached hereto as Exhibit 1 is a true and correct copy of a medical record from the Southern California Orthopedic Instituted dated April 16, 2015.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 4<sup>th</sup> day of April, 2019, at Santa Monica, California.

\_\_\_\_\_  
ALAN VAN GELDER, ESQ.  
Declarant

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