DEFENDANTS' RESPONSE TO PLAINTIFFS BRIEF REGARDING THE ADMISSIBILITY OF EVIDENCE REGARDING PLAINTIFF'S MARIJUANA INTOXICATION

Defendants hereby respond to Plaintiff's Motion in Limine regarding his marijuana use at the time of the accident, and shows the Court as follows:

1. Introduction

Plaintiff seeks to exclude ALL reference to Plaintiff's marijuana consumption at the time of the accident, despite the fact that the Plaintiff turned left in front of a clearly visible dump truck that had the right of way. To that end, Plaintiff launches a two-pronged attack: (1) that Georgia's criminal DUI laws apply in a civil case in federal court; and (2) that "there is no evidence showing an unbroken chain of custody regarding the blood allegedly drawn from the Plaintiff, and the blood tested by the GBI." (Doc. 65, p. 2).

As demonstrated below, Georgia's statutory DUI laws do not govern the admissibility of evidence in federal court, especially in a civil case between private litigants. But even if Georgia's DUI laws apply, the Plaintiff's blood was drawn at the direction of the Georgia State Patrol and tested by the Georgia Bureau of Investigation, not by the Defendants. Finally, any challenge to the chain of custody is wholly unfounded as the phlebotomist at SouthEast Georgia Health System in Brunswick hospital drew the Plaintiff's blood, sealed the Plaintiff's blood in G.B.I. blood tubes, and the G.B.I. forensic toxicologist testified that she did not find any evidence of tampering with the Plaintiff's blood or the seals on the blood. Therefore, the Plaintiff's motion should be denied.

2. Argument and Citation to Authorities

A. Georgia's DUI laws do not govern the admissibility of evidence in federal court.

When federal jurisdiction is based on diversity, as it is in the present case, the Court is to apply state substantive law and federal procedural law. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). It is well-established that in general, "federal courts are not bound by state law when determining the admissibility of evidence." Clark v. Martinez, 295 F.3d 809, 813 n.4 (8th Cir. 2002). Issues of admissibility are not substantive issues, but are procedural, and thus questions of federal law. Grenada Steel v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th Cir. 1983); Fed. R. Ev. 1101(b). Therefore, when it comes to the **admissibility of evidence indicating intoxication**, the Federal Rules of Evidence take precedence over state law. *See, e.g.*, Hansen v. General Motors Corp., 915 F.Supp. 118, 121 (E.D. MO. 1996) (holding Missouri breathalyzer and blood drawing statutes and regulations governing the admissibility of evidence of drinking do not rise to the level of substantive law and therefore cannot displace the Federal Rules of Evidence in a diversity action"); Levitt v. H.J. Jeffries, Inc., 517 F.2d 523, 525 (6th Cir. 1975) (holding that lower court erred in granting motion to exclude evidence of drinking because a United States District Court sitting in a diversity case is not bound by Illinois law, but rather looks to the Federal Rules of Evidence); Huss v. U.S., 738 F.Supp. 1098, 1110 n. 25 (W.D. Mich. 1990) (allowing blood test results even though the test did not conform with evidentiary test put forth by the Michigan Supreme Court); Olson v. Ford Motor Co., 411 F. Supp. 2d 1149, 1154 (D.N.D. 2006)("several [federal] courts have held that the admissibility of evidence regarding intoxication is

governed by federal law.").[1] Accordingly, the Federal Rules, rather than Georgia's DUI laws, govern the admissibility of Plaintiff's marijuana intoxication.[2] And as shown below, this evidence is admissible under the Federal Rules.

B. Evidence of Plaintiff's drug use at the time of the accident is relevant to and probative of accident causation, and Plaintiff's credibility and recollection of the accident.

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[1]Note that Olson addressed North Dakota's DUI law, which states:

> "Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor, drugs, or a combination thereof, evidence of the amount of alcohol, drugs, or a combination thereof in the person's blood at the time of the act alleged as shown by a chemical analysis of the blood, breath, saliva, or urine is admissible. For the purpose of this section:" N.D. Cent. Code, § 39-20-07

And Georgia's DUI law is almost identical to North Dakota's code section:

> "Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, evidence of the amount of alcohol or drug in a person's blood, urine, breath, or other bodily substance at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply:" O.C.G.A. § 40-6-392

[2]But even if Georgia's DUI laws apply, which they do not, these rules do not bar the introduction of this evidence. While not a paragon of clarity, Plaintiff contends that his marijuana use is inadmissible because, according to the Plaintiff, "[t]here is no indication whatsoever that the Plaintiff exhibited any signs of intoxication or impairment. The hospital reports show that the attending physician, Dr. Michael Morin, was of the opinion that the Plaintiff was not impaired." (Doc. 65, pp. 6-7). First, the hospital record is hearsay, and this doctor has never been deposed. But even in a criminal case - - where the State must prove its case under a higher burden of proof - - the doctor's testimony is not the final say so. *See, e.g.*, Fletcher v. State, 157 Ga. App. 707, 709 (1981)(in a criminal case, it was not error to permit the arresting officer to answer the following question: "Do you have an opinion with regard to whether or not the [appellant] was a less safe or not safe driver on that day?") Second, Plaintiff's reliance on Ensley v. Jordan, 244 Ga. 435 (1979) is misplaced since that opinion addressed an issue under Georgia's impeachment statute, and was a matter of state-law evidence, which as shown above does not bind this Court.

As an initial matter, district courts are empowered with broad discretion in determining and ruling on the admissibility of evidence. See Tamez v. City of San Marcos, 118 F.3d 1085, 1098 (5th Cir. 1997); McNeese v. Reading & Bates Drilling Co., 749 F.2d 270, 274 (5th Cir. 1985). The Federal Rules of Evidence generally allow for the admission of all relevant evidence unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. See Fed. R. Evid 402; Fed R. Evid 403. Federal Rule of Evidence 401 provides that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of action more probable or less probable than it would be without the evidence." The Supreme Court favors a liberal standard of admissibility. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

In the former Fifth Circuit case of Ballou v. Henri Studios, Inc., the Court held that the trial court committed reversible error in excluding intoxication evidence in an automobile collision case. 656 F.2d 1147 (5th Cir. 1981). In that case, the defendant attempted to introduce evidence that the plaintiff automobile driver was intoxicated at the time of the collision. The trial court excluded the evidence, relying on Federal Rule of Evidence 403, and the argument that the probative value of the intoxication evidence was substantially outweighed by the potential for unfair prejudice. The former Fifth Circuit reversed, finding "as a matter of law that the potential for unfair prejudice of the test results does not substantially outweigh their probative value":

> Proof of Ballou's intoxication is, of course, highly relevant to and probative of one of the ultimate questions before the jury, Ballou's contributory negligence, and would doubtless have a major effect on the jury's apportionment of fault. On the other hand, in our view the potential prejudice of the test results is comparatively slight. Ballou, at 1155-56.

The same analysis applies to the case at bar. Evidence of Plaintiff's intoxication at the time of the accident is highly relevant to and probative of accident causation, including Plaintiff's fault in turning left in front of a clearly visible truck that had the right way.

Federal courts around the country routinely hold that evidence of a plaintiff's alcohol consumption is relevant to issues of causation and not unduly prejudicial. See, e.g., McInnis v. A.M.F., Inc., 765 F.2d 240, 243-246 (1st Cir. 1985); Levitt v. H.J. Jeffries, Inc., 517 F.2d 523, 525 (6th Cir. 1975); Miles v. Gen. Motors Corp., 262 F.3d 720, 723 (8th Cir. 2001).

In McInnis, a products liability case against a motorcycle manufacturer, evidence that the plaintiff had consumed alcohol prior to a motorcycle crash was relevant to the issue of her contributory negligence. 765 F.2d at 243-246. The plaintiff had told a hospital employee after the crash that she had consumed three beers prior to the crash and had not eaten since the night before. Id. at 243-44. The appeals court upheld the lower court's ruling that evidence of the plaintiff's alcohol consumption was relevant and not unfairly prejudicial, and therefore admissible. Id. at 246. As noted by the appeals court, the lower court concluded that under the particular circumstances, the evidence of drinking permitted a reasonable inference of intoxication. Id. at 244, n. 4.

Similarly, in Levitt, an action brought by a motorist arising out of a collision with a tractor trailer, the appeals court held that the trial court abused its discretion when it excluded evidence that the plaintiff had consumed intoxicants prior to the collision. 517 F.2d at 524-25. Such evidence was relevant even though it consisted only of testimony that several hours prior to the collision, the plaintiff had consumed a number of bottles of beer and smelled of alcohol. Id. at 525. Moreover, the defendants showed that the consumption of intoxicants was a circumstance to be considered by the jury in their determination of

whether or not the plaintiff exercised ordinary care or was contributorily negligent. Id. The court admitted the evidence.

Finally, in Miles, a products liability case against a motorcycle manufacturer and a truck manufacturer, the appeals court held that the lower court did not abuse its discretion when it allowed evidence that the plaintiff smelled of alcohol at the accident scene because such evidence was relevant to the question of whether or not the plaintiff contributed to the accident. Miles, 262 F.3d at 723.

As these cases show, evidence of Plaintiff's drug use at the time of the accident is relevant to and probative of accident causation, and Plaintiff's credibility and recollection of the accident.

C. The probative value of evidence related to Plaintiff's marijuana intoxication at the time of the accident is not substantially outweighed by the danger of unfair prejudice.

Under Federal Rule of Evidence 403, a court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." The former Fifth Circuit Court of Appeals has routinely cautioned, however, that "unfair prejudice as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it is not material. The prejudice must be 'unfair.'" Ballou, 656 F.2d at 1155. Rule 403 contemplates unfair prejudice to mean "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Id. Because Rule 403 allows for the exclusion of relevant evidence, its application "must be cautious and sparing. Its major function is limited to

excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its probative force." United States v. Sawyer, 799 F.2d 1494, 1506 (11th Cir. 1986)

Plaintiff's marijuana intoxication at the time of the accident is not unfairly prejudicial. The evidence is not substantially outweighed by the danger of unfair prejudice. The fact that Plaintiff ingested marijuana prior to the accident is a fact that Plaintiff has known for some time, and Plaintiff will have the opportunity at trial to cross-examine witnesses who testify regarding the subject. As stated by the former Fifth Circuit:

> Although evidence of [the decedent's] intoxication would surely have an adverse effect on the plaintiffs' case, most of the potential prejudice flowing from the evidence cannot be considered to be unfair since [the decedent's] intoxication is unquestionably a legitimate ground for a finding of contributory negligence. Ballou, 656 F.2d at 1155

Thus, the probative value of evidence related to Plaintiff's marijuana intoxication at the time of the accident is not substantially outweighed by the danger of unfair prejudice.

D. Even if for some reason the blood test results are inadmissible, Defendants' forensic expert's testimony regarding Plaintiff's intoxication is still admissible.

The Plaintiff has not challenged Defendant's expert, Jerry Bush, M.D's, opinions in this case. Dr. Bush has opined, among other things, that the Plaintiff "had actively ingested/inhaled marijuana prior to the motor vehicle accident…." and that Plaintiff "was impaired at the time of the accident, to the extent that he was operating his motor vehicle in a less-than-safe manner." (Expert Disclosure, page 9). Even if the test results of the blood analysis are inadmissible for some reason, which they are not, Dr. Bush is still allowed to testify that the Plaintiff was impaired at the time of the accident. In this regard,

the federal rules state that the facts upon which an expert base his opinions do not have to be admissible in evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, **the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted**. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. Fed. R. Ev. 703 (Emphasis supplied)

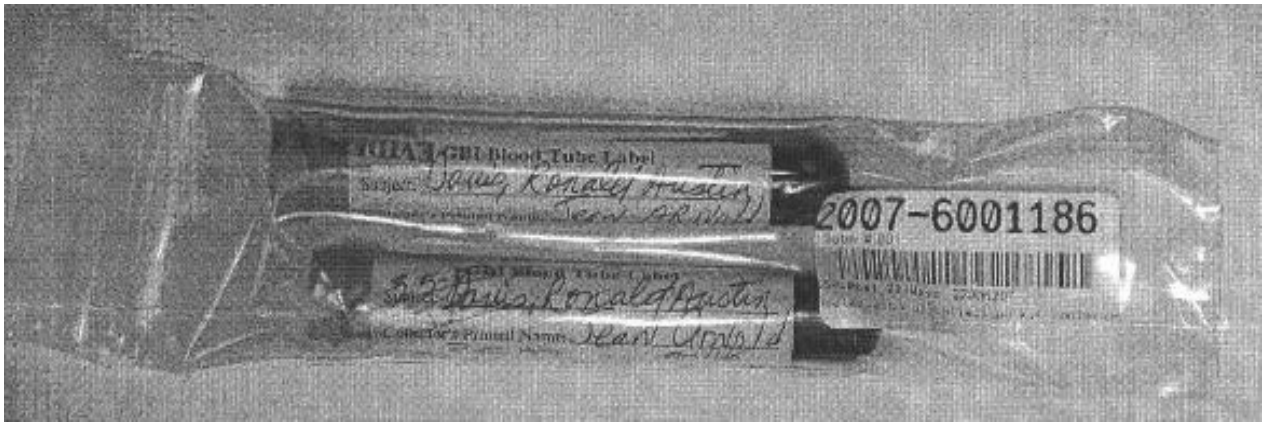
Thus, Dr. Bush should still be allowed to testify regarding Plaintiff's intoxication. And since, as demonstrated in the preceding section, the blood test's "probative value in assisting the jury to evaluate the [Dr. Bush's] opinion substantially outweighs their prejudicial effect," the blood test, even if "otherwise inadmissible" can be disclosed to the jury. Fed. R. Ev. 703

E. Plaintiff's chain-of-custody argument fails

Plaintiff contends that the blood test results are inadmissable because "there is no evidence showing an unbroken chain of custody regarding the blood allegedly drawn from the Plaintiff, and the blood tested by the GBI." (Doc. 65, p. 2). Of course, the law is clear that a "challenge to the chain of custody goes to the weight rather than the admissibility of the evidence." United States v. Block, 148 Fed. Appx. 904, 910 (11th Cir. 2005); *see also* 5-901 Weinstein's Federal Evidence § 901.03 ("the chain of custody need not be perfect to establish the evidence's authenticity."); United States v. Lopez, 758 F.2d 1517, 1521 (11th Cir. 1985) ("the adequacy of the proof relating to the chain of custody is not a proper ground to

challenge the admissibility of the evidence"). Moreover, the evidence shows that there is a chain of custody.

Boiled down to its bones, Plaintiff contends that "[t]here is no showing as to whether [the blood from the Plaintiff] is the same blood tested by Denise Childers,"[3] a forensic toxicologist with the Georgia Bureau of Investigation.[4] But Jean Arnold, a licensed phlebotomist at SouthEast Georgia Health System in Brunswick, testified that she would draw a blood sample at the request of law enforcement; seal the vials of blood; write on the vials of blood; and then put the vials in a box and give the box to the officer. [5] A picture



depicts two "GBI Blood Tubes"; the Plaintiff's name; and Jean Arnold's name:

Ms. Arnold believes the handwriting on the tube is her handwriting, and that she drew this blood and sealed the tube.[6]

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[3]Doc. 65, page 8.

[4]Dep. of Childers, 5:21-24.

[5]Dep. of Arnold, 6:8-9; 8:13-19.

[6]Dep. of Arnold, 8:5-7; 8"24-25; 9:1-5; This photo is attached to Childer's and Arnold's depositions.

Ms. Childers, the forensic toxicologist with the G.B.I., testified generally about the G.B.I.'s receiving and processing of these specimens.[7] And Childers specifically testified that this picture depicts the vials of blood that she received, and that there was no evidence whatsoever that the Plaintiff's blood specimens had been tampered.[8] Regarding the sealing of blood samples, Childers deposed:

> It was sealed with -- the tubes themselves have a very thin -- a thin piece of evidence tape on top, and then it's placed inside of a plastic bag and sealed. And when it's placed inside the bag and closed up, it's usually heat-sealed and has the initials of the person that sealed the bag.[9]

And Childers stated that all of these seals were in place when she received the Plaintiff's blood specimens.[10]Thus, the Plaintiff's contention that "[t]here is no showing as to whether [the blood from the Plaintiff] is the same blood tested by Denise Childers" is factually incorrect.

The Plaintiff further contends that Ms. Childers's "description as to how the vials were packaged differs from that of Trooper Mack." (Doc. 65, p. 8). First, as shown above, the Plaintiff's argument would go the weight and not the admissibility. But more troubling, the plaintiff's statement mischaracterizes Trooper Mack's testimony:

> I witnessed the, like I said, I don't remember if she was a nurse or a lab tech, physically draw the blood, put it in the vials, pack it in the box, and fill out the information, put down the time, and seal it up, and then she handed it to me.[11]

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[7]Dep. of Childers, 7:15-24

[8]Dep. of Childers, 9:4-11; 9:14-22.

[9]Dep. of Childers, 9:24-25; 10:1-5

[10]Dep. of Childers, 10:6-8

[11]Dep. of Mack, 9:1-5

Next the Plaintiff contends that "Trooper Mac's testimony about the person who drew blood describes a different person than Jean Arnold." (Doc. 65, p. 8) In reality, Trooper Mack did not recall the person who drew the blood, though he knew that she was a female.[12] Again, the Plaintiff's argument carries no legal basis.

Finally, Plaintiff contends that "Trooper Mack does not know who he handed the box containing the blood he said he saw drawn to, and there is no evidence as to what became of that blood." (Doc. 65, p. 8) Mack, however, testified that after taking the vials to the GSP station, he left the vials with a radio dispatcher, and believes that Dispatcher Easterling was the person with whom he left the vials.[13] And "as to what became of that blood," Childers' tested the Plaintiff's blood and detected marijuana indicators therein.[14] Thus, plaintiff's chain-of-custody argument fails as a matter of law.

E. Conclusion

Based upon the foregoing, all evidence that Plaintiff had marijuana in his blood stream at the time of the accident should not be excluded because it is highly relevant to the subject of causation and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Thus, the Plaintiff's Motion should be denied.

This the 1st day of February, 2010.

s/ Richard A. Brown, Jr.
Richard A. Brown, Jr.
Georgia Bar Number: 089200

s/ Paul Scott

[12]Dep. of Mack, 16:1-3; 17:6.

[13]Dep. of Mack, 24:23-25; 25:2

[14]See, e.g. Ex. 2 to Dep. of Childers.

BROWN, READDICK, BUMGARTNER,
CARTER, STRICKLAND & WATKINS, LLP
Post Office Box 220
Brunswick, GA 31521-0220
(912) 264-8544
(912) 264-9667 FAX
rbrown@brbcsw.com

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing pleading by addressing same to:

W. Douglas Adams, Esquire
1829 Norwich Street
Post Office Box 857
Brunswick, GA 31521-0857

Ronald E. Harrison, II, Esquire
1621 Reynolds Street
Post Office Box 1983
Brunswick, GA 31521-1983

in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing.

This the 1st day of February, 2010.

s/ Richard A. Brown, Jr.
Richard A. Brown, Jr.
Georgia Bar Number: 089200
BROWN, READDICK, BUMGARTNER,
CARTER, STRICKLAND & WATKINS, LLP
Post Office Box 220
Brunswick, GA 31521-0220
(912) 264-8544
(912) 264-9667 FAX
rbrown@brbcsw.com

ATTORNEY FOR DEFENDANTS