# IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

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**KELLI McKEOWN, )**

**)**

**Plaintiff, )**

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1. **)**

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**CH ALLIED SERVICES, INC. d/b/a )**

**BOONE HOSPITAL CENTER, )**

**) Case No. 11BA-CV05362**

**CENTER FOR FAMILY AND ) INDIVIDUAL COUNSELING, LLC, ) Div. IV**

**)**

**DR. JAMES STRAUB, and )**

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**DR. VICKI STRAUB, )**

**)**

**Defendants. )**

**MOTION AND MEMORANDUM REGARDING VOIR DIRE PROCEDURES**

COMES NOW Plaintiff, by and through her undersigned counsel, and provides the Court this motion and memorandum regarding voir dire procedures in this case.

# PURPOSE

This is a medical malpractice case involving complex issues of mental health and mental health treatment. Plaintiff has been diagnosed with Dissociate Identity Disorder (DID) and Post Traumatic Stress Disorder (PTSD) that stems from severe sexual and physical abuse she sustained as a child. Additionally, she has experienced instances of sexual abuse as an adult.

The details of the childhood abuse Plaintiff believes Defendants will attempt to introduce at trial are horrific. Plaintiff’s allegations against Defendants relate to manipulation and abuse by health care providers she justifiably relied upon to be experts aiding her recovery from her childhood trauma. Due to the manner in which Defendants provided or failed to provide care, Plaintiff’s condition did not improve and, in fact, worsened resulting in a mental condition that

was frozen in a horrific mess of confusion, significantly damaging Plaintiff. Apart from the obvious emotional impact such issues can have on other individuals, Plaintiff’s mental diagnoses, particularly DID, are complex conditions that can be extremely difficult to comprehend. DID is such a nuanced mental condition that it is only truly understood by a few experts throughout the country. As previously stated, the case being submitted to a jury in this instance involves a heart-wrenching and horrific history of child molestation and other forms of abuse. Additionally, the case involves an extremely complex and unusual mental state that requires expert explanation for a person to even begin to grasp them.

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With this understanding, counsel believes using the ordinary and regular voir dire process may not sufficiently provide both sides appropriate information to select an impartial jury in this unusual and difficult case. The issues involving sexual, physical, and mental abuse alone make this a situation that requires a careful crafted voir dire process to ensure an impartial jury will be impaneled.

# SUGGESTIONS IN SUPPORT

1. A review of applicable law reveals certain obvious standards in the voir dire process that should be followed. Although the trial court is vested with substantial discretion in the actual manner in which voir dire is conducted, restricting counsel’s ability to inquire as to critical issues in the selection process at times can be prejudicial and reversible error. *See generally, Wingate v. Cox,* 853 S.W.2d 912 (Mo. banc 1993); *State v. Clark,* 981 S.W.2d 143 (Mo. banc 1998); *State v. Nicklasson*, 967 S.W.2d 596, 611 (Mo. banc 1998); *State v. Mudgett,* 531 S.W.2d 275 (Mo. 1975); *Banks v. Village Enterprises, Inc.*, 32 S.W.3d 780 (Mo. Ct. App. 2000); *State v. Guy,* 770 S.W.2d 362 (Mo. Ct. App. 1989); *Pollard v. Whitner,* 965 S.W.2d 281 (Mo. Ct. App.1998); *Littell v. Bi-State Transit Development Agency*, 423 S.W.2d 34 (Mo. Ct.

App. 1967). The state of Missouri obviously favors voir dire that is conducted by counsel, and failure to be able to delve thoroughly into issues that touch upon the heart of a party’s case can frequently lead to reversal. *See State v. Clark* supra. *See State v. Latel* supra. *See also generally, United States v. Victoria-Peguero,* 920 F.2d 77, 84-85 (1st Cir. 1990); *See Rosalee- Lopez,* 451 U.S. 182, 191 (1981); *Mu'min v. Virginia*, 500 U.S. 415, 424 (1991). At appropriate times, the law favors the use of individual voir dire on particularly sensitive issues. *Berryhill v. Zant,* 858 F.2d 633, 642 – 643 (11th Cir. 1988). Among these cited cases, two cases of note have a particular Boone County, Missouri connection.

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In *Pollard v. Whitner,* the trial court limited the voir dire in a medical malpractice case over the objection of counsel. 963 S.W.2d 281. While eventually that limitation was affirmed on appeal, mainly due to a “preservation issue,” it was a 6 – 5 opinion in which there was an dissent. *Id*. at 284-299. The dissent was written by Judge Stith, who now sits on the Missouri Supreme Court. *Id*. at 293-299 (Stith, J., dissenting). Similarly in *State v. Nicklasson*, there was substantial limitation on death penalty voir dire in a death penalty case heard in St. Louis County. 967 S.W.2d at 609-613. That case was affirmed by the Missouri Supreme Court in a 4 – 3 opinion, *Id.*, but there was a vigorous dissent written by Judge Covington suggesting that the jury selection process was too limited. *Id*. at 622-624 (Covington, J., dissenting). Joining Judge Covington in that dissent was Judge Duane Benton, who now sits on the Eighth Circuit Court of Appeals, and Judge Ronnie White, who served on the Supreme Court and was recently promoted to the United States District Court for the Eastern District of Missouri. Therefore, at a minimum, the issue of using individualized jury selection processes is an issue taken very seriously by the Missouri Supreme Court and would possibly be a cause for reversal. It is clear, though, that cases

which would require an individualized process to secure an impartial jury would definitely be overturned on appeal if such a process was not employed.

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1. Clearly, a key component of this case will be issues that touch upon the topics of mental health, emotional disturbance, childhood sexual and physical abuse, and intimate details of intense therapeutic techniques. Without a doubt, these issues are very sensitive to the average citizen. These would be difficult issues to probe without the use of some type of extended voir dire process. In particular, it would be difficult to fully explore these avenues without the use of some individual voir dire so as not to prejudice the entire panel, or to embarrass the individual juror that may be asked to answer such questions, or to ensure the honest and complete disclosure by individual jurors. Attached hereto as Exhibit A is an affidavit of Charles E. Atwell who is one of Plaintiff’s undersigned counsel in this cause. This is an affidavit that was prepared for Mr. Thomas Carver, a lawyer in Springfield, Missouri, in the course of his preparation of a federal death penalty case. Included in that affidavit from Mr. Atwell is his experience being the trial judge in a certain case that involved similar issues of sexual assault and abuse, *State of Missouri v. Theodore White*, 81 S.W.3d 561 (Mo. Ct. App. 2002); *Theodore White v. Richard McKinley*, 519 F.3d 806 (8th Cir. 2008). In the *White* case, the defendant was initially convicted of committing alleged acts of sexual abuse upon his adopted daughter. *State v. White*, 81 S.W.3d at 563. His initial conviction was eventually reversed due to significant Brady violations. *Id*. at

571. Ultimately, he was acquitted in a retrial of that case. *See* Affidavit of Charles E. Atwell, paragraph 8. In addition to the criminal action, there was a civil suit filed which resulted in a $16 million verdict that was affirmed by the Eighth Circuit Court of Appeals. *See White v. McKinley*, 519 F.3d at 809. Careful review of this affidavit will note that in the jury selection process of one of the Ted White criminal cases, there was a particular circumstance in which a juror was slow to

mention matters of abuse that were truly substantial and significant. *See* Affidavit of Charles E. Atwell, paragraph 9. As displayed by the *White* cases, issues involving such horrific forms of abuse will not be ferreted out just by general questioning in the course of a typical voir dire process. Further, merely asking a jury panel the question of whether they had been the victim of abuse or have had mental health issues, and then asking them if they can set such experiences aside, is clearly insufficient to procure a fair and impartial jury in this case.

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1. The Missouri Supreme Court actually has endorsed the use of individual voir dire in the course of criminal cases. See MAI-CR 300.02; *see also* Affidavit of Charles E. Atwell. Either the Court or counsel could easily identify people who may be responsive to certain questions like, for example, “How many of you have had contact with the mental health system?”; “How many of you have yourself been or have close friends who have been the victim of abuse?”; “How many of you have had loved ones who have had severe mental health issues?”; and “How many of you have had loved ones in long time mental health therapy?” Once identified, those individuals could be questioned outside the hearing of the rest of the jury. That questioning could be conducted by counsel, by the Court, or by a combination of the two. As referenced above, such practice is one that has been endorsed in federal court cases involving trial publicity and other complex matters.
2. In a similar sense, the use of specialized questionnaires can often be helpful as well. See Affidavit of Charles E. Atwell referencing *Newton and Nolte v. Ford Motor Company* and *Carnahan v. Parker-Hannifin Corp*. Not only did these cases allow the use of jury questionnaires, but they also utilized the use of individual questioning. In particular, the jury in the *Carnahan* case was questioned regarding the extent of the publicity to which they had been exposed regarding the tragic death of Governor Carnahan in the plane crash that was the subject

of that litigation. In further support, see the attached example of a specialized questionnaire that was used in *Newton*, with some modifications, and was also used as an example at the Missouri Bar Trial Seminar that was co-sponsored by the Missouri chapter of the American College of Trial Attorneys. *See* Exhibit B, Car Product Liability Confidential Juror Questionnaire.

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1. Another technique that could be used is the technique called a scaled question. A scaled question is a technique in which a question is displayed to the jury and the jury gives a numeric value to that question. For example, the question could read: 1. I believe that medical malpractice cases are almost always frivolous and they greatly burden our system. 10. I believe doctors are frequently careless and that when they are careless they should be sued and large judgments entered. Then you ask people to access a value between 1 and 10, and the resulting responses can be useful in the ultimate selection of an impartial jury.
2. This litigation has been, is, and will continue to be extremely difficult for the Plaintiff to undergo. She has expended significant time and energy, both physical and mental, on this matter. In addition, she has been forced to face her horrifying history repeatedly throughout the course of these proceedings and will have to face it once more at trial. Therefore, it should be clear to the Court how important this case is to the Plaintiff that she is willing to undergo such a traumatic experience in order to have her voice heard in a court of law. In light of this, we ask the Court to recognize the importance of ensuring that an impartial jury is selected in this matter. As Plaintiff has shown above, the typical forms of jury selection will be inadequate to safeguard a fair trial for the Plaintiff, and Plaintiff deserves a fair trial. For this reason alone, Plaintiff respectfully requests that her counsel be permitted, along with counsel for the Defendants, to conduct an individualized voir dire that will be able to uncover private, personal details of juror’s lives to ensure they are well-suited to hear this matter fairly.

# RELIEF REQUESTED

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Specifically the Plaintiff requests the following relief:

1. That the Court conduct pre-trial conference or hearing well in advance of trial to discuss the nature of voir dire process to be utilized in this particular case.
2. That the Court consider the use of individual specialized questionnaire or other technics such as a use of scaled questions.
3. That the Court allow individual voir dire of individual jurors in this particularly sensitive case.

WHEREFORE based upon the foregoing it is hereby requested that this honorable Court conduct a hearing regarding the voir dire process well in advance of trial and further, enter any other relief deemed just and appropriate under the premises.

Respectfully submitted,

# FOLAND, WICKENS, EISFELDER, ROPER & HOFER, P.C.

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# CERTIFICATE OF SERVICE

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I hereby certify that, in conformity with Rule 55.03(a), the original of this electronic filing was signed by me and will be maintained in my file. I further certify that on September 4, 2014, the foregoing was filed electronically using the Missouri Courts eFiling System, which will send notice of electronic filing to the following:

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