

IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

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**Appeal No. ED100952**

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JASON D. DODSON, and JASON D. DODSON, JR., a Minor, and EVA RAINE DODSON-LOHSE, a Minor, and AUGUST WILLIAM DAVIS DODSON, a Minor, said Minors appearing by their duly appointed Next Friend, JASON D. DODSON,

*Plaintiffs/Respondents/Cross-Appellants,*

vs.

ROBERT P. FERRARA, M.D. and MERCY CLINIC HEART AND VASCULAR, LLC,

*Defendants/Appellants/Cross-Respondents.*

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**BRIEF OF DEFENDANTS/APPELLANTS/CROSS-RESPONDENTS  
ROBERT P. FERRARA, M.D. and  
MERCY CLINIC HEART AND VASCULAR, LLC**

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WILLIAMS VENKER & SANDERS LLC

Paul N. Venker, #28768  
Lisa A. Larkin, #46796  
Bank of America Tower  
100 North Broadway, 21<sup>st</sup> Floor  
St. Louis, Missouri 63102  
(314) 345-5000  
(314) 345-5055 Fax  
[pvenker@wvslaw.com](mailto:pvenker@wvslaw.com)  
[llarkin@wvslaw.com](mailto:llarkin@wvslaw.com)

ATTORNEYS FOR DEFENDANTS/  
APPELLANTS/CROSS-RESPONDENTS  
ROBERT P. FERRARA, M.D AND MERCY  
CLINIC HEART AND VASCULAR, LLC

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## JURISDICTIONAL STATEMENT

Plaintiffs/Respondents/Cross-Appellants seek wrongful death damages against Defendants/Appellants/Cross-Respondents arising out of a cardiac catheterization Dr. Robert Ferrara performed on Shannon Dodson in February 2011. (L.F. 14-24; 45-58; 149-163). Defendants deny all allegations. (L.F. 25-32; 59-67; 96-104; 397-404; 405-412).

In August 2013, the parties tried this case to a jury. (L.F. 388-389). At the close of all the evidence, the trial court directed a verdict in favor of Defendants on Plaintiffs' claim for aggravating circumstances damages. (Tr. 1256-1257, A65-A66; 1267, A68). The jury returned a verdict in Plaintiffs' favor on all remaining claims and awarded damages in the amount of \$10,831,155.00, including a total of \$9,000,000.00 for past and future non-economic damages. (L.F. 390-391, Judgment).

All parties timely filed post-trial Motions (L.F. 443-550), culminating in entry of a Second Amended Judgment on December 23, 2013, denying all post-trial Motions except for Defendants' Motion seeking application of the non-economic damage cap, which the trial court granted. (L.F. 789-796, Second Amended Judgment and Order, A1-A8). After reducing the award for past and future non-economic damages to \$350,000.00 pursuant to § 538.210 RSMo., the trial court entered judgment in favor of Plaintiffs for \$2,181,155.00. (L.F. 789-796, Second Amended Judgment and Order, A1-A8).

On December 27, 2013, Plaintiffs timely filed a Notice of Appeal to the Missouri Supreme Court. (L.F. 797). On January 2, 2014, Defendants timely filed a Notice of Appeal to this Court. (L.F. 814). On February 25, 2014, after thorough briefing by both

sides on the issue of proper jurisdiction, the Missouri Supreme Court ordered Plaintiff's appeal transferred to this Court, "where jurisdiction is vested." (SC93917, Order of February 25, 2014, acknowledged by this Court on March 3, 2014). On March 6, 2014, this Court ordered both appeals consolidated into cause number ED100952.

There is no basis for jurisdiction in the Missouri Supreme Court, and jurisdiction of Defendants' appeal and Plaintiffs' cross-appeal is proper in this Court pursuant to Article V, Section 3, of the Missouri Constitution. This case does not involve the validity of a treaty or statute of the United States or of a statute or provision of the Missouri Constitution, the construction of Missouri's revenue laws, the title to any state office, or the imposition of the death penalty. The Circuit Court of the Twenty-First Judicial Circuit (St. Louis County) is within the territorial jurisdiction of this Court. Section 477.050, RSMo (2004).

## STATEMENT OF FACTS

Plaintiffs assert claims for medical negligence/wrongful death involving health care provided Shannon Dodson at Mercy Hospital St. Louis (formerly known as St. John's Mercy Medical Center) (hereafter also "Mercy") from February 8 to February 10, 2011. (L.F. 14-24, Petition). On February 8, 2011, Ms. Dodson presented to the emergency room with a history of fever for two days. (L.F. 17, ¶12, Petition). She experienced chest pain and a non-specific, abnormal electrocardiogram, following a dose of albuterol inhaler, and was admitted to Mercy. (L.F. 17, 19, ¶23, Petition). She came under the care of interventional cardiologist Dr. George Kichura, who ordered an exercise stress echo and blood tests and then recommended a cardiac catheterization for further evaluation. Dr. Robert Ferrara, the on-duty interventional cardiologist, was to perform the procedure. (L.F. 17-18, ¶¶13, 15-18, Petition).

At approximately 3:30 p.m. on February 10, 2011, Dr. Ferrara performed the cardiac catheterization procedure, during which Ms. Dodson suffered a left main artery dissection, which is a known complication. (L.F. 18, ¶19, Petition; Tr. 573:10-22, A34). The dissection compromised blood flow to the left anterior descending artery. (L.F. 18, ¶19, Petition). Efforts to address the complication proved ineffective, and Ms. Dodson was taken emergently to the operating room. (L.F. 18, ¶20, Petition). All surgical efforts to restore cardiac function also proved unsuccessful, and Ms. Dodson was pronounced dead at 7:57 p.m. on February 10, 2011. (L.F. 19, ¶21, Petition).

Plaintiffs' claims are essentially that Dr. Ferrara, as an employee of Defendant Mercy Clinic Heart and Vascular, LLC, was negligent in his care and treatment of Ms.

Dodson once the dissection had occurred, including the failure to undertake certain treatment efforts, the failure to timely arrange for a surgical consultation, and the failure to immediately stent the vessel or use a guide wire to open the vessel. (L.F. 158-160, ¶27, Second Amended Petition). Plaintiffs also sought punitive/aggravating circumstances damages against both Defendants. (L.F. 161-162, Second Amended Petition).

The jury trial began on August 19, 2013. (Tr. 84). At the close of all the evidence, the trial court directed a verdict in favor of Defendants on Plaintiffs' claim for punitive/aggravating circumstances damages. (Tr. 1256-1257, A65-A66; 1267, A68). On August 29, 2013, the jury returned a verdict in Plaintiffs' favor on all remaining claims and awarded damages in the total amount of \$10,831,155.00, broken out as follows:

Past economic damages including past medical damages	\$305,737.00
Past non-economic damages	\$1,000,000.00
Future economic damages	\$1,525,418.00
Future non-economic damages	\$8,000,000.00

(Tr. 1401, A71; L.F. 388-389, Verdict). All parties filed timely post-trial motions. (L.F. 443-550). The trial court reduced the award for past and future non-economic damages to \$350,000.00 pursuant to § 538.210 RSMo., and entered judgment in favor of Plaintiffs for \$2,181,155.00. (L.F. 789-796, Second Amended Judgment and Order, A1-A8).

**A. Trial Testimony Relevant to Defendants' Points Relied On**

**1. Plaintiffs' Question to Defendants' Expert Witness, Dr. Edward Geltman, Postulating the Unwillingness of St. Louis Physicians to "Testify to the Truth" Against Other St. Louis Physicians**

On direct examination, Dr. Edward Geltman, Defendants' expert witness, had not been questioned in any way about, and did not testify to whether he would or would not review a case on behalf of a St. Louis-based plaintiff. (Tr. 731:5-780:23, A47-A59).

However, during cross-examination, Plaintiff's counsel asked Dr. Geltman, the first of Defendants' expert witnesses to testify, what his practice would be if contacted by a St. Louis-area attorney regarding reviewing a case on behalf of a local plaintiff. (Tr. 787:2-14, A60; Tr. 790:17-791:12, A61). Dr. Geltman testified he believed he would have a conflict of interest in terms of his St. Louis-based health care consulting work and would refer those attorneys to an out-of-state physician who could provide them the guidance they need on the case. (Tr. 787:2-14, A60; Tr. 790:17-791:12, A61).

Plaintiffs' counsel, over Defendants' counsel's relevancy and prejudice objections (Tr. 791:13-792:12, A61), then asked Dr. Geltman the following:

Q. Dr. Geltman, if folks in St. Louis can't get St. Louis doctors to come in and testify to the truth, what they felt in their heart, feel was handled wrong by a physician in St. Louis, how can we – how can anybody in St. Louis get the care that we are entitled to?

(Tr. 792:14-19, A61).

**2. Plaintiffs' Pursuing the Admission of Questions To and Answers of Dr. Ferrara Regarding Certain of His Post-Care Conduct in not talking to surgeon, Dr. Jeanne Cleveland**

Over Defendants' objections (Tr. 302-305, A18-A19; Tr. 319-320, A22), Plaintiffs' counsel was permitted to play for the jury the following testimony of Dr. Ferrara about his not having spoken with cardiothoracic surgeon, Dr. Jeanne Cleveland (who performed Ms. Dodson's emergency by-pass surgery) *after* Ms. Dodson died:

Q. Have you talked to Dr. Cleveland at all since this night about what her observations or conclusions were?

A. No, I have not.

Q. Even after Shannon died, you never consulted her to talk about her surgery and what she thought?

THE WITNESS: I don't recall having a – you know, I might have had a brief conversation. I, I don't recall what was said at the conversation.

Q. (BY MR. GRAHAM) Were you, were you curious at all about what Dr. Cleveland found and did?

A. Yes, absolutely. But I mean I did read the operative report too, and that pretty much laid everything out.

(L.F. 860, Transcript of Dr. Ferrara, p. 116:9-117:4, A78).

**3. Friend and Co-Worker, Maria Kossmeyer's Testimony  
Regarding Ms. Dodson's Career Path and Future Earning  
Potential**

Before trial, Defendants filed Motions in Limine seeking to preclude Ms. Dodson's friend and co-worker, Maria Kossmeyer, from testifying to decedent's alleged long-term career path and potential income. (L.F. 139-140; L.F. 308-312). At trial, Defendants again objected that Ms. Kossmeyer should not be allowed to testify due to the speculative nature of her testimony regarding Ms. Dodson's career path and future earning potential. (Tr. 52:25-55:13, A16-A17; Tr. 308:15-319:9, A19-A22; Tr. 388:10-396:18, A23-A25). The trial court denied the Motion in part and allowed Ms. Kossmeyer to testify that Ms. Dodson was likely to receive a promotion and raise in 2011 to \$45,000 per year, and a further promotion and raise within five years after that, to \$55,000 annually. (Tr. 395:12-21, A25). This was Plaintiffs' only evidence on this point, in that Plaintiffs' economist expert did not analyze or provide any statistics or other labor information regarding career paths and future earning potential for Ms. Dodson in particular or property managers in general. (*See* Tr. 685-720, A37-A45).

Maria Kossmeyer testified she is a professional property manager and was Shannon Dodson's last supervisor or boss. (Tr. 400:25-401:9, A26-A27). She worked with Ms. Dodson for about two and one half years at CRBE and later at McShane Health Properties after McShane Health Properties began managing certain properties at St. Anthony's Medical Center. (Tr. 401:10-11, A27; Tr. 401:19-402:11, A27). At the time of Shannon Dodson's death, she was the assistant property manager at McShane Health

Properties with a salary of roughly \$42,000. (Tr. 403:20-404:2, A27). Over Defendants' objections (Tr. 404, A27), Ms. Kossmeyer was allowed to testify that with a promotion, Ms. Dodson's salary would have increased to what Ms. Kossmeyer "would estimate [to be] around \$45,000.00." (Tr. 404:3-404:24, A27).

Ms. Kossmeyer also testified that, based on her background and experience, she was familiar with what property managers and assistant property managers earn in the St. Louis market. (Tr. 404:25-405:4, A27-A28). Over Defendants' objections (Tr. 406-07, A28), she was allowed to testify to what she herself earned as a property manager while working for Lillibridge, the company which bought McShane Health Properties' portfolio. (Tr. 405:25-407:6, A28).

Ms. Kossmeyer was also asked, over Defendants' objection (Tr. 409:8-10, A29), whether she had formed a belief or opinion as to "whether [Ms. Dodson] had a future in the real estate management business." (Tr. 409:4-11, A29). Ms. Kossmeyer responded that there was no question that Ms. Dodson had a talent for the work, was well-liked and well-respected, and that they had discussed her obtaining either a CPM (Certified Property Manager) or RPA (Real Property Administrator) designation at some point in the future. (Tr. 409:12-18, A29).

On cross-examination, Ms. Kossmeyer admitted McShane, the company for which she and Ms. Dodson worked, no longer existed and that she herself also had left the employ of her next employer, Lillibridge, to seek better opportunities. (Tr. 413:15-23, A30). She further admitted that in terms of her projections as to what Ms. Dodson might have earned in the future, it was based on her own career path and promotions, and on her

personal opinion based upon what she has seen with other assistant property managers who have advanced into the property management position. (Tr. 414:24-415:8, A30). Thereafter, Ms. Kossmeyer testified, over Defendants' objections (Tr. 417:13-16, A31), that based upon her familiarity with what salary Ms. Dodson was earning at the time of her death and the salary of the subsequent assistant property manager hired after Ms. Dodson died, she "felt" that Ms. Dodson's salary would have increased to \$45,000.00. (Tr. 416:16-417:18, A30-A31). Based upon that same testimony, she was allowed to testify, over Defendants' objections (Tr. 418:1-3, A31), that Ms. Dodson's annual salary five years into the future would have increased to \$55,000.00. (Tr. 417:20-418:6, A31). She admitted, however, that she has never offered or given a similar opinion for anyone else. (Tr. 418:11-15, A31).

#### **4. Testimony Regarding An Alleged Loss of A Health Insurance Benefit**

Plaintiff Jason Dodson testified he sustained a loss of fringe benefits valued at \$500 per month because it costs him \$500 more each month to insure his children on his employer's health insurance plan (Legal Services of Eastern Missouri) than it did to insure his children through decedent's employer's (McShane Realty) health insurance plan. (Tr. 681:7-682:6, A36). The only evidence Plaintiffs produced as to the cost of health insurance through Legal Services was a copy of an unauthenticated e-mail to Jason Dodson from an individual purportedly with Legal Services, which indicated the monthly cost to insure the children is approximately \$500. (Tr. 714:12-715:5, A44). Plaintiffs'

economist, Jay Marsh, used this email to testify that the annual loss of insurance fringe benefits amounts to \$6,000.00 per year. (Tr. 714:12-715:8, A44).

Under Mr. Marsh's various scenarios as presented to the jury, he carried the \$6,000.00 yearly loss out to age 67 or 70 in terms of Ms. Dodson's anticipated retirement age and up to age 76 in terms of her work life expectancy. (Trial Exhibit 14A; Tr. 716:8-17, A44). Mr. Marsh's explanation was that Mr. Dodson "could have benefited from group insurance through his wife." (Tr. 718:10-14, A45). Although Mr. Dodson is currently employed by Legal Services, Mr. Marsh testified that many lawyers ultimately become self-employed and that Mr. Dodson may at some point do the same. (Tr. 716:18-23, A44). As a result, according to Mr. Marsh, "there's some likelihood that Mr. Dodson at some point could have benefitted from his wife having insurance through her employer." (Tr. 716:23-25, A44). There was no testimony presented that Mr. Dodson planned to one day become self-employed. Further, Mr. Marsh testified that he was not asked to assess or estimate Mr. Dodson's career path. (Tr. 717:15-17, A45).

**B. Jury Instruction No. 4 – MAI 2.07 (non-mandatory)**

At Plaintiffs' counsel's request and over Defendants' objections (Tr. 1268:8-1273:19, A68-AA70), the trial court submitted the following non-mandatory MAI instruction to the jury:

The existence or non-existence of any type of insurance, benefit, right or obligation of repayment, public or private, must not be considered or discussed by any of you in arriving at your verdict. Such matters are not relevant to any of the issues you must decide in this case.

(L.F. 378; MAI 2.07, A9).

Plaintiffs' counsel argued its submission to the jury was necessary due to insurance benefit evidence which Plaintiffs presented through Jason Dodson and Plaintiffs' expert economist (as mentioned in the immediately prior portion of this Statement of Facts). (Tr. 1268:25-1269:7, A68-A69). Plaintiffs' counsel also argued MAI 2.07 was necessary because of the admission into evidence of medical bills from Mercy Hospital and clinics (L.F. 518-533, Trial Exhibit 11), which included both the amounts billed for health care and the final amounts as adjusted. (Tr. 1271:9-12, A69). There is no indication in the trial record that, other than hearing Jason Dodson's testimony that the total hospital and physician charges amounted to \$98,535.79 (Tr. 670:1-9, A35), the jury saw the specific pages of Exhibit 11 which referred to insurance payments or adjustments.

At the jury instruction conference, Plaintiffs' counsel said MAI 2.07 should be given and that the instruction "is meant to encompass any situation where insurance benefits are in evidence." (Tr. 1271:6-8, A69). "All we're doing is telling the jury that they're not to consider, in arriving at their verdict, whether or not there existed any type of insurance. So there's no real prejudice to the defendant by submitting this." (Tr. 1272:5-10, A69).

**C. Motion for Directed Verdict At The Close Of Plaintiffs' Case On Plaintiffs' Claim for Punitive/Aggravating Circumstances Damages.**

At the close of Plaintiffs' case, Defendants moved for a directed verdict on Plaintiffs' claim for punitives/aggravating circumstances damages. (L.F. 327-343; Tr.

726:8-730:21, A46-A47). The trial court deferred ruling until after the close of all the evidence, expressing uncertainty as to whether Plaintiffs had presented enough evidence to survive the Motion. (Tr. 728:18-730:13, A46-A47). “I’m going to withhold my decision on punitives, but frankly, Mr. Graham, I’m not sure that there’s enough for me. My inclination is always to send it to the jury and we’ll see, ... but I’m not sure in this case that there’s enough.” (Tr. 730:7-13, A47). Thereafter, at the close of all the evidence and on Defendants’ renewed Motion for Directed Verdict, the trial court directed a verdict in favor of Defendants on Plaintiffs’ claim for aggravating circumstances damages. (L.F. 344-360; Tr. 1245:25-1267:7, A63-A68).

In the interim, due to the trial court’s decision to defer ruling on Defendants’ Motion for Directed Verdict close of Plaintiffs’ case on the punitives/aggravating circumstances claim, Defendants presented certain evidence to the jury in their own case-in-chief to defend against the claim that Dr. Ferrara improperly delayed sending Ms. Dodson to surgery and to rebut the claim of willful, wanton, or malicious misconduct. Specifically, Defendants presented evidence of two other arterial dissections. First, there was an instance where Dr. Ferrara’s patient had experienced a dissection during a cardiac catheterization. (Tr. 921:4-922:20, A62). In that instance, the patient, who survived, went to surgery about one hour and 15 minutes after the dissection was detected. (Tr. 922:5-14, A62). In the other instance, which Dr. Ferrara merely observed, the patient, who also survived, did not go to surgery for approximately 45 minutes from the detection of the dissection. (Tr. 922:21-923:3, A62).

**POINTS RELIED ON**

**I. The trial court erred in permitting Plaintiffs' counsel to pose an argumentative question, over Defendants' objections, to Defendants' expert cardiologist, Dr. Edward Geltman, because Plaintiffs' counsel used the question to accuse all St. Louis physicians of being unwilling to "testify to the truth" in medical malpractice cases against other St. Louis physicians in that such credibility and character attacks impugned St. Louis physicians at large, as well as Dr. Geltman and Defendants' other St. Louis physician witnesses in the case, and such attacks are improper, prejudicial and are reversible error under Missouri law.**

*Yingling v. Hartwig*, 925 S.W.2d 952 (Mo.App. W.D. 1996)

*Weidower v. ACF Industries, Inc.*, 763 S.W.2d 333 (Mo.App. W.D.

1989)(overruled as to standard of review by *Hampton v. Big Boy Steel*

*Erection*, 121 S.W.3d 220 (Mo. banc 2003)

*Allen v. Andrews*, 599 S.W.2d 262 (Mo.App. S.D. 1980)

*Warnke v. A. Leschen & Sons Rope Co.*, 178 S.W. 76 (Mo. 1915)

**II. The trial court erred in denying Defendants' Motion for New Trial because the trial court abused its discretion in permitting Plaintiffs' counsel to question Dr. Ferrara about his not, after Ms. Dodson's death, ever having spoken with Ms. Dodson's surgeon, Dr. Jeanne Cleveland, about what "she found and did" in that any such post-health care conduct was irrelevant and prejudicial and incited the jury to believe Dr. Ferrara did not care about Ms. Dodson.**

*Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38 (Mo.App. E.D. 2007)

*Shelton v. City of Springfield*, 130 S.W.3d 30 (Mo.App. S.D. 2004)

*Nolte v. Ford Motor Co.*, --- S.W.3d ---, 2014 WL 6915163 (Mo.App. W.D.,  
December 9, 2014)

Section 538.210.5 RSMo. (2005)

**III. The trial court erred in giving Instruction No. 4 (MAI 2.07 – non-mandatory) at Plaintiffs’ request and over Defendants’ objection because it was confusing and lacked foundation in that Plaintiffs’ counsel argued it should be given because there was evidence of insurance benefits in Plaintiffs’ case, but the instruction directed the jury to not consider insurance benefits, and therefore, under these circumstances the instruction was irrelevant and, consequently, gratuitously injected the issue of insurance in the case, which is impermissible and reversible error.**

*Wilson v. Kaufmann*, 847 S.W.2d 840 (Mo.App. E.D. 1992)

*Ivy v. Hawk*, 878 S.W.2d 442 (Mo. banc 1994)

*Ballinger v. Gascoage Elec. Coop.*, 788 S.W.2d 506 (Mo. banc 1990)(overruled  
on other grounds by *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809  
S.W.2d 384 (Mo. banc 1991).

MAI 2.07 [2012 New] Explanatory – Insurance, Benefits

**IV. The trial court erred in denying Defendants’ Motion for Directed Verdict, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial, because Plaintiffs failed to make a submissible case for loss of economic support, in that: (1) the trial court erred in permitting Plaintiffs’ witness, Maria**

**Kossmeyer, a friend and one-time co-worker of Ms. Dodson, to offer testimony as to Ms. Dodson's future career path and earnings because it was speculative, without proper foundation, and lacked reasonable certainty; and, (2) Plaintiffs' evidence that Shannon Dodson's health insurance benefit of \$500.00 per month for family coverage would extend into the future until she reached at least the age of 67 (well past the age of majority for the three minor children) was speculative and unsupported.**

*Thienes v. Harlin Fruit Company*, 499 S.W.2d 223 (Mo.App. 1973)

*Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780 (Mo.App. 1992)

*Fairbanks v. Weitzman*, 13 S.W.3d 313 (Mo.App. E.D. 2000)

**V. The trial court erred in failing to grant Defendants' Motion for Directed Verdict on Plaintiffs' claim for aggravating circumstances damages, instead of waiting to grant Defendants' Motion at the Close of All the Evidence, because Plaintiffs did not present evidence in their case in chief sufficient to submit their claim for aggravating circumstances damages, and Defendants were prejudiced by being compelled to introduce evidence of two prior arterial dissections Dr. Ferrara either knew of or was involved in to establish Defendants' defense to the claim for aggravating circumstances, showing Dr. Ferrara's perspective on how long he reasonably had to deal with Ms. Dodson's arterial dissection, which would not otherwise have been introduced and which was clearly prejudicial to Defendants' defense of a negligence only claim.**

*Arnold v. City of Maryville*, 85 S.W. 107 (Mo.App. 1905)

*Ziervogel v. Royal Packing Co.*, 225 S.W.2d 798 (Mo.App. 1949)

*Moon v. Hy-Vee, Inc.*, 351 S.W.3d 279 (Mo.App. W.D. 2011)

*Peters v. General Motors Corp.*, 200 S.W.3d 1 (Mo.App. W.D. 2006)

## ARGUMENT

**I. The trial court erred in permitting Plaintiffs' counsel to pose an argumentative question, over Defendants' objections, to Defendants' expert cardiologist, Dr. Edward Geltman, because Plaintiffs' counsel used the question to accuse all St. Louis physicians of being unwilling to "testify to the truth" in medical malpractice cases against other St. Louis physicians in that such credibility and character attacks impugned St. Louis physicians at large, as well as Dr. Geltman and Defendants' other St. Louis physician witnesses in the case, and such attacks are improper, prejudicial and are reversible error under Missouri law.**

### A. Summary of Argument

Plaintiffs' unprovoked statement during cross-examination of Dr. Edward Geltman that St. Louis physicians will not "testify to the truth," impugned the credibility of Dr. Geltman and all St. Louis physicians, including those whom were called as witnesses later in the trial, and also bolstered Plaintiffs' non-St. Louis physician witnesses, thereby severely prejudicing Defendants.

### B. Standard of Review

The standard of review for the denial of a motion for new trial is abuse of discretion by the trial court. *M.E.S. v. Daughters of Charity Services of St. Louis*, 975 S.W.2d 477, 482 (Mo.App. E.D. 1998). A new trial will be available upon a showing that trial court error or misconduct by the prevailing party incited prejudice in the jury. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 372 (Mo. banc 1993). While a trial court is accorded broad discretion in admitting evidence, only relevant evidence is admissible.

See *Pittman v. Ripley County Memorial Hosp.*, 318 S.W.3d 289, 293-294 (Mo.App. S.D. 2010). “The test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence.” *Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. banc 1993)(citing *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991)).

“Irrelevant testimony is excluded because such evidence tends to draw the minds of the jurors away from the point at issue and misleads [the jurors].” *Ward v. Kansas City Southern Ry. Co.*, 157 S.W.3d 696, 699 (Mo.App. W.D. 2004)(quoting *Luechtefeld v. Marglous*, 151 S.W.2d 710, 713 (1941)). It is presumed that erroneously admitting any evidence whose only purpose is to mislead jurors is prejudicial. *Id.*

**C. Plaintiffs’ counsel’s “question” to Dr. Geltman, which was no more than his voluntary statement/argument postulating that St. Louis physicians will not testify to the truth, was irrelevant and clearly improper, prejudicial, misleading and confusing in that it was an attempt to inflame the jury.**

The trial court prejudicially erred in overruling Defendants’ objection to Plaintiffs’ cross-examination of one of Defendants’ expert witnesses, Dr. Edward Geltman. Plaintiff interrogated Dr. Geltman on the irrelevant and prejudicial topic of a perceived unwillingness on the part of St. Louis-based physicians to testify “to the truth” against other St. Louis-based physicians.

During cross-examination, Dr. Geltman testified that if contacted by a St. Louis-area attorney regarding reviewing a case on behalf of a plaintiff, he would have a conflict of interest in terms of his St. Louis-based consulting and would refer those attorneys to an

out-of-state physician who could provide them the guidance they need on the case. (Tr. 787:2-14, A60). Plaintiffs' counsel continued:

Q. You've indicated that it would not be good for your referral business if you testified for plaintiffs against health care providers in St. Louis; is that right?

A. That's correct.

Q. So if a – if a lawyer, any lawyer came to you with a medical chart and said, “I want you to look at this and give me your honest opinion whether this injury or death occurred because of medical negligence or something the doctor did very, very wrong,” but it was a St. Louis case, you wouldn't look at that?

A. No, I would look at it. I would look at them; I would give them my opinion as to whether or not I thought there was a cause to pursue it. And if there was, I would then give them the name of a reputable physician who would not have a conflict of interest who could then review it for them.

Q. But you wouldn't –

A. I would have a conflict of interest. I don't want to have a conflict of interest. That's inappropriate.

Q. If people in the St. Louis community can't get –

MR. VENKER: Your Honor, may we approach?

(Counsel approached the bench and the following proceedings were held:)

MR. VENKER: Your Honor, I'm going to object to this line of questioning. Now he's going to ask this witness if people in St. Louis can't get local doctors to testify on their behalf, how are they going to prosecute

medical malpractice cases. What's this got to do with cross-examination of this witness in this case? That's some kind of empirical social policy question.

I object to it as irrelevant. I think – not even anything to do with anything in this case. I think –

MR. GRAHAM: That's just prejudice.

MR. VENKER: Well, I think it injects possible prejudice in this case. So I object on those grounds.

THE COURT: Overruled.

(Proceedings resumed in open court.)

THE COURT: You may continue, Mr. Graham

MR. GRAHAM: Thank you.

(Tr. 790:17-792:12, A61).

Plaintiffs' counsel, over objection, then asked Dr. Geltman the following:

Q. Dr. Geltman, if folks in St. Louis can't get St. Louis doctors to come in and testify to the truth, what they felt in their heart, feel was handled wrong by a physician in St. Louis, how can we – how can anybody in St. Louis get the care that we are entitled to?

(Tr. 792:14-19, A61)(emphasis added)(see also Post-Trial Motion Hearing for November 22, 2013, Tr. 1467:16-1478:12, A72-A75; Tr. 1486:14-1488:12, A76; Tr. 1489:14-1491:16, A77).

This line of questioning by Plaintiffs' counsel culminated in a "question" which on its face cast aspersions on the character, veracity and credibility of all St. Louis physicians. This question and statement by counsel was both improper and inadmissible not only because it failed any relevancy test, but it also improperly commented on the credibility of Dr. Geltman, other witnesses, and at the every least, confused and misled the jury away from the relevant issues in the case.

We must begin with relevancy because it is the foundational, gate-keeping legal principle for all evidence at trial. Missouri courts are loath to permit irrelevant evidence into a trial because, inherently, such evidence puts a fair trial in jeopardy. "Trials before juries ought to be conducted with dignity and in such manner as to bring about a verdict based solely on the law and the facts." *Calloway v. Fogel*, 213 S.W.2d 405, 409 (Mo. 1948). Courts cannot be too careful to see that juries are entirely free from improper influences, or even the suspicion of such. *Stutz v. Milligan*, 223 S.W. 128, 129 (Mo.App. 1920).

Relevancy is the key criterion for the admission of evidence. *Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38, 43 (Mo.App. E.D. 2007). Evidence must be both logically and legally relevant to be admissible. *Id.* For evidence to be admissible it must satisfy both prongs of this bifurcated relevancy standard. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo.App. S.D. 2004).

Evidence is logically relevant only if it tends to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without that evidence. *Westerman v. Shogren*, 392 S.W.3d 465, 474 (Mo.App.

W.D. 2012). To determine legal relevance, on the other hand, “the court must weigh the probative value, or usefulness, of the evidence against its costs, specifically the dangers of unfair prejudice, confusion of the issues, undue delay, misleading the jury, waste of time, or needless presentation of cumulative evidence.” *Kroeger-Eberhart*, 254 S.W.3d at 43. “The trial court must measure the usefulness of the evidence against its cost, and if the cost outweighs the usefulness, then the evidence is not legally relevant, and the court should exclude it.” *Id.*

Judicial adherence to this overarching principle of relevancy manifests itself in as many ways as the tactics which parties – both defendants and plaintiffs – have attempted to use to circumvent it in the interest of obtaining a verdict for their client. “[A]ssertions unwarranted by the proof and intended to arouse hatred or prejudice against a litigant or the witnesses are condemned as tending to cause a miscarriage of justice.” *Calloway v. Fogel*, 213 S.W. 2d , at 409. For example, courts have held: it is improper for a party to try to engender hatred or prejudice against another party by appealing to regional bias (*Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839, 845 (Mo. banc 1992)); and, it is always improper, where there is no evidence to support it, for counsel to make an argument to the jury which tends towards the prejudice of a party (*Calloway v. Fogel*, 213 S.W.2d 405, 409 (Mo. 1948)).

In keeping with this concern for relevancy and, with it, some semblance of fairness, Missouri courts have also held that neither witnesses nor counsel are permitted to comment on the credibility of witnesses or to impugn their character by their own voluntary statements or otherwise.

For example, in *Yingling v. Hartwig*, 925 S.W.2d 952, 956 (Mo.App. W.D. 1996), the appellate court reversed the decision of the trial court to allow a defense expert to make broad, prejudicial statements reflecting on “people not in litigation” and “people who are in litigation” that had no probative value to the specific issues in the case. 925 S.W.2d at 956-57. The defense expert, an orthopedic surgeon, testified that, in general, litigants tend to “get over” their injuries after their lawsuit is concluded. *Id.* at 956.

In holding this testimony to be irrelevant and prejudicial, the appellate court noted, “A court of law is not a public forum, and witnesses are not permitted to make general declarations about matters wholly unrelated to the parties.” *Id.* at 956. The court found the testimony pertained to collateral matters that injected controversy and confusion into the case, and the prejudice was wholly disproportionate to any possible value or usefulness of the offered evidence. *Id.*

The appellate court also found the testimony was, in essence, a comment on a plaintiff's credibility in that it implied that plaintiffs generally falsify their subjective complaints for the purpose of furthering their lawsuit and increasing their damages. *Id.* The testimony was also an inadmissible personal opinion of the expert witness designed to attack the plaintiff's credibility and to bias the jury against plaintiffs. *Id.* (citing *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984) “[E]xpert opinion testimony is not admissible as it relates to credibility of witnesses.” *Taylor*, 663 S.W.2d at 239.

Other cases have also utilized the limitations of relevance as seen in *Yingling*, *supra*, to set aside jury verdicts. In the worker's compensation retaliatory discharge case of *Wiedower v. ACF Industries*, the court found that the testimony of plaintiff's expert, a

former chairman of the Labor and Industrial Relations Commission, amounted to an irrelevant, confusing and prejudicial diatribe on the history of the underlying worker's compensation proceeding. *Wiedower v. ACF Industries, Inc.*, 763 S.W. 2d 333, 335-336 (Mo.App. W.D. 1989)(overruled as to standard of review by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). The trial court granted a new trial, based on that improper testimony and plaintiff appealed that ruling. *Id.*

In affirming the trial court, the *Wiedower* court found the witness's testimony had "no probative effect on the issue of whether plaintiff was discharged for filing a [worker's compensation] claim. Furthermore, the trial court found the admission of this evidence to have appealed to the jury's sympathies and provoked an instinct to punish defendant because of the numerous proceedings and time span of the case." *Id.* at 336. Consequently, the appellate court affirmed the trial court's granting of a new trial.

In *Allen v. Andrews*, 599 S.W.2d 262 (Mo.App. S.D. 1980), the court dealt with the misconduct of a witness making a voluntary statement about Plaintiffs in general. There, one of plaintiff's treating physicians offered his own opinion that plaintiffs seeking monetary damages in litigation "without exception" seem to recover physically once they have recovered money. *Id.* at 266. Specifically, the physician offered: "...apparently [they] recover because they never come back to see me once the litigation has been settled, so I would say (the plaintiff's) neck would recover without any residual disability." *Id.* The trial court denied plaintiff's counsel's courtroom objection and motion for mistrial. In ruling upon post-trial motions, however, the trial court granted plaintiff's new trial motion. Defendant appealed.

On appeal, the court politely described the physician as “mistaking a court of law for a public forum”, when he gave his voluntary opinion about all plaintiffs seeking damages for neck injuries not being truthful about the extent or permanency of their injuries. *Id.* The appellate court held that a trial court has discretion to grant a new trial because of the misconduct of a witness in making a voluntary statement. *Id.* For comparison, it cited to a few cases where the voluntary statements did not warrant a new trial, but it affirmed the trial court’s decision, based on the trial court’s better position in which determine the prejudicial effect of the physician’s statement. *Id.*

In *Warnke v. A. Leschen & Sons Rope Co.* 178 S.W.76 (Mo. 1915), the court dealt with plaintiff’s counsel having referred to cases other than the one at issue in argument to the jury. He argued that defendant had not produced what was alleged to be a defective pulley wheel, both in the case at bar, and in “all the cases in all these courts against them (defendant)”. *Id.* at 78. The trial court at first did not grant any relief to defendant on his objection, but merely admonished the jury that they should be guided by the evidence. The jury found for plaintiff. On post trial motions, the court granted defendant’s motion for new trial. Plaintiff appealed.

In affirming the granting of a new trial, the appellate court, observed that the pulley not being in court was something that could be commented on by both parties. *Id.* at 78-79. However, as to plaintiff’s counsel’s mention of “other cases,” the court stated, in part:

The assertion of counsel that other cases were pending in other courts against the same defendants, and clearly implying by the words “all these cases in all these

courts” that there were numerous cases in numerous courts, depending upon the condition of these appliances, presents another aspect of the question. So far as the court could judicially know, or the jury be entitled to information, there were no such other cases in any other court. ...[T]he fact of the pendency of other cases in other courts was immaterial to the issue and equally objectionable, whether brought to the attention of the jury by sworn testimony or in argument of counsel.” *Id.*, at 79. In light of these circumstances, the appellate court affirmed the granting of the new trial. *Id.*

Of course, Missouri courts have long held that no witness, including expert witnesses are allowed to comment on the credibility of other witnesses. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984).

Plaintiffs’ counsel’s cross-examination of Dr. Geltman on counsel’s apparent perception that St. Louis physicians are unwilling to testify against other local physicians injected controversy and confusion into the case, and the prejudice was wholly disproportionate to the little to no value and usefulness of the offered evidence. Further, counsel’s statement/question that St. Louis physicians do not testify truthfully was an attempt at character assassination, not only of Dr. Geltman, but of the Defendants’ numerous other local physician witnesses who were yet to testify at trial. Plaintiffs attempted to cast a shadow of untrustworthiness over all local physician witnesses, including the Defendants’ retained experts, based on an implied argument that all local physicians “stick together” such that they would not testify critically against “one of their own,” like Dr. Ferrara. This was an unfair, improper, and prejudicial attempt to inject

fabricated bias and controversy into the case, to confuse and influence the jury, and to attack the credibility of Dr. Geltman and other physician witnesses. It invited and encouraged the jury to look at Dr. Geltman, and each of the physicians and Defendants' expert witnesses who were yet to testify, with unfounded suspicion as each took the stand. It bore no logical or legal relevancy to any issue in this case.

Further, in addition to impugning the credibility of all local physicians, it implied to the members of the jury that, they too, on a personal level, may be affected by this alleged fraternity of local physicians. Rather than just assailing the credibility of local *testifying* physicians, Plaintiffs' counsel took it one step further and questioned the credibility of *any and all* St. Louis-based physicians: "Dr. Geltman, if folks in St. Louis can't get St. Louis doctors to come in and testify to the truth, what they felt in their heart, feel was handled wrong by a physician in St. Louis, how can we – how can anybody in St. Louis get the care that we are entitled to?" (Tr. 792:14-19, A61)(emphasis added). This is a wholesale character assassination of all local physicians, including Dr. Ferrara, and the health care they provide. It is well-known that evidence which appeals to jurors' self-interest is improper and prejudicial. *Williams v. North River Insurance Company*, 579 S.W.2d 410, 413 (Mo.App. S.D. 1979).

The prejudice to the Defendants is clear. This line of questioning was unsupported, controversial, inflammatory, prejudicial, and irrelevant to this case. Defendants made no provoking statement or argument that Plaintiffs could retain only "out of town" experts. The line of questioning implied there exists some type of conspiracy or concerted action among St. Louis-based physicians who are unwilling to

testify truthfully. This line of questioning was particularly prejudicial in this case given that Dr. Geltman was the first of Defendants' retained experts to testify, thereby giving an impression or implication that all of Defendants' locally retained expert witnesses who testified thereafter were part of this same conspiracy or connection. It constituted an impermissible reference to regionalism and regional bias as to St. Louis-based physicians, implying they cannot be objective and fair as expert witnesses or even just treating health care providers. It had no usefulness or relevance to the issues of either the direct or cross-examination of Dr. Geltman or to any issue in the case as a whole.

Here, the prejudice operated on more than just the one level seen in *YingLing, supra*. In the case at bar, plaintiffs' counsel's question and accusatory statement had the impact of: 1) attacking the credibility and character of Dr. Geltman; 2) attacking the credibility and character of other St. Louis physicians; 3) causing the jurors to consider their self-interest and that of all citizens of St. Louis County; and, 4) bolstering Plaintiffs' physician experts, none of whom were from St. Louis, and therefore, were purportedly free from any "taint" of being unwilling to "testify to the truth."

The trial court erred in overruling Defendants' objection to this questioning and in denying Defendants' Motion for New Trial.

**II. The trial court erred in denying Defendants' Motion for New Trial because the trial court abused its discretion in permitting Plaintiffs' counsel to question Dr. Ferrara about his not, after Ms. Dodson's death, ever having spoken with Ms. Dodson's surgeon, Dr. Jeanne Cleveland, about what "she found and did" in that any such post-health care conduct was irrelevant and prejudicial and incited the jury to believe Dr. Ferrara did not care about Ms. Dodson.**

**A. Summary of Argument**

Plaintiffs' questioning of Dr. Ferrara about his never having spoken to Dr. Jeanne Cleveland (one of the surgeons who tried to save Ms. Dodson) at any time after Ms. Dodson died was irrelevant and prejudicial. The trial court improperly admitted this evidence because: a) it was irrelevant in that it dealt with post-health care conduct, which did not prove or disprove any relevant fact in the case; and, b) it was prejudicial because it painted Dr. Ferrara as uncaring and disinterested in Ms. Dodson's welfare.

**B. Standard of Review**

The standard of review for the denial of a Motion for New Trial is abuse of discretion by the trial court. *M.E.S. v. Daughters of Charity Services of St. Louis*, 975 S.W.2d 477, 482 (Mo.App. E.D. 1998). A new trial will be available upon a showing that trial court error or misconduct by the prevailing party incited prejudice in the jury. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 372 (Mo. banc 1993). Although a trial court is accorded broad discretion in admitting evidence, only relevant evidence is admissible. *See Pittman v. Ripley County Memorial Hosp.*, 318 S.W.3d 289, 293-294 (Mo.App. S.D. 2010).

“The test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence.” *Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. banc 1993)(citing *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991)). “Irrelevant testimony is excluded because such evidence tends to draw the minds of the jurors away from the point at issue and misleads [the jurors].” *Ward v. Kansas City Southern Ry. Co.*, 157 S.W.3d 696, 699 (Mo.App. W.D. 2004)(quoting *Luechtefeld v. Marglous*, 151 S.W.2d 710, 713 (1941)). It is presumed that erroneously admitting any evidence whose only purpose is to mislead jurors is prejudicial. *Id.*

**C. Questioning of Dr. Ferrara regarding the absence of post-care discussions with Dr. Cleveland was accusatory and argumentative and such evidence was prejudicial and irrelevant and immaterial to any issue to be decided by the jury.**

Over Defendants’ objections, (Tr. 302-305, A18-A19; Tr. 319-320, A22), Plaintiffs’ counsel played for the jury the following testimony from Dr. Ferrara regarding his not having interacted with Dr. Cleveland, the surgeon who performed Ms. Dodson’s by-pass surgery, *after* Dr. Ferrara’s care of Ms. Dodson:

Q. Have you talked to Dr. Cleveland at all since this night about what her observations or conclusions were?

A. No, I have not.

Q. Even after Shannon died, you never consulted her to talk about her surgery and what she thought?

THE WITNESS: I don't recall having a – you know, I might have had a brief conversation. I, I don't recall what was said at the conversation.

Q. (BY MR. GRAHAM) Were you, were you curious at all about what Dr. Cleveland found and did?

A. Yes, absolutely. But I mean I did read the operative report too, and that pretty much laid everything out.

(L.F. 860, Transcript of Dr. Ferrara, p. 116:9-117:4, A78). (emphasis added)

The trial court prejudicially erred in permitting Plaintiffs, over Defendants' objections, to play to the jury this portion of Dr. Ferrara's video-taped deposition testimony. This line of questioning was argumentative, irrelevant, and implied there was something improper and uncaring about Dr. Ferrara not consulting with Dr. Cleveland or that this fell below the standard of care in some way.

Relevancy is the main criterion for the admission of evidence. *Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38, 43 (Mo.App. E.D. 2007); *see also* discussion under Point I, *supra*. Evidence must be both logically and legally relevant to be admissible. *Id.* To be inadmissible, evidence must satisfy both prongs of this bifurcated relevancy standard. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo.App. S.D. 2004). The party seeking to admit evidence bears the burden of establishing both its logical and legal relevance. *Nolte v. Ford Motor Co.*, --- S.W.3d ---, 2014 WL 6915163, \*10 (Mo.App. W.D. December 9, 2014).

Here, the questioning and testimony regarding the absence of post-care conversations between Dr. Ferrara and Dr. Cleveland was neither logically nor legally

relevant and, therefore, had no probative value. The post-care “evidence” at issue lacked logical relevance because any post-care interactions did not tend to make any more or less probable the existence of any fact that was of consequence to the determination Plaintiffs’ wrongful death claims. Nothing said or done *after* Dr. Ferrara’s care of Ms. Dodson bore any logical relevance to whether he breached the standard of care in his care and treatment of Ms. Dodson.

Nor can it be said that such post-care conduct might have been logically relevant to Plaintiffs’ claim for punitive damages, which claim remained pending until the trial court directed a verdict in favor of Defendants at the close of all the evidence. (Tr. 1256-1257, A65-A66; Tr. 1267, A68). Section 538.210.5 RSMo provides “an award of punitive damages against a health care provider governed by the provisions of sections 538.205 to 538.230 shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct *with respect to his actions which are found to have injured or caused or contributed to cause the damages claimed in the Petition.*” (emphasis added). Evidence of post-care conduct could not, by its very nature of having happened *after* the health care and death at issue, relate to any willful, wanton or malicious misconduct which was alleged to have caused or contributed to cause the death.

Further, the questioning and testimony about post-care conduct had no legal relevance. The purpose of this post-care conduct “evidence” could only be to prejudice Dr. Ferrara in the minds of the jury and portray him as uncaring and callous. This prejudice clearly outweighed whatever usefulness Plaintiffs claim it has. The questioning

and testimony had no probative value and did not further the inquiry regarding any relevant issue in the case. Post-care conversations or lack thereof, by their very nature, cannot inform the issues of standard of care, causation or damages. The questioning and testimony at issue was inadmissible as both logically and legally irrelevant, and the trial court erred in denying Defendants a new trial on this ground.

**III. The trial court erred in giving Instruction No. 4 (MAI 2.07 – non-mandatory) at Plaintiffs’ request and over Defendants’ objection because it was confusing and lacked foundation in that Plaintiffs’ counsel argued it should be given because there was evidence of insurance benefits in Plaintiffs’ case, but the instruction directed the jury to not consider insurance benefits, and therefore, under these circumstances the instruction was irrelevant and, consequently, gratuitously injected the issue of insurance in the case, which is impermissible and reversible error.**

**A. Summary of Argument**

Plaintiffs' Instruction No. 4 (MAI 2.07) gratuitously and prejudicially injected "insurance" into this case because the instruction directed the jury to ignore the very evidence of health benefits upon which plaintiffs justified the submission of the instruction.

**B. Standard of Review**

Whether a jury was properly instructed is a question of law that the appellate court reviews *de novo*. *Edgerton v. Morrison*, 280 S.W.3d 62, 65 (Mo. banc 2009). The court reviews the evidence in the light most favorable to submission of the instruction. *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. banc 2008). “Reversal for instructional error is appropriate when the instruction misdirected, misled, or confused the jury and resulted in prejudice.” *Edgerton*, 280 S.W.3d at 66.

**C. Non-mandatory MAI 2.07 was without foundation, misled and confused the jury, and needlessly injected “insurance” into this case.**

At Plaintiff’s request and over Defendants’ objections (Tr. 1268:8-1273:19, A68-A70), the trial court instructed the jury, as follows, pursuant to MAI 2.07, which is non-mandatory:

The existence or non-existence of any type of insurance, benefit, right or obligation of repayment, public or private, must not be considered or discussed by any of you in arriving at your verdict. Such matters are not relevant to any of the issues you must decide in this case.

(L.F. 378). Defendants objected to the instruction in that the only evidence presented to the jury involving an insurance benefit was that which Plaintiffs submitted in their case for past and future economic damages. (Tr. 1268:9-24, A68).

During the presentation of evidence in this case, the only possible mention of, or reference to, insurance came through Plaintiffs’ presentation through the testimony of Plaintiff Jason Dodson and their economist as to the cost of an employment health insurance benefit as part of Plaintiffs’ claim for economic damages. Mr. Dodson testified that, while Ms. Dodson was working, their three children were insured through her employer’s health insurance plan. (Tr. 681:7-14, A36). He testified that since Ms. Dodson’s death, the children are insured through his own employer at a higher monthly cost. (Tr. 681:15-682:6, A36). Plaintiffs’ economist, Jay Marsh, opined that Mr. Dodson has sustained and will continue to sustain a loss until his wife would have reached at least the age of 67 of \$500 per month due to his family’s loss of her health insurance benefit (a

total of at least \$198,000.00). (Tr. 693:21-24, A39; Tr. 696:2-9, A39; Tr. 697:17-25, A40; Tr. 701:11-15, A41; Tr. 714:12-718:14, A44-A45; Trial Exhibits 14A and 14B).

Non-mandatory instruction MAI 2.07 was new in 2012. MAI 2.07, Committee Comment A (2014 Revision). No appellate decisions have interpreted this new instruction. Nothing in the Committee Comments to this instruction provides any guidance as to when or why it should or could be given. The Committee Comments state, however, there may be situations in which the instruction would *not* be appropriate. This includes cases where insurance is, in fact, at issue, such as bad faith insurance cases, vexatious refusal to pay cases, and insurance coverage cases. MAI 2.07, Committee Comment B (2014 Revision).

Missouri law does not take lightly the mention of insurance in a liability case. It is generally improper to inject the issue of liability insurance into an action for damages, and the improper injection of insurance constitutes reversible error. *Wilson v. Kaufmann*, 847 S.W.2d 840, 851 (Mo.App. E.D. 1992). The Supreme Court has admonished the bench and bar to “keep in mind that the introduction of such highly prejudicial evidence is a serious and hazardous matter [which] is to be avoided rather than sought for.” *Pope v. Pope*, 179 S.W.3d 442, 464 (Mo.App. W.D. 2005)(emphasis added)(quoting *Olian v. Olian*, 59 S.W.2d 673, 677 (Mo. 1933)).

As a practical matter, it seems one area where the mention of insurance is most likely to be volatile is during *voir dire*, where any mention of insurance is tightly controlled. Although courts have held a litigant is entitled to qualify jurors as to their relationship, if any, with an insurance company interested in the result of the trial, a

proper foundation must be laid during *voir dire* and a very specific procedure followed before a litigant may ask the so-called “insurance question.” *Ivy v. Hawk*, 878 S.W.2d 442, 444-45 (Mo. banc 1994); *Saint Louis University v. Geary*, 321 S.W.3d 282, 292 (Mo. banc 2009). Abuse of trial court discretion in this procedure can result in reversal. *Smith v. City of Farmington*, 577 S.W.2d 117, 120 (Mo.App. 1978).

Even where “the presence of insurance [is] no secret,” a plaintiff does not have free “license to flaunt insurance coverage in the jury’s face.” *Ballinger v. Gascoage Elec. Coop.*, 788 S.W.2d 506, 513 (Mo. banc 1990), overruled on other grounds by *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. banc 1991); *see also Amador v. Lea’s Auto Sales & Leasing*, 916 S.W.2d 845, 851 (Mo.App. S.D. 1996)(same). Thus, it is clear that under Missouri law the mention of insurance and other benefits is to be handled in a careful and reasoned way, even where relevant to the issues presented.

Here, at Plaintiffs’ request, the trial judge gave the jury this non-mandatory MAI instruction without any relevancy foundation. The committee comments to MAI 2.07 provide neither an explanation nor supporting case law as to the instruction’s proper use, and there are no “Notes on Use.” *See* MAI 2.07, Committee Comment (2014 Revision). Thus, the purpose this instruction is meant to accomplish seems a mystery. What does appear certain, however, is that it was not intended to address a situation where, as here, a plaintiff introduces the loss of insurance benefits as an element of their damages.

Whether intended here or not, the effect was that the court, through the MAI 2.07 instruction, reminded the jury of the possibility of the existence of insurance, with no

rationale in the context of the case as to why the court was so instructing the jury. How different is this from a plaintiff's counsel in closing argument announcing: "I am not going to mention the existence of insurance." or "You are not to consider the existence of insurance in this case." Under the circumstances here, the MAI 2.07 instruction itself needlessly mentioned and injected insurance into the case. And mentioning or reminding the jury of the existence of insurance – a highly prejudicial matter – is to be avoided if at all possible. *Olian*, 59 S.W.2d at 677. The improper injection of insurance is reversible error. *Wilson*, 847 S.W.2d at 851; *Smith*, 577 S.W.2d at 120.

The potential for jury confusion and misleading of the jury is clear. Plaintiffs injected health insurance benefits or "insurance" in terms of an element of their damages and then asked the trial court to tell the jury not to consider it. In effect, this was just a further reminder of the concept of insurance, a highly prejudicial matter. There was no proper basis under the facts of this case for instructing the jury with non-mandatory MAI 2.07. Giving this instruction was itself an improper mention of insurance, highlighted by being in a jury instruction that the jury took with them during deliberations, and is reversible trial court error. Defendants, therefore, are entitled to a new trial.

**IV. The trial court erred in denying Defendants' Motion for Directed Verdict, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial, because Plaintiffs failed to make a submissible case for loss of economic support, in that: (1) the trial court erred in permitting Plaintiffs' witness, Maria Kossmeyer, a friend and one-time co-worker of Ms. Dodson, to offer testimony as to Ms. Dodson's future career path and earnings because it was speculative, without proper foundation, and lacked reasonable certainty; and, (2) Plaintiffs' evidence that Shannon Dodson's health insurance benefit of \$500.00 per month for family coverage would extend into the future until she reached at least the age of 67 (well past the age of majority for the three minor children) was speculative and unsupported.**

**A. Summary of Argument**

Maria Kossmeyer's individual and personal opinions as to the promotions and pay increases of her friend and former co-worker, Shannon Dodson, for years into the future were mere speculation and could not provide evidence with any degree of reasonable certainty, as required by Missouri law.

Plaintiffs' evidence as to lost health insurance benefits of \$500.00 per month was riddled with speculation, lacked proper foundation, and was based only on Jason Dodson's testimony, hearsay in the form of an unauthenticated email, and conjecture about whether Jason Dodson might someday need or use such health benefits many years after his children are no longer eligible for these benefits.

## **B. Standard of Review**

The standards of review for a denial of a Motion for Judgment Notwithstanding the Verdict and the denial of a Motion for Directed Verdict are essentially the same. *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104 (Mo. banc 2010)(citing *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007)). To defeat either motion, the plaintiff must make a submissible case by offering substantial evidence supporting every fact essential to a finding of liability. *Id.* To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding all conflicting evidence and inferences. *Id.* The jury's verdict will be reversed if there is a complete absence of probative facts to support the jury's conclusion. *Id.*

The standard of review for the denial of a Motion for New Trial is abuse of discretion by the trial court. *M.E.S. v. Daughters of Charity Services of St. Louis*, 975 S.W.2d 477, 482 (Mo.App. E.D. 1998). Viewing the evidence in a light most favorable to the trial court's order, a trial court abuses its discretion when a ruling is clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 134 (Mo. banc 2013).

**C. The testimony of decedent's friend and co-worker, Maria Kossmeyer, as to Shannon Dodson's future income lacked foundation and reasonable certainty.**

**1. The Kossmeyer Testimony**

Maria Kossmeyer testified she is a professional property manager and was Shannon Dodson's last supervisor or boss. (Tr. 400:25-401:9, A26-A27). She worked with Ms. Dodson for about two and a half years at CRBE, and later at McShane Health Properties after McShane Health Properties began managing certain properties at St. Anthony's Medical Center. (Tr. 401:10-11, A27; Tr. 401:19-402:11, A27). At the time of her death, Shannon Dodson was the assistant property manager at McShane Health Properties with a salary of roughly \$42,000. (Tr. 403:20-404:2, A27).

Over Defendants' objections both in Motions in Limine and at trial (L.F. 139-140, L.F. 308-312; Tr. 52:25-55:13, A16-A17; Tr. 308:15-319:9, A19-A22; Tr. 388:10-396:18, A23-A25; Tr. 395:12-21, A25; Tr. 404, A27), Ms. Kossmeyer was allowed to testify regarding her personal opinion as to Ms. Dodson's likely career path and potential for future earnings. (Tr. 395:12-21, A25). Ms. Kossmeyer testified that, based on her background and experience, she is familiar with what property managers and assistant property managers make in the St. Louis market, and that, with a promotion, Ms. Dodson's salary would have increased to what Ms. Kossmeyer "would estimate [to be] around \$45,000.00." (Tr. 404:3-405:4, A27-A28).

Over Defendants' continuing objections (Tr. 406-07, A28), Ms. Kossmeyer was allowed to testify to what salary she, as a property manager, received while working for

Lillibridge, the company that bought McShane Health Properties' portfolio. (Tr. 405:25-407:6, A28). Ms. Kossmeyer was also asked, again over Defendants' objections (Tr. 409:8-10, A29), whether she had formed a belief or opinion as to "whether [Ms. Dodson] had a future in the real estate management business." (Tr. 409:4-11, A29). Ms. Kossmeyer responded that there was no question that Ms. Dodson had a talent for the work, was well-liked and well-respected, and that they had discussed her obtaining either a CPM (Certified Property Manager) or RPA (Real Property Administrator) designation at some point in the future. (Tr. 409:12-18, A29).

On cross-examination, Ms. Kossmeyer admitted her former employer, McShane, no longer existed and that she also had left the employ of her next employer, Lillibridge. (Tr. 413:15-23, A30). She further admitted that in terms of her projections as to what Ms. Dodson might have earned in the future, they are just her personal opinions based upon personal experience and what she has seen with other assistant property managers who have advanced into the property management position. (Tr. 414:24-415:8, A30).

Thereafter, Ms. Kossmeyer testified, again over Defendants' objections (Tr. 417:13-16, A31; Tr. 418:1-3, A31), that based upon her familiarity with what salary Ms. Dodson was earning at the time of her death and the salary of the assistant property manager hired after Ms. Dodson's death, she "felt" that Ms. Dodson's salary would have increased to \$45,000.00, and that Ms. Dodson's salary five years into the future would have increased to \$55,000.00. (Tr. 416:16-418:6, A30-A31). She admitted, however, that she was Ms. Dodson's friend (Tr. 412:18-413:2, A29-A30; Tr. 418:16-17, A31) and

that she has never offered or given a similar opinion for anyone else. (Tr. 413:3-6, A30; Tr. 418:11-15, A31).

**2. Ms. Kossmeyer's testimony was speculative and did not support an award for decedent's career promotions or lost earnings.**

Plaintiffs relied solely on the Maria Kossmeyer testimony for their claim for lost future earnings as a result of Shannon Dodson's death. This testimony, however, was based entirely upon Ms. Kossmeyer's personal opinions regarding decedent's long-term income potential. Over Defendants' objections, as recounted above, Ms. Kossmeyer testified that Ms. Dodson would likely have received a promotion to Assistant Property Manager the year after she died, and within five years, she would have been a Property Manager making a minimum of \$55,000. This appears to add more than \$250,000 (not adjusted to present value) to Plaintiffs' claim for past and future economic damages at trial. The trial court prejudicially erred in allowing any evidence or testimony from Ms. Kossmeyer because it was speculative, lacked foundation, and could not properly support Plaintiffs' claim for loss of economic support.

In Missouri, a plaintiff is entitled to full compensation for past or present injuries that the plaintiff has shown by a preponderance of evidence were caused by the defendant. *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 130-131 (Mo. banc 2007). Although a party should be fully compensated for its loss, it should not recover a windfall. *Ameristar Jet Charter, Inc. v. Dodson Intern. Parts, Inc.*, 155 S.W.3d 50, 54 (Mo. banc 2005). An award of damages must be supported by tangible, credible and reasonable evidence and not

a “gossamer web of shimmering speculation and finely-spun theory.” *Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780, 783 (Mo. App. 1992).

A plaintiff may prove a loss of earnings or wages as an item of special damages and may recover for loss of future earnings. *Fairbanks v. Weitzman*, 13 S.W.3d 313, 319 (Mo. App. E.D. 2000)(citing *Seymour v. House*, 305 S.W.2d 1, 3 (Mo. 1957)). However, the evidence of the value of such loss must be *reasonably certain* and not based upon speculation. *Fairbanks*, 13 S.W.3d at 320. The evidence must provide the jury with a basis for a reasonable estimate of the amount of the loss. *Id.*

The *Thienes v. Harlin Fruit Company* is illustrative of a case resulting in a new trial where a plaintiff’s claim of future promotions and for loss of future earnings was found too speculative in nature and not reasonably certain. *Thienes v. Harlin Fruit Company*, 499 S.W.2d 223 (Mo. App. 1973). In that case, the plaintiff claimed he suffered injuries in a car accident that ultimately forced him to drop out of Officer Candidate School. *Id.* at 224-225. Plaintiff presented evidence at trial of the salary he would have earned had he completed the nine months of OCS and received promotions thereafter. *Id.* at 227. He presented evidence through Army documents of the rate of promotion or advancement of Army officers in general, the rates of pay for various ranks of Army officers, the trend for cost of living increases among Army officers, the amount of salary the plaintiff might have received had plaintiff achieved various future promotions, and other evidence of the possibility of plaintiff becoming and remaining an Army officer up to the time of trial. *Id.*

In explaining why the trial court erred in admitting this evidence, the appellate court stated that “reasonable certainty contemplates and demands something more than a showing

of contingent or speculative occurrences...possible or even probable developments...or conjecture, likelihood and probability.” *Id.* at 230. (internal citations omitted). Because the evidence regarding the plaintiff’s future wages was too speculative, the appellate court remanded for a new trial on the issue of damages. *Id.* at 231.

Plaintiff Thienes’ evidence was, in effect, a “chain of hypothesization.” *Id.* at 229. The plaintiff postulated his completion of OCS and concomitant commissioning as a Second Lieutenant. *Id.* Then he hypothesized his application for and acceptance into flight school. *Id.* Finally, he theorized “winning his wings” and earning promotions in strict compliance with his own hypothesized schedule. *Id.* The court felt this chain of hypothesization was particularly frail in light of the complete lack of evidence as to: (1) what would have been involved in completing OCS; (2) under what circumstances plaintiff might have been granted a branch transfer to the air wing; (3) the mental, physical and educational requirements and standards for acceptance for flight training; and (4) what would have been involved in flight training and the attrition rate for such training. *Id.* Due to this evidentiary vacuum, the court concluded plaintiff’s evidence did not permit and support a finding that his “escalator chain of hypothesization” had been established to a reasonable certainty. *Id.* at 230.

As in *Thienes* (and arguably to an even greater degree of uncertainty), the evidence of Ms. Dodson’s loss of future earnings lacked reasonable certainty. Ms. Kossmeyer testified to what she “felt” Ms. Dodson would have been earning with promotions and raises which had not yet occurred and were not actually planned to occur. There was no indication in her testimony that Ms. Kossmeyer had the authority to set Ms. Dodson’s compensation or

that she ever became aware that Ms. Dodson was to receive a promotion or raise at any time. In fact, the company Ms. Dodson worked for at the time of her death, McShane Realty, went out of business in 2011. Ms. Kossmeyer's testimony as to future earning, therefore, consisted of merely her personal opinions and were based on a hypothesis that Ms. Dodson, but for her death, would be working at some entirely different, unknown company than the one either of them had worked at before.

Likewise, Ms. Kossmeyer's testimony regarding Ms. Dodson's future career trajectory was pure speculation. There was no evidence concerning a planned career advancement schedule. Moreover, there was no evidence that Ms. Dodson, a mother of three, would have accepted a promotion at McShane or any other company, even if one had been offered. In fact, Dana Workes, one of decedent's best friends, testified that decedent was considering working a more flexible or part-time schedule so she would be able to spend more time at home with her children. (Tr. 539:21-544:12, A32). As such, career advancements to positions with increased responsibility may not have been something of interest to decedent.

Accordingly, any claim for loss of future earnings in this case, based on the personal opinions of Ms. Kossmeyer, falls squarely within the realm of "contingent or speculative occurrences, possible...developments," or "conjecture" as rejected in *Thienes*. The testimony from Ms. Kossmeyer could not reasonably and credibly support an award of the decedent's future promotions or earnings and should not have been admitted into evidence.

**D. Plaintiffs' evidence that Shannon Dodson's health insurance benefit of \$500.00 per month for family coverage would extend into the future until she reached the age of at least 67 – well past the age of majority for the three minor children – was speculative and unsupported.**

Before trial, Defendants sought to preclude Plaintiffs from offering evidence of an alleged loss of fringe benefits as such was speculative and unsupported. (L.F. 316). At trial, Plaintiff presented insufficient evidence as a matter of law to make a submissible case for compensatory damages for loss of fringe benefits, and Defendants moved for a Directed Verdict and Judgment Notwithstanding the Verdict on this basis. (L.F. 337-338; L.F. 354-355; L.F. 470-473). To support Plaintiffs' claim, they relied solely on Jason Dodson's testimony, as well as documents Mr. Dodson provided. Mr. Dodson testified he sustained a loss of fringe benefits of \$500 per month because it costs \$500 more each month to insure his children on his employer's health insurance plan than it did on Ms. Dodson's employer's (McShane Realty) health insurance plan. (Tr. 681:7-682:6, A36).

Plaintiffs, however, produced no credible evidence of Ms. Dodson's cost of health insurance through McShane Realty had she continued to work there. Plaintiff's economist, Jay Marsh, simply testified that it was "something less than \$100." (Tr. 715:14-21, A44). Further, the only evidence Plaintiffs produced of the cost of health insurance through Jason Dodson's employer, Legal Services of Eastern Missouri, was a copy of an e-mail to Jason Dodson from an individual apparently with Legal Services. (Tr. 714:12-715:5, A44). Plaintiffs' economist used this email to support an assumption

that the loss of insurance fringe benefits amounts to \$6,000.00 per year. (Tr. 714:12-715:8, A44). The email indicated insurance through Legal Services would cost \$482.51 per month for medical coverage and \$56.21 for dental coverage. (Tr. 714:12-715:8, A44). This means the cost of health insurance through McShane would have had to have been free in order for plaintiffs to have sustained a loss of fringe benefits in the amount of \$500 per month. There was no such testimony, and in fact Mr. Marsh acknowledged Ms. Dodson contributed some dollar amount for her family coverage. (Tr. 715:9-715:21, A44).

Moreover, as stated above, McShane Realty went out of business in 2011, after decedent's death. Therefore, it was purely speculative for Plaintiffs' economist to make any assumptions regarding the cost of health insurance beyond McShane's 2011 closure.

Finally, Mr. Marsh carried this loss of fringe benefit well beyond the point where the Dodson children would reach the age of majority and would no longer qualify to be covered by their parents' insurance policies. Under Mr. Marsh's various scenarios as presented to the jury, he carried the \$6,000.00 yearly loss out to age 67 or 70 in terms of Ms. Dodson's anticipated retirement age and up to age 76 in terms of her work life expectancy. (Trial Exhibit 14A; Tr. 716:8-17, A44). The youngest Dodson child was three years old at the time of his mother's death, meaning that, under the current concept of medical insurance, he could have been carried on his mother's insurance for at most another 23 years. (Tr. 718:3-9, A45). Yet, Mr. Marsh carried this anticipated loss another 10 to 19 years beyond that point. His reasoning for doing so was that "there is *some prospect* that 23 years in the future that Mr. Dodson could have benefited from

group insurance through his wife.” (Tr. 718:10-14, A45)(emphasis added). Although Mr. Dodson is currently employed by Legal Services, Mr. Marsh speculated that, because many lawyers ultimately become self-employed, Mr. Dodson *may* at some point do the same. (Tr. 716:18-23, A45). As a result, according to Mr. Marsh, “there’s *some* likelihood that Mr. Dodson at *some* point could have benefitted from his wife having insurance through her employer.” (Tr. 716:23-25, A44)(emphasis added).

However, there was no testimony, from Mr. Dodson or anyone else, that Mr. Dodson planned to one day become self-employed. In fact, Mr. Marsh readily agreed that he was not asked to assess or estimate Mr. Dodson’s career path. (Tr. 717:15-17, A45). Mr. Marsh’s testimony, therefore, about a potential continuing loss of \$6,000.00 yearly beyond even the age where the Dodson children could have benefitted from Ms. Dodson’s insurance coverage was based on nothing more than rank speculation as to Mr. Dodson’s particular circumstances. This testimony could not properly support the alleged fringe benefit loss of \$6,000.00 yearly.

As with the loss of earnings and the Kossmeyer testimony, the evidence regarding the alleged loss of fringe benefits was pure speculation falling squarely within the realm of “contingent or speculative occurrences, possible...developments,” or “conjecture” as rejected in *Thienes, supra*. The trial court, therefore, erred in not directing a verdict or entering judgment notwithstanding the verdict in favor of Defendants or granting a new trial on Plaintiffs’ claim for economic damages.

**V. The trial court erred in failing to grant Defendants' Motion for Directed Verdict on Plaintiffs' claim for aggravating circumstances damages, instead of waiting to grant Defendants' Motion at the Close of All the Evidence, because Plaintiffs did not present evidence in their case in chief sufficient to submit their claim for aggravating circumstances damages, and Defendants were prejudiced by being compelled to introduce evidence of two prior arterial dissections Dr. Ferrara either knew of or was involved in to establish Defendants' defense to the claim for aggravating circumstances, showing Dr. Ferrara's perspective on how long he reasonably had to deal with Ms. Dodson's arterial dissection, which would not otherwise have been introduced and which was clearly prejudicial to Defendants' defense of a negligence only claim.**

**A. Summary of Argument**

The trial court's decision to delay granting Defendants' Motion for Directed Verdict as to punitive/aggravating circumstances damages until the close of all the evidence severely prejudiced Defendants because they had no choice but to present evidence to defend against that claim, as opposed to merely a negligence claim. Defendants were forced to have Dr. Ferrara testify that in treating Ms. Dodson, he drew on his experience of two prior arterial dissections – one he was aware of and the other he was involved in – which evidence would be powerfully prejudicial in a negligence-only claim and is evidence Defendants would have objected to in such a claim. Under Missouri law, Defendants had a right to so defend themselves and it was not self-invited error.

## **B. Standard of Review**

The standard of review for a denial of a motion for directed verdict and for a denial of a judgment notwithstanding the verdict are essentially the same. *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104 (Mo. banc 2010)(citing *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007)). To defeat either motion, the plaintiff must make a submissible case by offering substantial evidence supporting every fact essential to a finding of liability. *Id.* To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding all conflicting evidence and inferences. *Id.* The jury's verdict will be reversed if there is a complete absence of probative facts to support the jury's conclusion. *Id.*

## **C. The trial court erred in not directing a verdict at the close of Plaintiffs' case in favor of Defendants on Plaintiffs' claim for aggravating circumstances damages.**

At the close of Plaintiffs' case, Defendants moved for a directed verdict on Plaintiffs' claim for aggravating circumstances damages. (L.F. 327-343; Tr. 726:8-730:21, A46-A47). Rather than denying the motion at that time, the trial court deferred ruling until after the close of all the evidence, expressing uncertainty as to whether Plaintiffs had presented enough evidence to survive the Motion. (Tr. 728:18-730:13, A46-A47). "I'm going to withhold my decision on punitives, but frankly, Mr. Graham, I'm not sure that there's enough for me. My inclination is always to send it to the jury

and we'll see, ... but I'm not sure in this case that there's enough." (Tr. 730:7-13, A47). Thereafter, at the close of all the evidence and on Defendants' renewed Motion for Directed Verdict, the trial court directed a verdict in favor of Defendants on Plaintiffs' claim for aggravating circumstances damages. (L.F. 344-360; Tr. 1245:25-1267:7, A63-A68).

In the interim, due to the trial court's failure to direct a verdict on that claim at the close of Plaintiffs' case, Defendants were forced to present certain evidence to the jury in their own case-in-chief to defend against the punitive/aggravating circumstances claim. In other words, Defendants were forced to present evidence which, though relevant to punitive/aggravating circumstances damages, was clearly irrelevant and prejudicial, under Missouri law, in the setting of a negligence-only claim.

Specifically, Defendants were forced to present evidence of two other instances where Dr. Ferrara was either aware of or was involved in an arterial dissection during a cardiac catheterization. (Tr. 921:4-922:20, A62). In one of those instances, the patient, who survived, went to surgery about an hour and 15 minutes after the dissection was detected. (Tr. 922:5-14, A62). In the other instance, which Dr. Ferrara merely observed, the patient, who also survived, did not go to surgery for approximately 45 minutes. (Tr. 922:21-923:3, A62). Defendants had no choice but to present this evidence in direct response to the allegations of conscious disregard attendant to Plaintiffs' then still-pending claim for aggravating circumstances damages. This evidence of previous incidents, which otherwise had no relevance to a negligence claim, was relevant only to

show a basis for Dr. Ferrara's allegedly improper delay in sending Ms. Dodson to surgery and rebut the claim of willful, wanton, or malicious misconduct.

**1. At the close of Plaintiffs' case, no evidence supported a claim for aggravating circumstances damages.**

Section 538.210.5 R.S.Mo. (2005) governs punitive damages in medical negligence cases. An award of punitive damages against a health care provider "shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct with respect to the actions which are found to have injured or caused or contributed to cause the damages claimed in the petition." Mo.Rev.Stat. § 538.210.5. Damages for aggravating circumstances in a wrongful death action are the equivalent of punitive damages. Mo.Rev.Stat. § 538.205(10)(defining "punitive damages" as "damages intended to punish or deter willful, wanton or malicious misconduct, including exemplary damages and damages for aggravating circumstances"); *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996).

A plaintiff must prove aggravating circumstances damages by clear and convincing evidence. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 1110 (Mo. banc 1996). To meet the "clear and convincing" standard of proof, the defendant's conduct "must be tantamount to intentional wrongdoing where the natural and probable consequence of the conduct is injury." *Peters v. General Motors Corp.*, 200 S.W.3d 1, 25 (Mo.App. W.D. 2006). Plaintiffs must present evidence "which instantly tilts the scales in the affirmative when weighed against evidence in opposition; evidence which clearly convinces the fact finder of the truth of the proposition to be proved." *Id.*

(quoting *Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579, 582-83 (Mo.App. S.D. 1999)). A trial court should only submit such a claim to the jury if there is sufficient evidence to permit a reasonable juror to conclude “the plaintiff established with convincing clarity – that is, that it was highly probable – that the defendant’s conduct was outrageous because of evil motive or reckless indifference.” *Id.*

Here, as Defendants argued during the Motion hearing at the close of Plaintiffs’ case (L.F. 341; Tr. 726-730, A37-A38), there was no evidence in Plaintiffs’ case-in-chief to lead any reasonable juror to conclude Defendants demonstrated “willful, wanton or malicious misconduct” such that they should be punished for their actions. As such, there was no evidence at the close of Plaintiffs’ case to support a submission of aggravating circumstances damages, and the trial court should have directed a verdict for such damages at that point.

Instead, the trial court, in an attempt to be very cautious, chose to withhold a ruling on the issue until the close of all the evidence. (Tr. 726:8-730:21, A46-A47). The trial court’s erroneous denial of Defendants’ Motion for Directed Verdict forced defense counsel to have to question Dr. Ferrara about two prior arterial dissections with which he was involved or observed in order to show he had certain expectations about how the dissection would progress and about how long he had to deal with the dissection at issue in this case. (Tr. 921:4-923:12, A62).

Thus, while the trial court ultimately granted a directed verdict in favor of Defendants on the aggravating circumstances claim at the close of all the evidence, the prejudice to Defendants in not having done so earlier is clear. In the absence of a claim

for aggravating circumstances damages, defense counsel would not have conducted any questioning of Dr. Ferrara in the area of prior instances of arterial dissections. Yet, defense counsel was compelled to do so here because it showed Dr. Ferrara had a perspective on the time frame within which he had to act to deal with the dissection. This showed he was not simply not acting or not caring about Ms. Dodson.

**2. That Defendants were forced to present the highly prejudicial evidence of prior instances of arterial dissections is reversible error.**

Once the trial court denied Defendants' Motion for Directed Verdict at the close of Plaintiffs' case, Defendants had no choice but to offer countervailing evidence in an effort to defend the still-pending aggravating circumstances claim. "A party has a right to try the issues which have been forced upon him." *Arnold v. City of Maryville*, 85 S.W. 107, 108 (Mo.App. 1905). Thus, it cannot be said that by presenting evidence of the two prior instances of dissection, Defendants invited the error of which they now complain. *See Nolte v. Ford Motor Company*, --- S.W.3d ---, 2014 WL 6915163, \*8 (Mo.App. W.D. December 9, 2014). "[W]here a party is forced by an adverse ruling of the court to meet an issue which he should not be compelled to meet, the fact that he thereafter adduces countervailing evidence upon such issue does not preclude him from insisting on appeal that the original ruling of the trial court was wrong." *Ziervogel v. Royal Packing Co.*, 225 S.W.2d 798, 803 (Mo.App. 1949)(citing *State ex rel. State Highway Commission v. Blobeck Inv. Co.*, 110 S.W.2d 860, 863 (Mo.App. 1937)).

Evidence of similar facts, conditions, or occurrences is generally inadmissible unless conditions are demonstrated to be the substantially similar. *Dillman v. Missouri Highway and Transp. Com'n*, 973 S.W.2d 510, (Mo.App. E.D. 1998). Missouri courts have held the prejudicial power of admitting irrelevant evidence of prior conduct in negligence actions can require reversal of verdicts. *See Moon v. Hy-Vee, Inc.*, 351 S.W.3d 279 (Mo.App. W.D. 2011)(reversing verdict for defendant where defendant presented evidence of past favorable verdicts for the purpose of showing it had not been negligent in the current case); *see also Bender v. Burlington-Northern R. Co.*, 654 S.W.2d 194, 197 (Mo.App. S.D. 1983) (“Generally, evidence of prior accidents of the plaintiff, even though demonstrating negligence on his part, would be inadmissible upon the issue of his contributory negligence in this case.”). The unfair prejudice of admitting evidence of any prior act of negligence (*i.e.* confusing the issues, misleading the jury, and creating mini-trials) typically outweighs the probative value of such evidence in the absence of a proper foundation. *Moon*, 351 S.W.3d at 285.

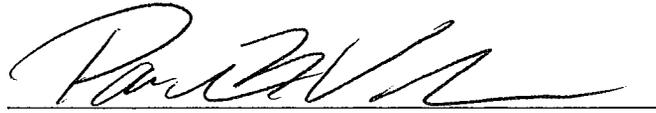
The evidence of prior dissection events Defendants were compelled to offer at trial was powerful evidence of negligence in this case, which evidence Defendants certainly would not have adduced at trial if there was no aggravating circumstances claim still pending. The trial court, therefore, erred in not directing a verdict in favor of Defendants on Plaintiffs’ claim for aggravating circumstances damages at the close of Plaintiffs evidence, and Defendants are entitled to retry this case, defending only against a negligence theory and without the powerfully negative burden of the prior two arterial dissections.

## CONCLUSION

For the reasons fully discussed above, the trial court erred as follows: (1) permitted Plaintiffs' counsel to pose an argumentative and accusatory question to Defendants' expert cardiologist; (2) permitted Plaintiffs' counsel to question Dr. Ferrara regarding irrelevant post-care conduct; (3) gave Instruction No. 4 (MAI 2.07), which was unnecessary and irrelevant and which gratuitously injected the issue of insurance in the case; (4) failed to grant a directed verdict or new trial when Plaintiffs' evidence to support their economic damages claim consisted of speculation as to Ms. Dodson's future career path and earnings and as to a loss of fringe benefits; and (5) failed to grant Defendants' Motion for Directed Verdict at the close of Plaintiffs' case as to the claim for aggravating circumstances damages, thereby compelling Defendants to introduce evidence clearly prejudicial to a negligence-only case. Any single one of these errors, standing alone, constitutes reversible error, as does the cumulative weight of these errors. *See Faught v. Washam*, 329 S.W.2d 588, 604 (Mo. 1959)(noting a new trial can be ordered for cumulative error without undertaking to determine whether any single point standing alone would constitute reversible error)(overruled on other grounds by *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. banc 1994).

Defendants, therefore, ask that the Judgment in this case be reversed and the case remanded for a new trial on all issues.

WILLIAMS VENKER & SANDERS LLC



Paul N. Venker, #28768  
Lisa A. Larkin, #46796  
Bank of America Tower  
100 North Broadway, 21<sup>st</sup> Floor  
St. Louis, Missouri 63102  
(314) 345-5000  
(314) 345-5055 Fax  
[pvenker@wvslaw.com](mailto:pvenker@wvslaw.com)  
[llarkin@wvslaw.com](mailto:llarkin@wvslaw.com)

ATTORNEYS FOR  
DEFENDANTS/APPELLANTS/CROSS-  
RESPONDENTS ROBERT P. FERRARA, M.D AND  
MERCY CLINIC HEART AND VASCULAR, LLC

**RULE 84.06(c) CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing Brief of Defendant/Appellants/Cross-Respondents Robert P. Ferrara, M.D. and Mercy Clinic Heart and Vascular, LLC contains 14,171 words (exclusive of the cover, the table of contents, the table of authorities, the proof of service, this Rule 84.06(c) certificate of compliance, the signature block and appendix), and that counsel relied on the word count of Microsoft Word for Windows, which was used to prepare the brief. Further, counsel certifies that the electronic copies of the foregoing brief have been scanned for viruses and are virus free.



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Counsel for Defendants/Appellants/Cross-Respondents Robert P. Ferrara, M.D. and Mercy Clinic Heart and Vascular, LLC

**PROOF OF SERVICE**

The undersigned hereby certifies that he signed the original of the foregoing document and that the foregoing was filed and served electronically through the Missouri Courts eFiling System this 16th day of January 2015 , which sent notification to all parties of interest herein. A copy of the foregoing was also served via U.S. mail and email to the following:

Maurice B. Graham  
Gray, Ritter & Graham, P.C.  
701 Market Street, Suite 800  
St. Louis, MO 63101-1826  
314-732-0728  
[mgraham@grgpc.com](mailto:mgraham@grgpc.com)

and

John G. Simon  
The Simon Law Firm, P.C.  
800 Market Street, Suite 1700  
St. Louis, MO 63101  
314-241-2929  
[jsimon@simonlawpc.com](mailto:jsimon@simonlawpc.com)

*Attorneys for Plaintiffs*



Counsel for Defendants/Appellants/Cross-  
Respondents Robert P. Ferrara, M.D. and  
Mercy Clinic Heart and Vascular, LLC