

**Summary of SC90370, *Elizabeth Mitchell, et al. v. Milton Kardesch, M.D.***

Appeal from the St. Louis County circuit court, Judge Steven H. Goldman  
Argued and submitted Jan. 13, 2010; opinion issued June 15, 2010

**Attorneys:** Mitchell was represented by Michael A. Gross of The Law Offices of Michael A. Gross in St. Louis, (314) 727-4910; and Kardesch was represented by David P. Ellington, T. Michael Ward, Christine A. Vaporean and Teresa M. Young of Brown & James P.C. in St. Louis, (314) 421-3400.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** Plaintiffs appeal the trial court's judgment that the defendant doctor appropriately evaluated, diagnosed and treated named plaintiff's deceased husband and that the defendant did not deviate from the appropriate standard of care. In a unanimous decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri reverses the trial court's decision and remands (sends back) the case for further action. Because much of the case turned on whether the jury believed the plaintiff's or defendant's recitation of events, it was error for the trial court not to allow plaintiffs to question the defendant doctor about his inaccurate answer in his deposition about whether his license to practice medicine ever had been suspended. The trial court also erred in ruling that it would not permit the plaintiffs to use the doctor's deposition and interrogatory answers as extrinsic evidence should he deny their content at trial. The relevance of the doctor's willingness to swear falsely in this very case is so relevant and probative on the central issue of whose version of the facts to believe that it outweighs its prejudicial affect in the limited form in which it would be introduced, and the trial court abused its discretion in entirely excluding it.

**Facts:** Subsequent to her husband awakening from a nightmare and clutching his chest, Elizabeth Mitchell called the offices of Dr. Milton Kardesch and spoke with Kardesch's assistant. According to Kardesch's testimony, the assistant was told to instruct Mitchell that her husband needed to go to the emergency room. At trial, Mitchell stated this never occurred. The assistant could not recall whether she was told to relay that message but stated it would have been her standard procedure to do so. It is undisputed that during the conversation, Mitchell was told that Kardesch would order a thallium stress test for her husband. The test was performed 11 days later; each blames the other for the delay. Four days after the test, the husband died due to complications arising from myocardial infarction and arteriosclerosis. Mitchell and her two minor children subsequently sued Kardesch for medical malpractice. At trial, Mitchell requested permission to ask the doctor about a false answer that he gave in his sworn response to an interrogatory answer in this case. The trial court found the fact that Kardesch inaccurately answered that he had never been suspended from the practice of medicine, whereas in fact his license had been suspended for two years in Missouri and New York for reasons unrelated to his medical practice, to be collateral and not probative. The court prohibited Mitchell from either asking Kardesch about the suspension or from introducing either the false answer or the doctor's deposition testimony in which he admitted his answer was inaccurate and sought to justify it. Also at trial, both sides presented contradicting expert testimony about Kardesch's readings of

the stress test and whether or not the 11 day delay in scheduling the test amounted to a deviation in the standard of care. The jury found in favor of Kardesch on all counts. Mitchell appeals.

**REVERSED AND REMANDED.**

**Court en banc holds:** The trial court erred in concluding that the issue of Kardesch's inaccurate answer was not relevant or material to Mitchell's claim and prohibiting counsel from asking Kardesch about it or impeaching him with the interrogatory answer or deposition. Missouri's long-standing rule is that, on cross-examination, a witness may be asked any questions that tend to test the witness's accuracy, veracity or credibility. To the extent *State v. Wolfe*, 13 S.W.3d 248, 258 (Mo. banc 2000), and its progeny hold otherwise, they misinterpreted this Court's prior cases and should not be followed. While the right to cross-examine a witness on the stand is subject to the trial court's discretion to weigh the probative value of the evidence against its prejudicial effect, here the plaintiffs offered to limit their questions so that the jury would not be aware of the reasons for the suspension. The trial court further erred in ruling that it would not permit plaintiffs to use Kardesch's deposition and interrogatory answers as extrinsic evidence should he deny their content at trial. The Court here formalizes the *ad hoc* exceptions to the bar on extrinsic evidence that were recognized for prior false accusations in cases such as *State v. Black*, 151 S.W.3d 49, 55 (Mo. banc 2004), and for evidence that bore strongly on plaintiff's essential soundness as a witness in cases such as *Roberts v. Emerson Elect. Mfg. Co*, 362 S.W.2d 579, 584 (Mo. 1962): Where the relevance and probative value of evidence about the party's character for truth and veracity is so great that it would deprive the jury of evidence highly relevant to its resolution of material issues, extrinsic evidence is admissible, subject to the trial court's discretion to limit or exclude it so as to avoid undue prejudice. Here, the relevance of Kardesch's willingness to swear falsely in this very case is so relevant and probative on the central issue of whose version of the facts to believe that the trial court abused its discretion in entirely excluding it.