

IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

**FILED**  
MAY 06 2009

**Laura Roy**

CLERK, MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

ELIZABETH MITCHELL, et al., )

Appellants, )

v. )

MILTON KARDESCH, M.D., )

Respondent. )

Appeal No.: ED 91103

90370

**FILED**

OCT 15 2009

Thomas F. Simon  
CLERK, SUPREME COURT

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY  
STATE OF MISSOURI

THE HONORABLE STEVEN H. GOLDMAN, PRESIDING  
CIRCUIT JUDGE, DIVISION TWELVE

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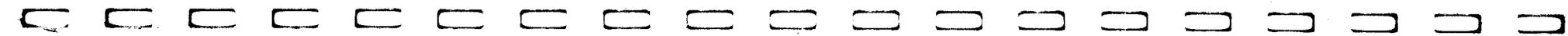
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**SCANNED**



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## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	4
STATEMENT OF FACTS	7
A.    Introduction	7
B.    Mr. Mitchell had a history of serious heart disease.	7
C.    Mr. Mitchell had a nightmare on October 11, 2001.	9
D.    Dr. Kardesch ordered a stress test to rule out heart disease as the cause of Mr. Mitchell’s nightmare.	11
E.    Dr. Kardesch informed Mrs. Mitchell that the stress test results did not indicate a cardiac problem.	15
F.    Mr. Mitchell suffered a fatal heart attack on October 25, 2001.	15
G.    Plaintiffs sought to introduce evidence that Dr. Kardesch was suspended from the practice of medicine following a criminal matter twenty-five years earlier.	17
POINT RELIED ON	19
ARGUMENT	20
I.    The trial court did not err in refusing to admit Plaintiffs’ proposed impeachment evidence concerning the suspension of	

Dr. Kardesch’s license to practice medicine, because the trial court has broad discretion to determine the admissibility of evidence and, in this instance, the trial court properly exercised its discretion, in that evidence of Dr. Kardesch’s license suspension twenty-five years ago following a criminal proceeding unrelated to the practice of medicine is a collateral matter not relevant to the care he provided Mr. Mitchell in this case and its admission would have been highly prejudicial to Dr. Kardesch.

	20
A. Introduction and Standard of Review	20
B. A party may not impeach a witness with evidence of a collateral matter.	22
C. Dr. Kardesch’s suspension was a collateral matter.	23
D. The trial court’s ruling did not materially impact the case’s outcome.	27
E. Conclusion	30
CONCLUSION	32
AFFIDAVIT OF SERVICE	33
CERTIFICATE OF COMPLIANCE	34

**Abbreviations:**

“AB” Appellant’s Brief

“LF” Legal File

“SLF” Supplemental Legal File

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Cases:</b>	
<i>A.G. Edwards &amp; Sons, Inc. v. Drew,</i> 978 S.W.2d 386 (Mo. App. E.D. 1998)	21
<i>Aliff v. Cody,</i> 26 S.W.3d 309 (Mo. App. W.D. 2000)	27
<i>Ashcroft v. TAD Resources Int’l,</i> 972 S.W.2d 502 (Mo. App. W.D. 1998)	21, 30
<i>Brewer v. Raynor Mfg. Co.,</i> 23 S.W.3d 915 (Mo. App. S.D. 2000)	23
<i>Cline v. William H. Friedman &amp; Assoc.,</i> 882 S.W.2d 754 (Mo. App. E.D. 1994)	22, 23
<i>Eagan v. Duello,</i> 173 S.W.3d 341 (Mo. App. W.D. 2005)	21, 26
<i>Enos v. Ryder Auto. Operations, Inc.,</i> 73 S.W.3d 784 (Mo. App. E.D. 2002)	21
<i>Frechin v. Thornton,</i> 326 S.W.2d 122 (Mo. 1959)	22
<i>Giles v. Riverside Transport, Inc.,</i> 266 S.W.3d 290 (Mo. App. W.D. 2008)	25, 31

	<b>Page</b>
<b>Cases:</b>	
<i>Graf v. Wire Rope Corp. of America,</i> 861 S.W.2d 588 (Mo. App. W.D. 1993)	23
<i>Henderson v. Fields,</i> 68 S.W.3d 455 (Mo. App. W.D. 2001)	22
<i>Jones v. Grant,</i> 75 S.W.3d 858 (Mo. App. W.D. 2002)	21
<i>Klein v. General Elec. Co.,</i> 714 S.W.2d 896 (Mo. App. E.D. 1986)	24, 31
<i>Miller v. SSM Health Care Corp.,</i> 193 S.W.3d 416 (Mo. App. E.D. 2006)	25
<i>Nelson v. Waxman,</i> 9 S.W.3d 601 (Mo. banc 2000)	20
<i>Noble v. Lansche,</i> 735 S.W.2d 63 (Mo. App. E.D. 1987)	24, 31
<i>Porter v. Toys 'R' Us-Delaware, Inc.,</i> 152 S.W.3d 310 (Mo. App. W.D. 2004)	21
<i>Powell v. Norman Lines, Inc.,</i> 674 S.W.2d 191 (Mo. App. E.D. 1984)	22

	<b>Page</b>
<b>Cases:</b>	
<i>Romeo v. Jones,</i> 144 S.W.3d 324 (Mo. App. E.D. 2004)	21, 30
<i>Sandy Ford Ranch, Inc. v. Dill,</i> 449 S.W.2d 1 (Mo. 1970)	22
<i>State v. Dunson,</i> 979 S.W.2d 237 (Mo. App. W.D. 1998)	22
<i>State v. Taylor,</i> 944 S.W.2d 925 (Mo. banc 1997)	22
<i>State v. Williams,</i> 849 S.W.2d 575 (Mo. App. E.D. 1993)	22

## STATEMENT OF FACTS

Defendant Milton Kardesch, M. D., provides a separate Statement of Facts to set forth those facts material to the question presented by this appeal. In accordance with the applicable standard of review, the following facts support the jury's verdict.

### **A. Introduction**

This appeal stems from a wrongful-death action filed by Plaintiff Elizabeth Mitchell, individually and as next friend for her children, Rachel and Justin Mitchell. (LF11) Plaintiffs alleged Dr. Kardesch failed to diagnose myocardial ischemia in Ruben Mitchell, Plaintiffs' husband and father, in time to prevent a fatal heart attack. (LF14, 31) Dr. Kardesch denied he was negligent – he offered evidence showing Mr. Mitchell suffered a sudden onset heart attack rather than a progressing ischemia that could have been discovered in the weeks before his fatal attack. (LF25, 33)

The jury, at the trial's conclusion, returned a verdict for Dr. Kardesch. (LF52) The trial court later denied Plaintiffs' Motion for New Trial. (LF67) Plaintiffs' appeal followed.

### **B. Mr. Mitchell had a history of serious heart disease.**

Mr. Mitchell had a family history of heart disease. (T983) His brother had a heart attack in his early fifties. (T227) His father died at sixty-seven of a heart attack and hypertension. (T227) Doctors began treating Mr. Mitchell for hypertension when he was twenty-one years old. (T227) Mr. Mitchell also had a history of high blood pressure. (T181-82)

Mr. Mitchell had his first heart attack in 1992, at the age of thirty-eight. (T178, 227, 982-83) A heart attack results when an obstruction prevents the blood flow through a coronary artery. (T227) Permanent residual damage to the heart muscle follows because heart muscle does not regenerate after a heart attack. (T227-28)

At the time of the 1992 attack, Mr. Mitchell had chest pains throughout that day; however, he waited until he finished work to drive himself to the emergency room. (T232) There, doctors performed an angioplasty, a procedure that stretches the heart valve to remedy the obstruction. (T235-36) At the time, Mr. Mitchell was diagnosed with arteriosclerotic heart disease. (T254-55)

Following the 1992 heart attack, Mr. Mitchell continued to smoke and gained additional weight. (T227) He had no formal exercise plan. (T227) He believed his work as a plumber provided him with sufficient exercise. (T227)

A stress test following the 1992 heart attack disclosed that Mr. Mitchell had scar tissue. (T241-43) Subsequent stress tests also disclosed scar tissue, findings that confirmed that his heart damage was permanent. (T243)

In July 2000, Mr. Mitchell had a second heart attack. (T172) Doctors again performed an angioplasty. (T247) Mr. Mitchell's history indicated he would have another heart attack, but the timing of the attack was not predictable with any precision. (T182)

Dr. Kardesch provided follow-up treatment for Mr. Mitchell after both heart attacks. Dr. Kardesch was Mr. Mitchell's general internist. While Dr. Kardesch had many patients with heart disease, he did not specialize in cardiology. (T157-58)

**C. Mr. Mitchell had a nightmare on October 11, 2001.**

On October 11, 2001, Mr. Mitchell woke up in the middle of the night from a nightmare, clutching his chest in a startled and frightened state. (T478, 480) After about fifteen minutes, Mrs. Mitchell was able to calm her husband long enough for him to fall back to sleep. (T480) During his prior heart attacks, Mr. Mitchell experienced continuous chest pain. (T480) On this occasion, when Mr. Mitchell woke up the next morning, he felt fine and left for work. (T480)

After Mr. Mitchell left their home, Mrs. Mitchell called Dr. Kardesch's office and spoke with Vicky Lakowski, Dr. Kardesch's registered medical assistant. (T118) Mr. Mitchell did not ask her to make this call – she did it on her own. (T520) When he learned his wife had done so, Mr. Mitchell asked his wife: "What did you do that for?" (T520)

Ms. Lakowski, in her note documenting her telephone conversation with Mrs. Mitchell wrote as follows: "October 11, 2001, Ruben Mitchell, diet: eats anything; sleep, nightmare, grabs chest, sleeps after work, never used to nap." (T126; Defendant's Trial Exhibit K) Ms. Lakowski also noted the Mitchells' telephone number, indicating she would call Mrs. Mitchell back after conferring with Dr. Kardesch. (T126, 140-41; Defendant's Trial Exhibit K) Ms. Lakowski then drew a line under the message. It was her practice to do so when she discussed calls with Dr. Kardesch. (T127; Defendant's Trial Exhibit K)

Under the line, Ms. Lakowski wrote Dr. Kardesch's instructions for Mr. Mitchell. (T127; Defendant's Trial Exhibit K) She noted Mr. Mitchell's diagnosis of

arteriosclerotic heart disease and that Dr. Kardesch wanted to rule out angina, which is chest pain of cardiac origin. (T128-29; Defendant's Trial Exhibit K) Mrs. Mitchell did not report to Dr. Kardesch's office that her husband had chest pain at the time of the nightmare. (T519) If Mr. Mitchell had suffered chest pain, Mrs. Mitchell would have called 911 or taken him to the hospital immediately. (T519)

Ms. Lakowski also noted Dr. Kardesch's belief that Mr. Mitchell's heart medication could have caused some of his symptoms. (T127, 192; Defendant's Trial Exhibit K) One known beta-blocker-related side effect is the occurrence of bad dreams or nightmares. (T255) Generally, nightmares are not considered a common symptom of a heart attack. (T569)

Dr. Kardesch believed Mr. Mitchell had only suffered a nightmare. (T173) In an abundance of caution, Dr. Kardesch instructed Ms. Lakowski to inform Mr. Mitchell that he should go to the emergency room. (T167-68, 187, 253, 295) Dr. Kardesch's response to Mrs. Mitchell's telephone call, including the recommendation that Mr. Mitchell go to the emergency room, was within the appropriate standard of care. (T188, 284)

Moreover, if Dr. Kardesch had not directed Mr. Mitchell to go to the emergency room, Ms. Lakowski would have so advised Mrs. Mitchell because such an instruction was an automatic practice at Dr. Kardesch's office for any patient experiencing chest pains. (T137) The automatic recital of this instruction was common knowledge in Dr. Kardesch's office. (T137-38)

Dr. Kardesch believed Mrs. Mitchell, after her call back with Ms. Lakowski, would take Mr. Mitchell to the emergency room. In the past, he had never had a patient

who failed to go to the emergency room under such circumstances and with such instructions. (T176)

After a follow-up telephone call with Mrs. Mitchell, Ms. Lakowski informed Dr. Kardesch that Mr. Mitchell was feeling fine and free of chest pain. (T183, 254) Contrary to Dr. Kardesch's instructions, Mr. Mitchell did not go to the emergency room. Instead, he went to work. (T183) In Dr. Kardesch's mind, Mr. Mitchell's conduct lessened his suspicion that Mr. Mitchell was experiencing cardiac problems and confirmed his opinion that Mr. Mitchell had only experienced a nightmare, and nothing more. (T254)

**D. Dr. Kardesch ordered a stress test to rule out heart disease as the cause of Mr. Mitchell's nightmare.**

Dr. Kardesch took additional immediate action to determine whether Mr. Mitchell's symptoms were of cardiac origin because Mr. Mitchell was young, with a history of heart disease. (T162-63) Dr. Kardesch ordered a stress test for Mr. Mitchell. (T254) This order was appropriate under the applicable standard of care. (T568)

Dr. Kardesch sent his patients to the hospital for stress tests. He could not perform the test himself. (T158) In this case, Ms. Lakowski was unable to schedule Mr. Mitchell's stress test until October 22, 2001, twelve days after his nightmare. (T133) The normal procedure in Dr. Kardesch's office was to schedule a thallium scan and stress test for the next day. (T134-35) The only reason why he might delay a stress test would be in the event of a conflict with the patient's schedule. (T143, 146) Moreover, if St. Joseph's Hospital were unable to perform the stress test the next day, arrangements would be made for the test to be performed at another hospital. (T144, 257-58)

From October 11, 2001, to October 22, 2001, the Mitchells did not call Dr. Kardesch's office to report any issues of chest pain or other problems that Mr. Mitchell may have experienced. (T261-62) During this time period, Mr. Mitchell worked every day without any recurring symptoms. (T379, 381, 492) As Mr. Mitchell continued working with no complaints of chest pain, the scheduling of the stress test eleven days after Mrs. Mitchell first contacted Dr. Kardesch's office following Mr. Mitchell's nightmare was reasonable. (T261)

On October 22, 2001, a cardiologist performed the EKG portion of the stress test on Mr. Mitchell; a radiologist performed the thallium scan. (T262-63) At the time of the test, the cardiologist took Mr. Mitchell's medical history and performed a physical examination. (T262) The cardiologist noted Mr. Mitchell had no cardiac symptoms and presented no complaints of shortness of breath. (T264)

Both the cardiologist and the radiologist interpreted the stress test. (T262-63) The cardiologist indicated Mr. Mitchell had a negative stress test under EKG criteria, indicating no abnormal findings. (T266) The cardiologist further noted Mr. Mitchell had above average functional capacity with no chest pain. (T266) During the test, Mr. Mitchell was able to reach one hundred percent maximum predicted heart rate. (T383) Mr. Mitchell, himself, denied any cardiac symptoms during the test. (T402)

Plaintiffs concede that nothing in the EKG portion of the stress test provided any indication that Mr. Mitchell was likely to have a heart attack within three days of the test's conclusion. (T287)

The radiologist also noted Mr. Mitchell had no chest pain. (T268-69) Results from the thallium stress test indicated the existence of heart muscle damage from Mr. Mitchell's prior heart attacks. (T193, 243) The results also disclosed a mildly depressed ejection fraction of 38.7%. (T193-94, 269-70) Otherwise, this aspect of the test went very well for Mr. Mitchell. (T195)

Although the ejection fraction had decreased from the fifty percent reported in Mr. Mitchell's July 2000 stress test, Dr. Kardesch believed the decline was largely due to a change in modality. (T194) Mr. Mitchell's 2000 stress test was performed with an echocardiogram, whereas the 2001 stress test was performed with thallium, a method that is less accurate and regularly returns lower percentages. (T195, 274) These two modalities cannot be compared. (T888) Moreover, it would be expected for Mr. Mitchell's ejection fraction to be lower than normal because he had two previous heart attacks where heart muscle was lost. (T799)

Dr. Kardesch did not trust the ejection fraction result from Mr. Mitchell's thallium scan because it was at odds with the rest of the stress test results. (T198-99, 272) Generally, a low ejection fraction coincides with other symptoms, including shortness of breath, fluid in the lungs, or a palpation or irregular heart beat. (T275) Mr. Mitchell did not have any of these symptoms. (T275) Indeed, the test went well overall and showed no other decline from the prior tests. (T610) In short, nothing in the stress test indicated a cardiac problem requiring emergent care, much less providing a warning that Mr. Mitchell would have a heart attack within the next three days. (T280, 610, 885, 1003) Mr. Mitchell's ejection fraction was not below the 30% cut off indicating immediate

concern of heart attack. (T889) Simply put, an ejection fraction of 38.7% does not indicate a patient is in imminent danger of a heart attack and does not require immediate medical intervention or action. (T889-90)

Mr. Mitchell's stress test, including his mildly depressed ejection fraction, did not indicate myocardial ischemia. (T883-84) The stress test disclosed no new blockage. (T884) Indeed, if Mr. Mitchell had ischemia sufficiently significant to cause chest pain during a nightmare, the blockage would have shown up on the stress test. (T581, 997, 1001) In Mr. Mitchell's case, it was simply not possible that he could perform as well as he did on the stress test if he had the ninety-nine percent blockage suggested by Plaintiffs. (T583) Rather, the test demonstrated that Mr. Mitchell had normal sinus rhythms inconsistent with the existence of significant blockage. (T587-88)

The specialists performing the stress test agreed. Normally, if a cardiologist is concerned about the results of a stress test, the cardiologist will contact the treating physician directly, often while the patient is still in the room. (T270-71, 613, 992, 1003) The cardiologist who performed Mr. Mitchell's stress test never contacted Dr. Kardesch with any concerns. (T271, 286) Nor did the cardiologist admit Mr. Mitchell to the hospital in response to his mildly depressed ejection fraction. (T271, 301-02)

In short, Dr. Kardesch's scheduling the stress test for October 22, 2001, and his subsequent response to the test results were appropriate and within the appropriate standard of care. (T261, 287, 579-80, 890, 987-88) No immediate reaction in response to the stress test was required. (T890, 896) Even if a stress test had been performed on October 11, 2001, on the day Mrs. Mitchell called Dr. Kardesch's office, the results

would have been the same – with the same conclusion. (T281, 572) Absent further symptoms, a cardiologist would likely not have performed a cardiac catheterization because of the risks inherent in that procedure. (T575-76)

**E. Dr. Kardesch informed Mrs. Mitchell that the stress test results did not indicate a cardiac problem.**

After receiving the stress test results, Dr. Kardesch relayed the results to Mrs. Mitchell on October 23, 2001. (T195) He informed Mrs. Mitchell the stress test was normal and that he was not recommending any immediate treatment. (T276, 473)

However, Dr. Kardesch did not tell Mrs. Mitchell about the mildly depressed ejection fraction. (T196) He believed Mr. Mitchell was scheduled for his regular examination in his office “any day,” and that he could follow up with him then, performing an echocardiogram to rule out the depressed ejection fraction. (T196, 198)

Dr. Kardesch did not believe a few extra days would make a difference because Mr. Mitchell had gone back to work and felt fine. (T198-99) Generally, patients are unable to work with myocardial ischemia because they would have chest pain each time they exert themselves. (T217, 334, 968-69) In this case, aside from the depressed ejection fraction, all other indications from the stress test established that Mr. Mitchell was stable. (T208-09)

**F. Mr. Mitchell suffered a fatal heart attack on October 25, 2001.**

On October 25, 2001, Mr. Mitchell began suffering chest tightness and sweating at seven o'clock in the morning and drove himself to the emergency room, without first calling his wife or Dr. Kardesch. (T281-82, 613, 936) Mr. Mitchell had been

asymptomatic from October 11, 2001, through October 25, 2001, with no reports of chest pain. (T381, 521-22, 679)

Many people mistakenly believe heart attacks are caused by a slow build up of plaque inside the artery. (T615) However, a large number of deaths occur each year from sudden onset cardiac disease in which the patient is asymptomatic only moments before the heart attack. (T381-83, 617) In those cases, a piece of the plaque ruptures, causing clots that block the artery. (T615-16) A patient can progress from no significant blockage to one-hundred-percent blockage in a matter of minutes. (T617) The cardiologist who treated Mr. Mitchell in the emergency room opined that Mr. Mitchell's condition was inconsistent with Plaintiffs' assertion that Mr. Mitchell had ninety-nine percent blockage up to two weeks before the heart attack. (T942)

The emergency room staff informed Mrs. Mitchell that her husband had been admitted for a possible heart attack. (T282) Within hours of his admission, Mr. Mitchell received a cardiac catheterization followed by angioplasty and the insertion of a stent. (T283, 620-21) Mrs. Mitchell visited Mr. Mitchell after his surgery. At that time, he was extremely upset, telling her this heart attack felt nothing like his prior attacks. (T469-70) Mrs. Mitchell stayed with him during the night. (T470)

Mr. Mitchell suffered complications from the catheterization procedure. (T624) Post-surgery, Mr. Mitchell was placed on blood thinners for the prevention of blood clots around his stent. (T943) The doctors later found that Mr. Mitchell had suffered a puncture during the catheterization, which developed a bleed. (T627, 943) Bleeds are considered an accepted risk of the procedure. (T627, 943)

Because the doctors could not perform another surgery to repair the perforation, due to Mr. Mitchell's condition, they took him off the blood thinners to prevent excessive bleeding from the perforation. (T627, 943) But, as a result, Mr. Mitchell developed a clot around the stent, which triggered another cardiac event from which Mr. Mitchell did not recover. (T627, 943)

Mr. Mitchell died from complications arising from myocardial infarction and arteriosclerosis. (T169, 657-58) The associated risks from the catheterization would have been the same if it had been performed before Mr. Mitchell had the heart attack on October 25, 2001. (T628) A perforation would have caused the same result. (T628)

**G. Plaintiffs sought to introduce evidence that Dr. Kardesch was suspended from the practice of medicine following a criminal matter twenty-five years earlier.**

Dr. Kardesch, in response to an interrogatory submitted by Plaintiffs, stated his license to practice medicine had never been suspended. (Plaintiffs' Trial Exhibit 19) In a later deposition, Dr. Kardesch clarified that in 1982 and 1983, his license to practice medicine had been suspended following criminal charges, but he was able to continue practicing medicine in Missouri at the Veteran's Administration Hospital. (T153; Plaintiffs' Trial Exhibit 22)

Dr. Kardesch, in a Motion in Limine, sought to exclude evidence of the suspension because the suspension was based on a criminal allegation that was irrelevant to his skill as a physician and was highly prejudicial. (T12-13, 24; SLF1)

Dr. Kardesch's counsel explained that Dr. Kardesch's initial response to the interrogatory was based on Dr. Kardesch's understanding that his license had never been fully suspended because he had continued to practice medicine in Missouri. (T22-23; Plaintiffs' Trial Exhibit 22) Dr. Kardesch believed his interrogatory answer was truthful when he gave it. (T23; Plaintiffs' Trial Exhibit 22) After being shown further documentation, Dr. Kardesch realized his interrogatory response had not been accurate, and so admitted. (T23) At trial, Plaintiffs sought admission of the inconsistent responses as evidence of Dr. Kardesch's lack of credibility as a witness. (T16-17, 25-26)

The trial court agreed with Dr. Kardesch that his suspension was a collateral issue not relevant to the issues in the case. (T29) Therefore, the trial court barred Plaintiffs from attempting to impeach Dr. Kardesch through use of this collateral matter. (T30) Thereafter, Plaintiffs made an offer of proof concerning Dr. Kardesch's suspension by offering his deposition testimony on this matter. (T440-42; Plaintiffs' Trial Exhibit 22)

## POINT RELIED ON

- I. The trial court did not err in refusing to admit Plaintiffs' proposed impeachment evidence concerning the suspension of Dr. Kardesch's license to practice medicine, because the trial court has broad discretion to determine the admissibility of evidence and, in this instance, the trial court properly exercised its discretion, in that evidence of Dr. Kardesch's license suspension twenty-five years ago following a criminal proceeding unrelated to the practice of medicine is a collateral matter not relevant to the care he provided Mr. Mitchell in this case and its admission would have been highly prejudicial to Dr. Kardesch.

*Noble v. Lansche*, 735 S.W.2d 63 (Mo. App. E.D. 1987)

*Klein v. General Elec. Co.*, 714 S.W.2d 896 (Mo. App. E.D. 1986)

*Giles v. Riverside Transport, Inc.*, 266 S.W.3d 290 (Mo. App. W.D. 2008)

*Ashcroft v. TAD Resources Int'l*, 972 S.W.2d 502 (Mo. App. W.D. 1998)

## ARGUMENT

I. The trial court did not err in refusing to admit Plaintiffs' proposed impeachment evidence concerning the suspension of Dr. Kardesch's license to practice medicine, because the trial court has broad discretion to determine the admissibility of evidence and, in this instance, the trial court properly exercised its discretion, in that evidence of Dr. Kardesch's license suspension twenty-five years ago following a criminal proceeding unrelated to the practice of medicine is a collateral matter not relevant to the care he provided Mr. Mitchell in this case and its admission would have been highly prejudicial to Dr. Kardesch.

### A. Introduction and Standard of Review

Plaintiffs, in their sole point on appeal, argue the trial court erred in barring their examination of Dr. Kardesch concerning his deposition testimony in which he admitted that his medical license had been suspended following a criminal proceeding, more than twenty-five years earlier, despite an earlier interrogatory response in which he stated his license had never been suspended. (AB24) Plaintiffs' point should be denied. The trial court did not abuse its discretion in so ruling. Plaintiffs' proposed examination would have prejudicially introduced extrinsic evidence of Dr. Kardesch's suspension – a collateral matter that is irrelevant to Dr. Kardesch's care and treatment of Mr. Mitchell and whether he breached the applicable standard of care.

The admissibility of evidence rests with the trial court's sound discretion and such decisions will not be disturbed on appeal absent an abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601, 603-04 (Mo. banc 2000). In reviewing the alleged error, the

Court's focus is not on whether the evidence is admissible, but on whether the trial court abused its discretion in excluding the evidence. *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 390 (Mo. App. E.D. 1998). A trial court's principal criterion for admitting evidence is relevancy. *Porter v. Toys 'R' Us-Delaware, Inc.*, 152 S.W.3d 310, 318 (Mo. App. W.D. 2004).

On appeal, a trial court's discretionary ruling is presumed correct. *Romeo v. Jones*, 144 S.W.3d 324, 332 (Mo. App. E.D. 2004). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Eagan v. Duello*, 173 S.W.3d 341, 346 (Mo. App. W.D. 2005). If reasonable persons can differ over the propriety of the trial court's action, then it cannot be said the trial court abused its discretion. *Id.* If the Court finds any recognizable ground for the trial court's exclusion, the ruling will be upheld. *Jones v. Grant*, 75 S.W.3d 858, 862 (Mo. App. W.D. 2002). Thus, even if the exclusion of evidence was erroneous, the Court will not reverse the trial court's judgment absent a finding that the error prejudiced the appellant by materially affecting the action's merits. *Aliff v. Cody*, 26 S.W.3d 309, 314 (Mo. App. W.D. 2000).

A trial court also has wide discretion in ruling on a motion for a new trial. *Enos v. Ryder Auto. Operations, Inc.*, 73 S.W.3d 784, 788 (Mo. App. E.D. 2002). On appeal, the Court indulges every reasonable inference favoring the trial court's denial of a motion for a new trial and may not reverse absent a clear abuse of discretion. *Ashcroft v. TAD Resources Int'l*, 972 S.W.2d 502, 505 (Mo. App. W.D. 1998). A new trial is available

only upon a showing that the alleged error incited prejudice in the jury. *Henderson v. Fields*, 68 S.W.3d 455, 471 (Mo. App. W.D. 2001).

**B. A party may not impeach a witness with evidence of a collateral matter.**

A trial court has discretion to allow examination on matters affecting witness credibility. *Sandy Ford Ranch, Inc. v. Dill*, 449 S.W.2d 1, 6 (Mo. 1970); *Powell v. Norman Lines, Inc.*, 674 S.W.2d 191, 196 (Mo. App. E.D. 1984). But, impeachment may not concern an immaterial or collateral matter. *State v. Williams*, 849 S.W.2d 575, 578 (Mo. App. E.D. 1993). A matter is collateral if the fact in dispute is of no material significance in the case or is not pertinent to the issues developed. *Id.*

In contrast, “a matter is not collateral if the alleged discrepancy involves a crucial issue directly in controversy.” *State v. Dunson*, 979 S.W.2d 237, 242 (Mo. App. W.D. 1998) (citing *Williams*, 849 S.W.2d at 578). The test as to whether a matter is collateral or not is whether the party seeking to introduce the matter for purposes of contradiction would be entitled to prove it as a part of the party’s case. *Cline v. William H. Friedman & Assoc.*, 882 S.W.2d 754, 760 (Mo. App. E.D. 1994) (quoting *Frechin v. Thornton*, 326 S.W.2d 122, 126 (Mo. 1959)).

Trial courts do not err when they bar offers of extrinsic evidence for impeachment relating to a collateral matter. *State v. Dunson*, 979 S.W.2d 237, 242 (Mo. App. W.D. 1998). If an examiner inquires about a collateral matter, the examiner must take the answer received and no extrinsic evidence on the issue is permitted so as not to confuse the issues before the jury. *See State v. Taylor*, 944 S.W.2d 925, 934-35 (Mo. banc 1997);

*Brewer v. Raynor Mfg. Co.*, 23 S.W.3d 915, 919 (Mo. App. S.D. 2000). The rationale underlying this rule is to shield the jury from a proliferation of issues that would require the court to go into the merits of collateral matters and to avoid the unfairness and surprise of requiring the opposing party to disprove issues not raised by the pleadings. *Cline*, 882 S.W.2d at 760.

On the other hand, appellate courts are not as deferential when trial courts permit impeachment on collateral matters. Reversal follows when a trial court erroneously admits extrinsic evidence on collateral matters to impeach another witness's testimony. *Graf v. Wire Rope Corp. of America*, 861 S.W.2d 588, 590 (Mo. App. W.D. 1993) (Holding evidence that contradicted testimony given by the plaintiff related to answers on her employment application was collateral to any issue in the case and was erroneously admitted into evidence.). *See also Cline*, 882 S.W.2d at 760 (Holding the trial court committed reversible error by admitting testimony from a patient with dry eye to contradict the defendant doctor's testimony that he had never had a patient develop a case of dry eye because the patient's testimony was collateral to any issue in the case.).

**C. Dr. Kardesch's suspension was a collateral matter.**

Plaintiffs sought to introduce extrinsic evidence that Dr. Kardesch's medical license had been suspended in 1982 and 1983 following a criminal proceeding. The sanctions imposed by the Missouri Board of Healing Arts more than twenty-five years before the trial of this case have no bearing on Dr. Kardesch's care and treatment of Mr. Mitchell. The sanctions arose from criminal allegations that resulted in a suspended imposition of sentence, and not from any alleged failure of patient care. (T12-14)

Therefore, the suspension is nothing more than a collateral matter that the trial court, in the exercise of its broad discretion, concluded was not the proper subject for impeachment.

On this point, consider this Court's decision in *Noble v. Lansche*, 735 S.W.2d 63 (Mo. App. E.D. 1987), which demonstrates the propriety of the trial court's ruling. In *Noble*, the Court held the trial court committed reversible error when it permitted the defendant in a medical malpractice action to impeach the plaintiff's expert witness during examination with the fact that the expert had voluntarily surrendered his license to dispense narcotics because he had a substance abuse problem. The Court explained the defendant's examination was improper because the expert's former drug problem was unrelated to his skill, knowledge, and qualifications to express expert opinions on the defendant's surgery performed on the plaintiff. 735 S.W.2d at 64.

Consider also, this Court's decision in *Klein v. General Elec. Co.*, 714 S.W.2d 896 (Mo. App. E.D. 1986). In *Klein*, the Court held the trial court did not abuse its discretion in rejecting evidence that the plaintiff's expert had previously been named as a co-conspirator in a federal criminal action. 714 S.W.2d at 905. The Court noted that witness credibility may not generally be discredited through the showing of a mere accusation, arrest, or criminal charge that does not result in a conviction.

The Court, in *Klein*, further held the scope and extent of "questioning permitted during examination on collateral matters concerning misconduct of a witness for purposes of impeachment is left to the trial court's discretion." *Id.* In *Klein*, the Court

held the trial court did not abuse its discretion in barring the examination because the conspiracy charge did not reveal a bias on the expert's part.

Consider also, *Giles v. Riverside Transport, Inc.*, 266 S.W.3d 290 (Mo. App. W.D. 2008). In *Giles*, the trial court did not allow the plaintiff to impeach the defendant with evidence the defendant lied in his employment application on his employer's advice. On appeal, the plaintiff argued this evidence went directly to the defendant's credibility. She asserted she should have been allowed to question the truck driver about lying on his employment application because the evidence was admissible to impeach the truck driver and expose his employer to punitive damages. *Id.* at 295.

On appeal, the Western District noted the trial court has wide latitude in ruling on the exclusion of evidence and discretion to determine the materiality and relevancy of evidence. *Id.* The court held that where a witness is called during the plaintiff's case, as Plaintiffs called Dr. Kardesch, the plaintiff may not directly impeach the witness's credibility except with a prior inconsistent statement. The attack on the truck driver's credibility through testimony he lied on an employment application, an act unrelated to the substantive claims before the jury, was not proper impeachment. *Id.* Here, Dr. Kardesch made no prior inconsistent statements than those he made before the jury when called by Plaintiffs.

The facts in *Noble*, *Giles*, and *Klein* stand in contrast to *Miller v. SSM Health Care Corp.*, 193 S.W.3d 416 (Mo. App. E.D. 2006), a case cited by Plaintiffs. (AB26) The plaintiff's expert witness in *Miller* testified on direct examination he was a former member of the American College of Obstetrics and Gynecology (ACOG), conducted peer

reviews for that organization, but had since resigned. *Id.* at 420. The plaintiff also admitted the expert's curriculum vitae stating he had been a member of ACOG. *Id.* During the expert's examination, the trial court permitted the defendants to ask the expert about ACOG's censure of the expert for making false representations as an expert witness in a prior case. *Id.* at 421. On appeal, this Court upheld the trial court's ruling, holding the censure went directly to the expert's credibility. *Id.* That is not this case.

The suspension of Dr. Kardesch's medical license by the Missouri Board of Healing Arts resulted from a criminal proceeding brought against Dr. Kardesch unrelated to patient care and did not bear in any way on his skills as a physician or on his treatment of Mr. Mitchell or any other patient. Plaintiffs offer no argument to the contrary. Under the circumstances before it, the trial court rightly barred evidence of Dr. Kardesch's suspension consistent with the Court's decisions in *Noble*, *Giles*, and *Klein*. Plaintiffs' attempt to sidestep application of the rule against admission of extrinsic evidence on collateral matters by focusing on Dr. Kardesch's discovery responses does not save their cause.

In this case, it cannot be said that the trial court abused its discretion in ruling as it did because the trial court's ruling was consistent with the logic of the circumstances before it. Guided by this Court's decisions in *Noble*, *Giles*, and *Klein*, the trial court's ruling cannot be said to be arbitrary and unreasonable, much less a ruling that shocks the sense of justice or discloses a lack of careful consideration. *Eagan v. Duello*, 173 S.W.3d 341, 346 (Mo. App. W.D. 2005). Thus, as reasonable persons can, at the very least,

differ over the propriety of the trial court's ruling, the trial court's judgment should be affirmed because the record demonstrates no error, much less an abuse of discretion. *Id.*

**D. The trial court's ruling did not materially impact the case's outcome.**

The trial court did not err or abuse its discretion in excluding Plaintiffs' offered impeachment evidence based on a collateral matter. But, if the trial court had erred in so ruling, which Dr. Kardesch denies, the error would not require reversal of the trial court's judgment because the error did not affect the action's merits. *Aliff v. Cody*, 26 S.W.3d 309, 314 (Mo. App. W.D. 2000). The fact of Dr. Kardesch's suspension as a collateral matter would have had no bearing on the jury's verdict for Dr. Kardesch on Plaintiffs' malpractice claim.

Plaintiffs argue Dr. Kardesch's credibility was a material issue in the case due to conflicting testimony on the instructions that Dr. Kardesch gave Mrs. Mitchell when she called to report Mr. Mitchell's nightmare on October 11, 2001. (AB25) Plaintiffs further cite Mrs. Mitchell's denial that Dr. Kardesch told her to take Mr. Mitchell to the emergency room on the morning of October 11, 2001, as well as their denial that the delay in performing the stress test until October 22, 2001, was caused by her or her husband's schedule. (AB25)

Plaintiffs' arguments do not save their appeal. Even if, for the sake of argument, one assumes that Dr. Kardesch did not send Mr. Mitchell to the emergency room on October 11, 2001, and failed to schedule Mr. Mitchell's stress test before October 22, 2001, Dr. Kardesch still acted within the appropriate standard of care. Stated differently, even if a stress test had been performed on October 11, 2001, on the very day on which

Mrs. Mitchell first called Dr. Kardesch's office about Mr. Mitchell's nightmare, the result would have been the same – with the same conclusion. (T281, 572)

Between October 11, 2001, and October 25, 2001, the Mitchells did not call Dr. Kardesch's office. (T261-62) At no time during this period did Dr. Kardesch receive any reports that Mr. Mitchell was experiencing chest pain or any other problems. Mr. Mitchell worked every day during this period. (T379) Indeed, from October 11, 2001, through October 25, 2001, Mr. Mitchell was completely asymptomatic. (T381, 492) Thus, as Mr. Mitchell worked with no complaints of chest pain, the scheduling of Mr. Mitchell's stress test for October 22, 2001, was reasonable. (T261) Dr. Kardesch's experts so testified. (T287, 579-80, 890, 987-88, 890, 896)

Plaintiffs, in opposition, contend the stress test, if administered on October 11, 2001, would have shown that Mr. Mitchell suffered myocardial ischemia. They contend this information would have permitted his doctors to prevent his later heart attack. Plaintiffs' argument fails in the face of the results of Mr. Mitchell's October 2001 stress test. When the stress test was performed, the test did not indicate a cardiac problem, much less forecast that Mr. Mitchell would have a heart attack within the next three days. (T280, 610, 885, 1003)

Plaintiffs concede as much. They acknowledge that nothing in the EKG portion of the stress test gave any indication that Mr. Mitchell was likely to have a heart attack within three days. (T287) Absent in the test results is any indication that Mr. Mitchell had had myocardial ischemia, a condition that sometimes precedes a heart attack. (T883-84) Moreover, the testing disclosed no new blockage. (T884)

This evidence demonstrates the trial court's ruling did not materially affect the outcome of Plaintiffs' action against Dr. Kardesch. If the defect shown on Mr. Mitchell's October 2001 stress test had been caused by ischemia, rather than revealing permanent damage resulting from Mr. Mitchell's prior heart attacks, the defect would have corrected itself when Mr. Mitchell was at rest, but it did not do so. (T883)

Moreover, if Mr. Mitchell had ischemia sufficiently significant to cause chest pain during a nightmare, the blockage would have shown up on the stress test. (T581, 997, 1001) Restated, it is simply not possible that Mr. Mitchell could perform as well as he did on the stress test if he had the ninety-nine percent blockage suggested by Plaintiffs. (T583) Mr. Mitchell also had normal sinus rhythms, a finding inconsistent with the existence of any significant blockage. (T587-88)

Indeed, absent other symptoms, a cardiologist would not have performed a cardiac catheterization on Mr. Mitchell based on the October 2001 stress test results alone because the procedure's risks are too severe to warrant its performance absent a clear indication of blockage. (T575-76) In short, Dr. Kardesch's scheduling the stress test for October 22, 2001, and his subsequent response to the test results were appropriate and within the appropriate standard of care. (T287, 579-80, 890, 987-88) Under the circumstances, no immediate reaction in response to the stress test was required. (T890, 896)

Even if one were to accept Plaintiffs' version of events – that Dr. Kardesch did not send Mr. Mitchell to the emergency room on October 11, 2001, and failed to schedule a stress test until eleven days later – the record still supports the jury's verdict for Dr.

Kardesch. Expert testimony established that Mr. Mitchell had suffered a sudden heart attack on October 25, 2001. In the weeks before his fatal heart attack, Mr. Mitchell did not have any significant blockage that could have been diagnosed and treated in an attempt to prevent a later heart attack. Regardless of when the stress test was performed, an earlier stress test would not have shown that Mr. Mitchell was in imminent danger of suffering a heart attack. In no way would the admission of Plaintiffs' proffered impeachment evidence have supported a contrary conclusion. Certainly, if Mr. Mitchell would have had a favorable stress test on October 22, 2001, he would have also had a favorable test result if the test had been performed on October 11, 2001. Therefore, Plaintiffs cannot claim, given the facts of the case, that the exclusion of their collateral impeachment action affected the case's merits in any way.

#### **E. Conclusion**

Plaintiffs' appeal is governed by the abuse-of-discretion standard of review. The trial court's discretionary ruling barring impeachment of Dr. Kardesch based on the suspension of his medical license twenty-five years ago must be presumed correct. *Romeo v. Jones*, 144 S.W.3d 324, 332 (Mo. App. E.D. 2004). Indeed, this Court, in examining the trial court's order denying Plaintiffs' new trial motion, must indulge every inference favoring the trial court's decision. *Ashcroft v. TAD Resources Int'l*, 972 S.W.2d 502, 505 (Mo. App. W.D. 1998).

Plaintiffs' appeal demonstrates no abuse of discretion. The trial court possessed wide discretion to bar Plaintiffs' impeachment of Dr. Kardesch based on the suspension because the suspension is a collateral matter wholly irrelevant to Plaintiffs' malpractice

claim against him. Dr. Kardesch received his suspension because of his involvement in a criminal proceeding brought against him that had no relation to patient care. Moreover, the suspension took place more than twenty-five years before the trial in this matter. Under these circumstances, the trial court was right to bar Plaintiffs' proposed impeachment because the evidence would not have strengthened or diminished Dr. Kardesch's credibility as a witness. *See Giles v. Riverside Transport, Inc.*, 266 S.W.3d 290 (Mo. App. W.D. 2008); *Noble v. Lansche*, 735 S.W.2d 63 (Mo. App. E.D. 1987); *Klein v. General Elec. Co.*, 714 S.W.2d 896 (Mo. App. E.D. 1986). Rather, under the circumstances of this case, the admission of the evidence would have been inherently prejudicial to Dr. Kardesch because the evidence would have injected an irrelevant and inflammatory collateral matter into the case. Therefore, the trial court's judgment for Dr. Kardesch and against Plaintiffs should be affirmed.

**CONCLUSION**

Milton Kardesch, M.D., respectfully requests the Court to affirm the trial court's judgment.

Respectfully submitted,



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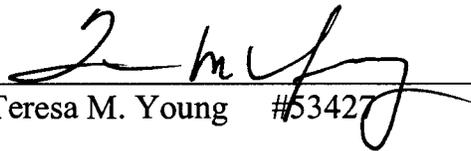
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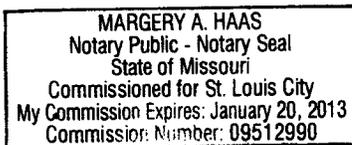
The undersigned certifies that a copy of Respondent's Brief and a disk containing same were deposited on this 6th of May, 2009, in the United States Mail, postage prepaid, addressed to: Mr. Michael A. Gross, Counsel for Appellants, 34 N. Brentwood Blvd., Suite 207, St. Louis, Missouri 63105.

  
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Subscribed and sworn to before me this 6th day of May, 2009.

  
Notary Public

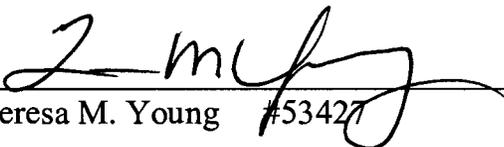
My Commission Expires:



### CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Respondent's Brief includes the information required by Rule 55.03.
2. The Respondent's Brief complies with the limitations contained in Rule 84.06 and Eastern District Special Rule 360;
3. The Respondent's Brief, excluding cover page, signature blocks, certificate of compliance, affidavit of service, table of contents, and table of authorities, contains 6,488 words, as determined by the word-count tool contained in the Microsoft Word 2000 software with which this Respondent's Brief was prepared; and
4. The computer disk accompanying Respondent's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

  
Teresa M. Young #53427