IN THE MISSOURI SUPREME COURT

No. SC89840

ALICE GEARY,
Individually and as Personal Representative of the Estate of Phillip Sgroi,
Plaintiff/Respondent,
v.
SAINT LOUIS UNIVERSITY
and PAULO BICALHO, M.D.,
Defendants/Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
THE HONORABLE MARGARET M. NEILL, CIRCUIT JUDGE
CIRCUIT COURT NUMBER 032-10783

SUBSTITUTE BRIEF OF PLAINTIFF/RESPONDENT ALICE GEARY

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STATEMENT OF FACTS

In 2000, Phillip Sgroi suffered a stroke that affected his left side. (Tr. 306-07.) As a result of the stroke, he temporarily lost his ability to walk. (Tr. 307.) Mr. Sgroi worked hard in rehabilitation and was able to regain the ability to walk with the assistance of a walker. (Tr. 307.) When he was discharged from the rehabilitation program approximately seven weeks later, he was able to walk with a walker and could get in and out of a car. (Tr. 307.) As of December 5, 2001, Mr. Sgroi was able to walk 50 feet on a regular basis and was able to rake leaves from his wheelchair. (Tr. 307-08.) Moreover, he was able to and did, in fact, travel out of state and was quite active. (Tr. 308-09.)

On December 27, 2001, Mr. Sgroi slipped and fell onto a garage floor, landing on his left side. (Tr. 309.) He was taken to the emergency room at a hospital in Oklahoma City, where he was diagnosed with a left arm fracture and left knee contusion. (Tr. 310.)

Upon returning home to St. Louis, Mr. Sgroi was admitted to Saint Louis University (SLU) Hospital, after which he was transferred to SSM Health Care St. Louis (SSM) for conditioning in activities of daily living. (Tr. 256, 311-12, 421-22.) Dr. Abna Ogle was Mr. Sgroi's treating physical and rehabilitation medicine specialist at SSM. (Tr. 414.) Dr. Ogle noted pain in Mr. Sgroi's left lower extremity, including knee pain. (Tr. 428.) He also noted that Mr. Sgroi was unable to move his left leg at times because of pain. (Tr. 442-43.)

On January 10, 2002, Mr. Sgroi was transferred to Jewish Center for the Aged (JCA) for continued rehabilitation. (Tr. 260.) He complained to his treating physician, Dr. Ehab Kaiser, of continued knee pain. (Tr. 260.)

On February 17, 2002, Mr. Sgroi was readmitted to SLU Hospital, complaining of very severe knee pain. (Tr. 112, 133, 165.) He also complained of left knee pain for the past four months. (Tr. 133.) On February 18, 2002, Mr. Sgroi's wife, Alice Geary, called from Mr. Sgroi's hospital room to request an order for an orthopedic consult. (Tr. 312-13.)

On February 19, 2002, Dr. Paulo Bicalho, an orthopedic surgeon, was consulted with regard to Mr. Sgroi's left lower extremity problems. (Tr. 107, 229, 233, 313, 342, 364.) Mr. Sgroi's chief complaint was very severe pain in his left knee. (Tr. 112.) X-rays of Mr. Sgroi's left knee were ordered, but Dr. Bicalho never ordered x-rays of his hip. (Tr. 120, 313, 372.) The x-ray films were found negative for fracture, dislocation or joint effusion in Mr. Sgroi's left knee. (Tr. 114, 120.) Dr. Bicalho diagnosed Mr. Sgroi with left knee pain. (Tr. 122, 350-51.) He did not recall doing a hip exam and did not record doing a hip exam. (Tr. 398.) Dr. Bicalho recommended that Mr. Sgroi continue to be mobilized with physical therapy. (Tr. 351.)

Mr. Sgroi was discharged from SLU Hospital on February 21, 2002. (Tr. 313.) He was in continuing pain and could do very little for himself. (Tr. 314.) He received SSM Home Care after his discharge from SLU Hospital. (Tr. 159.) During that time, he continued to experience left lower extremity pain and lost muscle tone in his left leg. (Tr. 159-60, 162-63.) On February 28, 2002, he could not straighten his left lower extremity due to pain. (Tr. 161.) He also suffered from a pressure ulcer on his buttocks. (Tr. 160.)

On March 21, 2002, Mr. Sgroi was readmitted to SLU Hospital complaining of continued and worsening pain in his left leg from mid-femur to the knee. (Tr. 96, 315-

16.) An x-ray taken that day revealed an "old left femoral fracture." (Tr. 127, 517.) He was also diagnosed with a urinary tract infection. (Tr. 316.)

Because Mr. Sgroi was no longer a candidate for an open reduction internal fixation due to the delay in treatment, Mr. Sgroi was forced to undergo a left hemiarthroplasty, a high risk surgery where he received a hip prosthesis, on April 5, 2002. (Tr. 240-46, 519, 526.) Alternatively, Mr. Sgroi and Ms. Geary's expert orthopedic surgeon Dr. Nick Tsourmas testified that if the fracture had been timely diagnosed, Mr. Sgroi could have received a minor procedure in comparison, involving pinning of the bone where no prosthesis is required. (Tr. 239-240.)

Mr. Sgroi was discharged from SLU Hospital and transferred to an extended care and rehabilitation facility. (Tr. 318-19.) After his discharge from the facility on October 29, 2003, Mr. Sgroi continued his attempt at rehabilitation and eventually regained the same ability to walk that he had prior to his fall. (Tr. 319.) Between 2003 and 2005, Mr. Sgroi's ability to walk waxed and waned. (Tr. 319-20.) In July 2006, he started developing hip pain which further hindered his ability to walk. (Tr. 320-21.) He eventually had another hip surgery on April 27, 2007, where it was discovered that he suffered from an infected hip prosthesis and resulting infected hip joint. (Tr. 243-46, 320-21.) As a result of the infection, his hip prosthesis and hip joint were surgically removed on April 27, 2007. (Tr. 243-46, 320-21.) Mr. Sgroi remained in an extended care facility at the time of trial, and was unable to appear at trial. As a result of the loss of his hip joint due to the infected prosthesis, Mr. Sgroi permanently lost not only the

ability to try and walk but the ability to transfer himself from his bed to a chair without assistance. (Tr. 243-46.)

Mr. Sgroi and his wife, Alice Geary, filed suit against SLU, Dr. Bicalho, and others, alleging the healthcare providers were negligent in failing to timely and properly diagnose and treat Mr. Sgroi's hip fracture. (L.F. 1-2.) Mr. Sgroi and Ms. Geary dismissed all of the defendants without prejudice, with the exception of SLU and Dr. Bicalho. (L.F. 9, 12, 17, 20, 101-03.) In their First Amended Petition for Damages, Mr. Sgroi and Ms. Geary claimed that Dr. Bicalho was negligent in failing to diagnose and treat Mr. Sgroi's hip fracture on February 19, 2002 and that SLU, as Dr. Bicalho's employer, was vicariously liable for his acts and omissions. (L.F. 35-69.) Additionally, Ms. Geary brought a claim for loss of consortium against SLU and Dr. Bicalho. (L.F. 68-69.)

The trial for Mr. Sgroi and Ms. Geary's cause of action began on June 11, 2007. (Tr. 6.) Voir dire was conducted on that same date. (Supp. Tr. 1.) During voir dire, Mr. Sgroi and Ms. Geary's counsel asked an "insurance question." (Supp. Tr. 38.) Specifically, he asked: "Is anybody here an officer, director, or shareholder of an insurance company called The Doctor's Company?" (Supp. Tr. 38.) Defendants' counsel immediately requested that counsel approach the bench and moved the court for a mistrial based on what Defendants' counsel stated was an "improper statement of the insurance question." (Supp. Tr. 38.) The trial court denied Defendants' motion for a mistrial. (Supp. Tr. 39.)

At trial, Dr. Nicholas Tsourmas, Mr. Sgroi and Ms. Geary's orthopedic surgery expert, testified that referred knee pain is an indication that a patient may be having a problem with his hip. (Tr. 226-27.) He stated that if a patient complains of referred knee pain, an orthopedic surgeon should have a hip fracture in his differential diagnosis. (Tr. 228.) Dr. Tsourmas further testified that in order to rule out a hip fracture, the surgeon must use radiologic tests to diagnose hip pathology, including fracture. (Tr. 228.)

Dr. Tsourmas testified that Mr. Sgroi had a hip fracture on February 19, 2002. (Tr. 229.) He based this opinion on Mr. Sgroi's clinical presentation at that time – he had fallen in December 2001; he presented to the hospital with ill-defined left lower extremity pain; over the next month he had ongoing left lower extremity pain of unknown etiology; no diagnosis had been made to account for why he continued to suffer left lower extremity pain; and he was unable to walk, transfer and care for himself. (Tr. 229-30.) He testified that the standard of care required Dr. Bicalho to have hip fracture on his differential diagnosis and that Dr. Bicalho breached the standard of care by failing to do a hip exam and order a hip x-ray on February 19, 2002. (Tr. 236-38.) Moreover, Dr. Tsourmas testified that the x-rays from March 2002 revealed an old fracture that was there on February 19, 2002 and that if Dr. Bicalho had ordered a hip x-ray on that date, it would have revealed the hip fracture. (Tr. 236-37.) Dr. Tsourmas testified that a hip fracture is an urgent orthopedic situation because it can lead to numerous other serious health problems. (Tr. 225-26.) He testified that a hip fracture should be fixed within a day or two. (Tr. 225.)

Dr. Tsourmas testified that Dr. Bicalho's breach of the standard of care caused Mr. Sgroi damages, including complications caused by a delay in treatment, such as deconditioning, decubitus ulcers, a urinary tract infection, severe pain, and the necessity for a more radical hip operation and hip prosthesis. (Tr. 238-40.) He stated that if Dr. Bicalho had properly diagnosed the hip fracture on February 19, 2002, Mr. Sgroi could have undergone a hip pinning, which was a lesser surgical procedure with a lower chance for infection than the procedure ultimately performed. (Tr. 240-46.) Dr. Tsourmas testified that Mr. Sgroi probably would never walk again and will never be a candidate for an implant due to the infection that ultimately developed. (Tr. 246.)

Ms. Geary testified at trial that Phillip Sgroi had planned to run for political office. (Tr. 306.) Mr. Sgroi and Ms. Geary also presented at trial the videotaped deposition of Mr. Sgroi's treating neuropsychologist, Dr. Robert Fucetola, who testified concerning the cognitive and communicative limitations of Mr. Sgroi secondary to his stroke. (Tr. 170.)

Two videotapes of Mr. Sgroi were played at trial. One was the videotaped deposition of Mr. Sgroi, taken May 31, 2007, while he was at Barnes Jewish Extended Care after his surgery to remove his hip prosthesis. (Tr. 321-22.) The second, Appellants' Exhibit 35 (Exhibit 35), was a portion of a news report concerning Mr. Sgroi's stroke and subsequent recovery that was filmed in 2001. (Tr. 100, 325.) SLU and Dr. Bicalho objected to the audio portion of Exhibit 35 on the basis that they could not cross examine the persons involved. (Tr. 100-01.) SLU and Dr. Bicalho did not object to the video portion showing Mr. Sgroi's physical abilities at that time. (Tr. 101.)

After hearing all of the evidence, including the testimony of SLU and Dr. Bicalho's experts, a jury returned a verdict in favor of Mr. Sgroi and Ms. Geary, awarding a total amount of $825,000 (for Mr. Sgroi in the amounts of $200,000 for past economic damages, $500,000 for past non-economic damages, and $75,000 for future non-economic damages and for Mrs. Geary in the amount of $50,000 for past non-economic damages). (L.F. 112-13.) The trial court entered judgment in accordance with the jury's verdict on June 18, 2007. (L.F. 114-16.)

SLU and Dr. Bicalho filed a post-trial motion for judgment notwithstanding the verdict or, in the alternative, for new trial or, in the second alternative, to amend judgment on July 18, 2007. (L.F. 117-23.) They also filed a Motion to Subpoena Juror and for Evidentiary Hearing. (L.F. 125-26.) The trial court allowed SLU and Dr. Bicalho's counsel to contact Juror Demetrius Sims to serve him with a subpoena for an evidentiary hearing. (L.F. 30-31.)

The supplemental evidentiary hearing on the issue of juror nondisclosure was held on October 11, 2007. (Tr. 654.) At the hearing, Mr. Sims testified that he had previously been involved in a lawsuit concerning an automobile accident. (Tr. 655.) He testified further that he received about $1800 from that lawsuit, but he did not remember the names of the defendant or his attorney in that matter until the names were mentioned by defense counsel in questioning. (Tr. 655-57.) During voir dire in this cause of action, counsel asked jurors if they had ever filed any kind of lawsuit before. (Tr. 48-49.) Mr. Sims stated at the supplemental evidentiary hearing that he must have missed that question, or he would have answered that he had filed a lawsuit. (Tr. 659-60, 662-63.)

He also testified that the verdict he gave in this cause of action was based on the evidence he heard at trial and his prior litigation did not play a role in his deliberation. (Tr. 664-65.)

The trial court denied SLU and Dr. Bicalho's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial or, in the Second Alternative, to Amend Judgment on October 15, 2007. (L.F. 114-16, 191-97.) SLU and Dr. Bicalho appealed to the Missouri Court of Appeals, Eastern District, which reversed the judgment in favor of Mr. Sgroi and Ms. Geary based on the admission of the videotape and remanded the case to the trial court for a new trial. (L.F. 198-99.) As Mr. Sgroi has since passed away, Ms. Geary, individually and as personal representative of Mr. Sgroi's estate, filed an Application for Transfer of the case to this Court. The case was ordered transferred to the Missouri Supreme Court on February 24, 2009.

POINTS RELIED ON

I. **THE TRIAL COURT WAS CORRECT IN ADMITTING EXHIBIT 35 WITH THE LIMITATIONS ORDERED, BECAUSE IT WAS PRACTICAL, INSTRUCTIVE, AND CALCULATED TO ASSIST THE JURY; DID NOT CONSTITUTE HEARSAY; AND WAS NOT PREJUDICAL, IN THAT IT (1) ASSISTED THE JURY IN UNDERSTANDING THE NATURE AND EXTENT OF MR. SGROI'S DAMAGES THAT OCCURRED THROUGH APRIL 2007, ASSISTED THE JURY IN UNDERSTANDING THE NATURE OF PHILLIP SGROI'S COGNITIVE AND COMMUNICATIVE ABILITIES THAT WERE PRESENT PRIOR TO THE DATE OF HIS CONDITION AS SEEN IN HIS VIDEOTAPED TRIAL DEPOSITION, AND WAS PRACTICAL AS IT WAS INTRODUCED IN A CASE WHERE THE PLAINTIFF WAS UNABLE TO ATTEND TRIAL DUE TO ILLNESS; (2) THE OUT-OF-COURT STATEMENTS IT CONTAINED WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTERS ASSERTED THEREIN; AND (3) MANY OF THE STATEMENTS IT CONTAINED WERE ALREADY IN EVIDENCE THROUGH OTHER TESTIMONY.**

Dunn v. St. Louis-San Francisco Ry. Co., 612 S.W.2d 245 (Mo. banc 1981)

Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99 (Mo. banc 1985)

Gomez v. Construction Design, Inc., 126 S.W.3d 366 (Mo. banc 2004)

Lawton v. Jewish Hosp. of St. Louis, 679 S.W.2d 370 (Mo. App. E.D. 1984)

II. **THE TRIAL COURT WAS CORRECT IN DENYING SLU AND DR. BICALHO'S MOTION FOR MISTRIAL, BECAUSE COUNSEL IS PERMITTED TO ASK AN "INSURANCE QUESTION" ON VOIR DIRE IF THE PROPER PROCEDURE IS FOLLOWED, IN THAT COUNSEL FOLLOWED THE PROPER PROCEDURE, AND THERE IS NO EVIDENCE THAT SLU AND DR. BICALHO WERE PREJUDICED BY THE QUESTION THAT WAS ASKED.**

Hulahan v. Sheehan, 522 S.W.2d 134 (Mo. App. 1975)

McCaffery v. St. Louis Pub. Serv. Co., 252 S.W.2d 361 (Mo. 1952)

Yust v. Link, 569 S.W.2d 236 (Mo. App. 1978)

III. **TRIAL COURT WAS CORRECT IN DENYING SLU AND DR. BICALHO'S MOTION FOR NEW TRIAL BASED ON JUROR NONDISCLOSURE, BECAUSE AN UNINTENTIONAL NONDISCLOSURE BY A JUROR DURING VOIR DIRE MUST PREJUDICE A PARTY TO REQUIRE A NEW TRIAL, IN THAT JUROR SIMS DID NOT HEAR THE QUESTION ASKED ABOUT PRIOR LITIGATION DURING VOIR DIRE, THE PREVIOUS LITIGATION HE FAILED TO DISCLOSE OCCURRED SIX YEARS BEFORE THE JURY TRIAL IN THIS CASE, AND HE DID NOT CONSIDER HIS PRIOR LITIGATION WHEN CONSIDERING THIS CASE.**

Bradford v. BJC Corp. Health Servs., 200 S.W.3d 173 (Mo. App. E.D. 2006)

Williams ex rel. Wilford v. Barnes Hosp., 736 S.W.2d 33 (Mo. banc 1987)

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN ADMITTING EXHIBIT 35 WITH THE LIMITATIONS ORDERED, BECAUSE IT WAS PRACTICAL, INSTRUCTIVE, AND CALCULATED TO ASSIST THE JURY; DID NOT CONSTITUTE HEARSAY; AND WAS NOT PREJUDICAL, IN THAT IT (1) ASSISTED THE JURY IN UNDERSTANDING THE NATURE AND EXTENT OF MR. SGROI'S DAMAGES THAT OCCURRED THROUGH APRIL 2007, ASSISTED THE JURY IN UNDERSTANDING THE NATURE OF PHILLIP SGROI'S COGNITIVE AND COMMUNICATIVE ABILITIES THAT WERE PRESENT PRIOR TO THE DATE OF HIS CONDITION AS SEEN IN HIS VIDEOTAPED TRIAL DEPOSITION, AND WAS PRACTICAL AS IT WAS INTRODUCED IN A CASE WHERE THE PLAINTIFF WAS UNABLE TO ATTEND TRIAL DUE TO ILLNESS; (2) THE OUT-OF-COURT STATEMENTS IT CONTAINED WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTERS ASSERTED THEREIN; AND (3) MANY OF THE STATEMENTS IT CONTAINED WERE ALREADY IN EVIDENCE THROUGH OTHER TESTIMONY.

A. Standard of Review

Admission of demonstrative evidence is within the sound discretion of the trial court. *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d 839, 846 (Mo. banc 1992). Specifically, the trial court has broad discretion in assessing the admissibility of videotapes. *Gomez v. Construction Design, Inc.*, 126 S.W.3d 366, 373-74 (Mo. banc

2004). A trial court's ruling regarding the admissibility of videotapes "is accorded great weight and will not be disturbed on appeal absent an abuse of discretion." *Id.* "Judicial discretion is abused when a 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; if reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Trageser v. St. Joseph Health Ctr.*, 887 S.W.2d 635, 636 (Mo. App. 1994) (quoting *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 804 (Mo. banc 1988)).

B. Argument

1. *Introduction*

The trial court appropriately admitted Exhibit 35, a videotape of a local television news report showing Mr. Sgroi at a rehabilitation facility in St. Louis, after he had sustained a stroke but before he was required to have a prosthetic hip implanted in March 2002, developed a hip prosthesis infection in 2006 and 2007, and had to have his hip prosthesis and entire hip joint surgically removed in 2007, rendering him permanently confined to his bed as of the time of the trial of this matter on June 11, 2007. All of the above events starting in March 2002 were a direct result of the negligence of SLU and Dr. Bicalho. The videotape was practical, instructive, and calculated to assist the jury; did not constitute hearsay; was not admitted for the purpose of demonstrating Mr. Sgroi's "good character;" and was not prejudicial to SLU or Dr. Bicalho, neither of whom asked for any limiting instruction from the court on the basis for which the jury could consider

it. As the trial court did not abuse its discretion in admitting the video, its decision should not be disturbed on appeal.

2. *Videotape Was Practical, Instructive and Calculated to Assist the Jury in Understanding the Case*

The videotape was practical, instructive, and calculated to assist the jury in understanding multiple differences in Mr. Sgroi's condition before and after the negligence of SLU and Dr. Bicalho which was relevant to the determination of damages. Specifically, the videotape provided both visual and audio evidence which was crucial for the jury to understand the following with respect to damages in the case: (1) the extent of Mr. Sgroi's physical limitations and level of disability after SLU and Dr. Bicalho's negligence when compared to before; (2) Mr. Sgroi's mental state and communicative abilities after his stroke but before the time of his videotaped deposition, which was extremely limited with respect to the testimony that he could give as he was recuperating from major surgery in which his hip prosthesis and hip joint were removed; (3) the extent of Mr. Sgroi's other damages including his loss of enjoyment of life.

"Whether a videotape should be admitted or rejected depends on whether it is practical, instructive and calculated to assist the trier of fact in understanding the case." *Gomez*, 126 S.W.3d at 374. Though SLU and Dr. Bicalho attempt to apply a much narrower rule, such a rule has not been adopted by the Missouri Supreme Court and would significantly limit the discretion afforded trial courts in the admission of evidence.

The Missouri Supreme Court has only acknowledged the general rule governing the admission of videotapes. However, the Courts of Appeals for the Eastern and

Southern Districts have significantly narrowed that rule by finding that videotapes can only be admitted for either (1) a re-creation of events or (2) to aid an expert in demonstrating a difficult concept. *Grose v. Nissan North America, Inc.*, 50 S.W.3d 825, 830 (Mo. App. E.D. 2001); *Daniel v. Indiana Mills & Manufacturing*, 103 S.W.3d 302, 315 (Mo. App. S.D. 2003). The case relied on for that limitation is *Beers v. Western Auto Supply Co.*, 646 S.W.2d 812 (Mo. App. W.D. 1982). The holding in *Beers* is not so limited. Instead, the *Beers* court merely extended existing Missouri law on the admission of videotapes to include not only the re-creation of an accident scene, as was apparently already recognized, but also to include the situation where a videotape is offered for the purpose of foundation for an expert's opinion. *Beers* at 815-816. The *Beers* court did not limit its holding to the two purposes discussed in the case; it merely extended Missouri law to cover the videotape admission at issue, i.e. a videotape offered in support of an expert's testimony.

Additionally, Ms. Geary is unable to find a case from the Court of Appeals for the Western District, in which the *Beers* case was determined, limiting the admission of videotapes to the two purposes enumerated by the Courts of Appeals for the Eastern and Southern Districts. In fact, the Court of Appeals for the Western District has cited *Beers* in subsequent cases and did not so limit the holding. *See Trageser v. St. Joseph Health Ctr.*, 887 S.W.2d 635, 636 (Mo. App. W.D. 1994); *King v. Copp Trucking, Inc.*, 853 S.W.2d 304 (Mo. App. W.D. 1993). Furthering the confusion, the Court of Appeals for the Eastern District has, since its decision in *Grose*, upheld the admission of a day-in-the-life videotape without citing the two-purpose rule laid out in *Grose*. *See Lawton v.*

Jewish Hosp. of St. Louis, 679 S.W.2d 370 (Mo. App. E.D. 1984). In *Lawton*, the appellate court simply held that the videotape was "essential" to the plaintiff's proof of his claims and "necessary for the jury's determination of damages." *Id.* at 372. Thus, inconsistency abounds on this issue within the Courts of Appeal of this state.

While these inconsistencies exist in the Courts of Appeal, the Missouri Supreme Court has yet to adopt the narrow rule being applied in many instances by the Eastern and Southern Districts. In fact, since 2001 when the Court of Appeals for the Eastern District announced that limited two-purpose test in *Grose*, the Missouri Supreme Court has addressed the issue of admission of videotapes and did not adopt that rule. *See Gomez* at 374. Instead, the Missouri Supreme Court reaffirmed its holding that to be admitted a videotape must be practical, instructive, and calculated to assist the jury in understanding the case. *Id.* Additionally the Court reiterated that the trial court should be given broad discretion with respect to the admission of videotape evidence. *Id.* at 373-74.

Furthermore, the videotape admitted in *Gomez*, an admission which the Missouri Supreme Court upheld, would not have been properly admitted for either of the two limited purposes outlined in *Grose*. The videotape at issue in *Gomez* was a videotape of an accident scene taken the day after the plaintiff was injured. *Id.* at 373. The Missouri Supreme Court found that the videotape "depicted many of the items and concepts discussed by both parties" at trial and that the video served the "exact purpose" of showing the condition of the accident scene when the plaintiff was injured. *Id.* at 374. Such a purpose does not fit into either of the two categories delineated in *Grose* for the admission of videotapes.

The narrow rule created by the Courts of Appeal for the Eastern and Southern Districts would also seemingly not permit "day-in-the-life" videotapes to be admitted into evidence, regardless of whether the trial court found them to be practical, instructive, and calculated to assist the jury, because they are neither re-creations of events nor are they aids for experts. This result is confusing as Missouri courts consistently hold that trial courts have broad discretion in the admission of videotapes and the narrow rule would significantly limit that discretion. The broader rule laid out by the Missouri Supreme Court more appropriately supports the wide discretion granted trial courts in the admission of videotape evidence.

Situations such as this case, where the plaintiff is not able to be present at trial, create additional justification for the admission of certain videotape evidence. In *Helm v. Wismar*, the Missouri Supreme Court upheld a trial court's exclusion of a day-in-the-life video based on (1) the due deference awarded trial courts in their admission or exclusion of evidence and (2) the fact that the plaintiff was present at trial. *Helm v. Wismar*, 820 S.W.2d 495, 497 (Mo. banc 1991). The Missouri Supreme Court first emphasized that a trial court's ruling in regard to the admission of videotape evidence must be given great deference. *Id.* The Missouri Supreme Court then distinguished the situation in *Helm* from the situation in *Lawton*, where the admission of a day-in-the-life video was upheld, on the fact that the plaintiff in *Lawton* was unable to be appear at trial. *Id.* In *Lawton*, the appellate court specifically found that "the videotape provided information essential to a fair jury determination because respondent's ill health prevented his appearance in

the courtroom." *Lawton*, 679 S.W.2d at 372. It then stated that the probative value of the videotape admitted outweighed any potential resulting prejudice. *Id.*

The Missouri Supreme Court has never addressed whether a videotape of a party plaintiff prior to injury may be admitted into evidence in order to demonstrate issues such as the nature and extent of damages and the mental and physical condition of the plaintiff prior to injury. Such evidence in certain circumstances would certainly assist the jury in understanding the case. Nor has the Missouri Supreme Court directly addressed the admission of videotape evidence of the plaintiff when that plaintiff is unable to attend trial and/or fully testify by way of videotaped deposition due to illness or disability. However, the Missouri Supreme Court has alluded to the plaintiff's inability to attend trial to being a significant factor that should be considered when determining whether to admit a day-in-the-life videotape of the plaintiff. *Helm*, 820 S.W.2d at 497.

SLU and Dr. Bicalho first argue that the videotape was not practical, instructive, and/or calculated to assist the jury in understanding the case because it did not meet the test established by the Court of Appeals for the Eastern and Southern Districts on videotape admissibility. (Appellants' Substitute Brief at 22.) SLU and Dr. Bicalho argue that the test regarding the admissibility of a videotape requires that the videotape either (1) recreate an event at issue in the litigation or (2) illustrate physical properties or scientific principles that a lay person would find difficult to understand and which forms the foundation for an expert's opinion. (Appellant's Substitute Brief at 22.) It should be noted that SLU and Dr. Bicalho never made such an objection at the trial of this matter and conceded that some of the video portion of the tape was not objectionable to the

extent that it showed `Mr. Sgroi's "physical abilities at that time." (Tr. 101.) Nevertheless, for the reasons previously explained above and in Respondent's Application for Transfer, this Court should not apply the narrow standard employed inconsistently by the Courts of Appeal but rather should affirm this Court's standard as explained in *Gomez*.

Second, SLU and Dr. Bicalho argue that the videotape is "simply not relevant." (Appellants' Substitute Brief at 22.) Ms. Geary respectfully submits that SLU and Dr. Bicalho are simply missing the point here. First, while it is arguably true, as SLU and Dr. Bicalho state, that the "injury" in the case occurred on February 19, 2002, when Dr. Bicalho failed to diagnose Mr. Sgroi's hip fracture, the damages that directly resulted from that injury occurred both in 2002, when there was a delay in treatment resulting in the need for a hip prosthesis among other complications, and in April 2007, when Mr. Sgroi developed a hip infection because of the hip prosthesis. The damages that resulted from Mr. Sgroi's hip infection included a major surgery to remove the infected prosthesis and hip joint bone which rendered Mr. Sgroi bed bound in a nursing home, suffering from a serious infection, unable to move himself from the bed, unable to walk, and unable to have another prosthetic joint implanted. (Tr. 246.) This was Mr. Sgroi's physical state at the time of trial in this case on June 11, 2007, and he was unable to attend trial due to those circumstances.

Exhibit 35 provided the only available visual evidence of Mr. Sgroi's pre-injury and pre-damages condition at the time of the trial of this case. Mr. Sgroi's ability to ambulate had waxed and waned over the years since his stroke and hip fracture. He had

regained his ability to walk with assistance following his hip fracture prosthesis surgery, only to lose it again at some later point. SLU and Dr. Bicalho admit that Phillip Sgroi had regained the ability to walk after his fractured hip commensurate with his abilities prior to the fall ever occurring. Mr. Sgroi's wife testified that he continued through 2006 and 2007 to try to walk in different physical therapy programs. (Tr. 320) However, in 2007, events took a sharp turn for the worst when Mr. Sgroi lost not only all potential to ambulate but his abilities to stand, transfer from bed and chair, and have a functioning leg and hip joint. His loss of enjoyment of life was also more seriously impacted than it had been before. Exhibit 35 was an accurate portrayal of (1) Mr. Sgroi before the fall and resulting fracture and (2) Mr. Sgroi after the surgical repair of the fracture with the prosthesis and before he developed an infected prosthetic requiring its removal.

Additionally, the admission of Exhibit 35 assisted the jury in understanding the true nature of Mr. Sgroi's cognitive and communicative abilities at the time of his care and treatment at issue. SLU and Dr. Bicalho's repeatedly argued during the trial that Mr. Sgroi had failed to follow directions and communicate due to alleged "psychiatric problems" and the allegation that "he was not always able to follow directions because of the problems he ha[d]." (Tr. 85.)

Mr. Sgroi and Ms. Geary presented the testimony of Mr. Sgroi's treating neuropsychologist, Dr. Robert Fucetola, to explain the true and limited degree of his psychiatric and cognitive disabilities. (Tr. 170.) Other than Exhibit 35, though, the only visual evidence the jury had of Mr. Sgroi was his videotaped deposition. However, Mr. Sgroi's deposition was taken on May 31, 2007, about a month following his surgery to

remove his prosthesis and hip joint and over five years following the events in question involving SLU and Dr. Bicalho. At the time of his deposition, Mr. Sgroi was at Barnes Jewish Extended Care where he was receiving therapy following his hip surgery on April 27, 2007. (Tr. 321-22.) The deposition, which lasted about twenty minutes total, showed the limitations of Mr. Sgroi's ability to testify and accurately recall. let alone attend trial, are evident by watching the video. Exhibit 35 became important then to show Phillip Sgroi's cognitive and communicative abilities prior to the significant damages caused by the SLU and Dr. Bicalho in 2007 when he was not confined to a bed, suffering from an infection, recovering from massive surgery, and under the influence of pain medication in comparison to his condition at the time of his videotaped deposition.

Exhibit 35 was taken much closer in time to the care at issue than Mr. Sgroi's videotaped deposition, the only other time the jury saw Mr. Sgroi. As such, Exhibit 35 provided good evidence to assist the jury in understanding the full nature and extent of Mr. Sgroi's damages as a result of SLU and Dr. Bicalho's negligence up through the time of trial in 2007. Rather than looking at Exhibit 35 in a vacuum and only as representation of Mr. Sgroi's condition prior to his hip fracture and resulting hip prosthesis in 2002, the trial court properly considered the full extent of its value in assisting the jury to understand the totality of Mr. Sgroi's damages that had occurred not only in 2002 when compared to 2001, but in 2003, 2004, 2005, 2006 and 2007.

Not only was the videotape admissible for the above reasons, but it is questionable whether SLU and Dr. Bicalho preserved this objection for appeal. A party may not raise on appeal an objection to evidence it did not make at trial. *Firestone v. Crown Center*

Redevelopment Corp., 693 S.W.2d 99, 107 (Mo. banc 1985). Only the specific objection made at trial may be pursued on appeal and all other objections are waived. *Id.* "An objection to a question should be so specific that the trial court can realize what rule of evidence is being invoked and why that rule would exclude a responsive answer." *Bailey v. Valtec Hydraulics, Inc.*, 748 S.W.2d 805, 808 (Mo. App. E.D. 1988). An objection "on the grounds of relevancy and materiality is too general to preserve the trial court's ruling for appellate review." *Id.*

One of SLU and Dr. Bicalho's main arguments on appeal is that the videotape was irrelevant and did not show what Mr. Sgroi's ability to walk would have been. However, SLU and Dr. Bicalho did not sufficiently object to this at trial. First, SLU and Dr. Bicalho only made general objections that the videotape was not calculated to assist the jury and was irrelevant. (Tr. 100-101; A4-A5.) However, a relevancy objection is too general to preserve it for appeal. Thus, SLU and Dr. Bicalho's objections were not specific enough to preserve these arguments for appeal.

Second, after SLU and Dr. Bicalho objected to the videotape as not calculated to assist the jury and as irrelevant, their counsel specifically disclaimed having any objection to the videotape if it were played without sound to show Mr. Sgroi's physical abilities at the time the videotape was made. (Tr. 101, A4.) As such, not only were those objections not preserved for appeal, but SLU and Dr. Bicalho seemingly waived this entire argument and may not now object on these bases on appeal. Moreover, SLU and Dr. Bicalho could have requested a limiting instruction be read to the jury, confining their use of the videotape to considering only Mr. Sgroi's damages and his before and after

conditions. Their failure to request a limiting instruction is further evidence that they waived their right to appeal this issue.

The cases SLU and Dr. Bicalho cite in support of their arguments are not persuasive. SLU and Dr. Bicalho cited *Grose* for the limited, two-purpose test the Eastern District employed for the admission of videotapes. (Appellants' Substitute Brief at 21.) For the reasons already discussed, this Court should not so limit the test on videotape admissibility. SLU and Dr. Bicalho also rely on *Grose* in support of their assertion that the video improperly created a lasting visual impression in the minds of the jurors, and its probative value was outweighed by its inflammatory effect. (Appellants' Substitute Brief at 21.)

The facts underlying the court's holding in *Grose* were much different than the facts of this case. In *Grose,* the video at issue showed a staged recreation of a tractor-trailer/automobile accident. *Grose*, 50 S.W.3d 828. The court held that similarities between the actual and staged crashes created the impression that the video was a recreation of the accident. *Id.* at 832. It further held, "[p]hotos or videos showing one party's *staged re-creation* of those facts present an altogether different set of problems." *Id.* (emphasis in original). The court further explained:

> Here the extreme vividness and verisimilitude of pictorial evidence is truly a two-edged sword. For not only is the danger that the jury may confuse art with reality particularly great, but the impressions generated by the evidence may prove particularly difficult to limit or, if the film is

subsequently deemed inadmissible, to expunge by judicial instruction.

Id. (internal citation omitted). In this case, the video did not show a staged recreation; rather, it documented Mr. Sgroi's actual rehabilitation efforts. Therefore, the concerns present in *Grose* were not present here, and there was not a heightened possibility that jurors would confuse art with reality.

SLU and Dr. Bicalho also rely on *Haley v. Byers Transp. Co.*, 414 S.W.2d 777, 780 (Mo. 1967), for their assertion that admission of the videotape was improper because it was not subject to cross-examination and "the very obvious impact of the videotape would be to inflame the jurors." (Appellants' Substitute Brief at 23.) *Haley* is distinguishable from this case in two important respects. First, in the *Haley* case, the videotape was made for purposes of trial and was found to be "self-serving." *Haley*, 414 S.W. 2d at 780. It was a "day-in-the-life" film which depicted the disabled plaintiff engaging in various activities, including very "laborious acts," such as getting in and out of his wheelchair. *Id.* at 780. The court found the impact of the video would have been to incite sympathy for the plaintiff out of proportion to the relevancy of the evidence. *Id.* The court further noted that the plaintiff was present at trial for several days in his wheelchair. *Id.* Second, the court found that the video was taken for purposes of the litigation and that defense counsel was not present when it was taken. *Id.*

Conversely, the videotape here was not taken for purposes of trial and was thus not "self-serving" in the sense that the court in *Haley* found the videotape to be. Indeed, the videotape was taken before the events at issue in this trial even occurred.

Additionally, the video did not show Mr. Sgroi in any pain, nor did it show him performing "laborious acts" attributable to the injuries at issue in this case. As such, it did not have the same impact of inciting sympathy of the jury in the way the court found the video in *Haley* did.

Moreover, Mr. Sgroi was not able to be present in court during these proceedings as was the plaintiff in *Haley*. Courts have routinely upheld admission of videotapes when plaintiffs are not able to be present in court. *See, e.g., Lawton v. Jewish Hosp. of St. Louis*, 679 S.W.2d 370 (Mo. App. E.D. 1984) (appellate court upheld admission of videotape when plaintiff was unable to be in court); *Long v. Missouri Delta Med. Ctr.*, 33 S.W.3d 629 (Mo. App. S.D. 2000). In *Lawton*, the court stated that the probative value outweighed any potential resulting prejudice. *Id.* Conversely, when courts exclude "day-in-the-life" videotapes, they often cite the ability of the plaintiff to be physically in court. *Haley*, 414 S.W.2d 777 (noting that plaintiff was in trial for five days); *Repple v. Barnes Hosp.*, 778 S.W.2d 819 (Mo. App. E.D. 1989) (holding that plaintiff was present at trial and could demonstrate her activities to the jury through testimony).

Because Mr. Sgroi was unable to be at trial due to poor health, Exhibit 35 partially took the place of his testimony; especially since Mr. Sgroi's videotaped deposition was of limited duration due to his poor health. The probative value of Exhibit 35 outweighs any potential prejudice. The trial court here, as in *Lawton*, should be given great deference as to its decision, and the admission of the videotape should thus be upheld.

Finally, SLU and Dr. Bicalho rely on *Spain v. Brown,* 811 S.W.2d 417 (Mo. App. E.D. 1991). In that medical malpractice case, the defendant surgeon reviewed a video of

the procedure he ultimately performed on the plaintiff prior to surgery. *Spain*, 811 S.W.2d at 424. The defendant sought to admit the video to show the information on which he based his procedures while performing them on the plaintiff. *Id.* The trial court sustained the plaintiff's hearsay objection, and the court of appeals affirmed, holding that a principal issue at trial was the placement of a particular incision that allegedly caused nerve damage in relation to anatomical landmarks, and that information the defendant received from the videotape was not relevant to that issue. *Id.* In contrast, in this case, the videotape was highly relevant with regard to both the nature and extent of damages and liability related to Mr. Sgroi's cognitive and communicative abilities.

Notably, in the cases cited by SLU and Dr. Bicalho, the videotapes were used in an attempt to prove liability, whereas, the videotape in this case was relevant with regard to damages, which courts have deemed proper. For example, in *Watkins v. Cleveland Clinic Found.*, 719 N.E.2d 1052, 1066 (Ohio App. 1998), it was not reversible error for a trial court to allow a videotape that showed the plaintiff, who was in a persistent vegetative state, exhibit a painful reflex during the suctioning of her airway. The video was relevant and admissible to demonstrate that the patient could experience pain and suffering. *Id.* The court in *Watkins* admitted the video to show an incident where the plaintiff experienced pain, to prove damages in the case.

Courts have also found that before-and-after evidence shown through videotaped evidence is also relevant and admissible. A Hawaii court found just that to be true in *Tanuvasa v. City and County of Honolulu*, 626 P.2d 1175, 1179 (Hawaii App. 1981), a case comparable to this one. There, the plaintiff, who had a "brilliant" high school

football career and played football in college, claimed damages for injuries inflicted on him by a police officer that kept him from playing football. Expert testimony showed that, had the plaintiff stayed in shape and motivated, he "stood a good chance of playing professional football in the bottom 25% of the National Football League or in the World or Canadian Leagues." *Id.* At trial, an expert testified that, as a result of the plaintiff's injuries, he should not play football anymore. *Id.* The trial court admitted videotapes of the plaintiff's high school football career. In upholding admission of the tapes, the appellate court found:

> [T]here was a claim of limitation of activities due to the injury, and evidence in support thereof. The evidence introduced was relevant to show appellee as he was before the incident in question and the court below did not abuse its discretion in permitting the jury to view the same.

Id. at 1181.

In accordance with the general rule laid out by the Missouri Supreme Court regarding the admission of videotape evidence, Exhibit 35 was calculated to assist the jury in understanding the damages in this case Mr. Sgroi's mental and physical condition before the injury at issue in this case which made issues by SLU and Dr. Bicalho at trial. Additionally, showing the video was practical because Mr. Sgroi was unable to attend trial and his physical condition limited his deposition.

3. *Audio Portion of Videotape Did Not Constitute Hearsay*

The videotape's audio did not constitute hearsay of Mr. Sgroi's good character, and the trial court was correct in allowing the videotape's admission with the sound. "Hearsay is defined as 'in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the credibility of the out-of-court declarant.'" *State v. Bell,* 62 S.W.3d 84, 89 (Mo. App. W.D. 2001) (internal citation omitted).

SLU and Dr. Bicalho argue that the audio portion of the videotape contains hearsay statements not subject to cross-examination and, thus, should not have been admitted. (Appellants' Substitute Brief 27.) The videotape's audio did not constitute hearsay. The statements on the videotape were not offered to prove the truth of the matters asserted therein; rather, they were offered to show Mr. Sgroi's condition, both physically and mentally, after his stroke but before his injury in 2001. Specifically, they were offered to rebut SLU and Dr. Bicalho's assertion at trial that after Mr. Sgroi's stroke, but prior to SLU and Dr. Bicalho's care and treatment, Mr. Sgroi had limited mobility and failed to follow directions and adequately communicate due to "psychiatric problems." (Tr. 85.) The videotape audio showed that Mr. Sgroi could follow directions and communicate normally after his stroke and that he did not have "psychiatric problems." Therefore, a video showing Mr. Sgroi following directions and communicating in a normal fashion after his stroke, but prior to SLU and Dr. Bicalho's care and treatment was highly relevant.

SLU and Dr. Bicalho admit they "have been unable to locate any Missouri case discussing the admissibility of a newscast or audio portion of a videotape. . ." (Appellants' Substitute Brief at 28.) They did note that the appellate court in *Lawton* found that "the admission of a videotape without sound was not an abuse of discretion." (Appellants' Substitute Brief at 28.) However, that holding supports the principle that trial court decisions on admissibility of videotapes are given great deference by appellate courts instead of the argument that a videotape's audio is inadmissible.

Additionally, SLU and Dr. Bicalho attempt to support their assertion with *Rivera v. Eastern Paramedics, Inc.*, 267 A.D.2d 1029 (N.Y.A.D. 4 Dept. 1999). (Appellants' Substitute Brief at 28.) First, in the *Rivera* case, the audio portion of the videotape described care at issue in that litigation. *Rivera*, 267 A.D.2d at 1030-31. That is not the case here. Second, that case, once again, is an appellate court decision upholding a trial court's ruling concerning a videotape. SLU and Dr. Bicalho have been unable to cite any case from any jurisdiction holding that the admission of the audio portion of a videotape has been an abuse of discretion and, thus, overturned on appeal. Furthermore, *Rivera*, being a New York case, is wholly without controlling authority on this court. SLU and Dr. Bicalho also cite *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978). (Appellants' Substitute Brief at 29-30.) As with *Rivera*, the audio portion of the videotape in *Wilson* included statements directly relevant to a matter in issue. *Wilson*, 577 P.2d at 1330. Here, concededly, the audio portion of the video was an interview of Mr. Sgroi while he was at SSM Rehabilitation facility for treatment that is not at issue in

this case. (Appellants' Substitute Brief at 23.) Also as with *Rivera*, *Wilson* is wholly without controlling authority on this court as it is an Oregon state case.

Without a controlling decision that requires the audio portion of a videotape to be excluded at trial, this court's decision to admit the audio of a videotape must be given great deference. The trial court viewed this videotape, outside the presence of the jury, and allowed its admission into evidence, including a majority, but not all, of the audio portion. After viewing the videotape, the trial judge had the opportunity to remove any portions he deemed to be irrelevant, immaterial, or prejudicial. What was then shown was within the trial judge's discretion and should not be disturbed on appeal.

SLU and Dr. Bicalho also attempt in their Substitute Brief to establish a new basis for which the alleged hearsay of the videotape is inadmissible. However, Rule 83.08 explicitly forbids a change in the basis of any claim raised in the court of appeals brief. SLU and Dr. Bicalho, in their Substitute Brief lump a new argument, specifically that the audio portion of the videotape constitutes character evidence, together with their hearsay argument. However, SLU and Dr. Bicalho should not be allowed to make this argument on appeal to this Court, as it was not made in their brief submitted to the court of appeals.

Additionally, SLU and Dr. Bicalho cannot now object on the basis that the audio portion of the videotape constitutes inadmissible character evidence because they did not make that specific objection at trial. A party may not raise on appeal an objection to evidence it did not make at trial. *Firestone*, 693 S.W.2d at 107. Only the specific objection made at trial may be pursued on appeal and all other objections are waived. *Id.*

Further, SLU and Dr. Bicalho waived this argument by not requesting a limiting instruction. In *State v. Porter*, 241 S.W.2d 385 (Mo. App. W.D. 2007), the defendant argued on appeal that the trial court erred and abused its discretion in overruling his motion for a mistrial after certain testimony was allowed in error. At trial, the defendant's counsel objected to the testimony and requested a mistrial but did not request any other relief. *Id.* The trial court sustained the objection but denied the request for mistrial. *Id.* The appellate court in that case held first that a mistrial is "a drastic remedy" and that it should only be granted to "cure grievous prejudice" where the prejudice that results could not be corrected by any other means. *Id.* (internal citation omitted). It then found that the defendant should have requested a limiting instruction, because such instruction could have avoided any resulting prejudice. It stated that "[t]he fact that a defendant limits his request for relief to that of a mistrial rather than making a request for a less drastic corrective action cannot aid him." *Id.*

Here, not only did SLU and Dr. Bicalho not request a limiting instruction that the jury not consider the audio portion of the videotape as character evidence of Mr. Sgroi, but they did not object on the basis that the audio constitute inadmissible character evidence at trial. Had SLU and Dr. Bicalho had this objection at trial, they could have asked the court for a limiting instruction to prevent the jury from considering the videotape as character evidence. Without requesting such an instruction, SLU and Dr. Bicalho waived this argument. SLU and Dr. Bicalho should not be allowed to make this argument on appeal.

Regardless, the videotape was not offered or admitted for the purpose of character evidence and did not constitute character evidence. The statements on the videotape at issue here did not establish Mr. Sgroi's personality traits or propensities. Instead, they were merely statements of his progress in rehabilitation and his plans of running for political office. As such, they did not constitute character evidence.

Admission of the videotape, including some of the audio portion is not reversible error. While SLU and Dr. Bicalho offer case law demonstrating cases where videos were excluded from evidence, the courts of appeals consistently hold that a trial court's decision on admissibility should not be disturbed on appeal absent abuse of discretion. Appellate courts have upheld decisions to exclude *and* admit videotapes. In this case, the trial court had the opportunity to view the tape and was in the best position to rule on its admissibility based on whether it was probative and helpful to the jury. After watching the video, the trial court ruled on what part of the videotape was admissible and that the audio could be played. That ruling should not be disturbed.

4. *Admission of Videotape Was Not Prejudicial Error*

Finally, SLU and Dr. Bicalho argue that they were prejudiced by admission of the videotape. (Appellants' Substitute Brief at 31.) As SLU and Dr. Bicalho acknowledge, to prevail on a claim of error regarding the admission of evidence or improper argument, an appellant must show prejudice. *See, e.g., Danneman v. Pickett,* 819 S.W.2d 770, 773 (Mo. App. E.D. 1991) (evidence); *Henderson v. Fields,* 68 S.W.3d 455, 471 (Mo. App. W.D. 2001) (argument). Prejudicial error occurs when evidence or argument tends to lead the jury to decide the case on some basis other than the established propositions in

the case. *See id.* A party alleging improper admission of evidence must specify how it was prejudiced by the evidence, and conclusory arguments will not suffice. *Goede v. Aerojet General Corp.,* 143 S.W.3d 14, 19 (Mo. App. E.D. 2004).

SLU and Dr. Bicalho admit they cannot identify how the videotape affected the verdict and/or the amount of the verdict. (Appellants' Substitute Brief at 31.) Because they have failed to specify how they were prejudiced, their argument that the judgment should be reversed due to admission of the videotape (which was proper) fails. Moreover, as discussed above, the videotape was not inflammatory in that it was not made for purposes of litigation and did not show Mr. Sgroi in pain. Furthermore, because Mr. Sgroi's damages were a key issue at trial (and a prima facie element of Mr. Sgroi and Ms. Geary's case), Mr. Sgroi's abilities prior to the injury and, hence, the videotape were highly relevant.

Assuming *arguendo*, that the statements were inadmissible hearsay, inadmissible hearsay is only reversible error if it was prejudicial. "The admission of evidence claimed to be hearsay is reversible error only if the complaining party is prejudiced." *Dunn v. St. Louis-San Francisco Ry. Co.*, 612 S.W.2d 245 (Mo. banc 1981). "Error in admitting evidence is not prejudicial requiring reversal unless it is outcome-determinative." *State v. Washington*, 260 S.W.3d 875, 880 (Mo. App. E.D. 2008) (internal citation omitted). "A finding of outcome-determinative prejudice expresses a judicial conclusion that the erroneously admitted evidence so influenced a jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability

that the jury would have reached a different conclusion but for the erroneously admitted evidence." *Id.* at 880-81 (internal citation omitted).

Here, SLU and Dr. Bicalho complain about three statements on the video: (1) a statement by a treating physician who was not a party to this case that Mr. Sgroi had worked hard to recover from injuries caused by his stroke; (2) a statement by Mr. Sgroi that he would like to run for political office to help others; and (3) a statement by Mr. Sgroi that he believed healthcare was a basic human right and that he would like to use the political process to assure everyone had access to healthcare. (Appellants' Substitute Brief at 25-26.)

SLU and Dr. Bicalho have failed to show that they were prejudiced by these statements. To the contrary, the statements complained of were merely cumulative evidence of other testimony admitted. Prior to the time at trial when the videotape was played, Ms. Geary, testified as follows:

> Q. Okay. Was Phil back in that period of time in the nineties before his stroke interested in community things and politics?
>
> A. Yes, he was. He was very active in a lot of community things and in politics.
>
> Q. Did he actually run for office?
>
> A. Well, he had at one time been a committee man in the City of St. Louis. He had to run for that office, and he did win, and he only served one term. And then at the time

we were living in south county, he was active in the local political organization and he was planning at some point to run for office.

Q. Okay. Now, he had a stroke, as we all know, we've been talking about, in 2000, right? And that affected his left side, is that right?

A. Yes, that's right.

Q. And did he lose the ability to walk for awhile?

A. Yes, he did.

Q. And did he fight hard to get back the ability to walk?

A. Yes. He worked very hard in rehabilitation, and he was in a very good program and he probably was walking – I mean, he was walking somewhat within a few weeks. And by the time he got out of the rehab program after almost two months, I think it might have been seven weeks, he was walking with a walker. He could get in and out of a car. He was doing really well.

(Tr. 306-07.) SLU and Dr. Bicalho did not object to any of these questions regarding Mr. Sgroi's political involvement, his desire to run for office in the future, and his determination to work hard to regain the ability to walk. Therefore, they failed to preserve any objection to the testimony and subject matters at issue for purposes of when

the video was played later at trial or for purposes of appeal. *Roberson v. Weston,* 255 S.W.3d 15, 18 (Mo. App. S.D. 2008) (holding that if the objection is not made at the time of the incident giving rise to the objection, the objection is deemed waived or abandoned). Similarly, during the defense cross examination of Mr. Sgroi during his videotaped trial deposition, Mr. Sgroi testified yet again about his run for office an his political aspirations. Obviously, there was an opportunity to cross examine him then concerning that issue. Consequently, not only did SLU and Dr. Bicalho fail to preserve any objection to the testimony and line of questioning at issue, they cannot now claim they were prejudiced by statements that the jury had already heard by way of Ms. Geary's testimony.

II. THE TRIAL COURT WAS CORRECT IN DENYING SLU AND DR. BICALHO'S MOTION FOR MISTRIAL, BECAUSE COUNSEL IS PERMITTED TO ASK AN "INSURANCE QUESTION" ON VOIR DIRE IF THE PROPER PROCEDURE IS FOLLOWED, IN THAT COUNSEL FOLLOWED THE PROPER PROCEDURE, AND THERE IS NO EVIDENCE THAT SLU AND DR. BICALHO WERE PREJUDICED BY THE QUESTION THAT WAS ASKED.

A. Standard of Review

The trial court has broad discretion with respect to the scope and procedure of voir dire. *Yust v. Link,* 569 S.W.2d 236, 239 (Mo. App. 1978). A trial court's decision concerning that scope will not be disturbed on appeal absent an abuse of discretion. *Id.* Not only is the scope of voir dire left to the discretion of the trial judge, but more

specifically to this case, the decision to grant or deny a motion for a mistrial based on an inquiry into insurance during voir dire is also discretionary. *Id.* "The decision on whether to grant or deny a motion for a mistrial is committed to the sound discretion of the trial court and decisions on such matters will not be disturbed on appeal unless there is a clear abuse of discretion." *Id.*

B. Argument

1. *Introduction*

The Missouri Supreme Court has held that the constitutional right to a trial by jury includes the right to a fair and impartial jury. *Moore v. Middlewest Freightways,* 266 S.W.2d 578, 586 (Mo. 1954). Parties have the right to know if any of the panel members or their families has a potential interest in the outcome of the lawsuit. *Bunch v. Crader,* 369 S.W.2d 768, 770 (Mo. App. 1963). "The rule is settled in this state that a plaintiff is entitled to qualify the jurors as to their relations, if any, with insurance companies interested in the result of the trial." *Smith v. Star Cab Co.,* 323 Mo. 441, 19 S.W.2d 467, 469 (1929). Accordingly, during voir dire, Mr. Sgroi and Ms. Geary's counsel asked the jury, "Is anybody here an officer, director or shareholder of an insurance company called The Doctor's Company?" (Supp. Tr. 38.) SLU and Dr. Bicalho then moved for a mistrial, which the trial court properly denied. (Supp. Tr. 38-39.)

2. *Trial Court Followed the Proper Procedure Governing Voir Dire Insurance Questioning*

The trial court has *no discretion* to deny a party the right to ask the preliminary "insurance question" if the proper foundation is laid. *Pollock v. Searcy,* 816 S.W.2d 276,

278 (Mo. App. 1991). A proper foundation requires that a party inquire as to the name of any interested insurance company on the record prior to voir dire. *Yust,* 569 S.W.2d at 239. This is evidence of "good faith" on the part of the attorney seeking to ask the "insurance question." *Id.*

Mr. Sgroi and Ms. Geary's counsel in this case laid the proper foundation when he requested, prior to voir dire and on the record, that he be permitted to ask the "insurance question" because of The Doctor's Company's interest in the case. This established a "good faith" basis for asking the "insurance question." Once the proper foundation had been laid, counsel had the right to ask the preliminary "insurance question."

The accepted procedure in Missouri for asking the preliminary "insurance question" includes: (1) getting the judge's approval of the proposed question out of the hearing of the jury panel, (2) asking only one "insurance question," and (3) not asking it first or last in a series of questions so as to avoid unduly highlighting the question to the jury panel. *Callahan v. Cardinal Glennon Hosp.,* 863 S.W.2d 852, 871 (Mo. banc 1993). "The form of the question is at the trial court's discretion." *Ivy v. Hawk,* 878 S.W.2d 442, 444 (Mo. banc 1994). "However, it generally encompasses whether any members of the panel or their families work for or have a financial interest in the named insurance company." *Id.*

SLU and Dr. Bicalho do not dispute that Mr. Sgroi and Ms. Geary's counsel asked the proper name of their insurance provider and that their counsel conferred with the Court in regard to how many questions concerning insurance would be asked as well as the sequence of the questioning. Counsel thereby followed the accepted procedure for

asking the preliminary "insurance question" in that he (1) obtained the judge's approval to ask the "insurance question" out of the hearing of the jury panel, (2) asked only one "insurance question," and (3) did not ask it first or last in a series of questions and, thus, did not unduly highlight the question to the jury panel. (Supp. Tr. 38.) Thus, the trial court did not err in allowing Mr. Sgroi and Ms. Geary's counsel to ask the "insurance question" to the jury.

The only argument SLU and Dr. Bicalho attempt to make with regard to the procedure surrounding the "insurance question" is that the wording of the specific question was not discussed with the trial court. This argument fails for two reasons. First, SLU and Dr. Bicalho could have raised this point at the time of the parties' discussion with the trial court to allow the court to consider it, but they failed to do so. At the time of that discussion, the trial judge and SLU and Dr. Bicalho's counsel agreed that Mr. Sgroi and Ms. Geary's counsel could ask an insurance question and that it could involve "The Doctor's Company." SLU and Dr. Bicalho's counsel knew the parties and the court did not discuss the exact wording of the insurance question and, yet, they stood silently by without voicing any concerns to the trial court for its consideration and ruling. (Supp. Tr. 38.) As a result, they waived the objection, and this Court need not consider their argument. *See Roberson,* 255 S.W.3d at 18 (holding that if the objection is not made at the time of the incident giving rise to the objection, the objection is deemed waived or abandoned); *Richter v. Kirkwood,* 111 S.W.3d 504, 510 (Mo. App. S.D. 2003) (holding that "[i]n order to preserve a point for appellate review the point raised on

appeal must be based upon the theory of the objection as made at the trial and as preserved in the motion for new trial") (internal citations omitted).

Second, the trial court followed proper procedure governing voir dire questioning in regard to the "insurance question." The only step that SLU and Dr. Bicalho allege was not properly followed was the first step of the procedure, i.e. prior approval from the trial court of the "insurance question." However, Mr. Sgroi and Ms. Geary's counsel did, in fact, obtain prior approval of the "insurance question" and followed the proper procedure in doing so. Additionally, SLU and Dr. Bicalho's argument that the trial court's denial of their motion for mistrial was erroneous because the *specific* insurance question was not approved prior to voir dire fails for two reasons: (1) SLU and Dr. Bicalho waived this point in failing to raise it before the trial court and (2) Mr. Sgroi and Ms. Geary's counsel followed the proper procedure in asking the "insurance question."

3. ***Voir Dire Question Did Not Improperly Inject Insurance***

The preliminary insurance question at issue here was proper under Missouri law. A party is entitled to ask at least a preliminary insurance question during voir dire. *See Ivy,* 878 S.W.2d at 444. Furthermore, insurance questions that actually include the words "insurance company" have been deemed proper and been permitted by Missouri courts on numerous occasions. *See, e.g., Richter,* 111 S.W.3d 504 (holding that the trial court properly denied a motion for mistrial after counsel asked the panel, "Do any of you provide goods and services of any kind to Allstate Insurance Company?" and subsequently mentioned "Allstate" again during voir dire); *Banks v. Village Enters., Inc.,*

32 S.W.3d 780 (Mo. App. W.D. 2000); *Hulahan v. Sheehan*, 522 S.W.2d 134 (Mo. App. 1975).

In *Banks,* the trial court expressly approved an insurance question asking whether "any panel member or member of their family is [an] employee, agent, officer or director of the insurance companies involved, which his [sic] American States and Safeco." The question that counsel actually directed to the venire panel was "Does [sic] anybody here, you or any family member, an employee or an agent or an officer or a member of the board of directors of American States Insurance Company or Safeco Insurance Company?" *Id.* at 794. After the inquiring counsel asked a couple of follow-up questions directed to the panel members who responded in the affirmative, opposing counsel moved for a mistrial, which the trial court denied. The court of appeals affirmed, noting no problems with the court-approved question or the question actually directed to the panel. The court held that "it is well-settled that the trial court is better suited than an appellate court to judge the effect that 'insurance questions' have on a jury panel" and that "the decision of whether to grant a mistrial when such a situation arises is one that is left to the sound discretion of the trial court, and only where a manifest abuse of discretion occurs will the appellate court disturb this decision." *Id.* (internal citations omitted).

The court of appeals addressed a very similar situation with respect to the insurance question in *Hulahan*, 522 S.W.2d 134. There, plaintiff's counsel laid the proper foundation in the judge's chambers by asking whether an insurance company was interested in the suit. *Id.* at 143. After finding out that United States Fidelity and Guaranty Company was interested, plaintiff's counsel got permission from the judge to

ask the "insurance question." *Id.* However, when plaintiff's counsel asked the question, he stated, "Is there any member of the panel, or any member of their family, that has a financial interest in or is employed by United States Fidelity and Guaranty Insurance Company?" *Id.* The defendants' counsel in that case immediately asked to approach the bench and requested a mistrial. *Id.* The trial court denied the defendants' motion. *Id.* at 143-44. That decision was affirmed on appeal. The Missouri Court of Appeals, in giving deference to the trial judge's decision, specifically stated:

> Whether, when in the propounding of the question to elicit from the members of the jury if they or some members of their immediate families have a financial interest in, or are employed by some insurance company, which is conducting the defense of a law suit, the term 'insurance' is inadvertently injected into the corporate name of a company which is in fact engaged in the insurance business but whose name would not so indicate, clearly constitutes error so prejudicial as to require a mistrial and discharge of the jury is, in our opinion, best left to the discretion of the trial judge present at the time, except in those unusual cases where the record clearly demonstrates an abuse of discretion or a deliberate course of conduct on the part of counsel to inject into the case the fact that the insurance company, and not the defendant, is the real

party who stands to gain or lose, dependent on the outcome of the case.

Id. at 144.

As the insurance question actually asked by Mr. Sgroi and Ms. Geary's counsel has been previously deemed proper under Missouri law, it cannot now be deemed as an improper injection of insurance into voir dire.

4. ***Insurance Was Not Injected in Bad Faith***

The preliminary "insurance question" at issue here was proper. However, assuming, arguendo, that it was not, the trial court's denial of SLU and Dr. Bicalho's request for a mistrial did not amount to reversible error as there is no evidence that Mr. Sgroi and Ms. Geary's counsel acted in bad faith. Not every reference to insurance constitutes reversible error. *Means v. Sears, Roebuck & Co.,* 550 S.W.2d 780, 787 (Mo. banc 1977). However, injection of insurance beyond the preliminary insurance question "can constitute reversible error, particularly if done so in bad faith." *Taylor v. Republic Automotive Parts, Inc.,* 950 S.W.2d 318, 321 (Mo. App. W.D.1997). "The trial judge is in a much better position than the appellate court to determine whether a reference to insurance was motivated by good or bad faith." *Id.* The trial court is also in a better position to judge the effect of a reference to insurance on the jury. *Id.* Thus, a trial court's decision of whether to grant or deny a mistrial when an insurance question is raised is "one that is left to the sound discretion of the trial court, and only where a manifest abuse of discretion occurs will the appellate court disturb this decision." *Id.*

SLU and Dr. Bicalho failed to point to any evidence that Mr. Sgroi and Ms. Geary's counsel acted in bad faith. As discussed, the proper procedure for questioning on insurance involves laying a foundation prior to voir dire by inquiring on the record and out of the hearing of the jury as to the name of any insurance company interested in the outcome of the case. *Yust,* 569 S.W.2d at 239. Adherence to this step has been held to be evidence of "the good faith of the attorney who seeks to voir dire on this matter." *Id.* Additionally, an attorney should "request the court to rule on what questions and in what manner the trial court will permit inquiry concerning insurance." *Id.* Good faith is inferred when questioning is in accord with the court's instructions on this matter. *Id.*

Here, Mr. Sgroi and Ms. Geary's counsel discussed the "insurance question" with the trial court and defense counsel prior to voir dire, outside the presence of the jury. SLU and Dr. Bicalho do not dispute that Mr. Sgroi and Ms. Geary's counsel asked SLU and Dr. Bicalho's counsel the proper name of their insurance provider. SLU and Dr. Bicalho also do not dispute that Mr. Sgroi and Ms. Geary's counsel conferred with the court with regard to how many questions regarding insurance would be asked as well as the sequence of the questioning. Thus, if Mr. Sgroi and Ms. Geary's counsel followed the court's instructions in that respect, it is assumed that he acted in good faith during the inquiry. Mr. Sgroi and Ms. Geary's counsel indeed followed the court's instructions and, therefore, the presumption is that he was acting in good faith.

Mr. Sgroi and Ms. Geary agree that the exact wording of the "insurance question" was not discussed. Mr. Sgroi and Ms. Geary's counsel did not use the word "insurance" in bad faith when asking the jury the "insurance question." Furthermore, his use of the

word "insurance" was not prejudicial. None of the jurors raised their hands in response to the question, and the issue was moved on from completely. (Supp. Tr. 38-39.) This situation, being so similar to that in *Hulahan*, requires the same deference to the trial judge's decision here as that given to the trial judge in *Hulahan*. Accordingly, SLU and Dr. Bicalho's motion for a mistrial was appropriately denied.

SLU and Dr. Bicalho's brief cites three dated cases to support its contention that Mr. Sgroi and Ms. Geary's counsel improperly raised the issue of insurance during voir dire: *Page v. Unterreiner*, 106 S.W.2d 528 (Mo. App. 1937); *Buehler v. Festus Mercantile Co.*, 119 S.W.2d 961 (Mo. banc 1938); and *McCaffery v. St. Louis Pub. Serv. Co.*, 252 S.W.2d 361 (Mo. 1952). (Appellants' Brief at 39-44.) The first two cases are easily distinguishable from the case at bar and are likewise inapplicable to this case, especially in light of the Missouri Court of Appeals' decision in *Hulahan* and the similarities between that case and the case here. Additionally, the court's decision in *McCaffery* actually supports Ms. Geary's assertion that her counsel properly asked the "insurance question" on voir dire.

In *Page*, counsel went far and beyond what Mr. Sgroi and Ms. Geary's counsel said in this case. Counsel in *Page* asked multiple questions about an insurance company. Although the court found counsel's initial questions were permissible, it found counsel followed those up with several impermissible ones. *Page*, 106 S.W.2d at 536. Specifically, counsel permissibly asked whether anyone or anyone's family had ever been employed by American Surety Company. *Id.* After no response from the jury, he repeated that question in another form. *Id.* However, after receiving no response again,

counsel continued on that issue stating, "This American Surety Company is an insurance company that writes golf insurance together with other insurance. With that statement have any of you relatives or friends who ever worked for that insurance company?" *Id.* Counsel went even further after getting no response, asking, "Have any of you ever worked for any other insurance company that wrote golf insurance?" *Id.*

It was the last two questions to which defense counsel objected and the appellate court held should have been sustained. *Id.* The appellate court found the first two questions were sufficient to establish whether any jury member or a member of their family had been employed by the insurance company interested in that case. *Id.* The appellate court further stated that counsel never should have been allowed to ask generally whether "any juryman had every worked for any other insurance company that wrote golf insurance, as such other company or companies could not be involved in the outcome of this case." *Id.*

As previously discussed and as is apparent from the voir dire transcript, Mr. Sgroi and Ms. Geary's counsel asked only one question about the insurance company involved in this case, which he thought was proper, and then dropped the matter completely. (Supp. Tr. 38-39.) The situation in *Page* is far from comparable to that which occurred in the instant case. In the case at bar, Mr. Sgroi and Ms. Geary's counsel conducted the proper procedure for discovering the interested insurance company and only referred to that one. He did not continue with the line of questioning. Thus, unlike in *Page*, Mr. Sgroi and Ms. Geary's counsel here followed the proper procedure for asking the

"insurance question," acted in good faith, and asked only one question concerning insurance during voir dire.

SLU and Dr. Bicalho cite *Buehler* as support that the trial court's sustaining of their objection as to Mr. Sgroi and Ms. Geary's counsel's "insurance question" was not sufficient to cure the error that resulted therefrom. (Appellants' Substitute Brief at 36). SLU and Dr. Bicalho also cite *Buehler* as holding "that plaintiff's counsel's injection of insurance during opening statement required a reversal and remand for new trial; such error could not have been cured by court's instruction to disregard remark, because remark was not made in heat of argument and could not have been retaliatory because it was beginning of plaintiff's opening statement, and the prompt withdrawal of it and the apology of counsel was but an acknowledgement of the seriousness of the error." (Appellants' Substitute Brief at 36-37.)

First, SLU and Dr. Bicalho have yet to show any error from the "insurance question" asked. Second, the "injection of insurance" in *Buehler* was not a mere mention of an insurance company as in this case. In *Buehler*, plaintiffs' counsel, in his opening statement, said:

> We don't want a small verdict in this case; we want a large verdict, gentlemen. This suit is for $50,000, and that is the sum of money this woman is entitled to recover, if she is entitled to recover a dime. Don't worry about who we will collect it from. You give this woman a substantial verdict for

> the injuries she has sustained and leave it to the lawyers in this case to collect it for her . . . .

Buehler, 119 S.W.2d at 967.

The court found that the plain inference drawn from plaintiff's counsel's statements was that the defendant had $50,000 in liability insurance and that they would "collect the judgment from the insurance carrier." *Id.* The court held that counsel, in doing so, went clear beyond merely injecting proof that an insurance company was interested in the suit. *Id.* at 969. The mere mention of an insurance company during voir dire, as occurred in the present case, cannot be compared to the situation in *Buehler,* where counsel made a direct appeal to the jury for a particular sum of money with an inference that the insurance company would pay it all.

Lastly, SLU and Dr. Bicalho take the unusual approach of relying on a case that actually supports Ms. Geary's argument. In *McCaffery,* counsel for the plaintiff asked one insurance question during voir dire: "Anyone on this panel who has any interest financial or have you ever been employed by the Transit Casualty Company, an insurance company, which offices in the Buder Building . . . ?" *McCaffery,* 252 S.W.2d at 366. The defendant then moved for a mistrial, asserting the same argument that SLU and Dr. Bicalho make here – that injecting the phrase "an insurance company" was improper and prejudicial. The trial court denied the defendant's motion, and the court of appeals affirmed. In explaining its decision, the court of appeals said:

> In the instant case counsel for plaintiff characterized the Transit Casualty Company as an insurance company at the

> time he indicated to the court and opposing counsel his intention of asking the question. There was no objection at the time to the characterization or any suggestion that counsel should not so characterize Transit Casualty Company when the question was asked. We do not mean that defendant's counsel was necessarily put on notice that the question when asked would designate the company in the exact manner it had been designated when plaintiff's counsel indicated his intention to ask the question. But the fact that plaintiff's counsel characterized Transit Casualty Company as an insurance company when laying the foundation for the question on voir dire examination clearly indicates that *plaintiff's counsel was in good faith, not only in the purpose of his question but in the language used in propounding it.*

Id. at 555 (emphasis added).

Ms. Geary acknowledges that the *McCaffery* court stated that it believed it was improper to characterize Transit Casualty Company as an insurance company. *Id.* at 556. However, the court expressly stated:

> [T]he one general question propounded by counsel for plaintiff under the circumstances of this case could not have been prejudicial or certainly not so prejudicial as to convict the trial court of an abuse of discretion in refusing to

> discharge the jury because of this question. The circumstances mentioned and which we have in mind are that the trial court, who was in a position to know, was of the opinion that plaintiff's counsel had used no undue inflection of voice in asking the question; that plaintiff's counsel asked only the one general question and did not again refer to Transit Casualty Company or any other insurance company during voir dire examination, during the trial of the case, or in argument to the jury; that there is nothing in the record to indicate the bad faith of plaintiff's counsel in including in his question the characterization of the company inquired about as an insurance company. . . .

Id. at 366-67.

SLU and Dr. Bicalho argue that this case differs from *McCaffery* in that Mr. Sgroi and Ms. Geary's counsel's question necessarily was in bad faith because he did not obtain approval from the trial court prior to asking the "insurance question." (Appellants' Substitute Brief at 39.) This argument is not only meritless, it is a misstatement of fact. Mr. Sgroi and Ms. Geary's counsel obtained the exact same approval of the "insurance question" as was obtained in *McCaffery*. In that case and here, counsel discussed with opposing counsel and the trial court their intention of asking the "insurance question," including the name of the insurance company. In both cases, defense counsel was not expressly put on notice that the question, when asked, would designate the company as

"an insurance company." *McCaffery,* 252 S.W.2d at 366. Therefore, the distinction that SLU and Dr. Bicalho attempt to make in support of their argument that Mr. Sgroi and Ms. Geary's counsel acted in bad faith simply is not there.

Moreover, in this case the "insurance question" would have been ambiguous and confusing without identifying the company as an insurance company. The "insurance question," without that phrase, would have been: "Is anybody here an officer, director or shareholder of The Doctor's Company?" (Supp. Tr. 38.) In a lawsuit in which doctors were defendants, this question likely would have been interpreted as a question asking whether any of the panel members were an officer, director or shareholder of a defendant doctor's company. Due to the specific name of the insurance company involved in this case, adding "an insurance company" clarifies that the question was not referring to a defendant doctor's company.

Finally, it is important to note that after Mr. Sgroi and Ms. Geary's counsel asked the "insurance question" and defense counsel objected, the trial court actually gave Mr. Sgroi and Ms. Geary's counsel the opportunity to ask it again, without the phrase "an insurance company," later during voir dire. (Supp. Tr. 38-39.) Clearly, the trial court, which was in the best position to determine prejudice, did not believe the injection of insurance was prejudicial, even offering the option of asking an insurance question again later in voir dire. However, Mr. Sgroi and Ms. Geary's counsel chose not to do so to avoid any potential questions from jury which would reopen the issue.

For the reasons discussed above, there is simply no evidence of bad faith, and the mention of an insurance company once during the middle of voir dire is not reversible

error. The trial court used its discretion in denying SLU and Dr. Bicalho's motion for a new trial, and the court's ruling should not be disturbed on appeal.

5. ***No Prejudice Resulted From the Insurance Question Asked During Voir Dire***

SLU and Dr. Bicalho have failed to show they were prejudiced by the trial court's alleged failure to follow proper procedure governing voir dire insurance questioning or by the actual insurance question directed to the panel at trial. Consequently, SLU and Dr. Bicalho's motion for mistrial was properly denied.

SLU and Dr. Bicalho argue that prejudice was evident when a panel member, Terry Grohman, made "repeated references to insurance *after*" Mr. Sgroi and Ms. Geary's counsel asked the insurance question. (Appellants' Substitute Brief at 40.) This argument fails for two reasons. First, it is factually inaccurate. Venireperson Grohman, who was the only panel member to mention insurance, did not do so immediately after the insurance question. Rather, he mentioned insurance 20 pages (or 500 lines) later in the voir dire transcript.

Second, the context of his three references to insurance clearly indicates that those references had nothing to do with the insurance question:

> MR. POTTS: Who believes that there are too many lawsuits against doctors? . . .
>
> VENIREPERSON GROHMAN: . . . . [I]t raises insurance premiums for the rest of us that have to pay our own insurance to levels that are just crazy. Year after year

after year it keeps going up because people are allowed to get away with suing doctors. Sometimes it's legitimate; sometimes it's not. . . . .

MR. POTTS: Do you think knowing that this is a medical malpractice case against the doctor that you're the right juror for the case?

VENIREPERSON GROHMAN: . . . . I've been a contractor for years in my business that I do, and I pay my own insurance. And every year I see premiums go higher and higher, and I follow the trend and I see this stuff. And different times when I was without it, where if I had gotten sued I would be in trouble, but now that I am paying my own insurance, it's, you know, these factors come into play for me.

(Supp. Tr. 58-59.) Venireperson Grohman's response to Mr. Sgroi and Ms. Geary's counsel's question was not only a common response to that particular question in voir dire, the response had nothing to do with insurance as it relates to damages or SLU and Dr. Bicalho; rather, Venireperson Grohman was simply stating that he paid for his own health insurance and attributed the rise in premiums to lawsuits against doctors. If either party was prejudiced by these responses, it was Mr. Sgroi and Ms. Geary.

Neither Mr. Sgroi and Ms. Geary's counsel's insurance question, nor the procedure preceding it, resulted in any prejudice to SLU or Dr. Bicalho. Consequently,

there was no reversible error, and the trial court was correct in denying SLU and Dr. Bicalho's Motion for Mistrial.

III. TRIAL COURT WAS CORRECT IN DENYING SLU AND DR. BICALHO'S MOTION FOR NEW TRIAL BASED ON JUROR NONDISCLOSURE, BECAUSE AN UNINTENTIONAL NONDISCLOSURE BY A JUROR DURING VOIR DIRE MUST PREJUDICE A PARTY TO REQUIRE A NEW TRIAL, IN THAT JUROR SIMS DID NOT HEAR THE QUESTION ASKED ABOUT PRIOR LITIGATION DURING VOIR DIRE, THE PREVIOUS LITIGATION HE FAILED TO DISCLOSE OCCURRED SIX YEARS BEFORE THE JURY TRIAL IN THIS CASE, AND HE DID NOT CONSIDER HIS PRIOR LITIGATION WHEN CONSIDERING THIS CASE.

A. Standard of Review

The trial court's determination of whether a juror's nondisclosure is intentional or unintentional is reviewed for abuse of discretion. *Rogers v. Bond,* 880 S.W.2d 607, 610-11 (Mo. App. 1994). Likewise, a trial court's determination as to whether any prejudice resulted from an unintentional nondisclosure is also reviewed for abuse of discretion. *Id.* at 611. An abuse of discretion may only be found in that case where the appellate court is "convinced from the totality of the circumstances that the litigant's right to a fair trial and the integrity of the jury process has been impaired." *Id.*

B. Argument

1. *Introduction*

Because Juror Demetrius Sims' nondisclosure during voir dire was neither intentional nor prejudicial, the trial court did not abuse its discretion in denying SLU and Dr. Bicalho's motion for a new trial. A party alleging juror misconduct in a motion for new trial has the burden of proving such misconduct. *Portis v. Greenshaw*, 38 S.W.3d 436, 445 (Mo. App. W.D. 2001). In determining whether a party is entitled to a new trial because of intentional nondisclosure by a juror, the court must first find that there was a nondisclosure. *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 722 (Mo. App. E.D. 2001). If a juror discloses everything that a voir dire question requires, no nondisclosure occurs. *Heinen v. Healthline Management, Inc.,* 982 S.W.2d 244, 248 (Mo. banc 1998). For example, if a juror does not know of a lawsuit at *voir dire,* the juror's silence when the panel was asked if anyone had been a party to a lawsuit is "complete disclosure." *Id.*

If a party has shown that there was a nondisclosure, then the trial court must decide if the nondisclosure was intentional or unintentional. A nondisclosure is intentional when: (1) the juror has no reasonable inability to comprehend the information sought by the attorney's questions, and (2) the juror actually remembers the experience or the experience was so significant that forgetfulness is unreasonable. *Williams ex rel. Wilford v. Barnes Hosp.,* 736 S.W.2d 33, 36 (Mo. banc 1987). However, if the matter was insignificant or remote in time, or if the juror has reasonably misunderstood the question, a court may find the nondisclosure to be unintentional. *Id.* at 36.

Intentional nondisclosure creates an inference of bias and prejudice. *Stallings v. Washington University,* 794 S.W.2d 264, 266 (Mo. App. 1990). However, if the nondisclosure was unintentional and reasonable, the party seeking a new trial must establish that the juror's presence did or may have influenced the verdict to its prejudice. *Heinen,* 982 S.W.2d at 250. To determine prejudice, a court must consider the materiality and relevance of the undisclosed incident to the matter being tried. *Rogers,* 880 S.W.2d at 611.

Also, it is worth noting that in *McBurney v. Cameron,* 248 S.W.3d 36 (Mo. App. W.D. 2008), the Missouri Court of Appeals for the Western District recently discussed the issue of timeliness of an appellant's efforts in researching the litigation history of those chosen to serve on the jury. "[T]imeliness in a juror challenge is important in view of the expense and burden to parties and taxpayers of conducting another jury trial. If the issue is raised before submission of the case, there remains time to remove a challenged juror and to replace that juror with an alternate." *Id.* at 41. The court further explained:

> The common delay in checking records generally seems to be based on counsel's assumptions 1) that the *voir dire* questions were all clear in context; and 2) that all the jurors tend to be very open and forthright, happy to inform counsel of every matter remotely related to a question, even if the matter is personally embarrassing to the juror. Experience continues to confirm that such assumptions are unrealistic.

> It would be realistic for an attorney to send a member of his or her clerical staff to any computer, at any time of day or night, to research the civil litigation records before submission of the case, rather than waiting until after an adverse verdict to do so. The appellants in this case had more than a week after the selection of the jury and before submission of the case to raise this issue, but did not do so.

Id.

The court went on to note that an additional result of the delay is "collateral damage to innocent jurors who have already donated a significant amount of time to the matter." *Id.* Regardless, the court noted that the issue of timeliness had not been raised by the parties and went on to evaluate the merits of the appeal. However, the court commended consideration of this matter to the attention of counsel trying future cases. *Id.* at 42.

Here, like the parties in *McBurney,* SLU and Dr. Bicalho had eight days to research the jurors' prior litigation histories on Casenet or otherwise, but they apparently failed to do so. Under the rationale of *McBurney,* for that reason alone, their juror nondisclosure argument should be rejected on appeal.

2. *Questions Triggered a Duty to Disclose*

Ms. Geary acknowledges that the trial court correctly found that the questions at issue triggered a duty to disclose a prior lawsuit arising from an auto accident. However,

this finding is only a preliminary step, and the trial court also correctly found that SLU and Dr. Bicalho failed to prove that the nondisclosure was intentional and prejudicial.

3. ***Nondisclosure Was Unintentional and Reasonable***

Juror Demetrius Sims' nondisclosure was unintentional and reasonable. A nondisclosure is intentional when: (1) the juror has no reasonable inability to comprehend the information sought by the attorney's questions, and (2) the juror actually remembers the experience or the experience was so significant that forgetfulness is unreasonable. *Williams,* 736 S.W.2d at 36. However, if the matter was insignificant or remote in time, or if the juror has reasonably misunderstood the question, a court may find the nondisclosure to be unintentional. *Id.* at 36.

At a post-trial hearing, Juror Sims testified that the lawsuit he failed to disclose arose from an auto accident filed six years prior to the voir dire in this case which settled prior to trial. Sims received only $1800 as a result of the settlement. (Tr. 657.) Moreover, the only injury he suffered as a result of that accident was a problem with his lower back which essentially resolved. (Tr. 655-57.) Juror Sims explained his nondisclosure of this lawsuit by stating several times that he must have missed the question. (Tr. 657-60.) He further testified that he would have answered the question had he heard it. (Tr. 663.)

Moreover, as SLU and Dr. Bicalho concede in their substitute brief, Juror Sims responded to several voir dire questions regarding a prior broken leg and the care and treatment he received for that injury, including x-rays and surgery. (Supp. Tr. 22-25.) The evidence shows that Juror Sims was willing to answer voir dire questions with

information about himself. He was not a venireperson who simply sat idly by; rather, he was an active participant who simply missed a question. Additionally, at the time of the post-trial hearing, he could not even remember the names of the defendant or his own attorney in that case until they were mentioned to during the defense counsel's questioning. (Tr. 655-56.) Clearly, the case was remote and inconsequential for him. It was thus reasonable for him to have not disclosed this previous lawsuit and, as he testified that he did not hear the question, his nondisclosure was unintentional.

Interestingly, SLU and Dr. Bicalho again rely on a case that supports Ms. Geary's argument: *Washburn v. Medical Care Group,* 803 S.W.2d 77 (Mo. App. E.D. 1990) *overruled on other grounds by Brines v. Cibis*, 882 S.W.2d 138 (Mo. 1994). In that case, after hearing testimony from a juror who failed to disclose a prior lawsuit arising from an auto accident, the trial court found that the juror's explanation for his nondisclosure was not reasonable. However, the trial court also found that there was no prejudice and, therefore, a new trial was not warranted. *Id.*

The trial court is in the best position to assess the credibility of a juror explaining his nondisclosure, and the trial court's findings will be not be disturbed on appeal absent an abuse of discretion. In *Washburn,* the trial court determined that the particular juror was not believable; here, the trial court determined that Juror Sims' was believable. The trial judge personally assessed Juror Sims' appearance, mannerisms, and attitude when he appeared at the post-trial hearing, and after assessing these factors, as well as Juror Sims' answers, she concluded that there was no intentional nondisclosure. Because there is no evidence that the trial court abused its discretion in making this finding, the finding

should not be disturbed. Additionally, unlike in *Washburn,* the trial court here determined that the nondisclosure was unintentional; therefore, SLU and Dr. Bicalho were required to prove prejudice. Even assuming that Juror Sims' nondisclosure was intentional, the nondisclosure did not involve a material issue; therefore, SLU and Dr. Bicalho were required to prove prejudice regardless.

The facts of this case are almost identical to those underlying the court's decision in *Bradford v. BJC Corp. Health Servs.*, 200 S.W.3d 173 (Mo. App. E.D. 2006). In *Bradford*, the trial court and the court of appeals considered and relied upon the post-trial testimony of the juror, who was found to have unintentionally failed to disclose her involvement in a prior collections action. The trial court found the juror believable in her testimony that she had forgotten the action, as it had happened five years prior to her jury service. *Bradford*, 200 S.W.3d at 182. The court of appeals noted that, in her testimony at the post-trial hearing regarding her nondisclosure, the juror testified that "if she had remembered the case, she would have answered the question from [defense] counsel during voir dire regarding prior suits." *Id.* The court further noted, "[t]here was no indication that she was dissatisfied with the care provided to her by the dentist involved in the collection action, and more importantly, [the juror] testified that her involvement with the collection action would not have any impact on her ability to sit as a juror in the plaintiff's case." *Id.* Thus, it is appropriate and relevant for the trial court to consider testimony from a juror in a post-trial hearing about whether the nondisclosure was intentional or unintentional.

Here, the civil case that was not disclosed was filed six years before this jury trial, and it appears that the court was notified of a settlement in September 2002, almost five years before this jury trial. SLU and Dr. Bicalho have failed to show that Juror Sims' nondisclosure was intentional. Here, the trial court specifically found the juror credible in his testimony that he was not paying attention when the question about previous lawsuits was asked. (Tr. 195.) The trial court further found that, as Mr. Sims responded to other questions posed during voir dire about his previous medical care for a broken leg, he was not intentionally withholding information. (Tr. 195.) The trial court, in its discretion, found that the nondisclosure was unintentional and reasonable and its decision in that regard should not be disturbed on appeal.

It is appropriate and relevant for the trial court to consider testimony from a juror in a post-trial hearing about not only whether the nondisclosure was intentional or unintentional, but also whether and to what extent the information not disclosed may have affected that juror's deliberations or participation in the deliberations or verdict. The trial court, in its discretion, found that the nondisclosure was unintentional and reasonable and its decision in that regard should not be disturbed on appeal.

4. *The Juror Nondisclosure Caused No Bias or Prejudice*

SLU and Dr. Bicalho were not prejudiced by Juror Sims' nondisclosure. If a nondisclosure is intentional and material information is withheld, prejudice is presumed. *State v. Mayes,* 63 S.W.3d 615, 625 (Mo. 2001). With regard to an unintentional nondisclosure, the trial court must find some prejudice which affected the verdict in order to grant a motion for new trial. *Mayes,* 63 S.W.3d at 625. "If the information withheld

has no bearing on the present case, or on the ability of the potential juror to fairly evaluate the evidence, no prejudice results." *Bradford*, 200 S.W.3d at 173. In *Bradford*, in evaluating the question of whether a juror's unintentional nondisclosure prejudiced the verdict, the court noted, "[t]here was no indication that she was dissatisfied with the care provided to her by the dentist involved in the collection action, and more importantly, [the juror] testified that her involvement with the collection action would not have any impact on her ability to sit as a juror in the plaintiff's case." *Id.* As with determining whether a disclosure was intentional or unintentional, it is also appropriate and relevant for the trial court to consider testimony from a juror in a post-trial hearing about whether the information not disclosed may have affected that juror's deliberations or participation in the deliberations or verdict.

As the presumption of prejudice is limited to cases involving findings of intentional nondisclosure, and since Juror Sims' nondisclosure was unintentional and reasonable, SLU and Dr. Bicalho must prove they were prejudiced by that nondisclosure. However, even assuming that the disclosure was intentional, the information withheld was not material, and SLU and Dr. Bicalho are still required to show prejudice resulted from the nondisclosure.

SLU and Dr. Bicalho failed to present one item of evidence tending to show prejudice. Juror Sims expressly testified that the prior lawsuit arising from the auto accident did not affect his vote in this case, which he said was based on the evidence he heard in the courtroom. (Tr. 664-65.) SLU and Dr. Bicalho failed to show how an auto accident a juror was involved in six years prior to this case, in which he received a small

settlement amount, for which he cannot remember the names of the parties against whom it was brought, and which did not involve any healthcare providers or medical malpractice issues prejudiced them in this case. There is no reason to believe that the undisclosed case would have caused Juror Sims to be prejudiced against health care providers or would have influenced his deliberations in any way. SLU and Dr. Bicalho have not met their burden to prove the elements of juror nondisclosure necessary to warrant a new trial and the trial court's denial of their motion for new trial based on that ground should not be disturbed.

CONCLUSION

The trial court was correct in admitting Exhibit 35, the videotaped newscast of Mr. Sgroi and thus in denying SLU and Dr. Bicalho's Motion for New Trial. In addition, the trial court was correct in denying SLU and Dr. Bicalho's Motion for Mistrial because Mr. Sgroi and Ms. Geary's counsel followed the proper procedure for asking a preliminary insurance question on voir dire and there is no evidence that (1) counsel injected insurance in bad faith or (2) that SLU or Dr. Bicalho was prejudiced by the mere mention of the word "insurance" in one question. Finally, the trial court was correct in denying SLU and Dr. Bicalho's Motion for New Trial based on juror nondisclosure of prior litigation because the trial court was in the best position to find, and did find, that the nondisclosure was unintentional and that it did not prejudice SLU or Dr. Bicalho. For all these reasons, this Court should uphold the judgment in favor of Mr. Sgroi and Ms. Geary and affirm the trial court's decision on all issues.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

ALICE GEARY, Individually and as Personal Representative of the Estate of Phillip Sgroi,	)	
Plaintiff/Respondent,	)	Supreme Court No. SC89840
vs.	)	
SAINT LOUIS UNIVERSITY and PAULO BICALHO, M.D.,	)	
Defendants/Appellants.	)	

CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Plaintiff/Respondent Alice Geary, and for her certificate of compliance, state as follows:

1. The undersigned does hereby certify that Plaintiff/Respondent's brief filed herein complies with the page limits of Rule 84.06 and contains 17,862 words of proportional type.

2. Microsoft Word was used to prepare Plaintiff/Respondent's brief.

3 The undersigned does hereby certify that the CD-ROM provided with this notification has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing brief and one copy of accompanying CD-ROM were mailed, postage prepaid, to the following this 17th day of April, 2009:

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APPENDIX

APPENDIX

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Supreme Court Rules
Rules of Civil Procedure
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Rule 83. Transfers from Court of Appeals to This Court (Refs & Annos)
→ **83.08. Record on Appeal and Briefs in Cases Transferred After Opinion**

(a) In General. When a case is transferred to this Court after opinion, the parties shall retain the same position as appellant and respondent as in the court of appeals. The record on appeal filed in the court of appeals is the record in this Court.

(b) Substitute Briefs. A party may file a substitute brief in this Court. The substitute brief shall conform with Rule 84.04, shall include all claims the party desires this Court to review, shall not alter the basis of any claim that was raised in the court of appeals brief, and shall not incorporate by reference any material from the court of appeals brief. Any material included in the court of appeals brief that is not included in the substitute brief is abandoned.

(c) Timing. Substitute briefs shall be filed within the following times:

(1) appellant's brief--twenty days after the date of the order of transfer;

(2) respondent's brief--forty days after the date of the order of transfer;

(3) appellant's reply brief--fifty days after the date of the order of transfer.

In the case of cross-appeals, substitute briefs shall be filed within the following times:

(1) appellant's brief--twenty days after the date of the order of transfer;

(2) respondent/cross-appellant's brief--forty days after the date of the order of transfer;

(3) cross-respondent/appellant's reply brief--sixty days after the date of the order of transfer;

(4) cross-appellant's reply brief--seventy days after the date of the order of transfer.

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(d) Extensions of Time. An order extending any party's time to file a brief automatically extends the filing deadline for any subsequent brief by the same amount of time.

CREDIT(S)

(Adopted June 1, 1971, eff. Jan. 1, 1972. Amended June 1, 1993, eff. Jan. 1, 1994; June 17, 1997, eff. Jan. 1, 1998.)

HISTORICAL NOTES

2002 Main Volume

The 1997 amendment rewrote the rule which formerly provided:

"In any case transferred to this Court after opinion, the parties shall retain the same position as appellant and respondent as in the court of appeals, and the transcript and briefs filed in the court of appeals shall constitute the transcripts and briefs in this Court. Any party may file a substitute brief if the party so desires. The substitute brief shall conform with Rule 84.04, shall include all claims the party desires this Court to review, shall not alter the basis of any claim that was raised in the brief filed in the court of appeals, and shall not incorporate by reference any material from the brief filed in the court of appeals. Any material included in the brief filed in the court of appeals that is not included in the substitute brief shall be deemed abandoned. Substitute briefs shall be filed within the following times: appellant's brief--twenty days after the date of the order of transfer; respondent's brief--forty days after the date of the order of transfer; appellant's reply brief--fifty days after the date of the order of transfer."

The 1993 amendment rewrote the rule.

LIBRARY REFERENCES

2002 Main Volume

Courts ⚿ 488.
Westlaw Topic No. 106.
C.J.S. Courts § 199.

RESEARCH REFERENCES

Treatises and Practice Aids

2 MO Practice Series § 22.12, The Record on Appeal.

2 MO Practice Series § 22.24, Transfer of Cases to the Missouri Supreme Court.

9 MO Practice Series R 84.04 F 6, Form 6. Brief -- Jurisdictional Statement -- Supreme Court After Transfer.

9 MO Practice Series R 84.04 F 9, Form 9. Brief -- Statement of Facts -- Supreme Court -- Supplemental Brief

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Filed Pursuant to Rule 83.08.

17 MO Practice Series § 83.08-1, Overview.

17 MO Practice Series § 83.08-2, Status of Parties.

17 MO Practice Series § 83.08-3, Substitute Briefs.

31 MO Practice Series R 83.08, Record on Appeal and Briefs in Cases Transferred After Opinion.

NOTES OF DECISIONS

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1. In general

Issues not raised in brief before Court of Appeals in marriage dissolution suit could not be raised on transfer to Supreme Court. Linzenni v. Hoffman (Sup. 1997) 937 S.W.2d 723, rehearing denied. Divorce ⚿ 179; Divorce ⚿ 181

2. Substitute briefs

Horse owner's brief to Supreme Court, on transfer from Court of Appeals regarding petition for mandamus relief regarding trial judge's order granting permission to animal humane societies to humanely dispose of malnourished and emaciated horses seized from owner pursuant to search warrant, would not be stricken, though brief arguably could be stricken as improper substitute brief because owner had argued in trial court and to court of appeals that trial court lacked jurisdiction under animal impoundment statute to dispose of the horse but brief to Supreme Court presented two fundamentally different points, where the matter had been expedited in court of appeals and parties had not been permitted to file briefs there and instead had proceeded on their initial pleadings. State ex rel. Zobel v. Burrell (Sup. 2005) 167 S.W.3d 688. Mandamus ⚿ 187.7

Any material included in a court of appeals brief that is not included in the substitute brief filed in Supreme Court is abandoned. State v. Davidson (Sup. 1998) 982 S.W.2d 238. Criminal Law ⚿ 1130(.5)

V.A.M.R. Rule 83.08, MO R RCP Rule 83.08
Current with amendments received through 11-6-2008.

END OF DOCUMENT

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months ago, correct?
A Yeah, that's what I have documented, or a couple months ago.
Q And that he had fractured his left wrist, is that right?
A Yes.
Q Did you subsequently learn that he had actually broken his shoulder?
A No. Not at that time, no.
Q Do you know now that he actually had broken a shoulder?
A His shoulder, yes.
Q And had pain in his left knee. So what he's reporting to you is that when he fell those two months ago, his pain was in his knee, correct?
A That's correct.
Q He didn't tell you that he had pain in his hip two months earlier, did he?
A No.
Q And then it says, since that time the wrist has healed but his knee and upper leg having increasing pain, correct?
A That's correct.
Q Upper leg, did he tell you that he was having pain in his hip?

A No. From what I document there, it's from his mid thigh, the general area of his thigh, to his knee.
Q Now, earlier you told us you have taken care of a variety of patients, if you will. I know you're not a doctor --
A That's correct.
Q -- but people who are complaining of pain that relate to a broken hip, right?
A Yes.
Q And you said they sometimes have pain in the groin, right?
A Yes.
Q Sometimes pain in the thigh, correct?
A Yes.
Q All right. They don't ever complain of pain isolated to the knee, do they, related to a broken hip?
A I couldn't say with accuracy. We don't always get the final outcome of our patient's condition. You know, when we transport a patient to the hospital, we treat them. If they have pain in their leg in general, we try to mobilize it if we can. If necessary, we treat the pain. And when we transport and get them to the hospital, especially now with HIPAA requirements, we can't find out what happens to our patient after we transfer them to the emergency room.

Q Sure. You're not a medical doctor, obviously?
A That's correct.
Q And your job is to get the patient to a medical doctor to make the diagnosis, right?
A Yeah.
Q All right. And then -- and then you tell us the rest of his history. He never complained to you about having hip pain, did he?
MR. POTTS: Objection, asked and answered.
THE COURT: Overruled.
A No, not specific hip pain, other than he was not able to bear weight on his leg. He was not able to stand.
Q And the history that he gave you was that two months ago in the fall, that the pain he had was in his knee, correct?
A That's correct.
MR. WILLMAN: Thank you. That's all I have.
REDIRECT EXAMINATION BY MR. POTTS:
Q Just one point. He told you that the pain in his knee had gradually gotten worse --
A Yes.
Q -- and spread down his leg, right?
A Yes.
MR. POTTS: Thank you. No further questions.
THE COURT: May this witness be excused?

MR. WILLMAN: Yes.
THE COURT: Sir, you may step down.
(The witness stepped down.)
THE COURT: Ladies and gentlemen of the jury, at this time we will take our luncheon recess until 1:30. The Court again reminds you what you were told at the first recess of the court. Until you retire to consider your verdict, you must not discuss this case among yourselves or with others or permit anyone to discuss it in your hearing. You should not form or express any opinion about the case until it's finally given to you to resolve.
(The jury was excused for the noon recess. The following proceedings were had, out of the presence of the jury:)
THE COURT: Mr. Willman?
MR. WILLMAN: Yes. At this time, your Honor, I'd like to put on the record Defendant's objection to Exhibit Number 35 which is a videotape of a newscast from Channel 30 in 2001 with Mr. Sgroi and Ms. Geary, a Dr. Erker and several other reporters included in that videotape.
The basis for the objection is that the television interview of Mr. Sgroi is not practical and instructive, not calculated to assist the jury in understanding the case. It's irrelevant and not subject to cross-examination.

There are a number of statements made in there that I don't have the ability to cross-examine several of the people who speak on the video. The defendant would not have an objection if a portion of the videotape was shown indicating Mr. Sgroi's physical abilities at the time. Although defendant would also note that this is before the fall where he broke his shoulder which further complicated his recovery. And even with that, the defendant would not have an objection without the sound which would take care of the cross-examination objection, that a portion of the videotape could be shown indicating Mr. Sgroi's abilities at that time.

MR. POTTS: Judge, for the reasons previously stated and as noted in our trial brief that we filed on this issue, the courts have previously ruled that videotapes like this are the same as photographs. If they have probative evidence, they should be admitted. And there's a case within our trial brief that's very similar of a patient with a hip injury who couldn't come to trial. It's the same facts we have here, and this will assist the jury in assessing Mr. Sgroi's before or after condition related to the damage in this case.

THE COURT: As I indicated prior to going on the record, I will allow a portion of it, that it stop where you see a woman in something red.

MR. POTTS: In the studio.

THE COURT: I believe so.

MR. WILLMAN: No, there's -- are you talking about in the studio? Because the woman in red is before that.

THE COURT: It ends with the woman in red.

MR. POTTS: It's in the facility standing there. So right before she starts to speak.

THE COURT: Right.

MR. WILLMAN: And with the Court's permission, if I could just rely on any additional arguments made in our motion in limine regarding this?

THE COURT: Certainly.

MR. WILLMAN: Thank you.

THE COURT: All right. I guess for the record, the motion will be overruled in part and sustained in part.

oOo

(The proceedings returned to open court.)

THE COURT: Good afternoon, ladies and gentlemen. Mr. Potts, you may proceed.

MR. POTTS: Plaintiff's would call Dr. Richard Kube.

RICHARD A. KUBE II,

having been first duly sworn by the deputy clerk, testified:

DIRECT EXAMINATION BY MR. POTTS:

THE COURT: You may inquire.

MR. POTTS: Thank you, Judge.

Q Good afternoon.

A Good afternoon.

Q Would you tell the jury your name, please?

A Richard Anthony Kube II.

Q And Dr. Kube, what's your occupation?

A I'm an orthopedic spine surgeon.

Q And how long have you been an orthopedic spine surgeon?

A One year now.

Q Are you board certified?

A Not board certified but board eligible.

Q What does it mean to be board eligible?

A The orthopedic board certification process is a two-part process by which you perform an oral board examination at the completion of your residency program. Once you're in practice for a couple of years and accumulate cases, the second stage of board certification is based upon the cases that you have done to verify the types of treatment that you are rendering are within the standard of care, and so that for myself will be next July.

Q So when did you graduate medical school?

A 1996.

Q And when did you complete your residency?

A 2005, I believe.

Q So when do you plan to be board certified?

A I would plan to take the step two of the board certification exam in 2008, July, and I believe the results are available sometime for us in September, October, somewhere that fall.

Q So hopefully from what you're telling us, three years after you complete the residency you'll be board certified?

A It would be two years after completing your formal training. So if you do not do a fellowship year such as I did subspecialized within orthopedics, it would be two years after entering practice and being at a particular location. There are a lot of other technical things that you have to perform, being at certain locations for certain times, et cetera. But in general, two years after you enter into private practice, the first year you perform cases, months 12 through 18, you would collect all the cases that you had performed during that time period. Those cases would then be submitted to a board who would review those, select a cross-section of those cases to then perform an oral examination of you some six months after your collection period took place. So that would then be essentially month 24 after you enter private practice, and that month for me would be July.