IN THE MISSOURI SUPREME COURT

No. SC89840

ALICE GEARY,
Individually and as Personal Representative of the Estate of Phillip Sgroi,

Plaintiff/Respondent,

vs.

SAINT LOUIS UNIVERSITY,
and PAULO BICALHO, M.D.,

Defendants/Appellants.

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

SUBSTITUTE BRIEF OF DEFENDANTS/APPELLANTS SAINT LOUIS UNIVERSITY and PAULO BICALHO, M.D.

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JURISDICTIONAL STATEMENT

This matter involves an appeal from the trial court's judgment entered on June 18, 2007, against Defendants Saint Louis University (hereinafter "SLU") and Paulo Bicalho, M.D. (hereinafter "Dr. Bicalho"), and in favor of Plaintiffs Phillip Sgroi (hereinafter "Patient") and Alice Geary (hereinafter "Patient's Wife") in a medical negligence action.[1] On July 18, 2007, SLU and Dr. Bicalho filed their Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial or, in the Second Alternative, to Amend Judgment, which was denied by the court on October 15, 2007. SLU and Dr. Bicalho filed their Notice of Appeal on October 25, 2007.

None of the issues on appeal were within the exclusive jurisdiction of the Missouri Supreme Court. Jurisdiction was properly in the Court of Appeals pursuant to Article V, Section 3, of the Missouri Constitution, because this action does not involve the validity of a treaty or statute of the United States, the validity of a statute or provision of the Constitution of this State, the construction of revenue laws of this State, the title to any state office or the imposition of the death penalty. The Circuit Court for the City of St. Louis is within the territorial jurisdiction of the Eastern District of the Missouri Court of Appeals. Section 477.040 R.S.Mo. Following oral argument, the Eastern District issued its unanimous opinion on November 4, 2008, reversing the judgment and remanding the

[1] On March 10, 2008, Alice Geary, as personal representative of the Estate of Phillip Sgroi, was substituted for Phillip Sgroi as Plaintiff/Respondent.

case for a new trial. On February 24, 2009, this Court ordered the case transferred to the Missouri Supreme Court pursuant to Rule 83.04.

STATEMENT OF FACTS

In 2000, Patient suffered a stroke that affected his left side. (Tr. 306-07.) He lost the ability to walk and spent two months in a rehabilitation program, where he progressed to the point where he was walking with the use of a walker. (Tr. 307-08.) In October 2001, when Patient was receiving therapy for some of the residual effects of the stroke, he had a -3 out of 5 on a hip flexion test, which measures range of motion and would demonstrate whether pain is elicited when motion occurs. (Tr. 152, 257-58.) On December 5, 2001, a doctor documented that Patient was able to walk 50 feet with a walker. (Tr. 307-08.) He was able to rake leaves from his wheelchair. (Tr. 308.) However, Patient still had left-sided weakness. (Tr. 256-57.)

In late December 2001, Patient slipped and fell on his left side while on a trip with his wife to Oklahoma City to visit family. (Tr. 309.) He was diagnosed with a left arm fracture. (Tr. 310.) Although he hurt his knee in the fall, it was not broken. (Tr. 310.) After traveling back to St. Louis, he was admitted to the hospital and, after discharge, received rehabilitation therapy at two different centers. (Tr. 310-13.)

Patient was first admitted to St. Mary's Health Center (SSM Rehab) in early January 2002 for rehabilitation to recover from the fall and to continue therapy for his left-sided weakness from the stroke. (Tr. 256, 421.) On admission, Dr. Ogle, a specialist in physical and rehabilitation medicine, performed an examination of Patient's entire body, including his hips. (Tr. 414, 425, 427.) At that time, Patient complained of pain in his knee and the entire left side of his body. (Tr. 428.) He had no complaints of groin pain. (Tr. 428.) His hip was also examined by the physical therapist and orthopedic

surgeons on two occasions during his stay at SSM Rehab. (Tr. 430.) Dr. Ogle testified that she did not believe he had a fractured hip during his admission at SSM Rehab. (Tr. 435.) However, there were times that he was unable to move his leg because of pain. (Tr. 442-43.) Although Dr. Ogle's initial examination of his hip was limited, subsequent to that, she did a more complete examination of his hips. (Tr. 433-44.) Patient was eventually transferred from SSM Rehab to the Jewish Center for the Aged, where Dr. Kaiser examined Patient's left leg on three different occasions in January 2002. (Tr. 260.) In February 2002, Patient became a patient of SSM Home Care, which provides therapy and services to patients in their homes. (Tr. 157-58.)

On February 17, 2002, Patient was admitted to SLU for gastrointestinal problems. (Tr. 133, 165.) At that time, Patient complained that he had experienced left knee pain for the past four months. (Tr. 133.) During this admission, Patient's Wife asked whether an orthopedic consultation could be ordered. (Tr. 312.) On February 19, a request came into the orthopedic department at SLU for a consultation for Patient. (Tr. 107.) Dr. Bicalho was then asked to be Patient's orthopedic consultant. (Tr. 229, 313, 342.) Dr. Bicalho was the supervising orthopedic surgeon, and there were two other physicians on the orthopedic team—Dr. Kube, an orthopedic surgeon in training, and Dr. Raemisch, the chief resident. (Tr. 344.) The three members of the team are trained to find and diagnose hard-to-find fractures. (Tr. 149.) In this case, all three members of the team examined Patient. (Tr. 345-46.)

Dr. Kube performed and documented the initial orthopedic examination and findings on February 19. (Tr. 107, 112, 313.) Patient's chief complaint was very severe

pain in his patella (kneecap). (Tr. 112, 117.) Patient did not complain of hip pain. (Tr. 133.) A knee x-ray taken the day before Dr. Kube's examination indicated that there was mild wear in, but no fracture or dislocation of, the knee. (Tr. 114, 120-21.) Dr. Kube chose to do a knee exam and did not do a focused hip exam. (Tr. 114.) In doing a knee exam, Dr. Kube moves the hip around a little bit. (Tr. 123.) His examination would have involved gross inspection of both legs. (Tr. 138.) Dr. Kube would have palpated on and around the kneecap to determine whether there was joint fluid within the knee, crepitus, and pain within the patella. (Tr. 138-39.) Volgus stresses would have been performed, which means the leg would have been positioned such that it would have been given bowlegged, knock-kneed kind of forces across the knee, trying to bring the joint into contact with each other both on the inside and outer side of the knee joint. (Tr. 139.) This helps determine whether there is arthritic pain or symptoms that can be related to arthritic pain. (Tr. 139.) In addition, Dr. Kube would have brought the knee up in doing a Lockman's maneuver. (Tr. 139.) Even though the maneuvers are not specifically going up to the hip joint, they certainly would be expected to cause pain in the hip of someone with a hip fracture. (Tr. 140-41.) However, Patient had no pain with any of these maneuvers. (Tr. 140.) When he assessed Patient, Dr. Kube determined that he was at an increased risk for hip fracture. (Tr. 112.) Dr. Kube even called on the chief resident Dr. Raemisch with more experience to perform an exam and give his opinion. (Tr. 143.) Dr. Kube recalled that Dr. Raemisch performed a logroll maneuver, which would involve an internal and external rotation of the hip. (Tr. 143-44.)

Hip pathology can cause referred pain to the knee, so it is possible that a patient whose chief complaint is knee pain actually has a hip fracture. (Tr. 115.) The standard of care is to diagnose and treat a hip fracture as soon as possible, as it is an urgent orthopedic situation. (Tr. 119, 225.) If diagnosis and treatment are delayed, a hip fracture can become displaced and/or cause bone death, bleeding, infection, blood clotting, pulmonary embolus, and pain, leading people to stay in bed. (Tr. 118, 225-26.) People in bed can become deconditioned, develop such infections as urinary tract infections or pneumonia, and develop bedsores. (Tr. 118-19, 225-26.)

In a consultation, the physician gathers information from the patient, records, and other physicians who have seen the patient and performs an examination. (Tr. 342-43.) On February 19, 2002, Dr. Bicalho went through these steps with Patient. (Tr. 343.) Dr. Bicalho learned that Patient had sustained a broken arm in a fall, that he was ambulatory, and that he was experiencing knee pain. (Tr. 347.) Dr. Bicalho also learned of Patient's numerous chronic medical problems, such as diabetes, heart problems, high blood pressure, and a stroke, leading to significant left-sided weakness. (Tr. 347.) Dr. Bicalho also learned that Patient had been in a nursing facility for rehabilitation from his stroke and fall in December 2001, but he did not complain of pain in the groin, hip, thigh, and back at that time. (Tr. 348-49.) Dr. Bicalho performed a hip examination, and Patient did not complain of hip, groin or back pain during that exam. (Tr. 349.) Dr. Bicalho's diagnosis was that the pain was attributable to problems with the kneecap. (Tr. 351.) A negative x-ray does not rule out problems in the knee. (Tr. 351.) There are many

problems in the knee that do not show up on x-ray films. (Tr. 351.) The final diagnosis of Dr. Bicalho and Dr. Kube was left knee pain. (Tr. 122.)

After diagnosis, Dr. Bicalho recommended that Patient continue with physical therapy. (Tr. 351.) Dr. Kube had instructed him to follow up with Dr. Bicalho in seven to 10 days. (Tr. 352.) Patient was discharged on February 21. (Tr. 313.) At that time, he was in continuing pain and could do little for himself. (Tr. 313-14.)

SSM Home Care took over the home care of Patient when he was released from SLU on February 21. (Tr. 159.) On February 25, a routine visit from a SSM Home Care nurse revealed that Patient was experiencing left leg pain. (Tr. 157-60.) A February 28 visit from the nurse revealed that he could not straighten his left lower extremity because of the pain. (Tr. 161.) Visits from a home health care nurse on March 8 and 11, 2002, revealed that he denied pain on those dates. (Tr. 168.) A March 19, 2002, visit revealed that Patient had pain and loss of muscle tone in the left thigh. (Tr. 162-63.)

On March 21, 2002, an ambulance was called to the home of Patient, because of pain in his left leg from the mid-femur to the knee. (Tr. 96, 315-16.) Patient was transported to the emergency room at SLU and was diagnosed with a urinary tract infection. (Tr. 316.) In addition, an x-ray taken of Patient's hip on March 21, 2000, revealed a fracture that was two to four weeks old. (Tr. 127.) Generally, when a patient presents with a broken hip, he or she has excruciating pain in the hip, mainly radiating to the groin, and sometimes rotational deformity in the leg, causing shortening of the leg. (Tr. 131.) However, the pain can radiate to a variety of places, such as to the buttock,

thigh, or medial aspect of the leg. (Tr. 131.) A patient with a non-displaced hip fracture typically does not complain only of pain along the medial knee. (Tr. 132.)

Patient was admitted to SLU through the emergency room. (Tr. 512.) Dr. Irvine described Patient's hip fracture "old," because the femoral neck looked sclerotic, indicating that the fracture was not an acute fracture that occurred within the past 24 to 48 hours. (Tr. 518.) Dr. Irvine thought the fracture was about two weeks old. (Tr. 518.) Patient was not a candidate for open reduction internal fixation (ORIF), because Patient had a displaced fracture and multiple medical problems. (Tr. 519.) The problem with fixing the fracture with pins, plates, or screws is that there is a high incidence of that falling apart and requiring surgery later. (Tr. 519-20.) In addition, if a hip pinning were performed, the amount of weight the patient would put on that side to protect the fracture would be limited. (Tr. 521-22.) Dr. Irvine did not believe Patient could comply with this weight limitation due to Patient's obesity, diabetes and weakness from the stroke. (*Id.*) Patients with osteoporosis who undergo pinning have a high failure rate, because it is like putting a screw in a stick of butter. (Tr. 560.) However, after Patient's condition stabilized, he was a possible candidate for hemiarthroplasty, which requires one surgery to replace only the ball of the hip joint, and not the cup, so it is not a total hip replacement. (Tr. 519, 526.) With a hemiarthroplasty, a patient can put full weight on the hip the same day as surgery, and Patient's medical conditions—including diabetes, morbid obesity, and weakness on the left side—required that he get up and moving as soon as possible. (Tr. 521-22.) Regardless, hemiarthroplasty was still high risk due to Patient's medical condition. (Tr. 520.) The risks, including risk of infection, nerve

injury, and dislocation, were discussed with Patient. (Tr. 520-21.) Dr. Irvine did not believe that Patient's knee pain was necessarily from his hip fracture; he thought it was from another cause. (Tr. 523.)

On April 3, 2002, Dr. Irvine discussed the risks and possible complications of the planned procedure with Patient and his wife again, including the high risk for infection, which may lead to more surgery and even loss of a limb, and more dislocation. (Tr. 525.) In April 2002, Dr. Bicalho performed a hemiarthroplasty on Patient, and Dr. Irvine was pleased they got him out of the operating room alive, because he was concerned about his medical problems. (Tr. 331, 527.) After surgery, Patient was discharged from SLU, and he went to two rehabilitation facilities to undergo physical therapy so that he could walk again. (Tr. 318-19.) For several months after surgery, Patient still had pain in his left knee. (Tr. 528-29.)

In October 2003, he completed the therapy and at that time was able to walk with assistance about 40 – 50 feet. (Tr. 286, 319.) Thus, after his hemiarthroplasty, Patient recovered the ability that he had before the fall to walk. (Tr. 286-87.) However, because Patient wanted to improve on the ability to walk, he applied for outpatient rehabilitation. (Tr. 319-20.) In December 2003, shortly after he was discharged from the rehabilitation institute, he injured his leg. (Tr. 319-20.) He tried to continue his therapy, but he was unable to stand. (Tr. 320.) In July 2006, he could not get up anymore without the help of a lift, and so he stayed in bed from that point until he had hip surgery on April 27, 2007. (Tr. 321.) Thus, between December 2003, when he injured his leg, and April 2007, when he had hip surgery, Patient was unable to walk. (Tr. 320.)

As of the date of trial on June 13, 2007, Patient was in Barnes Jewish Extended Care. (Tr. 321.) He was on an antibiotic for a hip infection, which may develop in a normal hip, a hip with a plate and pins, or a hip with a prosthetic replacement. (Tr. 571.) The videotaped deposition of Patient was played at trial. (Tr. 170.)

Patient and Patient's Wife's expert, Dr. Nicholas Tsourmas, testified that he believed that Patient had a hip fracture on February 19, 2002, which he sustained when he fell in December 2001. (Tr. 229-30, 250.) Dr. Tsourmas based his opinion on Patient's history of a fall in December 2001, which resulted in ill-defined left lower extremity pain, and ongoing left lower extremity pain of unknown etiology over the next month. (Tr. 229-30.) In addition, after a month of rehab, he continued to have pain in the left lower extremity and was still unable to walk, transfer, and care for himself. (Tr. 230.) Finally, the x-rays taken on March 21, 2002, revealed fuzziness, indicating that the fracture was old, as opposed to sharpness like a new fracture would show. (Tr. 231.)

Based upon Patient's presentation on February 19, Dr. Tsourmas believed that the standard of care required Dr. Bicalho to consider hip fracture in his differential diagnosis. (Tr. 236.) Although 90 to 95 percent of people with hip pathology present with groin pain, problems with hips can cause referred pain from the hip to the knee in an atypical presentation. (Tr. 226, 227.) Dr. Tsourmas explained that if a patient comes in with a complaint of pain only in the knee, the clinician must include hip fracture in the differential diagnosis. (Tr. 228.) This would be low down on the list but should be one of them. (Tr. 228.)

Dr. Tsourmas testified that if Dr. Bicalho would have gotten an x-ray of the hip on that date, he would have found the hip fracture. (Tr. 236-37.) In addition, Dr. Tsourmas testified that the knee exam would not be appropriate to rule out a hip fracture. (Tr. 237.) Although a proper knee exam would encompass some hip flexion and extension, true pathology in the hip is demonstrated by the ability of the hip to internally or externally rotate. (Tr. 237.) Dr. Tsourmas also testified that a patient with a hip fracture who undergoes a knee exam may not complain of hip pain. (Tr. 237.) Thus, Dr. Tsourmas testified that SLU and Dr. Bicalho deviated from the standard of care by failing to examine the hip appropriately and order the appropriate diagnostic tests, such as a hip x-ray. (Tr. 237-38.)

Dr. Tsourmas also testified that SLU and Dr. Bicalho's deviation from the standard of care caused Patient to sustain damages. (Tr. 238.) If the fracture had been diagnosed on February 19, 2002, Dr. Tsourmas believed that Patient could have had his hip pinned instead of having to undergo a hip replacement. (Tr. 241-42.) Dr. Tsourmas testified that by March 21, 2002, the hip was in too far an advanced collapsed pattern to pin it. (Tr. 242.) Dr. Tsourmas explained that the benefits of pinning are that it is much less of a surgical procedure and has a decreased chance of infection. (Tr. 242, 243.) If the fracture had been diagnosed on February 19 and Patient had the pinning procedure, he probably would not have had an infection and the problems he was having with the removal of the prosthesis. (Tr. 245.) As of the time of trial, Dr. Tsourmas testified that Patient would probably not be able to walk again. (Tr. 246.) Dr. Tsourmas testified that Patient had neurologic damage caused by other conditions, not the medical treatment

provided by SLU and Dr. Bicalho, which affected Patient's gait and ability to walk. (Tr. 287-90.) In addition, Dr. Tsourmas testified that Patient will probably not be an implant candidate again. (Tr. 246.)

Dr. Ogle believes it was appropriate for Dr. Bicalho to do an extensive knee examination, a passive leg raise of the left knee, and ligamentous stability exam. (Tr. 269-71.) In addition, some of the knee exams, if done correctly and not cursorily, should move the hip in flexion and extension. (Tr. 271.) The examination that one would do for a hip would be putting the leg through a range of motion. (Tr. 271-72.) In fact, when Dr. Bicalho does a knee examination, about 95 percent of the hip evaluation is performed. (Tr. 398.)

If Patient had had a displaced fracture on February 18 and 19, the appropriate action would be a hip replacement. (Tr. 278.) A risk of doing a pin procedure in a patient is that bone may be lost by way of necrosis or death of bone tissue because of lack of blood supply. (Tr. 279.) A patient with vascular necrosis after pinning would probably have required a hip replacement. (Tr. 279-80.) A body mass index of greater than 30, such as Patient had, could affect a surgeon's decision regarding whether to do a pinning versus a hip replacement, because pinning is difficult to do, especially in someone who is obese. (Tr. 281, 563.) A patient's limited weakness on one side from a stroke and a left shoulder fracture may also affect the decision of surgeons to do pinning versus hip replacement. (Tr. 282.) Nonetheless, there are complications with both procedures. (Tr. 284.)

Dr. Bicalho's opinion within a reasonable degree of medical certainty was that Patient did not have a broken hip when he saw him on February 19, 2002. (Tr. 352.) During his training and career, Dr. Bicalho has made, or participated in making, a diagnosis of a fractured hip from 450 to 500 times. (Tr. 332-35.) He has never had a patient presenting with pain only in the knee. (Tr. 332-35.)

Dr. Bicalho believes that when Patient presented at SLU in March 2002, the fracture was about two to three weeks old. (Tr. 353-54.) Dr. Bicalho testified that he met the standard of care but agreed that it is below the standard of care to dismiss a patient from the hospital with a possible dangerous condition, such as a hip fracture, without ruling it out. (Tr. 361.) Dr. Bicalho testified that if Patient had presented with hip or upper thigh pain on February 19, he would have ordered an x-ray, which would have been required by the standard of care. (Tr. 389, 391-92.)

Dr. Bicalho believes that this was an old fracture, two to three weeks old, which would have occurred a week or two after Dr. Bicalho did his exam. (Tr. 401, 402.) One of the most common causes of hip fracture in someone who has had a stroke or has osteoporosis is the process of bearing weight or a transfer, because a fracture can occur due to the brittle nature of the bone. (Tr. 504.)

SLU and Dr. Bicalho's expert, David Irvine, M.D., testified that when Dr. Bicalho examined Patient in February 2002, he may have had the beginning stage of a fracture that was not yet completed and did not yet produce pain. (Tr. 557-58.) In other words, the fracture may have completed itself through an evolutionary process going on for four to six weeks. (Tr. 559.) Dr. Irvine testified that Dr. Bicalho used that degree of skill and

learning that is ordinarily used in the same or similar circumstances by members of his profession. (Tr. 568.)

Patient and Patient's Wife filed suit against several defendants, alleging medical negligence for the failure to diagnose Patient's hip fracture. (L.F. 1-2.) All of the defendants were dismissed without prejudice, with the exceptions of SLU and Dr. Bicalho. (L.F. 7, 9, 12, 17, 20, 101-103.) In their First Amended Petition for Damages, Patient and Patient's Wife claimed that Dr. Bicalho was negligent in his failure to diagnose and treat Patient's hip fracture on February 19, 2002. (L.F. 35-69.) In addition, Patient and Patient's Wife claimed that SLU was liable under a vicarious liability theory for the acts of its employee, Dr. Bicalho. (L.F. 35-69.) Finally, Patient's Wife alleged a loss of consortium claim against defendants. (L.F. 68-69.)

After a jury trial, a verdict was rendered in favor of Patient and Patient's Wife in the following amounts: for Patient in the total amount of $775,000.00 ($200,000.00 for past economic damages, $500,000.00 for past non-economic damages, and $75,000.00 for future non-economic damages), and in favor of Patient's Wife on her claim for damages in the amount of $50,000.00 for past non-economic damages and $0 for future and non-economic damages, for a total verdict in the amount of $825,000.00. (L.F. 112-113.) On June 18, 2007, the court entered judgment in accordance with the jury's verdict. (L.F. 114-116.) Thereafter, SLU and Dr. Bicalho filed their post-trial motion. (L.F. 117-123.) In addition, SLU and Dr. Bicalho filed a Motion to Subpoena Juror and for Evidentiary Hearing. (L.F. 125-126.) The court granted permission for SLU and Dr. Bicalho's counsel to contact Juror Demetrius Sims for purposes of serving a subpoena for

an evidentiary hearing. (L.F. 30-31.) At the supplemental evidentiary hearing on the issue of juror nondisclosure, Demetrius Sims appeared and testified. (L.F. 31.) On October 15, 2007, 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. (L.F. 191-197.) SLU and Dr. Bicalho appealed to the Missouri Court of Appeals, Eastern District, which reversed the judgment in favor of Patient and his wife and remanded to the trial court for a new trial based on the admission of a videotape of a newscast featuring Patient, which was shown with sound.

An Application to Transfer the case to this Court was filed by Patient's Wife. The case was ordered transferred to the Missouri Supreme Court.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN OVERRULING SLU AND DR. BICALHO'S OBJECTION AND ADMITTING EXHIBIT 35, A VIDEOTAPE WITH AUDIO OF A NEWSCAST INTERVIEWING PATIENT AND HIS HEALTH CARE PROVIDERS, BECAUSE IT WAS NOT PRACTICAL, INSTRUCTIVE, AND/OR CALCULATED TO ASSIST THE JURY IN UNDERSTANDING THE CASE; CONSTITUTED HEARSAY; AND SERVED ONLY TO INFLAME THE MINDS OF THE JURY, IN THAT IT CONTAINED OUT-OF-COURT STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION OF PATIENT'S "GOOD" CHARACTER AND OF HIS PROGRESS IN RECOVERING FROM HIS STROKE, WHICH DID NOT HAVE A TENDENCY TO PROVE OR DISPROVE ANY MATTER AT ISSUE.

Haley v. Byers Transportation Co., 414 S.W.2d 777 (Mo. 1967)

Haynam v. Laclede Electric Co-op, Inc., 827 S.W.2d 200 (Mo. banc 1992)

Grose v. Nissan North America, Inc., 50 S.W.3d 825, 830 (Mo. App. E.D. 2001)

II. THE TRIAL COURT ERRED IN DENYING SLU AND DR. BICALHO'S MOTION FOR MISTRIAL, BECAUSE SLU AND DR. BICALHO SUFFERED PREJUDICE DURING THE *VOIR DIRE* EXAMINATION OF THE JURY PANEL MEMBERS RESULTING IN AN EXCESSIVE VERDICT IN FAVOR OF PATIENT AND

PATIENT'S WIFE, IN THAT PATIENT AND PATIENT'S WIFE'S COUNSEL IMPROPERLY AND IN BAD FAITH INJECTED INSURANCE INTO THE CASE.

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

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

Page v. Unterreiner, 106 S.W.2d 528 (Mo. App. S.D. 1937)

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

III. THE TRIAL COURT ERRED IN DENYING SLU AND DR. BICALHO'S MOTION FOR NEW TRIAL, BECAUSE SLU AND DR. BICALHO SUFFERED PREJUDICE FROM INTENTIONAL JUROR NONDISCLOSURE OF MATERIAL INFORMATION, IN THAT JUROR SIMS DID NOT DISCLOSE HIS PREVIOUS INVOLVEMENT IN PRIOR LITIGATION AND IT WAS UNREASONABLE FOR JUROR SIMS TO HAVE FORGOTTEN ABOUT THE LAWSUIT DURING *VOIR DIRE* OR OTHERWISE NOT HAVE HEARD THE QUESTIONS AND ANSWERS REGARDING PRIOR LITIGATION ON *VOIR DIRE*.

Brines By and Through Harlan v. Cibis, 882 S.W.2d 138 (Mo. 1994)

Williams by and through Wilford v. Barnes Hosp., 736 S.W.2d 33 (Mo. banc 1987)

Bell v. Sabates, 90 S.W.3d 116 (Mo. App. W.D. 2002)

Washburn v. Medical Care Group, 803 S.W.2d 77 (Mo. App. E.D. 1990)

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING SLU AND DR. BICALHO'S OBJECTION AND ADMITTING EXHIBIT 35, A VIDEOTAPE WITH AUDIO OF A NEWSCAST INTERVIEWING PATIENT AND HIS HEALTH CARE PROVIDERS, BECAUSE IT WAS NOT PRACTICAL, INSTRUCTIVE, AND/OR CALCULATED TO ASSIST THE JURY IN UNDERSTANDING THE CASE; CONSTITUTED HEARSAY; AND SERVED ONLY TO INFLAME THE MINDS OF THE JURY, IN THAT IT CONTAINED OUT-OF-COURT STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION OF PATIENT'S "GOOD" CHARACTER AND OF HIS PROGRESS IN RECOVERING FROM HIS STROKE, WHICH DID NOT HAVE A TENDENCY TO PROVE OR DISPROVE ANY MATTER AT ISSUE.

A. Standard of Review

The admission or exclusion of evidence lies within the sound discretion of the trial court, and the trial court's ruling will not be disturbed absent an abuse of discretion. *Huffy Corp. v. Custom Warehouse, Inc.*, 169 S.W.3d 89, 92 (Mo. App. E.D. 2005).

B. Argument

1. *Introduction*

The trial court erred in admitting, over SLU and Dr. Bicalho's objection, a videotape of a 2001 local newscast featuring Patient, Patient's Wife and health care

providers and allowing the videotape to be played with audio up to the point on the tape where the lady in red appeared. (Exhibit 35; Tr. 101-102.) The videotape was inadmissible, because it was not practical, instructive, and/or calculated to assist the jury in understanding the case; was not subject to cross-examination; and served only to inflame and prejudice the minds of the jury.

2. *Videotape was Not Practical, Instructive, and/or Calculated to Assist the Jury in Understanding the Case*

The admissibility of a videotape depends on whether it is practical, instructive, and calculated to assist the jury in understanding the case. *Grose v. Nissan North America, Inc.*, 50 S.W.3d 825, 830 (Mo. App. E.D. 2001); *Repple v. Barnes Hospital*, 778 S.W.2d 819, 822 (Mo. App. E.D. 1989). While demonstrative evidence may at times be invaluable in the court's search for the truth, it remains the *exception* rather than the rule, and its use raises certain problems for a judicial system the mechanics of which are essentially geared to the reception of *viva voce* testimony by witnesses. *Id.* at 831. Because of the lasting visual impression that photos, computer-generated recreations, movies and videos create in the mind, courts must exercise their discretion carefully when admitting them. *Id.* Even footage or photos of an actual crime or accident are inadmissible when their probative value is outweighed by their inflammatory effect. *Id.* In *Grose*, the Court explained that videotapes are allowed into evidence for two essential purposes: (1) to recreate events at issue in the litigation and (2) to illustrate physical properties or scientific principles the average layperson would find difficult to understand and which forms the foundation for an expert's opinion. *Id*. at 830.

Here, the videotape of a local newscast featuring Patient was not practical, instructive, and/or calculated to assist the jury in understanding the case. It neither (1) recreated an event at issue in the litigation nor (2) illustrated physical properties or scientific principles the average layperson would find difficult to understand and which forms the foundation for an expert's opinion. More importantly, the videotape was simply not relevant.

Patient and Patient's Wife argued that the videotape was admissible to show the jury Patient's ability to walk and his mental capacity before the "injury" at issue in this case. However, the "injury" at issue here is Dr. Bicalho's failure to diagnose the hip fracture on or after February 19, 2002. Thus, Patient's Wife's argument fails to take into consideration that after the videotape was made in 2001, Patient fell in Oklahoma City later that year and received medial care for an arm fracture and rehabilitation services by other providers for almost two months before he was first seen by Dr. Bicalho in late February 2002. There is simply no evidence that Patient's ability to walk and comprehend in late February 2002—after a fall and treatment by other providers—was the same as it was on the videotape, which was made earlier in 2001, after his stroke but before the fall in December of that year. A medical provider is liable only for damage or injury caused by his negligence, and not for the results of the patient's original injury or illness. *Lawton v. Jewish Hosp.*, 679 S.W.2d 370, 372 (Mo. App. E.D. 1984). The videotape failed to accurately depict Patient's condition after the fall. Furthermore, no evidence was presented that had the hip fracture been diagnosed in February 2002, Patient would have returned to his condition in 2001 as represented by this videotape.

Moreover, Patient's Wife testified and medical testimony was presented at trial that following Dr. Bicalho's treatment, including the surgical resection and hip prosthesis, Patient regained the ability to ambulate with the use of a walker by the Fall of 2003. (Tr. 286-87, 319.) Patient's Wife testified that in December 2003, Patient injured his leg again. (Tr. 320.) Patient and Patient's Wife's own expert acknowledged that he agreed with one of Patient's treating orthopedic surgeons that, after the surgical resection of his hip prosthesis and after suffering another injury to his hip, Patient's inability to walk at the time of trial was due to neurologic issues unrelated to Dr. Bicalho's care. (Tr. 287-290.) Therefore, the videotape depicting Patient's ability to walk prior to fall in December 2001 was misleading to the jury. This videotape should not have been admitted as its contents were irrelevant and served to mislead the jury regarding the issue of damages in this case.

In addition, the videotape is not subject to cross-examination and the very obvious impact of the videotape would be to inflame the jurors. *See, e.g., Haley v. Byers Transportation Co.*, 414 S.W.2d 777, 780 (Mo. 1967). As discussed above, the videotape is of a television news reporter's interview of Patient at an SSM Rehabilitation facility many months before his fall on December 27, 2001, for treatment that is not at issue in this case. *Haley v. Byers Transportation Co.*, 778 S.W.2d 777 (Mo. 1987), and *Spain v. Brown*, 811 S.W.2d 417 (Mo. App. E.D. 1991), provide guidance here. In *Haley*, the Missouri Supreme Court held that a film depicting a disabled plaintiff engaged in various activities, such as getting in and out of his wheelchair, was inadmissible, because it was "self-serving" and "constituted testimony from plaintiff not subject to cross-examination,

and created sympathy for plaintiff out of proportion to the real relevancy of the evidence." *Id.* at 822. Moreover, the activities depicted in the film had already been described in evidence, and if plaintiff desired more detail, he could have offered the equipment as an exhibit or provided more detailed descriptions. *Id.* at 823. Here, as in *Haley*, the admission of the videotape would serve to only inflame the jury, and thus its probative value, if any, is outweighed by its inflammatory effect.

Similarly, in *Spain*, the Court of Appeals determined that a film depicting a surgeon performing two elbow arthroscopies was inadmissible. In *Spain*, the plaintiff filed suit against the surgeon who performed an arthroscopy on his elbow. After a verdict and judgment in favor of plaintiff, the defendant surgeons alleged on appeal that the trial court erred in excluding a videotape depicting two elbow arthroscopies being performed. Defendants' position at trial was that they performed the elbow arthroscopy on plaintiff's elbow using a technique developed by Dr. Lanney Johnson, an orthopedic surgeon. According to the defendants, in preparation for plaintiff's arthroscopy, one of the surgeons viewed a videotape depicting Dr. Johnson performing two elbow arthroscopies using his techniques. Even though defendants maintained that they were not offering the videotape for the truth of the matter asserted, but to show the surgeon's training, which according to defendants, was very much at issue in the case, the trial court sustained the plaintiff's hearsay objection to the videotape.

The Court of Appeals in *Spain* found that the videotape was irrelevant to the principal issue in the case, which was the placement of a lateral portal in relation to the anatomical marks on the elbow. Thus, the information that the surgeon received from the

videotape was not relevant to that issue unless the videotape was being offered to show the surgeon's opinion of the proper location of the lateral portal incision; that, however, would have constituted hearsay. Thus, the Court of Appeals found that the trial court properly found the videotape inadmissible. Here, as in *Spain*, the videotape was purportedly admitted to show Patient's mobility before the alleged act of neglect here. However, the audio portion was completely irrelevant to any issue in the case at bar and constituted inadmissible hearsay, which is more fully discussed in the next section.

3. *In the Alternative, Audio Portion of Videotape Constituted Hearsay Not Subject to Cross-Examination of Patient's "Good" Character and of His Progress in Recovering from his Stroke*

In the alternative, the trial court abused its discretion in overruling SLU and Dr. Bicalho's objection to the audio portion of the videotape. Although a demonstration of the nature and extent of plaintiff's injuries, in and of itself, arguably may not be improper or prejudicial in a personal injury action, it is improper when the demonstration exceeds legitimate purposes and would unduly elicit sympathy and prejudice in plaintiff's favor to a degree that would tend to minimize other considerations required of the jury. *See Kickham v. Carter*, 314 S.W.2d 902, 908 (Mo. 1958).

The audio portion of the videotape that was played to the jury contains statements from Patient's physician and therapist who were providing care for a condition wholly unrelated to the condition at issue in this case and who are not parties to this case. (Ex. 35.) The physician on the videotape, Dr. Gerard Erker, states that Patient has worked very hard to recover from the injuries caused by his stroke. (*Id*.) In addition, the audio

portion of the videotape contains statements from Patient that are not sworn and are irrelevant to any issue in this case. Patient stated on the videotape that he wished to run for political office and use the political process to help others. (*Id.*) Patient spoke on the videotape of the belief that health care was a basic human right and that he wanted to work within the political process to assure everyone had access to health care. (*Id.*)

Such statements of Patient's personal beliefs and his work to help others are irrelevant and highly prejudicial. The statements contained in the videotape of the newscast from 2001 did not have a tendency to prove or disprove any of the facts at issue in the case. In fact, the audio from the videotape constitutes an attempt to prove Patient's general character or reputation. It is well established that in civil cases the evidence of the good character of a party is generally irrelevant and inadmissible. *See Ridge v. Ridge*, 165 S.W.2d 294, 300 (Mo. App. E.D. 1942). As a general rule, a party to a civil case may not introduce evidence of his good character or evidence of his opponent's bad character. *Haynam v. Laclede Electric Co-op, Inc.*, 827 S.W.2d 200, 205-08 (Mo. banc 1992). The exception to this general rule, where a person's character is directly at issue as an element of a claim or defense or as a factor in assessing damages, is not applicable to the present case. *See, e.g., Reynolds v. Jobes*, 565 S.W.2d 690, 694 (Mo. App. W.D. 1978), abrogated on other grounds by *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo. 1994) (no error in refusing evidence of party's character in alienation of affections action; "the law is well established that the character of a party to a civil action cannot be inquired into if not put into issue by the nature of the proceedings, such as libel, slander, malicious prosecution, etc., where evidence of good character is relevant on the issue of

damages."). The rationale of this general rule prohibiting character evidence is "evidence on the collateral issue of character . . . comes with too much dangerous baggage of prejudice, distraction from the issues, and surprise." *Williams v. Bailey,* 759 S.W.2d 394, 396 (Mo. App. S.D. 1988). Further, as noted by this Court in *Taylor v. Kansas City Southern Ry. Co.*, 266 S.W.2d 732 (Mo. 1954):

> A defendant, in an action for personal injury, suffers many unavoidable disadvantages, which makes it only the more necessary to shield him from those which may be avoided. The maimed, the widow, and the orphan draw strongly enough on the hearts of jurymen without affirmative effort to arouse sympathy. Human nature needs no artificial aid in this respect.

Id. at 699, quoting *Willis v. City of Browning,* 143 S.W. 516 (Mo. App. W.D. 1912).

The playing of the audio of the videotaped newscast did not further Patient and Patient's Wife's purported purpose of playing the videotape—to illustrate Patient's prior physical condition. Rather, it provided inadmissible, irrelevant and highly prejudicial evidence of Patient's character and was therefore erroneously admitted into evidence. Furthermore, the audio portion clearly contained hearsay, which is an out-of-court statement offered to prove the truth of the matter asserted. *Taylor v. Republic Automotive Parts, Inc.*, 950 S.W.2d 318, 323 (Mo. App. W.D. 1997). At trial, a video deposition of Patient was played. (Tr. 170.) The video deposition afforded Defendants the opportunity to cross-examine and was subject to the Rules of Evidence, unlike the videotape of the newscast.

SLU and Dr. Bicalho have been unable to locate any Missouri case discussing the admissibility of a newscast or the audio portion of a videotape, although at least one case found that the admission of a videotape *without sound* was not an abuse of discretion. *See Lawton v. Jewish Hosp. of St. Louis*, 679 S.W.2d 370, 372 (Mo. App. E.D. 1984) (trial court did not abuse discretion in allowing into evidence a day-in-the-life videotape of plaintiff when plaintiff's health prohibited appearance at trial and "trial court carefully reviewed the videotape, removed from the jury's consideration any portions determined to be inflammatory or prejudicial, and *ordered that it be played without sound.*") [Emphasis added.]

Similarly, the New York case of *Rivera ex rel. Rivera v. Eastern Paramedics, Inc.*, 267 A.D.2d 1029 (N.Y.A.D. 4 Dept. 1999), also provides guidance here. In *Rivera*, which involved a claim of medical negligence against an EMT service for brain injury allegedly resulting from the alleged failure to maintain an adequate airway during a post-accident emergency treatment, the Court of Appeals held that the audio portion of a videotape of plaintiff was properly excluded. In so doing, the Court of Appeals stated as follows:

> The Court also properly determined, in the exercise of its discretion [citation omitted] that *the audio portion of a videotape was inadmissible because of the hearsay description of . . . [plaintiff's] care and comments made by nurses, which would not be subject to cross-examination*. [Citation omitted.]

[Emphasis added.] *Id*. at 725-26.

Finally, in *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978), the Supreme Court of Oregon held that the defendant was entitled to a new trial on other grounds but proceeded to address other assignments of error that were likely to arise in the new trial, including whether two films were erroneously admitted at trial. *Wilson* involved a wrongful death action based on products liability against a manufacturer of a light aircraft, which crashed and killed two people. The first film was a documentary entitled "Crash Impact Survival in Light Airplanes," and depicted a series of three test crashes of light two-place airplanes occupied by dummies. The film demonstrated the importance in a crash of upper torso restraints in addition to over-the-lap seat belts. It was accompanied by a soundtrack that included descriptions of the test crashes and their results, as well as general statements about the importance of shoulder harnesses in protecting the occupants of airplanes in crashes. The manufacturer objected to the admission of the film on hearsay grounds. The Oregon Supreme Court found that the trial court should not have admitted the film, stating as follows:

> We conclude the defendant's hearsay objection was well taken and that the film ought to have been excluded. During its viewing of the film the jury heard, from an apparently authoritative source, statements and conclusions which were directly relevant to a matter in issue (whether defendant's airplane was dangerously defective because no upper torso restraints had been provided for the rear seat passengers), and defendant had no opportunity to test the validity of those statements by examining the person or persons

> responsible for them. Dr. Snyder's familiarly with and willingness to be cross-examined about the principles involved did not cure this defect.
>
> * * *
>
> The effect of showing this film was similar to the effect of permitting a witness to testify that he agrees with the opinions of absent experts whose statements are read into the record. Dr. Snyder's testimony was bolstered by corroboration by presumed experts, while only Dr. Snyder himself was available for defendant to cross-examine in order to test the authority and extent of that corroboration. The film, as narrated, was inadmissible.

In addition, the second film, entitled "Restraints for Survival," was also erroneously admitted. The Oregon Supreme Court found that it was not necessary to determine the issue of whether or not the film was objectionable on hearsay grounds, as set forth by the manufacturer, because its frank appeal to the emotions of the audience through its graphic images and use of dramatic music outweighed any probative value. Thus, its admission was not proper.

Here, any arguably probative value of the tape, such as Patient's physical abilities before the incident at issue in this case, was far outweighed by the unfair prejudice of admitting ex-parte, irrelevant testimony from several absent witnesses, including Patient, his health care providers, and the host of the television program. Likewise, as in *Wilson*, testimony that was arguably of an "expert" nature was admitted in the form of

commentary from the host and other health care providers without providing SLU and Dr. Bicalho an opportunity to question the basis of the opinion or otherwise cross-examine the witnesses about their testimony. Similar to *Wilson*, the prejudice suffered by SLU and Dr. Bicalho require a reversal and a remand.

4. *Admission of Videotape was Prejudicial Error, Requiring Reversal and Remand*

Admission of evidence that is allegedly hearsay is reversible error if the challenged evidence prejudiced the complaining party. *In re A.A.T.N.*, 181 S.W.3d 161, 170 (Mo. App. E.D. 2005). Evidence is prejudicial if it tends to lead the jury to decide the case on some basis other than the established propositions in the case. *Ellis v. Kerr-McGee Chemical, L.L.C.*, 1999 WL 969278 (Mo. App. E.D. 1999). In this case, it is impossible to approximate the effect of the inadmissible character evidence on the verdict and the amount of the verdict, and the situation may not be remedied by remittitur. *See Taylor*, 266 S.W.2d at 700. In addition, the videotape was misleading with respect to the scope of damages recoverable as discussed above. Thus, the judgment should be reversed and the cause remanded for a new trial on all issues. *See id*.

II. THE TRIAL COURT ERRED IN DENYING SLU AND DR. BICALHO'S MOTION FOR MISTRIAL, BECAUSE SLU AND DR. BICALHO SUFFERED PREJUDICE DURING THE *VOIR DIRE* EXAMINATION OF THE JURY PANEL MEMBERS RESULTING IN AN EXCESSIVE VERDICT IN FAVOR OF PATIENT AND PATIENT'S WIFE, IN THAT PATIENT AND PATIENT'S WIFE'S

COUNSEL IMPROPERLY AND IN BAD FAITH INJECTED INSURANCE INTO THE CASE.

A. Standard of Review

The trial court's denial of a motion for mistrial when counsel steps beyond the boundaries of the "insurance question" on *voir dire* is reviewed for an abuse of discretion. *Taylor v. Republic Automotive Parts, Inc.*, 950 S.W.2d 318, 321 (Mo. App. W.D. 1997).

B. Argument

1. *Introduction*

The trial court abused its discretion in failing to grant a mistrial because Patient and Patient's Wife's counsel's bad-faith injection of insurance into this matter during *voir dire* resulted in prejudice to SLU and Dr. Bicalho and thereby caused an excessive verdict in favor of Patient and Patient's Wife. In general, it is improper to inject the issue of the existence of liability insurance into an action for damages. *Missey v. Kwan*, 595 S.W.2d 460, 465 (Mo. App. E.D. 1980). Juries tend to return larger verdicts when informed that an insurance company, rather than the defendant, will pay the judgment. *See Mock v. J.W. Githens Co.*, 719 S.W.2d 79, 83 (Mo. App. S.D. 1986). Thus, Missouri courts have uniformly held that there is nothing more prejudicial than to bring before a jury the fact that an insurance company is interested in the result. *See Melvin v. Carter*, 299 S.W. 103, 105 (Mo. App. W.D. 1927), and cases cited therein.

2. *The Proper Procedure Governing Voir Dire Insurance Questioning was Not Followed*

To guard against such prejudice, Missouri has adopted a three-step process governing *voir dire* insurance questioning. A litigant must (1) obtain the judge's approval of the proposed "insurance question" out of the hearing of the panel; (2) ask only one "insurance question"; and (3) refrain from asking the question first or last in a series of questions, so as to unduly highlight the issue of insurance. *Ivy v. Hawk*, 878 S.W.2d 442, 445 (Mo. banc 1994). Thus, if an attorney wishes to *voir dire* prospective jurors about their interest in or connection with an insurance carrier or interest in the defense or prosecution of the case, he or she should lay a foundation "prior to voir dire by inquiring on the record and out of the hearing of the jury as to the name of the insurance company or companies interested in the outcome of the case. This evidences the good faith of the attorney who seeks to voir dire on this matter." *Yust v. Link*, 569 S.W.2d 236, 239 (Mo. App. E.D. 1978). During this conference, counsel should request the court to rule on what questions and in what manner the trial court will permit inquiry concerning insurance. *Id*. Inquiry in accordance with the court's instruction will necessarily be in good faith. *Id*.

Although asking the insurance question on *voir dire* was discussed in chambers prior to *voir dire*, the precise wording of the specific question was never discussed and thus Patient and Patient's Wife's counsel did not follow the proper procedure to "obtain the judge's approval of the proposed 'insurance questions' out of the hearing of the panel." *See Ivy*, 878 S.W.2d at 445. (Supp. Tr. 38.) Instead, the question was posed for the first time during *voir dire*.

3. *Voir Dire Question Improperly Injected Insurance*

Patient and Patient's Wife's counsel's question during *voir dire* was as follows: "Is anybody here an officer, director or shareholder of *an insurance company* called The Doctors Company?" (Supp. Tr. 38; A12.) [Emphasis added.] This question was improper, because it identified The Doctors Company as an insurance company. As this Court held in *Ivy*, such a question unnecessarily highlights the insurance issue and is improper.

In *Ivy*, the plaintiff first proposed asking the following question: "Do any of you or do any members of your family work for or have a financial interest in an insurance company known as Medical Defense Associates?" This Court explained that this question was improper because it unnecessarily highlighted the insurance issue because it referred to Medical Defense Associates as an insurance company. *Ivy*, 878 S.W.2d at 445[1]. A second question was posed by the plaintiff in *Ivy* that followed the format normally approved in Missouri: "Do any of you or do any members of your family work for or have a financial interest in a company known as Medical Defense Associates?" This Court concluded that the second question was the proper method for posing the insurance question. *Id.* Here, Patient and Patient's Wife's counsel's question unnecessarily highlighted the insurance issue because it referred to The Doctors Company as an insurance company. Therefore, the question was improper.

4. *Insurance was Injected in Bad Faith*

In *Page v. Unterreiner*, 106 S.W.2d 528 (Mo. App. S.D. 1937), the Court of Appeals held that the trial court erred in failing to discharge the jury after the panel members became aware during *voir dire* that defendants carried insurance. In *Page*, a

caddy at a golf course sued for injuries sustained when he was struck by a golf ball driven by the defendant. During *voir dire*, the plaintiff's counsel asked the jury whether any members of the panel or their relatives or friends had ever been in the employ of American Surety Company. Plaintiff's counsel also asked a second question: "None of you have any relatives or friends that have ever been in the employ of the American Surety Company?" The Court held that the procedure up to this point in the case was correct. However, plaintiff's counsel then proceeded to ask the jury the following question:

> This American Surety Company is an insurance company that writes golf insurance together with other insurance. With that statement have any of you [sic] relatives or friends who ever worked for that insurance company?

There was no answer from the jury. Plaintiff's counsel also asked: "Have any of you ever worked for any other insurance company that wrote golf insurance?" There was no answer. The Court found in pertinent part as follows:

> To these latter questions the defendant's counsel objected, and it is the opinion of this court that the objection should have been sustained. . . . If any of the jury or their near friends or relatives had been employed by the American Surety Company the first questions asked by plaintiff's counsel were sufficient, in good faith, to elicit this information, and assist plaintiff's counsel in passing on their qualifications as jurors. In going any further within this, and in

> telling them that the American Surety Company was an insurance company that wrote golf insurance, and other insurance, and in asking them if any of them ever worked for a company that sold golf insurance, plaintiff's counsel went beyond the bounds to which he should be allowed to go on voir dire examination. *Such question merely told the jury, in effect, that the defendant carried golf insurance, and was error for which the jury panel should have been discharged*.

[Emphasis added.] *Page*, 106 S.W.2d at 536.

Based on the language of the question in the present case, there is no reasonable conclusion other than the question was asked in bad faith and solely for the purpose of injecting into the case the fact that SLU and Dr. Bicalho were covered by a policy of liability insurance. The question did not merely ask potential jurors about their interest, if any, in The Doctors Company, but went further and described The Doctors Company as an *insurance* company.

Although the Court sustained SLU and Dr. Bicalho's objection, their motion for a mistrial was denied. (Supp. Tr. 39; A12.) Such relief was insufficient to cure the error. *See, e.g.*, *Buehler v. Festus Mercantile Company*, 119 S.W.2d 961, 969-70 (Mo. banc 1938) (holding that plaintiff's counsel's injection of insurance during opening statement required a reversal and remand for a 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 the beginning of plaintiff's opening

statement, and the prompt withdrawal of it and the apology of counsel was but an acknowledgment of the seriousness of the error).

McCaffery v. St. Louis Public Service Co., 252 S.W.2d 361 (Mo. 1952), also provides guidance here. In *McCaffery*, out of the hearing of the jury, plaintiff's counsel stated as follows: "For the purpose of properly qualifying this jury and for that purpose I would like to ask Mr. Gartner whether or not the Transit Casualty Company, an insurance company, has any interest in the outcome of this litigation?" Opposing counsel answered in the affirmative. Thereafter, plaintiff's counsel stated that he proposed to ask one general question and would not ask it immediately upon leaving the bench and would not put undue emphasis or single it out in the course of his examination. The court agreed, and thereafter plaintiff's counsel then asked the members of the panel various questions pertaining to their qualifications and then asked the following question:

> 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 at 7th and . . ."

Out of the hearing of the jury, counsel for defendant requested that the court discharge the jury panel and declare a mistrial because, although proper foundation had been laid for asking the jury about the insurance company, undue influence remained in the tone of counsel's voice and further by emphasizing that it was an insurance company. The court refused to discharge the jury, and there was no other mention of the Transit Casualty Company, insurance company, or insurance during further examination on *voir dire*. On appeal, defendant's counsel argued that the trial court abused its discretion in

overruling defendant's motion to discharge the jury with regard to the injection of insurance.

The *McCaffery* Court held that the trial court did not abuse its discretion. First, unlike the present 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. At that time, there was no objection to the characterization or any suggestion that counsel should not so characterize Transit Casualty Company when the question was asked. Thus, plaintiff's counsel's characterizing Transit Casualty Company as an insurance company when laying the foundation for the question on *voir dire* examination clearly indicated that plaintiff's counsel was acting in good faith, not only in the purpose of his question but in the language used to propound it.

The Court also noted that no prejudice resulted, stating as follows:

> *We are of the opinion that it was improper to characterize Transit Casualty Company as an insurance company*. But we are also of the opinion that this characterization in the 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 is 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 an argument to the jury; that there is nothing in the record to indicate the bad faith of plaintiff's counsel in including his question the characterization of the company inquired about as an insurance company; and finally, and contrary to the suggestion of the trial court, we believe that any panel of jurors would know that Transit Casualty Company was in fact an insurance company and thus the characterization of it as such would be harmless.

[Citations omitted; emphasis added.] *Id*. at 367.

The present case differs significantly from *McCaffery*, in that counsel's question necessarily was in bad faith, because he did not obtain approval from the trial court prior to asking the insurance question. In fact, the court noted, "I assumed that you were aware of the insurance question." (Supp. Tr. 38; A12.) SLU and Dr. Bicalho's attorney certainly was aware of the proper form of the question, stating in his motion for mistrial that "[t]he proper form under Missouri case law is to ask any juror if they have a financial interest in or is employed by and give the name of the company. To then describe it as an insurance company is improper under Missouri law, and it's prejudicial error." (Supp. Tr. 38; A12.) In addition, it is doubtful that the panel of jurors would know that The

Doctors Company was in fact an insurance company and thus the characterization of it as such was not harmless.

5. *Prejudice is Presumed But Also has Been Shown*

If good faith is not shown, the injection of the fact or suggestion that the defendant carries insurance and that some invisible insurance company may have to pay the judgment is prejudicial error, even if adroitly done only on *voir dire* examination. *Carter v. Rock Island Bus Lines, Inc.*, 139 S.W.2d 458, 462 (Mo. 1940). Nonetheless, prejudice was clearly demonstrated when prospective juror Mr. Terry Grohman made repeated references to insurance *after* Patients and Patient's Wife's counsel asked the improper question identifying The Doctors Company as an "insurance company." In response to Patient and Patient's Wife's counsel's question "[w]ho believes that there are too many lawsuits against doctors?," Venireperson Grohman responded as follows:

> I mostly think that a lot of time, you know, *when it comes to the point where you can't settle the lawsuit before you even come to the courtroom*, you know, a lot of time *I wonder why that much money, there are large sums of money even have to be—I guess before it 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. . . .

[Emphasis added.] (Supp. Tr. 58; A13.)

After Patient and Patient's Wife's counsel asked Venireperson Grohman whether he was the right juror for a medical malpractice case, Venireperson Grohman responded as follows:

> It doesn't necessarily mean, you know, the doctor is right or wrong in the case. I don't know all the facts or specifics, but in general, I have a general opinion that, you know—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 I am paying my own insurance, it's, you know, these factors come into play for me. . .*

(Tr. 58-59;A13.) [Emphasis added.]

Finally, in response to Patient and Patient's Wife's question on *voir dire* regarding whether any member of the panel would have a problem assigning a dollar figure on pain and suffering, Venireperson Grohman responded as follows:

> I still don't feel that—I still think this could have been settled outside of court if it's not about greed or giving somebody a huge extravagant amount of money. *And the insurance company is going to be taking care of it anyhow, most likely.* It could have been settled through that, rather than taking it to trial and trying to get more money . . ."

(Supp. Tr. 79-80; A14.) [Emphasis added.]

At that point, SLU and Dr. Bicalho's counsel renewed his Motion for Mistrial, noting that it was clear that the jury is aware of, and talking about, insurance being involved as a direct result of the identification of The Doctors Company as "an insurance company," which was done in bath faith. It became clear the prospective jurors were aware insurance coverage was involved in this case based on Mr. Grohman's repeated questions and comments regarding settlement of lawsuits outside of court by employers on behalf of their employees, premiums increasing, and, ultimately his statement that "the insurance company is going to be taking care of it. . ." However, after explaining that Venireperson Grohman would not be seated on the jury, the trial court denied the motion for mistrial. (Supp. Tr. 81.)

6. *Conclusion*

As this Court stated in the preeminent case of *Olian v. Olian*, 59 S.W.2d 673 (Mo. 1933), "It is the common experience of practicing attorneys that it is highly prejudicial to a defendant's case for the jury to be informed that any verdict returned against the defendant will not hurt him, but will be paid by insurance company." *Id*. at 674. As in *Olian*, the large verdict rendered by the jury in favor of Patient and Patient's Wife in the amount of $825,000.00 is largely attributable to the prejudicial question asked during *voir dire*. Thus, the trial court erred in failing to grant a mistrial and discharge the jury, because all of the panel members were tainted due to the improper question on *voir dire* that identified The Doctors Company as an insurance company, which prejudice was exemplified and compounded by Venireperson Grohman's statements during *voir dire*

regarding settlements, increasing premiums, and the fact that the insurance company was most likely going to pay any damages awarded. This Court should reverse the judgment in favor of Patient and Patient's Wife and remand for a new trial.

III. THE TRIAL COURT ERRED IN DENYING SLU AND DR. BICALHO'S MOTION FOR NEW TRIAL, BECAUSE SLU AND DR. BICALHO SUFFERED PREJUDICE FROM INTENTIONAL JUROR NONDISCLOSURE OF MATERIAL INFORMATION, IN THAT JUROR SIMS DID NOT DISCLOSE HIS PREVIOUS INVOLVEMENT IN PRIOR LITIGATION AND IT WAS UNREASONABLE FOR JUROR SIMS TO HAVE FORGOTTEN ABOUT THE LAWSUIT DURING *VOIR DIRE* OR OTHERWISE NOT HAVE HEARD THE QUESTIONS AND ANSWERS REGARDING PRIOR LITIGATION ON *VOIR DIRE*.

A. Standard of Review

In reviewing a determination that intentional or unintentional disclosure has occurred, the appellate court reviews for an abuse of discretion. *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 723 (Mo. App. E.D. 2001).

B. Argument

1. *Introduction*

The trial court abused its discretion in finding that Juror Sims' nondisclosure during *voir dire* of a five-year-old lawsuit in which he sued for personal injuries allegedly sustained in an automobile accident was unintentional. Intentional nondisclosure occurs:

1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that the juror's purported forgetfulness is unreasonable. *Williams by and through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 36 (Mo. banc 1987). Parties to a lawsuit have a constitutional right to a fair and impartial jury. *Bradford v. BJC Corporate Health Services*, 200 S.W.3d 173, 182 (Mo. App. E.D. 2006). *Voir dire* is designed to ensure the selection of such a fair and impartial jury by allowing counsel to ask questions which permit counsel to learn facts which may form the bases of challenges for cause and which may be useful in executing peremptory challenges. *Id*. *Voir dire* affords counsel the opportunity to discover potential biases of the members of the panel relevant to the type of suit being tried. *Id*. The venirepersons have a duty to answer the questions fully, fairly and truthfully. *Id*. Finding a juror had a "reckless disregard" for the responsibility to disclose information during *voir dire* is tantamount to intentional disclosure. *Williams*, 736 S.W.2d at 38.

2. *Questions Were Clear, Triggering Duty to Disclose*

Juror nondisclosure will only be found after a clear question unequivocally triggers a duty to answer. *Id*. Here, the question posed by counsel for Patient and Patient's Wife was clear, in that he specifically asked, "Could you raise your hand if you've ever filed any kind of lawsuit before? Not just a medical case but auto accident, anything like that, filed a lawsuit, could you raise your hand?" (Supp. Tr. 48-49.) Not only was Patient and Patient's Wife's counsel's question clear, counsel for SLU and Dr.

Bicalho gave the jurors another opportunity to disclose lawsuits when he asked, "So the question I want to ask, I want to make sure I have a complete answer from everybody. Have we heard from everybody as to whether you have ever filed a lawsuit against anyone for any reason other than for say child custody or divorce, cut those out, separate those out. But have all of you told us any time that you have ever filed a lawsuit against anyone else?" (Supp. Tr. 136.) The standard for clarity is whether a layperson would reasonably conclude that the undisclosed information was solicited by the question. *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 726 (Mo. App. E.D. 2001). Here, as the trial court properly found, that standard was met.

3. *Nondisclosure Was Intentional*

a. Mr. Sims Was Reasonably Able to Comprehend Information Solicited.

Because the questions were clear, the next inquiry is whether the nondisclosure was intentional or unintentional. *Bradford*, 200 S.W.3d at 182. Here, the trial court erred in determining that Mr. Sim's nondisclosure was unintentional. It was unreasonable for Mr. Sims to have "forgotten" about the lawsuit or not have heard the questions—and other jurors' answers—regarding prior auto accident litigation. Intentional nondisclosure occurs if the juror is reasonably able to comprehend the information solicited by the question asked by counsel, and where the potential juror actually remembers the experience or that it was of such significance that it is unreasonable for the potential juror to have forgotten it. *Id*.; *Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228, 240 (Mo. App.

E.D. 2003). If a court finds intentional nondisclosure, it effectively per se requires a new trial. *Bradford*, 200 S.W.3d at 182.

In this case, the evidence adduced at the evidentiary hearing established that 1) the juror was reasonably able to comprehend the information solicited by the question asked by counsel, and 2) it is unreasonable for the potential juror to have forgotten it. Mr. Sims' answers on *voir dire* established that he was reasonably able to comprehend the information solicited by this question. When the panel was asked early in *voir dire* whether anyone had ever broken a leg, Mr. Sims was the first to respond that in 1994, he broke his leg, specifically his right femur. (Supp. Tr. 22.) He explained that he fell off a porch and that it was freak accident. (Supp. Tr. 22.) He also said that he had surgery performed by two physicians to repair his broken leg, and specifically a doctor at SLU performed the operation. (Supp. Tr. 22.) In response to further questioning by Patient and Patient's Wife's counsel, Mr. Sims responded that he was not currently having any problems with his leg and in fact it had completely recovered. (Supp. Tr. 23.) Mr. Sims also recalled that he had had an x-ray taken of his femur, and provided additional information that he had also had a chest x-ray because he had asthma. (Supp. Tr. 25.) Thus, Mr. Sims' responses on *voir dire* established that he was reasonably able to comprehend other questions soliciting other information. In fact, Mr. Sims testified at the post-trial evidentiary hearing that he understood the questions regarding prior lawsuits. (Tr. 659-660.) Therefore, Mr. Sims was able to comprehend the information solicited by the clear questions regarding the filing of prior lawsuits, including auto accidents.

b. <u>The Lawsuit Was of Such Significance that it Was Unreasonable for Mr. Sims to Have Forgotten It</u>.

With regard to the second prong, the trial court erred in finding that the nondisclosure was unintentional, because Mr. Sims' lawsuit was of such significance that it was unreasonable for him to have forgotten filing suit in 2001 for injuries allegedly sustained in an automobile accident on November 17, 2000. (Tr. 656-661; L.F. 153.) The trial court took judicial notice of its own file in the case of *Demetrius Sims v. John Abernathy*, Cause No. 010-5864. (Tr. 661.) As established by Mr. Sims' testimony at the post-trial evidentiary hearing, the nature of Mr. Sims' suit was for injuries allegedly received in an automobile accident, and he testified that he still had problems with his back at the present time. (Tr. 656-57.) In fact, Mr. Sims recounted at the evidentiary hearing that he sought medical care for his injuries, missed work due to the injuries, and his car was totaled as a result of the accident. (Tr. 656-57.) Mr. Sims engaged in discovery in this matter by answering interrogatories, which he signed under oath. (L.F. 127-141; Tr. 656.) He also executed wage and medical authorizations. (L.F. 142-43.) In addition, Mr. Sims' deposition was taken on February 14, 2002. (Tr. 656, L.F. 144.) The case was ultimately settled and dismissed. (L.F. 657.) Thus, the lawsuit was significant, in that Mr. Sims retained an attorney; Mr. Sims filed suit in his own name for alleged injuries; he engaged in discovery, including signing answers to interrogatories and appearing for a deposition; and he received money in settlement of the case.

Washburn v. Medical Care Group, 803 S.W.2d 77 (Mo. App. E.D. 1990), overruled on other grounds by *Brines By and Through Harlan v. Cibis*, 882 S.W.2d 138

(Mo. 1994), is factually similar to the case at bar. In *Washburn*, a panel member who was ultimately seated on the jury, Juror Nekula, did not disclose that he had been sued as a result of an automobile accident. During the new trial hearing, Mr. Nekula remembered the details of the accident and remembered that it had been settled. He also remembered that he was thinking of filing a counterclaim for $2,500.00 for damage to his car, but he did not remember whether a counterclaim was ever filed. Mr. Nekula's explanation for not disclosing this incident during *voir dire* was that he did not think of himself as being sued since his claim and lawsuit were handled by his insurance company. He also stated that he forgot about the case during *voir dire*. The Court of Appeals held that Mr. Nekula's forgetfulness was unreasonable or unlikely. His accident occurred five years earlier. In addition, Mr. Nekula was able to remember the details of the incident during the new trial hearing, stating that he had been in contact with the attorney who was provided by his insurance carrier and was served with the petition. He further acknowledged that he answered interrogatories and discussed filing a counterclaim with his attorney or insurance representative. The Court of Appeals found that Mr. Nekula's having forgotten the incident was not a reasonable explanation for his failure to disclose. However, the Court proceeded to find that a new trial was not warranted, because the specific question posed during *voir dire* did not require Mr. Nekula to respond and because no prejudice was shown for the nondisclosure of the lawsuit. Significantly, under the current state of the law, the analysis of whether actual prejudice has been shown is no longer applicable, because *Brines* overruled *Washburn* and similar cases insofar as they held that prejudice must be established from the intentional nondisclosure

of prior litigation or another material issue. Thus, only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is unintentional, should a Court inquire into prejudice. *Brines*, 882 S.W.2d at 140. Otherwise, such as in this case, bias and prejudice are presumed to have influenced the verdict. *Id.*

As the Court in *Washburn* noted, it is unreasonable to have forgotten a lawsuit of such recent vintage, particularly where the juror answered discovery and, in the case at bar, was deposed. In addition, as in *Washburn*, Mr. Sims remembered the details of the lawsuit, including the fact that he received settlement funds. Even more significantly, Mr. Sims recalled a broken leg that he had sustained approximately 13 years before the trial of the instant case. However, at the evidentiary hearing, when asked by SLU and Dr. Bicalho's counsel whether he remembered the lawsuit at the time of trial, he testified as follows: "No, not—Yeah, I knew I was in it, but I think I must have missed it, just didn't think about it." (Tr. 658.) During examination by Patient and Patient's Wife's counsel, Mr. Sims responded "no" when asked whether he remembered the question being asked and further testified as follows: "I don't think I heard the question. I think I would have answered it if I had heard it." (Tr. 662-63.)

Nonetheless, it is unreasonable that he failed to disclose an action for personal injuries allegedly sustained in an automobile accident, which had occurred only seven years prior to the trial in this matter. Even if the lawsuit had originally slipped Mr. Sims' mind, certainly when Venirepersons Pendleton and King disclosed that they had been plaintiffs in lawsuits for injuries allegedly received in automobile accidents, for which

they both received settlement monies, this should have jogged Mr. Sims' memory as to his prior lawsuit. As in *Washburn*, Mr. Sims answered interrogatories, was deposed, and remembered the details of the lawsuit at the evidentiary hearing. In addition, it is unreasonable for Juror Sims to not have heard the question or at least realize it had been asked, thereby triggering a duty to answer, when jurors disclosed their involvement in litigation in Mr. Sims' presence, and two of the jurors had been involved in litigation stemming from automobile accidents. Finally, it is unreasonable that Mr. Sims to have also failed to disclose the lawsuit when asked again during SLU and Dr. Bicalho's counsel's questioning. The facts of *Washburn*, which the Court determined were sufficient to show that the juror's forgetfulness was unreasonable, are almost identical to the facts here.

This Court should find that the trial court abused its discretion in determining that the disclosure was unintentional, because Mr. Sims' forgetfulness or missing the question was unreasonable and therefore intentional.

4. *Bias and Prejudice*

As stated previously, bias and prejudice are presumed if there has been intentional concealment. *Williams by and through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 38 (Mo. banc 1987). The concealment of material information on *voir dire* by a prospective juror deprives both litigants of the opportunity to exercise preemptive challenge or challenges for cause in an intelligent or meaningful manner. *Id*. at 36. Questions and answers related to a prospective juror's prior litigation are always material. *Bell v. Sabates*, 90 S.W.3d 116, 120 (Mo. App. W.D. 2002). The fact that a prospective juror has been sued

as a defendant or has prosecuted cases as a plaintiff may cause the juror to be predisposed to defendants or to plaintiffs, as the case may be. *Brines By and Through Harlan v. Cibis*, 882 S.W.2d 138, 140 (Mo. banc 1994). Thus, Mr. Sims' intentional nondisclosure of his prior lawsuit is presumptively prejudicial.

5. *Conclusion*

Here, the trial court properly found that the questions asked on *voir dire* clearly asked for jurors' experiences in filing lawsuits, and specifically mentioned automobile accidents. However, the trial court abused its discretion and committed reversible error in finding that Mr. Sims' failure to disclose his involvement in the 2001 lawsuit in which he filed suit for injuries allegedly sustained in an automobile accident was unintentional. It was *per se* unreasonable for Mr. Sims to have forgotten about the lawsuit, which was of recent vintage and was of such significance that he remembered the details of the litigation at the evidentiary hearing. In addition, even if Mr. Sims did not "hear" the questions on *voir dire*, there is nothing in the record to suggest that he was not present when other panel members provided answers regarding their prior litigation experience, including automobile accident litigation that resulted in settlements. Thus, it was unreasonable that Mr. Sims did not "hear" what amounts to several pages of *voir dire* transcript regarding prior litigation experience, which should have triggered his disclosure of prior litigation. Because the nondisclosure involved material information, bias and prejudice are presumed. This Court should reverse the trial court's judgment and remand for a new trial.

CONCLUSION

The trial court erred in admitting Exhibit 35, the videotaped newscast of Patient, over SLU and Dr. Bicalho's objection. In the alternative, the trial court erred in denying SLU and Dr. Bicalho's Motion for New Trial because of the erroneous admission of the videotaped newscast of Patient. In addition, the trial court erred in denying SLU and Dr. Bicalho's Motion for Mistrial because of the prejudice that resulted from Patient and Patient's Wife's bad-faith injection of insurance during *voir dire*. Finally, the trial court erred in denying SLU and Dr. Bicalho's Motion for New Trial based on juror nondisclosure of prior litigation. For any or all of these errors, this Court should reverse the judgment in favor of Patient and Patient's Wife and remand for a new trial on all issues.

Respectfully submitted,

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IN THE MISSOURI SUPREME COURT

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

CERTIFICATE OF COMPLIANCE

COME NOW counsel for Defendants/Appellants Saint Louis University and Paulo Bicalho, M.D., and for their certificate of compliance, state as follows:

1. The undersigned does hereby certify that Defendants/Appellants' brief filed herein complies with the page limits of Rule 84.06 and contains 14,004 words of proportional type.

2. Microsoft Word was used to prepare Defendants/Appellants' brief.

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

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The undersigned does hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed, postage prepaid, to the following this 13th day of March, 2009, to:

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