

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

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ARGUMENT

I. EXHIBIT 35 IMPROPERLY ADMITTED.

A. Videotape was Not Practical, Instructive or Calculated to Assist the Jury in Understanding the Case, and Case Law from Court of Appeals Does Not Conflict with this Rule of Law

1. Videotape was Not Practical, Instructive or Calculated to Assist the Jury in Understanding the Case

The videotape here was not admissible in that, as the Court of Appeals found, it was not practical, instructive and/or calculated to assist the trier of fact in understanding the case. *Geary v. Saint Louis University*, 2008 WL 4793653 at *2 (Mo. App. E.D. 2008). Plaintiff argues that the videotape was admissible because it showed Patient's ability to walk and his mental capacity, including the ability to follow instructions, before his "injury." Plaintiff also asserts that it was admissible to show Patient's loss of enjoyment of life.

With regard to showing Patient's ability to walk before his injury, Plaintiff fails to recognize that the "injury" at issue here is Dr. Bicalho's alleged failure to diagnose the hip fracture on or after February 19, 2002, and fails to take into consideration that after the videotape was made, Patient fell and received medical care and rehabilitation services for almost two months before he was first seen by Dr. Bicalho. There is no evidence that Patient's ability to walk in late February 2002—after the fall and treatment by other providers—was the same as it was on the videotape, which was made in 2001 after his stroke but before the fall.

Moreover, Plaintiff ignores the testimony of Patient's expert, Dr. Tsormas, that Patient had neurologic damage caused by other conditions, not the medical treatment provided by Defendants, that affected Patient's gait. (Tr. 287-90.) Dr. Tsormas testified that he did not disagree with the conclusion of Patient's treating physician, Dr. Maloney, that Patient's subsequent inability to walk in 2004 was unrelated to the hip replacement. (Tr. 287-90.) Thus, Dr. Tsormas agrees with Patient's treating orthopedic surgeon that, prior to the infection and surgical resection of his hip prosthesis, Patient was unable to walk due to neurologic issues unrelated to Dr. Bicalho's care. This was undisputed. Thus, the videotape was misleading, because the evidence established that Patient was unable to walk for reasons unrelated to the alleged negligence. Finally, Plaintiff admits that Patient's ability to ambulate had waxed and waned over the years since his stroke and hip fracture. (See Plaintiff's Substitute Brief, p. 19.) As noted by the Court of Appeals, there was no evidence that Patient would have returned to the condition seen in the videotape, if his hip fracture had been diagnosed in February 2002. Thus, it was misleading.

In addition, contrary to Plaintiff's assertions, the newscast does not illustrate Patient's ability to follow directions or his cognitive abilities. (Exhibit 35.) Patient was not asked to follow directions during the newscast and the majority of his statements are not made in response to questions. (Exhibit 35.) In fact, Patient apparently responds to only one question in the portion of the newscast played to the jury, and this may have been the result of editing. Moreover, SLU/Dr. Bicalho fail to comprehend how the

statements made by the newscaster, Patient's physician, and Patient's Wife demonstrate Patient's ability to follow instructions or his cognitive abilities.

Plaintiff's reliance on *Tanuvasa v. City and County of Honolulu*, 626 P.2d 1175 (Haw. App. 1981), is misplaced. In *Tanuvasa*, there were apparently no intervening conditions that affected Tanuvasa's physical abilities after the videotape was made but before the alleged injury occurred. In addition, there is no indication whether the films in *Tanuvasa* were played with sound and, if so, whether it contained hearsay.

**2. Case Law from Court of Appeals does Not Conflict with
Gomez v. Construction Design, Inc., 126 S.W.3d 366 (Mo.
2004)**

In her Substitute Brief, Plaintiff argues that "the Missouri Supreme Court has only acknowledged the general rule governing the admission of videotapes." (See Plaintiff's Substitute Brief, p. 14.) The rule of law to which Plaintiff refers is that set forth in *Gomez v. Construction Design, Inc.*, 126 S.W.3d 366 (Mo. 2004), which is this Court's most recent pronouncement of the general law on videotape admissibility: "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.'" *Id.* at 374. In fact, the Court of Appeals in the instant case cited *Gomez* for this holding, after which it proceeded to find that "[t]he newscast videotape was neither practical nor instructive for the jury." See *Geary*, at *2.

However, Plaintiff goes on to state that the Eastern and Southern Districts of the Court of Appeals have significantly narrowed that rule by finding that videotapes can be

admitted only for (1) a recreation of events at issue in the litigation or (2) to aid an expert in demonstrating a “difficult concept,” citing *Grose v. Nissan North America, Inc.*, 50 S.W.3d 825 (Mo. App. E.D. 2001), and *Daniel v. Indiana Mills & Manufacturing, Inc.*, 103 S.W.3d 302 (Mo. App. S.D. 2003).¹ In addition, Plaintiff citing *Lawton v. Jewish Hospital of St. Louis*, 679 S.W.2d 370 (Mo. App. E.D. 1984), states that the Court of Appeals has furthered the confusion by upholding the admission of a day-in-the-life videotape since *Grose* without citing the two-purpose rule. However, *Lawton* was handed down 17 years prior to *Grose*. Nonetheless, *Grose* would not change the result in *Lawton*, as discussed more fully below.

The Court of Appeals in the instant case did in fact cite *Grose* for the two-category analysis. Although the Court proceeded to find that the videotape was inadmissible under *Grose*, noting that “[t]he tape did not recreate events at issue or illustrate any principles relied on by the experts,” the Court of Appeals did so only after first finding that the videotape was “neither practical nor instructive for the jury” under *Gomez*. *Geary* at *2. In this way, the Court of Appeals found that under both *Gomez* and *Grose*, the videotape was inadmissible.

Nonetheless, contrary to Plaintiff’s contentions, *Grose* does not set forth a different standard for admissibility of videotapes than that enunciated in *Gomez*. The Court of Appeals in *Grose*, and other cases setting forth the two-category analysis,

¹ This Court denied the application for transfer in *Grose* on August 21, 2001, and in *Daniel* on May 27, 2003.

merely recognizes the general categories under which videotapes have been found “practical, instructive, and calculated to assist the trier of fact in understanding the case.” In fact, *Grose* clearly cites the general rule of law that “[t]he admissibility of a video depends on whether it is practical, instructive, and calculated to assist the trier of fact in understanding the case.” Although Plaintiff states that the case on which *Grose* relies for the two-category analysis, *Beers v. Western Auto Supply Company*, 646 S.W.2d 812 (Mo. App. W.D. 1982), does not stand for this proposition, a close analysis of *Beers* reveals that it does. In *Beers*, the trial court excluded a videotape that was intended to serve as a visual aid to Plaintiff’s expert’s testimony. On appeal, the Court of Appeals stated as follows:

In cases where the film in question is being introduced into evidence for the purpose of re-creating the accident or incident at issue, the similarity of the film to the incident is obviously crucial. This is, however, a totally different situation from one in which a film is offered for a purpose other than re-creating the incident. ... While the latter factual situation has not yet occurred in Missouri’s case law, there is a line of recent out-of-state cases dealing with the question of the admissibility of films for other purposes.

[Emphasis added.] *Id.* at 815. The cases then discussed in *Beers* all involved the use of videotapes as visual aids to illustrate an expert’s opinion, which has been adopted as the second category of the analysis. Thus, although *Beers* does not explicitly set forth the two-category analysis, *Beers* recognizes the two categories for which videotapes have

been admitted. Nonetheless, the two-category analysis does not preclude an analysis of whether the evidence is practical, instructive, and calculated to aid the trier of fact in understanding the case. In fact, a review of some of the eminent cases in this Court, as well as the Court of Appeals, shows that these holdings are easily reconciled and routinely applied together.

In *Gomez*, which, incidentally, was decided after the Missouri Court of Appeals handed down *Grose*, this Court held that the admission of a videotape depicting an accident scene taken a day later was properly admitted. The real issue in *Gomez* was not whether the videotape was relevant, but whether the prejudicial effect of the videotape outweighed its probative value, because it showed subsequent remedial repairs. The Court found that the probative value outweighed the prejudicial effect, if any. Nonetheless, although the Court did not cite the two-category analysis, the videotape arguably fell within the first category of the analysis, which is to recreate events at issue in the lawsuit (i.e., the condition of the accident scene, or “floor grating,” where the plaintiff fell).

Similarly, in *Lawton*, a day-in-the-life video was properly admitted into evidence where it was played without sound and inflammatory/irrelevant portions were excised. Even though *Lawton* was decided well before the Court of Appeals handed down *Grose* and thus did not set forth the two-category analysis, the videotape arguably recreated events at issue in the lawsuit, which were “the nature and extent of ... [the plaintiff’s] injuries” after the alleged act of neglect. *Lawton*, 679 S.W.2d at 372. Nonetheless, the videotape at issue here is not a “day-in-the-life” videotape as in *Lawton*, but is a newscast

concerning Patient's political aspirations, work to help others and his recovery from a stroke in 2000, which was broadcast over a year before Patient fell, sustained a broken arm and hip, and underwent months of treatment, before the alleged act of neglect here. The newscast, in addition to interviews and statements by health care professionals, shows Patient walking with the assistance of a walker and health care professional. There is no evidence that Patient would have returned to the condition depicted in the newscast, if the alleged act of neglect did not occur, so it is very dissimilar to the day-in-the-life videotape in *Lawton*.

Finally, even the Western District cases of *King v. Copp Trucking, Inc.*, 853 S.W.2d 304 (Mo. App. W.D. 1993), and *Trageser v. St. Joseph Health Center*, 887 S.W.2d 635 (Mo. App. W.D. 1994), which Plaintiff relies on in support of her argument that the Western District has not adopted the two-category analysis, discusses both categories of the analysis in determining admissibility of a videotape. In *Trageser*, a plaintiff who was rendered paraplegic after back surgery sought to play a videotape during his expert's testimony. The trial court denied the admission of the videotape because it lacked proper foundation and because it showed spinal pressure points in red, which were prejudicial. On appeal, the court considered the first category of the analysis, finding that the plaintiff admitted that the videotape was not a recreation of the defendant/surgeon's surgical procedure. However, even though it was described as a demonstrative aid, sections of the tape were captioned as "[Defendant/surgeon's] First Procedure," "[Defendant/surgeon's] Second Procedure," and "Recommended Surgical Procedure." Thus, the videotape suggested that it was in fact a recreation, and it was

properly excluded. With regard to the second category of the analysis, the plaintiff had explained to the trial court he could delete references to the defendant/surgeon's procedures, but he never attempted to introduce the exhibit in another form. Thus, the videotape was properly excluded.

In *King*, which involved a lawsuit for injuries sustained in a rollover accident, the trial court excluded a videotape of tests performed by defendant's expert. On appeal, the defendant argued that "the videotape was not represented as a reenactment of the accident, but was instead offered to explain the tests [the expert] performed and to aid the jury in understanding the jury in understanding [the expert's] opinions." The trial court found that although the videotape was purportedly not a reenactment, the jury might be confused and misled because several important pieces of information regarding the accident were unascertainable and could not be provided by either of the parties, and the jury might adopt the circumstances of the videotape to fill in those unascertainable facts. Although the defendant argued that the videotape would aid the jury in understanding the expert's opinion, the Court still found the exclusion was proper, noting as follows:

The probative value of the video tape as an aid to [the expert] in explaining his tests is slight and such value is outweighed by the likelihood that the video tape would confuse and mislead the jury. [Citation omitted.] The video tape may be rejected on a finding that it is not practical, instructive or calculated to assist the trier of fact in understanding the case. [Citation omitted.]

Id. at 309. In this regard, the Court fully discusses both categories of the analysis, ultimately finding that the videotape was inadmissible, because it was not practical, instructive or calculated to assist the trier of fact in understanding the case and that its probative value was outweighed by the likelihood that it would mislead and confuse the jury.

King is a perfect example of how the two-category analysis and the rule of law that the admissibility of a videotape depends on whether it is practical, instructive, and calculated to assist the trier of fact in understanding the case are easily reconcilable and are applied together in determining the issue of a videotape's admissibility, which is determined on a case-by-case basis. *See King*, 853 S.W.2d at 309.

B. Audio Portion of the Videotape was Inadmissible Hearsay

Although SLU/Dr. Bicalho were admittedly unable to locate any Missouri case specifically discussing the admissibility of a newscast or audio portion of a videotape, at least one case has become final since the Court of Appeals' opinion in the instant case on November 4, 2008 (and since SLU/Dr. Bicalho's Substitute Brief was filed on or about March 13, 2009) that provides guidance on this issue. In *Gamble v. Browning*, 277 S.W.3d 723 (Mo. App. W.D. 2009), the defendants objected to two different videotapes that Plaintiff offered into evidence, claiming that they were hearsay. Although the trial court admitted certain portions of the first videotape, it excluded others, and excluded the second videotape in its entirety. On appeal, the plaintiffs argued that portions of the first videotape that were excluded, as well as the second videotape in its entirety, were admissible under the exception for admissions against interest.

In conducting its hearsay analysis, the Court of Appeals found that at least one statement in a portion of the first videotape sought to be admitted, and excluded by the trial court, was admissible against one defendant as an admission against interest and thus it should have been admitted. In determining whether the total exclusion of the second videotape was error, the Court of Appeals found that the declarations made by the declarant that were favorable to himself were assented to by the other party and therefore were admissible as an exception to the hearsay rule. Thus, because many of the self-serving statements made by the plaintiff on the videotape were given assent by the defendant, they were improperly excluded as hearsay. Thus, *Gamble* establishes that it is necessary to perform a hearsay analysis in determining the admissibility of a particular videotape, which should be excluded if it contains hearsay not subject to any exception.

Moreover, it is important to note that although this Court did not perform a specific hearsay analysis in *Gomez*, presumably because it was not necessary to a determination of the issues on appeal, this Court specifically noted in *Gomez* that “***the trial court excluded the narration of the video.***” [Emphasis added.] *Gomez*, 126 S.W.3d at 374. In addition, in *Beers*, the Western District also specifically made note of the fact that “***there is no sound accompanying the film.***” [Emphasis added.] *Beers*, 646 S.W.2d at 816.

In addition, Plaintiff erroneously states that SLU/Dr. Bicalho have been unable to cite any case from any jurisdiction holding that the admission of the audio portion of the videotape has been an abuse of discretion and thus overturned on appeal. In fact, SLU/Dr. Bicalho’s Substitute Brief contains a three-page discussion of *Wilson v. Piper*

Aircraft Corp., 577 P.2d 1322 (Or. 1978), in which the Oregon Supreme Court found that the admission of a videotape played with narrative audio was reversible error due because it contained hearsay; hence, **“the film, as narrated, was inadmissible.”** [Emphasis added.] *Id.* at 1330-31. Moreover, a recent search by SLU/Dr. Bicalho reveals several cases where the admission of the audio portion of a videotape constituted reversible error because it constituted inadmissible hearsay. *See, e.g., Fields v. Commonwealth*, 12 S.W.3d 275 (Ky. 2000) (holding that while there was no error in admitting video portion of reenactment, the admission of the audio portion significantly implicated the hearsay rule and constituted reversible error); *Scott v. State*, 559 So.2d 269 (Fla. App. 4th Dist. 1990) (holding that admission of audio portion of video of search warrant execution, which was made by television film crew, was reversible error because it contained inadmissible hearsay).

Contrary to Plaintiff’s assertion, SLU/Dr. Bicalho were not required to request a limiting instruction here. SLU/Dr. Bicalho did not object to the audio portion of the videotape on the sole ground that it inadmissible “character evidence,” they objected to the admission of the videotape on the ground that the entire audio narrative constituted inadmissible hearsay. SLU/Dr. Bicalho were not required to request a limiting instruction because the evidence was not admissible for any purpose. *See Dyer v. Globe-Democrat Publishing Co.*, 378 S.W.2d 570, 581 (Mo. 1964). In fact, SLU/Dr. Bicalho did try to “limit” the videotape by stating that they would not object to portions of it **if** it were played without sound. This did not occur, and thus their objections were not waived.

C. Prejudice Resulted From the Admission of the Videotape

Finally, SLU/Dr. Bicalho suffered prejudice due to the admission of this evidence of Patient's "good" character,² despite the fact that Plaintiff testified as to Patient's being active in politics and the community and working hard at rehabilitation after his stroke. (Tr. 306-07.) The statements on the videotape were much more detailed than Plaintiff's testimony at trial and referenced Patient's wanting to use the political process to help others, his belief that health care was a basic human right, and his desire to work within the political process to assure that everyone had access to health care. (Ex. 35.) In addition, Plaintiff claims on page 36 of her Substitute Brief that "during the defense cross-examination of [Patient] during his videotaped trial deposition, [Patient] testified yet again about his run for office an [sic] his political aspirations." However, this portion of the videotaped deposition was never played at trial and therefore, the newscast was not

² Plaintiff claims that SLU/Dr. Bicalho violated Rule 83.08 in that they purportedly added in their Substitute Brief a new basis for which the hearsay of the videotape is inadmissible, that being character evidence. However, SLU/Dr. Bicalho's Point Relied On for Point I of their Substitute Brief is identical to that set forth in their Brief filed with the Court of Appeals and specifically states that the videotape contains out-of-court statements of Patient's "good" character. The inadmissibility of said character evidence is also discussed at length on pages 30 to 33 of SLU/Dr. Bicalho's Brief filed with the Court of Appeals. Thus, Plaintiff is simply mistaken in her charge that SLU/Dr. Bicalho violated Rule 83.08.

merely cumulative. (See Stipulation of Parties filed with Exhibit A.) Furthermore, SLU/Dr. Bicalho suffered prejudice from the fact that statements regarding Plaintiff's progress in rehabilitation and political aspirations were made by a physician and a broadcaster. The jury may have given more credence to statements made by such witnesses, who may be viewed as an expert and an objective reporter, as opposed to Patient's wife, who clearly is an interested party and potentially a "biased" witness. See *Shears v. Missouri Pacific Railway Co.*, 355 S.W.2d 314 (Mo. 1962), superseded by statute on other grounds as stated in *Hickman v. Branson Ear, Nose & Throat*, 256 S.W.3d 120 (Mo. 2008) (recognizing that in some situations cumulative evidence can be prejudicial, such as when improper expert testimony is admitted that is cumulative to lay testimony, because they are different classes of evidence).

As discussed above, the newscast was misleading, in that it does not accurately depict Patient's condition at the time he was treated by SLU/Dr. Bicalho. Moreover, there was absolutely no evidence presented at trial that he would have returned to this condition had the fracture been diagnosed in February 2002. Therefore, the newscast was misleading in terms of damages and highly prejudicial if it was introduced to establish damages.

D. SLU/Dr. Bicalho Have Preserved the Objection to Exhibit 35

For the first time, Plaintiff argues in her substitute brief that SLU/Dr. Bicalho's objection to Exhibit 35 is insufficient.³ Regardless of the timeliness of Plaintiff's argument regarding the sufficiency of the objection, SLU/Dr. Bicalho's objection to Exhibit 35 was sufficient to preserve the issue for appeal. Plaintiff's argument quotes portions of the objection but fails to set forth the full objection. At trial, the following objection to Exhibit 35 was made:

MR. WILLMAN: ...[A]t this time, Your Honor, I'd like to put on the record defendants' objection to exhibit numbers 35 which is a videotape of the newscast from Channel 30 in 2001 with Mr. Sgroi and Ms. Geary, a Dr. Erker and several other reporters...

The basis of the objection is that the television interview of Mr. Sgroi is not practical and instructive, not calculated to assist the jury and understand 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

³ Rule 83.08 provides that a substitute brief shall not alter the basis of any claim that was raised in the Court of Appeals' brief.

where he broke his shoulder which further complicated his recovery.

An 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. 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.

(Tr. 11-102.)

The additional arguments contained in the motion in limine that were incorporated and reasserted before the videotape was played at trial included that the newscast was remote in time and did not recreate events at issue or illustrate physical or scientific properties that were the foundation of an expert's opinion. (2nd Supp. L.F. p. 2.) In addition, the newscast was objected to because it included statements by Patient, as well as Patient's physician and nurse, that were irrelevant, prejudicial, and not subject to cross-examination. (2nd Supp. L.F. pp. 2-3.) The objections also included that the videotape was irrelevant and misleading, in that the evidence establishes that Patient's inability to walk is unrelated to the alleged negligence in this case. (2nd Supp. L.F. p. 3.)

In this case, Exhibit 35 was not admissible for any purpose, and SLU/Dr. Bicalho's counsel objected to the admission of the exhibit on myriad grounds, including

that it was not practical, instructive, and calculated to assist the jury in understanding the case; was irrelevant; was not subject to cross-examination; and served only to inflame and prejudice the minds of the jury. (Tr. 100-102; 2nd Supp. L.F. 1-4.) In addition, SLU/Dr. Bicalho argued that the videotape was “remote in time” to the December 27, 2001, fall at issue in the case occurring before Patient broke his shoulder, which complicated his recovery. (2nd Supp. L.F. 3.) It was simply not admissible for any purpose, and thus these objections were sufficient to preserve all grounds presented to the Court of Appeals and this Court as to why it was error to admit it.

Although the above objections were detailed and specific, even a general objection would be sufficient, because the videotape was incompetent for any purpose. When it is apparent that evidence is self-evidently wholly incompetent for any purpose, or it is obviously unjustly inflammatory and prejudicial or plainly on its very face, so good for nothing as to serve no purpose whatever in the case, the general objections of their relevancy and immateriality are sufficient to call for action on the part of the trial court without further specification of reasons. *Hungate v. Hodson*, 185 S.W.2d 646, 649 (Mo. 1945). Thus, if evidence is wholly inadmissible for any purpose, general objections are sufficient to permit this Court’s examination. *Id.* In addition, even though one is bound by his mere general objection of irrelevancy or immateriality, in connection with such an assignment of error, a party may demonstrate the prejudicial effect of the evidence received when it is obviously prejudicial in character. *See id.* (holding that counsel’s objection to a line of questioning as “immaterial” sufficiently preserved the issue before the appellate court, because such evidence was wholly inadmissible for any purpose);

Kelly v. American Century Ins. Co., 178 S.W. 282 (Mo. App. E.D. 1915) (holding that a general objection to character evidence was sufficient to preserve the matter for review on appeal, because the testimony offered was not competent for any purpose).

E. No Waiver of Objection to Videotape

In her Substitute Brief, Plaintiff/Respondent also claims for the first time that SLU/Dr. Bicalho waived their objection to the playing of the videotape when their counsel stated that he would not have an objection to a portion of the videotape being shown without sound. (Tr. 101.) However, the entire colloquy that took place indicates that SLU/Dr. Bicalho did not in fact waive their objection to the entire videotape being played. (Tr. 100-102.)

SLU/Dr. Bicalho's objection shows that their counsel objected to the admission of the videotape of the newscast in its entirety, but then indicated he would not have an objection *if* only a portion of the videotape were shown and it was shown without sound to indicate Patient's physical abilities at the time of the newscast. However, Plaintiff did not agree to such a limitation or condition. The trial court then indicated that it would allow the playing of the videotape of the newscast, including the portion with the newscaster, Patient, Plaintiff, and several health care professionals and allow the videotape to be played with sound. (Tr. 101-102.) After the court's ruling allowing the playing of the videotape with audio, SLU/Dr. Bicalho's counsel reasserted that he would rely on additional arguments made in his motion in limine. (Tr. 102.) In this regard, SLU/Dr. Bicalho's counsel fully renewed his objection to the playing of the videotape.

SLU/Dr. Bicalho did not waive their objection to the videotape. Waiver is an intentional relinquishment of a known right, on question of which intention of party charged with waiver is controlling and, if not shown by express declarations but implied by conduct, there must be clear, unequivocal, and decisive act of party showing such purpose, and so consistent with intention to waive that no other reasonable explanation is possible. *Bartleman v. Humphrey*, 441 S.W.2d 335, 343 (Mo. 1969). Here, there is not a clear, unequivocal, and decisive act that SLU/Dr. Bicalho intended to relinquish their objection to the playing of Exhibit 35.

Furthermore, contrary to Plaintiff's position, SLU/Dr. Bicalho had no duty to request a limiting instruction. This Court has held that in a jury case where evidence is admissible for one purpose or one issue, but would be improper for other purposes or other issues, it should be received, and the objector then has a right to an instruction, if it were requested, limiting the extent to which and purpose for which the jury may consider such evidence; in the absence of a proper request, the objector cannot complain of a failure of the court to give a limiting instruction. *Dyer v. Globe-Democrat Publishing Co.*, 378 S.W.2d. 570, 581 (Mo. 1964). In this case, SLU/Dr. Bicalho contend that the evidence was not admissible for any purpose. Thus, a limiting instruction would not have remedied the error here in admitting such evidence. Nonetheless, there is no duty to request a limiting instruction; the objector merely has a right to an instruction, if so requested. *Id.* The judgment should be reversed and remanded for a new trial.

II. IMPROPER INJECTION OF INSURANCE.

A. Plaintiff Failed to Follow Proper Procedure

Plaintiff contends that she followed the proper procedure for asking the insurance question, including obtaining approval to ask the question, asking only one question, and not asking the question first or last in a series. (*See* Plaintiff's Substitute Brief, p. 27.) However, Plaintiff does not address that she failed to get approval for the specific question, which is required to show good faith. *See Ivy v. Hawk*, 878 S.W.2d 442, 445 (Mo. banc 1994). Regardless, Plaintiff claims that SLU/Dr. Bicalho's argument fails because (1) SLU/Dr. Bicalho "waived" this point, and (2) the insurance question was "proper." Plaintiff is incorrect on both arguments.

B. No Waiver Occurred

In claiming that SLU/Dr. Bicalho "waived" this point, Plaintiff attempts to shift the burden to SLU/Dr. Bicalho with regard to Plaintiff's particular proposed insurance question by stating that SLU/Dr. Bicalho should have required Plaintiff's counsel to state his proposed question at the time of the parties' discussion with the judge to allow the judge to consider it. In fact, Plaintiff goes so far as to argue that SLU/Dr. Bicalho waived any objection. (*See* Plaintiff's Substitute Brief, pp. 39-40.) However, SLU/Dr. Bicalho are at a loss as to how Plaintiff's failure to follow the correct procedure has suddenly shifted the burden to SLU/Dr. Bicalho. Moreover, SLU/Dr. Bicalho challenged the specific question at the earliest opportunity when it was first posed during *voir dire*. (Supp. Tr. 38-39.)

C. Question Improper and Prejudicial

Plaintiff's reliance on *Richter v. Kirkwood*, 111 S.W.3d 504 (Mo. App. S.D. 2003), is misplaced. In *Richter*, the defendant was represented by a staff attorney of his insurer, Allstate Insurance Company. The trial court allowed plaintiff's counsel to ask on *voir dire* whether they were familiar with defendant's attorney, who was an employee of Allstate. Furthermore, plaintiff's attorney asked whether any of the venirepersons provided goods and services to Allstate. The Court found that the inquiry was proper, because it was within the trial court's discretion to allow plaintiff's attorney to show that defendant's attorney was an employee of Allstate to ascertain prospective jurors' bias or prejudice. The Court noted that the plaintiff's attorney treated the situation with respect to defendant's attorney the same as he did regarding other attorneys who were not employed by Allstate by identifying the organization for whom each worked.

Richter differs from the present case, because the attorney in *Richter* was an employee of the insurance company, which fact was revealed to determine bias and prejudice, just as the other attorneys' employers were identified to reveal bias or prejudice. In addition, the term "insurance" is actually contained in the name of Allstate Insurance Company, which is not the case here. The insurance company at issue here is "The Doctors Company." As noted in *McCaffery v. St. Louis Public Service Company*, 252 S.W.2d 361 (Mo. 1952), it was improper to characterize Transit Casualty Company as an "insurance" company. In this case, Plaintiff's attorney simply could have asked: "Is anybody here an officer, director or shareholder of a company called The Doctors

Company?” Instead, Plaintiff’s attorney improperly characterized The Doctors Company as an insurance company.

Banks v. Village Enterprises, Inc., 32 S.W.3d 780 (Mo. App. W.D. 2000), does not support Plaintiff’s contention that the question here was “proper.” In *Banks*, the issue is whether reversible error occurred during *voir dire* because the court allowed counsel to unduly emphasize the existence of defendant’s liability insurance by asking a follow-up question not authorized by the court, by asking the insurance question too near the end of *voir dire*, and by asking the question as to two insurance companies. The propriety of the actual question was never at issue. Moreover, in *Banks*, the question actually posed to the panel was as follows:

Does anybody here, you or any family member, an employee or an agent or a member of the board of directors of American States Insurance Company or Safeco Insurance Company?

Thus, the companies at issue in *Banks* actually had “insurance” in their names.

Finally, *Hulahan v. Sheehan*, 522 S.W.2d 134 (Mo. App. E.D. 1975), is also inapposite. In *Hulahan*, although a proper foundation had been laid outside of the hearing of the jury as to the question to be asked during *voir dire* regarding insurance, Plaintiff’s counsel inadvertently inserted “insurance” into the name of the company. The Court found that this was a good faith error but certainly did not find that the question was “proper.” Nonetheless, the Court of Appeals found that the error was not reversible, but would be 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...”

Here, the injection of insurance was not “inadvertent.” After the question was posed and counsel for SLU/Dr. Bicalho moved for a mistrial, Plaintiff’s counsel stated, “Well, I don’t think that I agree you can’t identify it as an insurance company.” (Tr. 38-39.) This shows a clear intention to identify The Doctor’s Company as an insurance company, despite the well-established body of case law that prohibits such identification.

Because Plaintiff’s counsel did not follow the proper procedure, there can be no presumption that his injection of “insurance” was in good faith. As noted in *Hulahan*, if the record clearly demonstrates an abuse of discretion, the injection of insurance is reversible error.

Here, the record demonstrates an abuse of discretion in denying the motion for mistrial, because the prejudice resulting from the question was clearly shown—and compounded by—Juror Grohman’s repeated references to insurance during *voir dire* after Plaintiff injected insurance. In fact, contrary to Plaintiff’s assertion that Venireperson Grohman was referring to health insurance premiums and thus could not have been influenced by a question that referenced a liability insurance company, Venireperson Grohman was clearly referring to **liability** insurance. Venireperson Grohman stated, “And every year I see premiums go higher and higher ... ***And different times when I was without it, where if I had gotten sued I would be in trouble.***” [Emphasis added.] (Supp. Tr. 58-59.) Furthermore, Plaintiff ignores Venireperson Grohman’s statement that the case could have been settled out of court and the insurance company was most likely

going to be taking care of it. (Supp. Tr. 79-80.) These statements demonstrate the prejudice that arose from the improper reference to The Doctors Company as “an insurance company,” because it highlighted the fact that SLU/Dr. Bicalho had malpractice insurance.

Finally, contrary to Plaintiff’s assertion, *McCaffery* supports SLU/Dr. Bicalho’s position. First, Plaintiff’s representation that Plaintiff’s counsel obtained the same approval of the insurance question as was obtained in *McCaffery* is incorrect. In *McCaffery*, counsel stated that he “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.” Here, unlike *McCaffery*, the precise wording of the question was never discussed prior to *voir dire*. (Supp. Tr. 38.) In *McCaffery*, the Court held that, although the designation of Transit Casualty Company as an insurance company was improper, opposing counsel did not object to the specific question that referenced insurance company propounded out of the hearing of the jury and therefore, counsel was not acting in bad faith when he had already indicated that he would refer to Transit Casualty Company as an insurance company. Here, because Plaintiff’s counsel did not identify the specific question that he planned to ask out of the hearing of the jury, the indicia of good faith that was evidenced in *McCaffery* is not present. This Court should reverse the judgment and remand for a new trial.

III. JUROR INTENTIONAL NONDISCLOSURE.

First and foremost, Plaintiff is incorrect in her assertion that SLU/Dr. Bicalho’s claim of juror nondisclosure is untimely and should be rejected on appeal. Neither

McBurney v. Cameron, 248 S.W.3d 36 (Mo. App. W.D. 2008), or any other authority, stands for such proposition where Plaintiff is raising the issue of timeliness for the first time on appeal. In *McBurney*, the Missouri Court of Appeals for the Western District encouraged counsel to make juror challenges for nondisclosure of litigation experience before submission of the case wherever practicable. However, after noting that the issue of timeliness had not been raised, the Court in *McBurney* proceeded to address the merits of the point on appeal. Here, too, this Court should address the merits of this point, because Plaintiff is raising the issue of timeliness for the first time on appeal. The law is clear that an issue not presented to the trial court is not preserved for appellate review. *Barner v. The Missouri Gaming Co.*, 48 S.W.3d 46, 50 (Mo. App. W.D. 2001). Parties are bound by the position they took in the trial court and will not be heard on a different theory on appeal. *Id.*

Moreover, the comments made by the Court in *McBurney* constitute nonbinding dicta. The law remains as was set forth in *Brines v. Cibis*, 882 S.W.2d 138 (Mo. 1994), in which this Court explicitly rejected a duty to investigate prospective jurors' answers during trial. *Id.* SLU/Dr. Bicalho have fully preserved this point for review on its merits.

With regard to the merits of this point, Plaintiff concedes that the question triggered a duty to disclose Mr. Sims' prior lawsuit. (Plaintiff's Substitute Brief, p. 57.) However, Plaintiff contends that SLU/Dr. Bicalho failed to prove that Mr. Sims' nondisclosure was intentional, citing *Williams ex rel. Wilford v. Barnes Hospital*, 736 S.W.2d 33, 36 (Mo. banc 1987), for the holding that "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.” (See Plaintiff’s Substitute Brief, p. 58.)

Here, the matter was not insignificant or remote in time, and there is nothing to indicate that Mr. Sims misunderstood the question. Although the trial court found Mr. Sims’ explanation for his nondisclosure at the post-trial hearing to be credible, and based thereon, found the nondisclosure to be nonintentional, his nondisclosure was per se unreasonable and therefore intentional, despite a finding that he was credible.

Plaintiff then proceeds to argue that even if Mr. Sims’ nondisclosure was intentional, “the nondisclosure did not involve a material issue; therefore, [SLU/Dr. Bicalho] were required to prove prejudice.” (See Plaintiff’s Substitute Brief, p. 60.) This is a complete misstatement of the law, because in Missouri, 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). Furthermore, if a juror’s intentional nondisclosure involves a material issue, bias and prejudice are ***presumed***. *Brines*, 882 S.W.2d at 140.

Plaintiff’s contention that *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), supports Plaintiff’s position is simply incorrect. First, Plaintiff incorrectly states that “[i]n *Washburn*, the trial court found that the juror’s explanation for his nondisclosure was not reasonable...” (See Plaintiff’s Substitute Brief, p. 59.) However, the case indicates that the trial court in fact denied the motion for new trial, which was based in part on juror nondisclosure, without issuing a memorandum of law. *Washburn*, 803 S.W.2d at 79. This indicates that the trial court found the juror to be believable and reasonable as to why he did not disclose the prior lawsuit. The Court of Appeals

disagreed with this implicit finding, finding that the juror's forgetfulness was unreasonable or unlikely. Thus, *Washburn* supports SLU/Dr. Bicalho's claim here that a trial court's subjective credibility determinations may not stand if the juror's explanation for the nondisclosure is objectively unreasonable.

Nonetheless, even though the Court in *Washburn* found that there was not a clear question triggering a duty to disclose Juror Nekula's prior litigation based on an automobile accident (which Plaintiff admits is not the situation here), the Court of Appeals clearly found that his forgetfulness was unreasonable or unlikely. Such is the case here. Furthermore, although the Court went on to find that there was no prejudice resulting from the intentional nondisclosure of a material issue, this inquiry into prejudice is foreclosed under the present state of the law. Pursuant to *Brines*, prejudice is now presumed. Thus, the Court's holdings in *Washburn* with regard to determinations of prejudice are now inapplicable to cases where there is intentional disclosure of a material issue.

Plaintiff's contention that the facts in *Bradford v. BJC Corporate Health Services*, 200 S.W.3d 173 (Mo. App. E.D. 2006), are most identical to those here is incorrect. In *Bradford*, the juror's nondisclosure involved a collection action, not an action for personal injuries arising from an automobile accident, such as at issue here and in *Washburn*. In fact, the juror in *Bradford* characterized the collection action, which arose from non-payment of dental bills, as an "insurance dispute." This is not the situation here.

Finally, Plaintiff's claim that the juror nondisclosure caused no bias or prejudice is inconsequential. As stated previously, when juror nondisclosure of a material issue is intentional, prejudice is presumed. Because it was objectively unreasonable that Juror Sims failed to disclose his prior lawsuit and it was an abuse of discretion for the trial court to determine otherwise, there is no need to inquire into whether actual bias or prejudice resulted therefrom. This Court should reverse and remand for a new trial.

CONCLUSION

For any or all of the foregoing 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., pursuant to Missouri Supreme Court Rule 84.06(b) and (g), and for their certificate of compliance, state as follows:

1. The undersigned certify that the foregoing Substitute Reply Brief complies with the limitations contained Missouri Supreme Court Rule 84.06(b) and, according to the word count function in Microsoft Word by which it was prepared, contains 7,525 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

2. The undersigned further certify that the diskette filed herewith containing Defendants/Appellants' Substitute Reply Brief in electronic format complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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The undersigned does hereby certify that two copies of the foregoing Substitute Reply Brief and one copy of accompanying disks were mailed, postage prepaid, to the following this 4th day of May, 2009, to:

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