IN THE SUPREME COURT OF MISSOURI

CASE NO. SC90107

JAMES KLOTZ AND MARY KLOTZ

Appellants/Cross-Respondents

vs.

MICHAEL SHAPIRO, M.D. AND METRO HEART GROUP, L.L.C.

Respondents/Cross-Appellants.

On Appeal from the Twenty-First Judicial Circuit, St. Louis County
Case No. 06CC-4826
Honorable Barbara Wallace, Circuit Judge, Division 13

RESPONDENTS/CROSS-APPELLANTS' SECOND BRIEF (REPLY BRIEF)

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STATUTE:

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ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING DR. ROBERT CLARK TO TESTIFY BECAUSE DR. CLARK WAS NOT LEGALLY QUALIFIED UNDER §538.225 AND MAI 11.06.

ARGUMENT

Appellants/Cross-Respondents contend that MO. REV. STAT. §490.065 (2000) is the sole controlling statute governing the admissibility of expert witness testimony at trial. However, they ignore the fact that Dr. Clark would not be qualified to provide an "affidavit of merit" in this case pursuant to MO. REV. STAT. §538.225. It would be completely incongruous for Dr. Clark to be legally unqualified to provide the simple "affidavit of merit" related to malpractice cases but allow him to testify as an "expert" in such a case as to the standard of care and causation issues. MO. REV. STAT. §490.065 was enacted prior to MO. REV. STAT. §538.225 (2008). MO. REV. STAT. §538.225 (2008) applies solely to medical malpractice cases, while MO. REV. STAT. 490.065 (2000), applies, theoretically, to any type of case. Even if this Honorable Court were to follow Appellants/Cross-Respondents' suggestion and agree that MO. REV. STAT. §490.065 (2000) alone controls the applicability to the admissibility of expert testimony at trial, Dr. Clark should still not have been permitted to testify as to the standard of care of a cardiologist and electrophysiologist. MO. REV. STAT. §490.065 states that an expert must be qualified based on his knowledge, skill, experience, training, or

education. Dr. Clark was not skilled or trained in cardiology and electrophysiology and did not have the knowledge, experience, or education to testify as to the standard of care of a cardiologist and electrophysiologist.

Appellants/Cross-Respondents' cite *State Bd. Of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003) for the proposition that in order for an expert to testify, the expert does not have to have the same credentials as the defendant. However, that case actually supports Respondents/Cross-Appellants' position. This Court held that an expert whom practices in the area of vascular diseases is sufficiently qualified to testify at trial even though that particular expert does not perform the treatment in question, chelation therapy. *Id*. at 156-157. However, in that case, both the expert and the defendant practiced in the same subspecialty field of vascular disease. In the instant case, Dr. Clark did not practice in the field of cardiology or electrophysiology. Therefore, even if the court here applied only MO. REV. STAT. §490.065 and the case cited by Appellants/Cross-Respondents, Dr. Clark should not have been allowed to testify as to the standard of care of Dr. Shapiro, even if otherwise allowed to testify as an "expert".

The case of *Yantzi v. Norton*, 927 S.W.2d 427, 432 (Mo. App. W.D. 1996) also cited by Appellants/Cross-Respondents, only stands for the proposition that a person's credentials may differ, **but** "…competence should be judged by whether they meet the minimum standards of that field, the knowledge of which is within the expertise of all of those who are qualified to act in that field…". The issue in

this case was whether Dr. Shapiro should have put in a permanent pacemaker when he did. Dr. Clark did not have any expertise as a cardiologist, electrophysiologist, or in putting in permanent or temporary pacemakers. Therefore, even following the arguments put forth by Appellants/Cross-Respondents and under *Yantzi*, Dr. Clark was **not competent** to testify as an expert on the issue of the standard of care for a cardiologist. Additionally, the facts of *MacDonald v. Sheets*, 867 S.W.2d 627 (Mo. App. E.D. 1993) and *Laws v. St. Luke's Hosp.*, 218 S.W.3d 461 (Mo. App. W.D. 2007) are completely different than the facts in this case. In *MacDonald*, a dentist was qualified to testify against an oral surgeon because the dentist studied oral surgery, was familiar with the recommended procedures, and had frequently observed the surgery in question. *MacDonald*, supra at 630-631. Further, an otolaryngologist was qualified to testify against an oral surgeon because his training overlapped with oral surgery. *Id*. In addition, the doctors in *MacDonald* did not testify as to all aspects of malpractice, but only those to which they were qualified. *Id*. In the instant case, Dr. Clark had limited or no experience or training in cardiology or electrophysiology. He testified as to whether Dr. Shapiro violated the standard of care by placing a permanent pacemaker in Mr. Klotz, yet had never done so himself. Dr. Clark never placed a permanent pacemaker before. (Tr. Vol. 3/180-181). He testified that it was not his job to evaluate rhythm disturbances on patients. (Tr. Vol. 3/181). He testified that if a patient had an arrhythmia, he would refer them to somebody like Dr. Shapiro, a cardiologist/electrophysiologist,

for evaluation. (Tr. Vol. 3/181). Whether or when the temporary pacemaker should have been removed was beyond Dr. Clark's expertise. (Tr. Vol. 3/182). Dr. Clark, therefore, did not study cardiology or electrophysiology, was not familiar with permanent pacemakers, and did not frequently observe a permanent pacemaker being placed.

In *Laws*, a laryngologist was allowed to testify against an anesthesiologist and hospital because the physician's specialty provided him with "knowledge of both airway management, concerning intubation and extubation, as well as exposure to morbidly obese patients with sleep apnea". *Laws*, supra at 469. As shown in the instant case, Dr. Clark did not have any knowledge of when to place a permanent pacemaker or permanent pacemakers in general.

Appellants/Cross-Respondents also cite *Johnson v. State*, 58 S.W.3d 496 (Mo. banc 2001) for the proposition that the expert does not need to be licensed in the same profession as the defendant. However, Appellants/Cross-Respondents ignore the fact that this case actually supports part of Respondents/Cross-Appellants' position. In *Johnson*, an Associate Psychologist was not qualified to testify as an expert in regard to the diagnosis of mental conditions where the diagnosis of mental disorders was not within the area of the associate psychologist's expertise. *Id*. In the instant case, Dr. Clark was erroneously allowed to testify about issues that were not within his expertise, i.e. pacemakers and when to implant a pacemaker.

At trial, Appellants/Cross-Respondents' counsel asked Dr. Clark whether the permanent pacemaker needed to be put in at the time it was. (Tr. Vol. 3/84-87, 136-141, 160-151, 180-182, 189-190). Dr. Clark did not have the skill or training to put in a permanent pacemaker and never acted as a cardiologist or electrophysiologist. (Tr. Vol. 3/180-182). Dr. Clark was not an expert in the area in which he proposed to testify, i.e. cardiology or electrophysiology, and therefore such testimony should have been excluded. *State v. Love*, 963 S.W.2d 236, 241 (Mo. App. W.D. 1997). Appellants/Cross-Respondents suggest that experts do not have to limit their testimony to only their area of specialty. Even if this Court agrees with that statement, Dr. Clark still lacked sufficient experience or training in cardiology or electrophysiology. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo. banc 1992).

II. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF FUTURE DAMAGES AND FUTURE MEDICAL EXPENSES.

ARGUMENT

Allowing testimony and/or evidence as to projected future damages and future medical expenses was speculative and highly prejudicial. Contrary to Appellants/Cross-Respondents' contention in their brief, Respondents/Cross-Respondents did object to evidence of future damages and future medical expenses. L.F. 146. Appellants/Cross-Respondents likewise ignore the case law cited by Respondents/Cross-Appellants in their first brief. "Consequences which are contingent, speculative, or merely possible are not proper to be considered by the jury in ascertaining the damages, for it would be plainly unjust to compel one to pay damages for results that may or may not ensue". *Greer v. Continental Gaming Co.*, 5 S.W.3d 559, 566 (Mo. App. W.D. 1999), and *Zoeller v. Terminal Railroad Ass'n of St. Louis*, 407 S.W.2d 73, 78 (Mo. App. St. L. 1966).

Allowing testimony of speculative future care needs and future medical expenses such as driver's evaluation and training, a power scooter and a wheelchair (which Mr. Klotz does not use now), a personal care assistant, a licensed practical nurse, a housecleaner, and an elevator, etc., into evidence significantly prejudiced Respondents/Cross-Appellants.

III. THE TRIAL COURT ERRED IN NOT REQUIRING THAT EVIDENCE OF FUTURE DAMAGES BE PRESENTED AT PRESENT VALUE.

ARGUMENT

Appellants/Cross-Respondents' future damages should have been expressed by the court in terms of the present value of those damages as required by MO. REV. STAT. §538.215 (2008). Either the jury should have been so instructed, or the Court should have reduced the verdict on those damages to present value. Failure to instruct the jury on present value of future damages or to correct the verdict in its judgment was incorrect as a matter of law and is manifest error. *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409, 412 (1985) and *Eagle American Insurance Company v. Frencho*, 675 N.E.2d 1312, 1317 (Ohio Ct. App. 10th D. 1996).

Appellants/Cross-Respondents suggest that Respondents/Cross-Appellants somehow waived their "present value" argument because Appellants/Cross-Respondents did not mention reducing the future damages to present value during closing. This argument is without merit. A party is not required to "argue" a point in closing to preserve the issue for appeal. S. Ct. Rules 78.07 and 84.13. Moreover, Respondents/Cross-Appellants continually raised the issue before the trial court, requesting that either evidence of present value be offered so that the jury could assess damages in terms of present value, or that the court make the

calculation itself, but the Court ruled "as a matter of law" that the present value statute (MO. REV. STAT. §538.215) would not be utilized. (Tr. Vol. 3/126-127; Vol. 4/64, 71-73). As such, the trial court's rulings directly contradicted the clear requirement of MO. REV. STAT. §538.215 (2008).

Respondents/Cross-Appellants further objected to the testimony of Dr. Norbert Belz regarding his opinion about Appellants/Cross-Respondents' future damages. The trial court overruled those objections and allowed Dr. Belz to testify about the Appellants/Cross-Respondents' future damages without any comment as to what the present value of those future damages would be. (Tr. Vol. 3/126-127; Vol. 4/64, 71-73). Dr. Belz even stated on his original report (S.L.F. 1978) that his calculations needed to be adjusted to present value. That statement was redacted from the report that was initially shown by Appellants/Cross-Respondents to the jury (S.L.F. 2033).

The trial court erroneously ruled numerous times throughout the trial, as a matter of law, that evidence as to present value did not need to be offered by Plaintiff, and that Respondents/Cross-Appellants could not question Dr. Belz regarding his comments at the beginning of his report about his acknowledged need to reduce his future damages figures to present value. (Tr. Vol. 3/126-127; Vol. 4/64, 71-73). Appellants/Cross-Respondents' attorneys ultimately reconsidered at a later point in trial the Court's previous rulings regarding present value and the refusal to allow Respondents/Cross-Appellants to cross-examine about present value, and then agreed that they would allow the original

(unredacted) Belz report to go into evidence, and they now content that these later changes in tune somehow corrected or resolved the erroneous ruling by the court or the prejudice that the improper rulings caused Respondents/Cross-Appellants. (Tr. Vol. 4/68-73; Vol. 4/110; Vol. 7/80-87). Appellants/Cross-Respondents' concession about present value issues was not made until **after** Dr. Belz had left not only the witness stand, but the courtroom and the courthouse entirely. Reading Dr. Belz "offer of proof" or mentioning present value in closing argument, as the Appellants/Cross-Respondents suggest in their brief, would have been extremely ineffective and prejudicial to the Respondents/Cross-Appellants. Respondents/Cross-Appellants were unable to fully cross-examine Dr. Belz before the jury, and the jury was never provided with any evidence as to present value, or what the amount of future damages would have been had they been reduced to present value. (Whole Tr.). Respondents/Cross-Appellants' decision not to mention present value in closing had little to do with trial strategy except that given the fact that they were continually **refused** the opportunity to cross-examine witnesses on the issue, mentioning "present value" in closing, when nothing had been mentioned previously, would have been more prejudicial and ineffective.

Appellants/Cross-Respondents suggest that Respondents/Cross-Appellants did not make any credible effort to contest the issue of present value and are now just seeking relief from the consequences of Respondents/Cross-Appellants own actions citing *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 388 (Mo. 1986). However, as the record shows, nothing could be further from the truth.

Respondents/Cross-Appellants made every effort to contest the issue of present value, but were declined by the trial court at every step.

Not, should the trial court have instructed the jury that any future damages should only be assessed at their present value (see *Dickerson,* supra; *Eagle American Insurance Company*, supra; and MO. REV. STAT. §538.215 (2008)), the trial court erred in not itself making a reduction to present value, since the jury clearly did not do so. Appellants/Cross-Respondents' argument that only conclusory arguments were presented by Respondents/Cross-Appellants is without merit. Respondents/Cross-Appellants clearly relied on MO. REV. STAT. §538.215 (2008) for their arguments. The statute requires that future damages should be assessed at present value and since the court refused to require evidence to support what the statute requires, the jury did not reduce the future damages to present value. Therefore, the court should have corrected the verdict and enter judgment, in order to comply with MO. REV. STAT. §538.215 (2008). Appellants/Cross-Respondents' comment that MHG did not demonstrate that they ever requested the trial court to make a reduction to present value is without merit as well. Respondents/Cross-Appellants clearly requested the court do so in the post-trial motion (L.F. 413-416), following the verdict.

Appellants/Cross-Respondents suggest that Respondents/Cross-Appellants have the burden to show that future damages should be reduced to present value, but there is no authority for that contention, and plaintiffs necessarily have the burden of proving any damages they seek by statute or common law. They further

suggest that Respondents/Cross-Appellants should not be able to cross-examine Dr. Belz as to whether his figures should be reduced to present value, even though Dr. Belz specifically noted that fact on his report. Dr. Belz prepares numerous life care plans and has read numerous economists reports. Therefore, he is well aware of the concept of present value is and what it means. The issue of present value, what it is and how it is generally calculated was **not** outside the expertise of Dr. Belz, even if the actual calculation here might have been.

Respondents/Cross-Appellants were clearly prejudiced by the trial court's denial of Respondents/Cross-Appellants' proffered Instruction A. In *Burns v. Elk River Ambulance, Inc.*, 55 S.W. 3d 466 (Mo. Ct. App. SD 2001), the Court refused to rule on whether the instruction that was given was error since it did not express future damages at present value because no prejudice was shown. Respondents/Cross-Appellants were clearly prejudiced because the jury did not even know that the future damages should have been expressed at present value and the words "present value" were never even mentioned in front of the jury. (Whole Tr.). The *Burns* case stands for the proposition that reversal if warranted if prejudice is shown when an erroneous instruction is given that does not mention that future damages should be expressed at present value. *Id*. The jury did not know how to properly value their award since they were not informed of the appropriate law governing this case. The evidence presented, over Respondents/Cross-Appellants' numerous objections, with regard to future damages, was misleading and prejudicial, as it artificially inflated damages.

IV. THE TRIAL COURT ERRED IN ADMITTING STATEMENTS OF DRS. CASKEY AND BRADY, WHICH WERE TAKEN FROM THE MEDICAL RECORDS, REGARDING CAUSATION.

ARGUMENT

The trial court erroneously permitted Appellants/Cross-Respondents to question witnesses and present to the jury statements (through medical records) made by cardiologists in Arizona (Drs. Caskey and Brady) regarding the **cause** of Mr. Klotz's, MRSA infection. (Tr. Vol. 2/213-219, 253-254; Vol. 3/186). Drs. Caskey and Brady were not present in the Court and were never deposed. (Whole Tr.). The medical basis or rationale for the statements by Drs. Caskey and Brady, which were read to the jury repeatedly, and related to the essential case element of causation, were not given in the medical records. (Tr. Vol. 2/213-219, 253-254; Vol. 3/186). There was no evidence that the statements were their sound medical opinions versus simply having been written in the medical records as information from some other source. (Id.). The cases cited by Appellants/Cross-Respondents, *Allen v. St. Louis Public Service Company,* 285 S.W.2d 663 (Mo. banc 1956) and *Friese v. Mallon,* 940 S.W.2d 37 (Mo. App. E. D. 1997), are irrelevant, as the statements in question in those cases were not related to causation. In addition, in those cases a blanket objection was made to an entire offer of evidence and not to a specific part of the medical records as was done in this case. *Allen*, supra and *Friese*, supra. The statements presented from the records of Drs. Caskey and

Brady did not go to the history, diagnosis, treatment or prognosis of the infection, and thus do not qualify under the business records exception to the hearsay rule. *Long v. St. John's Regional Health Center, Inc.*, 98 S.W.3d 601, 607 (Mo. App. S.D. 2003). The statements of Drs. Caskey and Brady regarding their belief as to the "cause" of the infection, while contained in the record, are not a contemporaneous record of their observations, diagnosis, treatment and progress, and thus should not qualify as a business record. The medical records of Drs. Caskey and Brady that were shown to the jury were not the opinions of the Appellants/Cross-Respondents' retained experts, but instead, were offered by Appellants/Cross-Respondents as the medical conclusions of Drs. Caskey and Brady, two of plaintiffs' treating physicians, impliedly were therefore reliable, and without the stigma of having been paid for their testimony.

No stipulation as to the authenticity of medical records can cover statements that are otherwise excludable such as those that are self-serving, not necessary for treatment or diagnosis, or not covered by a hearsay exception. *Long v. St. John's Regional Health Center, Inc.*, 98 S.W.3d 601, 607 (Mo. App. S.D. 2003). See also *Kauffman v. Tri-State Motor Transit Company*, 28 S.W.3d 369, 372 (Mo. App. S.D. 2000) citing *Kitchen v. Wilson*, 335 S.W.2d 38, 43 (Mo. 1960), in which the Court stated:

> "Although the purpose of The Uniform Business Records as Evidence Law is to enlarge the operation of the common law rule providing for the admission of business records as an exception to

> the hearsay rule, the Law does not make relevant that which is not otherwise relevant, nor make all business and professional records competent evidence regardless of by whom, in what manner, or for what purpose they were compiled or offered…".

Appellants/Cross-Respondents completely ignore the cases cited by Respondents/Cross-Appellants. Based on the case law cited above, that the specific statements of Drs. Caskey and Brady do not qualify as a business record because they were not made for the purpose of history, diagnosis, treatment, or prognosis. When, where, and how Mr. Klotz' MRSA infection was contracted was irrelevant to Drs. Caskey and Brady's roles in the case as treating physicians, because regardless of where or how it was contracted, it had to be treated and managed the same way by the time of their involvement. Here, however, the evidence/statements by these doctors, contained only in medical records and not given under oath or subject to cross-examination, were impermissible hearsay, were self-serving, irrelevant, and were prejudicial to Respondents/Cross-Appellants. *Long*, 98 S.W.3d at 601.

The cause or origin of Mr. Klotz' infection was the central "causation" issue at trial. The statements from Drs. Caskey and Brady regarding causation were clearly so critical to Plaintiffs' case that they explicitly referred to these statements in closing argument as supportive of their causation theory, stating:

> "But this is Dr. Brady and [Caskey] which the defense has apparently forgotten…his treating doctors in Phoenix, not paid by anybody, say severe

endocarditis…secondary, meaning caused by, a pacemaker infection which likely occurred at the time of his implantation in March". (Tr. Vol. 8/66-68) (emphasis added).

There was no suggestion at trial or in the medical records that were admitted that Drs. Caskey and Brady ever had the opportunity to review all of Mr. Klotz' medical records from his hospitalization in St. Louis. (Whole Tr.). Without the opportunity to cross-examine these doctors, the jury did not have a chance to learn if their comments were strongly supported by data and medical evidence, or simply rogue speculation based on their limited knowledge at the time. In fact, no foundation whatsoever was laid for the basis of their opinions, which, had they been retained experts, would have been an evidentiary prerequisite to the testimony. There is a reasonable probability that if this evidence was excluded, as it should have been, the verdict would have been different.

V. THE TRIAL COURT COMMITTED ERROR WHEN IT REFUSED TO ALLOW CROSS-EXAMINATION OF PLAINTIFF'S EXPERT, DR. BELZ, REGARDING THE AMOUNT OF MONEY HE MADE FROM OTHER EXPERT WITNESS WORK.

ARGUMENT

The trial court improperly refused to allow Respondents/Cross-Appellants to question Dr. Belz regarding the amount of income he makes from his expert witness work. (Tr. Vol. 3/8-9). Appellants/Cross-Respondents cite *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 199 (Mo. App. W.D. 1988), *cert. denied*, 493 U.S. 817 (1989) for the proposition that cross-examination of Dr. Belz concerning the amount of money he made as an expert in other cases was inappropriate. However, that case does not stand for the proposition that cross-examination concerning the amount of money made as an expert in other cases was always inappropriate. As the Appellants/Cross-Respondents mention, *State v. Love*, 963 S.W.2d 236 (Mo. App. W.D. 1997) is still good law. The trial court's decision to exclude this testimony was outside of its discretion because Dr. Belz makes a significant amount of money doing expert witness work. Bias and prejudice are always relevant areas upon which to cross-examine experts. *Weatherly v. Miskle*, 655 S.W.2d 842, 844 (Mo. App. 1983), *State v. Love*, 963 S.W.2d 236, *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639 (Mo. App. W.D. 1994), *State v. Mann*, 23 S.W.3d 824, 835 (Mo. App. W.D. 2000), *State v. Johnson*, 700 S.W.2d 815,

817 (Mo. banc 1985) *quoting State v. Edwards*, 637 S.W.2d 27, 29 (Mo. banc 1982). The amount of money they make as paid "experts" is a frequent area of cross-examination since it clearly goes to bias and prejudice. *State v. Love*, 963 S.W.2d 236 (Mo. App. W.D. 1997). If the jury had heard Dr. Belz questioned about the percentage of his income that came from expert work, they could have disbelieved his testimony entirely. The jury could have disregarded much of his testimony if the jury was made fully aware of Dr. Belz bias and lack of credibility, and then the verdict may have been significantly less or a defense verdict rendered. Therefore, Respondents/Cross-Appellants were significantly prejudiced.

VI. THE TRIAL COURT ERRED IN ALLOWING THE KLOTZS' COUNSEL TO ARGUE AND DISPLAY A PART OF DR. SHAPIRO'S DEPOSITION IN CLOSING.

ARGUMENT

During Appellant/Cross-Respondents' rebuttal closing, the Appellants/Cross-Respondents' attorney displayed a portion of Respondent/Cross-Appellant Shapiro's pre-trial deposition. (Tr. Vol. 8/63-64). Respondent/Cross-Appellants did not waive any objection because they objected immediately when the Appellant/Cross-Respondents' attorney attempted to use in rebuttal closing a portion of Dr. Shapiro's deposition. (Tr. Vol. 8/63-64). The use of Shapiro's deposition was improper in closing since it was not ever introduced to the jury as evidence. *Robinson v. Empiregas Inc. of Hartville*, 906 S.W.2d 829, 837 (Mo. App. S.D. 1995). No cases were cited by Appellants/Cross-Respondents to contradict the *Robinson* case or any other case cited by Respondents/Cross-Appellants with regard to this issue. Closing arguments must be based on the evidence and not on something that was not in evidence such as the deposition of Dr. Shapiro. *Id*. "A statement by counsel in argument of facts not in evidence or a misstatement of the evidence is generally regarded as reversible error". *Kopp v. C.C. Caldwell Optical Company*, 547 S.W.2d 872, 878-879 (Mo. App. K.C. 1977) and *Friend v. Yokohama Tire Corporation*, 904 S.W.2d 575 (Mo. App. S.D. 1995). Appellants/Cross-Respondents suggest that there is no prejudice, even if

the allowance of Dr. Shapiro's deposition in closing was in error, since Dr. Shapiro testified to the same thing in cross-examination at trial. However, that argument is without merit. During trial, Dr. Shapiro testified that a "possible infection" was present when he treated the patient. However, in using his deposition as they did, where he explained that he treated the patient on the "presumption that there was an infection", they tried to imply his agreement with the concept that an infection actually was present, which was not his opinion or testimony at all. Therefore, Appellants/Cross-Respondents' argument that there was no prejudice since Shapiro testified to the "same thing" in cross-examination at trial is without merit.

VII. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NUMBER 9 REGARDING "ADDED RISK OF INFECTION" BECAUSE IT MISLEAD THE JURY, AND CAUSED PREJUDICE.

ARGUMENT

Jury Instruction #9 was improper because it contained the words "added risk of infection" in the second disjunctive statement (L.F. 400 and Tr. Vol. 7/78-79) and such words are vague, overbroad, and constituted a roving commission. *Grindstaff v. Tygett*, 655 S.W.2d 70, 72 (Mo. App. 1983). Appellants/Cross-Respondents' argument seems to be that there were disputed facts based on what Dr. Shapiro said and what Dr. Siegal said at trial and therefore there was not a roving commission. *See Appellants/Cross-Respondents' Second Brief pgs. 104-106*. However, that clearly establishes why there **was** a roving commission by having the instruction contain the words "added risk of infection". An instruction results in a "roving commission" when "it assumes a disputed fact or posits an 'abstract legal question that allows the jury to roam freely through the evidence and choose any facts that suited its fancy or its perception of logic to impose liability". *Newall Rubbersmaid, Inc. v. Efficient Solutions, Inc.*, 252 S.W.3d 164, 174 (Mo. App. 2007). There is no way to evaluate how the jury interpreted the phrase "added risk of infection". These words misled and confused the jury thereby causing prejudice to Respondents/Cross-Appellants by finding negligence when there was no clear expression of what that purported negligence was.

VIII. THE TRIAL COURT COMMITTED ERROR IN REFUSING TO DECLARE A MISTRIAL WHEN THE JURY WAS DEADLOCKED, AND IN SENDING A SECOND "HAMMER" INSTRUCTION.

ARGUMENT

Over Respondents/Cross-Appellants' objections, the trial judge personally spoke to the jury and gave a non-MAI "hammer" instruction, which was the second "hammer" instruction given to the jury. (Supplemental Trial Tr. 7/30/08, A75-A78). Respondents/Cross-Appellants' argument is that a second hammer instruction should not have been given at all, a mistrial should have been granted, and that the second hammer instruction that was given was improper and coerced the jury's verdict.

The second "hammer" instruction did **not** conform with the Notes on Use. (Respondents/Cross-Appellants' First Brief A75-A78). *State v. Johnson*, 948 S.W.2d 161, 164 (Mo. App. E.D. 1997), *State v. Hayes*, 563 S.W.2d 11 (Mo. banc 1978). The jury deliberated for a significantly short period of time after the second "hammer" instruction was given. (Tr. Vol. 8/74). It was not "40 minutes" as the Appellants/Cross-Respondents suggest.

"The use of MAI-CR 1.10 ("hammer" instruction) has been held proper in civil cases". *Klein v. General Electric Company*, 714 S.W.2d 896, 906 (Mo. App. E.D. 1986) (parenthetical added). The second "hammer" instruction was not given based on MAI-CR 1.10. The trial court's 2nd hammer instruction was not proper

because it was not given to the jury in writing. In addition, "When this instruction is given, however, "in addition to being read to the jury, it shall be handed to the jury. It shall be numbered and, when returned by the jury, filed with the other instructions of the court as provided in Rule 20.02(f)'…The requirement that this instruction be given in writing to the jury appears to be absolute". *State v. Wells*, 639 S.W.2d 563, 568 (Mo. banc 1982). Nowhere in Appellants/Cross-Respondents' arguments do they state that *Wells* is incorrect law or inapplicable to the situation at hand.

The jury was coerced. The judge's second "hammer" instruction was different from the first "hammer" instruction. Respondents/Cross-Appellants' counsel were under the belief that the trial judge was going to use the required hammer instruction, pursuant to the Notes on Use MAI-CR 1.10, when Respondents/Cross-Appellants were asked if the trial judge could go speak to the jury in the jury room. However, the judge did not use the appropriate "hammer" instruction. The second oral "hammer" instruction made it seem to the jury as though they would be wasting the court's time, attorney's time, and taxpayer money if they did not reach a verdict. The trial judge coerced the jury by stating that they have wasted their own time in addition to that of others if they do not come to a verdict because the case would be retried. There is not always a guarantee of that and there was no reason that the jury needed to be coerced by being told that information. The trial judge coerced the jury with the second "hammer" instruction because she "threatened" them with having to come back to

deliberate in the morning. The trial judge could have given the required "hammer" instruction pursuant to the Notes on Use MAI-CR 1.10 and then if the jury still did not come back with a verdict by a specific time in the judge's mind, either grant a mistrial or tell the jury that they would be brought back in the morning only after their deliberations were finished for the day.

IX. THE TRIAL COURT ERRED IN DENYING RESPONDENTS/CROSS-APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND/OR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

ARGUMENT

The Appellants/Cross-Respondents failed to prove any causal connection between the alleged negligence and the injury that was claimed. The evidence of causation that the Appellants/Cross-Respondents produced was strictly opinion testimony that was tenuous and speculative. Dr. Siegal testified that nobody knows what caused the infection that Mr. Klotz had in Phoenix. (Tr. Vol. 2/252). Dr. Siegal only believed there was a **possibility** of infection that the patient received while he was in the hospital in St. Louis, and not an actual infection. (Tr. Vol. 2/272). Dr. Siegal acknowledged that the infection could have gotten into Mr. Klotz' bloodstream any number of ways. (Tr. Vol. 2/273). Dr. Clark testified that a person could get a blood borne infection from any break in the skin. (Tr. Vol. 3/152, 164). There are cases of patients with sepsis where the actual source of the sepsis is never known. (Tr. Vol. 3/152). Mr. Klotz looked well the day he was discharged from St. Anthony's Hospital. (Tr. Vol. 3/170). Dr. Clark assumed that Mr. Klotz had an infection at St. Anthony's Hospital when he testified about his opinions. (Tr. Vol. 3/170-173). There was no culture or documentation of any sort to truly reflect that he had an MRSA infection on March 22, 2004. (Tr. Vol.

3/171). What was documented at St. Anthony's Hospital was an inflammation. (Tr. Vol. 3/172-173). Mr. Klotz was asymptomatic from the time he left St. Anthony's Hospital until over one month later after he got to Arizona, at least a couple of days before his hospitalization in Arizona. (Tr. Vol. 3/176). Mr. Klotz could have contracted this infection after leaving the hospital in St. Louis. (Tr. Vol. 3/176-178). Appellants/Cross-Respondents ignore the above testimony in this case. Appellants/Cross-Respondents' expert's opinions were not supported by sufficient facts in evidence, and were instead, speculative and conclusory. *Mueller v. Bauer*, 54 S.W.3d 652 (Mo. App. E.D. 2001). There was no objective evidence that the MRSA infection was in Mr. Klotz' bloodstream while at St. Anthony's Medical Center. (Tr. Vol. 2/252-253).

Each submission in a jury instruction must be supported by substantial evidence. *Romero v. Jones*, 144 S.W.3d 324, 330 (Mo. App. E.D. 2004). A witness' probative testimony on direct examination may be shown to be mere guess, speculation, impression, or conjecture on cross-examination, and thus it is of no probative value to establish a submissible case of negligence. *Gilpin v. Pitman, et al.*, 577 S.W.2d 72, 79 (Mo. App. W.D. 1978). Appellants/Cross-Respondents would have this Court believe that the speculative testimony on direct examination was sufficient to prove the causal connection. However, as shown above, the few statements made by the plaintiffs' experts on direct examination were of insufficient probative value to establish a submissible case of negligence.

In addition, there was no expert testimony that, but for Dr. Shapiro's failure to inform Mr. Klotz of an "added risk of infection" due to the right wrist symptoms, the injuries would have been avoided. *Townsend v. Eastern Chemical Waste Systems,* 234 S.W.3d 452, 466 (Mo. App. 2007). The plaintiff was required to bear the burden of producing evidence from which a jury could determine whether a reasonable person would have consented to the procedure and they failed to do so. *Aiken v. Clary*, 396 S.W.2d 668, 676 (Mo. App. 1965). Mr. Klotz signed a consent form after the permanent pacemaker was discussed with him. (Tr. Vol. 5/202-203). Implied consent is found where the patient gives a general authorization to the physician to act. *Rothe v. Hull*, 180 S.W.2d 7 (Mo. 1944). In addition, Appellants/Cross-Respondents relied on Dr. Siegal's testimony that Mr. Klotz should have been informed of the option of delaying implantation of the permanent pacemaker and treating the infection, however, Dr. Shapiro did not think those would be appropriate treatments. (Tr. Vol. 2/119, 206-207; Vol. 4/150-151, 154). *Baltzell v. Van Bustkirk*, 752 S.W.2d 902, 909 (Mo. App. 1988) (suggesting no need to discuss risks of alternative treatments which the doctor does not plan to recommend).

X. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY REGARDING DR. SHAPIRO'S KNOWLEDGE OF ST. ANTHONY'S INFECTION RATE.

ARGUMENT

The trial court erred in allowing testimony regarding Dr. Shapiro's knowledge of St. Anthony's infection rate. Respondents/Cross-Appellants' rely on their original brief as a reply to Appellants/Cross-Respondents' response to this Point. Appellants/Cross-Respondents sole purpose for showing the jury the infection rate of St. Anthony's Hospital to the jury was so that the jury would think that Dr. Shapiro knew of a significant risk of MRSA infection at his hospital and failed to protect Mr. Klotz from a presumed infection. The evidence presented at trial was speculative and assumed facts not in evidence. The Appellants/Cross-Respondents do nothing in their response to suggest that the case law cited in Respondents/Cross-Appellants' first brief, i.e. *Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466 (Mo. App. S.D. 2001) and *Perkins v. Kroger Co.*, 592 S.W.2d 292 (Mo. App. E.D. 1979), were incorrect or inapplicable to the present case. Appellants/Cross-Respondents have not shown whatsoever how this evidence was not completely speculative.

XI. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF THE FULL AMOUNT CHARGED FOR PLAINTIFF'S MEDICAL BILLS, AND NOT THE AMOUNT PAID.

ARGUMENT

Respondents/Cross-Appellants rely on their original brief in response to most of their arguments regarding this issue. Appellants/Cross-Respondents suggest that MO. REV. STAT. §490.715.5 provides that the amount charged by a provider should be used as the definition of value. However, nowhere in MO. REV. STAT. §490.715.5 does it state that the amount charged by a provider should be used as the definition of value. "Value" as used in MO. REV. STAT. §490.715.5 means the amount paid. If this Honorable Court were to follow the Appellants/Cross-Respondents' position that they could rebut the presumption that the "amount paid" is sufficient by just putting on an expert to say that the bills were reasonable and necessary, then there would be no reason for MO. REV. STAT. §490.715.5 since that argument was the law before MO. REV. STAT. §490.715.5 was enacted.

The case of *Berra v. Danter*, 2009 WL 3444814, 5 (Mo. App. E.D. 2009) has not yet been evaluated by this Court. In addition, the *Berra* case is different from the instant case because there were affidavits produced by the plaintiffs in that case which showed the reasonableness of the medical bills "charged". No

such affidavit or evidence overcoming the presumption that the amount paid was reasonable was produced in the instant case.

CONCLUSION

For all the reasons set forth herein, and as stated in Respondents/Cross-Appellants' original brief, Respondents/Cross-Appellants respectfully pray this Honorable Court grant their appeal, reverse the trial Court's judgment and direct that the judgment be entered for Respondents/Cross-Appellants consistent with their motions for directed verdict and/or post-trial motion for judgment notwithstanding the verdict, or, in the alternative, remand the case for a new trial on all issues.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, and the signature block contains, 7,295 words (as determined by Microsoft Word 2003 software);

(2) That the CD-ROM filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) Counsel also certifies that pursuant to Rule 84.05(a) that he mailed, postage prepaid, two true and correct copies of the brief, an e-mailed one complete copy of the brief this 5th day of January, 2010, to:

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