IN THE SUPREME COURT OF MISSOURI

WILLIAM DIESER,	)
	) **Supreme Court No. SC95022**
Plaintiff/Appellant/Cross-Respondent,	)
	) **Circuit Court No. 12SL-CC03428**
vs.	)
	) **Circuit Court for St. Louis County**
ST. ANTHONY'S MEDICAL CENTER,	)
	)
Defendant/Respondent/Cross-Appellant.	)

DIESERS'S SECOND BRIEF

Respectfully Submitted,

COFFEY & NICHOLS

Mary Coffey, #30919
Genevieve Nichols, #48730
Adam Henningsen, #64905
Attorneys for Plaintiff/Appellant/Cross-Respondent
6200 Columbia Ave.
St. Louis, MO 63139
Phone: 314-647-0033
Fax: 314-647-8231
E mail: mc@coffeynichols.com
gn@coffeynichols.com
ah@coffeynichols.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

DIESER'S REPLY TO ST. ANTHONY'S JURISDICTIONAL STATEMENT

Absent from Cross-Appellant/Respondent St. Anthony's Medical Center's (St. Anthony's) argument regarding the timeliness of Appellant/Cross-Respondent William Dieser's (Dieser's) constitutional challenge is any suggestion or showing that the trial court or St. Anthony's was denied a full and fair opportunity to consider the specific constitutional issues raised in this appeal. The verdict was reached on February 27, 2015. Legal File page 203 (LF 203). On March 12, 2015, Dieser filed a motion seeking post-judgment interest and a memorandum in support, raising the same constitutional issues raised here. LF 211, 214. St. Anthony's filed a response on March 19, 2015, that addressed the statutory construction but not the constitutional issues. The trial court heard argument on Dieser's motion for post-judgment interest on April 14, 2015, and took the matter under submission. LF 290, Dieser's Second Appendix page 1 (DSA A1). St. Anthony's then filed a supplemental memorandum in opposition to Dieser's motion, on April 16, 2015, which addressed the constitutional issues, but did not raise a timeliness argument. LF 291. Judgment was entered on April 23, 2015, without post-judgment interest and without opinion. LF 296. Dieser filed a Motion to Amend the Judgment to allow for post-judgment interest on April 24, 2015, incorporating his earlier constitutional arguments. LF 297. No response was filed by St. Anthony's, and Dieser's motion to amend the judgment to include post judgment interest was denied by the trial court on April 30, 2015 at the hearing on post trial motions. LF 329, 330. No motion or memorandum of St. Anthony's raised a timeliness objection to the trial court's consideration of Dieser's constitutional claim.

The record thus clearly shows that the constitutional issues raised by this appeal were fully briefed, argued and ruled on by the trial court both before and after entry of judgment, in an orderly and efficient fashion and before the action claimed to be unconstitutional had occurred.

When the purposes of the "earliest opportunity" rule are met by the trial court and the opposing party being given the opportunity to fairly address the constitutional issues, this Court has found that the issues were adequately preserved. *Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996); *see also Mayes vs. St. Lukes Hospital of Kansas City*, 430 S.W.3d 260, 267-268) (Mo. banc 2014) (treating constitutional objections like all objections under Rule 78.09 and stating that they must be "made when the occasion for the ruling desired first appeared " *id* at 267; *Dodson v. Ferrara*, __ S.W.3d ___, 2015 WL 4456188 (Mo. App. 2015) (opinion transferring appeal to Supreme Court because of constitutional issues regarding caps in wrongful death cases, and finding that raising of constitutional issues in the trial court after entry of judgment sufficiently preserved the claims).

It should also be noted that on June 30, 2015, this Court, on its own motion, transferred jurisdiction of St. Anthony's appeal from the Eastern District, without explanation. Dieser invokes Supreme Court jurisdiction not only under the exclusive jurisdiction provision of Mo. Const. Art. 5, section 3, but also under the Court's discretionary jurisdiction for questions of general interest and import. Mo. Const. Art. 5, section 10; Rule 83.06. Even if jurisdiction were not appropriate under Article 5 section 3, jurisdiction could lie under section 10, and this Court's order June 30, 2015.

DIESER'S REPLY TO ST. ANTHONY'S ARGUMENTS ON DIESER'S POINTS RELIED ON

I. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE SUB-SECTION ONE OF 408.040 REQUIRES POST-JUDGMENT INTEREST ON ALL JUDGMENTS AND THAT REQUIREMENT IS NOT AFFECTED BY SECTION 538.300.

Legislative and Case Law History

Going back to at least 1939, Missouri statutes provided that "interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction made by payment". *Architectural Res., Inc. v. Rakey*, 956 S.W.2d 420, 423 (Mo. App. 1997) ("Except for the rate, the present statute on judgment interest, § 408.040.1, RSMo 1994 is identical to § 3228, RSMo 1939...").

Beginning in 1991, the statutory scheme permitted post-judgment but not pre-judgment interest for cases brought under the medical negligence statutes. Section 408.040[1], DSA A4; RSMo section 538.300 (2000), DSA A5.

---

[1] All statutory references are to RSMo. The 1991 versions of 408.040 and 538.300 are published in the 2000 cumulative supplement to RSMo. The 2005 versions of 408.040 and 538.300 are in the 2013 cumulative supplement. The 2014 version of section 408.040 is contained in the 2014 non-cumulative supplement. All versions of the statutes are also available at http://www.moga.mo.gov/mostatutes/statutesAna.html.

Then, in 2005, both 408.040 and 538.300 were amended as part of HB 393. Dieser' first appendix page A4 (DSA A4); DA8; Dieser's second appendix page A6 (DSA A6).

HB 393 (2005), DSA A6-8[2], changed 408.040 from two to three sections. Subsection one of 408.040, formerly providing for post-judgment interest in all cases, was limited to non-tort actions. Subsection two, formerly providing only for pre-judgment interest in tort cases, was expanded to cover both pre and post-judgment interest in tort cases. The rate for pre-judgment interest was moved to a new subsection three. *See* DSA A6-8 for HB 393 (2005); DSA A4 and DSA A5 for the 1991 versions of 408.040 and 538.300; DA A4 and DA A8 for the 2005 versions.

HB 393 (2005) also amended section 538.300. DSA A21. The former prohibition against subsection two of 408.040 applying to medical negligence cases was removed and replaced with a provision barring application of subsections two and three. This was the legislation under which *Mackey* found that there was no statutory authority for post-judgment interest in medical negligence cases. Dieser presumes *Mackey* did this because the only statutory authority for post judgment interest had been moved from subsection one to two of 408.040 and subsection two was made inapplicable by 538.300 continuing to say subsection two did not apply to actions brought under the medical negligence statutes. *Mackey v. Smith,* 438 S.W.3d 465, 481 (Mo. App. 2014) (construing the 2005

---

[2] Available at

http://www.house.mo.gov/content.aspx?info=/bills051/biltxt/truly/HB0393T.HTM

versions of section 408.080 and section 538.300). The 2005 Bill Summary for HB 393, DSA A25[3], said nothing about a new prohibition against post-judgment interest in medical negligence cases. Missouri Bar articles reviewing the changes from HB 393 only mentioned a new rate for post-judgment interest and were silent as to any new prohibition against post-judgment interest in medical negligence cases. Paul J. Passanante and Dawn Mefford, *The Effect of Tort Reform on Medical Malpractice,* Journal of the Missouri Bar, 236, at 245 (Sept/Oct 2005), DSA A29; James L. Stockberger and Brian Kaveney *Missouri Tort Reform*; Journal of the Missouri Bar, 378, at 385 (Nov/Dec 2006), DSA A38. Missouri courts after 2005 continued to order post-judgment interest under subsection one of 408.010 in medical negligence judgments, even after the effective date of HB 393 of August 28, 2005. DSA A22, *Lake v. McCollum*, 324 S.W.3d 481, 485 (Mo. App. 2010); *Lindquist v. Mid-Am. Orthopaedic Surgery, Inc.*, 325 S.W.3d 461, 464-65 (Mo. App. 2010). It was not until the 2014 decision of *Mackey v. Smith, supra*, that a Missouri appellate court applied the 2005 version of 538.300, DSA A8, to deny post-judgment interest in medical negligence cases.

In 2014, effective after the opinion and judgment in *Mackey*, section 408.040 was amended but 538.300 was not. DSA A2-3, A6, A46. A new section one was added to 408.040, and the old sections shifted down. Section one now said, in relevant part, that "[j]udgments shall accrue interest on the judgment balance... defined as the total amount

---

[3] Available at

http://www.house.mo.gov/content.aspx?info=/bills051/bilsum/truly/sHB393T.htm.

of the judgment awarded..." Subsection two, like the 2005 subsection one, provided for post-judgment interest in non-tort actions. Subsection three, like the 2005 subsection two, provided for pre-judgment and post-judgment interest in tort actions. Subsection four, like the 2005 subsection three, defined the rate for pre-judgment interest. Section 538.300 was not amended, and the 2005 version of 538.300, saying subsections two and three of 408.040 did not apply to actions brought under the medical negligence statutes, remained in effect – but now subsection two of 408.040 referred to interest in non-tort actions and subsection three referred to both pre and post-judgment interest in tort actions. RSMo section 538.300 (2013 cum. supp.) and DSA A8.

St. Anthony's Arguments on Legislative Intent

St. Anthony's argues that the intent of the 2014 legislation, in adding subsection one to 408.040, was simply to instruct on existing rights, not to provide for post-judgment interest in medical negligence cases. St. Anthony's bases its conclusion on the "Bill Summary" of Senate Bill 621, which summarizes the bill by stating that it "provides a definition of judgment balance." LF 237-242. The writer of the bill summary is unknown, but the title of the Senate Bill 621, as truly agreed to and passed, is "An act to repeal sections ... [a number of sections including 408.040 but not 538.300] ... and to enact in lieu thereof ... new sections relating to judicial procedures..." DSA A46[4]. Thus, the intent of the 2014 amendment to 408.040 was not to give further instruction on existing law. It was rather to repeal existing judicial procedures and put new ones in their

[4] *available at* http://www.senate.mo.gov/14info/pdf-bill/tat/SB621.pdf.pdfis

place. In passing the 2014 version of 408.040.1, without an accompanying amendment to 538.300, the legislature did just that.

The language of the 2014 version of 408.040.1 that "Judgments shall accrue interest on the judgment balance", DSA A2-3, RSMo section 408.040 (2014 noncum. supp.), is not far from language in the 1991 version of 408.040.1, construed by this Court in *Moore v. Bi-State Dev. Agency*, 132 S.W.3 241, 243 (Mo. banc 2004). In *Moore* this Court said that the purpose of statutory language that "interest shall be allowed on all money due upon any judgment..." was "to compensate a judgment creditor for the judgment debtor's delay in satisfying the judgment pending the judgment debtor's appeal." *Id.* It would be inconsistent to construe "interest shall be allowed on all money due upon any judgment" to confer a right to post-judgment interest, *id*, yet construe "judgments shall accrue interest on the judgment balance", DSA A2-3, as only instructional on otherwise existing rights.

If St. Anthony's is right, then the legislature intended to preclude post-judgment interest in medical negligence cases, but only on the part of the judgment reflecting past damages. Medical negligence judgments that require future payments are required to bear interest pursuant to RSMo 538.220.2.[5] Why the legislature would want to protect medical negligence judgments that require future payments with post-judgment interest but not medical negligence judgments that require immediate payment is impossible to

[5] RSMo section 538.220.2 (2013 cum. supp.)

explain. The Bill Summary for HB 393 (2005), DSA A25[6], makes no mention of a new prohibition against post-judgment interest in medical negligence cases, and, as already noted, reviewers and courts back at time took no notice of any new prohibition. Paul J. Passanante and Dawn Mefford, *The Effect of Tort Reform on Medical Malpractice,* Journal of the Missouri Bar, 236, at 245 (Sept/Oct 2005), DSA A29; James L. Stockberger and Brian Kaveney *Missouri Tort Reform*; Journal of the Missouri Bar, 378, at 385 (Nov/Dec 2006), DSA A38; *Lake v. McCollum*, 324 S.W.3d 481, 485 (Mo. App. 2010); *Lindquist v. Mid-Am. Orthopaedic Surgery, Inc.*, 325 S.W.3d 461, 464-65 (Mo. App. 2010). Given this, the idea that the legislature in HB 393 intended only to preclude pre-judgment and not post-judgment interest makes more sense than the conclusion that it intended to preclude post-judgment interest but only as to payments that were immediately due.

Consideration of the legislative history raises more questions than answers. Did the legislature really want to say, by failing to amend 538.300 after the 2014 amendments to 404.040, that the non-tort provisions of 408.040(2) did not apply to actions brought under the medical negligence statutes? Or did they forget to change the references in 538.300 to apply to the new paragraph numbers of 408.040? In the 2005 amendments, did the legislature really intend to prohibit both pre and post-judgment interest by 538.300 without putting it in their bill summary? Did they forget that subsection two of

---

[6] *available at*

http://www.house.mo.gov/content.aspx?info=/bills051/bilsum/truly/sHB393T.htm.

408.040 now applied to both pre and post-judgment interest and that 538.300 might now reach both? Whatever one's conclusion, courts should be "guided by what the legislature says, and not by what we may think it meant to say." *Missouri Public Service Co. v. Platte–Clay Elec. Co-op., Inc.,* 407 S.W.2d 883, 891 (Mo. 1966). The plain language that "Judgments shall accrue interest on the judgment balance" as provided in 408.040(1) should be construed as this Court construed "interest shall be allowed on all money due upon any judgment...", in *Moore*, supra, "to compensate a judgment creditor for the judgment debtor's delay in satisfying the judgment pending the judgment debtor's appeal." *Moore*, 132 S.W.3 at 243 (construing 408.040(1) (the volume the 1991 version is published in)). So construed, the Court should enter a new judgment pursuant to 408.040.1 providing for post judgment simple interest at the rate of 5.13% running from April 23, 2015, plus taxable costs.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES APPELLANT'S FUNDAMENTAL PROPERTY RIGHTS AS GUARANTEED BY ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION.

St. Anthony's argues that the application of 538.300 to deny post-judgment interest advances the legislature's presumed goal of reducing medical malpractice costs, and that is all that is needed to support the legislation since, according to St. Anthony's, no fundamental property right is involved. When read in combination with 538.220(2), DSA A80, however, if 538.300 prohibits post-judgment interest in malpractice cases, it does so only on the part of the judgment that is past due. Malpractice judgments for future medical damages are required to bear interest pursuant to 538.220(2). DSA A80. There is no rational basis, much less a "substantial advancement" of a legitimate state interest, *Labrayere v. Bohr Farms*, LLC, 458 S.W.3d 319, 332 (Mo. 2015), in providing for post-judgment interest on amounts the judgment requires to a paid in the future but denying post-judgment interest on past due amounts. Therefore, regardless of the level of scrutiny applied to 538.300, in totally denying post-judgment interest on past due amounts, the statute irrationally deprives Dieser of his property interest in the judgment and is therefore a violation of Article I, Section 2 of The Missouri Constitution.

III. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES DIESER'S RIGHTS AS GUARANTEED BY THE OPEN COURTS AND CERTAIN REMEDY PROVISIONS OF ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION.

St. Anthony's argument seems to be that the protections of the open courts and certain remedy provisions are not invoked unless a person with a recognized cause of action is blocked or unduly delayed from bringing the claim at all. That, however, was not the case in *State ex parte French*, 285 S.W.2d 513, 515 (Mo. 1926), where this Court voided a statute forbidding a bank commissioner from testifying in civil cases based on an open courts and certain remedy violation. Bank commissioner French, a nonparty witness, was being held in jail for contempt for refusing to testify in a civil case based on the statute, and appealed. This Court held "[w]e may say that the provision of the act which prevents the court in a civil case from procuring evidence, in the conduct of the trial, is an unwarranted interference with the functions of the court ... If a litigant in a civil case is forbidden by statute to obtain evidence, otherwise available, then the power of the court to enforce his rights is impaired and a certain remedy is not afforded. *French*, 285 S.W. at 515. Like the statutory denial of the right to subpoena relevant evidence in *French*, the statutory denial of post-judgment interest to Dieser interferes with and impairs the power of the court and Dieser to enforce a recognized cause of action.

The arbitrary and irrational nature of a construction of 538.300 that denies post-judgment interest is especially clear in light of 538.220(2), granting post-judgment interest on judgments in medical negligence cases that require future payments. Again, what reason could there possibly be for such a distinction? If the reason were to reduce malpractice costs, wouldn't post-judgment interest on all parts of a medical negligence judgment be prohibited? Is there any legitimate reason to protect a judgment for future damages from loss of value over time, but not give the same protection to a judgment for past damages? The irrationality of such a scheme is highlighted where, as here, the delay in payment of past due amounts is an event entirely within the judgment debtor's control. A judgment is the physical manifestation of the successful prosecution of rights under Missouri law in Missouri courts. To allow a specific class of judgment debtors to effectively pay less by delaying payment on past due amounts is an unwarranted interference with Dieser's and the Court's right to enforce judgments, in violation of the rights guaranteed by the open courts and certain remedy provisions of Article I, Section 14 of the Missouri Constitution.

IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES DIESER'S RIGHTS TO TRIAL BY JURY AS GUARANTEED BY ARTICLE I, SECTION 22(A) OF THE MISSOURI CONSTITUTION.

St. Anthony argues on this point that there is no protection afforded to post-judgment interest by the constitutional right to trial by jury because the jury does not decide post-judgment interest, and, because post-judgment interest is historically a creature of statute.

This Court analyzed a post judgment interest statute in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 646-648 (Mo. banc 2012). Section 538.220, provides, in medical negligence cases, that "past damages shall be payable in a lump sum." 538.220(1). On request of any party, "the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic installment payments ..., The court shall apply interest on such future periodic payments at a per annum interest rate no greater than the coupon yield equivalent, as determined by the Federal Reserve Board .... The judgment shall state the applicable interest rate." 538.220(1). DSA A80. The plaintiff in *Watts* asserted that the 538.220(2) interest rate was arbitrary and unreasonable and would deprive the plaintiff of the value of the jury's award over time. *Watts*, *supra* at 648. This Court held that once the right to a trial by jury attaches, the Missouri Constitution gives the plaintiff the full benefit of that right free from the reach of hostile legislation. *Watts, supra* at 640. The Court went on to analyze

538.220(2), and noted that if more than one interpretation of a statute is possible, the Court would interpret it in a manner that renders it constitutional. *Watts,* at 647. The Court interpreted 538.220(2) as allowing judicial discretion on the interest rate because a too low rate "would take from him [plaintiff] the full value of the jury's award." *Watts,* at 648. The Court did this despite statutory language that "[t]he court shall apply interest on such future periodic payments at a per annum interest rate no greater than...". 538.220(2).

A close reading of the section of *Watts* dealing with 538.220(2) thus supports the conclusion that the Court was applying the constitutional right to trial by jury to post-judgment interest, and required judicial discretion on the rate in order to protect the constitutional right to the full value of the jury's award. If a too low interest rate in 538.220(2) implicates the right to trial by jury, then the complete denial of post-judgment interest under 538.300 should be held to do the same.

STATEMENT OF FACTS

This is a cross-appeal from a medical negligence case tried to a jury over five days in St. Louis County, Division 11 (Circuit Judge Michael Burton), in February, 2015. The jury found that St. Anthony's negligence caused Dieser to get a Stage IV (down to the bone) pressure wound to the buttocks that required two surgeries and a year to heal. The wound still causes Dieser pain and puts him at increased risk for complications in the future. The jury awarded Dieser $33,000.00 in past economic damages, $750,000.00 past non-economic damages and $100,000.00 in future non-economic damages.

"Never Events"

Out of 1226 pages of testimony, the jury heard the phrase "never event" a total of 12 times, it appears on 6 different pages. Transcript page 282, line 15 (Tr. 282:15), 1146:10, 16, 22, 24; 1147:12, 17, 20, 23; 1149: 19; 1150:2-3; 1174:18. The phrase first came up when it was volunteered by St. Anthony's corporate designee in response to a question about whether it was the hospital's position that this injury was unavoidable. Tr. 282:2-18. The corporate designee answered the question, in part, by telling the jury that "you try to do everything that you can to prevent that, but it's not a never event or whatever you want to say." Tr. 282:13–283:1. That the pressure wound was unpreventable given Dieser's other health conditions and illnesses was a main theme in St. Anthony's case that began in opening with a discussion of his "poor condition, bad health." Tr. 212:1-15, 215:6-7. The jury was told by St. Anthony's counsel that "[f]rom the beginning, it was understood that Dieser would" get a pressure wound. Tr. 212:1-15, 215:6-7.

In response, Dieser indicated to the court that he intended to discuss "never events" with his expert Dr. Rushing as support for Rushing's opinion that this pressure wound was preventable. Tr. 610:5 – 617:4. Dieser supported his arguments with Exhibit 34, admitted for purposes of the offer of proof only, a letter from The Centers for Medicare and Medicaid Services (CMS) written in July, 2008, outlining its position on "Serious Reportable Events (commonly referred to as "Never Events."). Tr. 610:5 – 617:4; DSA A84. The last page of the letter is a table entitled "Patient Safety: CMS Initiatives Addressing Never Events" and lists "Stage 3 or 4 pressure ulcers after admission" second from the last under "Care Management Events." DSA A88. As background for its position, CMS stated that "Never Events" are "errors in medical care that are of concern to …the public…and of a nature such that risk of occurrence is significantly influenced by the policies and procedures of the health care organization." DSA A84. Exhibit 34 then explains that CMS would no longer pay for costs associated with certain "never events," including Stage IV hospital acquired pressure wounds, in part because CMS had determined those events to be "reasonably preventable through application of evidence-based guidelines." DSA A84 – A85.

St. Anthony's objection to the questioning, first lodged in motions in limine, was sustained and Dieser went forward with an offer of proof from Dr. Rushing. Tr. 611:13 - 618:8-24; LF 115-116, 134-139. Dr. Rushing testified that CMS, as a regulatory body, has stated that a stage IV pressure wound acquired in the hospital shouldn't happen, is a never-event and is almost always preventable. Tr. 617:18-618:15. Dr. Rushing testified that he is familiar with the regulation and is not aware of any exception based on a

patient's other health conditions. Tr. 618:8-24. In front of the jury, Dr. Rushing also testified that St. Anthony's negligence caused Dieser to get the pressure wound, allowed the wound to progress to Stage IV, and caused Dieser to incur $33,085.96. Tr. 624:9-631:23.

The issue came up again during another offer of proof, this time with St. Anthony's witness Gail Lupien, a former wound care nurse at the hospital. Ms. Lupien agreed, without any exclusion or limitation, that a hospital acquired Stage IV pressure ulcer is considered a never-event. Tr. 988:20 – 989:3. Ms. Lupien explained that a never event is an event that CMS says should never happen. Tr. 989:4-9.

St. Anthony's evidence on causation was closed out by its nurse expert Diane Krasner when she told the jury about her second main opinion, that the pressure wound was unavoidable given Dieser's other illnesses and general health condition. Tr. 1036:16 – 1038:2. Krasner then introduced the topic of national standards and definitions along with their applicability to whether or not Dieser's pressure wound was "unavoidable." Tr. 1013:17 – 1014:5. She testified that she was a member of the National Pressure Ulcer Advisory Panel (NPUAP), which puts out standards and definitions used by her, CMS and others in the wound care community. Tr. 1013:17 – 1014:5. Krasner testified that with regard to guidelines for practice and staging "the government then took over and … requires us to document about bedsores." Tr. 1014:10-13. Also in direct exam, Krasner identified a book entitled Chronic Wound Care, 4th edition, which she has been editing since 1990 that has been used in teaching other wound care professionals. Tr. 1015:13-22, 1017:9-12; DSA A89-90.

During this discussion the witness testified that the 2014 standards published by the NPUAP supported her opinion on causation that this wound was not preventable saying that the 2014 standard defined "unavoidable" as a pressure wound in a patient like Dieser, who Krasner said was a very sick and unhealthy person. Tr. 1036:16 – 1038:2. She then went on to explain to the jury that the 2014 definition upon which she relied incorporated a 2010 version of the definition of "unavoidable ulcers" and that the 2010 definition "was a refinement of the definition that was put out by the Centers for Medicare and Medicaid in 2004." Tr. 1047:1-7. Krasner did not produce to the judge or show the jury any actual standards or definitions. Tr. 1008:6 – 1098:25, 1143:20 – 1155:23.

Krasner then agreed, on cross-exam, that "regulatory issues have enormous impact on the quality of care as well as the actual outcomes of care delivered." Tr. 1145:9-17. She confirmed her opinion that this pressure wound was unpreventable was based on a 2004 definition of "unavoidable" from CMS. Tr. 1145:22 – 1146:4. She then denied that in 2007 or 2008 CMS determined that hospital acquired Stage IV pressure wounds were "never events." Tr. 1146:7-12. But, she went on to explain that pressure wounds were called "never events" by the NPUAP since as far back as 2001. Tr. 1146:22-25. She continued saying that CMS had initially talked about calling certain conditions "never events" but that the final regulation stated only that hospital acquired Stage IV pressure wounds would not be paid for by CMS. Tr. 1147:7-17. She agreed that CMS refused to pay for hospital acquired Stage IV pressure wounds because they had determined those kinds of wounds should never happen. Tr. 1150:7-11. Dr. Krasner made clear that she

disagreed with this rationale, but agreed that it was in fact the rationale behind the CMS regulation. Tr. 1150:7-24.

Krasner was also explained to the jury during cross and re-direct all of her opinions about what a "never event" is and is not, along with a full explanation of why the concept did not apply to Dieser's wound. Tr. 1146:5 – 1148:1, 1149:13 – 1151:10, 1155:2-11. She told the jury that the wound care community does not use the phrase anymore and explained, although it is not entirely clear in the transcript, that they now use the phrase "serious reportable event." Tr. 1147:18-22, 1149:10-12 (Krasner testified, when the intervening argument at side-bar is removed, "the National Quality Forum at some point…called it something else that I can't remember right now. It's a different word…The Court: Hold on one second please proceed. Q: What's that? A. Serious reportable event.") According to Krasner a "never event", a "serious reportable event", and, CMS's definition of "unavoidable" are all the same: one where "you do everything humanly possible … use the best technology you have available and then if, in spite of doing all of those things that we have in our toolkit, the person still gets a pressure ulcer...". Tr. 1146:15-25, 1150:17-24.

That the pressure wound was unpreventable given Dieser's other health conditions and illnesses was a main theme in St. Anthony's case that began in opening. Tr. 212:1-15, 215:6-7. St. Anthony's reinforced this theme with almost every witness explaining their position that what the nurses did or did not do should not matter because this pressure wound was unavoidable. *See, e.g.,* Tr. 282:13 – 283:1, 980:22 – 981:1-10, 1018:20-24. They also had five different witnesses testify that St. Anthony's was not

negligent and did everything they could have to avoid this injury. Tr. 360:24 – 361:2, 778:9-17, 887:1 – 888:20, 980:22 – 981:1-7, 1149:13 – 1151:10. Dieser intentionally left out the words "reimbursement mechanism" along with "payments for providers" when quoting Krasner's book in front of the jury. DSA A91; Tr. 1145:9-17. The terms reimbursement and payment were volunteered by St. Anthony's expert Krasner on cross-exam and St. Anthony's made no motion to strike the testimony during trial. Tr. 1147:23 – 1149:6.

"Never-event" was mentioned one more time during trial in closing when Dieser's counsel argued "a Stage IV all the way down to the bone pressure ulcer in their hospital while he's recovering from surgery and in the ICU, when his body is in their hands. That's what happened here, and that is not acceptable. That is what is known as a never event or a serious reportable event, and that's what happened here." Tr. 1174:14-19. Just a few minutes later, Dieser explained to the jury that under MAI 3.01, they must find in favor of Dieser if they believed St. Anthony's was negligent and its negligence caused Dieser's damages. Tr. 1178:2 – 11:81:13. Dieser also specifically reminded the jury that if they did not so believe, they should find in favor of St. Anthony's. Tr. 1181:9-13.

Burden of Proof in Voir Dire

In voir dire Dieser began a discussion of the burden of proof in this civil case with a comparison of the burden in criminal cases. Tr. 126:4 - 127:6. Dieser's counsel explained that, unlike in civil cases, in criminal cases the jury cannot base their finding on what is simply probable. Tr. 126:4 - 127:6. St. Anthony's objection to this

explanation of the burden was sustained. Tr. 127:10. Dieser's counsel then discussed the concept of more likely true than not true, told the jury that 51% certainty could be enough under the standard, and, stated that the standard did not require 60-90% certainty, just more likely than not. Tr. 127:11 – 12:18. St. Anthony's objected to the implication that 1% was enough without also stating that the burden was on Dieser and not St. Anthony's, and, to the use of percentages generally. Tr. 128:19 – 129:22. The objection was sustained. Tr. 128:19 – 129:22.

St. Anthony's then objected to Dieser's counsel being allowed to ask any further questions on the burden of proof and that objection was overruled. Tr. 129:22-130:5. Dieser's counsel went on and asked the panel whether anyone would hold him to a higher standard of proof than more likely than not, for instance by requiring 80-90% certainty. Tr. 130:9-21. St. Anthony's objected to the use of these percentages and the objection was overruled. Tr.130:22-131:2. Next, in talking with a venireman who had answered the last question, Dieser's counsel used gestures to illustrate the scales of justice, and said "more likely true.. [c]ould be like this, and I think we will show more like this." Tr. 131:3-23. St. Anthony's objected to the gesturing, and the trial court overruled the objection but told Dieser's counsel that "getting into percentages causes me some concern" and to stick to the language of the instruction. Tr. 132:6 – 133:4. Dieser's counsel did not use any more percentages, but did make the comment that the jury could have reasonable doubt in a civil case. Tr. 133:10 – 134:10. St. Anthony's objected to the question, arguing that counsel was lecturing, that objection was overruled and no more objections were made to burden of proof questions. Tr. 134:11 – 135:3.

St. Anthony's also addressed the burden of proof in its questioning by discussing, without objection or interruption, that Dieser has the burden of proving to the jury that it is more likely true than not true that St. Anthony's fell below the standard of care. Tr. 137:9-19. The hospital revisited the issue again later and asked, again without objection or interruption, whether everyone understood that Dieser had the burden of proof. Tr. 162:23 – 163:2. St. Anthony's went back to the issue a third time, agreed that "more likely than not" was the degree to which Dieser's case must be proven, is a different standard from beyond a reasonable doubt, and, again asked whether the panel knew that Dieser had to prove the propositions needed to win the case. Tr. 166:8-20. No member of the panel indicated any problem. Tr. 137:18-19, 162:23 – 163:2, Tr. 166:8-20. St. Anthony's also asked whether anyone believed, had the predisposition or attitude "that simply because this pressure ulcer…that Dieser got while he was in St. Anthony's is St. Anthony's fault because it happened while he was at the hospital?" Tr. 159:15 – 21. The panel indicated no problem with their silence. Tr. 159:21.

Alleged 'Send a Message' Argument

In the first part of closing argument, Dieser's counsel explained, without objection, that certain subjects of discussion, like whether Dieser really needed the money, were not permitted under the instructions. Tr. 1172:3-23. Dieser's counsel then stated: "The only thing you decide in this case is whether the carelessness of the hospital caused or contributed to cause Dieser's wound. I thought that the hospital admitted that this was a pressure injury sustained in the hospital, a Stage III or Stage IV crater in his backside … sustained in St. Anthony's Hospital in the course of three days. That, ladies

and gentleman, is not acceptable medical care in this community, and that's what your verdict will say. Your verdict becomes a legal document." Tr. 1172:20 – 1173:6. Defense counsel objected to references to sending a message to the community at large. Tr. 1173:13-20. The Court found that "I didn't hear the argument the way you did. I'm going to overrule the objection." Tr. 1173:13 – 1174:4. This was a repeat of statements made at the very start of voir dire, to which there was no objection: "The verdict that the jury renders in this case will say whether the quality of care that Dieser got is acceptable in St. Louis County." Tr. 14:5-8.

The Size of the Judgment and Damages

Dieser was in St. Anthony's between January 28, and February 7, 2008, for a surgery on his pancreas when he sustained a Stage IV pressure wound on his backside from being left too long on his back or in a chair. Tr. 265:10-21; 268:7-22, 681:11 – 682:4, 683:19-22, 955:22 – 956:3, 958:3-7. Stage IV pressure wounds extend to the deep fascia or the bone. Tr. 560:1-4. Pressure wounds progress from Stage I to Stage IV usually because of persistent pressure. Tr. 560:4-9. A pressure wound is a serious thing for a patient and is a dangerous problem. Tr. 548:12-20, 970:6-10.

The pressure wound was first noted in the medical records as a purple spot on January 30. Tr. 324:24 – 326:3, 689:16 – 690:12, 810:13 – 811:7. By the next day he had three wounds, one on each buttock and a third in-between at the coccyx that was a stage II injury. Tr. 1029:18-24, 1084:17-25, 1085:1-3. Stage II indicates a break in the skin or a blister. Tr. 559:17-20. By February 1, the wound was described as deep purple/red and 10.5 cm x 7 cm with bloody drainage. Tr. 352:17 – 353:8; 354:25 –

355:9. By February 4, it was 9 x 10.5cm and had coalesced into a big black wound. Tr. 1030:20 – 1031:3, 1045:1-6, 1084:24-25. At times Dieser asked his wife to look at it and she gagged. Tr. 831:21 – 832:8. When his pancreatic surgeon first saw the wound he had a look of disgust and anger on his face. Tr. 833:20 – 834:22.

By February 6, Dieser had to be taken to the operating room where they found the wound went all the way down to the bone. Tr. 426:4-9, 671:19 – 672:6. In the surgery they cut and scraped out all of the dead tissue and took a pretty good piece out of his backside. Tr. 699:1-4, 798:9-13. Before the surgery, Dieser was not comfortable sitting and was scared he would pop something open. Tr. 828:19 – 829:3. After the surgery, he was in pain. Tr. 697:21-23, 797:10-16.

After he left the hospital he had home care nurses for dressing changes and to measure the wound twice, and then once a week, for one month. Tr. 459:8-22, 706:19 – 707:7, 815:17-24, 836:3 – 837:8. A lot of the time Dieser's wife Sherry would re-do the dressings by home health because they were not secure. Tr. 706:19 – 707:7. Other than home health visits, Dieser had to have his wife do all of the dressing changes on the wound. Tr. 706:19 – 707:7, 815:17-24. For about six months total the dressings were changed three times a day for a total of over 500 times. Tr. 471:23 – 475:11, 699:8-12, 708:17 – 709:14. The daily dressing changes were very painful causing Dieser to scream, cry or beat on the bed. Tr. 461:23 – 462:25, 463:13-14, 708:12-16, 836:3 – 837:17. The pain was bad enough that his surgeon prescribed him lidocaine to numb him from the pain of the dressing changes. Tr. 467:9-11. Unfortunately, even with the lidocaine the

dressing changes were painful. Tr. 461:23 – 462:25, 463:13-14, 708:12-16, 836:3 – 837:17.

To change the dressing Dieser would lay on his side with his backside exposed, his wife Sherry put on rubber gloves to protect herself and applied lidocaine, then they had to wait until the skin got numb. Tr. 707:8 – 14, 836:3 – 837:8, 840:8-11. Sherry started with an antibiotic cream and then used a medicine called Panafil which would eat away the dead and decaying tissue. Tr. 707:8 – 708:5, 836:3 – 837:8. Every dressing change Dieser had to have his wife apply the creams into the deepest part of the wound on his backside - her fingers would go in over her first knuckle - and then insert a gauze pad as deep as she could get it. Tr. 707:8 – 708:5, 836:3 – 837:8. They would do the dressing changes in their bedroom with the door closed so that their teenage daughter Dawn did not know what exactly was going on, although she heard them describe it as awful. Tr. 539:25 – 540:8. Dawn sat outside hoping everything was going to work out. Tr. 539:25 – 540:8.

Doing all of this was emotionally difficult for Sherry but she would hide her difficulty to not upset her husband. Tr. 719:4-8, 836:3 – 837:17. That his wife had to do all of this by was upsetting for Dieser, he was embarrassed that she was doing it. Tr. 836:3 – 838:1. It was difficult for Dieser to be unable to take care of himself and have to depend on his wife and others. Tr. 838:2-12.

During this time Dieser needed a special apparatus to raise the height of his toilet. Tr. 835:1-17. Generally, he was having severe discomfort, laying on his side almost exclusively and doing only limited walking. Tr. 466:6-16, 468:7-10. While the pressure

wound was still healing, and for several years after, he had to use a yellow inflatable donut to sit on when he went out. Tr. 256:9-16, 541:13-15. He also had to borrow a van from a family member and lay down in the backseat the entire way to and from Minnesota for a family event. Tr. 256:17 - 258:20. Because of the pressure wound he missed out on his youngest daughter's band concerts and competitions, something that was very important to her, and she missed having him there. Tr. 540:9-14.

When he first left the hospital in February, 2008, Dieser also had to follow up with a plastic surgeon and wound care clinic for 5 ½ months until the pressure wound was initially healed. Tr. 471:23 – 475:11, 459:8-13, 474:6 - 475:7-8, 819:14-19. At almost every visit they measured and photographed the wound on his buttocks and it was embarrassing to strip down and have the nurses and doctors staring at his backside. Tr. 819:20-23, 837:18 – 838:1, 900:8-19. At some visits he had to have the pressure wound cleaned out with a scalpel and at least once the procedure was stopped early due to pain. Tr. 467:17-21, 709:15-23, 839:8 – 840:7. Dieser described the pain of that procedure, even after being numbed by lidocaine as "gross…someone taking a tweezers and find the most sensitive area on your body and they grab it and they pull it and then cut it." Tr. 839:23-25.

Starting in May 2008, almost four months after he got the pressure wound, Dieser was reporting pain at the pressure wound site when bending over and it felt like a knife when he tried to sit down. Tr. 471:13-15, 471:23 – 472:12, 838:13-22. His plastic surgeon found that this pain was being caused by a band of scar tissue that formed as the pressure wound healed. Tr. 471:13-15, 471:23 – 472:12. Scar tissue is different from

regular skin, it is fragile, more susceptible to injury and also not as flexible as regular skin which causes pain with stretching. Tr. 635:9-22, Supplemental Legal File, portions of the deposition of Dr. Michael Chabot read to the jury, page 46 line 24 – page 47 line 21 (SLF 46:24 – 47:21). When Dieser sat down his buttocks would expand and the scar tissue tugged and pulled in response. Tr. 838:13-22. The scar tissue continued to cause problems through July, 2008, and Dieser was told that if the problem did not get better it would have to be surgically repaired. Tr. 472:23 – 474:3.

In October, 2008, the pain was continuing despite Dieser's efforts to treat the problem with ointment and massage as recommended by his doctor. Tr. 475:16 – 23, 476:9 – 477:1. He changed his shower-head in order to be able to get hot water on the scar tissue to help stretch it. Tr. 830:6-19. The pain was marked and sufficient to cause the doctor to recommend surgery to try and fix the problem although there was no guarantee that it would. Tr. 477:14 – 478:12. He had the second surgery under general anesthesia on the pressure wound in November, 2008, nine months after he left St. Anthony's. Tr. 478:16 – 480:2, 819:1-10. The surgery was supposed to remove the scar tissue and replace it with a two inch square piece of skin – a graft - taken from his right thigh, to get as close as possible to Dieser's pre-wound condition. Tr. 478:16 – 480:2, 838:13 – 839:5.

The recuperation from the surgery was painful and it was suggested Dieser have the dressing changed after every bowel movement. Tr. 479:22-25. His wife did all of his dressing changes again, for about another month or two. Tr. 708:18 – 709:14. These dressing changes also required Dieser's wife to clean and apply creams deep into his

gluteal cleft and were very painful. Tr. 461:23 – 462:25, 463:13-14, 480:19-24, 708:12 – 709:14, 840:12-18. Only 30-40% of the graft took and his surgeon found that despite the surgery he still had a thickened scar at the site that wasn't pliable. Tr. 480:14-17, 838:23 – 839:7. From start to finish, it took over a year for the pressure wound to reach maximum healing and Dieser was not finally done with medical care and treatment for it until February, 2009. Tr. 481:7-8, 830:2-5, 840:19-25. The pictures of the wound taken between February 2008, and February, 2009, which were shown to the jury are in Dieser's Second Appendix in date order starting at page A92.

At the time of trial in 2015, Dieser still had problems sitting in a car, bending and lifting and he didn't think it was ever going to go away. Tr. 482:7-13, 900:24 – 901:12. Sitting caused the scar tissue to pull and be uncomfortable causing Dieser to fidget around changing positions. Tr. 710:5-25. He cannot sit for long or short periods of time and cannot firmly sit in a seat without frequently shifting from side to side. Tr. 253:14 – 254:2; 261:22 – 262:1. His doctor recommended that he massage the area with ointment 2 times a day for 5-10 minutes each time. Tr. 482:15-25. No end date for this massage was indicated and no further surgery or treatment was available. Tr. 482:15 - 483:5. He still treats the scar tissue with lots of hot water to keep it as stretched as he can. 900:24 – 901:12. In 2011, Dieser went for a second opinion but was told again that nothing more could be done. Tr. 483:14 – 484:4, Tr. 841:1-13.

Since the pressure wound there is a difference in what Dieser can do, and although it didn't ruin his life, it changed his life. Tr. 254:3-255:15. Although Dieser had had back surgeries in the past, before he went into St. Anthony's he "wasn't running

marathons, but he was mobile. He was able to function and work." Tr. 232:9-11, 678:15-17. He did not have back pain everyday and he did not have to fidget around while sitting to get comfortable. Tr. 254:14 – 255:3, 710:5-25. Although Dieser had peripheral neuropathy from diabetes for many years, in the years before he went to St. Anthony's he was able to go fishing. Tr. 233:8 – 234:3. He was able to go to church every Sunday and sit in the pews. Tr. 803:7-23. Dieser was medically cleared at St. Anthony's for the surgery of January 28, 2008, and on admission St. Anthony's assessed his risk of developing pressure sores as mild. Tr. 390:2-7, 683:23 – 684:8, 981:9-19.

This wound took over Dieser and his family's lives for the year it was healing and he was depressed. Tr. 722:18 – 723:3, 803:23-24, 899:15-900:2. For the first three years it was really painful. Tr. 900:3-8. For a year he was not able to do his favorite thing, mowing the lawn on his riding mower with the "music going in through my headphones." Tr. 899:15-900:2. When he started up mowing again, he would sing "ow, ow, ow" along with music when it hurt going over bumps. Tr. 899:15-900:2. At trial, he still had problems with it and mowed his lawn about once a week or even every two weeks, compared to three times a week before. Tr. 900:3-8, 907:14-18. The worst part of the experience for Dieser was that during the time the wound was getting daily dressing changes and trying to heal, he and his wife didn't have any sexual life. Tr. 899:5-11.

Having the wound and everything that goes with it has also affected Dieser emotionally, he feels betrayed and deceived by St. Anthony's in part because he is a Catholic. Tr. 892:4-10, 893:17 – 894:1. No one from the hospital ever told Dieser back at the time why he got the wound. Tr. 830:19 – 831:3, 893:17 – 894:1. Dieser feels like

"St. Anthony's wants to cast me off to the side and say it's your fault, you deal with it. Yes, I am angry." Tr. 893:17 – 894:1. Every month, even 7 years later, when he gets an advertising magazine from the hospital it feels like a slap in the face. 893:17 – 894:1, 898:21-23. Every magazine has a mission statement claiming fantastic care for every patient and Dieser does not feel that he got that. Tr. 898:21 – 899:3. Having the pressure wound on top of recovering from the pancreatic surgery took a long time, was far more painful than the pancreatic surgery and is something Dieser will never forget. Tr. 835:21 – 836:2. He is scared to go into any hospital because of what happened to him at St. Anthony's. Tr. 901:13-17.

Scar tissue tends to contract further over time to some degree. Tr. 635:23-636:3. The continued existence of the scar tissue puts Dieser at increased risk for future pressure wounds. Tr. 636:11-21. It will take a lot less pressure over a lot less time to get another pressure wound and any wound he gets is more likely to be very severe. Tr. 636:11-21. Dieser's future life expectancy at the time of trial was another 17.8 years. Tr. 908:7-16. The jury was told during closing that they could give more, less or nothing at all. Tr. 1183:10-13. The jury was instructed pursuant to MAI 3.01 that it could not find in favor of Dieser unless it found that St. Anthony's was negligent and its negligence caused Dieser's damages. LF 182-183, Tr. 1178:2 – 11:81:13. Negligence was properly defined by the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of St. Anthony's employees' profession. LF 182-183. St. Anthony's submitted a converse instruction reinforcing the necessity of finding

negligence before entering a verdict in favor of Dieser. LF 184. The verdict was in favor of Dieser and signed by ten out of twelve jurors. LF 203.

DIESER'S RESPONSES TO ST. ANTHONY'S POINTS RELIED ON

I. DIESER'S RESPONSE TO ST. ANTHONY'S POINT RELIED ON NUMBER ONE REGARDING "NEVER EVENTS".

Standard of Review

The standard of review for this issue is the same whether it is couched as an error in allowing improper evidence, cross-examination, impeachment/contradiction testimony or closing argument. Trial courts have broad discretion over the admissibility of evidence and their decisions should not be reversed without a clear showing of abuse. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. 2010) (citing *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003)). "It is well established that the extent and scope of cross-examination in a civil action is within the discretion of the trial court and 'will not be disturbed unless an abuse of discretion is clearly shown.'" *Klotz*, 311 S.W.3d at 760 (citing *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 868–69 (Mo. banc 1993). The admission or exclusion of impeachment testimony is also within the discretion of trial court and it is granted wide-latitude to determine the materiality of any proposed impeachment evidence. *State v. Dunn*, 817 S.W.2d 241, 245 (Mo. banc 1991), *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000). This is especially true with cross-examination of the adverse party's expert witness. *Callahan*, 863 S.W.2d at 868-869. In the same way, the trial court has extensive discretion over closing argument and its decisions are reviewed for an abuse of discretion. *Klotz*, 311 S.W.3d at 766.

A trial court's ruling will not constitute an abuse of discretion unless it is "clearly against the logic of the circumstances … and is so unreasonable and arbitrary that it

shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014); *McGuire v. Seltsam,* 138 S.W.3d 718, 720 (Mo. 2004). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *In re Care and Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. banc 2014). As this Court has stated, "a trial court's discretionary ruling … is presumed … correct, and … the burden of showing abuse of that discretion is on" the party challenging the ruling. *Shirrell v. Missouri Edison Co.*, 535 S.W.2d 446, 448 (Mo. 1976). In evaluating decisions made during trial, "it is well settled that if the action of the trial court was proper on any ground … such action will be upheld." *Franklin v. Friedrich*, 470 S.W.2d 474, 476 (Mo. 1971). Also, the trial court's actions must be judged in light of the evidence "then before the court." *Lozano*, 421 S.W.3d at 451.

Last but not least, St. Anthony's cannot justify a new trial just by showing error and instead, pursuant to "both statute and rule, an appellate court is not to reverse a judgment unless it believes the error … materially affected the merits of the action." *Lozano v. BNSF Ry. Co.*, 421 SW3d 448, 451 (Mo. banc 2014).

The Testimony About "Never-Events" Was Appropriately Allowed During Cross-Examination Of An Expert Witness.

An important purpose of the right to cross-examination is the right to challenge the veracity of a witness's testimony through the process of impeachment. *State v. Johnson*, 700 S.W.2d 815, 817 (Mo. banc 1985). A party should be given wide latitude during cross-exam to test the value and accuracy of a witness's opinion. *Callahan v. Cardinal*

Glennon Hosp., 863 S.W.2d 852, 869 (Mo. banc 1993). Although some cases make a distinction between impeachment and contradiction – the latter being where other factual evidence is used to challenge the accuracy of the witness's statement – the rules are the same. *Mitchell v. Kardesch*, 313 S.W.3d 667, 675 n.4 (Mo. banc 2010). The credibility of witnesses is always a relevant issue in a lawsuit and "evidence creating or highlighting a contradiction … inherently affects credibility by undermining confidence in the reliability of the … testimony." *Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. 2010).

It has long been the rule in Missouri that "the contents of suitable publications properly identified may be used to test the witness' familiarity with the subject matter" and this is true whether or not the publication would be independently admissible. *Faught v. Washam*, 291 S.W.2d 78, 84 (Mo. 1956) (citing *Wiener v. Mutual Life Ins. Co.*, 179 S.W.2d 39, 44)). In a car crash case, this Court found no error in a trial court's decision to allow cross-examination of an expert with the "Missouri Driver's Guide" without mention of any particular foundation other than the presumed general reliability of the publication. *Faught v. Washam*, 291 S.W.2d 78, 84 (Mo. 1956). It is appropriate to cross-examine an expert about facts not in evidence. *State v. Goodwin,* 43 S.W.3d 805, 817 (Mo. 2001) (citing *State v. Parker*, 886 S.W.2d 908, 927 (Mo. banc 1994)).

It is also appropriate to cross-examine an expert witness about matters otherwise usually inadmissible. This Court has approved a trial court's decision to allow cross-exam of an expert about appellate court opinions because the expert testified those decisions helped form the basis of his opinions. *In the Matter of the Care and Treatment of Spencer,* 123 S.W.3d 166, 168 (Mo. banc 2003). This Court has also upheld the trial

court's decision to allow cross-examination of an expert witness with details about the defendant's prior criminal history because the expert testified he had reviewed the materials. *State v. Taylor*, 134 S.W.2d 21, 25 (Mo. banc 2004). Finally, a party who introduces evidence relating to a particular issue may not object when an adverse party introduces additional evidence in response. *State v. Weaver*, 912 S.W.2d 499, 510 (Mo. 1995). This is true even if the initial evidence would otherwise normally be inadmissible. *State v. Crocker*, 275 S.W.2d 293, 296 (Mo. 1955); *State v. McFall*, 737 S.W.2d 748, 750 (Mo. App. 1987). Similarly, having introduced testimony on any particular topic a party cannot then "object to a continuation of the evidence by the opposing party aimed at 'refuting adverse inferences arising from the incomplete nature of the evidence.'" *Wilson v. Shanks*, 785 S.W.2d 282, 285 (Mo. banc 1990).

In this case, the "never event" testimony came in on cross-exam of St. Anthony's expert about the definition of an "unavoidable" pressure wound specifically how that word is defined and understood by national standards and publications, and, how that term is understood in the national wound care community. On direct examination, St. Anthony's expert Krasner explained to the jury how she and others in the pressure wound community rely upon standards and definitions published by certain national organizations, including The Centers for Medicare and Medicaid Services (CMS). Tr. 1013:17 – 1014:5. Krasner agreed that the government is involved in setting these standards and, on cross-exam, that "regulatory issues have enormous impact on the quality of care as well as the actual outcomes of care delivered." Tr. 1014:10-13, 1145:9-17. Krasner then testified that the definition of an "unavoidable" pressure wound set out

in standards published in 2014, 2010 & 2004 supported her opinion that Dieser's pressure wound was unavoidable in this case. Tr. 1036:16 – 1038:2, 1047:1-7, 1145:22 – 1146:4. Implicit in this testimony is the argument that because all these other people over all these years agree with Krasner that pressure wounds in patient's like Dieser were "unavoidable," the jury should believe St. Anthony's over Dieser and enter a verdict accordingly.

It was in response to this testimony that Dieser's counsel was allowed, on cross-exam, to ask Krasner about a 2007/2008 definition of "unavoidable" by CMS which she left out of her discussion on direct. Tr. 1145:22 – 1150:24. Trial courts are in a superior position to balance the probative value and prejudicial effect of evidence during the trial. *Saint Louis Univ. v. Geary*, 321 S.W.3d 282 (Mo. 2009). They are, therefore, granted wide-latitude to determine the materiality of any proposed impeachment evidence. *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000). The trial court allowed the cross-examination based on its evaluation of the evidence and the testimony of the expert on direct.

St. Anthony's makes much of its contention that the use of the phrase "never event" is not in the final regulation passed by CMS and assumes that if that is true, the admission of the testimony was error. The cross-examination here was proper no matter what the final regulation may say. At the time of its ruling allowing the cross-exam the trial court had the following information regarding the phrase "never-event":

- A letter from CMS, admitted only for purposes of an offer of proof, specifically using the phrase "never event" in reference to Stage IV hospital acquired pressure

wounds and explaining that as of 10/1/08, it would no longer pay for costs associated with Stage IV hospital acquired pressure wounds, in part because CMS had determined those events to be "reasonably preventable through application of evidence-based guidelines. LF 157-161 at 157-158; DSA A84-88.

- Testimony from a former St. Anthony's nurse Gail Lupien, who specializes in pressure wounds, that a hospital acquired Stage IV pressure ulcer is considered a "never-event" and that the phrase is defined as an event that CMS says should never happen. Tr. 988:20 – 989:9.
- A quotation from a book edited by Krasner, and which was referred to by her on direct exam, which states "Regulatory issues and reimbursement mechanisms have enormous impact on the quality of care … and the actual outcomes of care delivered." Tr. 1015:13-22, 1017:9-12; DSA A89-91.
- Testimony from Krasner that in forming her opinions she relied upon national standards and definitions including ones from CMS and ones from after the negligent events in question (2010 and 2014). Tr. 1036:16 – 1038:2, 1047:1-7.
- Testimony from St. Anthony's corporate designee in front of the jury, and without any motion to strike, claiming that Dieser's wound was not a "never event". Tr. 282:13 – 283:1.
- Testimony during cross-exam, without any request to strike, from Dieser's physician expert Dr. Rushing that federal guidelines are an appropriate source of prevention measures. Tr. 666:17 - 667:21.

- Testimony from Dr. Rushing on an offer of proof that CMS, as a regulatory body, has stated that a stage IV pressure wound acquired in the hospital shouldn't happen, is a never-event and is almost always preventable no matter what the patient's other health conditions. Tr. 617:18 - 618:24.

There was ample evidence that the phrase "never-event" was widely known to those in the pressure wound community, and, that the phrase was commonly understood to mean an event that is usually preventable. The trial court carefully considered all of the evidence regarding the issue over the course of the week and presumably determined that the phrase was not unduly prejudicial and the topic was an appropriate subject for cross-examination of St. Anthony's main expert witness. This was not error but classic cross-examination of an expert. *Faught v. Washam*, 291 S.W.2d 78, 84 (Mo. 1956) (holding proper to cross-examine and expert with the contents of publications to test the witness' familiarity with the subject matter).

While the extensive discussion in St. Anthony's brief about the history of the term "never event", much of it without any citation, and the submission of medical journal articles and other publications on this appeal may be interesting, none of these materials were presented to the trial court or to the jury and should, therefore, be disregarded. *McHaffie v. Bunch,* 891 S.W.2d 822, 830 (Mo. banc 1995) (citing *Nelson v. Waxman*, 9 S.W.3d 601, 605 (Mo. 2000) (a party is not permitted to advance on appeal an objection different from that stated at trial); LF 115-116, 134-139, 249-254. In addition, if it is true that the phrase was intentionally used by the wound care community because of its "extra psychological charge", isn't that just more evidence of the severity of the problem with

wounds like Dieser's and the ease with which most professionals think the problem can avoided? *See, e.g.,* A. Milstein, *New England Journal of Medicine,* St. Anthony's Appendix, p.10. In fact, St. Anthony's discussion makes clear what Dieser has been arguing all along: that everyone in the wound care community knows all about "never events" and understands that to mean a "serious" event that CMS won't pay for because it is "largely preventable" with standard care. *See* J. Crist, *Never Say Never: "Never Events" in Medicare,* St. Anthony's Appendix, p.48. Whether called "never events" or "serious reportable events", wounds like Dieser's are considered preventable in hospitalized patients. This is contrary to St. Anthony's position at trial that Dieser's serious wound was "unavoidable", and, therefore, a permissible subject for cross-exam.

During the questioning on cross-exam, Krasner agreed that the term "never event" had been used with reference to pressure wounds like Dieser's since 2001. Tr. 1146:22-25, 1147:7-17. She also agreed that although the phrase did not make it to the final regulation in 2008, CMS did declare that it would not pay for hospital acquired Stage IV pressure wounds because those wounds are usually preventable. Tr. 1146:22-25, 1147:7-17, 1150:7-24; DSA A84-85. Krasner made clear that she disagreed with the rationale that Stage IV pressure wounds are preventable, but agreed that it was in fact the rationale behind the CMS regulation in 2007/2008. Tr. 1150:14-24.

Dieser was properly allowed to introduce this additional testimony about the existence of national standards and definitions for the purpose of rebutting St. Anthony's characterizations. *See State v. Weaver*, 912 S.W.2d 499, 510 (Mo. 1995) (holding that a party who introduces evidence relating to a particular issue may not object when an

adverse party introduces additional evidence for the purpose of rebuttal). It was not error to allow the cross-examination on "never events" as the credibility of witnesses is always a relevant issue in a lawsuit, and, this impeachment undermined the expert's credibility by highlighting a contradiction in her evidence and reasoning. *Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. 2010) (holding that evidence creating or highlighting a contradiction inherently affects credibility by undermining confidence in the reliability of the testimony).

The Testimony About "Never Events" Was Relevant.

If St. Anthony's is correct that any regulation or guideline not in effect at the time of the negligence in question is irrelevant then Krasner's testimony on direct regarding 2014 and 2010 standards was inappropriate for the same reason. Tr. 611:14-612:7, 1036:16 – 1038:2, 1047:1-7, 1145:22 – 1146:4. Instead, post-negligent publications was relevant to the issues in this case. Under Missouri law, evidence of industry standards and regulations is admissible proof in a negligence case. *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 772 (Mo. 1989); *Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 821 (Mo. banc 2000) (holding that federal regulations are competent evidence). In a medical negligence case, national standards and guidelines are relevant to the standard of care as long as there is also expert testimony which properly defines the standard of care and establishes that the defendant's negligence caused the plaintiff's damages. *Dine v. Williams*, 830 S.W.2d 453, 457 (Mo. App. 1992) (citing *Pierce*, 769 S.W.2d at 772 (Mo. 1989)). On direct exam, St. Anthony's expert was allowed to testify to the content of national definitions of "unavoidable" without having to produce to the judge or show the

jury any actual publications, and Dieser was allowed to conduct the cross-exam using "never events" under the same standard. Section 490.065; Tr. 1008:6 – 1098:25, 1143:20 – 1155:23.

Other states have held that standards and regulations from Medicare and other administrative bodies are relevant to the standard of care in a medical negligence case. *Koch v. Northport Health Srv's of Arkansas, LLC*, 205 S.W.3d 754 (Ark. 2005) (upholding use of Medicare regulations as evidence of negligence to be considered by the jury if the standard of care is otherwise shown); *Madison by Bryant v. Babcock Ctr., Inc.*, 638 S.E.2d 650 (S.C. 2006) (holding that fact finder may properly consider administrative regulations in determining whether defendant breached the standard of care); *Frantz v. HCR Manor Care, Inc.*, 2003 WL 23473921 (Pa. Cm. Pl. 2003) (finding that Medicare regulations properly used as evidence that defendants failed to conform to the standard of care even though regulations could not be used to prove negligence *per se*); *and Pirreca v. Koltchine, MD,* 2012 WL 5278712 (Conn. Super. 2012) (finding that regulations can be evidence of negligence as long as an expert testifies to the standard of care).

There is no question that Dieser presented evidence from his experts establishing the standard of care and that it was breached by St. Anthony's, and there is no challenge to the submissibility of any part of the case. Tr. 365:7-11, 426:14 – 427:9, 428:19 – 429:16, 624:9 - 631:23, 626:1-11. Whether or not the term "never event" was used and no matter when the regulation came into effect, that Medicare regulations at any time determined that pressure wounds like Dieser's should not normally happen with good

care was properly used in cross-examination to show that St. Anthony's did not meet the standard of care. Tr. 617:18-618:14. *See e.g. Spalding v. Stewart Title Guar. Co.*, 463 S.W.3d 770, 780 (Mo. 2015) (holding that incorrect assumptions in foundation for expert's opinions go to weight not admissibility). It was clear from the testimony that pressure wounds like Dieser's have been considered "never events" for many years spanning the time before and after the negligent events in question here. 1145:22 – 1146:25, Tr. 1047:1-7; DSA A84-88.

As to the question of national standards being relevant to causation, Dieser submits that St. Anthony's itself used post-negligent publications to support its argument that this pressure wound was unavoidable thereby accepting their relevance. 1145:22 – 1146:4, Tr. 1047:1-7. Dieser offered the "never events" testimony for the same purpose: to prove that the wound care community believes the opposite, that with standard care this pressure wound would probably have been prevented. Tr. 1147:7-17, 1150:7-24; DSA A84-88. Under these circumstances, the evidence was relevant. *Snellen v. Capital Region Med. Ctr.*, 422 S.W.3d 343, 354 (Mo. App. 2013) (holding that post-negligent publications may be relevant to causation).

Evidence admissible for one purpose should be admitted whether or not that evidence is incompetent on another issue at trial. *Rodriguez v. Suzuki Motor Corporation*, 936 S.W.2d 104, 109 (Mo. banc 1996) (holding evidence of subsequent remedial measures admissible in negligence claim because it is properly considered on claims for strict liability). When evidence is irrelevant on one issue but appropriate on another, the party objecting to the admission of the evidence should request a withdrawl

instruction. *State v. Goodwin*, 43 S.W.3d 805, 817 (Mo. 2001) (citing *State v. Smith*, 32 S.W.3d 532, 550 (Mo. banc 2000) (noting proper to request and submit instruction under MAI Chapter 34 on limiting instructions when evidence admitted not relevant to an issue at trial). St. Anthony's did not request or submit any proposed withdrawl instruction to inform the jury that "never events" should only be considered on causation. LF 176 – 187. Having failed to ask for an instruction, St. Anthony's cannot complain now about a potential for confusion arising from that failure.

The Phrase "Never Event" Did Not Impermissibly Inject Insurance

As to St. Anthony's argument that use of the phrase "never event" improperly introduced an issue of reimbursement or insurance, it was St. Anthony's corporate designee who first used the phrase when she volunteered it saying "you try to do everything that you can to prevent [a pressure wound], but it's not a never event or whatever you want to say." Tr. 282:13 – 283:1. If the complaint is specifically to the words "Medicare" or "Medicaid", again, it was St. Anthony's witness who first used these words on direct examination, specifically in reference to CMS's involvement in setting out national definitions of what is and is not an "unavoidable" pressure wound. Tr. 1036:16 – 1038:2. The terms reimbursement and payment were only used when they were volunteered by St. Anthony's expert Krasner on cross-exam and St. Anthony's made no motion to strike the testimony during trial. Tr. 1147:23 – 11:49:6. In contrast, Dieser intentionally left out the words "reimbursement mechanism" along with "payments for providers" when quoting Krasner's book in front of the jury. *Cf.* Tr. 1145:9-17 and DSA A91.

Having volunteered the phrase "never-event" as well as introduced the topic of national standards and definitions, St. Anthony's cannot now complain that it was an abuse of discretion for the trial court to allow Dieser to further explore these areas with contradictory evidence on cross-exam. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. 2010) ("When evidence of one of the issues in the case is admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may be properly considered even if the evidence would have been excluded upon a proper objection.") (citing *Reinert v. Dir. of Revenue*, 894 S.W.2d 162, 164 (Mo. banc 1995)). *See also Wilson v. Shanks*, 785 S.W.2d 282, 285 (Mo. banc 1990) (holding that a party cannot "object to a continuation of the evidence by the opposing party aimed at refuting adverse inferences arising from the incomplete nature of the evidence").

In addition, even if the evidence about "never events" somehow raised an issue of reimbursement or insurance, the "mere use of the word 'insurance' does not alone warrant reversal or a mistrial." *Saint Louis Univ. v. Geary*, 321 S.W.3d 282, 293 (Mo. 2009) (finding that even if was error to mention insurance during voir dire, error must be prejudicial to justify reversal). Instead, the existence of an insurance company and its involvement in an injury case can be relevant during cross-examination of an expert witness. *Schuler v. St. Louis Can Co.,* 18 S.W.2d 42, 46 (Mo. 1929).

Use Of The Phrase "Never-Event" Did Not Change

The Case Into One For Strict Liability or Negligence Per Se.

St. Anthony's also argues that by talking about "never events" Dieser somehow changed the case into one for strict liability or negligence *per se*. There is no challenge to

the correctness of any of the instructions given to the jury and it was instructed pursuant to MAI that it could not find in favor of Dieser unless it found that St. Anthony's was negligent and its negligence caused Dieser's damages. LF 182-183. Negligence was properly defined by the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of St. Anthony's employees' profession. LF 182-183, Tr. 1178:2 – 11:81:13. St. Anthony's submitted a converse instruction reinforcing the necessity of finding negligence before entering a verdict in favor of Dieser. LF 184. The verdict was in favor of Dieser and signed by ten out of twelve jurors. LF 203. It is, therefore, presumed that the jury properly found that St. Anthony's was negligent before it found in Dieser's favor. *State v. Johnson*, 284 S.W.3d 561, 574 (Mo. 2009) (possible error in closing nullified by presumption that jury follows the instructions as given).

St. Anthony's finds significant the one mention of "never events" in closing argument, perhaps indicating that this is the origin of its complaint about the case changing into one for strict liability. However, Dieser did not argue strict liability or anything close to it in closing argument. Tr. 1171:9 – 1188:16, 1204:3 – 1218:15. Instead, counsel reiterated, just a few minutes after the statement about "never events", the verdict director's admonition not to find in favor of Dieser unless they believed St. Anthony's was negligent and the negligence caused his damages. Tr. 1178:2-9 – 1181:13. There is no indication the jury did anything other than follow these instructions as given. LF 203.

Use of "Never Events" Did Not Materially Affect The Merits Of The Action

Even if this Court assumes an abuse of discretion in the trial court's rulings allowing use of the phrase "never event", St. Anthony's cannot show that any supposed error prejudiced it or materially affected the merits of the action. *Lozano v. BNSF Ry. Co.*, 421 SW3d 448, 451 (Mo banc 2014) (error is not reversible on appeal unless prejudice is shown). Out of 1226 pages of transcript, the jury heard the term "never event" a total of twelve times, it appears on only six different pages. Tr. 282:15, 1146:10, 16, 22, 24; 1147:12, 17, 20, 23; 1149:19; 1150:2-3; 1174:18. Other than the brief exchange during cross-examination of expert witness Krasner discussed above, "never event" was mentioned once by St. Anthony's corporate designee and once in closing when Dieser's counsel argued "a Stage IV all the way down to the bone pressure ulcer in their hospital while he's recovering from surgery and in the ICU, when his body is in their hands. That's what happened here, and that is not acceptable. That is what is known as a never event or a serious reportable event, and that's what happened here." Tr. 282:13 – 283:1; 1174:14-19. A few minutes later, Dieser's counsel told the jury they should not find in favor of St. Anthony's unless they believed the hospital was negligent and the negligence caused Dieser's damage. Tr. 1181:9-13.

During trial the jury heard from two different experts, without objection, that St. Anthony's negligence caused Dieser to get the pressure wound and allowed the wound to progress to Stage IV. Tr. 365:7-11, 426:14 – 427:9, 428:19 – 429:16, 624:9 - 631:23, 626:1-11. The very limited use of a phrase that is known in the pressure wound community to refer to a "serious" and "largely preventable" event could not reasonably

have materially affected the result in this case. It cannot be that justice requires the whole case be sent back and re-tried because Dieser used the phrase "never event" as a synonym of "serious reportable event", the latter being the correct phrase if one assumes as true the testimony from witness Krasner. Tr. 1147:18-22, 1149:10-12.

In response to St. Anthony's argument that the phrase "never event" prejudicially inflamed the jury by injecting insurance or issues of reimbursement, there can be no prejudice as the jury was given MAI 2.07 in which they were instructed not to consider or discuss any reference to insurance in arriving at their verdict. LF 185; *State v. Johnson*, 284 S.W.3d 561, 574 (Mo. 2009) (possible error in closing nullified by presumption that jury follows the instructions as given).

It also cannot be said that any supposed error was so prejudicial that it "deprived the defendant of a fair trial." *State v. Tisius*, 362 S.W.3d 398, 407 (Mo. 2012) (citing *State v. Winfrey*, 337 S.W.3d 1, 6 (Mo. banc 2011)). That the pressure wound was unpreventable given Dieser's other health conditions and illnesses was a main theme in St. Anthony's case that began in opening. Tr. 212:1-15, 215:6-7. St. Anthony's reinforced this theme with almost every witness explaining their position that what the nurses did or did not do should not matter because this pressure wound was unavoidable. *See, e.g.,* Tr. 282:13 – 283:1, 980:22 – 981:1-10, 1018:20-24. They also had five different witnesses testify that St. Anthony's was not negligent and did everything they could have to avoid this injury. Tr. 360:24 – 361:2, 778:9-17, 887:1 – 888:20, 980:22 – 981:1-7, 1149:13 – 1151:10. St. Anthony's was allowed to put on exactly the case it

wanted to and the jury rejected it. There was no prejudicial error which affected this verdict.

Finally, there can be no prejudice in this case because when Krasner was asked the few questions about "never-events" she specifically denied the supposedly prejudicial proposition "that in 2007 or 2008 [CMS] had declared that Stage III or IV pressure wounds acquired in the hospital were to be considered never events." Tr. 1146:7-12. Krasner was also allowed to explain to the jury during cross and re-direct all of her opinions about what a "never event" is, and is not, along with a full explanation of why the concept did not apply to Dieser's wound. Tr. 1146:5 – 1148:1, 1149:13 – 1151:10, 1155:2-11. She told the jury that the wound care community does not use the phrase anymore and explained, although it is not entirely clear in the transcript, that they now use the phrase "serious reportable event." Tr. 1147:18-22, 1149:10-12 (Krasner testified, when the intervening side-bar argument is removed, "the National Quality Forum at some point…called it something else that I can't remember right now. It's a different word…The Court: Hold on one second please proceed. Q: What's that? A. Serious reportable event.") Contrary to St. Anthony's position, these denials do not mean the evidence should have been disallowed and instead the jury was free to believe or disbelieve any or all of her testimony. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 770 (Mo. 2010) (citing *Georgescu v. K Mart Corp.*, 813 S.W.2d 298, 299 (Mo. banc 1991)).

According to Krasner a "never event", a "serious reportable event", and, CMS's definition of "unavoidable" are all the same: one where "you do everything humanly

possible … use the best technology you have available and then if in spite of doing all of those things that we have in our toolkit, the person still gets a pressure ulcer...". Tr. 1146:15-25, 1150:17-24. Dieser argued throughout trial this exact same standard and the jury believed Dieser's evidence that this wound was not "unavoidable" because St. Anthony's failed to do everything possible, use all available technology and give Dieser the benefit of all its tools. Tr. 624:7 – 632:6, 1150:25 – 1151:20.

Notwithstanding the brief use of the phrase, the jury had plenty of evidence from which they could have found either that St. Anthony's was not negligent or that any negligence was irrelevant because this pressure wound was "unavoidable". They, the ultimate arbiter on all questions of fact including the weighing of medical testimony, chose not to agree and entered a verdict for Dieser. *Mitchell v. Kardesch*, 313 S.W.3d 667, 683 (Mo. 2010) (holding that factual determinations of matters in dispute, including the weighing of medical opinions, rest solely within the province of the jury). This verdict should not be disturbed.

II. DIESER'S RESPONSE TO ST. ANTHONY'S POINT RELIED ON NUMBER TWO REGARDING THE DISCUSSION OF THE BURDEN OF PROOF DURING VOIR DIRE.

Standard of Review

The trial court's denial of a motion for new trial is reviewed under an abuse of discretion standard and this Court "must indulge every reasonable inference favoring the trial court's ruling." *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39 (Mo. 2013) (citing *Ashcroft v. TAD Resources Intern.,* 972 S.W.2d 502, 505 (Mo. App. 1998)). An abuse of discretion occurs if a trial court's decision was clearly against reason and results in prejudice against the party seeking the new trial. *Badahman*, 395 S.W.3d at 39 (citing *Criswell v. Short,* 70 S.W.3d 592, 594 (Mo. App. 2002). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *In re Care and Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. banc 2014). As this Court has stated, "a trial court's discretionary ruling … is presumed … correct, and … the burden of showing abuse of that discretion is on" the party challenging the ruling. *Shirrell v. Missouri Edison Co.*, 535 S.W.2d 446, 448 (Mo. 1976). With respect to voir dire, the trial court has considerable discretion controlling the examination and that discretion will not be disturbed absent "a manifest abuse of discretion *and* a real probability of injury to the complaining party." *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39 (Mo. 2013) (emphasis in the original, citing *State v. Olinghouse,* 605 S.W.2d 58, 68 (Mo. banc 1980)).

Dieser's Questions Regarding The Burden Of Proof Were Appropriate

The trial court's discretion to control voir dire is exercised with the understanding that counsel should be given wide latitude in questioning prospective jurors. *Badahman*, 395 S.W.3d at 39 (citing *Littell v. Bi–State Transit Dev. Agency,* 423 S.W.2d 34, 37 (Mo. App. 1967). This is true because both parties in a lawsuit have the constitutional right to a fair and impartial jury. Mo. Const. art. I, sec. 22(a); *Beggs v. Universal C.I.T. Credit Corp.,* 387 S.W.2d 499, 503 (Mo. banc 1965). The Court's grant of discretion to counsel during voir dire also recognizes that "bias often lies deep within the minds of prospective jurors…." *State v. Brown*, 547 S.W.2d 797, 799 (Mo. 1977) (citing *Littell*, 423 S.W.2d 34 (Mo. App. 1967)). The most basic purpose of voir dire is to provide an opportunity to expose prejudices or biases that would prevent prospective jurors from serving as fair and impartial jurors. *Smith v. Associated Natural Gas Co.,* 7 S.W.3d 530, 533 (Mo. App. 1999).

Section 494.470(2) defines as ineligible anyone unwilling to follow the instructions stating "Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case." While counsel may be discouraged from having long detailed discussions with prospective jurors about the law, it is appropriate to ask whether a venire woman would have a personal conviction against applying a particular instruction if instructed to do so by the court. *Duensing v. Huscher*, 431 S.W.2d 169, 172 (Mo. 1968). Specifically, the right to ask about opinions towards the burden of proof in a case is vital to the party's right to an unbiased jury. *State v. Brown*, 547 S.W.2d 797, 800 (Mo. 1977); *Littell v. Bi-*

State Transit Dev. Agency, 423 S.W.2d 34, 37-38 (Mo. App. 1967).

This right includes the ability to draw analogies or use illustrations in an attempt to explain what the burden of proof means in the context of the case. This Court has explained that during voir dire, counsel is allowed to make attempts "to explain the mechanics of the trial process and the role of the jury in assessing evidence presented by the state or by the defendant." *State v. Anderson*, 79 S.W.3d 420, 443 (Mo. 2002) (citing *State v. Christeson*, 50 S.W.3d 251, 266 (Mo. banc 2001)). Case law recognizes that counsel is allowed to go beyond the exact language of the instructions and this Court found no prejudicial error in a prosecutor's question whether there was "anyone here who would expect me to be able to prove the defendant is guilty to a one hundred per cent total absolute certainty?" *State v. Thompson*, 588 S.W.2d 36, 38-39 (Mo. App. 1979). This Court has also found no error with a prosecutor's question on voir dire, presumably regarding the burden of proof, with the analogy "Is there anyone who cannot find the defendant guilty unless they put a gun in her hand?" *State v. Copeland*, 928 S.W.2d 828, 851 (Mo. 1996), *overruled on other grounds* by *Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008). Similarly, there was no prejudicial error in another prosecutor's attempts to explain that the burden of proof does not require the weapon be in evidence with illustrations like "[C]an you think of a case where someone might throw the weapon in the Mississippi River, for example?" *State v. McFadden*, 369 S.W.3d 727, 746 (Mo. 2012). Finally, there was no plain error in counsel's discussion during voir dire about three doors in one hallway as an appropriate attempt at explanation of the jurors'

decision-making process in relation to the burden of proof. *State v. Tokar*, 918 S.W.2d 753, 769–70 (Mo. banc 1996).

In this case, Dieser's counsel unsurprisingly started a discussion about the civil burden of proof with a comparison of the well-known and significantly higher burden of proof in criminal cases. Dieser's counsel explained that, unlike in civil cases, in criminal cases the jury cannot base their finding on what is simply probable. Tr. 126:4 - 127:6. St. Anthony's objection to this explanation of the burden was sustained. Tr. 127:10. Dieser's counsel then discussed the concept of more likely true than not true, told the jury that 51% certainty could be enough under the standard, and, stated that the standard did not require 60-90% certainty, just more likely than not. Tr. 127:11 – 12:18. St. Anthony's objected to the implication that 1% was enough without also stating that the burden was on Dieser and not St. Anthony's, and, to the use of percentages generally. Tr. 128:19 – 129:22. The objection was sustained. Tr. 128:19 – 129:22.

St. Anthony's then objected to Dieser's counsel being allowed to ask any further questions on the burden of proof and that objection was overruled. Tr. 129:22-130:5. Dieser's counsel went on and asked the panel whether anyone would hold him to a higher standard of proof than more likely than not, for instance by requiring 80-90% certainty. Tr. 130: 9 -21. St. Anthony's objected to the use of these percentages and the objection was overruled. Tr.130-131. Next, in talking with a venireman who had answered the last question, Dieser's counsel used gestures to illustrate the scales of justice, and said "more likely true ... [c]ould be like this, and I think we will show more like this." Tr. 131:3-23. St. Anthony's objected to the gesturing, and the trial court overruled the objection but

told Dieser's counsel that "getting into percentages causes me some concern" and to stick to the language of the instruction. Tr. 132:6 – 133:4. Dieser's counsel did not use any more percentages, but did make the comment that the jury could have reasonable doubt in a civil case. Tr. 133:10 – 134:10. St. Anthony's objected to the question arguing that counsel was lecturing, that objection was overruled and no more objections were made to burden of proof questions. Tr. 134:11 – 135:3.

Missouri Courts of Appeal often use probabilities and percentages as an important factor in determining whether something is "more likely to be true than not true." Statistical evidence of survival rates above 50% are commonly used to support an expert's testimony that but for medical negligence, the decedent would likely have survived. *See e.g. Schiles v. Schaefer*, 710 S.W.2d 254, 259-261 (Mo. App. 1986) (holding expert's testimony that at least 75% of the time people who get timely care do not die sufficient to support opinion that negligence caused death); *Baker v. Guzon*, 950 S.W.2d 635, 647 (Mo. App. 1997) (finding expert's opinion that negligence more probably than not caused the death supported by statistic of an 80% likelihood of survival). This Court has said that the "more likely than not" standard is "[i]n reality, … merely a restatement that the burden of proof in tort cases is usually preponderance of the evidence." *Wollen v. DePaul Health Ctr.,* 828 S.W.2d 681, 685 (Mo. 1992).

Trial counsel often use fifty-one percent to explain the civil burden of proof and the appellate courts have, in reviewing voir dire questions on other grounds, not mentioned any legal issue with the use of 51%. *See e.g. Gleason v. Bendix Commercial Vehicle Sys., LLC*, 452 S.W.3d 158, 168-174 (Mo. App. 2014) ("Could you, sir, apply

that burden of proof … that we expect Judge Chamberlain to apply to the jurors if you're selected to be on this jury, 51 percent?"); *Williams v. Jacobs*, 972 S.W.2d 334 (Mo. App. 1998) (arguments from counsel in closing about more likely than not being equivalent to 51%). *See also Shefkiu v. Worthington Indus., Inc.,* 15 N.E.3d 394, 396 (Oh. 2014) (trial court explained to venireman that preponderance of the evidence did not mean 90% sure but is "more likely than not, or 51 percent."). In terms of referencing the scales of justice, it is difficult to imagine what the scales were originally intended to represent if not the weighing of evidence and the burden of proof. Perhaps more difficult to imagine is that a litigant could suffer harm from a reference to those venerable scales in a court of law.

When Dieser's counsel discussed the burden of proof in voir dire, she time and again correctly stated the burden as more likely true than not true. The use of the word "more" in MAI 3.01 necessarily sets up a weighing or quantification process – is fact A more likely true than not true? The burden of proof is not "substantially more likely" or "clearly and convincingly more likely" – it is just "more likely." Without any specification of how much "more" is good enough, the language of 3.01 permits the reasonable conclusion that slightly more likely is sufficient. The use of numbers, percentages and scales is natural and reasonable in talking about what is more likely than not. It cannot be reasonably disputed that 51% likely is more likely than 49% likely. Because MAI 3.01 permits a juror to find for plaintiff based on a belief about what is simply "more likely" it was reasonable for Dieser's counsel to try to identify those who would require more.

It is entirely appropriate "to determine if any venireman had a fixed opinion against the principle…[of the applicable burden of proof]. If so, defendant would have a good ground for challenging for cause, or at least peremptorily striking, such a venireman." *State v. Brown*, 547 S.W.2d 797, 799 (Mo. 1977) (reversing a trial court's refusal to allow a defense attorney to ask the venire panel about their abilities to apply the correct burden of proof on the defendant's claims of self-defense). In *Littell v. Bi-State Transit Dev. Agency*, the court of appeals addressed a similar situation when a civil defense attorney was prohibited from asking "(Is there) anybody on the panel who feels that they could not … give effect to the law that … the burden of proof is on the plaintiff to prove negligence?" 423 S.W.2d 34, 36-38 (Mo. App. 1967). The case involved "a large corporation being sued by a working man" and the court discussed the general likelihood that members of the panel would know that in some cases injuries to workers are compensable regardless of fault. *Id.* The court approved the voir dire, noting that "In the interest of justice to the defendant's effort to determine the impartiality of the panel, the trial court should have allowed the question." *Id.*

In this case Dieser was asking the panel about just this kind of bias. All of Dieser's questioning was directed at finding out whether any of the potential jurors would hold him to a higher burden of proof than that required in MAI 3.01. Tr. 127:14 – 128:8, 130:19-20, 133:10 - 134:10. There is no error in allowing this questioning. *See Littell v. Bi-State Transit Dev. Agency*, 423 S.W.2d 34, 37-38 (Mo. App. 1967). This is especially true when, as here, St. Anthony's itself probed for bias against the appropriate burden by acknowledging that more likely than not was different than beyond a reasonable doubt,

and, asking if everyone realized that Dieser had the burden of prove his case. Tr. 162:23 – 163:2, 166:8-20. St. Anthony's also asked whether anyone believed, had the predisposition or attitude "that simply because this pressure ulcer … that Dieser got while he was in St. Anthony's is St. Anthony's fault because it happened while he was at the hospital?" Tr. 159:15 – 21. If it is appropriate for St. Anthony's to ask if the fact of injury alone would be enough, it is appropriate for Dieser to ask how much more likely the potential jurors would require.

Any Supposed Error In Questions About

The Burden Of Proof Were Not Prejudicial

It should initially be noted that the only objections of St. Anthony's that were overruled during Dieser's voir dire questioning on the burden of proof were to: counsel being allowed to continue on the subject at all (Tr. 130:4); the use of the 80-90 percent figure (Tr. 131:2); the hand gestures showing the scales of justice (Tr. 132:22); and, the statements that the civil burden of proof allows for reasonable doubts (Tr. 134:15). Further, even if this Court were to hold that there was some error in Dieser's descriptions of the burden of proof, a new trial should not be granted absent a showing of "a manifest abuse of discretion *and* a real probability of injury to the complaining party." *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39 (Mo. 2013) (emphasis in the original, citing *State v. Olinghouse,* 605 S.W.2d 58, 68 (Mo. banc 1980)).

It is clear that St. Anthony's cannot make this showing as any potential prejudice from counsel's comments was effectively cured with the giving of the correct instruction on the burden of proof at the close of the case. *State v. Anderson*, 79 S.W.3d 420, 443

(Mo. 2002); *State v. Edwards*, 116 S.W.3d 511 (Mo. 2003) (no showing that clear misstatement of the law during voir dire affected the outcome of the case when the proper standard was properly restated multiple other times and the jury was appropriately instructed at the close of the case). *See also State v. Burnfin*, 606 S.W.2d 629, 631 (Mo. banc 1980) (holding that because the proper jury instructions were given, the Court cannot say any comments or arguments by counsel so confused or misled so as to result in manifest injustice or a miscarriage of justice); LF 181; Tr. 1101:13-18. There is certainly no contention here that Dieser's evidence failed to sustain his burden of proof.

Similarly, when it is clear from the entire transcript that the correct standard was advocated for by the parties in front of the jury, it should not be said that comments in voir dire caused a real probability of injury. *State v. Driscoll*, 711 S.W.2d 512, 516 (Mo. 1986) (holding that prosecutor's repeated references to the "innocent people of Missouri" was not prejudicial in light of repeated and forceful advocacy using the appropriate burden of proof). St. Anthony's certainly could have addressed any lingering concerns by pointing out in closing argument that the instruction did not contain any percentages. *See e.g. Williams v. Jacobs*, 972 S.W.2d 334, 344 (Mo. App. 1998). This seems especially true when there is, and never was, any question about the applicable burden of proof. *Littell v. Bi-State Transit Dev. Agency*, 423 S.W.2d 34, 36-38 (Mo. App. 1967) (discussion of burden on plaintiff in civil case was not speculative because the trial court had to instruct on burden of proof by giving MAI 3.01.); *State v. Miller*, 162 S.W.3d 7, 11 &17 (Mo. App. 2005) (no prejudice from the trial court sustaining objection after counsel explained the civil burden of proof by saying "if it's slightly more than not, … I'll

lean this way just a little. If it's fifty-one percent to forty-nine percent… One more check puts them ahead").

The supposed protracted discussion about the burden of proof during voir dire covers, including multiple arguments at side-bar, nine pages of transcript. Tr. 126 – 135. Dieser's entire voir dire covers 124 pages. Tr. 12 – 136. In response to Dieser's voir dire, St. Anthony's addressed the burden of proof multiple times in its questioning by discussing, without objection or interruption, that Dieser has the burden of proving to the jury that it is more likely true than not true that St. Anthony's fell below the standard of care. Tr. 137:9-19, 162:23 – 163:2, 166:8-20. No member of the panel indicated any problem with these statements. Tr. 137:18-19, 162:23 – 163:2, Tr. 166:8-20. As in *State v. Edwards*, 116 S.W.3d 511 (Mo. 2003), even if there was a misstatement of the law, there is no prejudice when the proper standard was restated multiple other times during voir dire and the jury was appropriately instructed at the close of the case.

III. DIESER'S RESPONSE TO ST. ANTHONY'S POINT RELIED ON NUMBER THREE REGARDING DIESER'S TESTIMONY ON RELIGIOUS AFFILIATION

Standard of Review

Trial courts have broad discretion over the admissibility of evidence and its decision should not be reversed without a clear showing of abuse. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. 2010). A trial court's ruling will not constitute an abuse of discretion unless it is "clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano v. BNSF Ry. Co.*, 421 SW3d 448, 451 (Mo. banc 2014), *McGuire v. Seltsam,* 138 S.W.3d 718, 720 (Mo. 2004). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *In re Care and Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. banc 2014). As this Court has stated, "a trial court's discretionary ruling … is presumed … correct, and … the burden of showing abuse of that discretion is on" the party challenging the ruling. *Shirrell v. Missouri Edison Co.*, 535 S.W.2d 446, 448 (Mo. 1976). St. Anthony's cannot win reversal just by showing error and instead, pursuant to "both statute and rule, an appellate court is not to reverse a judgment unless it believes the error … materially affected the merits of the action." *Lozano v. BNSF Ry. Co.*, 421 SW3d 448, 451 (Mo banc 2014).

Dieser's Testimony Was Properly Admitted at Trial

Generally, evidence which is admissible for any purpose will not be excluded. *See, e.g., Martin v. Mercantile Trust Co.*, 293 S.W.2d 319, 329 (Mo. 1956). The test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence. *Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. 1993). Evidence admissible for one purpose should be admitted whether or not that evidence is incompetent on another issue at trial. *Rodriguez v. Suzuki Motor Corporation*, 936 S.W.2d 104, 109 (Mo. banc 1996) (holding evidence of subsequent remedial measures admissible in negligence claim because it is properly considered on claims for strict liability). The trial court has broad discretion in accepting or rejecting evidence on the grounds of relevance. *See, e.g., State v. Taylor*, 701 S.W.2d 725, 727 (Mo. 1985).

Missouri law has always recognized that the jury's role in a civil case is to determine the facts relating to both liability and damages and to enter a verdict accordingly. *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 640 (Mo. 2012). One of the most difficult decisions facing the jury in a personal injury action is to decide the amount of monetary award, if any, that the plaintiff is entitled to be awarded as compensation for past, present and future pain and suffering. *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291, 301 (Mo. 1978). There is no fixed measure, table, or standard which the jury can use as an accurate index to establish an award of damages. *Id.* at 302. Instead, the plaintiff in a personal injury action has the burden of proving the injury and its extent. *See, e.g., Homeyer v. Wyandotte Chem. Corp.*, 421 S.W.2d 306, 310 (Mo. 1967).

During direct examination, Dieser's counsel asked Dieser the following question: "Bill, I wanted to talk about, you know, the impact of this wound on you. I guess I want to ask if it affected you emotionally." Tr. 892:4-6. In response, Dieser stated, "I felt betrayed. I'm a Catholic. St. Anthony's is a Catholic institution." Tr. 892:9-10. At sidebar, St. Anthony's counsel objected to this testimony on the basis of it "being prejudicial to interjecting religion into the case." Tr. 894:20-21. Dieser's counsel responded by stating, "I want him to tell the emotional impact oh him and explain it to the jury. He gets to do that." Tr. 892:22-24. St. Anthony's counsel responded that he "agree[d] with that part." Tr. 892:25. After further discussion, the court overruled the objection. Tr. 893:13. Dieser then testified, "I was in the Catholic institution. I am a Catholic. I felt deceived. I have never really found out about what was really going on. I felt like I didn't have a real participation with my nursing case. And then as I find out some of these things, I feel like St. Anthony's wants to cast me off to the side and say it's your fault, you deal with it. Yes, I am angry." Tr. 893:20 - 894:1.

Dieser's testimony was properly admitted at trial because it tended to prove the non-economic damages he sustained as a result of the injury. It was Dieser's burden to prove damages. MAI 3.01. Dieser properly pled non-economic damages and the jury was instructed on this category of damages by way of jury instruction number 11. LF 45; 187. By their nature, noneconomic damages elude objective calculation and are, therefore, subjective. *Faught v. Washam*, 329 S.W.2d 588, 602 (Mo. 1959). Because these damages are so intangible, effectively presenting them to a jury required Dieser's

counsel to elicit details concerning the Dieser's physical and emotional status since the injury.

Here, Dieser's counsel simply asked Dieser how the wound affected him emotionally. Tr. 892:4-6. Dieser's responses indicated that the wound and everything that went with it affected him emotionally, including feeling betrayed and deceived by St. Anthony's in part because he is a Catholic. Tr. 892:9-10, 893:20 – 894:1. The religious components of Dieser's testimony reflected his own subjective account of the mental anguish he experienced as a result of the injury. *Id.* His emotions are tied to his faith. *Id.* He was entitled to feel as he did under the circumstances and express those feelings to the jury. While references to a party's religion may have been inadmissible in other contexts, in this case the testimony was relevant to the issue of damages, and therefore did not, as St. Anthony's contends, lack relevance to any issue to be decided by the jury. The trial court's discretion in accepting Dieser's testimony for this purpose should not be disturbed.

Dieser's Testimony Was Not Prejudicial

and Did Not Materially Affect the Merits of the Action

To be the basis for reversal, any error of the trial court in admitting or excluding evidence must be prejudicial. *See, e.g., Wilcox v. St. Louis-Sw. R. Co.*, 418 S.W.2d 15, 20 (Mo. 1967). No appellate court can reverse a judgment unless it finds that error was committed which materially affected the merits of the action. Section 512.160(2); Rule 84.13(b). Even if the trial court has abused its discretion in admitting or excluding

evidence, "this Court is loathe to vacate a jury's verdict and resulting judgment on such grounds." *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. 2014).

Dieser's testimony was not prejudicial or misleading, and it did not materially affect the merits of the action. St. Anthony's argues that Dieser's counsel clearly wanted to bring out religious-affiliation testimony, and that this was an attempt to tap into jurors' possible feelings of anger directed toward Catholicism or any other organized religion. Tr. 894:20-21 – 893:13. Contrary to St. Anthony's claims, the religious components of Dieser's testimony on non-economic damages were completely unsolicited. Dieser's counsel only asked Dieser how the wound affected him emotionally. Tr. 892:4-6. After Dieser's response, Dieser's counsel did not ask any follow-up questions about religious affiliation. Tr. 892:4 - 901:19. Dieser's counsel did not make any arguments about religious affiliation in closing arguments. Tr. 1171:9 - 1188:15, 1204:3 - 1218:13. The comments were made on the fourth day of a five-day trial, which featured testimony from twelve different witnesses. It is illogical to assume that, in the context of all the evidence presented at trial, two short sentences referencing Catholicism materially affected the verdict rendered by the jury. Any error predicated on the admission of this testimony would have been immaterial and harmless.

Additionally, Dieser's testimony should not be deemed prejudicial because St. Anthony's religious affiliation is open and obvious. It is highly unlikely that Dieser's testimony that "St. Anthony's is a Catholic institution" was a revelation to any juror in St. Louis County. St. Anthony's has openly held itself out to the public as a Catholic medical center for over 130 years. According to St. Anthony's website, "St. Anthony's

long tradition of faith-based, Catholic service to the St. Louis area began in 1873 ... It was named after St. Anthony of Padua, who patterned his life and healing ministry after the example set by Jesus Christ."[7] Moreover, Dieser's medical records from his admission to St. Anthony's, which were admitted into evidence at trial and shown to the jury, include pages with St. Anthony's emblem, which prominently features a cross symbol intertwined with the words "St. Anthony's Medical Center." Tr. 439:9-21. Due to the overt nature of St. Anthony's religious affiliation, Mr. Dieser's statements cannot be deemed prejudicial.

The trial judge was in the best position to make the determination as to whether Dieser's testimony was prejudicial. *Saint Louis Univ. v. Geary*, 321 S.W.3d 282, 289 (Mo. 2009). By admitting the testimony at trial and subsequently denying St. Anthony's Motion for New Trial, the trial court found either that it committed no error or that St. Anthony's had not been prejudiced by Dieser's testimony. St. Anthony's has failed to provide any evidence on appeal that Dieser's testimony was sufficiently prejudicial as to require reversal. Thus, the trial court's discretion should not be disturbed.

Fleshner and Cavener Are Distinguishable

In support of their arguments on this issue, St. Anthony's relies on primarily on two cases: *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010), and *State v.*

---

[7] St. Anthony's Medical Center website, *available at* http://www.stanthonysmedcenter.com/About-Us/History

Cavener, 202 S.W.2d 869 (Mo. 1947). Both of these cases are distinguishable from the case at hand.

Fleshner is an appeal from a jury verdict entered in favor of an employee in a wrongful termination case. *Fleshner*, 304 S.W.3d at 86. After the jury was dismissed, a juror approached the Defendant's attorneys and reported that another juror made anti-Semitic statements about a defense witness during jury deliberations. *Id.* at 86. The Defendant contended in its motions for new trial that as a result of the anti-Semitic comments it was deprived of its due process rights and did not receive a fair trial. *Id.* This Court held that the trial court abused its discretion in failing to hold an evidentiary hearing to determine whether the alleged juror misconduct occurred. *Id.* at 90.

Unlike the Defendant in *Fleshner,* St. Anthony's has not alleged that juror misconduct occurred in this case. St. Anthony's has presented no evidence that the jurors discussed religion at all during deliberations, much less any evidence that statements reflecting religious bias or prejudice directed towards St. Anthony's were made by a juror during deliberations. Juror misconduct during deliberations is a much different issue than the trial court's admission of direct testimony from a party at trial. The scope of the holding in *Fleshner* is limited in that it provides guidance to trial courts as to the procedural steps that should be taken in the event that a party files a motion for a new trial alleging there were statements reflecting ethnic or religious bias or prejudice made by a juror during deliberations.

Cavener is a criminal appeal case in which the Defendant appealed a second degree murder conviction. *State v. Cavener*, 202 S.W.2d 869 (Mo. 1947). At trial, the

prosecuting attorney asked the widow of the deceased victim no fewer than six pointed questions on direct examination in an effort to solicit a response that the deceased was a member of the Masonic lodge and Methodist church to bolster the deceased victim's good character, which had been challenged by the defendant's attorney during opening statements. *Id.* at 873-874. On appeal, the Court held that the deliberate injecting into the case that the deceased had been a member of the Masonic lodge and of the Methodist church, when added to the fact that an unclear jury instruction was given, was sufficient to constitute reversible error. *Id.* at 874.

The *Cavener* holding admonishes only deliberately questioning witnesses regarding their religious faith or beliefs or as a means of soliciting character evidence in the context of a criminal trial. In the case at hand, Dieser was not deliberately asked about his religious beliefs, nor was he asked what organizations he belonged to. He was simply asked how his wound affected him emotionally. This question was not asked to bolster Dieser's good character. It was asked simply to elicit a response describing the non-economic damages he sustained as a result of his injury.

Although Dieser's response to this inquiry included reference to his religion, Dieser's counsel did not deliberately solicit the reference, and the reference was immaterial and collateral. This Court has declined to find reversible error on the basis of *Cavener*, in part because the record did not show deliberate efforts by a party to inject objectionable statements concerning character evidence. *See State v. Malone*, 301 S.W.2d 750, 757 (Mo. 1957) ("The instant record does not disclose that the State deliberately injected the fact that deceased had been in the Armed Services. The

objectionable statement related to a collateral matter."). As such, St. Anthony's reliance on *Fleshner* and *Cavener* is misplaced.

IV. DIESER'S RESPONSE TO ST. ANTHONY'S POINT RELIED ON NUMBER FOUR REGARDING STATEMENTS MADE BY DIESER'S COUNSEL DURING CLOSING ARGUMENT

Standard of Review

The trial court has broad discretion in the area of closing argument, not lightly to be disturbed on appeal. *Cornette v. City of N. Kansas City*, 659 S.W.2d 245, 249 (Mo. App. 1983) (*citing Lewis v. Bucyrus-Erie, Inc.,* 622 S.W.2d 920, 925 (Mo. 1981)). The trial court is in a far superior position compared to the appellate court to determine whether the argument was so prejudicial as to require remedy by the grant of a new trial. *Id.* (*citing Collins v. Cowger*, 283 S.W.2d 554, 561 (Mo. 1955)). The determination of the trial court in these respects will be reversed only where it can be said that the trial court abused its discretion. *Id.* Given the cold record on appeal, appellate courts of this state uniformly uphold trial courts' determinations of the prejudice injected by any error in "send a message" arguments. *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 779 (Mo. 1989).

Dieser's Counsel's Closing Argument Did Not

Constitute a Plea for Punitive Damages

Counsel should have a fair opportunity to argue their case and to present it with force and effect to the jury, within the bounds of fair argument. *Caldwell v. Payne*, 246 S.W. 312, 318 (Mo. 1922). When the trial court does not consider remarks made during closing argument sufficient to require a new trial, appellate courts are inclined to defer to the trial court's opinion. *Collins v. Cowger,* 283 S.W.2d 554, 561 (Mo. 1955).

Specifically, where a trial court denies a motion for new trial which raised the issue of injecting punitive damages by way of improper closing argument, the trial court is deemed to have found that the argument did not constitute a plea for punitive damages, and that the party requesting the new trial had not been prejudiced by the argument. *See Cornette v. City of N. Kansas City*, 659 S.W.2d 245, 248-49 (Mo. App. 1983).

In the first part of closing argument, Dieser's counsel explained, without objection, that certain subjects of discussion, like whether Dieser really needed the money, were not permitted under the instructions. Tr. 1172:3-23. Dieser's counsel then stated: "The only thing you decide in this case is whether the carelessness of the hospital caused or contributed to cause Dieser's wound. I thought that the hospital admitted that this was a pressure injury sustained in the hospital, a Stage III or Stage IV crater in his backside … sustained in St. Anthony's Hospital in the course of three days. That, ladies and gentleman, is not acceptable medical care in this community, and that's what your verdict will say. Your verdict becomes a legal document." Tr. 1172:20 – 1173:6. Defense counsel objected to references to sending a message to the community at large. Tr. 1173:13-20. The Court found that "I didn't hear the argument the way you did. I'm going to overrule the objection." Tr. 1173:13 – 1174:4. This was a repeat of statements made at the very start of voir dire, to which there was no objection: "The verdict that the jury renders in this case will say whether the quality of care that Dieser got is acceptable in St. Louis County." Tr. 14:5-8.

Dieser's counsel's closing argument did not constitute a plea for punitive damages. The argument made no reference to "the adequacy of your verdict," nor did it

implore the jury to "send a message." *Cf. Smith v. Courter*, 531 S.W.2d 743 (Mo. 1976); *Fisher v. McIlroy*, 739 S.W.2d 577 (Mo. App. 1987). Nor was "sending an message" a theme of Dieser's counsel's closing argument. *Cf. Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 779 (Mo. 1989). Additionally, Dieser's counsel did not ask the jury to punish or deter St. Anthony's conduct or tell the jury that they could consider punishment or deterrence as an element of damages.

Instead, Dieser's counsel's statements during closing that Dieser's injury was not acceptable medical care in this community and that is what the verdict would say were within the bounds of proper argument. Appellate courts have found that no error existed when counsel told the jury during closing argument that when they deliver a verdict they do so as the conscience of the community. *See, e.g., Caldwell v. Payne*, 246 S.W. 312, 318 (Mo. 1922); *Cornette*, 659 S.W.2d 245, 248. Juries are, by their very nature, a collection of members of the community empowered to render verdicts. As the Missouri Jury Organization's informational pamphlet available to jurors, titled, "In Appreciation of Jurors," states, "You and your fellow jurors represent the collective will and values of society. When you render a decision in court, you speak on behalf of your friends, your neighbors, and everyone in your community." DSA A98.

Dieser's counsel's statement during closing that the jury's verdict becomes a legal document was also proper. This statement was accurate: the verdict form executed by the jurors in this case was incorporated into the court's file, published in the court's online filing system, and ultimately formed the basis for the judgment entered by the trial judge. LF 203; 296. Any potential prejudice that could have resulted from this astutely accurate

comment cannot rise to the level sufficient to require reversal by this Court. Further, the trial judge was in the best position to make the determination as to whether the statements made by Dieser's counsel during closing argument were prejudicial. By denying St. Anthony's Motion for New Trial, the trial court must be taken to have found that the argument did not constitute a plea for punitive damages, and that St. Anthony's had not been prejudiced by the argument.

Smith and Fisher are Distinguishable

In support of their arguments on this issue, St. Anthony's relies on primarily on two cases: *Smith v. Courter*, 531 S.W.2d 743 (Mo. 1976) *overruled by Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. 1994), and *Fisher v. McIlroy*, 739 S.W.2d 577 (Mo. App. 1987). The remarks made during closing arguments at issue in those cases are distinguishable from Dieser's counsel's closing argument.

In *Smith*, this Court held that the trial court's order granting a new trial was not an abuse of discretion because the Plaintiff's attorney had improperly injected the issue of punitive damages into the case by arguing in closing, "You can also say, through the adequacy of your verdict, Lockwood—and anybody else that reads about it or hears about it—improve the quality of what you sell." *Smith*, 531 S.W.2d at 745. On appeal, this Court indicated its doubt as to whether the argument did in fact make a plea for punitive damages, but ultimately deferred to the trial court's determination. *Id.*

Unlike *Smith*, the trial court in this case did not order a new trial as a result of Dieser's counsel's closing argument. At trial, the judge stated specifically that he did not hear Dieser's counsel's closing argument the way St. Anthony's did. Tr. 1174:2-4. Also

unlike *Smith*, Dieser's counsel did not tell the jury in closing what the adequacy of their verdict could accomplish or tell the jury that through the adequacy of their verdict they could say to St. Anthony's, and anyone else that reads about it or hears about it, improve the quality of what you sell. Tr. 1171:9 – 1188:16, 1204:3 – 1218:15. Dieser's counsel's closing argument was therefore distinguishable from the argument in *Smith,* in that it did not inject the issue of punitive damages into the case.

In *Fisher*, the Missouri Court of Appeals affirmed the trial court's order granting a new trial on the basis of counsel's closing argument that the jury should, "send a message to the young people in this city." *Fisher*, 739 S.W.2d at 582. Unlike *Fisher*, the trial court in Dieser's case did not order a new trial as a result of Dieser's counsel's closing argument. The trial court in this case, by denying a new trial, must be taken to have found that the argument did not constitute a plea for punitive damages and that St. Anthony's had not been prejudiced by the argument. *Cornette* at 248-49. Also unlike *Fisher*, Dieser's counsel did not expressly implore the jury in closing to "send a message." Dieser's counsel's closing argument was therefore distinguishable from the argument in *Fisher,* in that it did not inject the issue of punitive damages into the case.

V. DIESER'S RESPONSE TO ST. ANTHONY'S POINT RELIED ON NUMBER FIVE REGARDING THE SIZE OF THE JUDGMENT.

Standard of Review

The standard of review on the denial of a motion for a new trial is abuse of discretion. *Stewart v. Partamian*, 465 S.W.3d 51, 57-58 (Mo. 2015) (citing *St. Louis Cnty. v. River Bend Estates Homeowners' Ass'n,* 408 S.W.3d 116, 134 (Mo. banc 2013)). In considering whether the trial court abused its discretion, this Court views the facts in the light most favorable to the verdict and should disregard evidence to the contrary. *Badahman v. Catering St. Louis,* 395 S.W.3d 29, 39 (Mo. 2013).

A trial court's ruling will not constitute an abuse of discretion unless it is "clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano v. BNSF Ry. Co.*, 421 SW3d 448, 451 (Mo. banc 2014); *McGuire v. Seltsam,* 138 S.W.3d 718, 720 (Mo. 2004). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *In re Care and Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. banc 2014). St. Anthony's cannot win reversal just by showing error and instead, pursuant to "both statute and rule, an appellate court is not to reverse a judgment unless it believes the error … materially affected the merits of the action." *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014).

This Court examines the question of excessiveness "with the recognition that the jury retains 'virtually unfettered' discretion in reaching its decision because there is a

'large range between the damage extremes of inadequacy and excessiveness.'" *Stewart v. Partamian*, 465 S.W.3d 51, 57-58 (Mo. 2015) (quoting *Lindquist v. Scott Radiological Grp., Inc.,* 168 S.W.3d 635, 647-648 (Mo. App. 2005)). The jury's determination of "the amount of noneconomic damages caused by medical negligence is a fact that must be determined by the jury and is subject to the protections afforded by the provision of the State Constitution guaranteeing the right to trial by jury." *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633 (Mo. 2012).

The Verdict Was Not A Result of Undue Passion, Prejudice or Error

Missouri law is clear that the amount of the verdict does not by itself establish bias or undue passion. *Giddens v. Kansas City Southern Ry. Co.,* 29 S.W.3d 813, 822 (Mo. banc 2000) (citing *Means v. Sears, Roebuck & Co.,* 550 S.W.2d 780, 788 (Mo. banc 1977)). Instead, the complaining party must show, when there is an alleged trial error or misconduct, that the verdict "is so grossly excessive as to shock the conscience because it is glaringly unwarranted." *Giddens,* 29 S.W.3d at 822. Also contrary to St. Anthony's argument, the suggestion of a lower damages award during closing argument does not establish that the verdict was excessive. *Stewart v. Partamian*, 465 S.W.3d 51, 57-58 (Mo. 2015) (citing *Goudeaux v. Bd. of Police Comm'rs of Kansas City*, 409 S.W.3d 508, 521 (Mo. App. 2013)). This maxim is "particularly true in cases such as this, in which 'the damages sought inherently involve an element of subjective calculation, as is the case with pain and suffering.'" *Id.* Deference to the jury should also extend to cases like this one where the jury was told during closing argument that they were free to give more, less or nothing at all. Tr. 1183:10-13.

Despite the number of calculations performed by St. Anthony's in its brief on this Point, when it comes to determining damages in a personal injury case, there is no standard, fixed basis or mathematical rule by which compensatory damages may be calculated. *Faught v. Washam*, 329 SW2d 588, 602 (Mo 1959). *See also Lewellen v. Franklin,* 441 S.W.3d 136, 139 (Mo. 2014) (striking down legislature's limit on punitive damages at five times compensatory damages). Similarly, there is no exact formula for determining that a verdict is excessive. *Callahan v. Cardinal Glennon*, 863 S.W.2d 852 (Mo. banc 2003). As shown in Dieser's other arguments, *supra,* there were no errors by the trial court and there has been no showing of any abuse of discretion. Those alleged errors cannot, therefore, support any complaint of excessiveness. *Giddens v. Kansas City Southern Ry. Co.,* 29 S.W.3d 813, 822 (Mo. banc 2000).

The Verdict Was Not Excessive

This jury appropriately awarded Dieser the undisputed $33,000.00 in past economic damages along with $750,000.00 in past non-economic damages and $100,000.00 in future economic damages as compensation for the serious and permanent injuries he sustained as a result of St. Anthony's negligence and the judge appropriately entered judgment accordingly. LF 204, 297. First, this award is in line with other awards for pressure wounds as bad as Dieser's. Over 20 years ago, in 1993, a jury in Cape Girardeau awarded $2 million dollars as compensation for negligently caused pressure wounds in a man who was already a paraplegic. *Parris v. Uni Med,* 861 S.W.2d 694 (Mo. App. 1993). *See also, e.g., Tucker Nursing Center, Inc. v. Mosby*, 692 S.E.2d 727 (Ga. App. 2010) ($1.25 million for stage IV pressure wound on backside that required

multiple surgeries to heal); *Olsten Health Srvc's, Inc. v. Cody*, 979 So.2d 1221 (Fla. App. 2008) ($3 million dollar award for stage IV pressure wound to the coccyx that had not healed after several years and surgical procedures, including a skin graft); *Dobose v. Quinlan,* 2015 WL 6438917 (Pa. 2015) ($1 million award for survival claim for pressure wounds in addition to $125,000.00 for death claim).

That the award may have been in large part to compensate pain, suffering and emotional harm does not mean the numbers must be low. To the contrary, the court of appeals upheld an award of $500,000.00 for the largely emotional harm done after plaintiff suffered a bruise and a cut in an auto-wreck. *Graham v. County Med. Equip. Co., Inc.*, 24 S.W.3d 145, 147 (Mo. App. 2000). *See also CIGNA Healthcare of Texas, Inc. v. Pybas*, 127 S.W.3d 400, 414 (Tex. App. 2004) (approving over $3 million in death claim including for conscious pain and suffering over few days between negligence even though decedent had significant pain and suffering from numerous other medical conditions and would not likely have survived much longer without the negligence); *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 329 (Ky. 2014) ($4.1 million in compensatory damages for two broken legs causing 225 days of being hospital and house bound with $74,000.00 in medical bills).

Second, whether St. Anthony's finds the evidence of damages credible is irrelevant and the jury was, of course, free to believe all of the evidence presented on damages. *Mitchell v. Kardesch*, 313 S.W.3d 667, 683 (Mo. 2010) (noting that jury is entitled to find evidence credible even if the defendant does not); *Young v. Kansas City S. Ry. Co.,* 374 S.W.2d 150, 154 (Mo. 1964) (holding there is no doubt the jury may believe

some, all or none of the evidence). Assuming they believed what they heard that supported the verdict and ignoring all evidence to the contrary as required by the standard of review, the jury awarded compensation for the following injuries and damages.

While in St. Anthony's ICU recuperating from surgery in February, 2007, 58 year old Dieser got a bedsore on his backside that went all the way down to the bone. Tr. 265:10-21; 268:7-22, 560:1-9, 681:11 – 682:4, 683:19-22, 955:22 – 956:3, 958:3-7. A pressure wound is a serious thing for a patient and is a dangerous problem. Tr. 548:12-20, 970:6-10. During his time in the hospital the pressure wound got worse instead of better and before he left the hospital he had to be taken back to the operating room to have surgery on the wound. Tr. 426:4-9, 671:19 – 672:6, 831:21 – 832:8. In the surgery they cut and scraped all of the dead tissue and took a pretty good piece out of his backside. Tr. 699:1-4, 798:9-13.

After he left the hospital his wife mostly had to do the three-times-daily dressing changes for him over a period of six months total. Tr. 471:23 – 475:11, 699:8-9, 706:19 – 707:7, 815:17-24, 836:3 – 837:8. To change the dressing Dieser would lay on his side with his backside exposed, his wife Sherry put on rubber gloves to protect herself and applied lidocaine, then they had to wait until the skin got numb. Tr. 707:8–14, 836:3 – 837:8, 840:8-11. Sherry had to apply two different creams one of which went into the deepest part of the wound on his backside - her fingers would go in over her first knuckle - and then insert a gauze pad as deep as she could get it. Tr. 707:8 – 708:5, 836:3 – 837:8.

These daily dressing changes on the pressure wound were very difficult for Dieser. Tr. 788:3-8. That his wife had to stick her finger knuckle-deep into a wound on his backside was upsetting and Dieser was embarrassed that she was doing it. Tr. 836:3 – 838:1. It was difficult for him to be unable to take care of himself and have to depend on his wife and others. Tr. 838:2-12. Also, the dressing changes were incredibly painful and his family was in distress about dealing with wound and its potential complications. Tr. 461:23 – 462:25, 463:13-14, 467:9-11, 539:25 – 540:8, 708:12-16, 831:21 – 832:8, 836:3 – 837:17.

While the wound was healing Dieser was not able to live his normal life, he missed out on doing his favorite things when he should not have had to, and, he was in pain. Tr. 233:8 – 234:3, 466:6-16, 468:7-10, 540:9-14, 803:7-23, 899:15-900:2. He had to buy devices to accommodate the injury, some he used for several years. Tr. 256:9 – 16, 541:13-15, 830:6-19, 835:1-17. His days were interrupted with frequent doctor visits at which he had to strip down in front of sometimes groups of people and let them poke, prod, scrape out with a scalpel, cut, measure, inspect and photograph this stage IV pressure wound on his backside. Tr. 471:23 – 475:11, 459:8-13, 474:6 - 475:7-8, 819:14-23, 837:18 – 838:1, 900:8-19. Dieser explained to the jury that it was "gross…someone taking a tweezers and find the most sensitive area on your body and they grab it and they pull it and then cut it." Tr. 838:8-839:7.

When the wound was finally mostly healed by about five months after he left St. Anthony's, his doctor told him that the continued pain he was having was from a band of fragile scar tissue and that the wound had, despite all efforts, healed kind of wrong. Tr.

472:23 – 474:3, 476:9 – 477:1, 635:9-22, 838:13-22, SLF 46:24 – 47:21. His doctor recommend surgery to try and fix the problem although there was no guarantee that it would. Tr. 477:14 – 478:12. He had the second surgery under general anesthesia on the pressure wound in November, 2008, nine months after he left St. Anthony's, that involved taking a two inch square skin graft from his thigh. Tr. 478:16 – 480:2, 819:1-10, 838:13 – 839:5.

After the second surgery the painful and embarrassing wound care by his wife started all over again. Tr. 461:23 – 462:25, 463:13-14, 479:9-11, 480:19-24, 708:18 – 709:14, 840:12-18. In total the pressure wound took over a year to heal and Dieser was not finally done with medical care and treatment for it until February, 2009. Tr. 481:7-8, 830:2-5, 840:19-25. The pictures of the wound taken between February 2008, and February, 2009, which were shown to the jury are in Dieser's Second Appendix in date order starting at page A92.

Only 30-40% of the graft took and his surgeon found that despite the second surgery he still had a thickened scar at the site that wasn't pliable. Tr. 480:14-17, 838:23 – 839:7. At the time of trial, eight years after he got the wound, Dieser still has problems sitting, since the wound he has to frequently shift from side to side to get comfortable, and, still has pain with bending and lifting. Tr. 253:14 – 254:2, 254:14 – 255:3, 261:22 – 262:1, 482:7- 484:4, 710:5-25, 841:1-13, 900:24 – 901:12. For the first three years it was really painful. Tr. 900:3-8.

Since the pressure wound there is a difference in what Dieser can do and although it didn't ruin his life, it changed his life. Tr. 232:9-11, 254:3 – 254:15, 678:15-17, 710:5-

25, 900:3-8, 907:14-18. This wound took over Dieser and his family's lives for the year it was healing and he was depressed. Tr. 722:18 – 723:3, 803:23-24, 899:15 - 900:2. Having the pressure wound on top of recovering from the pancreatic surgery took a long time, was far more painful than the pancreatic surgery and is something Dieser will never forget. Tr. 835:21 – 836:2. The worst part of the experience for Dieser was that during the time the wound was getting daily dressing changes and trying to heal, he and his wife did not have any sexual life. Tr. 899:5-11.

Having the wound and everything that goes with it has also affected Dieser emotionally, he feels betrayed and deceived by St. Anthony's and it feels like a slap in the face when he gets advertising from St. Anthony's every month. Tr. 892:4-10, 893:17 – 894:1, 898:21 – 899:3. Dieser feels like "St. Anthony's wants to cast me off to the side and say it's your fault, you deal with it." Tr. 893:17 – 894:1.

As for the future, because of the wound from St. Anthony's negligence, Dieser is at increased risk for future pressure wounds, It will take a lot less pressure over a lot less time to get another pressure wound and any wound he gets is more likely to be very severe. Tr. 636:11-21. He is scared to go into any hospital because of what happened to him at St. Anthony's in 2007. Tr. 901:13-17. Dieser's future life expectancy at the time of trial was another 17.8 years. Tr. 908:7-16. The jury's total award of $883,000.00 is not excessive but is fair and full compensation for the serious and permanent injuries, both physical and emotional, that Dieser sustained as a result of St. Anthony's negligence.

CONCLUSION

For all of the foregoing reasons the trial court's judgment, to the extent that it appropriately assessed damages in accordance with the juries' verdict, should be affirmed.

IN THE SUPREME COURT OF MISSOURI

WILLIAM DIESER,	)
	) **Supreme Court No. SC95022**
Plaintiff/Appellant/Cross-Respondent,	)
	) **Circuit Court No. 12SL-CC03428**
vs.	)
	) **Circuit Court for St. Louis County**
ST. ANTHONY'S MEDICAL CENTER,	)
	)
Defendant/Respondent/Cross-Appellant.	)

RULE 84.06(c) CERTIFICATION

COMES NOW Plaintiff-Appellant William Dieser, and pursuant to Missouri Supreme Court Rule 84.06(c), submits his Second Brief and certifies the following:

1. The brief complies with the limitations contained in Rule 84.06(b);
2. The brief is 21,986 words in length;
3. The brief is contains 1,695 lines of type.

Respectfully Submitted,

COFFEY & NICHOLS

Mary Coffey, #30919
Genevieve Nichols, #48730
Adam Henningsen, #64905
Attorneys for Plaintiff/Appellant/Cross-Respondent
6200 Columbia Ave.
St. Louis, MO 63139
Phone: 314-647-0033
Fax: 314-647-8231
E mail: mc@coffeynichols.com
gn@coffeynichols.com
ah@coffeynichols.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed and sent to those attorneys of record registered for this case in this Court's Electronic Filing System, and via email, this 31st day of JAN, 2016, to:

Paul N. Venker
Nathan D. Leming
Lisa Larkin
WILLIAMS VENKER & SANDERS, LLC
Attorneys for Defendant/Respondent/Cross-Appellant
Bank of America Tower
100 North Broadway, 21st Floor
St. Louis, MO 63102
Phone: 345-5000
Fax: 345-5055
E mail: pvenker@wvslaw.com
nleming@wvslaw.com
llarkin@wvslaw.com