IN THE MISSOURI SUPREME COURT

SC95022

WILLIAM DIESER,

Plaintiff/Appellant/Cross-Respondent,

v.

ST. ANTHONY'S MEDICAL CENTER,

Defendant/Respondent/Cross-Appellant

Appeal from the Circuit Court of St. Louis County, Missouri
Case No. 12SL-CC03428
The Honorable Michael D. Burton

REPLY BRIEF OF DEFENDANT/RESPONDENT/CROSS-APPELLANT ST. ANTHONY'S MEDICAL CENTER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Pages:**

Other Authorities:

REPLY ARGUMENT OF DEFENDANT'S CROSS-APPEAL

I. Plaintiff's cross-examination of Defendant's expert Dr. Diane Krasner about the purported Medicare "never event" regulation was without factual foundation, misstated the law, distorted the applicable standard of care, and injected irrelevant, inflammatory, and prejudicial testimony.

A. Plaintiff sought to cross-examine Dr. Krasner about "never events" in order to prove that the government of the United States, through its agency, CMS, had established the standard of care for pressure ulcer prevention.

In its principal brief, Appellant St. Anthony's Medical Center ("SAMC") showed that, throughout trial, Plaintiff sought to put before the jury what Plaintiff asserted was a liability-imposing Medicare "never event" regulation on the standard of care. Plaintiff finally succeeded in doing so, when the trial court overruled SAMC's objections to Plaintiff's cross-examination of SAMC's expert, Dr. Diane Krasner on this subject.

In his responsive brief, Plaintiff asserts that the challenged cross-examination was simply a permissible attempt to rebut Dr. Krasner's testimony about "unavoidable" pressure ulcers by showing that CMS had determined that pressure ulcers were avoidable "never events." (Dieser's Second Brief, p 35). Review of the whole record shows that it was much more than that. Plaintiff sought throughout trial to introduce evidence that would enable him to argue to the jury that a Medicare agency had determined by regulation that pressure ulcers of the type suffered by Plaintiff should never happen, so that the government had concluded that the fact of their occurrence, in itself, proves negligent care.

In the Statement of Facts in its principal brief, SAMC showed the lengths to which Plaintiff's counsel went to: (1) put the inflammatory phrase "never event" before the jury, and (2) show that the application of that phrase to pressure ulcers carried the full force of a United States Government determination (through its health care agency, CMS) that Plaintiff Dieser's pressure ulcer should never have happened and could not have happened absent negligence. (SAMC's initial Brief, p. 22-32).

Plaintiff's strategy is illustrated by two record excerpts. The first is the exchange between Plaintiff's counsel and Plaintiff's expert Dr. Rushing in the course of an offer of proof made by Plaintiff. (*See* SAMC's Initial Brief at 76-77). There counsel stated that she intended to present to Dr. Rushing the "regulation" which said that pressure ulcers are not reimbursable because "they are preventable by good hospital care". (*See* SAMC's initial Brief, p. 76; Tr. 613, A14).[1] Pertinent portions of Dr. Rushing's testimony during this offer of proof are as follows:

BY MS. NICHOLS:

Q. Dr. Rushing, you've told us that you believe that this injury was totally preventable; is that correct?

A. That's correct.

Q. And is there any regulatory body out there that agrees with you?

A. Yes, ma'am.

[1] Unless otherwise noted, all appendix references are to SAMC's Appendix filed with its initial Brief.

Q. Tell me about that.

A. Well, it's the medicare regulatory body that says this shouldn't happen. As you said, it is a never event which means an event that shouldn't occur. It is preventable almost always.

(Tr. 617:14 – 25, A12)(emphasis added).

Q. And are you familiar with that medicare regulation and its effects and its - - how it came into being.

A. Yes.

Q. And is it your understanding that the reason why they did that was they said we think these are preventable?

A. That is correct.

(Tr. 618:8 – 15, A13)(emphasis added).

Q. And is that - - is that part of the basis of your opinion that this was preventable?

A. Well, I think it was preventable regardless of what the medicare people say.

Q. Is it the same - - Do they have the same opinion as you on this issue?

A. Yes.

(Tr. 618:25 – 619:6, A13)(emphasis added).

The second exchange occurred when Plaintiff sought the Court's permission to cross-examine Dr. Krasner on this subject. (*See* SAMC's initial brief at 78-79). Plaintiff's counsel stated (incorrectly) that 2008 Regulatory Provisions for the Centers for Medicare

& Medicaid Services indicate that Stage III and Stage IV pressure ulcers acquired in a hospital are preventable and they are entitled "never events." (*See* SAMC's initial Brief, p. 79). Plaintiff's counsel told the trial court:

> I'm intending to ask her about the 2008 regulatory provisions from the Centers for Medicare & Medicaid Services, which indicate that Stage III and IV pressure ulcers acquired in the hospital are preventable, that they are entitled never events….. .

(Tr. 1106, A36).

Thus, Plaintiff's efforts to introduce this testimony went far beyond mere rebuttal of Dr. Krasner's testimony about unavoidable pressure ulcers; they were part of a continued effort to argue to the jury that CMS has set the standard of care in this case, and that the occurrence of pressure ulcers proved that that standard had not been met.

B. Dr. Krasner did not testify that CMS sets the standards for pressure ulcers.

In briefing this issue, Plaintiff has suggested, in effect, that the cross-examination was proper because the government did in fact set standards for the proper care of pressure ulcers, and that Dr. Krasner herself so testified. "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)." (Dieser's Second Brief, p. 35). In fact, Dr. Krasner did not testify to reliance by her or anyone else on CMS standards. She did refer, in passing, to a CMS definition in

describing the timing of the action of a private standard setting group, NPUAP, in defining which pressure ulcers are unavoidable. (Tr. 1047, A39). Dr. Krasner nowhere said that she and others in the pressure wound community rely on CMS standards. Contrary to a suggestion appearing in Dieser's Second Brief at page 35, defense expert Krasner did not testify, either under direct examination or cross-examination, that the government sets standards for the proper care of pressure ulcers. Thus, the premise of Plaintiff's argument—that the cross-examination was necessary because Dr. Krasner had testified that the government set the standard for pressure ulcer care—was unfounded.

C. There was no factual foundation for Plaintiff's cross-examination of Dr. Krasner on this subject.

A key component of Plaintiff's cross-examination of Dr. Krasner—that CMS did in fact, by regulation, set standards for prevention of pressure ulcers—is without factual foundation. In seven bullet points (Dieser's Second Brief, p. 36-38), Plaintiff sets out information regarding the phrase "never event" that the trial court allegedly had when it overruled SAMC's objection to this cross-examination. None of the seven items establishes a factual foundation for the impermissible questioning that the trial court allowed.

First, Plaintiff cites Ex. 34 (L.F. 157), the letter from a CMS administrator that was addressed in SAMC's initial brief at p. 75. Plaintiff states that the letter was "admitted only for the purposes of an offer of proof." (Dieser's Second Brief, p. 36). In fact, the letter was made part of an offer of proof, but without any foundation or authentication, and the trial court denied Plaintiff's request that the letter be admitted in

evidence. (Tr. 726). On its face, that letter states that whatever policy it was announcing, was not to be in effect until October 1, 2008, which is more than six months after the health care at issue. (L.F. 157). At most, the letter indicates that certain health care would not be reimbursed, including hospital-acquired Stage III and Stage IV pressure ulcers. (L.F. 157). The letter does not afford a factual foundation for the cross-examination of Dr. Krasner on this subject.

Second, Plaintiff cites the testimony of former SAMC nurse, Gail Lupien. (Dieser's Second Brief, p. 37). This testimony also was part of an offer of proof to which the court sustained SAMC's objection. (Tr. 987:23-995:8, A27-29). Other than using the phrase itself, Ms. Lupien's testimony did not put the phrase "never event" into any context. (Tr. 987:23-993:2, A27-29). At most, she testified that CMS now "says" hospital acquired Stage III and IV pressure ulcers should not happen, but that the reporting rules were different at the time of Plaintiff's hospitalization. (Tr. 988:11-989:13, A28). Nurse Lupien's testimony provides no foundation for the cross-examination of Dr. Krasner.

Third, Plaintiff refers to a book edited by Dr. Krasner, and a quoted statement from that book that "regulatory issues and reimbursement mechanisms have an enormous impact on the quality of care . ." (Dieser's Second Brief, p. 37). First, the transcript references Plaintiff provides, however, do not support that the words "reimbursement mechanism" were *actually ever spoken before the jury*. (*See* Tr. 1103:1-13, A35; 1015:13-22, A30; 1017:9-12). Plaintiff also refers to book pages within his Second Appendix (DSA A89-91), but again, nothing from those pages was read to the jury. Second, this general statement does not mean that CMS ever defined pressure ulcers as

"never events" in any regulation; it does not establish the foundation for counsel's later erroneous statement in front of the jury that CMS had done so.

Fourth, Plaintiff incorrectly states that Dr. Krasner testified she relied on national standards, including some from CMS and some from 2010 and 2014. (Dieser's Second Brief, p. 37). However, transcript references that Plaintiff cites do not support this. (*See* Tr. 1036:16-1038:2, A31; 1047:1-7, A33). Furthermore, Dr. Krasner never used the word "standard" as in a national standard for proper medical care. She did use the word "definition" in her testimony when referring to "unavoidable" pressure ulcers. (*See generally* Krasner testimony, Tr. 1008-1154).

Fifth, Plaintiff refers to testimony from an SAMC corporate designee that includes a fleeting reference to the "never event" phrase. (Dieser's Second Brief, p. 37). However, this was not something purposely elicited by defense counsel, was not placed in a context, and CMS was not mentioned in conjunction with it. (*See* Tr. 282:13-283:1).

Sixth, Plaintiff relies on testimony of his physician expert Dr. Rushing to the effect that federal guidelines can be an appropriate source of prevention measures. (Dieser's Second Brief, p. 37). This is misleading because there were no federal guidelines referred to as related to the "never event" phrase, even as that appears in Plaintiff's Exhibit 34 (L.F. 157), the letter which Plaintiff put forward as containing "regulations." Additionally, the guidelines referred to by Dr. Rushing were "directions for surveyors," which he did not claim or say were in any way related to proper care for patients either at risk for or actually having pressure ulcers. (Tr. 666:17-667:20).

Finally, Plaintiff relies on Dr. Rushing's testimony during an offer of proof (outside the jury's presence) that the CMS had a "never event" regulation which shows the agency determined that any occurrence of a pressure ulcer violated the regulation. (Dieser's Second Brief, p. 38; Tr. 617:18-618:24, A12-13). This has been discussed above at pp. 8-9.

None of these seven instances supports the trial court's action in overruling Defendant's objections to the cross-examination of Dr. Krasner about never events. In the course of that examination, Plaintiffs' counsel incorrectly told the trial court and the jury that in 2007 or 2008, CMS has a "never event" regulation. Plaintiff has still cited no factual foundation for that statement, which prejudicially misled the jury.

Plaintiff also argues that the pressure wound care community knew what the phrase "never event" meant or does mean and, therefore, whatever error there might have been in allowing the "never event" phrase to be used was rendered moot. (Dieser's Second Brief, p. 38). The mere mention of the "never event" phrase alone or in the abstract is not the point; nor would plaintiff's counsel have been satisfied if that had been all they were allowed to do with that phrase. Rather, Plaintiff's counsel wanted to clothe and empower the "never event" phrase with the force of a determination by a federal agency the occurrence of a Stage III or IV pressure ulcer means there was negligence.

D. Testimony about "never events" was irrelevant.

Plaintiff's argument about the potential admissibility of regulations to prove negligence is of no value here because there were no regulations in effect at the time of the health care in this case. (Dieser's Second Brief, p. 40-41). Had there been such

regulations, Plaintiff's counsel would have sought to have the Court take judicial notice of them and would have moved that they be admitted in evidence. *See e.g, Host v. BNSF Railway Company*, 460 S.W.3d 87, 110 (Mo.App. W.D. 2015)(not error to permit relevant federal regulations to be read into evidence in case asserting general negligence and negligence per se). Plaintiff's counsel represented more than once to the trial court that Plaintiff's Exhibit 34, the CMS letter, was, in fact, either a regulation, or contained a description and language from a Medicare regulation. However, when Plaintiff's counsel showed the letter to the trial court (Tr. 615:4-616:9, A12), it became clear that the letter did not quote, cite, or even refer to any regulation. At that point, the trial sustained Defendant's objection to Plaintiff's Exhibit 34. (Tr. 617:2, A12). As noted above, Exhibit 34, was never admitted into evidence.

Plaintiff erroneously cites to cases purportedly holding that cross-examination of an opponent's expert can be based on inadmissible evidence. (Dieser's Second Brief, pp. 33-35). None of those cases are applicable to the Plaintiff's cross-examination of Diane Krasner on the issue of the non-existent CMS "never event" regulation. Notably, in *Faught v. Washam,* 291 S.W.2d 78 (Mo. 1956), this Court affirmed the wide latitude given during cross-examination, by saying in part: "…cross-examination of expert witnesses…to test their qualifications and for this purpose, the contents of suitable publications properly identified may be used…". *Id.* at 84. The criminal cases which Dieser cites in this section of his Second Brief all involve a defendant's injection of collateral matters into the case, and the State being allowed to respond with evidence,

which may not have been admissible in its case in chief, but became proper because of the defendant's trial tactics. *E.g., State v. Goodwin*, 43 S.W.3d 805, 817 (Mo. banc 2001).

E. Use of the phrase "never event" as being a CMS regulation improperly injected insurance into this case.

Plaintiff argues that his counsel's references to Medicare regulations did not improperly inject insurance into the case. (Dieser's Second Brief, p. 43-44). Significantly, Plaintiff concedes that the terms "reimbursement and payment" were only (and thus, first) mentioned during the cross-examination of defendant's nurse expert, Diane Krasner. (Dieser's Second Brief, p. 43). Defendant objected to this entire line of questioning and the trial court overruled its objections. (Tr. 1098:19-1106:24, A34-36; 1137:5-1140:18, A37-38). Plaintiff argues that any prejudice from the injection of insurance and reimbursement into the case is cured because the Court gave MAI 2.07 [Explanatory—Insurance, Benefits]. (Dieser's Second Brief, p. 47) Surely, this is not the sequence of events which the MAI Committee envisioned would be one of the uses of MAI 2.07: to provide cover to the party who injected the error into the trial.

F. The use of phrase "never event" as a CMS determination of fault and negligence clearly changed the case to one of strict liability or negligence per se.

That the term "never event" was used "only once" in closing argument (Dieser's Second Brief, p. 44), cannot disguise the dangerous potential of any use of this term before the jury. During trial, Plaintiff's counsel had represented there was a federal regulation through Medicare, which stated that the mere occurrence of a Stage III or IV

hospital-acquired pressure ulcer was a "never event" -- i.e., should never happen regardless of any of the facts or circumstances. This was clearly powerful evidence the impact of which is shown in the size of the verdict. Even a single mention throughout the entire trial would likely have prevented a fair trial. The use of the term at a key point in closing argument, following the much longer and repeated discussion of the term that had occurred earlier in the day as Defendant's final witness was examined, surely rendered the result of the fact-finding process here unreliable.

It is well understood that the improper injection in a jury-tried case that the defendant was covered by liability insurance can constitute reversible error, especially if it is injected purposefully or in bad faith. *Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780, 787 (Mo. banc 1977). It is also true that during closing argument the improper mention of an adverse inference from a witness not being called by the other side of a case is grounds for reversal. *Leehy v. Supreme Express & Transfer Co.*, 646 S.W.2d 786, 790 (Mo. banc 1983).

Consequently, it is certainly no unrealistic stretch to apply such a severe rule to this situation where Plaintiff's counsel fought hard to get into evidence what never existed and really wanted only the ability to argue that a federal agency agreed with them and their experts on whether SAMC had lived up to the appropriate standard of care in trying to prevent a pressure ulcer in Mr. Dieser.

The purported CMS "never event" evidence here plainly was impermissible and prejudicial.

II. Plaintiff's counsel's statements and questions during jury selection, made over objection, misstated the burden of proof by conveying to the jury that burden of proof is a matter of percentages, that the parties essentially stand on equal footing in terms of the burden of proof, that Defendant's burden is equal to Plaintiff's, and that the jury needed only believe Plaintiff's evidence 51% to find for Plaintiff.

Plaintiff couches his counsel's statements and questioning during jury selection as merely an attempt to delve into "opinions towards the burden of proof in a case." (Dieser's Second Brief, p. 51). Far from a benign search for opinions and potential bias regarding the proper burden of proof, Plaintiff's counsel's protracted probing was a misleading discussion of the incorrect burden of proof in the case, which then, for the remainder of the trial, incorrectly framed how the jury should have been viewing the evidence.

Plaintiff argues that "51%" is often used to describe the notion of "more likely than not." (Dieser's Second Brief, p. 54). This argument, however, misses the point. While 51% may be an accurate way to describe when something is "more likely than not," the burden of proof to cause the jury to believe a disputed fact goes beyond percentages. Plaintiff Dieser had the burden of proof on the issues he sought to have the jury determine and it was *entirely and exclusively his burden* to cause the jury to believe that each such proposition was more likely to be true than not true. (L.F. 181, Instruction No. 5 based upon MAI 3.01 [1998 Revision] General). Under the law, Defendant SAMC had no burden to disprove any of Plaintiff's propositions. "When a plaintiff, having the affirmative of the issue, presents evidence to establish a prima facie case, the burden of

going forward with the evidence shifts to the defendant but, absent a statutory provision to the contrary, the burden of proof never shifts and remains with the plaintiff throughout the case." *State ex rel. State Dept. of Pub. Health & Welfare v. Ruble*, 461 S.W.2d 909, 913 (Mo.App. 1970).

Phrased another way, the law places upon the plaintiff 100% of the burden to show the factual propositions supporting his case are more like true than not true. Plaintiff's counsel, however, told the venire panel that as to each fact, plaintiff and defendant had essentially equal burdens of proof which were to be weighed; if they believed Plaintiff just 1% more than they believed Defendant, then the verdict should be for the Plaintiff. (*See* Tr. 127:11-131:2, A8-9; 131:15-133:4, A9). It is mainly for this reason that discussing Plaintiff's burden of proof in terms of percentages is misleading. The burden of proof is not a matter of a straight percentage within the framework of a shifting burden of persuasion, but rather it is a function of a burden of persuasion which *never shifts* within the framework of a shifting burden of production. "Once a plaintiff has discharged his burden of production, the burden shifts to the other party to produce, if he desires, competent controverting evidence which, if believed, will offset the plaintiff's prima facie case. ...If this is done the defendant has met the burden of evidence cast upon him, and made a prima facie defense, whereupon the burden swings back to the plaintiff to bring forward evidence in rebuttal, and so on. While the burden of producing evidence may shift from one party to the other and back again, the burden of persuasion does not." *In re Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Co.*, 438 S.W.3d 482, 490 (Mo.App. W.D. 2014)(internal citations and quotations

omitted). This is a complicated legal concept which counsel cannot and should not be allowed to explain or to question potential jurors about in *voir dire*.

With the *voir dire* questioning, statements, and scales-of-justice gesturing, Plaintiff's counsel implied, if not outright said, to the potential jurors that, for purposes of the trial going forward, Plaintiff and Defendant were each essentially equally positioned as to the burden of proof and/or had an equal burden of proof. Thus, she posited that a verdict ultimately could be had in favor of Plaintiff if the jury found evidence was just one percentage point more in Plaintiff's favor. This was clearly a misstatement of the law.

The cases relied upon by Plaintiff are distinguishable. In *State v. Edwards*, 116 S.W.3d 511 (Mo. banc 2003), the prosecutor misstated the burden of proof during voir dire. Although this Court found error in allowing the statements, it held no manifest injustice had occurred because, in part, the defendant did not object to the misstatements during *voir dire*. *Id.* at 537. Similarly, no objection was made to the *voir dire* statements in the *State v. Burnfin* case. 606 S.W.2d 629, 631 (Mo. 1980). Finally, in *State v. Driscoll*, defendant made no objections to the prosecutor's repeated references in *voir dire* and trial to "the innocent people of Missouri," leaving only the plain error standard of review. 711 S.W.2d 512, 516 (Mo. banc 1986). Here, Defendant SAMC's counsel objected multiple times. (Tr. 126:18-131:2, A8-9; 131:15-133:4, A9; see also Statement of Facts in SAMC's initial Brief, p. 33-37).

Further, Plaintiff's misplaces reliance on cases where trial counsel used "51%" to explain the civil burden of proof but where the appellate court, in reviewing *voir dire*

questions on other grounds, did not take any legal issue with the use of "51%". In those cases, either *no one raised error on appeal as to trial counsel's statements as to burden of proof* or *no objection was made to the reference at trial. See Gleason v. Bendix Commercial Vehicle Sys., LLC*, 452 S.W.3d 158, 168-174 (Mo.App. W.D. 2014)(only error alleged on appeal was as to questioning the venire person as to his experience with air brakes and no objection made during *voir dire* to "51%"); *Williams v. Jacobs*, 972 S.W.2d 334, 343-44 (Mo.App. W.D. 1998)(no objection made during closing argument which allegedly misstated the burden of proof, leaving only plain error level of review).

Here, protracted and confusing questioning by Plaintiff's counsel, as recounted above, clearly confused the venire on the issues and prejudiced Defendant. It allowed Plaintiff's counsel, over objection, to create and leave an incorrect impression with the jury as to: (a) which party had the burden of proof; and (b) that the quantum of "belief" required by the burden of proof was merely 1% more in favor of the plaintiff over the defendant.

Plaintiff erroneously argues any error was effectively cured with the giving, at the end of the trial, of the correct instruction on the burden of proof. (Dieser's Second Brief, p. 57). The trial court's instruction pursuant to MAI 3.01 (LF. 181) cured nothing and, under the circumstances, likely created further confusion. MAI 3.01 does not instruct or explain the burden of proof in terms of percentages and did not, therefore, clarify that the Defendant has no burden of persuasion at all.[2] Further, by the time the trial court

[2] MAI 3.01 [1998 Revision] states, "Your verdict will depend on the facts you believe after considering all the evidence. The party who relies upon any disputed fact has the

instructed the jury at the end of the case, the damage had already been done. The impaneled jury, who heard these confusing misstatements of the burden of proof, had listened to five days worth of evidence pursuant to an incorrect, or at least very confusing, percentage-based explanation of the Plaintiff's burden. It is difficult to see how an instruction which says nothing of percentages could "cure" such error. By allowing Plaintiff's counsel, over objection, to create and leave an incorrect impression as to the burden of proof required to return a verdict in Plaintiff's favor, the trial court allowed jury confusion of the issues and prejudiced Defendant, warranting a new trial.

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burden to cause you to believe that such fact is more likely true than not true. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence." Mo. Approved Jury Instr. (Civil) 3.01 [1998 Revision] General (7th ed).

III. The trial court abused its discretion in permitting Plaintiff to testify to St. Anthony's Medical Center being a "Catholic institution" and to his feeling "betrayed," "deceived," and angry as a Catholic because such testimony was prejudicial and irrelevant and encouraged the jury to believe the defendant hospital was to be held to a higher standard of care due to its purported religious affiliation.

Religious bias has no place in the trial of a medical negligence case.

Regardless whether intended, the impact of Plaintiff Dieser's testimony about being deceived, betrayed, and angry at St. Anthony's is a strong message that he considers defendant hypocritical. That is, his testimony was essentially, "I am a Catholic and St. Anthony's is a Catholic hospital, and so they should have cared for me very well, but they did not. They are hypocrites."

Like it or not, there have been many publicized events where the Catholic Church has been sharply criticized for not fulfilling its religious mission of properly caring for those in its charge. It seems the most publicized of these events have involved clergy in inappropriate interaction with children – those who cannot defend themselves and those whom no one would never have expected a member of the clergy to take advantage of.

Of course, however, St. Anthony's is not the Catholic Church. It is a hospital where people of all religious denominations work diligently to provide proper health care to all comers, not just Catholics.

This Court's decision in *Fleshner v. Pepose Vision Institute*, 304 S.W.3d 81 (Mo. banc 2010), and the cases it relied on, warrant closer examination, particularly the legal principles explored there about the constitutional requirement of a jury trial free from

religious or racial bias. In *Fleshner*, this Court followed the lead of other well-reasoned decisions, such as *United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986), and *Sanchez v. Int'l Park Condo. Ass'n*, 563 So.2d 197 (Fla. Dist. Ct. App. 1990), in holding that if improper religious or racial comments are made during jury deliberation, then a new trial must be granted. *Fleshner, supra*, at 89-90.

The fact that this case involves Plaintiff's own testimony of religious bias makes it no less compelling a situation for the protection of a party's right to a fair and impartial jury. In fact, such direct testimony by a sympathetic plaintiff in open court is more powerful than jurors deliberating in a private room, making crass jokes along racial or religious lines. *See e.g., Fleshner*, 304 S.W.3d at 90. Here, Plaintiff Dieser essentially told the jurors that the "Catholics" at SAMC were hypocrites – that they deceived and betrayed him in their medical care. These are very strong words for a medical negligence plaintiff. Even if we assume, without conceding, that such emotionally-charged language is proper in a medical negligence case, it is clear that Mr. Dieser could have said the same emotionally charged words without any reference to religion and without hindering his ability to fully inform the jury about how he felt. Surely, whether or not SAMC is a Catholic-affiliated hospital did not tend to prove or disprove any fact in the case.

Plaintiff tries to fend off the undeniably powerful message by arguing that it is St. Anthony's fault for having medical records which bear religious symbols and the name "St. Anthony's." Not one piece of testimony or evidence, however, drew attention to any such aspect of either the medical records, or the name of the defendant hospital.

Plaintiff's counsel unwittingly bears Defendant's point here when she states that Mr. Dieser's injuries were "tied to his faith" and that this feeling was relevant to the degree of his injuries. (Dieser's Second Brief, p. 63). She also concedes that religious references are inadmissible in certain contexts, but says this case is different because of Mr. Dieser's feelings of betrayal and deception. (*Id.*) Presumptively, this includes his statement of feeling like the staff at St. Anthony's wanted to "kick [him] to the curb."

This is the very emotional intensity that religious comments and references can lead to in a trial. Their very presence prevents the fair and impartial jury trial guaranteed by the Constitution.

IV. Plaintiff's counsel argument to the jury, over objection, that the jury would be telling the community what constitutes acceptable medical practice was improper and prejudicial because it constituted a "send a message" argument in a case where Plaintiff alleged no punitive or exemplary damages.

The trial court prejudicially erred in allowing Plaintiff's counsel, over objection, to state to the jury during closing arguments that they were the community standard-setters as to what constituted acceptable medical care and could send a message with their verdict.

Before the trial court, Plaintiff argued that juries are "always" told that when they deliver a verdict, they do so as the conscience of the community. (Tr. 1173:25-1174:1, A42). Plaintiff's counsel's closing argument in this regard, however, was not solely that the jury would be the conscience of the community, but essentially that they, as jurors, would determine the standard of care, not just for this case, but going forward through whatever message the verdict sent to others and the defendant hospital.

Plaintiff's counsel, over Defendant's objections, stated, "I had thought the hospital admitted that this was a pressure injury sustained in the hospital, a Stage III or Stage IV crater in his backside all the way down to the wound 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. 1172:24-1174:5, A42)(emphasis added). In arguing the point at side bar before the trial court, Plaintiff's counsel made clear the point of her argument: "MS. COFFEY: I said that their verdict becomes a legal document, saying whether the care

provided to Mr. Dieser was acceptable in this community. That is what it is. The jury is always told that they are the conscience of the community." (Tr. 1172:24-1174:5, A42)(emphasis added).

Thus, Plaintiff's counsel equated her words during closing argument with telling the jury they are the conscience of the community. This argument improperly told the jury to "send a message" to not only the defendant hospital, but to the community of doctors, hospitals and other health care providers. Thus, this blatantly improper appeal to the jury to punish Defendant SAMC was only heightened by the blatantly improper appeal to the jury to set the standard of care for the healthcare community, despite the fact Plaintiff did not allege willful or wanton misconduct and did not request punitive damages.

Plaintiff's counsel does not dispute that "send a message" arguments are viewed with displeasure in cases where punitive damages are not sought. Rather—contrary to her own statement to Judge Burton at the side bar—she attempts to deny her closing argument constituted a "send a message" argument. (Dieser's -Second Brief, p. 70-71). This is also difficult to comprehend when Plaintiff's counsel told the jury its verdict would be a "legal document" which would "say" to the community what is acceptable medical care. Counsel came just about as close as possible to saying "send a message" without using those exact words, which have so clearly been held a proper basis for a new trial. *See Smith v. Courter*, 531 S.W.2d 743, 747 (Mo. banc 1976)(overruled on other grounds in *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. banc 1994)); *Fisher v. McIlroy*, 739 S.W.2d 577, 582 (Mo.App. E.D. 1987).

Equally disingenuous is Plaintiff's counsel's argument that her comment as to the verdict becoming a "legal document" was merely a reference to how the verdict would ultimately be incorporated into the court's file, published in the online filing system, and would form the basis for the judgment. (Dieser's Second Brief, p. 71-72). While all that may be true, the greater context of the closing argument makes clear Plaintiff's counsel was including a plea for the jury to send a message to the health care provider community about what it would consider to be adequate medical care and telling the jury its verdict would ascribed some legal force beyond this Plaintiff and this set of facts. Counsel was clearly further imploring the jury to speak through its verdict and send a message to the community.

In a desperate step, Plaintiff reaches outside the trial record to rely on an informational pamphlet purportedly from an organization called the "Missouri Jury Organization." (Dieser's Second Brief, p. 71 and Supplemental Appendix, A98). Plaintiff merely says this was "available to jurors" without saying whether she is referring to the jurors in this case. (*Id.*) No effort is made to identify or explain where this pamphlet came from, whether this was given to, or otherwise made available to or read by *these* jurors, or even what type of group the "Missouri Jury Organization" is or who comprises it.[3] Under

[3] An internet search conducted by Defendant's counsel proved unable to find specific information regarding the "Missouri Jury Organization" beyond a reference to such an entity in a December 2009 newsletter from the United States District Court for the Western District of Missouri. *See* webpage last visited on January 26, 2016:

these circumstances, it is difficult to see how whatever may be contained in this pamphlet is relevant or probative to this point on appeal.

Defendant's counsel contacted the St. Louis County Circuit Court Jury Coordinator, who provided a copy the pamphlet given to jurors in that county. That pamphlet, which is included in SAMC's Second Appendix, is not what Plaintiff provided this Court. It is a pamphlet which states, "This Handbook is published by The Missouri Bar under the authority of Missouri Supreme Court Rule 69.02." (SAMC's Second Appendix, p. A128). Nowhere in this Missouri Bar pamphlet are jurors told they "represent the collective will and values of society" or that they "speak on behalf of [their] friends, [their] neighbors, and everyone in [their]community," as stated in the pamphlet Dieser has presented to this Court (Dieser's Second Brief, p. 71, DSA A98). There is absolutely no support for the proposition that, as Plaintiff asserts, *the jurors in this case* were so told or instructed by the court.

Plaintiff's argument before this Court, however, parallels the arguments he made with the purported CMS "never event" regulation at trial. There, as recounted in the briefing, Plaintiff's counsel kept referring to the existence of a federal regulation which somehow supported the admission of the "never event" evidence, without ever actually producing a regulation or admitting one into evidence. Of course, there was no such

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http://www.mow.uscourts.gov/courthouse_connection/December_2009/backpage_recent_events.htm#mojo

federal regulation. Now, before this Court, Plaintiff's counsel refers to a juror information pamphlet she represents was "available to jurors" (presumptively implying those deciding this case) without ever actually producing a pamphlet known to be available to *these* jurors or actually seen by any of them.

Plaintiff also seems to argue that, because Plaintiff's counsel stated in jury selection that "[t]he verdict that the jury renders in this case will say whether the quality of care that Dieser got is acceptable in St. Louis County," any objection to counsel's closing argument was somehow waived or cannot be held improper. (Dieser's Second Brief, p. 70). Essentially, Plaintiff would have it be that whatever is not objected to before the venire panel is waived when presented to the impaneled jury. What is said in closing argument is directed to the actual jury as impaneled, which would have heard all the evidence and which, after being instructed on the law by the court, will decide the case. This is quite different from a comment made to a venire panel of dozens of individuals, most of whom will not ultimately be called upon to decide the case.

There are other instances where things may be mentioned or inquired about in jury selection which would be inappropriate to raise later in the case. For example, in jury selection, counsel may properly ask the so-called "insurance question" to determine if a potential juror has an interest in an insurance company involved in the litigation. *Saint Louis University v. Geary*, 321 S.W.3d 282, 292 (Mo. banc 2009). Aside from this, however, it is generally improper to inject the issue of insurance into an action for damages and such an injection can constitute reversible error. *Taylor v. Republic Automotive Parts, Inc.*, 950 S.W.2d 318, 321 (Mo.App. W.D. 1997).

The trial court, therefore, erred in overruling Defendant's objection to the improper argument and in not granting Defendant a new trial on this basis. This improper argument severely prejudiced Defendant, as reflected in the excessive verdict for damages.

V. The excessive jury verdict was clearly the result of passion and prejudice fueled by the trial court errors addressed herein and far exceeded fair and reasonable compensation for Plaintiff's injuries.

The verdict in this case clearly resulted from passion and prejudice and far exceeded fair and reasonable compensation for Plaintiff's injuries when viewed in light of the nature of the injury and how grossly disproportionate the verdict is both to the evidence of Plaintiff's economic damages and of his pain and suffering.

Plaintiff argues the verdict here was in line with other pressure wounds similar to his. A review of some of the cases upon which Plaintiff relies, however, shows some material and significant differences.

For example, in *Tucker Nursing Center, Inc. v. Mosby*, 692 S.E.2d 727 (Ga. App. 2010), the plaintiff, a resident in a long-term care facility, developed bed sores on both buttocks. He spent about four months in the hospital to undergo treatment for one of the sores and its resulting complications, which included sepsis and malnutrition *Id.* at 82. He required multiple additional hospitalizations, including for a colostomy, placement of feeding tubes, and for surgical debridements of the wound. *Id.* at 82. Plaintiff had past economic damages of almost $230,000. *Id.* at 82. The jury awarded plaintiff $1,250,000, or about 5.5 times his economic damages. *Id.* at 81.

In *Olsten Health Srvc's, Inc. v. Cody*, 979 S.2d 1221 (Fla. App. 2008), the plaintiff's stage IV pressure wound never completely healed after several years and multiple surgical procedures, improving at times and worsening at times. *Id.* at 1224. At one point plaintiff's physicians tried to create a flap out of tissue from other parts of the

body to attempt to cover the wound. *Id.* Although the jury awarded plaintiff $3,050,000 in damages, it was *all* in economic damages and it ascribed 30% fault to the plaintiff. *Id.* at 1222.

In *Debose v. Quinlan* case, 125 A.3d 1231 (Pa. 2015), the jury awarded $1,000,000 on a survival claim and $125,000 on a death claim arising from severe pressure ulcers in a severely brain-damaged individual. The evidence showed the severe pressure ulcers were left untreated, leading to a painful and gruesome death caused by neglect and deterioration of the ulcers. *Id.* at 1236. Despite physician's orders, the nursing home neglected to treat the initial sores, leading to a marked deterioration of the initial sores and a proliferation of pressure ulcers to other parts of her body, including her shin and heels, such that she ultimately had at least 10 pressure ulcers and a systemic infection at the time of her death. *Id.* at 1240.

In contrast to these cases cited by Plaintiff, Mr. Dieser did not spend multiple weeks or months in the hospital as a result of his injuries. While he did undergo two surgical procedures on the wound, he was mostly healed about five months later and stopped seeing his treating physician altogether about one year after development of the wound. (Tr. 693:13-17, A14; 699:8-12, A15; 708:18-709:7, A16; 830:2-5, A22; 840:19-25, A23). There was no evidence or any other resulting complications such as sepsis, malnutrition, a proliferation of other sores, or, obviously, death. There was no evidence of future treatment needed, nor did Plaintiff express he may want or need any future care or treatment as a result of the wound. In fact, when asked about his concerns for the

future in terms of this wound, Plaintiff identified only a fear of going to the hospital. (Tr. 901:13-15, A25).

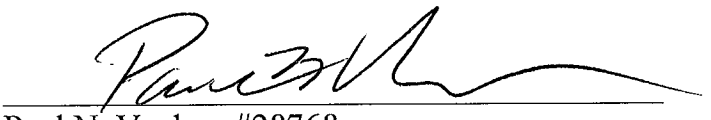
Given the absence in this case of any significant, chronic, physical injury to Plaintiff Dieser as a result of the treatment at SAMC and the fact that Plaintiff's total claimed economic damages were only $33,000 with no future economic damages, the excessive verdict in this case constitutes and demonstrates prejudice by the jury against Defendant. This disproportionate award shocks the conscience and demonstrates that the jury's damages award exceeded the upper limit of fair and reasonable compensation for Plaintiff's injuries. The trial court abused its discretion in denying a new trial on this basis.

CONCLUSION

For the reasons fully discussed above and in Defendant's initial Brief, the trial court erred in: **(1)** permitting testimony of about the so-called CMS "never event" regulation; **(2)** permitting Plaintiff's counsel during jury selection to make misstatements of law and to question the venire as to the burden of proof; **(3)** permitting Plaintiff Dieser to testify to SAMC being a "Catholic institution" and to his feeling "betrayed", "deceived" and "angry" as a Catholic; **(4)** allowing Plaintiff's counsel to state to the jury during closing argument that, with their verdict, they were setting the standard for the community as to what is acceptable medical care; and, **(5)** failing to grant a new trial on the basis of the excessiveness of the verdict. Any single one of these errors, standing alone, constitutes reversible error, as does the cumulative weight of these errors. *See Faught v. Washam*, 329 S.W.2d 588, 604 (Mo. 1959)(noting a new trial can be ordered for cumulative error without undertaking to determine whether any single point standing alone would constitute reversible error)(overruled on other grounds by *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. banc 1994).

Defendant, therefore, asks that the Judgment in this case be reversed and the case remanded for a new trial on all issues. In any event, the trial court should be affirmed as to its denial of post-judgment interest to Plaintiff.

WILLIAMS VENKER & SANDERS LLC



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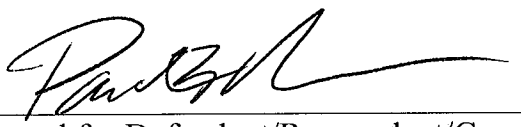
RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing Reply Brief of Defendant/Respondent/Cross-Appellant St. Anthony's Medical Center contains 7568 words (exclusive of the cover, the proof of service, this Rule 84.06(c) certificate of compliance, the signature block and appendix), and that counsel relied on the word count of Microsoft Word for Windows, which was used to prepare the brief. Further, counsel certifies that the electronic copies of the foregoing brief have been scanned for viruses and are virus free.



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PROOF OF SERVICE

The undersigned hereby certifies that he signed the original of the foregoing document and that the foregoing was filed and served electronically through the Missouri Courts eFiling System this 28th day of January 2016 , which sent notification to all parties of interest herein. Counsel further certifies that he signed the original of this document and has retained that original. A copy of the foregoing was also served via U.S. mail and email to the following:

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