No. 66959

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Bernice L. Mitchell,
Appellant,
v.
Joseph C. Evans, M.D., *et al.*
Respondents.

Appeal from the Circuit Court of Jackson County,

Hon. Vernon E. Scoville, Judge Presiding

Circuit Court Nos. 02CV-222374 & 03CV-222184 (Consolidated)

RESPONDENTS JOSEPH C. EVANS, M.D.; SURGICAL CARE OF INDEPENDENCE, INC.; ROBERT L. BOWSER, M.D.; INDEPENDENCE ANESTHESIA, INC.; SOL H. DUBIN, M.D. AND ORTHOPEDIC ASSOCIATES OF KANSAS CITY, INC.'S JOINT BRIEF

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Statement of Facts

On August 13, 2000, there was an altercation among several young individuals at a Sonic Restaurant located in Independence, Missouri around 35th Street and Noland Road. (Transcript, p. 390:6–20). Apparently, one of the young people brandished a firearm, leading to a car chase. (Transcript, p. 390:6–20). There were indications these events were gang related, and that several earlier events led up to this incident, but those issues are not particularly relevant for this appeal except to provide background. (Transcript, p. 5:2-5). A high speed auto chase ultimately commenced and resulted in a head-on collision at speeds estimated to be 60-70 miles per hour. (Transcript, p. 390:21–25; p. 448:7-10). The accident occurred at 27th Street and Sterling Road in Independence, Missouri, at approximately 1:11 a.m. (Transcript, p. 390:21–25; p. 448:7-10; p. 630:15–18).

The decedent most relevant to this case, William Mitchell, was the driver of a pick-up truck involved in the head-on collision. (Transcript, p. 390:6–20). Mitchell was an unrestrained driver whose lower extremities were trapped under the steering wheel and dash in the front of his burning truck. (Transcript, p. 560:23–561:1). Emergency rescue personnel had an actual memory of this incident and the rescue efforts because it "was an especially horrific scene." (Transcript, p. 558:12–15). Mitchell's extrication took approximately forty-five minutes. (Transcript, p. 561:10–12). Other occupants in the truck also suffered significant injuries. A twelve year-old boy riding in the back of truck died at the scene. (Transcript, p. 8:1-2). Another boy riding in the back of the truck was paralyzed. (Transcript, p. 22:17).

Mitchell, the paralyzed boy, and another boy with head injuries were all transferred from the scene to Independence Regional Health Center ("IRHC"). (Transcript, p. 453:24–25). IRHC was a level II trauma center at the time of this incident. (Transcript,

p. 1975:17–19). Mitchell arrived at IRHC at 2:05 a.m. (Transcript, p. 944:l–5). David Lisbon, M.D. was the emergency room physician who initially assessed Mitchell, and then transferred care to Respondent Joseph Evans, Jr., M.D. (Transcript, p. 985:18–21; p. 988:22-24).

Dr. Evans was the trauma surgeon on call the evening of this accident. (Transcript, p. 1978:23 – p. 1979:8). In this particular instance, Dr. Evans was advised that three trauma patients would be taken to IRHC. (Transcript, p. 1979:12–18). This was important because IRHC typically only accepts one trauma patient at a time. (Transcript, p. 1981:4–8). Upon timely arrival, Dr. Evans received a report from the emergency room physician, Dr. Lisbon, regarding the condition of the various trauma patients. (Transcript, p. 1981:20 – p. 1982:18).

Dr. Lisbon advised Dr. Evans that two patients were more critical than Mitchell. (Transcript, p. 1981:20 – p. 1982:18). One patient was bleeding into his chest, with a chest tube, a partially collapsed lung, as well as paralysis below the waist. (Transcript, p. 1982:4–8). A second trauma patient had a head injury and was having difficulty maintaining consciousness. (Transcript, p. 1982:9–13). After assessing the other two trauma patients, Dr. Evans assessed Mitchell shortly before 3:25 a.m. (Transcript, p. 1983:4–7).

Mitchell was found to be an obese male, wearing a cervical collar, with deformities of his lower limbs resulting from bilateral femur fractures, blood in the ear canal of the left side which could be indicative of a basilar skull fracture, a laceration of this chin, minor abrasions on his chest, he was in sinus tachycardia (rapid heart rate), he had second and third degree burns of his right leg and inner thigh, and he had a possible cervical spine fracture. (Transcript, p. 2028:20 – p. 2030:23; p. 2037:23 – p. 2038:1). Based on the information

Dr. Evans gathered, Dr. Evans continued earlier treatments and initiated further treatment for Mr. Mitchell.

Respondent Sol Dubin, M.D., was the orthopedic surgeon on call the evening of August 12, 2000. Dr. Dubin was contacted in the middle of the night by Dr. Evans to come in and assess Mitchell's bilateral femoral fractures. (Transcript, p. 2774:9–22). Dr. Dubin went to the hospital and assessed Mitchell's fractures. (Transcript, p. 2777:22 – p. 2778:5). Dr. Dubin found very severe fractures in both of Mitchell's legs. (Transcript, p. 2780:17 – p. 2781:25). The right leg had a transverse fracture just about midshaft in the femur which was rotated out, displaced and shortened. (Transcript, p. 2780:17 – p. 2781:6). The left leg had a comminuted fracture that had fragmented, and was also rotated out, displaced and shortened. (Transcript, p. 2781:9–20). Accordingly, Dr. Dubin recommended surgery to repair the fractures at the earliest opportunity. (Transcript, p. 2784:2 – p. 2784:16).

Before surgery could begin, Dr. Dubin needed time to gather the necessary equipment for surgery. IRHC did not have the equipment necessary to repair bilateral femoral fractures. (Transcript, p. 2787:3–13). Dr. Dubin requested to proceed with surgery as soon as he could gather the necessary equipment and as soon as the patient could be cleared for surgery by the other specialists involved. (Transcript, p. 2784:20 – p. 2785:1).

The uncontradicted testimony was that orthopedic surgeons need to stabilize femoral fractures at the earliest possible opportunity because, over time, complications can develop. (Transcript, p. 2785:18 – p. 2787:2). Through delay, patients become more at risk for thromboembolism. (Transcript, p. 2786:12). Another complication particular to this type of fracture is fat embolism. Fat exists inside bone marrow and mobilizes upon fracture. (Transcript, p. 2274:25). A femur fracture is the most common cause of fat embolism.

(Transcript, p. 688:21 – p. 689:3). Fat embolism is not preventable. The only thing physicians can do is repair the fractures and offer support. (Transcript, p. 2785:13 – p. 2787:2). Fat embolism can lead to death. (Transcript, p. 689:4–6). In this instance, Mitchell had bilateral femoral fractures resulting in a "double dose" of fat emboli to the lungs. (Transcript, p. 688:17–20).

By 5:00 a.m., Mitchell's overall condition was improving and he was looking "very good." (Transcript, p. 2046:18 – p. 2047:1). Dr. Evans proceeded to obtain the appropriate clearance for surgery. A neurosurgical consult was obtained to examine the potential basilar skull fracture and potential cervical spine fracture. (Transcript, p. 2061:19 – p. 2062:25). The patient was ultimately cleared for surgery from a neurosurgical standpoint by the neurosurgeon, with the caveat that the potential cervical fracture be protected and further worked up after surgery. (Transcript, p. 2068:24 – p. 2069:11). Dr. Evans saw the patient again between 7:00 and 7:15 a.m. (Transcript, p. 2069:23 – p. 2070:8). At that time, Dr. Evans found that the patient was hemodynamically stable and Mitchell was subsequently transferred to surgery at approximately 7:15 a.m. (Transcript, p. 2071:16-20; p. 2073:7-12).

Robert Bowser, M.D., was the anesthesiologist on call beginning at 7:30 a.m., the early morning of August 13, 2000. (Transcript, p. 3028:19 – p. 3029:16). Dr. Bowser became involved with Mitchell after relieving his partner, Dr. Turner, who was on call until 7:30 a.m. and who performed Mitchell's initial anesthesia assessment. (Transcript, p. 3029:10 – p. 3030:1). Dr. Turner began the anesthesia assessment at approximately 7:27 a.m. (Transcript, p. 3031:17). Dr. Bowser also had the assistance of Jeffrey Richardson, a certified registered nurse anesthetist. (Transcript, p. 2907:25 – p. 2908:7). Mitchell was evaluated just before surgery by Mr. Richardson, Dr. Turner, and Dr. Bowser. (Transcript, p. 2910:15 – p. 2911:22;

p. 3033:23 – p. 3034:14; p. 3037:11–18; p. 3050:9-11). By all accounts, Mitchell was stable for surgery. (Transcript, p. 2910:15 – p. 2911:22; p. 3033:23 – p. 3034:14; p. 3037:11–18; p. 3050:9-11; p. 3078:15-24). Dr. Dubin also assessed Mitchell and saw no reason to believe the patient was not stable and ready for surgery.

Dr. Bowser testified that he selected the anesthetic means for Mitchell's surgery. (Transcript, p. 3032:22 – p. 3033:3). He was advised by the neurosurgeon of a potential cervical neck fracture and directed not to move Mitchell's neck. (Transcript, p. 3065:7–25). Dr. Bowser testified that in order to provide a general anesthetic he would have to tilt the neck in order to intubate the patient. This would have posed a risk of shifting any neck fracture. (Transcript, p. 3066:1–17). Additionally, with the use of a spinal anesthetic, the patient is sedated, but awake and able to guard their own airway. (Transcript, p. 3072:12–21). It was decided that a spinal anesthetic was the best choice in Mitchell's case.

Mitchell's surgical anesthesia commenced at approximately 8:05 a.m. (Transcript, p. 3079:19 – p. 3080:15). The spinal anesthetic was provided at approximately 8:20 or 8:25 a.m. (Transcript, p. 3085:4–8). Anesthesia staff was constantly evaluating Mitchell during surgery through all various means available. (Transcript, p. 3094:21 – p. 3095:5). Dr. Bowser did another assessment at approximately 9:05 a.m., and noted Mitchell was stable, alert and awake. (Transcript, p. 3096:20 – p. 3097:5). At some point shortly thereafter, Mitchell lost consciousness and Dr. Bowser had to proceed with an emergency intubation. (Transcript, p. 3097:23 – p. 3098:25). It was determined that Mitchell suffered some type of catastrophic event during surgery, and surgery was immediately concluded prior to completion of the second fracture repair so that Mitchell could be stabilized. (Transcript, p. 3100:14 – p. 3101:5). Mitchell was transferred to the intensive care unit. (Transcript, p. 3101:10-12).

Dr. Bowser obtained a pulmonary consult. Additional measures were quickly undertaken by Dr. Bowser in an effort to save Mitchell's life. (Transcript, p. 3101:13–23). Unfortunately, Mitchell died at 1:32 p.m. (Transcript, p. 2243:17–18).

As a result of Mitchell's injuries and death, his family filed several lawsuits, all claiming wrongful death and all seeking recovery for the exact same claimed injuries and damages. A wrongful death lawsuit was filed against Gary Romano, Sonic, and Police Officer Gary Grayson. (Transcript, p. 1918:6–16). A wrongful death lawsuit was also filed against State Farm Automobile Insurance Company. (Transcript, p. 1919:21 – p. 1920:4). Another wrongful death lawsuit was filed against several other individuals involved in the auto accident. (Transcript, p. 1941:6–11). Appellant then brought several separate actions against the trauma surgeon Dr. Evans, the anesthesiologist Dr. Bowser, the C.R.N.A. Mr. Richardson, the orthopedic surgeon Dr. Dubin, their respective corporate employers, and Independence Regional Health Center.

Appellant's experts failed to offer specific opinions regarding the various standard of care allegations against each respective Respondent. The experts often spoke in general terms, rarely specifically referencing this case or the specific Respondent to whom the expert was referring. Additionally, there was insufficient and inadequate causation testimony for an admissible case. The expert testimony further failed in many respects to meet the standards of admissibility and submissibility for Missouri.

Respondents presented substantial evidence that the cause of death in this case was "extensive intravascular fat embolism" found at autopsy by all parties. (Transcript, p. 684:18-25). Mitchell's lungs at autopsy "were full of fat emboli." (Transcript, p. 687:4-9). Beginning at the instance of a fracture, fat starts embolizing to the lungs and this continues until

the fracture is stabilized. (Transcript, p. 2785:13 – p. 2787:2). Fat embolism is not preventable. The only thing the health care providers could do was repair the fractures and offer support. (Transcript, p. 2785:13 – p. 2787:2). When fat accumulates in the lungs, it clogs the blood vessels necessary for oxygen exchange. (Transcript, p. 2273:13 – p. 2274:16). If you get enough fat embolism in the lungs, oxygen exchange can not occur and death is imminent. (Transcript, p. 2277:23 – p. 2278:14).

In this case, Mitchell incurred two femoral fractures. He not only suffered from extensive fat embolism, but he also had the additional complication of pulmonary thromboembolism. (Transcript, p. 2278:18–24). Pulmonary thromboembolism are blood clots that move to the lungs and block oxygen exchange immediately. (Transcript, p. 2278:18 – p. 2279:15). Michael Fishbein, M.D., an expert retained by Respondent Robert Bowser, M.D., identified multiple pulmonary embolism within Mr. Mitchell's autopsy slides. (Transcript, p. 2281:24 – p. 2281:25). Dr. Fishbein testified that Mitchell suffered from two fatal complications, fat emboli and pulmonary thromboembolism. (Transcript, p. 2285:6–12).

The evidence presented by Respondents at trial proved that any alleged aspiration was very minor as reflected by the "rare" food particulate identified in Mitchell's lungs at autopsy. (Transcript, p. 684:18–25). The microscopic rare food particulate identified in a subsequent check, looking specifically for food particulate, identified food particulate so rare that it could be counted on one hand. (Transcript, p. 685:1–4). Additionally, the evidence showed that more likely than not, any alleged aspiration occurred at the scene of the accident. (Transcript, p. 683:2–15; p. 2245:8–17).

At the time of trial, Respondents presented expert testimony from both retained experts and treating healthcare providers stating that none of the Respondents deviated from the

standard of care in any respect. Respondents further presented evidence that Mitchell's death was caused by known complications of the injuries he sustained in the tragic auto accident, and that Respondents did not cause or contribute to the cause of Mr. Mitchell's injuries or death.

Appellant settled the claims against many other parties. The claims against Gary Romano and a series of other individuals settled for a total of $100,000. (Transcript, p. 1918:21–24). The case against State Farm Mutual Insurance Company was settled for a total of $210,000. (Transcript, p. 1920:9–16). Appellant's claims against IRHC were also settled for a total of $100,000. (Transcript, p. 1922:8–10). Additionally, Appellants received $4,950 in crime victim's compensation. (Transcript, p. 1922:11-14). The jury returned a defense verdict in this case.

Argument

The instructions submitted to the jury were proper (Appellant's First Point Relied On).

Standard of Review

Appellant failed to properly object to jury instructions 7, 9, and 11 at trial, and now seeks to develop new objections and arguments in the appeals court. Accordingly, this Court should apply the plain error standard of review to Appellant's jury instruction point relied on. *State v. Goebel*, 83 S.W.3d 639, 643 (Mo. Ct. App. 2002). "To find plain error regarding jury instructions, the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice." *Id.* (citing *State v. Black*, 50 S.W.3d 778, 788 (Mo. 2001)). The record clearly demonstrates Appellant failed to object, and the Court's refusal to submit Appellant's jury instructions 7, 9, and 11 to the jury did not cause a manifest injustice or miscarriage of justice.

If this Court determines Appellant, in some way, properly objected to jury instructions 7, 9, and 11, then Missouri Appellate Courts review a trial court's refusal to give instructions de novo. *Marion v. Marcus*, 199 S.W.3d 887, 893 (Mo. Ct. App. 2006). The Court evaluates whether the proposed instructions are supported by substantial evidence and the law. *Id*. at 893, 894 (citing Rule 70.02(a)). The Court will only reverse if the Court determines the error resulted in prejudice, and the error "materially affected the merits of the action." *Id*. at 894 (quoting Rule 84.13(b)) (citing Rule 70.02(a)).

"In reviewing the submissibility of an instruction, an appellate court views the evidence and reasonable inferences in the light most favorable to the instruction and disregards all contrary evidence." *William v. Daus*, 114 S.W.3d 351, 370 (Mo. Ct. App. 2003) (citations omitted).

Even if the Court determines Appellant properly objected to jury instructions 7, 9, and 11, the record clearly demonstrates Appellant's instructions were not supported by substantial evidence. Further, Appellant has failed to establish that the Court's refusal to submit Appellant's jury instructions 7, 9, or 11 to the jury caused any prejudice or "materially affected the merits of the action."

The Trial Judge is Responsible for Submitting Jury Instructions

Appellant's Brief purports that plaintiff's counsel, not the trial judge, submits jury instructions to the jury. "A party is entitled to an instruction on any theory supported by the evidence." *Romeo v. Jones*, 144 S.W.3d 324, 330 (Mo. Ct. App. 2004). However, the entitlement is determined by the trial judge's non-delegable duty to instruct the jury based on the evidence presented at trial.

"[E]ach instruction given or refused reflects the trial judge's performance and it is a judicial duty to give a complete charge to the jury." *Missouri Approved Jury Instructions*, Sixth Edition, Edited by Stephen Ringkamp and Richard McLeod, 2002, How to Use This Book, p. LI. "Civil Rule 70.02 reflects the non-delegable duty in its reference to identifying instructions prepared 'at the court's direction.'" *Id.* at LI-LII. Missouri Court Rules definitively address courts providing jury instructions by stating, **"The court may give instructions without requests of counsel."** Rule 70.02(a) (emphasis added).

It should be noted that Appellant never raised this issue during trial. Missouri law is overwhelmingly clear that judges, not attorneys, have the duty to instruct the jury. The non-delegable duty to instruct juries based on the evidence and law belongs solely to the judge. Accordingly, this Court should affirm the trial judge's Judgment in this case.

Jury Instruction 7 was proper

The text of Jury Instruction 7 submitted to the jury.

> Your verdict must be for the plaintiff Bernice Mitchell if you believe:
>
> First, defendant Joseph C. Evans, M.D. and Surgical Associates of Independence, Inc. permitted William Mitchell while in an unstable hypovolemic condition to be transferred to surgery, and
>
> Second, defendant Joseph C. Evans, M.D. and Surgical Care of Independence, Inc. were thereby negligent, and
>
> Third, such negligence either directly caused the death of

William Mitchell or combined with the injuries from the motor vehicle accident to directly cause the death of William Mitchell.

The text of Jury Instruction 7 submitted by Appellant.

Your verdict must be for the plaintiff Bernice Mitchell if you believe:

First, defendant Joseph C. Evans, M.D. and Surgical Associates of Independence, Inc. failed to establish adequate hemodynamic stability by proper restoration of fluid volume before allowing surgery by Dr. Dubin, and

Second, defendant Joseph C. Evans, M.D. and Surgical Care of Independence, Inc. was negligent, and

Third, such negligence either directly caused the death of William Mitchell or combined with the injuries from the motor vehicle accident to directly cause the death of William Mitchell.

Appellant failed to object to Jury Instruction 7 at trial.

Appellant failed to articulate any clear objection to Jury Instruction 7 at trial. The transcript of the Instruction Conference demonstrates Appellant failed to make a specific objection to Jury Instruction 7 at trial:

"THE COURT: Instruction 7 is the verdict director for

> defendant Joseph Evans. It is not the tendered verdict director of either the plaintiff or defendants.
>
> MR. PICKETT (ATTORNEY FOR APPELLANT): Plaintiff tenders Plaintiff A.
>
> THE COURT: Plaintiff now tenders, here's the stack of tendered that I have, a tendered proposed instruction. Would you like to make any other record?
>
> The Court shall file-stamp it in and write 'refused' with today's date. Any other record you would like to make in this regard?
>
> MR. PICKETT (ATTORNEY FOR APPELLANT): Well, other than I think it is a fair and appropriate statement of the ultimate fact issues and does not detail the facts as much as what the Court did and is giving.
>
> THE COURT: Thank you."

(Transcript, p. 3354-3355).

Rule 70.03 states, "Counsel must make **specific** objections to instructions considered erroneous." (emphasis added). Further, Rule 70.03 states, "No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, **stating distinctly the matter objected to and the grounds for the objection.**" (emphasis added).

Appellant's counsel's statements during the Court's Instruction Conference do not raise a single issue with Instruction 7 set forth in Appellant's Brief. Appellant's failure to make specific objections to Instruction 7 pursuant to Rule 70.03 preserves nothing for review. If this Court chooses to address Appellant's point relied on pertaining to Instruction 7, the plain error standard of review is applicable. The record clearly demonstrates that the Court's refusal to submit Appellant's jury instructions 7 to the jury did not cause a manifest injustice or miscarriage of justice.

No substantial evidence supported Appellant's proposed Instruction 7.

Appellant's own Brief stated, "In Dr. Tile's opinion Dr. Evans allowed William Mitchell to go to surgery while he was in a hypovolemic state." (Appellant's Brief, page 67) (citing "*Id*., at 94/24-95/7").[1] Appellant's own Brief described the specific evidence the trial

[1] It is unclear whether appellant is citing to the Transcript, Legal File, or the Appellant Brief Index. Based on page 28 of Appellant's Brief, the citation may reference Trial Exhibits 120, 121, 122, and 123. However, these trial exhibits are not contained in the Transcript, Legal File, or Appellant Brief Index, and are not part of the Record on Appeal. A small portion of Trial Exhibit 120 was read into the record (Transcript p. 1136-1153). The remaining portion of Dr. Tile's trial testimony is not included on the Record on Appeal, and is the subject of Appellant's Motion to Supplement the Record, which Appellant has requested the Court to defer ruling until Dr. Tile's actual trial testimony is located.

judge used to submit Jury Instruction 7 to the jury. Dr. Tile's testimony included in Appellant's Brief is almost the exact same language submitted to the jury in Instruction 7.

No other substantial evidence was produced at trial supporting Appellant's proposed Instruction 7. Accordingly, this Court should affirm the trial court's Judgment.

Appellant was not prejudiced by the submission of Instruction 7 to the jury.

If the Court finds Appellant properly objected to Instruction 7, and substantial evidence supported Appellant's Instruction 7, the Court should still affirm the trial court's Judgment because Appellant suffered no prejudice in the submission of Instruction 7 to the jury.

The Court will only reverse if the Court determines the error resulted in prejudice, and the error "materially affected the merits of the action." *Marion v. Marcus*, 199 S.W.3d 887, 894 (Mo. Ct. App. 2006) (quoting Rule 84.13(b)) (citing Rule 70.02(a)).

Appellant's proposed Instruction 7 required a showing that: (1) Dr. Evans failed to establish adequate hypovolemic stability by proper restoration of fluid volume, **AND** (2) Dr. Evans allowed William Mitchell while in an unstable hypovolemic condition to go to surgery with Dr. Dubin. *See* Appellant's proposed Jury Instruction 7. However, Jury Instruction 7 submitted to the jury only required a jury to find Dr. Evans liable if Dr. Evans permitted William Mitchell while in an unstable hypovolemic condition to be transferred to surgery. (*See* Jury Instruction 7 submitted to the jury).

In short, Appellant's proposed Jury Instruction 7 would have required the jury to make two separate findings to support judgment against Dr. Evans, while Jury Instruction 7 actually submitted to the jury only required the jury to make the second finding to support judgment against Dr. Evans. Appellant's claim of prejudice is disingenuous because Jury

Instruction 7 submitted to the jury actually made it easier for the jury to hold Dr. Evans liable for William Mitchell's alleged damages.

The record overwhelmingly demonstrates that Appellant was not prejudiced by Jury Instruction 7, and the submission of Jury Instruction 7 did not "materially affect the merits of the action."

This Court should Affirm the trial court's Judgment.

The record demonstrates Appellant never properly objected to Jury Instruction 7. Under the plain error standard of review, Appellant has never identified a single item in the record on appeal that the trial court "misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice." Accordingly, this Court should affirm the trial court's Judgment.

Even if the Court finds Appellant properly objected to Jury Instruction 7 at trial, the record demonstrates no substantial evidence supported Appellant's Jury Instruction 7. Accordingly, the Court should affirm the trial court's Judgment.

Even if the Court finds Appellant properly objected to Jury Instruction 7 at trial, and that Appellant produced substantial evidence supporting Appellant's Jury Instruction 7, the record overwhelmingly establishes Appellant was not prejudiced because Jury Instruction 7 made it easier for the jury to find Dr. Evans liable for William Mitchell's alleged damages. Accordingly, this Court should affirm the trial court's Judgment.

Jury Instructions 9 and 10 were proper

Jury Instruction 9 was a proper instruction to be submitted to the jury. Instruction 10 was the matching converse instruction to Instruction 9 and also proper. Appellant's Brief

makes no specific allegations or objections as to Instruction 10. Accordingly, this Brief will likewise focus on Instruction 9.

The text of Jury Instruction 9 submitted to the jury.

> Your verdict must be for the plaintiff Bernice Mitchell if you believe:
>
> First, Defendants Sol H. Dubin M.D. and Orthopedic Associates of Kansas City, Inc. took William Mitchell to surgery in an unstable hypovolemic condition; or Defendants Sol H. Dubin M.D. and Orthopedic Associates of Kansas City, Inc. failed to object to Robert Bowser, M.D.'s decision to perform a spinal anesthetic rather than a general anesthetic if such spinal anesthetic was improper; and
>
> Second, defendants Sol H. Dubin M.D. and Orthopedic Associates of Kansas City, Inc. were thereby negligent; and
>
> Third, such negligence either directly caused the death of William Mitchell or combined with the injuries from the motor vehicle accident to directly cause the death of William Mitchell.

(Appendix to Appellant's Brief, p. A-40).

The text of Jury Instruction 9 submitted by Appellant.

> Your verdict must be for the plaintiff Bernice Mitchell if you

believe:

> First, Defendant Sol H. Dubin M.D. and Orthopedic Associates of Kansas City, Inc. failed to establish adequate hemodynamic stability by proper restoration of fluid volume before his surgery, or Defendant Sol H. Dubin M.D. and Orthopedic Associates of Kansas City, Inc. failed to assure that an endotracheal tube with an inflated cuff around it was placed for use with general anesthesia before his surgery, and
>
> Second, defendant Sol H. Dubin M.D. and Orthopedic Associates of Kansas City, Inc. in any one or more of the respects submitted in paragraph First, was thereby negligent, and
>
> Third, such negligence either directly caused the death of William Mitchell or combined with the injuries from the motor vehicle accident to directly cause the death of William Mitchell.

(Legal File, p. 573).

Appellant failed to properly object at trial to most issues now raised regarding Jury Instruction 9.

Appellant failed to articulate any clear or proper objection to Jury Instruction 9 at trial. Additionally, to the extent that an objection was stated, it was limited to one small issue in

the Instruction. Appellant's objection as stated during the Instruction Conference was as follows:

> "THE COURT: …Instruction No. 9 is submitted by the Court. Any objection by the plaintiff?
>
> MR. PICKETT (ATTORNEY FOR APPELLANT): I object, Your Honor. I had previously tendered one which I tender again to the Court. I object to it because specifically in the second disjunctive submission, it states that the particular spinal anesthetic has got to be found. The phrase 'if such spinal anesthetic was improper' is totally misleading, is internally argumentative, calls for speculation and conjecture, and doesn't make any sense the way it is set forth. Not being critical of you, it doesn't make any sense the way it is. It asks them 'failed to object to Robert Bowser, M.D.'s decision to perform a spinal anesthetic rather than a general anesthetic.' That's where it should stop, I think. 'If said spinal anesthetic was improper,' it asks for the jury to determine that it was improper. It also asks for the state of mind of Dr. Dubin. For all those reasons, I think it's misleading."

(Transcript, p. 3358-3359).

Rule 70.03 states, "Counsel must make **specific objections** to instructions considered erroneous." (emphasis added). Further, Rule 70.03 states, "No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, **stating distinctly the matter objected to and the grounds for the objection**." (emphasis added).

Appellant's counsel's statements during the Instruction Conference regarding Instruction 9 do not raise any objections related to, or suggest limitations of, the Court's authority to reject Appellant's proffered instruction or propose its own instruction. The **only** objection raised by Appellant's counsel at trial relates to the inclusion of the phrase, "if such spinal anesthetic was improper" within the instruction. Appellant preserved no other objection for the record or for this Court's review. All additional belated arguments now raised on appeal should be disregarded.

Appellant's failure to make specific objections to Instruction 9 pursuant to Rule 70.03 preserves nothing for review. If this Court chooses to address Appellant's point relied on pertaining to Instruction 9, the plain error standard of review is applicable. The record clearly demonstrates that Instruction 9 submitted to the jury did not cause a manifest injustice or miscarriage of justice.

Instruction 9 was an appropriate submission to the jury.

The verdict director used in Instruction 9, and the converse in Instruction 10, did not result in error or prejudice against the Appellant. Additionally, the corresponding verdict director proposed by Appellant did not comply with Missouri Approved Instructions and further was not supported by any evidence or testimony.

As outlined above, it was entirely appropriate for the Court to submit these instructions. Jury Instructions are instructions from the Court. The Court is not required or somehow compelled to follow Appellant's proposed instructions, particularly when the instructions proposed do not correspond with the evidence.

Additionally, Instructions 9 and 10 submitted by the Court were perfectly appropriate in light of the facts and evidence presented and did not result in any error or prejudice to the Appellant. As outlined above, the Court has the duty to submit instructions tailored to the evidence. Again, Appellant's only trial objection to Instruction 9 related to the inclusion of the phrase "if such spinal anesthetic was improper."

"[I]f such spinal anesthetic was improper" is an entirely appropriate issue to include in this instruction. Appellant was required to establish that a spinal anesthetic was improper. If Appellant wanted to assert a claim against Defendant Dubin that Dr. Bowser's choice of a spinal anesthetic was improper under the circumstances and that Dr. Dubin should have somehow intervened, such intervention would only have been required "if such spinal anesthetic was improper." There would be no reason to object if the spinal anesthetic were proper. Accordingly, the Court's instruction on this issue followed the testimony of Appellant's experts, was not in error and presented absolutely no prejudice.

Appellant's Brief refers to jury questions presented during deliberations in a suggestion that the Jury Instructions were somehow confusing or misleading. Again, Appellant's objection to the Jury Instruction raised no issues relevant to the jury questions received. In fact, if anything, the questions suggest that Appellant failed to meet their burden of proof.

Jury Questions 1-3 are not relevant to these issues. Questions 1-2 merely requested exhibits. (Legal File, Vol. 3, pp. 579-580). Question 3 inquired what should be done if they were having difficulty reaching a 9-3 verdict. (Legal File, Vol. 3, p. 581).

The first potentially relevant question, Question 4, refers to the last two sentences in the Instruction regarding negligence. (Legal File, Vol. 3, p. 581). This question refers directly to the very language proposed by Appellant's counsel and language for which there was no objection by Appellant's counsel during trial. This language mirrors the language in Appellant's proposed Verdict Directors.

The second portion of Question 4 does not refer to an instructional issue but addresses the definition of a term in the medical setting. The question states, "What is considered unstable for surgery!?? in a trauma setting!" (Legal File, Vol. 3, p. 582). First, to the extent the question references medical terminology, these are the terms used by Appellant's experts during their trial testimony in arguing that the Respondents failed to meet the appropriate standard of care. Appellant had the burden of proof and failed to meet it as reflected in this question. Additionally, Appellant did not object to use of the terminology. To the extent that the language falls under common knowledge of a juror, the Court may presume the jury to possess this knowledge.

Appellant's experts testified that the patient was not stable for surgery and the Respondents deviated from the standard of care in various respects in failing to establish or confirm stability. Appellant was required to prove that the patient was not stable for surgery. The jury was asking questions because Appellant failed to educate the jury in this regard and failed to meet their burden of proof.

Question 5, again, does not relate to an instruction issue but represented the jury's request for a dictionary in an apparent effort to define terminology used by Appellant's experts. (Legal File, Vol. 3, p. 583). The language chosen was the language used by Appellant's experts. To the extent the words represented medical terminology, the Appellant had the burden of proof and apparently failed to adequately address the issue. Additionally, Appellant did not object to the use of this terminology.

There was no error in the Court's submitted instructions.

No evidence supported Appellant's proposed Instruction 9.

Appellant's relevant proposed director suggested that the verdict must be for the Plaintiff and against Defendant Dubin if, first, either:

> Defendant Sol Dubin, M.D. and Orthopedic Associates of Kansas City, Inc. failed to establish adequate hemodynamic stability by proper restoration of fluid volume before his surgery, or
>
> Defendant Sol Dubin, M.D. and Orthopedic Associates of Kansas City, Inc. failed to assure that an endotracheal tube with an inflated cuff around it was placed for use with general anesthesia before his surgery, and . . .

(Legal File, Vol. 3, p. 573).

Appellant's alternative instruction was not supported by the facts or evidence and failed to comply with Missouri Approved Instructions. Appellant failed to present any evidence or testimony against Dr. Dubin to suggest or support the Instruction proposed by Appellant. As

Appellant's Brief states, Dr. Dalenberg was Appellant's only expert addressing expert issues related to Defendant Dubin. (*See* Appellant's Brief, p. 55).

Dr. Dalenberg NEVER suggested that Dr. Dubin owed a duty to establish hemodynamic stability or provide fluids to this patient. (Transcript of Dale Dalenberg, M.D., p. 1199:16 – 1200:18). Not only did Dr. Dalenberg offer no testimony to suggest that Dr. Dubin owed a duty to "establish adequate hemodynamic stability by proper restoration of fluid volume before his surgery," but Dr. Dalenberg testified that the only duty Dr. Dubin owed was to recognize the alleged issue and "confer with his colleagues . . ." prior to commencing surgery. (Transcript of Dale Dalenberg, M.D., p. 1201:15 – 1201:23). As the case established, other specialists address fluid status in an acute trauma setting. This was not an orthopedic issue.

Appellant's proposed Instruction uses the phrase "hemodynamic stability." This was not the allegation against Dr. Dubin. In fact, we even discussed the issue on the record just prior to Dr. Dallenberg's testimony. Appellant's counsel did initially, and contrary to Dr. Dalenberg's deposition, attempt to bootstrap additional testimony suggesting hemodynamic stability was at issue for Dr. Dubin. Appellant's counsel subsequently admitted that hypovolemia was the issue, not hemodynamic stability. (Transcript, p. 1178:20 – 1179:1).

Hemodynamic stability and hypovolemia are not the same thing. Dr. Dalenberg did discuss generally hemodynamic stability; but he did not relate this issue to any standard of care violations alleged against Respondent Dubin. Dr. Dalenberg testified as to the identification of hypovolemia, NOT hemodynamic stability and NOT treatment for hypovolemia. (Transcript of Dale Dalenberg, M.D., p. 1199:16 – 1200:1).

The second disjunctive proposed by Appellant's Verdict Director was also not supported by any evidence or testimony and did not comply with the Missouri Approved

Instructions. There is absolutely no evidence, anywhere, to suggest that Respondent Dubin owed a duty to assure that an endotracheal tube with an inflated cuff around it was placed for use with general anesthesia before surgery. (Transcript of Dale Dalenberg, M.D., p. 1195:9 – 1196:2; p. 1198:7–16).

The Verdict Directors proposed by Appellant regarding Respondent Dubin were not supported by any evidence or testimony and failed to comply with Missouri Approved Instructions.

Appellant was not prejudiced by the submission of Instruction 9 to the jury.

The Court's Instructions 9 and 10 were not in error and did not cause any prejudice or harm to Appellant. Additionally, if the Court finds Appellant properly objected to Instruction 9, and substantial evidence supported Appellant's Instruction 9, the Court should still affirm the trial court's Judgment because Appellant suffered no prejudice in the submission of Instruction 9 to the jury.

The Court will only reverse if the Court determines the error resulted in prejudice, and the error "materially affected the merits of the action." *Marion v. Marcus*, 199 S.W.3d 887, 894 (Mo. Ct. App. 2006) (quoting Rule 84.13(b)) (citing Rule 70.02(a)).

Clearly, the only possible objection to Instruction 9 raised by Appellant related to the inclusion of the phrase "if such spinal anesthetic was improper." Appellant raised no other objection. The inclusion of this phrase creates no harm. It goes without saying that the only reason Dr. Dubin would be required to object to the use of a spinal anesthetic, would be if the jury first finds that the use of a spinal anesthetic were improper. If the jury found that a spinal anesthetic were proper, then there would be no reason to object.

Additionally, the Instructions provided to the Court do not amount to plain error in that there was no manifest injustice or miscarriage of justice resulting. Appellant was actually benefited by the Court's Instructions. Appellant's proposed Instruction requested the Jury to make a specific finding that Dr. Dubin "failed to assure" that an endotracheal tube with an inflated cuff around it was placed for use with a general anesthetic. That is a very specific factual finding proposed by Appellant. The Court's Instruction was much more general and would have allowed a finding of fault under much broader circumstances. Both Instructions suggested that Dr. Dubin was to be found at fault if the jury believed that a general anesthetic should have been used instead of the spinal anesthetic. Appellant's proposed Instruction then went a step further and also required the jury to determine that an endotracheal tube with an inflated cuff was also required. Appellant's proposed Instruction was a more difficult burden to meet.

Additionally, a review of the various testimonials of Appellant's experts, including Dr. Dalenberg, clearly reflects that Appellant failed to properly articulate the precise claims against the various defendants. The testimony of Dr. Dalenberg was confusing, seemingly rambling at times and addressing areas irrelevant and insignificant to any submissible opinion ultimately rendered. There was inadequate expert testimony by Dr. Dalenberg to render a submissible opinion against Dr. Dubin related to the selection of the anesthesia. Specifically, what was Dr. Dubin to have done to conform with the standard of care? What did he do wrong? What should he have done? How would that have affected the outcome? Critical components were missing in the testimony on this issue and, accordingly, the Court should not have submitted an Instruction against Dr. Dubin related to the selection of anesthesia because there was no clearly articulated opinion rendered by Dr. Dalenberg on that issue.

Appellant's proposed first disjunctive submission also suggested a more difficult submission that the one ultimately submitted by the Court. Appellant's proposal suggested that the jury could only find for the Appellant if the jury found that Dr. Dubin was required to establish hemodynamic stability by proper fluid volume before surgery, and that he failed in that regard. The Instruction submitted required only a finding that Dr. Dubin should not have taken the patient to surgery in an unstable, hypovolemic condition. Appellant's proposed Instruction was more difficult to reach.

Plain error does not exist on this issue. There was no prejudice resulting from the submission of Instructions 9 and 10. Appellant's proposed Instructions were much more restrictive than those submitted to the jury. Additionally, Appellant had the burden of producing evidence to clearly articulate the various standard of care opinions and the relevant causation. Appellant failed in that burden and responsibility.

This Court should Affirm the trial court's Judgment.

The record demonstrates Appellant never properly objected to Jury Instruction 9 or 10. Under the plain error standard of review, Appellant has never identified a single item in the record on appeal that the trial court "misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice." Accordingly, this Court should affirm the trial court's Judgment.

Even if the Court finds Appellant properly objected to Jury Instruction 9 or 10 at trial, the record demonstrates no substantial evidence supported Appellant's proposed Jury Instruction 9. Accordingly, the Court should affirm the trial court's Judgment.

Even if the Court finds Appellant properly objected to Jury Instruction 9 or 10 at trial, and that Appellant produced substantial evidence supporting Appellant's proposed Jury

Instruction 9, the record overwhelmingly establishes Appellant was not prejudiced because Jury Instruction 9 made it easier for the jury to find Dr. Dubin liable for Mitchell's alleged damages. Accordingly, this Court should affirm the trial court's Judgment.

Jury Instructions 11 and 12 were proper.

Jury Instruction 11 was a proper instruction to be submitted to the jury. Instruction 12 was the matching converse instruction to Instruction 11 and also proper. Appellant's Brief makes no specific allegations or objections to Instruction 12. Accordingly, this Brief will only focus on Instruction 11.

The text of Jury Instruction 11 submitted to the jury.

The trial court submitted the following Jury Instruction 11 (Verdict Director against Dr. Bowser).

SUBMITTED INSTRUCTION NO. 11

Your verdict must be for the plaintiff Bernice Mitchell if you believe:

First, defendant Robert Bowser, M.D. and Independence Anesthesia, Inc. either:

Failed to recognize that William Mitchell was in an unstable hypovolemic condition prior to anesthesia; or

Failed to perform a general anesthetic rather than a spinal anesthetic if such a spinal anesthetic was improper; and

Second, defendant Robert Bowser, M.D. and Independence Anesthesia, Inc. were thereby negligent; and

Third, such negligence either directly caused the death of

William Mitchell or combined with the injuries from the motor vehicle accident to directly cause the death of William Mitchell.

The text of Jury Instruction 11 submitted by Appellant.

The trial court refused the following Jury Instruction submitted by Appellant:

REFUSED INSTRUCTION NO. 11

Your verdict must be for the plaintiff Bernice Mitchell if you believe:

First, either:

Defendant Robert L. Bowser, M.D. and Independence Anesthesia, Inc. failed to establish adequate hemodynamic stability by proper restoration of fluid volume before surgery by Dr. Dubin, or

Defendant Robert L. Bowser, M.D. and Independence Anesthesia, Inc. failed to assure that an endotracheal tube with an inflated cuff around it was placed for use with general anesthesia before surgery by Dr. Dubin, and

Second, defendant Robert L. Bowser, M.D. and Independence Anesthesia, Inc. in any one or more of the respects submitted in paragraph First, was thereby negligent, and

Third, such negligence either directly caused the death of William Mitchell or combined with the injuries from the

motor vehicle accident to directly cause the death of William Mitchell.

Appellant failed to properly object to Instruction 11 at trial to most issues now raised regarding Jury Instruction 11.

Appellant failed to articulate any clear objection to submitted Instruction 11 at trial. The transcript of the Instruction Conference demonstrates that Appellant failed to make a specific objection to Jury Instruction 11 at trial. Appellant's objection was as follows:

> THE COURT: Thank you.
>
> Instruction No. 11, the verdict form for Dr. Bowser, M.D., again after much discussion and review of other proposed instructions, it was submitted by the Court.
>
> Plaintiff, do you have a proposed instruction? Yes, you do. You have handed it to me and the Court is refusing to give this instruction. Do you want to make any other record?
>
> MR. PICKETT: No. Well, yes, I do. By the way, I don't know if you rejected the last one.
>
> THE COURT: I did.
>
> MR. PICKETT: Okay. Your Honor, I think that the neutral reflection of what was stated in the submission both in the first and the second disjunctive submission is a fair and non-confusing statement to the jury of the ultimate fact issue and I believe that the Court in changing it is submitting too much

evidentiary detail. Therefore, it's confusing and misleading to the jury.

THE COURT: Thank you.

(Transcript p. 3361-3362).

Rule 70.03 states, "Counsel must make **specific objections** to instructions considered erroneous." (emphasis added). Further, Rule 70.03 states, "No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, **stating distinctly the matter objected to and the grounds for the objection**." (emphasis added).

Appellant's counsel's statements during the Instruction Conference regarding Instruction 11 did not raise any objections related to the trial court's authority to reject Appellant's proffered instruction or propose its own instruction. The only objection raised by Appellant's counsel at trial was that the Instruction 11 was "confusing and misleading." (Transcript p. 3361-3362). All belated arguments and objections now raised on appeal should be disregarded.

Appellant's failure to make specific objections to Instruction 11 pursuant to Rule 70.03 preserves nothing for review. If this Court chooses to address Appellant's point relied on pertaining to Instruction 11, the plain error standard of review is applicable. The record clearly demonstrates that the Court's refusal to submit Appellant's jury instruction 11 to the jury did not cause a "manifest injustice or miscarriage of justice."

Instruction 11 was an appropriate submission to the jury

As discussed above, it was entirely appropriate for the Court to submit Instruction 11. Jury Instructions are instructions from the Court. The Court is not required or somehow

compelled to follow Appellant's proposed instructions, particularly when the instructions proposed do not correspond with the evidence.

Additionally, Instruction 11 submitted by the Court was perfectly appropriate in light of the facts and evidence presented and did not result in any error or prejudice to Appellant. As discussed above, the Court has the duty to submit instructions tailored to the evidence. Again, Appellant's only trial objection to Instruction 11 was that it was "confusing and misleading." (Transcript p. 3361-3362).

When reviewing jury instructions, a court "must credit jurors with ordinary intelligence, common sense, and average understanding of the English language." *Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466, 478 (Mo. Ct. App. 2001) (citing *Hutson v. BOT Investment Co., Inc.*, 3 S.W.3d 878, 883 (Mo Ct. App. 1999). In addition, when "reviewing the submissibility of an instruction, an appellate court views the evidence and reasonable inferences in the light most favorable" to the submitted instruction. *Williams*, 114 S.W.3d at 370. Finally, even misleading jury instructions are "allowed if the misleading phrase was given flesh and meaning by evidence presented during the trial." *Id*. at 371.

An analysis of the evidence particular to Instruction No. 11 reveals that it is not "confusing and misleading." Rather, Instruction No. 11 was supported by substantial and competent evidence which was adduced during trial. Specifically, Instruction No. 11 was supported by the testimony of Appellant's expert Angelito Ham, M.D. Dr. Ham is an anesthesiologist, and was the only expert called by Appellant who offered testimony against Dr. Bowser. Thus, Dr. Ham's testimony is the only evidence which needs to be evaluated with respect to Instruction No. 11, the verdict director submitted against Dr. Bowser.

With respect to cause of death and Dr. Bowser's alleged negligence, Dr. Ham testified as follows:

> Q. And did you form an opinion based upon reasonable degree of medical certainty or probability as to what the proximate cause of death was, in your opinion, in this case?
>
> A. Yes, I did.
>
> Q. What was that opinion?
>
> A. My opinion as to the proximate cause of death was that Mr. Mitchell, because of poor choice of anesthetic, inadequate preoperative evaluation, *inadequate treatment of the hypotaxia and the hypovolemia*, that caused a drop in blood pressure in Mr. Mitchell which subsequently caused him to lose consciousness. He then vomited and aspirated …

(Transcript p. 1359-1360) (emphasis added).

Dr. Ham was also asked whether he had an opinion as to whether Dr. Bowser fell under the standard of care with respect to his care and treatment of Mr. Mitchell. That testimony is as follows:

> … Dr. Bowser deviated from the standard of care by failing to adequately assess this patient preoperatively … Dr. Bowser, who signed of and said in his deposition that he

> also examined the patient, *failed to recognize signs and symptoms that Mr. Mitchell was hypovolemic*, and that's evidenced by the fact that the patient had low blood pressure and a fast heart rate and I'm not talking about just one blood pressure that's low and one measurement of fast heart rate. *There was basic instability.*

(Transcript p. 1362-1363) (emphasis added).

Dr. Ham also testified that Dr. Bowser fell below the standard of care by failing to perform a general anesthetic rather than a spinal anesthetic because spinal anesthesia was "a poor choice of anesthetic." Dr. Ham's testimony in that regard is as follows:

> The standard of care in this instance for this patient would have been to do a general anesthetic, put the patient to sleep and put a breathing tube to secure the airway. Here he was worried about the neck, so he did a spinal knowing that full well it would cause a drop in blood pressure. It eventually made him lose consciousness, *so that was a poor choice of an anesthetic.*

(Transcript p. 1371) (emphasis added).

Finally, Dr. Ham defined hypovolemia for the jury during his testimony. Specifically, Dr. Ham testified as follows:

> A. When you have two femur fractures, obviously it compounded the injury, being there's two femur

fractures, but basically what that means is there is a potential for more blood loss. There's also a potential for fat emboli to occur. The more blood loss means that the patient can more rapidly become hypotensive or have low blood pressure or have decreased blood volume in his body.

Q. What do you call that?

A. Hypovolemia.

Q. What are dangers, if any, for an anesthesiologist to the patient if a person has a condition that's diagnosed as hypovolemia?

A. Basically, hypovolemia is a reduction in your circulating blood volume and that can occur via different mechanisms, but the main thing as an anesthesiologist is that this blood line is necessary to make sure that you're in organs – particularly the brain, the heart, the kidneys – get enough blood flow and oxygen, so when you have a decreased blood volume, or hypovolemia, you might not be able to maintained an adequate blood pressure to make sure that these organs stay perfused.

(Transcript 1326-1327).

Despite the above testimony by Dr. Ham, Appellant's only expert called to testify against Dr. Bowser, Appellant claims that the verdict director (Instruction 11) against Dr. Bowser was confusing and misleading. A review of Dr. Ham's pertinent testimony shows that Appellant presented evidence which would allow the jury to reasonably follow Instruction No. 11. In fact, Instruction 11 tracks Dr. Ham's testimony as well as Appellant's theory of the case against Dr. Bowser, *i.e.*, that Mr. Mitchell was in an unstable hypovolemic condition prior to surgery and that general anesthesia needed to be used because spinal anesthesia was improper.

As set forth above, Dr. Ham clearly testified that Dr. Bowser fell below the standard of care by failing to "recognize signs and symptoms that Mr. Mitchell was hypovolemic" and "basic instability" pre-operatively. (Transcript p. 1362-1363). This is exactly what the jury was asked to decide in the first disjunctive of the submitted Instruction 11. Dr. Ham also testified that Dr. Bowser fell below the standard of care by not using a general anesthetic because a spinal anesthetic would cause a drop in blood pressure and, therefore, spinal anesthetic was a "poor choice of anesthetic." (Transcript p. 1371). In other words, spinal anesthetic was improper. This is exactly what the jury was asked to decide in the second disjunctive of submitted Instruction 11. Accordingly, Instruction 11 was supported and its terms defined by Appellant's own expert. As such, it was properly submitted by the Court.

Appellant points to Jury Questions to support the argument that Instruction 11 was misleading and confusing. Jury questions 1-3 have nothing to do with jury instructions. The first part of Jury Question 4 deals with the definition of negligence which was a standard MAI instruction submitted without objection. The second part of Jury Question 4 inquires as to "what is considered unstable for surgery !?? in a trauma setting!"

"Unstable for surgery" is not a complex medical term which needs to be defined thereby rendering Instruction 11 confusing and misleading. *See Burns,* 55 S.W.3d at 478-81 (holding that a reasonable juror could understand the terms "establishing a proper airway" and "transport in a timely manner"); *Kampe v. Colom,* 906 S.W.2d 796 (Mo. Ct. App. 1995) (holding that a reasonable juror could understand the term "monitor").

In any event, the term "unstable for surgery" was defined by Dr. Ham as well as by Appellant's other experts. As set forth above, Dr. Ham testified as follows:

> … Dr. Bowser deviated from the standard of care by failing to adequately assess this patient preoperatively … Dr. Bowser, who signed of and said in his deposition that he also examined the patient, *failed to recognize signs and symptoms that Mr. Mitchell was hypovolemic*, and that's evidenced by the fact that the patient had low blood pressure and a fast heart rate and I'm not talking about just one blood pressure that's low and one measurement of fast heart rate. *There was basic instability.*

(Transcript p. 1362-1363) (emphasis added).

In fact, all of the terms contained in submitted Instruction were defined or "fleshed out" throughout this four week case in which more than a dozen medical experts testified. (*See e.g.* Transcript p. 1326, p. 1359-1360, p. 1362-1363, p. 1371). As such, even if this Court finds that submitted Instruction 11 contains misleading phrases, it should be allowed because even the terms perceived to be misleading by Appellant were "given meaning" by

numerous physicians through this case, including the one (Dr Angelito Ham) who testified against Respondent Dr. Bowser. *Williams*, 114 S.W.3d at 370.

Again, in reviewing jury instructions, juries are credited with "ordinary intelligence, common sense, and average understanding of the English language." *Burns*, 55 S.W.3d at 478. Based on Dr. Ham's testimony, there is nothing which is "confusing and misleading" with respect to Instruction No. 11. This instruction was supported by substantial and competent evidence which was adduced at trial. The submitted verdict director tracked Appellant's expert's (Dr. Ham) opinions as well as Appellant's theory of the case. Finally, even if the terms are deemed to be misleading, they were defined and given meaning throughout the four week trial. *Id.* Reviewing Instruction 11 "in the light most favorable," the trial court did not abuse its discretion in submitting it. *Williams*, 114 S.W.3d at 370.

No evidence supported Appellant's Proposed Instruction 11.

Appellant's proposed verdict director against Dr. Bowser which was ultimately refused by the court, reads in pertinent part, as follows:

> The verdict must be for plaintiff Bernice Mitchell if you believe:
>
> First, either Defendant Robert L. Bowser, M.D. and Independence Anesthesia, Inc. failed to establish adequate hemodynamic stability by proper restoration of fluid volume before surgery by Dr. Dubin, or Defendant Robert L. Bowser, M.D. and Independence Anesthesia, Inc. failed to assure that an endotracheal tube with an inflated cuff around it was placed for use with general anesthesia before surgery by

Dr. Dubin,

In her Brief, Appellant argues that she was entitled to have her verdict instructor submitted to the jury because it was allegedly supported by the evidence at trial. This is true despite the fact that her proposed verdict director was not supported by the evidence in this case. In fact, in her Brief, Appellant fails to cite to any evidence or testimony which supports her sweeping statements that her verdict director was clearly supported by the evidence at trial. As set forth above, Appellant is not automatically entitled to have her verdict director submitted. Rather, it is within the discretion of the trial court to properly instruct the jury with instructions which are supported by the evidence.

Again, Appellant's only expert called to testify against Dr. Boswer was Dr. Angelito Ham. A review of his testimony regarding the standard of care set forth above reveals that it does not support Appellant's proposed verdict director. Specifically, with respect to the first disjunctive submission of Appellant's proposed verdict director, Dr. Ham does not discuss hemodynamic stability when discussing his standard of care opinions. Rather, Dr. Ham's standard of care opinions addressed hypovolemia which was the term used in submitted Instruction 11. (Transcript p. 1362-1363).

The second disjunctive submission of Appellant's proposed verdict director was also not supported by any evidence or the testimony of Dr. Ham. As set forth above, Dr. Ham clearly stated that general anesthesia needed to be used because a spinal anesthetic was improper. (Transcript p. 1371). Dr. Ham also explained why the choice of spinal anesthetic was improper i.e. it causes a drop in blood pressure. *Id.* Again, this testimony tracks the actual verdict director which was submitted by the court in this case. Dr. Ham's testimony does not support Appellant's proposed verdict director.

In short, although Appellant believes she is "entitled" to have her verdict director submitted to the court, she is incorrect in that regard. It is within the court's discretion to instruct the jury as it deems proper according to the evidence which was introduced during trial. As discussed above, the court has a duty to submit instructions tailored to the evidence. In addition, it is proper for a court to reject both parties' instructions and submit its own instructions.

Appellant's proposed verdict director against Dr. Bowser was not supported by the evidence and by the testimony of Dr. Ham. Rather, the verdict director the court submitted was proper in that it was supported by Dr. Ham's testimony.

Appellant was not prejudiced by the submission of Instruction 11 to the jury.

If the Court finds Appellant properly objected to Instruction 11, and substantial evidence supported Appellant's Instruction 11, the Court should still affirm the trial court's Judgment because Appellant suffered no prejudice in the submission of Instruction 11 to the jury.

The Court will only reverse if the Court determines the error resulted in prejudice, and the error "materially affected the merits of the action." *Marion v. Marcus*, 199 S.W.3d 887, 894 (Mo. Ct. App. 2006) (quoting Rule 84.13(b)) (citing Rule 70.02(a)).

This was a four week medical malpractice case in which there were approximately a dozen expert health care providers who provided testimony. Appellant has not set forth any evidence of how she was prejudiced by an alleged defective Jury Instruction 11. Rather, a review of the record overwhelmingly demonstrates that Appellant was not prejudiced by Jury Instruction 11, and the submission of Jury Instruction 11 did not "materially affect the merits of the action."

As discussed above, Jury Instruction 11 submitted to the jury in this case was proper because it appropriately tracked the testimony set forth by Appellant's expert Dr. Ham. Although Appellant argues that her proposed Jury Instruction was more appropriate than the one submitted, she was actually benefited by Instruction 11 submitted by the Court. This is true because the first disjunctive of Appellant's proposed Jury Instruction 11 suggested a more difficult submission than the one ultimately submitted by the Court. Appellant's proposed Instruction No. 11 suggested that the jury could only find for the Appellant if the jury found that Dr. Bowser was required to establish hemodynamic stability by proper restoration of fluid volume before surgery, and that he failed in that regard. The Instruction actually submitted required only a finding that Dr. Bowser should not have taken Mr. Mitchell to surgery in an unstable hypovolemic condition. Appellant's proposed Instruction would have made it more difficult for the jury to return a verdict in her favor when compared with the instruction actually submitted.

This is also true with respect to the second disjunctive of Instruction 11 actually submitted to the jury. Appellants proposed Instruction 11 requested the Jury to make a specific finding that Dr. Bowser "failed to assure" that an endotracheal tube with an inflated cuff around it was placed for use with a general anesthetic before Dr. Dubin's surgery. That is a very specific factual finding proposed by Appellant. The Court's Instruction was much more general and would have allowed a finding of fault under much broader circumstances. Both Instructions suggested that Dr. Bowser was to be found at fault if the jury believed that a general anesthetic should have been used instead of the spinal anesthetic. Appellant's proposed Instruction then went a step further and also required the jury to determine that an endotracheal tube with an

inflated cuff was also required. Appellant's proposed Instruction was a more difficult burden to meet.

There was no prejudice resulting from the submission of Instruction 11. Appellant's proposed Instructions were much more restrictive than those submitted to the jury. If anything, the submitted instructions would have made it easier for Appellant to receive a verdict. Appellant has failed to show how she was prejudiced by the submission of Instruction 11. Rather, a review of the record overwhelmingly demonstrates that Appellant was not prejudiced by Instruction 11 and the submission of Instruction 11 did not "materially affect the merits of the action."

This Court should Affirm the trial court's Judgment.

The record demonstrates Appellant never properly objected to Jury Instruction 11. Under the plain error standard of review, Appellant has never identified a single item in the record on appeal that the trial court "misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice." Accordingly, this Court should affirm the trial court's Judgment.

Even if the Court finds Appellant properly objected to Jury Instruction 11 at trial, the record demonstrates no substantial evidence supported Appellant's proposed Jury Instruction 11. Finally, even if this Court gets past these first two hurdles, Appellant has failed to show prejudice as a result of the submission of Instruction 11. Accordingly, the Court should affirm the trial court's Judgment.

Even if the Court finds Appellant properly objected to Jury Instruction 11 at trial, and that Appellant produced substantial evidence supporting Appellant's proposed Jury Instruction 11, the record overwhelmingly establishes Appellant was not prejudiced because Jury

Instruction 11 made it easier for the jury to find Dr. Dubin liable for William Mitchell's alleged damages. Accordingly, this Court should affirm the trial court's Judgment.

The trial judge did not manifestly abuse his discretion by failing to grant a mistrial during *voir dire*. (Appellant's Second Point Relied On).

Standard of review

The standard of review for a trial court's refusal to grant a mistrial is abuse of discretion. *State v. Albanese*, 9 S.W.3d 39, 51 (Mo. Ct. App. 1999). "The decision whether to declare a mistrial 'rests largely within the discretion of the trial court because the trial court has observed the incident that precipitated the request for a mistrial and is in a better position than is the appellate court to determine what prejudicial effect, if any, the incident had on the jury.'" *State v. Hibler*, 21 S.W.3d 87, 94 (Mo. Ct. App. 2000) (citations omitted).

"Declaration of mistrial in a civil case is a drastic remedy and should be reserved for only the most grievous of errors where the prejudice cannot otherwise be removed." *Stucker v. Rose*, 949 S.W.2d 235, 238 (Mo. Ct. App. 1997) (citing *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 208 (Mo. 1991)). "The necessity of the drastic remedy of mistrial rests in the sound discretion of the trial court, and absent a manifest abuse of that discretion, appellate courts will not interfere." *Id.* (citing *Glidewell v. S.C. Management, Inc.*, 923 S.W.2d 940, 956 (Mo Ct. App. 1996)). "Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Hibler*, 21 S.W.3d at 94 (quoting *State v. Jackson*, 969 S.W.2d 773, 775 (Mo. Ct. App. 1998)).

Dr. Evans' counsel's *voir dire* question was proper.

Appellant's counsel mentioned Independence Regional Health Center ("IRHC") five times during *voir dire*. (Appellant's Brief, p. 82). In addition, Appellant's counsel mentioned the IRHC trauma manual and trauma team during *voir dire*. (Transcript p. 67:11-18).

Dr. Evans' counsel conducted *voir dire* after Appellant's counsel. During Dr. Evan's counsel's *voir dire*, Dr. Evans' counsel stated: "There were some questions asked about trauma and I want to ask this. First of all, Independence Regional Hospital or Health Center was previously a defendant in this lawsuit." (Transcript p. 125:5-8). At that point, Appellant's counsel objected and the parties discussed the issue at the bench. (Transcript p. 125:10-11). The trial judge asked Dr. Evans' counsel about a follow-up question. Dr. Evans' counsel stated the follow-up question was going to be: "Would anybody have a problem with assessing fault if there was evidence against them." (Transcript p. 126:13-19). The trial judge overruled Appellant's objection, and denied Appellant's request for mistrial. (Transcript p. 129:15-19). The trial judge permitted Dr. Evans' counsel to ask the two questions, however, Dr. Evans' counsel decided against asking the questions. (Transcript p. 129:20-23).

Dr. Evans' counsel's *voir dire* question was supported by the evidence.

The evidence before the trial judge demonstrated Dr. Evans' counsel's *voir dire* question was proper. The trial judge also believed the *voir dire* question was proper because the trial judge overruled Appellant's objection after hearing argument at the Bench.

Appellant's own *voir dire* questions to the jury regarding IRHC's trauma manual and trauma team clearly indicated that Appellant's own experts may opine that IRHC was also responsible for Mitchell's death. Also, Appellant's abandoned pleading specifically stated IRHC was responsible for Mitchell's death. (Legal File, Volume 1 p. 1-27). Also, Respondents were

very concerned that Appellant's experts were going to testify that Respondents may be negligent for not knowing and ascertaining certain blood gas reports which Respondents contended were not in the charts. (Transcript 140:15-142:21).

Dr. Evans' counsel was concerned about the very real possibility that IRHC's potential liability would be an issue in this lawsuit. Dr. Evans' counsel candidly told the trial judge he did not believe Mitchell's experts would be able to establish IRHC's potential liability, and that IRHC would not likely be on the verdict form. (Transcript p. 126:3-12). However, Dr. Evans' counsel's *voir dire* question directly related to Appellant's *voir dire* questions, and directly related to relevant evidence the jury may hear during trial. Accordingly, Dr. Evans' counsel's *voir dire* question was proper and supported by the evidence.

Appellant was not prejudiced by the *voir dire* question.

Even if the Court determines Dr. Evans' counsel's *voir dire* question was improper, this Court should still affirm the trial court's Judgment because Appellant was not prejudiced. "Improper comments made to a jury may be cured, in given circumstances, by **withdrawal**, reprimand, or admonition, or **by an instruction to the jury**." *Stucker v. Rose*, 949 S.W.2d 235, 238 (Mo. Ct. App. 1997) (citations omitted)(emphasis added).

The trial judge actually made an instruction to the jury despite overruling Appellant's objection. The trial judge gave the following instruction immediately before sending the venire panel to lunch: "Ladies and gentlemen of the jury, I would like to remind you that any statement of counsel in the *voir dire*, the opening statement, or the closing argument is not evidence. The jury will determine the facts based on only the evidence that they receive in this case when the case begins and after the conclusion of picking this jury." (Transcript, p. 133:24 – 134:5). The impact of the trial judge's instruction was more significant because the instruction

was given immediately before the lunch break. Accordingly, the trial judge's instruction to the jury cured any allegedly improper statement to the jury by Dr. Evans' counsel. Therefore, Appellant was never prejudiced by Dr. Evans' counsel's question to the venire panel.

Further, Dr. Evans' counsel withdrew the question despite the trial judge overruling Appellant's objection. (Transcript p. 129:20-23.) The withdrawal further demonstrates Appellant was not prejudiced.

Even if the Court determines Dr. Evans' counsel's question was not proper, the instruction to the jury and withdrawal of the question establish Appellant was not prejudiced. The trial judge properly denied Appellant's motion for mistrial. The record demonstrates the trial judge did not abuse his discretion in denying Appellant's motion for mistrial, and that the trial judge's ruling was not "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Accordingly, this Court should affirm the trial court's Judgment.

The trial court did not abuse its discretion in admitting Petitions Appellant filed in other lawsuits for the purpose of impeaching her with admissions against interest contained in the Petitions (Appellant's Third Point Relied On).

Standard of Review

The admissibility of evidence is within the sound discretion of the trial court and the trial court's decision is reviewed for an abuse of discretion. *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 100 (Mo. Ct. App. 2006) (citing *Legg v. Certain Underwriters at Lloyd's of London*, 18 S.W.3d 379, 386 (Mo. Ct. App. 1999). There has been an abuse of discretion when the trial court's ruling is so unreasonable and arbitrary that it shocks the sense of justice and is clearly against the logic of the surrounding circumstances. *Alberswerth*, 184 S.W.3d at 100. If

reasonable people could disagree about the propriety of the trial court's judgment, it cannot be said there was an abuse of discretion. *Id*.

Additionally, even if it is found that the trial court abused its discretion, reversal is not mandated. *Id*. An error in the admission of evidence will only result in reversal if the Appellant was prejudiced by it. *Id*. An error is prejudicial if it affects the outcome of the case. *Id*.

Argument

Background

Point III of Appellant's brief argues that the trial court erred by allowing Respondents to cross-examine Appellant about two other lawsuits she filed alleging that her son's death was caused by individuals involved with a fight, a car chase, and a car accident. (Transcript p. 5, p. 390, p. 448, p. 630). The injuries Mitchell sustained during these events led him to IRHC where he was treated by Respondents. At the trial of this matter, Appellant alleged that Respondents provided inadequate medical care while treating Mitchell for injuries he sustained in the automobile accident and the events preceding it. In addition, Appellant claimed that the inadequate medical treatment provided by Respondents caused or contributed to cause Mitchell's death. Conversely, Respondents presented evidence that Mitchell's death was caused by known complications (fat embolism syndrome) of the crush injuries he sustained to his femurs in the tragic auto accident and, therefore, Respondents did not cause or contributed to cause his injuries or death. In other words, Respondents argued that Mitchell died from the car accident and events surrounding it, as opposed to improper medical care.

As a result of the car accident and the events surrounding it, Appellant filed at least three other lawsuits aside from this one. Those cases included Case No. 03CV222794 filed

in the Circuit Court of Jackson County, Missouri at Independence against Gary Romano, Sonic Drive-In Restaurant of Independence, and Police Officer Donald Grayson ("Romano Lawsuit") and Case No. 01CV211654 in the Circuit Court of Jackson County, Missouri at Independence against Jeremiah Cesar, Jose Mares, Kenneth Stuart and Isla Tabakh ("Cesar Lawsuit"). Those two lawsuits were related to an incident at Sonic, a subsequent car chase, and the accident in which Mitchell sustained the injuries which took him to IRHC where he allegedly received improper treatment from Respondents. In the two other cases (Romano and Cesar), as well as this case, Appellant asserted that each of the respective Respondents directly caused or contributed to cause Mitchell's death.

During the cross-examination of Appellant, she was asked very limited questions about the Romano and Cesar lawsuits described above. Specifically, while tracking the language from the pleadings (Petitions) in those cases, Respondents' counsel asked Appellant whether she claimed that the individuals (defendants) in the Romano and Cesar cases directly caused or contributed to cause her son's death. (Transcript p. 1941-1942). At trial, Appellant's counsel objected to this line of questioning on the following grounds: (1) it had no probative value or relevance; (2) the petitions from Romano and Cesar were not abandoned pleadings; and (3) the statements used by defense counsel from the petitions were inappropriately used because they were conclusions of law and not statements of fact. (Transcript p. 1935 – 1939).

Essentially, Point III of Appellant's Brief argues that the trial court erred by allowing Respondents' counsel to cross-examine Appellant with the limited questions discussed above i.e. whether Appellant filed other lawsuits which claimed that individuals, other than respondents, directly caused or contributed to cause her son's death. (Transcript p. 1941). Appellant contends that the trial court abused its discretion for failing to exclude the evidence for

the following reasons: (a) the sole reason for introducing the other cases was to show that Appellant was litigious; (b) the other cases were not relevant because of the legal principle of downstream liability; (c) that defense counsel mentioned the other cases because Appellant was not allowed to consolidate all of the cases; (d) pleadings in the other cases were not abandoned pleadings; (e) the pleadings in the other cases were not binding judicial admissions; (f) the pleadings in the other cases were valid alternative pleadings which cannot be used to impeach; and (g) the prejudicial effect outweighed the probative value.

For the reasons set forth below, the trial court did not abuse its discretion by allowing defense counsel to ask Appellant about the other lawsuits or admit petitions from those lawsuits into evidence.

Appellant failed to properly preserve portions of her argument for appellate review

As discussed above, Appellant alleges for a number of reasons the trial court abused its discretion by allowing the admission of pleadings from the Romano and Cesar cases for impeachment purposes. These include that Respondents wanted to show Appellant was a litigious person and that it was Appellant's election to file several cases and not a single case when Appellant actually moved "vigorously" to have the cases consolidated. However, Appellant failed to object on these two grounds at trial and, therefore, has failed to preserve these issues for appeal. *Williams v. Enochs*, 742 S.W.2d 165, 168 (Mo. 1987). This is true because a party is not permitted to advance on appeal an objection different from that stated at trial. *Wilson v. Shanks*, 785 S.W.2d 282, 285 (Mo. 1990).

A review of the pertinent portion of the transcript reveals that Appellant failed to object to the admission of the petitions from the other case on the two grounds discussed above

during the trial of this matter. (Transcript p. 357-373, p. 1935-1942). Accordingly, Appellant has failed to preserve those two issues for appellant review. *Enochs*, 742 S.W.2d at 168; *Wilson*, 785 S.W.2d 282. As such, the court should disregard these two grounds set forth in Section III of Appellant's Brief.

The Petitions from the other suits are abandoned pleadings

Under Missouri law, abandoned pleadings containing statements of fact are admissible as admissions against the party who originally filed the pleading. *Brandt v. Csaki*, 937 S.W.2d 268, 274 (Mo. Ct. App. 1997). Abandoned pleadings are defined as pleadings in a current case which have been suspended/ revoked or pleadings from another case entirely. *Berry v. Berry*, 620 S.W.2d 456 (Mo. Ct. App. 1981); *Littell v. Bi-State Transit Development Agency*, 423 S.W.2d 34 (Mo. Ct. App. 1967); and *Lewis v. Wahl*, 42 S.W.2d 82, 86 (Mo. 1992). In short, under Missouri law, pleadings, including Petitions filed in other lawsuits are treated like abandoned pleadings. As a result, statements of facts contained in these Petitions from other lawsuits are admissible as admissions against interest against the party who originally filed the pleadings. *Id.*

In her brief, Appellant argues that the Petitions from the two other automobile cases do not constitute abandoned pleadings. In doing so, Appellant relies on *Lewis v. Wahl*, 842 S.W.2d 82 (Mo. 1992) by quoting language from the court that they "need not consider whether and to what extent the rules for the use of pleadings may differ with respect to abandoned pleadings or pleadings from other cases." *Lewis*, 842 S.W.2d at 86. However, a reading of the *Lewis* case reveals that the Court in that case was looking at Missouri law as it relates to using "live pleadings" from the actual case to impeach a witness. In other words, the *Lewis* case

addresses the situation where a party wants to impeach another party with actual pleadings from their case hence the term "live" pleadings.

In its opinion, the Court in *Lewis* gave a brief narrative of Missouri law on impeachment with live or actual pleadings as compared to "abandoned pleadings or pleadings from another case entirely." *Id*. In short, the *Lewis* case considered abandoned pleadings and pleadings from another case to be the same thing. The long quote sent forth by Appellant's Brief from *Lewis* simply illustrates that the Court in *Lewis* was addressing the use of live pleadings in its opinion, as opposed to a different set of rules which are applicable to abandoned pleadings or pleadings from another case entirely.

In summary, Appellant's interpretation that *Lewis* stands for the proposition that pleadings from another case entirely are not abandoned pleadings is incorrect. Rather, *Lewis* and other Missouri cases make it clear that pleadings from other cases are abandoned pleadings. *See Berry* 620 S.W.2d at 456; *Littell*, 423 S.W.2d at 34; and *Lewis*, 842 S.W.2d at 86. As such, statements of fact contained in the abandoned pleadings are admissible as admissions against interest against the party who originally filed the pleading. *Csaki*, 973 S.W.2d at 274.

> The abandoned pleadings were properly admitted for the purpose of impeaching Appellant with admissions against interest contained in them.

In *Csaki*, plaintiff filed a petition for medical malpractice against a hospital and two physicians (Drs. Schwegler and Csaki) alleging that they were responsible for her injuries. *Id*. In her final amended petition, plaintiff only named Dr. Csaki as a defendant and the case proceeded against him alone. As such, the original petition naming the hospital, Dr. Schwegler and Dr. Csaki became an abandoned pleading because it was superseded by the amended

petition. *Id*. In the abandoned petition, plaintiff asserted that the now non-party Dr. Schwegler was negligent and that there was a "casual relationship between Dr. Schwegler's actions and her permanent injury." *Id*.

During her cross-examination at trial, defense counsel asked plaintiff the following limited question:

> Q. Ms. Brandt, you have previously filed documents in which you state that Dr. Schwegler performed an aortagram via the left axillary approach and that is what caused you severe and permanent injuries of the median nerve, haven't you?
>
> A. At that time, that's what I thought.

Id.

After Dr. Csaki received a verdict, plaintiff appealed on several grounds, including that the trial court erred by allowing defense counsel to cross-examine her concerning the abandoned petition asserting claims against Dr. Schwegler, a previous defendant.

The court in *Csaki* ruled that "Missouri Courts have consistently held that abandoned pleadings containing statements of facts are admissible as admissions against interest against the party who originally filed the pleading." *Id*. The court ruled that only allegations of fact are admissible and that conclusions of law are not admissible to impeach the witness. *Id* (citing *Lazane v. Bean*, 782 S.W.2d 804, 805 (Mo. Ct. App. 1990)). Finally, the court ruled that "it has been held that extra judicial admissions are competent evidence even though in the form of conclusions as to the ultimate fact at issue." *Id*. (citing *DeArmon v. City of St. Louis*, 525 S.W.2d 795, 803 (Mo. Ct. App. 1975)). As such, the question before the court in *Csaki* was

whether the statements used from plaintiff's abandoned pleading consisted of admissible statements of facts or inadmissible conclusions of law. *Id*.

The court in *Csaki* found that plaintiff's assertions in her abandoned petition that there was a casual relationship between a non-party doctor (Dr. Schwegler) and her permanent injury were not legal conclusions even though they were in the form of conclusions as to the ultimate facts at issue. *Csaki*, 973 S.W.2d at 274. Rather, the court in *Csaki* found that the statements were statements of fact and were admissions against interest because they were inconsistent with the statements in plaintiff's amended petition which alleged that Dr. Csaki alone caused her injury. *Id*. As such, the appellate court found that the trial court in *Csaki* appropriately allowed defense counsel to admit the abandoned petition to cross examine plaintiff. In other words, the trial court found that it was appropriate for defense counsel to ask the limited questions regarding whether other pleadings had been filed stating that some one other than Dr. Csaki caused her injuries.

The situation in *Csaki* is strikingly similar to the situation at hand in this case. Specifically, like Respondents' counsel in *Csaki*, defense counsel in this case asked Appellant during cross-examination whether she had filed other lawsuits and whether she claimed in those lawsuits, that the defendants in those cases directly caused or contributed to cause her son's death. (Transcript p. 1941-1942). In her brief, Appellant repeatedly argues that the above statements are legal conclusions as opposed to statements of fact and, therefore, they are inadmissible. However, the statements from the Romano and Cesar Petitions regarding the cause of death are exactly like the statements taken out of the abandoned pleading in *Csaki*. The same statements that the Appellate Court found to be statements of fact even though they were in the form of conclusions as to the ultimate facts at issues. *Csaki*, 973 S.W.2d at 274. Like *Csaki*, the

statements in this case came straight out of Appellant's abandoned pleading (Romano and Cesar Petitions) and were inconsistent with Appellant's statements regarding cause of death in this case, *i.e.*, that Respondents caused Mitchell's death as opposed to any of the defendants listed in the Petitions or abandoned pleadings.

In summary, under Missouri law, it is clear that pleadings from "another case entirely are considered abandoned pleadings." *Berry*, 620 S.W.2d at 456; *Littell*, 423 S.W2d at 34 and *Lewis*, 842 S.W.2d at 86. Because the Petitions in the other lawsuits filed by Appellant are considered abandoned pleadings, under Missouri law, statements of facts contained in them are admissible as admissions against interest against the party who originally filed the pleading. *Csaki*, 973 S.W.2d at 274. In accordance with *Csaki*, the statements in the other Petitions (Romano and Cesar lawsuits) filed by Appellant regarding individuals other than Respondents who may have caused or contributed to cause her son's death are considered statements of fact. As such, they are admissible as admissions against interest against Appellant because they are inconsistent with the statements in the live petition for damages in this case which asserts that Respondents alone are responsible for Mitchell's death. *Csaki*, 973 S.W.2d at 274. Accordingly, the trial court did not abuse its discretion in allowing the Petitions from the Romano and Cesar cases to be admitted for the purpose of cross-examining Appellant regarding her inconsistent statements about the cause of Mitchell's death.

Respondents never sought to have the statements in the abandoned pleadings act as judicial admissions.

In her brief, Appellant spends a great deal of time discussing binding judicial admissions while arguing that the statements in the Romano and Cesar Petitions are not binding judicial admissions. However, Respondents have never suggested that the statements in the

petitions were binding judicial admissions. In other words, Respondents never asked the trial court to take notice that other people caused her son's death. Rather, as discussed above, the statements in the Petitions are admissions against interest. *Csaki*, 973 S.W.2d at 274; *Berry*, 620 S.W.2d 458.

In *Berry*, a Missouri trial court dissolved the marriage of the parties and divided the property. The husband appealed on the grounds that the trial court lacked jurisdiction over the case because the wife failed to meet the residency requirement of 90 days in Missouri.

The wife filed her petition for divorce in Missouri on June 7, 1979, alleging she had been a resident of Missouri for the required 90 days. However, on April 13, 1979, she previously filed a petition for divorce in Florida with an affidavit attached that she had been a resident of Florida for more than 6 months. Accordingly, the husband argued that she could not meet the Missouri residency requirement of 90 days because her affidavit from Florida stated she had lived there for six months.

On appeal, the husband argued that statements in the Florida petition and affidavit were binding judicial admissions and, therefore, the trial court needed to take notice that the wife was a resident of Florida and not Missouri for the purpose of the divorce. However, the Appellate Court found that the statements in the Petition from another lawsuit (divorce) were not binding judicial admissions, but rather they constituted only an admission against interest to be considered by the trier of fact along with other evidence. *Berry*, 620 S.W.2d 458.

The holding in *Berry* provides guidance for the situation at hand in this case. This is true because the ruling in *Berry* was that statements from another petition (Florida divorce) could be used in a Missouri case as admissions against interest with respect to inconsistent statements made in the Missouri case, *i.e.*, residency. *Berry*, 620 S.W.2d 458. This is very

similar to what occurred in this case in that Respondents used Petitions from other cases (Romano and Cesar) as admissions against interest against Appellant who made statements regarding the cause of her son's death which were inconsistent with her position in this case. In short, *Berry* confirms that inconsistent statements from abandoned pleadings or pleadings from another case entirely can be admitted for the purpose of impeaching a party as an admission against interest. *Berry*, 620 S.W.2d 458; *Csaki*, 973 S.W.2d at 274.

The admissions against interest from the other Petitions are relevant and do not prejudice Appellant.

Appellant argues that the automobile case evidence was not legally relevant and, even if it was relevant, it's probative value was outweighed by unfair prejudice. As discussed above, the court did not abuse its discretion by admitting the pleadings from the other cases. They were abandoned pleadings under Missouri law and Appellant was appropriately impeached with statements of fact contained in them as admissions against interest. *Berry*, 620 S.W.2d 458; *Csaki*, 973 S.W.2d at 274.

The inconsistent statements contained in the pleadings were highly relevant to this case. Throughout the four week case, one of Respondents' main defenses was that Mitchell's death was caused by a known complication (fat embolism) from the injuries he suffered in the events (car chase and car accident) preceding the medical care provided by Respondents. In other words, Respondents argued that some other cause (car accident) other than their medical care was the sole cause of Mitchell's death. This is exactly what Appellant set forth in the pleadings from her other lawsuits. As such, like *Csaki* discussed above, it was appropriate for the trial court to allow defense counsel to admit the abandoned pleadings for purpose of impeaching Appellant with the admissions of interest contained in them.

Additionally, Appellant has not met her burden of showing how she was prejudiced by the admission of this evidence if the trial court did in fact abuse its discretion in allowing the evidence. For all of the reasons set forth above, Point III of Appellant's Brief should be denied.

Respondents' closing arguments did not cause manifest injustice or a miscarriage of justice (Appellant's Fourth Point Relied On).

Appellant's Fourth Point Relied On is not preserved for judicial review.

Appellant's Brief addressed twenty-two different allegedly improper statements made by Respondents during closing arguments. Appellant never objected to seventeen of the statements cited in Appellant's Brief. Appellant objected to five statements cited in Appellant's Brief, and the Court issued cautionary instructions to the jury after all five objections.

Further, Appellant failed to raise the specific twenty-two allegedly improper closing argument statements during Plaintiff's Motion for New Trial required by Rule 78.07. Accordingly, Apellant did not preserve this issue for appellate review. *State v. Coker*, 210 S.W.3d 374, 385 (Mo. Ct. App. 2006) (citing *State v. Bowles*, 23 S.W.3d 775, 782 (Mo. Ct. App. 2000)). Therefore, this Court should affirm the trial court's Judgment because Appellant failed to preserve the Fourth Point Relied On for judicial review.

Standard of Review

The Standard of Review when Appellant failed to object.

Pursuant to Rule 84.13(c), "plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted there-from." If this Court

chooses to address the seventeen statements addressed by Appellant's Brief, the record does not indicate a single instance of "manifest injustice or miscarriage of justice."

"[P]lain error will seldom be found in unobjected closing argument." *State v. Coker*, 210 S.W.3d 374, 385 (Mo. Ct. App. 2006) (citing *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. 1992)). "Rarely will comments made during closing argument rise to the level of plain error entitling a party to relief." *Porter v. Toys "R" Us – Delaware, Inc.*, 152 S.W.3d 310, 324 (Mo. Ct. App. 2005) (citation omitted). "Plain error occurs only if the 'closing argument contains reckless assertions, unwarranted by proof and intended to arouse prejudice, which, therefore, may be found to have caused a miscarriage of justice.'" *Id.* (citing *Morgan Publishing, Inc. v. Squire Publishers, Inc.*, 26 S.W.3d 164, 170 (Mo. Ct. App. 2000) (quoting *Hensic v. Afshari Enters., Inc.*, 599 S.W.2d 522, 526 (Mo. Ct. App. 1980))). "Because trial strategy looms as an important consideration in any trial, assertions of plain error concerning matters contained in closing argument are generally denied without explication." *State v. White*, 2007 WL 1119648 (Mo. Ct. App., April 17, 2007).

The Standard of Review when Appellant objected.

When counsel objects during closing argument, the "appellate courts will reverse the trial court's decision with regard to closing argument only upon a showing of abuse of discretion by the trial court." *State v. Lockett*, 165 S.W.3d 199, 205 (Mo. Ct. App. 2005). The record demonstrates the trial judge did not abuse his discretion during Respondents' closing arguments.

The Respondents' closing arguments were proper and did not cause manifest injustice or miscarriage of justice.

Even if the Court decides to address the seventeen allegedly improper statements during closing argument where Apellant failed to object, the record demonstrates Respondents' statements were proper and supported by the evidence. Further, the record established that Respondents' closing arguments never caused manifest injustice or a miscarriage of justice.

Respondents' closing arguments were proper

Appellant's "Regional Prejudice" argument is disingenuous.

Appellant's "regional prejudice" argument is disingenuous because the word "Canada" was mentioned twelve times during Dr. Tile's deposition played, in part, to the jury.[2] (Dr. Tile's Deposition Transcript, p. 4:11; 6:25; 7:3; 12:15; 13:4 and 22; 16:2 and 5; 25:15 and 17; 29:6; and 30:7). Every single substantive mention of the word "Canada" in Dr. Tile's deposition was used by either Appellant's counsel or Dr. Tile.[3] Interestingly, the word "Canada" was never used by Respondents' counsels during Dr. Tile's deposition. Appellant now claims error for similar statements made by Appellant's counsel. Dr. Tile's nationality was first

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[2] As noted earlier, Dr. Tile's complete trial testimony was not included in the record on appeal. All citations refer to Dr. Tile's videotaped deposition, which was edited before it was played to the jury.

[3] The word "Canada" was used twice during Dr. Tile's deposition for procedural issues. The Court Reporter noted Dr. Tile's physical address. (*See* p. 271:2). Also, Dr. Evans' counsel used the word "Canada" in an objection. (*See* p. 12:6).

extensively addressed by Appellant's counsel, who now claims that Dr. Evans' counsel should have been prohibited from also mentioning the issue. Respondents' closing argument was proper based on the evidence submitted at trial.

Appellant makes a similar argument regarding the statement that Dr. Freeman is located "at Washington University here in St. Louis, across the state in St. Louis, a level one trauma center." (Appellant's Brief, p. 113 (citing Transcript p. 3454:4-10)). Appellant's argument is disingenuous because Appellant first mentioned Dr. Freeman is located in St. Louis during *voir dire.* (Transcript, p. 81:3-4). Further, Appellant never objected to the introduction of this evidence during trial. (Transcript, p. 2102:23-25; 2104:15-2105:24; 2106:2-7; 2106:19; and 2107:7:16).

Appellant's claim of "regional prejudice" is simply not supported by the record before the Court.

Appellant's "Sympathy" argument is disingenuous

Appellant seeks a new trial for nine allegedly "sympathetic" statements made by Respondents at trial. However, Appellant only objected to one allegedly "sympathetic" statement. (Transcript p. 3452:14 – 3453:1). The "sympathetic" statements made by Respondents were in the exact same context as statements made during Appellant's own closing argument.

Appellant's counsel stated in closing argument: "I could talk for three hours on just parts of this case because there's so many mistakes, there's so many contradictions, there's so many things that they want you to have to grasp and accept as true when they're contradictory with experts and their own particular issues that they think are important they're throwing at the wall and hoping that they may get it past you." (Transcript, p. 3413:2-9). Further, Appellant's

counsel stated: "Local doctors testify for local doctors. That's just a fact of life. That's the way it is. And defense, defense, defense, defense. Haven't testified against one local doctor, any of them. All defense. And they come up with things that aren't in the original record. They come up with things that cover up a horrible event that never should have happened and never does usually happen if they're treated in the standard of care." (Transcript, p. 3422:21 – 3423:4).

Appellant's "sympathy" argument is disingenuous because Appellant made similar arguments during closing argument, and Respondent's alleged "sympathy" statements were proper argument because they were based on the evidence.

Respondents' alleged "personalization" statements during closing argument were proper.

Respondents' alleged personalized comments were proper because they were based on the evidence at trial and did not address the ultimate questions for the jury. Further, Appellant did not object to many of the alleged "personal" statements during closing argument. In the few instances where Appellant objected to the closing argument, the trial judge issues a cautionary instruction every time. *See* p. 3440:7; 3469:8-10; and 3475:13-16. The Record on Appeal demonstrates Respondents' closing arguments were proper.

Respondents never made "misleading statements" during closing argument.

First and foremost, Respondents never made any misleading statements to the jury during closing arguments. Respondents' closing arguments were based on the evidence during the trial. Also, Appellant never objected to the allegedly "misleading statements." Further, Appellant never addressed the allegedly "misleading statements" during Appellant's final closing

argument. Appellant's argument regarding allegedly "misleading statements" is simply not supported by the law or the Record on Appeal.

Appellant did not properly preserve anything relating to Dr. Tile's testimony for review by this Court because there is absolutely no record of the deposition testimony of Dr. Tile which was played by videotape at the trial of this matter. Additionally, there was never any agreement to limit Dr. Tile's testimony against Dr. Dubin and this argument was not raised or preserved at the time of trial. Appellant's counsel designated Dr. Tile as an expert to testify against Dr. Dubin, and Dr. Tile's testimony was that he could not find anything that Dr. Dubin did wrong.

Dr. Tile was an orthopedic surgeon (the same as Dr. Dubin), designated by Appellant to testify against Defendant Evans. At the time of Dr. Tile's deposition, Appellant's counsel belatedly amended the expert designation and asserted that Dr. Tile would be rendering opinions against Dr. Dubin. ((Legal File, Vol. 4, p. 771) citing Deposition Transcript of Dr. Tile at p. 4:13-17)). This expert designation against Dr. Dubin was never withdrawn.

Because Appellant designated Dr. Tile to testify against Dr. Dubin, counsel for Dr. Dubin was forced to examine Dr. Tile at the deposition. Dr. Tile testified in his deposition that he had, in fact, reviewed the evidence against Dr. Dubin, and he was still not willing to take the "jump" to suggest that Dr. Dubin deviated from the standard of care because he did not think that Dr. Dubin, "had anything to do with the resuscitation or the anesthesia . . ." (Legal File, Vol. 4, p. 772, Deposition Transcript of Dr. Tile at p. 193:21 - p. 196:7).

Additionally, regardless of the expert designation, it is important to note that "[i]t is common practice to obtain favorable concessions from the other party's expert or treating physician." *Smith v. Wal-Mart Stores, Inc.*, 967 S.W.2d 198 (Mo. Ct. App. 1998) (citations

omitted). Dr. Dubin did not submit duplicative expert witness testimony, he effectively cross-examined Appellant's expert witness. There was certainly nothing stopping Appellant's counsel from re-direct examination of Dr. Tile. Appellant never made such an effort and can not now complain about the testimony of Appellant's own expert.

It is also notable that the direct testimony elicited by Appellant's counsel was vague and repeatedly referenced "the Defendants," making a suggestion that Dr. Tile's opinions were against all Respondent, including Dr. Dubin. Accordingly, counsel for Dr. Dubin clearly had the right, if not the obligation, to clarify the fact that Dr. Tile's opinions did not apply to Dr. Dubin.

Appellant's claim of "lack of judicial control" is without merit.

Appellant also makes a generic "lack of judicial control" argument. Appellant does not cite a single inappropriate statement made in closing argument, but instead states the trial judge had no control over the closing argument. Appellant's argument about "judicial control" is unclear because Appellant failed to object to seventeen of the twenty-two closing argument statements described in Appellant's Brief. The record demonstrates the trial judge instructed the jury on all five objections to the closing argument statements described in Appellant's Brief. Accordingly, the record establishes the trial judge absolutely controlled the Respondents' closing arguments. Appellant's claim of "lack of judicial control" is without merit.

Respondent's closing arguments did not cause manifest injustice or miscarriage of justice.

The record demonstrates the seventeen closing argument statements where Appellant failed to object never caused manifest injustice or miscarriage of justice. The seventeen statements were all supported by the record and the evidence. Further, Appellant had the final opportunity in closing argument to clear any potential misconceptions.

Appellant's Brief never cited a single instance of "reckless assertions, unwarranted by proof and intended to arouse prejudice, which, therefore, may be found to have caused a miscarriage of justice." *See Porter v. Toys "R" Us – Delaware, Inc.*, 152 S.W.3d at 324 (citation omitted). The record demonstrates Respondents' closing arguments did not cause manifest injustice or a miscarriage of justice. Accordingly, Respondents respectfully request the Court to affirm the trial court's Judgment.

The trial judge did not abuse his discretion during Respondents' closing arguments.

Even if the Court finds Appellant's Fourth Point Relied On is preserved for appellate review, and the court finds Appellant properly objected to Respondents' statements during closing arguments, and the Court finds Respondents' statements during closing arguments were improper, the Court should still affirm the trial court's Judgment because the trial judge did not abuse his discretion during Respondents' closing arguments.

The record establishes that Respondents' closing arguments were supported by the evidence in this case. Further, the Court instructed the jury on all five of Appellant's objections. (Transcript, p. 3443:6-8 ("The jury will remember that the comment of counsel is not evidence and their decisions will be guided by the evidence.")) Transcript, p. 3452:24 – 3453:1

("The jury shall remember that the statement of counsel is not evidence and is merely the closing argument of counsel."); Transcript, p. 3469:8-10 ("The jury shall remember that this is only the statements of counsel and is not evidence."); Transcript, p. 3475:13-16 ("The jury will remember the statements of counsel are not evidence and are merely designed to assist you in the interpretation thereof and is not evidence."); Transcript, p. 3440:7 ("The jury will remember the evidence.")).

The record establishes Appellant received a jury instruction from the trial judge at times when Appellant did not even ask for one. Further, the record demonstrates Appellant did not seek any further relief or instructions from the trial judge when Appellant made objections. Now, for the very first time, Appellant seeks a new trial for Respondents' statements during closing argument. It is undisputed the record demonstrates the trial judge instructed the jury every single time Appellant objected to Respondents' closing argument at trial.

The trial judge's instructions to the jury demonstrates he had "control over the closing arguments" and utilized his discretion to prevent any prejudice to any party. The record establishes the trial judge did not abuse his discretion during Respondents' closing arguments. Accordingly, Respondents respectfully request the Court to deny Appellants' Fourth Point Relied On and affirm the trial court's Judgment.

The trial court properly denied Appellant's motion for a new trial because there was no cumulative error or prejudice (Appellant's Fifth Point Relied On).

In the final point raised in Appellant's Brief, Appellant contends that the Trial Court erred in failing to grant a new trial because of the cumulative effect of all the previously alleged errors.

Standard of Review.

This Court reviews the denial of a motion for new trial for an abuse of discretion. *City of Pleasant Valley v. Baker*, 181 S.W.3d 204, 211 (Mo. Ct. App. 2005)(citation omitted).

The trial court properly denied Appellant's Motion for a New Trial which asserted cumulative error.

The trial court properly denied Appellant's motion for a new trial. No error existed on the other points asserted in Appellant's Brief. Accordingly, there can be no cumulative error resulting from those points. "Numerous non-errors cannot add up to error." *State v. Gray*, 887 S.W.2d 369, 390 (Mo. 1994), *cert. denied*, 514 U.S. 1042, 115 S.Ct. 1414, 131 L.Ed.2d 299 (1995) (citation omitted). "Having determined that none of [appellant's] … previous points amount to reversible error, there can be no reversible error attributable to their cumulative effect." *State v. Buchli*, 152 S.W.3d 289, 309-310 (Mo. Ct. App. 2005) *cert. denied*.

Not only does Appellant have to establish error on the various issues, but Appellant must also establish prejudice as a result of any alleged error. *Koontz v. Ferber*, 870 S.W.2d 885, 894 (Mo. Ct. App. 1993) (citation omitted). In this case, as previously outlined herein within the various Points addressed, no error has been shown by Appellant and Appellant has failed to establish any prejudice resulting from any alleged error. Accordingly, the trial court properly denied the Appellant's motion for new trial.

This Court should affirm the trial court's decision to deny Appellant's Motion for New Trial based upon alleged cumulative error in that Appellant has failed to establish any error or prejudice.

Conclusion

Appellant's First Point Relied On.

Appellant failed to properly object to Jury Instructions 7, 9, and 11 at trial, and the record demonstrates these instructions did not cause Appellant any "manifest injustice or a miscarriage of justice." Even if the Court finds Appellant properly objected to Jury Instructions 7, 9, and 11 at trial, the record demonstrates no substantial evidence supported Jury Instructions 7, 9, and 11. Even if the Court finds Appellant properly objected to Jury Instructions 7, 9, and 11 at trial, and that Appellant produced substantial evidence supporting Jury Instructions 7, 9, and 11, the record overwhelmingly establishes Appellant was not prejudiced because Jury Instructions 7, 9, and 11 made it easier for the jury to find Respondents liable for Appellant's alleged damages. Accordingly, Respondents respectfully request the Court to affirm the trial court's Judgment.

Appellant's Second Point Relied On.

The trial judge did not abuse his discretion by denying Appellant's request for mistrial during voir dire. The trial judge determined Dr. Evans' counsel's questions were appropriate and supported by the evidence. Despite the trial judge's ruling, Dr. Evans' counsel withdrew the question, and the trial judge instructed the jury. The trial judge's decision to deny Appellant's request for mistrial was not "clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Accordingly, Respondents respectfully request the Court to affirm the trial court's Judgment.

Appellant's Third Point Relied On.

The trial judge did not abuse his discretion by allowing Respondents to impeach Appellant with admissions against her interest contained in Appellant's Petitions in other cases. The record demonstrates the abandoned pleadings were properly used to impeach Appellant for admissions against interest. Further, the admissions against interest were clearly relevant to Appellant's claims in this lawsuit. The trial judge's decision to allow Respondents to impeach Appellant with admissions against interest was not "clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Accordingly, Respondents respectfully request the Court to affirm the trial court's Judgment.

Appellant's Fourth Point Relied On.

Appellant's Fourth Point Relied On is not preserved for judicial review. Even if the Court finds Appellant's Fourth Point Relied On was preserved for judicial review, Respondents' closing arguments did not cause manifest injustice or a miscarriage of justice because Respondents arguments were supported by the evidence at trial. Further, Appellant was not prejudiced because the Court instructed the jury on every single objection made by Appellant. Accordingly, Respondents respectfully request the Court to affirm the trial court's Judgment.

Appellant's Fifth Point Relied On.

The trial court properly denied Appellant's Motion for New Trial because there was no cumulative error or prejudice. No error existed on other points raised in Appellant's Brief, and no cumulative error occurred during trial. Accordingly, Respondents respectfully request the Court to affirm the trial court's Judgment.

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RULE 84.06(c) CERTIFICATION

Pursuant to Mo.R.Civ.P. 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Mo.R.Civ.P. 84.06(b); and (3) this Brief contains 19,370 words, as calculated by Microsoft Word software used to prepare this Brief.

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