No. 66959

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Bernice L. Mitchell, *et al.*,
Appellants,

vs.

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)

APPELLANT'S REPLY BRIEF

William H. Pickett (MO #21324)
Mark E. Meyer (MO #51786)
William H. Pickett, P.C.
100 Interstate Building
417 East Thirteenth Street
Kansas City, Missouri 64106

Telephone: 816-221-4343
Fax: 816-221-8258

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

REPLY STATEMENT OF FACTS

Respondents are, of course, entitled to provide additional facts supported by the record, which they believe were omitted by Mrs. Mitchell's Statement of Facts. However, the right to offer additional facts does not grant the right to convert a statement of facts into argument. If a party says, "Dr. Smith testified at page X of the transcript that A and B were true," that is an objective statement of fact. If the party says, "At page X of the transcript, Dr. Smith's testimony proved A and B were true," argument has been introduced. The latter statement is argumentative because it offers a legal conclusion or an opinion about the value to be given to the evidence. That is not the function of counsel on appeal, nor the proper function of a statement of facts.

For example, at page 7-8 of Respondents' joint brief, in their "Statement of Facts," Respondents said:

> 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.

Each of the four sentences above is not a neutral statement of fact, but is instead the opinion of Respondents and/or their counsel as to the weight to be given to the testimony. Each sentence is an argument that Mrs. Mitchell failed to make a submissible case.

Beginning with the first complete paragraph on page 8 of Respondents' joint brief, and ending with the second complete paragraph on page 9, Respondents continue their argumentative approach to what is supposed to be a neutral activity. Respondents' attorneys are all experienced; they are all well aware that when the issue of submissibility is raised on appeal, the appellate court is to disregard all evidence contrary to that offered by a plaintiff. Indeed, they cited *Williams v. Daus*, 114 S.W.3d 351, 370 (S.D. Mo. App. 2003) (en banc), for that very principle. [Respondents' Brief at 11.] The rationale for that principle is simple: if a plaintiff, by himself, does not offer sufficient evidence to make a submissible case, then the jury need not consider evidence to the contrary, and thus, for purposes of a submissibility analysis anything and everything offered by the defense which contradicts a plaintiff's evidence is irrelevant.

Aside from the impropriety of using a supposedly neutral section of the brief to begin their arguments, Respondents' comments and conclusions about what they "proved" and "stated" are unsworn statements of supposed fact, and as such not

only can have no value in this appeal but may not be considered by this Court in making its ultimate determination.

"Unsworn statements of trial attorneys do not prove themselves or constitute evidence. [Citations omitted.]" *Kettler v. Hampton*, 365 S.W.2d 518, 523 (Mo. 1963). In an appeal, an attorney's statement cannot be accepted as a substitute for proof in the record, even when the appellate court has no reason to disbelieve the statement. *Landers v. Smith*, 379 S.W.2d 884, 887 (S.D. Mo. App. 1964). The facts in *Kettler* and *Landers* are not relevant to this litigation, and the cases are cited only for the principles quoted. MAI 2.01, the explanatory instruction given in all trials, says in pertinent part:

> The trial may begin with opening statements by the lawyers as to what they expect the evidence to be. At the close of the evidence, the lawyers may make arguments on behalf of their clients. Neither what is said in opening statements or in closing arguments is to be considered as proof of a fact.

In addition, the Southern District has also held that "the unsworn statements of an attorney are not evidence of the facts asserted." *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (S.D. Mo. App. 1997), and also pointed out:

> Further, except where facts asserted in a party's brief are conceded to be true by the adversary party, statements in briefs are not evidence

and are insufficient to supply essential matters for review [Citation omitted.]

Id.

Mrs. Mitchell of course recognizes that they have used a "Statement of Facts" section of her Reply Brief to make a legal argument, while chastising Respondents from doing so in Respondents' brief. Mrs. Mitchell respectfully suggests that Respondents opened the door to that necessity themselves. Regardless of any similarity between the arguments made by Respondents in their Statement of Facts to arguments they made in their Argument section, Mrs. Mitchell has a due process right under the Fourteenth Amendment to the Constitution of the United States and Article I, §10 of the Constitution of Missouri to be heard in opposition to their Statement of Facts arguments. The only logical place for that opposition is in a "Reply Statement of Facts."

REPLY POINTS RELIED ON

REPLY POINT I

The trial court erred in rejecting Plaintiff's proffered Instructions corresponding to given instructions 7, 9 and 11, and instead giving Instructions 7, 9 and 11, with matching converse instructions 8, 10, and 12, all of which were drafted by the court and not by any party, because as a matter of law Plaintiff was entitled to have her proffered instructions submitted to the jury in that:

a. Mo. R. Civ. P. 70.02(a) does not give a trial court discretion to reject a plaintiff's proffered instructions so long as the instruction is in the proper form and supported by substantial evidence;

b. Plaintiff's proffered and rejected instructions were in the proper form and supported by substantial evidence;

c. There is no legal authority for a trial judge to reject a Plaintiff's proffered instructions and, *sua sponte*, draft both verdict directors and converse instructions on his own;

d. Plaintiff and Defendants Drs. Evans, Dubin and Bowser all objected to the trial court's self-drafted instructions, and

e. There was no substantial evidence to support any of the court-drafted instructions;

f. The court-drafted instructions were vague, confusing and misleading;

g. The court-drafted instructions significantly prejudiced Mrs. Mitchell by depriving her of the right to go to the jury with her theories of recovery, instead of being compelled to argue theories she did not believe in, had not chosen and which were not supported by substantial evidence.

Marion v. Marcus, 199 S.W.3d 887 (W.D. Mo. App. 2006)

Ploch v. Hamai, 213 S.W.3d 135 (E.D. Mo. App. 2006)

Mo. R. Civ. P. 70.02

REPLY POINT II.

The trial court erred in failing to declare a mistrial as sought by Plaintiff during voir dire because the trial court thereby abused its discretion, in that a mistrial was the only appropriate remedy when:

a. Defendants violated the letter and spirit of the pretrial order to refrain from mentioning any settlement by asking a question in voir dire about the former Defendant, Inde-

pendence Regional Health Center ("IRHC"), thereby necessarily implying to the jury that IRHC had settled with Plaintiff and that was the reason it was no longer a part of the case;

b. Defendants brought up the subject of IRHC during voir dire without approaching the bench first, as counsel had promised to do;

c. Defendants admitted there was no legitimate basis for identifying IRHC as a prior Defendant, as they had no reasonable expectation that there would be any question of comparative fault on the verdict director, and as a matter of law there could be no issue of set-off since the allegations were that IRHC and the Defendants against whom the case was tried were joint tortfeasors, and in any event, any issue of set-off would have purely been a question of law for the trial court and not a question of fact for the jury;

d. The fact that IRHC was a former defendant in the case was completely irrelevant to any issue to be proved in the case against the Defendants against whom the case was

tried, and

e. Allowing Defendants to mention IRHC as a former Defendant tainted the entire proceeding by injecting a false and misleading issue into the minds of the jury, *i.e.*, that Plaintiff was being greedy by having (implicitly) settled with IRHC and then proceeding to trial against the remaining Defendants.

No new citations

POINT III.

The trial court erred in failing to exclude evidence of the prior cases brought by Plaintiff against those involved in the car chase and the collision which resulted in William R. Mitchell being taken to IRHC and being treated by the Defendants against whom the case was tried, because the trial court thereby abused its discretion, in that exclusion was the only proper ruling when:

a. The sole reason for raising the issue was to create the appearance for the jury that Plaintiff was overly litigious and greedy by filing other suits and that by doing so she had admitted that it was the conduct of the defendants in the car chase/crash cases which actually caused the death of

William R. Mitchell, and not any conduct on the part of the Defendants against whom the case was tried;

b. The fact of the prior litigation and the allegations made had no relevance to the proceedings against the medical malpractice Defendants due in part to the legal principle of downstream liability, *i.e.*, the tortfeasors who caused the vehicle crash which led to the injuries to William R. Mitchell at the scene which in turn led to him being at IRHC and treated by these Defendants were responsible for the totality of his injuries and/or death, while the medical malpractice Defendants were liable only for their share of responsibility;

c. Defendants used the argument to the Court that one reason the mention of the chase/crash cases was that Plaintiff could have filed a single suit but chose not to do so, despite the fact that the record shows that Plaintiff attempted to consolidate the medical malpractice case with the automobile cases; these Defendants vigorously and successfully opposed that consolidation, and then used the lack of consolidation/lack of a single case as a reason for introducing

evidence about the chase/crash cases;

d. The pleadings in the automobile cases were not abandoned pleadings;

e. The pleadings in the automobile cases were not binding judicial admissions;

f. The pleadings in the automobile cases were valid alternative pleadings which could not properly be used against Mrs. Mitchell in the instant case, and

g. The prejudicial effect of the evidence relating to the automobile cases far outweighed whatever probative value the evidence might have.

No new citations

POINT IV.

The trial court erred in permitting improper closing argument by all defense counsel because in doing so he abused his discretion in that he allowed appeals to regional prejudices; personalization; appeals for sympathy, and misleading statements (as more fully detailed in the Argument below), all of which are impermissible in closing arguments as a matter of law, thereby confusing and misleading the jury, and depriving Mrs. Mitchell of a fair trial be-

cause of the resulting prejudice.

Carlyle v. Lai, 783 S.W.2d 925 (W.D. 1989)

Gibson v. Zeibig, 24 Mo. App. 65, 1887 WL 1742 (E.D. 1887)

POINT V.

The cumulative effect of the errors of the trial court as identified in the preceding Points Relied on warrants granting of a new trial, even if the errors considered individually do not warrant granting a new trial.

No new citations

REPLY ARGUMENT

REPLY POINT I

The trial court erred in rejecting Plaintiff's proffered Instructions corresponding to given instructions 7, 9 and 11, and instead giving Instructions 7, 9 and 11, with matching converse instructions 8, 10, and 12, all of which were drafted by the court and not by any party, because as a matter of law Plaintiff was entitled to have her proffered instructions submitted to the jury in that:

a. Mo. R. Civ. P. 70.02(a) does not give a trial court discretion to reject a plaintiff's proffered instructions so long as the instruction is in the proper form and supported by substantial evidence;

b. Plaintiff's proffered and rejected instructions were in the proper form and supported by substantial evidence;

c. There is no legal authority for a trial judge to reject a Plaintiff's proffered instructions and, *sua sponte*, draft both verdict directors and converse instructions on his own;

d. Plaintiff and Defendants Drs. Evans, Dubin and Bowser all objected to the trial court's self-drafted instructions, and

e. There was no substantial evidence to support any of the court-drafted instructions;

f. The court-drafted instructions were vague, confusing and misleading;

g. The court-drafted instructions significantly prejudiced Mrs. Mitchell by depriving her of the right to go to the jury with her theories of recovery, instead of being compelled to argue theories she did not believe in, had not chosen and which were not supported by substantial evidence.

Section 1. Standard of Review

Mrs. Mitchell stands by her statement of the standard of review in this case, but agrees that *if* her objections are determined by this Court to have been insufficient to serve as a basis for some or all of the arguments made here—a point Mrs. Mitchell by no means concedes to be true—then Mrs. Mitchell agrees with Respondents' suggestion that plain error is an appropriate alternative review. If the Court determines that plain error review is appropriate to the issue of instructional error, then Mrs. Mitchell agrees that the standard of review is:

> 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. *State v. Black*, 50 S.W.3d 778,

788 (Mo. banc 2001).

State v. Goebel, 83 S.W.3d 639, 643 (E.D. Mo. App. 2002) (cited with approval by Respondents).

Section 2. Objections and Substantial Evidence

A review of the instruction conference in this case [TR Vol. VII at 3352-3371] makes it very clear that this was never a conference based on each side arguing in favor of its proposed instructions and objecting to the instructions proposed by the other side. Instead, this was a conference which *began* with the foundation that the trial judge was going to use instructions he himself had drafted. The only reasonable inference to be drawn from the totality of the conference is that there had been some prior meeting or discussion between the trial judge and counsel, unfortunately not recorded, at which the judge's decision to use his own instructions was announced, and in all likelihood, discussed. The purpose of the formal (*with* court reporter) conference thus became a matter of making a record of each party's objections to what the judge had already decided to do.

As previously pointed out, Respondents all vigorously opposed the court-drafted instructions for a variety of reasons, including but not limited to assertions that the judge-drafted instructions were overly general, vague and constituted a roving commission, *cf.* Mrs. Mitchell's Statement of Facts at pages 40-41 of their brief. In this Court Respondents have chastised Mrs. Mitchell for allegedly chang-

ing her position and making new arguments on appeal, yet at the same time they apparently have felt no qualms about doing precisely the same thing themselves. The difference, of course, is that they benefited from the instructions they so vehemently opposed below.

Although the issue of Respondents' appellate change of heart on the propriety of the judge-drafted instructions was clearly raised by Mrs. Mitchell's brief, Respondents have not addressed the subject. They have not provided any case law to support their right to oppose the judge-drafted instructions below, and then change their position on appeal, and argue that despite the over-breadth, vagueness and being something of a roving commission, the judge-drafted instructions were in reality eminently correct. What is sauce for the goose is apparently not sauce for the gander.

The parties have each made their objections known to the judge-drafted instructions; they have each argued whether the instructions proposed by Mrs. Mitchell were supported by substantial evidence. The Rules do not permit of further discussion, therefore, and the matter of the sufficiency of Mrs. Mitchell's objections to the judge-drafted instructions, considered in light of both the instruction conference, and Mrs. Mitchell's Motion for New Trial, and the matter of support by substantial evidence, as well as the issues of prejudice and materiality, are for the Court to determine.

Section 3. Other Arguments by Respondents

At pages 11-12 of their brief, Respondents asserts that Mrs. Mitchell is arguing that her attorney, rather than the trial judge, should be the one who submits instructions to the jury. Respondents apparently misunderstand Mrs. Mitchell's argument. Mrs. Mitchell has argued that the holdings of *Marion v. Marcus*, 199 S.W.3d 887 (W.D. Mo. App. 2006), and *Ploch v. Hamai*, 213 S.W.3d 135 (E.D. Mo. App. 2006), state that a trial judge has *no* discretion to reject a plaintiff's proposed instruction if it is in the proper form and supported by substantial evidence. Mrs. Mitchell's argument in the opening brief and here, is precisely that: the trial judge improperly exercised discretion he did not have by rejecting Mrs. Mitchell's proposed instructions and drafting his own. It is respectfully pointed out that Respondents never directly addressed the issue of discretion and Rule 70.02(a). Their citations to *Marion* were directed toward the standard of review. *Ploch* was never cited, nor was any attempt made to distinguish it. Indeed, the closest thing to "addressing" the issue of judicial discretion vis-à-vis Rule 70.02(a) appears at page 44 of Respondents' Brief, where they state, *without citation to authority*, "In addition, it is proper for a court to reject both parties' instructions and submit its own instructions."

From the lack of response to this important issue, it appears Respondents have in reality conceded the legal principle that a trial judge has no discretion to

reject a proposed instruction if it is in the proper form and supported by substantial evidence. In light of that concession, the only issues for this Court to decide are still whether *Mrs. Mitchell's proposed instructions*, not the court-drafted instructions, were in the proper form and supported by substantial evidence, and if the rejection of those instructions caused prejudice, and materially affected the merits of the case. *Marion, supra*.

At page 16 of their brief, Respondents misstate (presumably inadvertently) Mrs. Mitchell's proposed Instruction 7 (actually quoted by them at page 13). While it is true that Mrs. Mitchell's proposed Instruction 7 required the jury to find that Dr. Evans "failed to establish adequate hypovolemic stability by proper restoration of fluid volume," nowhere does the rejected No. 7 say anything at all about "Dr. Evans allowed William Mitchell while in an unstable hypovolemic condition to go to surgery with Dr. Dubin." For whatever reason, Respondents have chosen to insert words into the rejected No. 7 and then make an argument based on patently incorrect language.

Respondents then proceed to argue that Mrs. Mitchell actually *benefited* from the judge-drafted Instruction 7 because the judge's version only required the jury to make the "second finding" (the one "quoted" by Respondents which is not in reality a part of the proposed No. 7), and thus it was "easier for the jury to hold Dr. Evans liable for William Mitchell's alleged damages." [Respondents' Brief at

17.] It should be noted that this argument about the judge creating jury instructions with an "easier" burden of proof than the "heavier" burden proposed by Mrs. Mitchell, is made by all the Respondents. Thus, claim Respondents, Mrs. Mitchell's claim of prejudice from the judge-drafted instructions is disingenuous because the judge was actually doing her a favor by lightening her load and easing her burden of proof.

Not surprisingly, Respondents have cited no case which holds that if a plaintiff chooses to propose a valid jury instruction with "layers" of complexity, *e.g.*, three conjunctive allegations of negligence all supported by substantial evidence, that the trial judge has the right to tell the plaintiff to "go easy" on herself and submit only two conjunctive allegations. Whether a plaintiff and his counsel make the right choice or the wrong choice in proposing an instruction that is in the proper form (as Respondents have implicitly conceded the rejected instructions were, since they only offered a conclusion that the rejected instructions failed to comply with M.A.I., rather than proof) and is supported by substantial evidence (disputed here), nevertheless the choice belongs to the plaintiff. Similarly, if a plaintiff's proposed jury instruction contains three disjunctive allegations of negligence supported by substantial evidence, then it is her right to have all three submitted to the jury, and not to have her case made "easier" by judicial editing which eliminates one or two.

Consider the analogy of an election of remedies. If a plaintiff has litigated two mutually-exclusive theories of recovery, and made a submissible case on both, at some point she must decide which one to present to the jury. Theory No. 1 is more difficult to prove; theory No. 2 is easier. Respondents have cited no cases which would lead to the conclusion that a trial judge would ever have the power in such a situation to *compel* the plaintiff to submit the second theory. If it turned out that the jury rejected the second theory, the plaintiff would have to accept the consequences of her decision—*exactly as Mrs. Mitchell should have been allowed to make her choice and abide by the consequences of that choice*.

Section 4. Plain Error

Respondents have argued that the only way Mrs. Mitchell's allegations of instructional error can be considered is by plain error review, and have argued that there is no basis for concluding any plain error. As noted above, while Mrs. Mitchell does not concede that plain error is the only avenue of review open to her, even if it is, the facts of this case unquestionably meet the definition of the trial judge having "so misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice."

There can hardly be an error more plain and less subject to dispute than a trial judge purporting to exercise discretion when in fact and in law he has none. If the law states that a trial judge can do "A" and only "A," and the judge elects to do

"B" instead, it would be manifestly unjust and a great miscarriage of justice for any appellate court to condone such a violation of the law.

The application of the lack-of-discretion principles of *Marion* and *Ploch*, *supra*, is unquestionably predicated on a determination by this Court that, as Mrs. Mitchell has argued, her proposed instructions were in the proper form and were supported by substantial evidence. If this Court agrees with Mrs. Mitchell on those two factors, then the trial judge here had only one course of action open to him: giving Mrs. Mitchell's proposed instructions. Judges are bound by the rule of law, as are litigants and their lawyers, and in other contexts, as is the general public. If the foundation laid by Mrs. Mitchell is solid (proper form/substantial evidence), then the trial court had no discretion to go the "B" route and draft his own instructions. It is also respectfully submitted that where the law directs a specific act when certain facts exist, then *this* Court is without power to allow a trial judge to do anything other than that specific act, once this Court has found that those facts exist.

Even if this Court considers Mrs. Mitchell's instructional error claims as a matter of plain error, rather than preserved error, Mrs. Mitchell has, considering all the evidence in the light most favorable to her instructions and rejecting all other evidence, shown that the trial court committed not merely reversible error, but has committed both manifest injustice and a grave miscarriage of justice.

Respondents have argued that the jury's questions did not relate to Mrs. Mitchell's objections during the instruction conference. As the substance of any jury questions could never be anticipated at the instruction conference, and thus such unknown questions could not be used as the basis for an objection, this argument really makes no sense. Considered as a whole, and considering the use of the same main description of negligence in each of the proposed instructions, Mrs. Mitchell's objections were broad enough to encompass all the arguments made in this appeal. Those objections were broad enough, as well, to encompass the point that the jury found the judge's use of the word "unstable" to be confusing (they did, after all, ask what "unstable" meant in relation to a trauma), and they remained so confused after the "remember the evidence" response, that they then asked for a dictionary to try to help them understand what was meant.

A presumption about a jury's ability to understand plain language in light of the evidence is not something carved in granite and impervious. It is at most a rebuttable presumption, and that presumption was clearly rebutted here by the jury's unequivocal inability to understand what the judge-drafted language meant. A person does not ask for a definition of a word in relation to a particular set of circumstances, or ask for a dictionary, if those persons understand the words being used.

At page 24, Respondents argue without record references that the terms in the judge-drafted instructions were the same terms used by Mrs. Mitchell's experts

during trial. They then argue that Mrs. Mitchell had the burden of proof and she failed to meet that burden as reflected by the question about the definition of "unstable" in "a trauma setting." The Court and Respondents are reminded that Mrs. Mitchell never sought this particular burden during trial; she did not seek to demonstrate negligence based on there being an "unstable hypovolemic condition" (or the alternative version, an "unstable, hypovolemic condition"). Instead, she sought to demonstrate—and in fact did demonstrate by substantial evidence—negligence by failure "to establish hemodynamic stability by proper restoration of fluid volume."

The so-called "burden" to prove to the jury that William Mitchell was in an unstable hypovolemic condition was a burden imposed much like an *ex post facto* law: after the event, after the trial for all practical purposes was over. If there was a failure, it was because Mrs. Mitchell was set up to fail by forcing her at the end of four weeks of trial to suddenly argue theories of recovery she and her counsel did not espouse and about which she had not presented any proof. A court-compelled change in a plaintiff's theory of recovery just prior to closing argument is not how the judicial system is intended to operate, especially not in light of *Marion* and *Ploch*.

Respondents argued at pages 35-41 of their brief that there was substantial evidence to support the use of judge-drafted Instruction 11. With all due respect,

even if that were true, so what? Even if the argument *was* true—which Mrs. Mitchell does not concede—it is irrelevant to this appeal. The question before the Court is whether proposed Instruction 11 (like the others proposed by Mrs. Mitchell) was supported by substantial evidence. Respondents have admitted at page 26 of their brief that hemodynamic stability (and thus hemodynamic instability as well) and hypovolemia are not the same thing. So once again, even if the evidence supported both concepts (hypovolemia and hemodynamic stability/instability), it was Mrs. Mitchell who had the right to choose which concept to present to the jury, not the trial court. This is also true in light of the fact that Mrs. Mitchell chose to narrow the allegation relating to hemodynamic instability by specifically tying it to a failure to restore proper fluid volume.

Mrs. Mitchell's proposed Instruction 7 is distinctly different from the judge-drafted No. 7 in another respect besides the issue of hypovolemia vs. hemodynamic instability. Mrs. Mitchell proposed and her evidence supported an instruction that Dr. Evans was negligent by failing to achieve hemodynamic stability *before allowing surgery by Dr. Dubin*. The judge-drafted version speaks of transferring William Mitchell to surgery. Transferring someone "to" somewhere is nothing more than physical movement and Mrs. Mitchell's evidence was in no way directed at asserting Dr. Evans was negligent by allowing William Mitchell to be moved from one room to another in the hospital. Rather, her claim is that he was

negligent because he allowed the surgery to be performed without first ensuring William Mitchell was hemodynamically stable via "proper restoration of fluid volume."

With respect to the judge-drafted Instruction 9 and Mrs. Mitchell's No. 9, there is no rational relationship between the second disjunctive in each one. Mrs. Mitchell did not offer evidence of negligence from not speaking up (the judge's "failed to object") but rather offered evidence of negligence from failure to act: not having an endotracheal tube with an inflated cuff in place for use with general anesthesia before the surgery on William Mitchell.

Section 5. Conclusion

Mrs. Mitchell's proposed instructions 7, 9 and 11 were each in proper form, and were each supported by substantial evidence. Considering all the evidence offered by Mrs. Mitchell in the light most favorable to her proposed instructions and disregarding all other evidence, Mrs. Mitchell had an absolute right under Rule 70.02(a) to have her proposed instructions given. The trial judge had no discretion in such circumstances to draft his own instructions.

The rejected instructions were material because they contained the theories of recovery about which Mrs. Mitchell had made a submissible case and those theories were subverted by the trial court forcing Mrs. Mitchell to use and argue entirely different theories. Respondents have offered no case law to support their

assertion that a plaintiff doesn't suffer prejudice from rejection of instructions so long as someone can say that the judge gave the plaintiff an "easier" burden of proof than the one plaintiff chose.

Whether review on the basis of preserved error or plain error, by rejecting Mrs. Mitchell's proposed instructions and drafting his own, the trial court was manifestly unjust and caused a grave miscarriage of justice under all the facts and circumstances. The case should be reversed and remanded for a new trial against all Defendants.

REPLY POINT II.

The trial court erred in failing to declare a mistrial as sought by Plaintiff during voir dire because the trial court thereby abused its discretion, in that a mistrial was the only appropriate remedy when:

a. Defendants violated the letter and spirit of the pretrial order to refrain from mentioning any settlement by asking a question in voir dire about the former Defendant, Independence Regional Health Center ("IRHC"), thereby necessarily implying to the jury that IRHC had settled with Plaintiff and that was the reason it was no longer a part of the case;

b. Defendants brought up the subject of IRHC during voir dire without approaching the bench first, as counsel had promised to do;

c. Defendants admitted there was no legitimate basis for identifying IRHC as a prior Defendant, as they had no reasonable expectation that there would be any question of comparative fault on the verdict director, and as a matter of law there could be no issue of set-off since the allegations were that IRHC and the Defendants against whom the case was tried were joint tortfeasors, and in any event, any issue of set-off would have purely been a question of law for the trial court and not a question of fact for the jury;

d. The fact that IRHC was a former defendant in the case was completely irrelevant to any issue to be proved in the case against the Defendants against whom the case was tried, and

e. Allowing Defendants to mention IRHC as a former Defendant tainted the entire proceeding by injecting a false and misleading issue into the minds of the jury, *i.e.*, that Plain-

tiff was being greedy by having (implicitly) settled with IRHC and then proceeding to trial against the remaining Defendants.

Section 1. Standard of Review

Mrs. Mitchell stands by her previous statement of the standard of review.

Section 2. Argument

At page 48 of their brief, Respondents correctly state that Mrs. Mitchell's counsel made several references to Independence Regional Health Center ("IRHC") during voir dire, before Dr. Evans' counsel started to ask questions. As can be seen from the record and as cited in Mrs. Mitchell's opening brief, Mrs. Mitchell in no way said anything remotely close to suggesting that IRHC was a former defendant, or that she would be offering any evidence at trial to suggest that IRHC caused or contributed to cause her son's death.

The last complete paragraph contains Respondents' somewhat incomplete summary of the events relating to the introduction of IRHC as a former defendant in the case. The Court is referred to Mrs. Mitchell's more detailed summary at pages 82-84, and of course to the transcript itself [TR. Vol. I, 125-133], which includes the judge's own statement of how shocked he was by the reference to IRHC as a defendant.

At page 49 of their brief, Respondents argue that Mr. Pickett's reference to

the IRHC trauma manual [TR. Vol. I at 67/11-13] somehow suggested that Mrs. Mitchell's experts would be opining that IRHC was at fault. This is as specious an argument as those made on this subject by defense counsel during the trial. First, it is a Grand Canyon leap to go from mention of a trauma manual to a conclusion that Mrs. Mitchell would offer testimony that a non-defendant, rather than some or all of the then-existing defendants, was responsible for her son's death. Second, common sense alone says a plaintiff is highly unlikely, to the point of virtual certainty, to be pointing the finger of blame at a former defendant during a trial against the remaining defendants. It is *far* more likely that a defendant would want to deflect attention from his negligence by pointing that finger. Third, if, as claimed on page 49, Respondents were so very concerned about the blood gas reports that may or may not have been in the medical records, *and* in some way not explained by Respondents that concern led to a vital need to tell the jury panel IRHC was a former defendant, then why didn't counsel simply approach the bench first and make his concerns known? That methodology would have permitted the judge to make an informed decision on whether to allow mention of IRHC as a former defendant, instead of being faced with the aftermath of defense counsel's deliberate introduction of that fact into the record, and more importantly, into the minds of all the potential jurors.

Despite Respondents claim to the contrary in the second-last sentence on

page 49 of their brief, the mention of IRHC as a former defendant had *no* direct relationship to the questions asked by Mrs. Mitchell's counsel, nor to any evidence the jury was likely to hear at trial. This is particularly so in light of defense counsel's first argument that if IRHC was going to be on the verdict form, *i.e.*, sufficient evidence was adduced by someone to make a submissible case against IRHC, he was entitled to mention IRHC was a former defendant. However, when asked if he had any reason to believe IRHC would be on the verdict form he immediately admitted he had no basis for believing so. *Id.* at 125/20-126/5.

To phrase Respondents' last sentence on page 49 as it should have been written: "Accordingly, Dr. Evans' counsel's *voir dire* question was [improper] and [not] supported by the evidence [likely to be admitted at trial]."

Respondents argue at page 50 of their brief that Mrs. Mitchell was not prejudiced by the mention of IRHC as a former defendant because an improper comment could be cured by "withdrawal, reprimand, admonition, or by an instruction to the jury," citing *Stucker v. Rose*, 949 S.W.2d 235 (Mo. App. 1997). The prejudice occurred because once IRHC was stuck in the jurors' minds as a former defendant, Respondents made sure to keep up the references to the hospital throughout the entire trial so that that information would stay stuck.

Respondents argue that any impropriety in the question was cured by the pre-lunch instruction in which the judge reminded the jury "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." [Resp. Brief at 50; TR. Vol. I at 133/24-134/5.]

The flaw in this argument is that that statement was nothing more than the coupling of a *voir dire* reference with the ordinary admonition a judge gives a jury panel before taking a break during the selection process. Mrs. Mitchell's attorney asked for a curative instruction as an alternative to a mistrial, and the proposed instruction was directly linked to the issue of IRHC as a former defendant. However, there was nothing in the pre-lunch admonition phraseology that would have given any reasonable person the slightest thought that the admonition had to do with whether they could consider the fact that IRHC was a former defendant during the course of the trial and in their deliberations. Nor was the purported "withdrawal" of that question in any way effective. This was the proverbial bell that cannot be unrung, and nothing short of a mistrial or a proper curative instruction directly related to the issue could have resolved this correctly.

Under all the facts and circumstances, the trial court's refusal to either grant a mistrial or give a curative instruction directly related to IRHC's status as a former defendant is a sufficient basis for granting a new trial.

REPLY POINT III.

The trial court erred in failing to exclude evidence of the prior cases brought by Plaintiff against those involved in the car chase and the collision which resulted in William R. Mitchell being taken to IRHC and being treated by the Defendants against whom the case was tried, because the trial court thereby abused its discretion, in that exclusion was the only proper ruling when:

a. The sole reason for raising the issue was to create the appearance for the jury that Plaintiff was overly litigious and greedy by filing other suits and that by doing so she had admitted that it was the conduct of the defendants in the car chase/crash cases which actually caused the death of William R. Mitchell, and not any conduct on the part of the Defendants against whom the case was tried;

b. The fact of the prior litigation and the allegations made had no relevance to the proceedings against the medical malpractice Defendants due in part to the legal principle of downstream liability, *i.e.*, the tortfeasors who caused the vehicle crash which led to the injuries to William R. Mitchell at the scene which in turn led to him being at IRHC and treated by these Defendants were responsible for the

totality of his injuries and/or death, while the medical malpractice Defendants were liable only for their share of responsibility;

c. Defendants used the argument to the Court that one reason the mention of the chase/crash cases was that Plaintiff could have filed a single suit but chose not to do so, despite the fact that the record shows that Plaintiff attempted to consolidate the medical malpractice case with the automobile cases; these Defendants vigorously and successfully opposed that consolidation, and then used the lack of consolidation/lack of a single case as a reason for introducing evidence about the chase/crash cases;

d. The pleadings in the automobile cases were not abandoned pleadings;

e. The pleadings in the automobile cases were not binding judicial admissions;

f. The pleadings in the automobile cases were valid alternative pleadings which could not properly be used against Mrs. Mitchell in the instant case, and

g. The prejudicial effect of the evidence relating to the auto-

mobile cases far outweighed whatever probative value the evidence might have.

Section 1. Standard of Review

Mrs. Mitchell stands by her previously-stated standard of review.

Section 2. Argument

Respondents' argument on this Point Relied On is essentially a counter-argument to what Mrs. Mitchell said in her brief, relying on many of the same cases, and thus the parties are primarily differing about the way those cases should be applied to the facts at issue here. Although Mrs. Mitchell will therefore not reargue this Point, nevertheless there are certain statements by Respondent which necessitate a response here.

First, Mrs. Mitchell believes she properly preserved the issues she raised here through objections that were broad enough to cover those issues.

Second, even if every argument was not technically preserved, which Mrs. Mitchell does not concede, the standards of plain error review are applicable. When the references to the prior cases are admitted into evidence by the trial court, coupled with the jury's awareness that IRHC was a former defendant, and thus implicitly having settled in order to get out of the case, the only reasonable inference to be drawn from these efforts by defense counsel is that they wanted to portray Mrs. Mitchell as litigious, and they wanted to hint to the jury through the mention

of the various related cases that these cases had been settled and thus she had already received more than enough compensation from other sources for her son's death, and did not need any more from this jury.

Respondents argued at page 62 of their brief that the former pleadings were "highly relevant" because one of their main defenses was that fat embolism, "a known complication…from the injuries he received in…the car chase and car accident" was the sole cause of William Mitchell's death. Information about the non-medical malpractice former pleadings, when analyzed under the relevancy standards of *Carlyle v. Lai*, 783 S.W.2d 925 (W.D. Mo. App. 1989), did not tend to prove or disprove that theory. The fact of the car chase and the severe injuries William Mitchell suffered in that collision were not in dispute. The fact that some fat embolism was present was not in dispute. What *was* in dispute was whether, *from a medical standpoint*, the fat embolism was, as claimed by Respondents, the sole cause of William Mitchell's death. The only way to prove or disprove that claim was for the parties to offer expert medical evidence pro and con, which is precisely what they did.

Allegations or conclusions of law in related non-medical malpractice petitions arising out of the same car accident have nothing to do with medical proof of the cause of William Mitchell's death. And it was singularly inappropriate for the trial court to admit evidence about those related cases, when Respondents had suc-

cessfully opposed the consolidation that would have allowed the jury to have a complete perspective on all the events of that night, rather than the truncated one necessitated by this case going forward as a standalone case. As previously noted, denial of the motion to consolidate also prevented Mrs. Mitchell from arguing the principle of downstream liability, which was something she could not do in the context of this case as it stood at trial.

For the reasons stated previously, as well as above, the admission of evidence relating to the other lawsuits warrants a new trial, whether considered alone, or in the aggregate with other trial court error.

REPLY POINT IV.

The trial court erred in permitting improper closing argument by all defense counsel because in doing so he abused his discretion in that he allowed appeals to regional prejudices; personalization; appeals for sympathy, and misleading statements (as more fully detailed in the Argument below), all of which are impermissible in closing arguments as a matter of law, thereby confusing and misleading the jury, and depriving Mrs. Mitchell of a fair trial because of the resulting prejudice.

Section 1. Standard of Review

Mrs. Mitchell stands by her previously stated standard of review.

Section 2. The Inappropriate Closing Arguments

While Mrs. Mitchell would generally agree with the principle that that which is not mentioned in a motion for new trial is not preserved for appellate review, Respondents, however, have not provided any case which holds that principle to be literally true.

A literal application of that principle would mean that the only way Mrs. Mitchell could have preserved every single error was either by her counsel having taken such meticulous notes at trial that the notes became the functional equivalent of a complete trial transcript, or her counsel somehow obtained a 3600-page transcript, *and* reviewed it in the thirty days allowed for filing a motion for new trial after entry of judgment, *and* somehow managed to file a timely Motion for New Trial. Mrs. Mitchell's Motion for New Trial and her Suggestions in Support adequately preserved the categories of inappropriate closing argument by defense counsel, and provided sufficient data to cover the more specific examples which were able to be identified for appellate purposes via perusal of the actual transcript.

As previously pointed out in Mrs. Mitchell's opening brief, it rapidly became clear that the trial judge had no intent or no will to control Respondents' closing argument, a duty that exists, as shown by Mrs. Mitchell's opening brief, independent of objections, and thus any further objections would have been an exercise in futility. The duty to control closing argument is particularly true where

counsel for one party appeals to local prejudices to establish an "us against the outsiders" mind-set in the jury, as Respondents did here with reference Dr. Marvin Tile, Mrs. Mitchell's expert from Canada. *Cf.*, *Gibson v. Zeibig*, 24 Mo. App. 65, 1887 WL 1742 (E.D. 1887), *Fathman v. Tumility*, 34 Mo. App. 236, 1889 WL 1536 (E.D. 1889), and *Yingling v. Hartwig*, 925 S.W.2d 952, 958 (W.D. Mo. App. 1996), previously cited and discussed.

Basically, what Respondents have done is to offer argument on Point IV that contradicts the argument offered by Mrs. Mitchell on Point IV. As reargument is prohibited, Mrs. Mitchell stands by the arguments she previously made.

REPLY POINT V.

The cumulative effect of the errors of the trial court as identified in the preceding Points Relied on warrants granting of a new trial, even if the errors considered individually do not warrant granting a new trial.

Mrs. Mitchell stands on her previous argument.

CONCLUSION

Mrs. Mitchell has not abandoned any prior arguments. For all the reasons stated here in and her opening brief, and regardless of whether the errors alleged were preserved or plain error, the case should be reversed and remanded for a new trial.

WILLIAM H. PICKETT, P.C.

By: _____

William H. Pickett (MO #21324)
Mark E. Meyer (MO #51786)
100 Interstate Building
417 East Thirteenth Street
Kansas City, Missouri 64106

Telephone: 816-221-4343
Fax: 816-221-8258

Attorneys for Appellant

CERTIFICATE OF SERVICE

A copy of the above and foregoing was mailed, postage prepaid, this 28th day of September, 2007, to:

RESPONDENTS	RESPONDENTS' ATTORNEYS
Joseph C. Evans, M.D. Surgical Care of Independence, Inc.	Michael D. Moeller, Esq. Niles S. Corson, Esq. Bryan Pratt, Esq. Shook, Hardy & Bacon, L.L.P. 2555 Grand Boulevard Kansas City, Missouri 64108 Telephone: 816-474-6550 Fax: 816-421-5547
Sol H. Dubin, M.D. Orthopedic Associates of Kansas City, Inc.	Diane L. Waters, Esq. 11125 Johnson Drive, Suite A Shawnee, Kansas 66203 Telephone: 913-631-2727 Fax: 913-631-2726
Robert L. Bowser, M.D. Independence Anesthesia, Inc.	Marc Erickson, Esq. Jeffrey M. Kuntz, Esq. Wagstaff & Cartmell 4740 Grand Avenue, Suite 300 Kansas City, Missouri 64112 Telephone: 816-701-1100 Fax: 816-531-2372

_____

Mark E. Meyer

CERTIFICATE OF COMPLIANCE

I hereby certify the following:

1. This brief is in compliance with the requirements of Mo. R. Civ. P. 55.03.

2. This brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b).

3. This brief contains _____ words, exclusive of the cover, signature block, certificate of service, and certificate of compliance. This brief was prepared using Microsoft Word 2007, and the word count was calculated by Word 2007.

4. The file containing this brief, and the respective diskettes filed with the Court and/or served on the parties were scanned for viruses on 28 September 2007, using McAfee VirusScan 10, with virus definitions updated through 28 September 28, 2007, the most recent date for which virus definitions were available, and the file and diskettes have been found to be virus-free.

WILLIAM H. PICKETT, P.C.

By: _____

William H. Pickett (MO #21324)
Mark E. Meyer (MO #51786)
100 Interstate Building
417 East Thirteenth Street
Kansas City, Missouri 64106

Telephone: 816-221-4343
Fax: 816-221-8258

Attorneys for Appellant