IN THE SUPREME COURT OF MISSOURI

NO. SC88690

WESLEY LEON JOY and LINDA JOY,
individually and as husband and wife,
Plaintiffs-Appellants,

vs.

STEPHEN K. MORRISON, M.D. and
JOHN WORDY BUCKNER, III, M.D.
Defendants-Respondents.

Appeal from the Circuit Court of Greene County, Missouri
Honorable J. Miles Sweeney, Judge

SUBSTITUTE BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

II. JURISDICTIONAL STATEMENT

This is an appeal by plaintiffs Wesley Leon Joy and Linda Joy from the judgment entered in favor of the defendants following a jury trial in a medical liability personal injury claim based on the trial court's ruling sustaining the defendants' objection to plaintiffs' challenge for cause of venireperson Mr. Shirkey. Plaintiffs contend such ruling and refusal to excuse Mr. Shirkey was error requiring reversal and a new trial. Transfer to this Court was granted pursuant to Rule 83.04.

This action does not involve the construction of the Constitution of the United States or of this State, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the Revenue Laws of this State, title to any office under this State or a criminal offense involving a sentence of death or life imprisonment. Plaintiffs' Application for Transfer under Rule 83.04 was granted by this Court, and thus, this appeal is within the proper jurisdiction of this Court pursuant to V.A.M.S. Const. Art. V, Sec. 10.

III. STATEMENT OF FACTS

Appellants, Mr. and Mrs. Joy, filed suit against respondents, Drs. Morrison and Buckner, alleging damages from personal injuries to Mr. Joy as the result of improper health care he received following his heart bypass surgery causing his right leg to be amputated above his knee. (L.F. tab 2, page 20). For simplicity and clarity, all references to the parties and venirepersons will be by proper names such as Mr. Joy, Dr. Morrison, or Mr. Shirkey; no offense or disrespect is intended, nor should any be inferred.

Mr. Joy had been evaluated by his cardiologist, Dr. Anderson, for possible atherosclerotic coronary vascular disease who recommended that Mr. Joy be admitted to the hospital for cardiac catheterization (L.F. tab 2, page 22). Following the cardiac catheterization, Dr. Anderson consulted Dr. Morrison, a heart surgeon, who recommended that Mr. Joy should submit to a coronary artery bypass graft surgery which would involve harvesting a vein from one of his legs to be used as grafting material in the bypass procedure. Id. The Joys alleged that in their presence, Mr. Joy specifically told Dr. Morrison not to use the vein from his right leg because he had vascular circulatory problems in the past and his right leg was his "bad leg." Id. During the bypass surgery performed by Dr. Morrison, Mr. Joy's right leg was used for the vein harvest. Id. Following the bypass surgery, Dr. Buckner was called in

by Dr. Morrison for a surgical consultation as the Joys alleged Mr. Joy's right leg was beginning to show signs of possibly serious morbid or mortal consequences. Id.

The Joys alleged that Drs. Morrison and Buckner each approved Mr. Joy for discharge from the hospital on Tuesday, June 20, 1995, at a time when his right leg still showed symptoms of possibly serious morbid or mortal consequences, including ischemia and drainage. Id.

Three days later, on Friday, June 23, 1995, Mr. Joy was readmitted to the hospital with gangrene for emergency treatment in an attempt to save his right foot and leg. Id. The next day, Saturday, June 24, 1995, Dr. Buckner took Mr. Joy to surgery and performed a full thickness debridement, which was followed by an above the knee amputation one day later on Sunday, June 25, 1995. (L.F. tab 2, pages 22-23).

Mr. and Mrs. Joy alleged that Mr. Joy's above the knee amputation caused him serious and lifelong damages as the result of negligent health care provided by Drs. Morrison and Buckner. (L.F. tab 2, pages 23-29).

As defendants in this case, both Drs. Morrison and Buckner filed general denials of the allegations brought against them by Mr. and Mrs. Joy. (L.F. tabs 3 and 4).

This case came to trial by jury in Greene County on June 19, 2006 at which time voir dire was conducted by counsel for all parties. (L.F. tab 1,

page 15).

Originally, the trial court summoned 42 persons for the venire, but prior to the conclusion of voir dire, one juror had to be excused, thus leaving the panel limited to 41 venirepersons. (T. 353). Late in the process of hearing challenges for cause and for hardship requests, the trial court noted that it was close to running short of having a sufficient number of remaining venirepersons in order to seat a full jury of 12 with two alternates after each side exercised their three statutory peremptory strikes against the primary panel of 18 and one peremptory strike against the alternate panel of three, and the trial court wanted to have two alternates since the trial was expected to last two full weeks. (T. 365-371). Ultimately, the trial court decided to narrow the list to a final total of only 20 venirepersons, thus the trial court ruled that each side would be allowed their three peremptory strikes from the first 18 remaining on the list, and no strikes from the alternates, leaving the final two venirepersons, jurors 13 and 14, by default to be automatically designated as alternates. (T. 371-372). Mr. Shirkey was challenged for cause by appellants, and the trial court denied that challenge. (T. 345, line 20 through 346, line 21). Mr. Shirkey was among the first 12 venirepersons remaining on the list, served on the jury, (T. 373), and signed the verdict.

During voir dire, Mr. Shirkey affirmed multiple opinions which appellants contend were likely to influence his judgment in a biased manner against their

interests if he was selected to serve as a juror in this case.

Just before Mr. Shirkey's participation in voir dire, Ms. Sons testified about her biased opinions, (Tr. 103-108), and she was later challenged by appellants for nearly identical reasons as was Mr. Shirkey, but Ms. Sons was stricken for cause and Mr. Shirkey was not. (T. 343-344).

When the panel was asked "Who else feels like Ms. Sons?", Mr. Shirkey immediately raised his hand and shared his opinions. (T. 108).

Mr. Shirkey testified that he agreed with Ms. Sons who believed that if someone has surgery and is negligently injured that such is simply a risk that must be accepted by the patient, that the doctor can make mistakes, and "you should just live with the result." (T. 106-107).

Ms. Sons also expressed the opinion that the defense experts in this particular case would hold more credence with her because of her personal feelings about medical liability cases. (T. 108). Mr. Shirkey agreed with this opinion and stated that such might very well affect his ability to listen to the Joys' experts and give them fair credence in this case. (T. 112-113).

Mr. Shirkey voluntarily expressed strong opinions that "Things are way out of hand in the country as far as lawsuits against doctors or whoever." (T. 108-109). "Some of the judgments that you read about, you know, millions of dollars for this or that" sounded "crazy" to him, and he volunteered that he just wanted "to go on the record" to demonstrate the significance of his opinions in

this regard. Id. Furthermore, he clarified that it would probably bother him if he was selected to serve on this jury and was asked to award a substantial amount of money in this case. (T. 110-111).

Mr. Shirkey further clarified that in addition to his strong feelings against lawsuits in general that he was definitely prejudiced against lawsuits filed against doctors, and admitted that he "probably" would be "biased" in favor of the doctors in this particular case, unless appellants' counsel could persuade him otherwise. (T. 109-112).

The pertinent testimony which begins with Ms. Sons and follows with Mr. Shirkey is set out in Appendix tab 4. (T. 104, line 12 to page 113, line 4; see Appendix tab 4).

The depth, clarity and resolve of Mr. Shirkey's opinions in this regard were not lost on the other venirepersons. Mr. Condreay demonstrated that he passionately identified with and clearly understood the significance of Mr. Shirkey's biased opinions by specifically referring to Mr. Shirkey and his opinions three different times. (T. 125, line 18; T. 127, line 19; T. 128, line 16). The entire pertinent testimony is set out in Appendix tab 5. (T. 125, line 16 to 130, line 18).

Defense counsels' followup inquiry of Mr. Shirkey was limited to only several questions by each counsel. Mr. Hyde's only questions to Mr. Shirkey were limited to two leading questions covering only nine lines in the transcript,

asking Mr. Shirkey whether he could reach a verdict for either side without supplying any factual or legal context whatsoever. Mr. Hyde asked Mr. Shirkey:

MR. HYDE: Okay. And, Mr. Shirkey, same question to you, sir.

VENIREPERSON SHIRKEY: Yes.

MR. HYDE: Okay. If -- if you're -- if you believe there's negligence and there's damages and you get to decide what they are and

277

how much, you can do that?

VENIREPERSON SHIRKEY: Yes.

MR. HYDE: And if you believe there's no negligence, you also can find in favor of the doctors?

VENIREPERSON SHIRKEY: Yes.

MR. HYDE: Okay. I appreciate that.

(T. 277, line 20 through 278, line 7).

Mr. Hyde did not ask Mr. Shirkey any rehabilitative questions dealing directly with any biases about which Mr. Shirkey had previously testified in response to the questions posed by appellants' counsel.

Mr. Hyde did attempt to rehabilitate similar biases expressed by Ms. Sons which the trial court later rejected as ineffective:

Ms. Sons, given the question, again, if the Judge gave you the instructions that you decide, you and collectively the rest of the jury, whether or not either of these doctors were negligent, and whether or not you believe that caused or contributed to what Mr. Joy claims, and

276

you get to pick an amount you think's fair, okay -- that you think's fair to adequately compensate him -- can you do that?

VENIREPERSON SONS: Uh-huh, yes.

MR. HYDE: Okay. Do you have any question about that?

VENIREPERSON SONS: No.

(T. 276, line 20 through 277, line 7).

Ms. Sons was challenged for cause by appellants on nearly identical testimony and reasons as they asserted in their challenge of Mr. Shirkey, Mr. Hyde's questioning was very similar, and the trial court excused Ms. Sons from service, stating her testimony was "problematic" and "on the edge":

MR. RANSIN: Number 13, Ms. Sons. She is on the hardship side. I mean, these have to be taken into account. She's in summer school at OTC.

I know Mr. Hyde asked if she could be fair and she said, sure, I could be fair. I've never heard anybody say no.

343

She said she'd be instantly on the doctors' side, it's just a risk you take when you have a problem after a surgery, and she said she felt strongly about that from the start.

MR. HYDE: I didn't ask her about fair. That -- but I specifically told her what the instruction was, and even said could you find for plaintiff if you believe this to be true, and she said, yes, I can.

THE COURT: Well, she did say some things that were problematic, but when you take that together with the fact that she is in summer school, missing two weeks of summer school would

14 be almost impossible. I might -- she's on the
15 edge, and given the -- the hardship, I'm going to
16 go ahead and strike her for the combination.

(T. 343, line 19 to 344, line 16).

Mr. Hunt did not pose any question to Mr. Shirkey directed toward countering the various biased opinions he expressed in response to questions by appellants' counsel. Mr. Hunt did invite Mr. Shirkey to assess his own "fairness" by leading questions as to whether either party would start out with any "real advantage," to which Mr. Shirkey replied "No, I don't believe they do. I think I could be fair," and:

15 I want to cut to the chase. I want to
16 know if you folks will tell the Court and jury
17 that if you're selected you will be fair, and
18 your answer is you would be?
19 VENIREPERSON SHIRKEY: Yes.

(T. 306, line 10 through T. 307, line 8, and lines 15-19).

Mr. Hunt limited the remainder of his examination of Mr. Shirkey to two other questions. The next question clarified that Mr. Shirkey's "problem" opinion about dollar amounts did not relate to someone trying to get him to commit to "a dollar amount in the future without having heard any evidence." (T. 307, line 20, through 308, line 2). Mr. Hunt's final question posed to Mr.

Shirkey was a leading question blending several different concepts:

> MR. HUNT: Okay. So as far as -- as far as dollar amounts, would you be fair and reasonable and would you listen to the other jurors if you, in fact, did find for the plaintiffs -- which I don't think you will -- but if you did, would you take into account everything they said and mix in with the group?
>
> VENIREPERSON SHIRKEY: Well, you said two key words, fair and reasonable.
>
> MR. HUNT: Sure.
>
> VENIREPERSON SHIRKEY: Yes.
>
> MR. HUNT: Okay. Good enough. All right. Take your seat. Thank you, sir.

(T. 308, lines 3 through 15). Defense counsel's entire questioning of Mr. Shirkey comprises less than three pages and is set out in the Appendix at tab 6.

Other venirepersons were cross-examined by defense counsel more thoroughly. Mr. Bryant had expressed strong opinions demonstrating his bias against the Joys and their case during questioning by appellants' counsel in response to which Mr. Hunt attempted to rehabilitate his qualifications as a

juror. Although unsuccessful, these efforts were specific in topic and targeted directly against the precise biases brought out during questioning by plaintiffs' counsel. (T. 299, line 8 through T. 300, line 25; see Appendix tab 7). Mr. Hunt did not attempt this type of rehabilitation to refute the opinions expressed by Mr. Shirkey.

Neither defense counsel asked Mr. Shirkey whether he could "put aside" his biases, "find hard to ignore", or put his biases "out of his mind", nor was he ever asked if his opinions would yield to the evidence and instructions of the trial court, as they had asked other venirepersons. ("put aside": Mr. Hunt/Mr. Bryant, Tr. 300, line 19; Mr. Hunt/Ms. Solie, Tr. 317, line 7; Mr. Hunt/panel, Tr. 323, line 3); ("find hard to ignore": Mr. Hunt/Ms. Van Stavern, Tr. 301, line 5).

Another venireperson, Ms. Van Stavern, testified to various biases and was later questioned by Mr. Hunt in a specific and detailed attempt to rehabilitate her as a juror in this case. (T. 301, line 4, through 302, line 18; See Appendix tab 8). Counsel for Dr. Morrison challenged Ms. Van Stavern claiming she was "biased toward people with handicaps" which the trial court sustained. (Tr. 356, line 20, through 357, line 3).

Ms. Wagner described her personal surgical experience, yet she never suggested her experience would influence her judgment in this case. (Questions by plaintiffs: T. 180, line 1 through 184, line 1; Questions by defendants: T. 325, line 16 through 328, line 1; see Appendix tab 9). The

defense examination of Ms. Wagner never explored any bias. (T. 287, line 4-15). Ms. Wagner also disclosed that she only occasionally saw Rick Joy, one of the plaintiffs' sons, at work, and interacted with him on a very limited basis. (T. 228, line 14 through 229, line 25; see Appendix tab 10). Ms. Wagner never testified that such a limited association with a son of the plaintiffs would have any influence whatsoever on her ability to judge the evidence in this case. The defendants challenged Ms. Wagner for cause on these two grounds and without any further testimony of "influence," the trial court sustained the defendants' challenges for cause. (T. 359, line 10 through 360, line 12; see Appendix tab 8). Ms. Wagner never said her surgery had "gone wrong," as was reported to the trial court by defense counsel, and she never said she saw Rick Joy "on a regular basis" as defense counsel represented to the trial court in support of their joint challenge for cause on that basis. Id.

Other than the basic introductory informational questions, the trial court never conducted any independent inquiry of any venirepersons. (T. line 2-68).

After voir dire, appellants presented their challenges for cause. Among those challenged was Mr. Shirkey and the record proceeded as follows:

Mr. Shirkey, No. 19.

THE COURT: Yeah, he was one of those that expressed a bias for the doctors but then

recanted, and -- I think, under Kent's re-examination. How bad was he?

MR. RANSIN: I've got -- I've got

345

number of things with Mr. Hunt. He said he was a firm believer that verdicts are way out of line.

THE COURT: Get a lot of that.

MR. RANSIN: Wants to go on the record, and he was troubled about the fact that the lawsuit is against the doctor. That bothers him. I asked if it was a car wreck or health care -- that was early this morning. He was – he was pretty vocal about that.

MR. HYDE: Well, being bothered by a proposition, I don't think, is fair, Judge. We, again, flat put the question to him, and he had no hesitation whatsoever, and that included a finding for the plaintiff.

THE COURT: You know, I understand Mr. Ransin's concern that jumping back in and

17 just making somebody -- shaming them into saying
18 they would be fair doesn't clear the boards, but
19 in Mr. Shirkey's case, I felt pretty good about
20 his response. I'm going to decline to strike
21 Clarence Shirkey, No. 19, for cause.

(T. 345, line 20 through 346, line 21).

Mr. Shirkey served on the jury of 12.

On June 30, 2006, the jury retired for deliberations and returned its verdict in favor of both defendants and against the plaintiffs signed by all 12 members of the jury. (L.F. tab 5, page 47). The trial court accepted the verdict and entered judgment accordingly. Id.

On August 15, 2006, plaintiffs filed their motion for new trial alleging trial court error in sustaining defendants' objections to plaintiffs' challenge of Mr. Shirkey for cause, alleging error in the ruling which admitted certain color photographs into evidence, and alleging that the verdict was against the weight of the evidence. (L.F. tab 6). After the voir dire transcript was obtained, plaintiffs filed supplemental suggestions in support of their motion for new trial. (L.F. tab 7). Neither defendant filed any written responsive pleadings.

On October 12, 2006, all counsel appeared before the trial court and engaged in argument on plaintiffs' motion for new trial. (L.F. tab 1, page 18). The trial court ruled from the bench by overruling plaintiffs' motion for new trial.

Id. On October 24, 2006, Mr. and Mrs. Joy filed their notice of appeal in this matter. Id.

Mr. and Mrs. Joy raise a single point of error alleging abuse of the trial court's discretion in sustaining defendants' objections to plaintiffs' challenge of Mr. Shirkey for cause and allowing him to serve on the jury, thereby depriving them of their Constitutional and statutory rights to trial by a jury of 12 fair and impartial jurors, thus requiring reversal of the judgment and a new trial.

IV. POINT RELIED ON AND AUTHORITIES

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANTS' PREJUDICE BY SUSTAINING RESPONDENTS' OBJECTIONS AND NOT EXCUSING VENIREPERSON MR. SHIRKEY FROM SERVING AS A JUROR IN THIS CASE UPON APPELLANTS' CHALLENGE FOR CAUSE,

BECAUSE A PARTY IS GUARANTEED THE CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY PURSUANT TO MO. CONST. ART. I, SEC. 22(a), AND SECTION 494.470.1 R.S.MO. MANDATES THAT "NO PERSON WHO HAS FORMED OR EXPRESSED AN OPINION CONCERNING THE MATTER OR ANY MATERIAL FACT IN CONTROVERSY IN ANY CASE THAT MAY INFLUENCE THE JUDGMENT OF SUCH PERSON" . . . "SHALL BE SWORN AS A JUROR IN THE SAME CAUSE",

IN THAT MR. SHIRKEY WAS NOT A PROPERLY QUALIFIED JUROR TO SERVE IN THIS CASE AS HE UNEQUIVOCALLY TESTIFIED THAT:

A. HE WANTED TO GO "ON THE RECORD" REGARDING HIS OPINION THAT "THINGS ARE

WAY OUT OF HAND IN THE COUNTRY AS FAR AS LAWSUITS AGAINST DOCTORS";

B. IN HIS OPINION, THE CONCEPT OF BEING ASKED TO AWARD A SUBSTANTIAL AMOUNT OF MONEY IN THIS CASE BOTHERED HIM;

C. IN HIS OPINION, THE FACT THAT THIS CASE WAS A LAWSUIT AGAINST DOCTORS TROUBLED HIM SUBSTANTIALLY;

D. HIS OPINIONS MIGHT VERY WELL AFFECT HIS ABILITY TO LISTEN TO THE EXPERTS FOR BOTH SIDES IN THIS CASE AND GIVE THEM FAIR CREDENCE;

E. IN HIS OPINION, HE "PROBABLY WOULD BE BIASED FOR THE DOCTORS" IN THIS CASE, "UNLESS [APPELLANTS' COUNSEL] COULD PERSUADE" HIM OTHERWISE;

F. HE HELD "STRONG FEELINGS" ABOUT LAWSUITS IN GENERAL WHICH WAS AN

OPINION HE HELD WITH A "STRONG BIAS";

G. DURING QUESTIONS POSED BY RESPONDENTS' COUNSEL CONCERNING HIS OPINIONS ABOUT LAWSUITS, MR. SHIRKEY CANDIDLY REAFFIRMED HIS OPINION THAT HE WAS "A FIRM BELIEVER THAT THE AWARDS BY THE COURT AND THE JURY IS [SIC] WAY OUT OF LINE" IN OUR COUNTRY;

AND, AT NO TIME DID MR. SHIRKEY "RECANT" ANY OF HIS BIASED OPINIONS, NOR DID EITHER OF RESPONDENTS' COUNSEL SPECIFICALLY INQUIRE OF MR. SHIRKEY WHETHER HE COULD SET EACH OF THESE OPINIONS ASIDE AND PROMISE THAT NONE OF THESE OPINIONS WOULD INFLUENCE HIS JUDGMENT AS A JUROR IN THIS CASE, OTHER THAN TO ASK HIM TO BE THE JUDGE OF HIS OWN "FAIRNESS" WHICH WAS THEN RELIED UPON BY THE TRIAL COURT AS THE SOLE DETERMINING FACTOR IN DENYING APPELLANTS' CHALLENGE FOR CAUSE, NOR DID THE TRIAL COURT CONDUCT ANY INQUIRY OF MR. SHIRKEY AND IT

THEREBY LACKED THE PROPER BASIS UPON WHICH TO EXERCISE ITS INDEPENDENT DISCRETION,

THUS, APPELLANTS WERE DENIED THEIR CONSTITUTIONAL AND STATUTORY RIGHTS TO A FAIR AND IMPARTIAL JURY, AND THE JUDGMENT MUST BE REVERSED AND A NEW TRIAL ORDERED.

Acetylene Gas Company v. Oliver, 939 S.W.2d 404 (Mo. App. 1996)

Brown v. Collins, 46 S.W.3d 650 (Mo. App. 2001)

State v. Holland, 719 S.W.2d 453 (Mo. banc 1986)

State v. Thompson, 541 S.W.2d 16 (Mo. App.1976)

Mo. Const. Art. I, Sec. 22(a)

Section 494.470 R.S.Mo.

V. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANTS' PREJUDICE BY SUSTAINING RESPONDENTS' OBJECTIONS AND NOT EXCUSING VENIREPERSON MR. SHIRKEY FROM SERVING AS A JUROR IN THIS CASE UPON APPELLANTS' CHALLENGE FOR CAUSE,

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A. INTRODUCTION

Mr. Shirkey was not a properly qualified juror and should not have been permitted to serve on the jury in this particular case. With his very first words, Mr. Shirkey unequivocally volunteered strongly-held, biased opinions against the Joys' claims and in favor of the doctors. Mr. Shirkey's biases were never rehabilitated, nor did he ever recant his opinions. The trial court conducted absolutely no independent inquiry upon which it could exercise its judicial discretion in order to resolve any possible equivocation, other than to rely on Mr. Shirkey's own "self assessment". The Joys were thereby denied their Constitutional and statutory rights to have their case tried to twelve fair and impartial jurors. The trial court thereby abused its discretion in denying appellants' challenge for cause and allowing Mr. Shirkey to serve on the jury, and justice now requires that the judgment must now be reversed and a new trial ordered.

The premise of an unbiased jury forms the very bedrock of our system of justice. Two hundred years ago, Justice Marshall deftly summed up why venirepersons with suspect biases must be excused, and why their own "self assessment" is not reliable: "Why do your personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have bias on his mind which will prevent impartial decision of a case according to testimony. He may declare that notwithstanding these prejudices, he is determined to listen to the evidence and be governed by it: but the law will not trust him . . . . Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to the testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case." Trial of Aaron Burr, John Marshall, 1807.

"One aspect of 'the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors.' Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992). The purpose of voir dire is to discover bias or prejudice in order to select a fair and impartial jury. State v. Leisure, 749 S.W.2d 366, 373 (Mo. banc 1988); State v. Smith, 649 S.W.2d 417, 428 (Mo. banc 1983). 'Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able

impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' Morgan, 504 U.S. at 729-730." State v. Clark, 981 S.W.2d 143, 146 (Mo. banc 1998).

Weeding out venirepersons with biased opinions which "may influence the judgment of such person" is even more critical given the current prevalence of tort "reform" and attacks on our judiciary now than it has ever been before. Essential public policies support and are served by the ruling that the denial below was reversible error, and none exist to the contrary. Our judicial system inherently relies on seating an unbiased jury in every trial.

Where appropriate, for simplicity and clarity, many references to the parties, counsel, and venirepersons will be by proper names such as Mr. Joy, Dr. Morrison, or Mr. Shirkey; no offense or disrespect is intended, nor should any be inferred.

B. STANDARD OF REVIEW

The resolution on appeal of whether a challenge for cause was properly denied is "as fraught with substance as it is with difficulty." State v. Thompson, 541 S.W.2d 16, 18 (Mo. App.1976).

"Determination of a challenged venireman's qualifications initially rests within the sound judicial discretion of the trial judge and will not be lightly disturbed on appellate review; however, appellate courts are not required to give blind deference to a trial judge's exercise of discretion in this respect and

should, when the question is raised, review the record and determine whether or not the trial judge, in fact, abused his discretion." Id.

A trial court's discretion is not endless, and it must consider the venireperson's responses in the entirety, not relying on a single or a few responses, and must make an independent evaluation of their ability to serve impartially. State v. Holland, 719 S.W.2d 453, 453 (Mo. banc 1986); Brown v. Collins, 46 S.W.3d 650, 652 (Mo. App. 2001). Failure by the trial court to conduct any independent inquiry to explore a venireperson's possible bias may undercut any basis for the trial court's exercise of discretion and constitute reversible error. Brown, 653. "In the absence of an independent examination after equivocal responses, the appellate court is justified in conducting a more thorough review of the challenged juror's qualifications." Id. When the initial indication of bias is strong, the self-assessment of the venireperson "must be discounted" absent independent inquiry by the trial court establishing some other evidence that the venireperson could in fact serve impartially. Ray v. Gream, 860 S.W.2d 325, 334 (Mo. banc 1993).

The decision of the trial court should rest upon the "facts" stated by the venireperson with reference to their state of mind, and should not be allowed to depend upon the venireperson's own mere "conclusions" as to whether they believe they can or cannot divest themselves of a bias or prejudice they previously admitted to exist in their mind. State v. Lovell, 506 S.W.2d 441, 444

(Mo. banc 1974). If the venireperson admits to a bias that may influence their judgment, and it is only by leading questions from opposing counsel to which they respond with limited, conclusory answers lacking any factual support or independent factual explanation, this impermissibly allows too much doubt to persist, and the proper exercise of discretion requires the trial court to excuse the venireperson, and the failure to do so results in reversible error. Id.

Denial of a legitimate challenge to excuse a "partial or prejudiced" venireperson constitutes reversible error. Catlett v. Illinois Cent. Gulf R. Co., 793 S.W.2d 351, 353 (Mo. banc 1990).

The appellate courts are more liberal in upholding a trial court's ruling sustaining a motion for new trial due to the failure to excuse a challenged juror than in denying it. Hawkins v. Cockroft, 848 S.W.2d 622, 626 (Mo. App. 1993).

C. STATUTORY STANDARDS AND CASE CATEGORIES

It is necessary at the outset to explain, distinguish and contrast the subparts of the applicable statute, Section 494.470 R.S.Mo., and it will be helpful to collect the applicable cases in categories for a better understanding of appellants' arguments and case law analysis.

As an overview of this analysis, there are two key substantive differences in the proper application of the two subparts of the statute which revolve around (a) the type of the issues, and (b) the degree of certainty:

(a) (issues) whether the venireperson's bias involves "case specific

issues" or "bigger issues" which apply to cases across the board;

(b) (certainty) the degree of certainty with which the bias affects the venireperson.

The above distinctions are derived directly from the plain statutory language, and have the below further critical sub-distinctions to consider:

(a) Issues:

(subpart 1, case specific issues) "concerning the matter or any material fact in controversy in any case";

(subpart 2, bigger issues) "opinions or beliefs" [in general]

(b) Degree of certainty:

(subpart 1) "may influence the judgment";

(subpart 2) "preclude them from following the law".

1. SECTION 494.470 R.S.MO. SUBPARTS 1 AND 2

The statute applicable here is found in subparts 1 and 2 of Section 494.470 R.S.Mo., titled Challenges for cause, grounds for — juror on panel not summoned off as a witness, exception, and is set out in full at Appendix, tab 3.

The provision in subpart 2 contains the standard most frequently relied on for challenging venirepersons who hold "opinions or beliefs" which flat out preclude them from following the law as declared by the trial court in its instructions. This clearly sets forth a rigid rule by using the word "preclude".

Regardless of what words are actually used by a venireperson during voir dire, there can be no argument that if a venireperson unequivocally admits they are "precluded" from following the trial court's instructions, then a challenge for cause is proper and that person must be excused. This subpart 2 is not applicable to this case.

By contrast, the provision contained in subpart 1 is less black and white. It states: "no person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that **may** influence the judgment of such

person . . . shall be sworn as a juror in the same cause." (emphasis added).

This different standard required by subpart 1 is understandable by taking into context the chronological context of trial as to when the venireperson's determination must be made. At the time of voir dire, no evidence has been presented and it would be premature to expect a venireperson to actually pass judgment and reach a 'verdict' in their mind. Therefore, unless the venireperson admits they are "precluded" from following the trial court's instructions, or the trial court is so convinced, it is upon this "sliding scale" set forth in subpart 1 that the trial court must assess that person's bias or fairness, and their fitness to properly serve on that jury for that particular case.

Unless noted otherwise, the remaining analysis will be directed to and focused on Section 494.470 subpart 1 cases since there is no issue here

whether Mr. Shirkey stated that his opinions precluded him from following the law as given to him by the trial court's instructions.

2. CATEGORIES OF SUBPART 1 CASES

At first blush, a cursory review of the appellate decisions reviewing denials of challenges for cause appear to be just as varied in their diversity of factual situations as the individual cases and venirepersons are expected to be, but upon closer inspection, a definite pattern is discernable. While it is true that there exists no hard and fast method for the trial court to employ in assessing the bias or fairness of individual venirepersons in every case, deeper analysis reveals that a set of categories can be applied to generally group the decisions to better assist an orderly discussion, and to better appreciate the relative consistency of the analysis applied and the results determined on appeal in each of the cases. These are listed below in a semblance of a "descending" order.

FOUR CATEGORIES OF SUBPART 1 CASES

Category 1 An unequivocal expression by the venireperson either establishing bias or no bias and no rehabilitation is attempted:

A. if bias, (very similar to the black and white standard of Section 494.470.2 R.S.Mo.'s "subpart 2") the challenge should be sustained and no independent inquiry is required by the trial court;

B. if no bias, the challenge should be denied and no independent inquiry is required by the trial court.

Category 2 The venireperson unequivocally expresses significant factually supported biases, and there is neither any attempt to rehabilitate by countering the specific biases other than by inviting the venireperson to assess their own biases in response to leading questions resulting in only non-factual conclusions of their own self-assessment of no bias, nor is there any independent inquiry by the trial court to resolve the inconsistency created between the unequivocally expressed bias and the self-assessment of no bias, then the challenge must be sustained.

Category 3 The venireperson equivocates, first expressing either bias or no bias, and then vice versa; independent inquiry by the trial court is required:

A. if independent inquiry by the trial court reasonably resolves the equivocation, then the ruling should follow in the same fashion, but, if the equivocation is not resolved, or is only "resolved" through the use of forceful leading questions from the bench, then, the venireperson should be excused;

B. if the trial court conducts no independent inquiry, then the denial of the challenge is suspect, and the appellate court

will engage in close scrutiny on its own with much less deference paid to the trial court's decision and the appellate court will resolve the inconsistency and rule accordingly.

Category 4 If the responses are equivocal but do no more than just suggest the mere possibility of a general, not case or party specific, bias, then the trial court is not required to conduct any independent inquiry, and broad discretion is granted to the trial court on appellate review, usually affirming the trial court's ruling.

The following is a discussion of the more prominent cases grouped according to these four categories and only the cases involving claims of error from challenges for cause denied or granted are listed. The cases are addressed in relative chronological sequence, and comparisons are made to the current case where applicable. Cases involving juror misconduct/non-disclosure may be cited elsewhere in this Brief as references for certain principles common to both types of issues, but such cases are not included here since the analyses applied are not the same, and as such, are not subject to the same categorization.

3. REVIEW OF CASES BY CATEGORY

A. CATEGORIES 1A and 1B:

1A: Category 1 An unequivocal expression by the venireperson either

establishing bias or no bias and no rehabilitation is attempted:

A. if bias, (very similar to the black and white standard of Section 494.470.2 R.S.Mo.) the challenge should be sustained and no independent inquiry is required by the trial court.

There should be little surprise that category 1A cases do not appear on appeal. If the venireperson unequivocally admits bias which remains unrefuted, the correct result is very similar to the black and white standard of Section 494.470.2 R.S.Mo. which commands the sustaining of the challenge for cause without any need for independent inquiry by the trial court.

1B: Category 1 An unequivocal expression by the venireperson either establishing bias or no bias and no rehabilitation is attempted:

B. if no bias, the challenge should be denied and no independent inquiry is required by the trial court.

The forgery conviction case of State v. Jones, 384 S.W.2d 554 (Mo. 1964) is a category 1B case holding that the trial court did not abuse its discretion in not excusing a venireperson who admitted to knowing the complaining witness and the prosecutor, but unequivocally denied holding any prejudice or bias based on those relationships. Id. at 557. Nor did any of his

personal experiences or knowledge of anything about the case cause the venireperson to form any opinions which may influence his judgment as a juror. Id. The opinion does not mention whether there was any attempt to rehabilitate the venireperson, and the trial court conducted no independent inquiry. The court held there was no abuse of discretion in refusing to sustain the challenge for cause. Id. at 558.

The well-known case of State v. Feltrop, 803 S.W.2d 1 (Mo. banc 1991) also falls into category 1B. This was a murder case which affirmed the denial of a challenge for cause since all three venirepersons unequivocally indicated their ability to evaluate the evidence without bias. Id. at 7. Opposing counsel made no attempt to rehabilitate the venirepersons, nor was there any independent inquiry by the trial court. Id. It is interesting to note that besides just inviting self-assessment of no bias, at least one venireperson was asked to "promise" that they could put aside any preconception they might have and base their decision solely on the evidence and instructions. Id. No counsel for either defendant posed such a firm and solid inquiry for fairness to Mr. Shirkey in the instant case. The court in Feltrop found no error in the denial of the challenges for cause and affirmed the judgment.

B. CATEGORY 2:

Category 2 The venireperson unequivocally expresses significant factually supported biases, and there is neither any attempt to rehabilitate

> by countering the specific biases other than by inviting the venireperson to assess their own biases in response to leading questions resulting in only non-factual conclusions of their own self-assessment of no bias, nor is there any independent inquiry by the trial court to resolve the inconsistency created between the unequivocally expressed bias and the self-assessment of no bias, then the challenge must be sustained.

The case of Acetylene Gas Company v. Oliver, 939 S.W.2d 404 (Mo. App. 1996) was a claim for tortious interference with a contract, and is squarely "on all fours" with the instant case. The similarities are significant: Only one venireperson was challenged on appeal; strong bias was demonstrated; there was no attempt to rehabilitate any bias; the trial court conducted no independent inquiry; and the jury reached a unanimous verdict. Id. at 410-412. Under these circumstances, independent inquiry was "required" by the trial court. Id. at 412. It was held that the trial court erred by overruling the motion to strike the venireperson. Id. The same holding is required here.

Brown v. Collins, 46 S.W.3d 650 (Mo. App. 2001) involved a rear-end automobile collision claim where a venireperson expressed her bias toward chiropractors. Id. at 651. The court noted that the venireperson "did not change her answer at any time." Id. This "raised legitimate doubts" as to the

venireperson's qualifications to serve on the jury, and if not resolved, requires that the venireperson be excused. Id. at 652. Failing to excuse the venireperson was held that the trial court abused its discretion as such error deprived Ms. Brown of her right to an impartial jury of twelve persons "requiring reversal for a new trial." Id. at 653. In similar fashion, Mr. Shirkey never altered nor recanted any of his answers at any time regarding his multiple biases nor was he specifically questioned by either defense counsel or the trial court, about the same. The same conclusion and result is required here.

Holland was a burglary conviction which held the failure to sustain the challenge for cause constituted error and required reversal. State v. Holland, 719 S.W.2d 453 (Mo. banc 1986). Neither the trial court nor the prosecutor posed any questions regarding the biases disclosed by the venireperson, nor was he asked whether he could follow the law and instructions of the trial court. Id. at 454. There, as here, scattered through the transcript are several instances of inquiry to the venireperson on other general subjects, however the questions they were asked did not touch on the beliefs or attitudes concerning the specific topic of the bias which may influence his judgment in that case. Id. Absent such pointed questions and absent any independent inquiry by the trial court, the failure to sustain the challenge for cause was error and the cause was properly reversed and remanded for a new trial. Id. at 455.

Holland was cited with approval with a consistent conclusion in State v.

Stanley, 124 S.W.3d 70, 78 (Mo. App. 2004) where it was held that a venireperson expressing equivocal biases who is never rehabilitated by either opposing counsel or the trial court constitutes plain error to deny a challenge for cause and excuse the venireperson.

Except for the type of case, Thompson is strikingly similar in many key respects. State v. Thompson, 541 S.W.2d 16 (Mo. App.1976). On appeal, only a single point was advanced, and it asserted the erroneous denial of a challenge for cause. Id. at 18. Instead of saying he was "probably biased" as Mr. Shirkey testified here, it was sufficient there that the venireperson merely said that it was "possible" he would be biased. Id. "Two paramount principles well established in this state appear controlling. In no event shall a challenged venireman be allowed to pass upon his own qualifications to serve as a juror; the trial judge, rather than the venireman, is impressed with the duty of making this crucial determination." Id. In identical fashion as to what is required here, the judgment was reversed and the case was remanded for a new trial. Id. at 19.

As appellants' counsel was also appellants' counsel in Edley v. O'Brien, 918 S.W.2d 898 (Mo. App. 1996), he is certainly not unmindful of that decision, and a discussion of that case, and its distinctions from the present case, are appropriate here. Both cases involved allegations of improper health care and claimed error in denying challenges for cause. However, there are critically

distinguishing differences. First, the issue framed and presented in Edley focused on the lack of a full panel of qualified jurors from which to make peremptory challenges, thus claiming the "loss" of a peremptory challenge, and did not raise any claim under Mo. Const. Art. I, Sec. 22(a), or Section 494.470 R.S.Mo. as is presented here. Second, to the extent that the court in Edley examined whether the trial court abused its discretion by not granting plaintiffs' challenge for cause of Mr. Pollett, the resulting holding turned upon the unique factual difference in that Mr. Pollett remained silent in response to a general question posed to the panel as a whole. Appellants respectfully suggest that the holding in Edley should be re-examined under the light of the above Bill of Rights guarantee and the related statute, and be realigned consistent with the rulings of the other appellate districts. With the greatest of due respect, appellants herein suggest that the more appropriate reasoning which should have been adopted was demonstrated in the dissent in Edley. In such a setting of unequivocally and repeatedly expressed biases, a venireperson's total silence following a "double negative" question ("who here cannot be unbiased?") to the panel as a whole can hardly equate to an opposite and firmly unequivocal indication of a single venireperson's ability to evaluate the evidence without bias. Id. at 904. Furthermore, the fact that footnote 3 which focuses on "follow[ing] the instructions of the court" implicates subpart 2 of Section 494.470 R.S.Mo. to the exclusion of subpart 1 clearly

distinguishes the issues presented there and here. Id. at 907. If re-evaluated under the law and analysis presented here, the facts in Edley would require a reversal and remand for a new trial, and such a holding would then be consistent with the above-cited decisions from the other districts.

C. CATEGORY 3A:

Category 3 The venireperson equivocates, first expressing either bias or no bias, and then vice versa; independent inquiry by the trial court is required:

A. if independent inquiry by the trial court reasonably resolves the equivocation, then the ruling should follow in the same fashion, but, if the equivocation is not resolved, or is only "resolved" through the use of forceful leading questions from the bench, then, the venireperson should be excused.

The seminal case of Theobald is a category 3A case claiming wrongful death from a car wreck. Theobald v. St. Louis Transit Company, 90 S.W. 354 (Mo. 1905). There, after expressing certain biases, both opposing counsel and the trial court inquired of the venirepersons. Id. at 359. Of interest is the harsh approach used by the court which dispelled any reliability of the responses. Justice Marshall's opinion describes the venireperson as improperly "being put in the position" of choosing between defying his oath or forcing a long held opinion from his mind, a task scarcely fulfilling our system of jurisprudence. Id.

He ridiculed the concept that upon just a few questions, such deeply held bias would "become dissipated within the last five minutes." Id. Likewise, in our case, Mr. Shirkey's deep-seated biases could not possibly be expected to simply "dissipate" completely within mere minutes in reaction to just a few very general, leading questions from defense counsel, nor were those biases ever "recanted". The judgment here should be reversed just as it was in Theobald. Id. at 363.

The checking fraud case of DeClue is also a category 3A case with similarities to Theobald. State v. Declue, 400 S.W.2d 50 (Mo. 1966). The issue on appeal concerned only a single venireperson; the trial court conducted independent inquiry; but, the best the venireperson could muster was "I don't know," and that he would "hope to be able" to render a fair and impartial verdict. Id. at 56. The court held: "the challenge for cause should have been sustained." Id.

Lovell was a criminal case involving the charge of possession of burglar's tools, but set forth important aspects applicable to the instant case. State v. Lovell, 506 S.W.2d 441 (Mo. banc 1974). There the trial court stepped in with forceful leading questions asking whether the venireperson knew of any reason why he could not give the defendant a fair trial, and the trial court got no more stronger reply than "I don't think so." Id. at 444. Since the only basis for the trial court's ruling was the opinion of the venireperson himself, it was

held the trial court should have granted the challenge for cause as it was error to not do so. Id.

Hopkins was a manslaughter case reversed due to the erroneous overruling of the challenge for cause of a single venireperson who should not have served on the jury despite the independent inquiry by the trial court. State v. Hopkins, 687 S.W.2d 188 (Mo. banc 1985). The court noted that errors in the exclusion of potential jurors should always be made on the side of caution. Id. at 190. Also, in circumstances as these, judicial discretion requires that the challenge be sustained and the venireperson be replaced by another from the pool of readily available venirepersons. Id. at 191. In the case below, nearing the end of the hearing on challenges for cause and hardship the trial court realized it was running dangerously low on the number of remaining venirepersons on the existing panel for a jury of twelve and two alternate jurors. (T. 353, 365-373). Nonetheless, such pressure should play absolutely no role whatsoever in the decision as to whether or not to exclude admittedly biased venirepersons such as Mr. Shirkey. As noted by Hopkins, proper discretion requires the exclusion and resorting to the pool of available venirepersons. Id. at 191.

The claim of retaliatory discharge was presented in Wiedower v. ACF Industries, Inc., 715 S.W.2d 303 (Mo. App. 1986). After trial commenced, a juror approached the court and announced that she could not be an unbiased

juror. Id. at 307. A request for mistrial was overruled and the case proceeded to verdict. Id. After trial, a motion for new trial on that basis was granted and upheld on appeal. Id. at 308. This evidences the trial court's opportunity to have corrected its erroneous denial of appellants' challenge for cause by granting their motion for new trial, but it erred a second time in failing to do so. (L.F. tab 1, page 18; tabs 6, 7). Appellate courts are more liberal in upholding a trial court's ruling sustaining a motion for new trial due to the failure to excuse a challenged juror than when the motion for new trial is denied. Hawkins v. Cockroft, 848 S.W.2d 622, 626 (Mo. App. 1993).

Finally, the will contest case of Ray v. Gream, 860 S.W.2d 325 (Mo. banc 1993) has been cited extensively for the proposition consistent with category 3A cases that when the venireperson equivocates, the trial court has a duty to step in and is bound to conduct independent inquiry to resolve the differences. Id. at 334. It is unreasonable and legally improper for the trial court to rely solely on the venireperson's own conclusion of no bias, and to assume that they can suddenly and summarily divest themselves of their previously expressed bias, and to allow the venireperson to be the sole judge of their qualifications to serve on the jury. Id. at 334. If the rule were otherwise, all voir dire in all civil trials would be ridiculously reduced to a single, very ineffective, but short question posed to each venireperson: "Despite all your biased opinions to the contrary, can you judge this case

without bias?" Ray correctly noted that when the initial indication of bias is so strong, as it was here ("probably biased for the doctors"), the self-assessment of the venireperson "must be discounted" absent some other factual evidence that the venireperson could in fact serve impartially. Id. Nowhere during voir dire did Mr. Shirkey provide "some other evidence" that he could totally ignore the many specific biases he expressed and serve impartially other than his own conclusory self-assessment. As such, he should have been excused as requested by appellants' challenge for cause.

D. CATEGORY 3B:

Category 3 The venireperson equivocates, first expressing either bias or no bias, and then vice versa; independent inquiry by the trial court is required:

B. if the trial court conducts no independent inquiry, then the denial of the challenge is suspect, and the appellate court will engage in close scrutiny on its own with much less deference paid to the trial court's decision and the appellate court will resolve the inconsistency and rule accordingly.

The analysis in Carter is instructive in our case. State v. Carter, 544 S.W.2d 334 (Mo. App. 1976). The trial court there conducted no independent inquiry and on appeal its normally wide discretion was discounted accordingly.

Id. at 337. The court noted that the trial court's decision should rest upon the "facts" stated by the venireperson with reference to his state of mind, and should not be allowed to depend upon his own "conclusions" of whether he could or would divest himself of a bias he admitted existed in his mind. Id. at 338. After reading the entire transcript, the court held that it could "discover no such basis for the trial judge's exercise of discretion", and held that the judgment had to be reversed and the case remanded for a new trial. Id. at 337-339.

Stewart was a robbery case appealed on the claim of error for failure to grant a challenge for cause where the venireperson equivocated and the trial court failed to conduct any independent inquiry. State v. Stewart, 692 S.W.2d 295 (Mo. banc 1985). The parties there engaged in extensive "back and forth" over the venireperson's ability to judge the case without bias, far more than was pursued by the defense in the trial below. Id. at 296-298. No questions were asked by the trial court. Id. at 299. The venireperson never abandoned her original bias, and as such the trial court should have sustained the challenge for cause, therefore, it was reversible error to fail to do so. Id.

E. CATEGORY 4:

Category 4 If the responses are equivocal but do no more than just suggest the mere possibility of a general, not case or party specific, bias, then the trial court is not required to conduct any independent

inquiry, and broad discretion is granted to the trial court on appellate review, usually affirming the trial court's ruling.

This category of cases involves equivocal responses from venireperson which merely suggest the possibility of a general bias, not party or case specific, and the trial court is granted the widest of discretion. The case of State v. Gray, 812 S.W.2d 935 (Mo. App. 1991) is a good example of a category 4 case. Gray was a methamphetamine conviction with a twist in that the prosecution challenged a venireperson who seemed "soft on drugs", and the challenge was granted over the defendant's objection. A close reading of the voir dire establishes that the venireperson expressed equivocal opinions about the legality of drugs in general and never tied any bias to the particular case or any party at hand. Id. at 937-938. Nonetheless, on appeal it was determined that such biased attitudes and opinions afforded a sufficient basis for the trial court to have concluded that the venireperson had opinions that may influence his ability to judge the case without bias, and found no reversible error in sustaining the challenge for cause. Id. at 938. It is important to note that the defendant there did not claim he was not provided with a fair jury of twelve unbiased persons as is claimed here. Id.

The car wreck case of Rogers is also a category 4 case. Rogers v. B.G. Transit Corp., 949 S.W.2d 151 (Mo. App. 1997). The Southern District Court of Appeals declined the invitation to revisit the claim presented in Edley that it

was reversible error when an improper denial of a challenge for cause forces the sacrifice of a party's peremptory challenge, but the venireperson does not serve on the jury. Id. at 155. The biases expressed in Rogers were more general in nature than those expressed by Mr. Shirkey, and were held to "not necessarily require a conclusion" of prejudice against the challenging party. Id. at 156. In such a circumstance of mere equivocation, great deference is granted to the trial court as compared to the instant case where Mr. Shirkey clearly and unequivocally and specifically stated he would be "biased" in favor of the defendants in this case, he would be substantially bothered by a request for a substantial award to the plaintiffs, and he would have difficulty listening to the experts for both sides fairly and impartially.

4. THIS IS A CATEGORY 2 CASE, AND IT MUST BE REVERSED

The instant case is a category 2 case. Mr. Shirkey expressed significant and multiple biases. There was no attempt by either defense counsel to rehabilitate any of his multiple biases by specifically questioning him on each one. The trial court conducted no independent inquiry. Instead, the questioning by defense counsel was limited to inviting self-assessments of fairness. "Self assessments" in light of firm biases is not "rehabilitation". The often cited standard is stated as: "The question is not whether a prospective juror holds opinions about the case, but whether these opinions will yield and the juror will determine the issues under the law". State v. Feltrop, 803 S.W.2d

1, 8 (Mo. banc 1991). Nor did Mr. Shirkey ever recant his biases.

"The applicable standard does not require that a juror's bias be proven with 'unmistakable clarity.' Witt, 469 U.S. at 424." State v. Winfield, 5 S.W.3d 505, 511 (Mo. banc 1999), citing Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). It is sufficient that the record reflects evidence that the venireperson's ability to perform their duties without bias is substantially impaired. Id.

Many of Mr. Shirkey's biases were case specific: being "biased for the doctors" in this case; being asked to award a substantial amount of money; this was a lawsuit against doctors; his opinions about this particular type of case would likely affect his ability to listen to the experts with equal credence for both sides; and several were more general: twice volunteering that he was a firm believer that jury and court awards "way out of hand in the country", (once in response to defense counsel's questions); and that he held "strong feelings" in that regard about which he held a "strong bias" against. (Appendix, tab 4).

The depth and sincerity with which Mr. Shirkey held and expressed these biased opinions was certainly not lost on others present during voir dire. Mr. Condreay, another venireperson, specifically referred to Mr. Shirkey three times as representing to him a very clear example of the precise type of bias appellants' counsel was trying to seek out. (Appendix, tab 5 and T. 125, line 18; T. 127, line 19, T. 128, line 16).

Even defense counsel, Mr. Hunt, during his questioning of Mr. Shirkey referred back to Mr. Shirkey's testimony: "I had written down that at one point in time you made a comment to the effect that you had a concern that you might be biased in favor of the doctor". (T. 306). Finally, immediately after Mr. Shirkey was challenged for cause, the trial court responded with: "Yeah, he was one of those that expressed a bias for the doctors". (T. 345).

However, instead of relying on its own independent inquiry to resolve any discretionary issue of Mr. Shirkey's fitness to serve on this jury, the trial court asked no questions, and summarily stated that Mr. Shirkey "recanted" his biases. (T.345). In doing so, the trial court referred back to and relied exclusively on the "re-examination" by defense counsel Mr. Hyde which was limited to only 9 lines in the record:

MR. HYDE: Okay. If -- if you're -- if you believe there's negligence and there's damages and you get to decide what they are and

277

how much, you can do that?

VENIREPERSON SHIRKEY: Yes.

MR. HYDE: And if you believe there's no negligence, you also can find in favor of the doctors?

6 VENIREPERSON SHIRKEY: Yes.

(T. 277-278; 345-346). These very generalized conclusions do not even amount to an otherwise useless "self-assessment of fairness", much less a "re-examination" of the multiple specific biases unequivocally expressed by Mr. Shirkey. At best, these conclusions serve only to prove that by using the very same biases he held so deeply, it would be possible for Mr. Shirkey to reach either one of two verdicts in a total void of factual parameters or trial court instructions, all filtered through his known biases which definitely favored the defense. The trial court's reliance in this regard is a complete abuse of discretion and requires reversal and a new trial.

Asking an admittedly biased venireperson if he considered himself to be unbiased, and capable of making a "fair and reasonable" judgment if he was selected to serve on the jury completely fails any test of whether each of the biases which Mr. Shirkey previously acknowledged will or will not "yield" to the facts and the law of the particular case and does not serve to "rehabilitate" or "recant" those biases. Such a question ignores the inherent flaw of asking a biased person whether they can be "fair", as that judgment will certainly be made under the overbearing influence of the very same bias that is in itself not otherwise "fair". The same approach would be no different than asking an inebriated driver to self-assess their own ability to safely drive home! It borders on credulity to assume the venireperson's own deep biases play no

role in such a self-assessment that they are not biased. Perhaps just as significant to show how unimportant it is to ask a venireperson to conduct a self-assessment of fairness, is the fact that no case has been found which holds it to be error, or even suggests a criticism, for failure to ask whether the venireperson “can be fair”.

Asking whether the venireperson can follow the law and the trial court’s instructions is not the same as inviting a venireperson to assess their own bias or lack of bias. When properly phrased with pertinent case facts and proper statements of the law, such an inquiry might be helpful to compare to other responses from additional questioning concerning specific biases previously expressed. But in the vacuum which existed in this particular voir dire during opposing counsel’s questioning of Mr. Shirkey, there were no questions posed to him of a “rehabilitative” substance, nor any questions about whether he could follow the law and the instructions, all of which left the trial court without any valid independent basis upon which to rest any judicial discretion, and thus, Mr. Shirkey should have been excused as challenged because it was an abuse of discretion to fail to do so.

Both defense counsel in the voir dire had every possible opportunity to confront Mr. Shirkey with questions pinpointing his multiple significant biases, but they chose to not do so. Furthermore, the trial court had a clear duty, and was obligated to become involved by conducting its own independent inquiry

so that its discretion could be properly exercised. Failing to do so essentially abandons the trial court's discretion and hands it over to the venireperson who is then permitted to use their own "discretion" filtered through the admitted biases to sum up their own assessment of whether they see themselves as "biased." This amounts to a clear abuse of discretion as it is really the exercise of no discretion at all at a time when such careful judicial discretion is the most critically necessary.

After a full and careful analysis across the range of cases, their facts and the rationale for their holdings, it is clear that the trial court abused its discretion, failed to conduct any independent inquiry when it had a definite duty to do so, and instead it effectively surrendered its judicial discretion to Mr. Shirkey by relying solely on Mr. Shirkey's self-assessment of his bias which came from only two very short, general, leading questions and ignored the entirety of the rest of the voir dire. Consistent with the holdings in similar cases, justice requires this Court to reverse the judgment and remand this case for a new trial.

D. PREJUDICE AND THE CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY OF TWELVE

1. ARTICLE I, BILL OF RIGHTS, SECTION 22(A)

The Joys were deprived of their constitutional rights to trial by a fair and impartial jury of twelve members guaranteed to them by Article I, Bill of Rights,

Section 22(a). (Appendix tab 2). This right "shall remain inviolate". Id. "At the cornerstone of our judicial system lies the constitutional right to a fair and impartial jury, composed of twelve qualified jurors. Mo. Const. Art. I, Sec. 22(a); Beggs v.Universal C.I.T. Credit Corp., 387 S.W.2d 499, 503 (Mo. banc 1965)." Williams by Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. banc 1987). Such was also recognized by the court in Hawkins v. Cockroft, 848 S.W.2d 622, 625 (Mo. App. 1993). If this right of trial by jury guaranteed by our Constitution is to be worth anything, it clearly must mean the right to a fair and impartial jury. Triplett v. St. Louis Pub. Serv., 343 S.W.2d 670, 672 (Mo. App. 1961).

2. UNANIMOUS DEFENSE VERDICT

Based on the arguments presented at the hearing on the Joys' after trial motion for new trial, it is reasonably expected that the respondents might try to argue that since there was a unanimous defense verdict, the Joys cannot show prejudice and their appeal should be denied. Such is a misleading and legally false argument. This argument has been presented and analyzed in other cases and it has been consistently rejected.

"Even if the jury had been unanimous in returning a verdict for defendant, plaintiffs would be entitled to a new trial if one or more of the persons who actually sat on the jury was not qualified. The right to remand does not depend on a showing that the juror was the deciding vote against

plaintiff." Rodgers v. Jackson County Orthopedics, 904 S.W.2d 385, 391 fn5 (Mo. App. 1995).

Where there is a dispute as to liability, and an objectionable juror is permitted to try the case, it is difficult to conceive how that would be harmless error even if there is a unanimous verdict. Triplett v. St. Louis Pub. Serv., 343 S.W.2d 670, 675 (Mo. App. 1961). There is abundant authority that in such a situation as this, the appellate court will reverse the judgment and remand the case for a new trial. Id.

Solid precedence is found in a case presenting extremely similar facts and issues, where it was held that although the jury reached a unanimous defense verdict, the plaintiffs were "entitled to a jury of twelve impartial jurors", and the judgment was reversed. Acetylene Gas Company v. Oliver, 939 S.W.2d 404,411 (Mo. App. E.D. 1996).

In a well-reasoned opinion, the appellate court in Brown v. Collins, 46 S.W.3d 650 (Mo. App. 2001) considered a similar issue after a unanimous defense verdict following trial of a rear-end collision claim. Since the challenged juror remained on the jury panel and was one of twelve jurors that signed the verdict for the defense, such error deprived the plaintiff of her right to an impartial jury of twelve persons which required reversal for a new trial. Id. at 653.

The Eastern and Western districts agree on this issue. In granting a

new trial, the court in Wiedower v. ACF Industries, Inc., 715 S.W.2d 303 (Mo. App. 1986) squarely addressed the argument that because the verdict was unanimous that it would be error to grant a new trial. Id. at 308. The court stated very plainly: "The suggestion is totally without merit." Id. Citing Wiedower, the court in Brines by and through Harlan v. Cibis, 784 S.W.2d 201 (Mo. App. 1989) faced the identical issue, and with equal dispatch held: "The argument is not tenable." Id. at 204.

Regardless of the unanimous verdict, since the challenge of Mr. Shirkey was proper and should have been granted, remand and a new trial is required as a matter of law.

E. POLICY CONSIDERATIONS

Many important policy considerations support reversal and remand for a new trial of this case, and none exist to the contrary.

1. THE OVERWHELMING IMPORTANCE OF AN UNBIASED JURY OF TWELVE

The integrity of the right to trial by a fair and impartial jury goes to the very heart and existence of our judicial system. "We entrust to our juries the fortunes and futures of all who come before them. This Court has consistently deferred to and placed great confidence in the verdicts of juries, realizing that the jury system remains our brightest hope for achieving justice between litigants." Williams, at 38. "Our confidence in and deference to the findings of

juries demands that we assure litigants of the integrity of the jury selection process as well. Such confidence and deference, after all, is justified only where the juries are composed of fair and impartial persons who take their responsibilities both as jurors and potential jurors seriously." Id. at 39. The public's perception of the very bedrock of our judicial system will be irreparably harmed if an admittedly biased juror is permitted to be the sole judge of their own qualifications, and if their long-standing, deep-seated biased opinions are deemed by legal fiction to suddenly vaporize upon one or two crafty leading questions.

2. EASE OF EXCUSING AND EFFICIENCY OF TRIAL

Important principles of judicial efficiency cannot be ignored. "[D]uring the voir dire process, there exists a pool of potential jurors available for service. It is better for the trial court to err on the side of caution by sustaining a challenge for cause than to create the potential for retrial — "'an illogical expenditure of the citizenry's time and money'" — by retaining the questionable juror." Brown, at 652. Judge Blackmar said as much in his concurring opinion in State v. Hopkins, 687 S.W.2d 188, 191 (Mo. banc 1985): "Trial judges should fully sustain challenges to jurors who indicate reservations about their impartiality. Replacement jurors are easily available in the metropolitan areas, and it should not be difficult to ensure adequate supply of jurors in other parts of the state." "It is puzzling that a trial court would run the risk of prejudice and

reversal where that risk can be so easily avoided. See State v. Stewart, 692 S.W.2d 295, 299 (Mo. banc 1985)." State v. Walton, 796 S.W.2d 374, 379 (Mo. banc 1990).

Besides the obvious efficiency at the trial level, the practical impact on appeals must not be overlooked. "An appellant may not predicate error on the sustaining of a challenge for cause if the challenged juror is replaced by another qualified juror." Catlett v. Illinois Cent. Gulf R. Co., 793 S.W.2d 351, 352 (Mo. banc 1990). Thus, if the challenge is sustained, all error, and all related costs and delays will be obviated completely.

3. ERROR ON THE SIDE OF CAUTION

Errors in rulings on challenges for cause should always be made on the side of caution by excusing in the face of any doubt. State v. Carter, 544 S.W.2d 334, 338 (Mo. App. 1976). If there is "any doubt", the better practice is to sustain the challenge. More than twenty years ago, Judge Blackmar wrote of his concern that this good policy rule of caution was not applied often enough: "I concur, and write separately simply to express concern about the many cases presented to our Court and the Court of Appeals in which a juror indicates doubt about his or her ability to function impartially, and is nevertheless continued on the panel tendered to counsel for strikes. In the typical case the trial judge or the prosecutor will ask questions until the juror gives assurance of efforts of impartiality. The suspicion remains that the juror's

initial reaction persists, and that the assurances are only what might be expected from interrogation by a high authority figure." State v. Hopkins, 687 S.W.2d 188, 191 (Mo. banc 1985). Such a policy required the challenge of Mr. Shirkey to be sustained by the trial court below.

VI. CONCLUSION

The Joys' challenge of Mr. Shirkey for cause was proper and should have been sustained. The trial court abused its discretion by failing to conduct any independent inquiry to resolve any possible equivocation it might have felt in Mr. Shirkey's ability to serve as an unbiased juror. Mr. Shirkey never "recanted" any of the multiple, serious biases he expressed during voir dire. Nor was he ever "rehabilitated" by any questions from defense counsel. Simply allowing Mr. Shirkey to be the sole arbiter of his own lack of bias, with that assessment being filtered through his expressed personal biases, improperly surrenders the judicial discretion of the trial court to the venireperson, and amounts to the exercise of no discretion by the trial court, and thus is an inherent abuse of that discretion.

All perception of impartiality and fairness in our civil judicial system depends on the preservation of the integrity of every litigant's constitutional right to trial by a proper and unbiased jury. Many compelling policy reasons require that this case be remanded for a new trial. No compelling policy reasons exist to excuse defense counsel, or the trial court, from failing to conduct specific inquiry to delve into Mr. Shirkey's biased opinions to determine whether any substantial facts existed which would support a judicial determination that his biases would be reasonably expected to yield to the

evidence and the law in the case. Absent such inquiry, the trial court was required to sustain the challenge. Remand and a new trial may seem harsh considering all that is involved in this case, but the consistency of the law from case to case, and the essential integrity of our jury system, depend on the proper application of the rules to all litigants on an even and equal basis.

Therefore, under the law applicable to this case, and for the reasons stated herein, appellants respectfully request this Court for its remand and order for a new trial.

pectfully submitted:

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned certifies that on this 7th day of December 2007, one true and correct copy of the foregoing Brief, and one disk containing the foregoing Brief, were hand delivered to the offices of Mr. Bruce Hunt, Burkart & Hunt, P.C., 242 S. National Avenue, Springfield, MO 65802 and to Mr. Kent Hyde, Hyde, Love & Overby LLP, 1121 S. Glenstone, Springfield, MO 65804.

The undersigned further certifies that the foregoing Brief complies with the limitations contained in Rule 84.06(b), and that the Brief contains 13,517 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the Brief, has been scanned for viruses and is virus free.

David W. Ransin

APPENDIX

TABLE OF CONTENTS