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

APPELLANTS' SUBSTITUTE REPLY BRIEF

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INTRODUCTION

In summary, Respondents mischaracterize which subpart of Section 494.470 R.S.Mo. applies to this case, improperly ignore critical distinctions between various cases, over simplify the issues, and unfairly focus on only about 3% of the entire voir dire. Respondents have failed to refute that Mr. Shirkey expressed unequivocal biases against the Appellants and in favor of Respondents, at least one of which was specifically and consistently acknowledged by a fellow venireperson, Mr. Condreay, by defense counsel Mr. Hunt, and by the trial court. (Tr. 125, 127, 128, 306, 345). Respondents have failed to show where Mr. Shirkey "recanted" as the trial court incorrectly believed, nor have they shown that he was properly "rehabilitated," other than that he was improperly permitted to be the sole judge of his own qualifications to serve on this particular jury. Respondents have also failed to justify why the trial court completely failed to conduct any independent inquiry to resolve any possible inconsistency when it had a duty to do so.

The rest of this reply argument will follow the same format and designations set forth in Respondents' Substitute Brief, but first it is necessary to point out several important issues which were raised by Appellants but which Respondents completely failed to address.

As part of their fundamental argument that they were entitled to a fair and unbiased jury, Appellants raised the contention that their rights to such guarantee under Article I, Bill of Rights, Section 22(a) of the Missouri Constitution were denied.

(Appellants' Substitute Brief at 48-49). Respondents did not address this argument and appear to not dispute any of the underlying legal principles.

Appellants also proposed and discussed key public policy reasons supporting the reversal of the judgment below. Id. at 54-55. Respondents did not raise any public policy reasons to support their position.

Prejudice is presumed and reversal mandated when an unqualified juror serves on the jury. Id. at 55-57. Respondents did not address this principle and appear to have conceded that point.

I. REPLY TO RESPONDENTS' STATEMENT OF FACTS

A. REPLY TO PROCEDURAL HISTORY

Appellants accept the procedural facts as stated.

B. REPLY TO RELEVANT FACTS

In their footnote 2, page 5, of this section, Respondents claim Appellants' Statement of Facts are not fair and concise. Indeed, Appellants' Statement of Facts are more voluminous than Respondents', but such is necessary as the standard of review requires consideration of the entire voir dire, which includes the responses of other venirepersons with whom Mr. Shirkey either agreed, others agreed with him, or to contrast comparable testimony of some other venirepersons which the court deemed sufficient to excuse them for cause, but not Mr. Shirkey. Therefore, the additional details from the voir dire are very relevant and important to proper analysis of the issues on appeal. Also, it is apparent that Respondents do not want this Court

to pay much attention to the entire 374 pages of the voir dire as they spend the rest of their Statement of Facts focused almost exclusively on just 11 pages. (Tr. 108-113, 277-278, 306-308).

In fact, it would be error to not consider other portions of the voir dire, thus their inclusion was proper. It should be noted that Respondents apply a double standard in this regard. At page 9 of their Statement of Facts they note the pages of testimony by Ms. Sons which Mr. Shirkey referred to, but they summarily dismiss it all as if unimportant, and they totally fail to note the facts of how Mr. Condreay repeatedly used Mr. Shirkey as an example of wrestling with one's own biases. Yet, at page 26 of their Substitute Brief, Respondents quote State v. Feltrop, 803 S.W.2d 1 (Mo. banc 1991) for the rule that the trial court must consider the entire voir dire. Then in their Conclusion, page 39, Respondents tell this Court that it is proper to consider the entire voir dire, including questions to other members of the panel. Thus, the additional voir dire testimony contained in and referred to in Appellants' Statement of Facts of which Respondents complain is not only proper, it is necessary for a full and fair ruling on the subject challenge for cause.

On page 12 of their Substitute Brief, Respondents include the final "kitchen sink" question posed by Mr. Hunt to which he received no responses. If any portion of the transcript is irrelevant to the issues on this appeal, this must be it as the trial court in its ruling on the challenge of Mr. Shirkey for cause, clearly stated that it relied on Mr. Shirkey's "response," not on his lack of a response to a single question

posed generally to the entire panel. (Tr. 346).

The remainder of the facts are accurately stated.

II. REPLY TO ARGUMENT

A. REPLY TO POINT RELIED ON

The trial court abused its discretion in denying the challenge for cause

> because Mr. Shirkey was not a properly qualified juror for this case under subpart 1 of Section 494.470 R.S.Mo.
>
> > in that he formed and expressed opinions concerning the matter or material facts in controversy in the case that would influence the judgment of such person.

1. Reply to Standard of Review

Respondents falsely assert that the standard of review for this Court on appeal grants the trial court nearly unlimited discretion, requiring proof by Appellants of a "clear and certain abuse of discretion." (Respondents' Substitute Brief at 13, citing Morris v. Spencer, 826 S.W.2d 10 (Mo. App. 1992)). Reliance on Morris is misplaced as it was a category 1A type of case which does not require any independent inquiry, and the opinion instead establishes a more narrow standard of review than is required in our instant case. In Morris, the venireperson did not equivocate, yet the appellant there claimed that the trial court erred by failing to conduct any independent inquiry. Id. at 11. As pointed out in Appellants's Substitute Brief, no independent inquiry is required in category 1A cases under those facts.

(Appellants' Substitute Brief at 36-37). What the Respondents also omit from their reference to Morris is the important distinction that that case involved a challenge for cause on a "non-statutory basis," unlike our issue here. Morris, at 11. In the very next paragraph following the contention relied on by Respondents here, the court in Morris made the important distinction which Respondents completely overlook, and cited Catlett v. Illinois Cent. Gulf R. Co., 793 S.W.2d 351, 353 (Mo. banc 1990) with approval: "when a venireperson makes an equivocal response an appellate court is justified in making a more thorough review of a challenged juror's qualifications." Id. at 11-12. Later in the same opinion, the Morris court again cited Catlett reiterating that under the instant circumstances the appropriate appellate court review of a failure to excuse a venireperson requires "closer scrutiny," hardly a standard of "clear and certain." Id. at 13.

Next, Respondents cite the case of Rogers v. B.G. Transit Corp., 949 S.W.2d 151 (Mo. App. 1997) for a similar proposition, and make a similar mistake of not reading the full opinion. (Respondents' Substitute Brief at 13-14). Rogers was a category 4 case where the venirepersons' testimony only suggested the possibility of a bias on a general issue, and was not such that clearly translated to an unequivocal bias against the appellants in that particular case. Id. at 156. In such a case it is understandable that the discretion on appeal paid to the trial court's decision is granted greater breadth, as compared to a category 2 or 3 case, where distinct biases specific to the parties, issues or the particular case are expressed more strongly. When making

the statement which was singled out by Respondents, the court in Rogers referred to trial court determinations "such as the one at bar," which was different than what was presented here in the trial court below. Id. at 155.

Also, at the end of that opinion, the court correctly distinguished the situation from one where the venireperson's opinions would "produce bias or prejudice against" the other party. Id. at 156.

In the instant case, when asked the open-ended question: "How do you feel about that issue?", Mr. Shirkey replied that he would "probably be biased for the doctors." (Tr. 109-110). "Biased" and "probably" were his words which he chose to best describe his true feelings; they were not suggested to him, and the corresponding legal significance of that fact cannot be ignored. This was a strong and deep-seated bias that was specific to the issues and the parties in this particular case. Mr. Shirkey's bias favoring the doctor defendants here was unique to this case and would not influence his judgment if he served as a juror in a non-medical liability case. On appeal here, the trial court's ruling is not entitled to the same broad discretion that it would have been allowed if the testimony, issues and facts were different.

In addition, the McClain v. Petkovich, 848 S.W.2d 33 (Mo. App. E.D. 1993) case should also be discussed as it was cited by the court in Rogers at 155. McClain was clearly a category 4 case as it involved venirepersons whose testimony merely raised the "bare possibility of prejudice," and only "hinted at the possibility of prejudice." Id. at 35. Under those circumstances, far different from those at trial

below, the rule is understandable that mere equivocation over possible general biases is not enough to disqualify a venireperson. Id. And, as such, under those different circumstances, the degree of discretion allowed the trial court is different and much broader as it well should be given the circumstances. However, it is not proper to use a rule applicable to a certain set of circumstances and apply it to a case with very different circumstances. Thus the sorting and grouping of the various cases into four categories naturally assist in the proper analysis of these issues. Later in this section of their Substitute Brief, Respondents quote a similar passage from State v. Walton, 796 S.W.2d 374, 377 (Mo. 1990) which is also a category 4 case and it is distinguishable on the identical basis. (Respondents' Substitute Brief at 14).

Respondents next quote from and cite the Feltrop case for two propositions. (Respondents' Substitute Brief at 13). The first is the "clear and certain abuse" standard that has been shown above to be inapposite here. The second is the apparent assertion that Appellants here must show a “real probability of injury” from the trial court's ruling. Respondents do nothing to flesh out or pursue this argument other than a partial quote. (Respondents' Substitute Brief at 13). Appellants believe these assertions are also not applicable here. Feltrop was a category 1 case in that the venirepersons there unequivocally established (“promised”) that they could be fair, the challenges were properly denied, and no independent inquiry was required by the court. Feltrop, at 7. Further, it is very significant that counsel in Feltrop asked the venireperson very directly whether he could “put aside” any preconception he held

and base his decision "solely" on the evidence and the court's instructions. Id. at 7. Neither defense counsel ever approached Mr. Shirkey in the same fashion. However, they did squarely confront other jurors in that manner. (For example: Mr. Bryant, T. 299). Given that those very different circumstances are consistent with a more concrete standard of review justifies why the court in Feltrop would require a definite showing of harm or injury to reverse the trial court's ruling. In dramatic contrast, the standard remains unrefuted in the instant circumstances that if an unqualified juror serves on the jury, Appellants are not required to show any prejudice as reversible error is presumed. (Appellants' Substitute Brief at 55-57).

The Supreme Court case of Ray v. Gream, 860 S.W.2d 325 (Mo. banc 1993) is next cited for the obvious proposition that the trial court is in a better position to evaluate the venirepersons than anyone reading the cold record. (Respondents' Substitute Brief at 14). But, that simple observation does not end the analysis. Such "better position" merely highlights the importance of the trial court's duty to conduct independent inquiry whenever there is significant disagreement or inconsistency in the venireperson's testimony regarding their case specific bias. Indeed, Ray is a category 3 case, and the trial court there conducted its own inquiry, thus justifying the appellate court's reference to that "better position." Id. at 332. It is only when the trial court fails to fulfill its duty to independently inquire in order that it can benefit directly from that opportunity to be directly involved in the observation process that the deference to the observer is discounted. A similar quote is taken by Respondents

from the Rogers case, and as a category 1 case, the discretion is broader, thus the quote does not apply to the same context of facts and issues presented here. (Respondents' Substitute Brief at 14). Respondents also cite the Walton and Edley v. O'Brien, 918 S.W.2d 898 (Mo. App. 1996) cases which merely refer back to the same propositions addressed above by Ray, and are distinguishable on the same basis. (Respondents' Substitute Brief at 14).

Respondents twice quote passages from the opinion issued by the Court of Appeals below which must be ignored. (Respondents' Substitute Brief at 17, 26). On transfer, this Court reviews this case as if it were on original appeal. Rule 83.09; Precision Investments v. Cornerstone Propane, 220 S.W.3d 301, 303 (Mo. banc 2007).

In summary, in applying Section 494.470 R.S.Mo. there are different ranges of discretion allowed to the trial court upon appellate review which depend on the particular circumstances presented, and it is not proper to apply one blanket rule to all cases regardless of those important differences.

2. Reply to Missouri Statute on Challenges for Cause, Sec. 494.470 R.S.Mo.

Respondents here claim Appellants' analysis of Section 494.470 R.S.Mo. is "misguided." (Respondents' Substitute Brief 15). However, it is Respondents who are mischaracterizing the situation and thus missing the proper analysis. Mr. Shirkey testified to several very deep-seated biases which were specific to this particular case.

(Tr. 103-113). In this case, based on what he had heard so far, he testified under oath that he "probably would be biased for the doctors." (Tr. 109-110). His opinions about a number of other facts and issues in controversy in this case also stood to influence his judgment if he were selected to serve as a juror on this particular case. The whole concept that he might be asked to award a substantial amount of money bothered him. (Tr. 110). He was troubled substantially that this was a lawsuit against doctors. (Tr. 112). He agreed with Ms. Sons that because of the type and nature of this particular case, the defense experts would "hold more credence" with him than those called by the plaintiffs. (Tr. 104-113).

Respondents seem to imply that in order to be disqualified under subpart 1, a venireperson must know the parties by name and have independent personal knowledge of the facts of the case before entering the court house. (Respondents' Substitute Brief at 15-16). A plain and simple reading of Section 494.470 R.S.Mo. does not lend itself to that interpretation. Respondents stretch credibility when they claim that subpart 1 only applies to venirepersons who have "some direct connection or link to the matter up for trial." (Respondents' Substitute Brief at 15). Respondents fail to offer any citation to any authority to support that strained interpretation of subpart 1 of Section 494.470 R.S.Mo. None of those words, nor even that concept are contained in the plain language of the statute, and this Court is not empowered to insert the same; the statute must be read as written by the Legislature, not as Respondents would like it to have been written.

A very vague statement with no supporting authority is advanced by Respondents on page 16 questioning the reasonableness of why the Legislature would write a statute with two subparts, each about a different group of venirepersons. (Respondents' Substitute Brief at 16). When reading each subpart in pari materia, it is clear why such a schema is indeed quite reasonable: it is inevitable that every person has opinions, and thus subpart 1 applies to those persons whose opinions "may influence the judgment of such person" on certain facts and issues in this particular case, but not in another case lacking the same facts or issues; whereas subpart 2 applies to persons with immovable opinions transcending the case specific type of facts and issues, such that the opinions "preclude" them from following the applicable law, and regardless of what the facts or issues were involved, they would not be proper jurors, and thus a different standard is required.

Respondents further strain credibility in advancing this argument when they boldly state that Mr. Shirkey never "had any knowledge whatsoever of the underlying facts or circumstances of the case," and that he never knew any "dispute even existed between Appellants and Respondents," and he had no "knowledge of any material fact in dispute." Id. It is simply incredible for Respondents to assert that any venireperson, Mr. Shirkey included, would not very clearly and immediately understand there was a "dispute" between the parties when the court told them right away that this was a trial of a wife and her husband with an amputated leg after a heart surgery who were suing two surgeons. (Tr. 10-12). This description came

within the very first few minutes of the voir dire, and followed the trial judge's announcement to the entire panel that "medical issues will be the topic of this case." (Tr. 6). A plain reading of the voir dire conclusively refutes any possible fiction that Mr. Shirkey had no idea that "this is a lawsuit against doctors" when that same description preceded his own testimony by less than 10 minutes. (Tr. 100).

The above-cited transcript of Mr. Shirkey's testimony from pages 103 to 113 make it vividly clear that he held deep-seated opinions that he called "bias" which would "probably" affect his judgment in this particular case with these particular parties, facts and issues. His expressions were so solid and unequivocal that not only another venireperson, Mr. Condreay, but also defense counsel, Mr. Hunt, and also the trial court summarized Mr. Shirkey's testimony as demonstrating his deep and obvious "bias." (Tr. 125, 127, 128, 306, 345). For Respondents to now claim the contrary is to simply ignore the words on the official sworn transcript and defies further description.

It is also of particular importance to note how Respondents attempt to subtly substitute the word "knowledge" to replace the statute's word "opinion" when discussing the rule set out in subpart one of Section 494.470 R.S.Mo. (Respondents' Substitute Brief at 16). This is a vain attempt to falsely frame the function of the statute into something the drafters did not chose to create. The statute does not require the venireperson to have any "knowledge" and that word and concept cannot now be grafted into the statute. In fact, not to sound rude or absurd, but knowledge

rarely stands in the way of a firmly held, deep-seated opinion, and such opinions are most likely held all the more inflexibly and wielded more dangerously in the absence of real knowledge. Thus, the choice of words in drafting the statute reveals the legislature's wisdom and was not just left to chance.

The case of State v. Debler, 856 S.W.2d 641 (Mo. banc 1993) is next cited and discussed. (Respondents' Substitute Brief at 17). It is true that Debler clarifies the separate roles of subparts 1 and 2 into biases related to the particular case or parties (subpart 1), as compared to more general, "larger" issues (subpart 2). However, again, that mere explanation and distinction alone does not end the full analysis. First, the pertinent issue in Debler was substantially different in that it was limited to what type of questions were proper during voir dire concerning the death penalty, not at all an issue in this appeal. Id. at 645. Second, Debler is definitely a category 4 case involving a venireperson expressing nothing more than a mere possibility that her general views on "larger" issues might impair her ability to follow the court's instructions, and thus the proper analysis falls under subpart 2. Id. at 647. The test of whether a venireperson should be stricken for cause does not require a "series of magic words." Id. However, the key factor should be whether the venireperson's responses "raise a legitimate concern" about their ability to follow the instructions. Id. Given the depth and character of Mr. Shirkey's volunteering many strong biases against this particular type of case, and expressly in favor of these particular defendants, there can be no reasonable doubt whatsoever that his responses "raised

legitimate concerns" about his ability to follow the instructions. Therefore, whether his biases fall under either subpart 1 or 2, the better, and more reasoned approach required by the proper exercise of discretion was to excuse him from service, and the failure to do so when relying solely on his own self assessment of "fairness," amounts to an abuse of discretion and requires reversal.

Additionally, the combination of the distinction between case specific "smaller" issues versus "larger" issues still combined to compel excusing Mr. Shirkey in this case. These "larger" issues falling under subpart 2 are the type which would apply across the board to almost every case. For example, someone who cannot judge the acts of another for either religious, ethical or moral reasons; someone who believes it is simply wrong for anyone to ever sue anyone, period; someone who believes it is wrong to give money as compensation for injury or death; and someone who believes the burden of proof in a civil case should be beyond a reasonable doubt, or even higher. These are opinions that are not "concerning the matter or any material fact in controversy," but are opinions of a "fixed character," which will not "readily yield to evidence" regardless of the type of matter or particular material facts in controversy. Ray, at 332-333. Opinions or beliefs of these types may keep the venireperson from following the instructions in almost any civil tort case regardless of the particular type of claim or the nature of the parties. When opinions about the "smaller" issues, like the particular type of claim ("concerning the matter"), or when a patient is suing doctors because of improper health care ("material fact in

controversy"), are such that the venireperson has formed or expressed an opinion that may affect the judgment of such person in that particular case, then subpart 1 is definitely invoked and its constraints apply, and the venireperson must be excused. Failure to do so is an abuse of discretion.

On page 19 of their Substitute Brief, Respondents oversimplify and confuse the applicable standards. If a venireperson testifies that despite their opinions on certain "bigger issues" they can still follow the court's instructions, that does not permit them to serve on the jury if subpart 1 is not satisfied in that their testimony also demonstrates they hold firm opinions on more case specific facts and issues which may influence their judgment on this particular case. Respondents seam to suggest that the standard of subpart 2 controls over that of subpart 1, and they end this section of their Argument with a bold conclusion that any other proposition is "inconsistent with the numerous reported cases," but they fail to tell us what cases they are referring to, thus no reply is possible here. In any event, the two subparts must be read and applied in pari materia such that either one can apply independent of the other to require the granting of a challenge for cause. The plain wording of the statute allows no other reading, and such is directly consistent with the many cases on point.

3. Reply to The Trial Court did not Err in Overruling Appellants' Challenge for Cause as to Venireperson Shirkey

The contentions in the opening paragraph of this section again attempt to defy and ignore the printed word of the official transcript. Respondents falsely claim Mr.

Shirkey's "only one primary" bias concerned awarding damages. (Respondents' Substitute Brief at 19). Next, Respondents boldly proclaim that Mr. Shirkey did not have a "deep seeded [sic] bias with regard to lawsuits against doctors." Id. These false contentions were thoroughly refuted above, and need not be addressed again here. In similar fashion, in the second paragraph on page 19-20 of their Substitute Brief, Respondents continue to contort the official record into assertions of something it will not support. Simply comparing these baseless contentions with the same transcript pages cited therein, and as addressed above, proves Respondents' contentions to be inaccurate.

The balance of the paragraph which continues from page 20 onto page 21 plainly shifts into further unfair and inaccurate reading of Mr. Shirkey's testimony. He testified that he had no problem awarding some money for injuries, but what Respondents totally ignore is his sworn testimony that what did trouble him was the large amounts of money the jury would be asked to award in this particular case. (Tr. 111). Appellants fail to understand Respondents' citation to and quoting from M.A.I. 21.03 as such was never mentioned in voir dire at any point, and thus make no reply to the same.

The next several pages of Respondents' Substitute Brief simply recite the questions posed to Mr. Shirkey by defense counsel which have been reviewed thoroughly before, and further review here would add nothing new since Mr. Shirkey was never effectively "rehabilitated" on nor did he ever "recant" any of his specific

biases he described under oath.

Beginning on page 24 and continuing to page 25, Respondents raise an "Edley" last ditch type of argument for the first time, to the effect that since Mr. Shirkey, despite all his sworn testimony to the contrary, failed to respond affirmatively, thus his silence affirmatively constituted his sworn testimony "that he could keep an open mind." This approach specifically fails here in that it contradicts the record. The trial court explicitly stated that its ruling was based on what Mr. Shirkey said, and not what he failed to say: "I felt pretty good about his response." (Tr. 345). It is patently inconsistent to completely controvert affirmatively spoken sworn testimony in direct response to specific questions in one direction, by total silence and lack of any action whatsoever following a broad, general question to the entire panel in an opposite direction many hours later. Since Edley is also discussed by Respondents at pages 30 to 32, such will be addressed here. The bottom line is that Respondents interpret Edley as holding that all that is required to qualify a biased venireperson for service is to prod or shame them into saying they can be "fair" despite their sworn testimony otherwise. Besides flat wrong, that proposition stands both logic and the law on their heads and should not be followed.

Next, Respondents discuss a few cases cited by Appellants in their Substitute Brief. (Respondents' Substitute Brief 26). The first case discussed is Acetylene Gas Co. v. Oliver, 939 S.W.2d 404 (Mo. App. 1996). The citation to page 412 completely undercuts Respondents' reliance on the immediately preceding argument concerning

the effectiveness of the "Edley" question approach. This merely demonstrates concretely how the holdings of the Southern District on this issue are not consistent with identical issues in the other Districts, and a realignment is needed. Respondents make no effort whatsoever to reconcile these differences, nor to explain them, nor to justify why this case should not be decided exactly as Acetylene Gas dictates, especially when that case is "on all fours" with the instant case.

Respondents do try to argue that it is sufficient for either the trial court or counsel to conduct "independent inquiry." (Respondents' Substitute Brief at 27). However, if opposing counsel inquires as an advocate, it would hardly be called "independent." In any event, in the voir dire below, opposing counsel did not directly and squarely address and "independently inquire" about Mr. Shirkey's various specific biases exposed during questioning by Appellants's counsel. Instead, the questions were leading, compound, rambling, and very general in terms of "could you sign a verdict," etc. Hardly the type of "independent inquiry" called for when a venireperson volunteers in his own words that he probably would be biased in favor of the doctors, among other many biases and indications of unfairness.

The next paragraph simply argues that Mr. Shirkey should be allowed to be the sole judge of his own qualifications to serve on the jury. (Respondents' Substitute Brief 27). This argument is soundly refuted in all the case law cited in Appellants' Substitute Brief and need not be repeated here, as Respondents introduce no new case law or other authority to support these unfounded contentions. (Appellants' Substitute

Brief at 51-54).

In identical fashion as the Acetylene Gas case, Respondents discuss Brown v. Collins, 46 S.W.3d 650 (Mo. App. 2001), and simply dismiss its holding as they believe Mr. Shirkey "unequivocally stated he could be fair, impartial, and reasonable." (Respondents' Substitute Brief at 28). Respondents offer no real legal analysis of Brown. The fallacy of their reasoning is revealed in their assertion that "Mr. Shirkey was specifically questioned about his alleged bias against medical malpractice cases", when the reality is that he was not so questioned; instead, he was only asked if he could be "fair", and he was never asked if he could set aside those opinions. The basis of his "doctor bias" was never explored by Respondents. The bottom line is that both Acetylene Gas and Brown are directly on point and apply the better reasoning and reach a result consistent with the majority of cases addressing these issues.

A comparison between Brown and our instant case is revealing and compelling: it must be noted that Brown was a 12/0 defense verdict; it presented an identical single issue on appeal; the venireperson never changed her original answer; she never retracted her original statement; this "raised legitimate doubts as to her qualifications"; she never recited the "magic words" that"her biases precluded her from following the court's instructions," only that her beliefs might cause her a "problem" after hearing the evidence and instructions by the court; the trial court conducted no independent inquiry; the trial court's discretion is "not endless," and is

"undercut" if the trial court conducts no independent inquiry; public policy favors the trial court to use its discretion "to err on the side of caution by sustaining a challenge for cause than to create the potential for retrial"; and finally, at the presentation of the challenge for cause, the trial court's inaccurate recall of the testimony was steered in the wrong direction by defense counsel's mistaken representation that the venireperson had "recanted" (Brown: "I thought that she could set aside her prejudice." Brown, at 651; in our instant case: "We, again, flat put the question to him, and he had no hesitation whatsoever, and that included a finding for the plaintiff." (Tr. 346)). Id. at 651-653. Respondents admit that Brown and the instant case are perfectly indistinguishable on both the facts and the law, and they should also admit that the same result is required here.

Again, with no legal analysis or solid distinction, Respondents pay cursory attention to State v. Holland, 719 S.W.2d 453 (Mo. banc 1986) but summarily announce it distinguished because Mr. Shirkey's biases (which Respondents earlier say he did not have) were completely "rehabilitated" on each of the specific issues raised in voir dire by Appellants' counsel. (Respondents' Substitute Brief at 29). Respondents fail to support their bald assertion with any reference to the record, thus that position should be ignored.

However, it must also be pointed out that Respondents both did not attempt any rehabilitation at all on some of Mr. Shirkey's biased opinions, and on others, failed in those attempts, all of which left his sworn testimony regarding the same

unrebutted, thus requiring the challenge to be sustained and he to be excused.

For example, expert medical witness testimony is often very critical evidence in a medical liability trial, and Mr. Shirkey testified that even before he heard any evidence his biased opinions might likely affect his ability to give the experts for each side fair and equal credence and to listen to them with an open mind. (T. 113). Neither defense counsel addressed this very plainly stated and significantly biased opinion.

Examples of failed rehabilitation attempts are seen after Mr. Shirkey testified he would "probably be biased for the doctors," (Tr. 109-110), Mr. Hyde took a tangential approach but completely missed the mark by merely asking Mr. Shirkey if he could sign a verdict for either the plaintiffs or the defendants, and simply ignored the fact Mr. Shirkey's answer left his specific "doctor bias" untouched. (T. 277-278). Mr. Hunt acknowledged Mr. Shirkey's obvious bias in favor of the doctors and cloaked the preface of his question with the appearance of "rehabilitation" on that issue, but then he steered his actual question away from the real target, and got an affirmative response that Mr. Shirkey "could be fair," which was later argued to be an effective rehabilitation or recanting of his bias. (T. 306-307).

In a parenthetical note, Respondents refer to State v. Sanders, 842 S.W.2d 916 (Mo. App. 1992) claiming that Holland was distinguished for "similar reasons." (Respondents' Substitute Brief at 29). Again, no local citation was provided by Respondents to support this contention. A thorough reading of Sanders further

demonstrates that Respondents' contention is totally flawed. The venireperson in Sanders was equivocal at first, so the trial court stepped up and performed its duty to conduct its own independent inquiry, thus this is a category 3A case, and was correctly decided. Therefore, Sanders actually stands against the trial court's ruling in the absence of any independent inquiry if it is believed that Mr. Shirkey's testimony that he was biased was anything other than unequivocal. Furthermore, the very distinction by Sanders to which Respondents refer actually supports Appellants' position here: if the trial court fails to conduct an independent inquiry, less discretion is granted, and the venireperson most likely should be excused.

In identical fashion, at page 29, Respondents discuss State v. Thompson, 541 S.W.2d 16 (Mo. App. 1976), and pronounce it distinguished on the same basis that Mr. Shirkey was completely "rehabilitated" of the same biases Respondents earlier claim he did not express. As demonstrated earlier, the Transcript reveals that Mr. Shirkey's significant biases were never effectively rehabilitated. This continued pattern simply attempts to force our instant case into category 3, and as such, without independent inquiry by the court, the ruling below must still be reversed. Further, the court there precisely stated the rule that "[i]n no event shall a challenged venireman be allowed to pass upon his own qualifications to serve as a juror." Id. at 18. Either way, whether our instant case is characterized as a category 2 or 3, the ruling below was wrong.

On pages 30 to 32, Respondents discusses Edley and claim the same result

should obtain here. Respondents completely ignore the critically distinguishing fact that the trial court below expressly relied on Mr. Shirkey's statements, not his silence, so even if not overruled, the holding in Edley does not apply here. The facts and the contentions on appeal were different and were based on different legal concepts. No reference to the Constitutional or statutory rights were raised in Edley, nor were they relied on as a basis for the appellate decision. Either way, Edley is not controlling here.

At this point on pages 32 and 33 of Respondents' Substitute Brief, they repeat their analysis of the Morris and Rogers cases. Appellants replied to this analysis previously herein. (Appellants' Reply Substitute Brief 7-10). Since Morris involved a different set of circumstances as it is a category 1 case, it does not help Respondents here. Additionally, Morris affirms principles which support the reversal of the trial court's judgment below, namely, that if the testimony is equivocal, independent inquiry is required; absent the same, the appellate review is more stringent; a venireperson's self assessment of their own fairness is not an adequate basis alone to support proper exercise of discretion in light of legitimate concerns of deep bias; and, the entire voir dire must be considered, not just 11 pages.

First, the proper analysis of Rogers is consistent with that offered by Appellants when Acetylene Gas was analyzed, above, and in Appellants' Substitute Brief. (Appellants' Substitute Brief 44-49). Second, Respondents correctly state that

Rogers "is a case strikingly similar to the one at bar," and Appellants definitely agree. (Respondents' Substitute Brief at 33). The venireperson in Rogers expressed both case specific and larger general biases, just as Mr. Shirkey did in this case. Id. at 651-653. Therefore, in as much as Respondents admit that Rogers is similar to the current case, Respondents oddly still fail to admit that Rogers' holding is still controlling here. The cases are perfectly indistinguishable on both the facts and the law, and the same result is required.

Respondents parenthetically, in a single sentence at page 33, raise the case of Trejo v. Keller Industries, Inc., 829 S.W.2d 593 (Mo. App. 1992). The first challenged venireperson did not serve and thus does not "count" in the proper legal analysis. Id. at 597. This was a category 4 case, in that the second venireperson challenged was quite equivocal over a single, extremely general, "larger" issue, offered in response to a single question out of the entire voir dire: whether his 48 years in "corporate service" would cause him to be biased in the case. In light of only the very limited, inferred connection that such experience might possibly make him a biased juror simply because the defendant was a corporation, and absent anything more, the court reasonably held "it was never established that Caton's forty-eight years corporate experience would produce prejudice," and the trial court's denial of the challenge for cause was upheld as it should have been. Id. at 597-598. As such, given the dramatically different facts and issues, Respondents' reliance on Trejo is totally misplaced.

Beginning on page 33, Respondents spend considerable time discussing the facts of Ray, but fail to note a critical distinction. Every venireperson there was directly and successfully rehabilitated regarding their initial expressions of bias. Ray, at 331-333. Such was simply never achieved with Mr. Shirkey.

Respondents next raise the case of State v. Walton, 796 S.W.2d 374 (Mo. 1990), which is interesting for several reasons not revealed by Respondents. First, Respondents boldly state that Mr. Shirkey "clearly and unequivocally assured his impartiality," yet offer no supporting citation to the Transcript. (Respondents' Substitute Brief at 35-36). Second, the venireperson in Walton never clearly established his bias, but Mr. Shirkey did. Walton, at 377-378. There is an interesting similarity also in that the opposing party convinced the trial court in both cases by mistakenly stating the events of the voir dire. Id. at 378. Also, Walton recognizes it is not proper to shame a venireperson into giving a yes or no answer to resolve the issue of bias. Id.

Last, the case of State v. Walls, 744 S.W.2d 791 (Mo. banc 1988) is mentioned parenthetically at page 36, which does not support Respondents' position, and is distinguishable. Walls was a criminal case which turned on a similar but different statute which was repealed in 1989, Section 546.150 R.S.Mo.: Juror may be challenged, when; "It shall be a good cause of challenge to a juror that he has formed or delivered an opinion on the issue, or any material fact to be tried, but if it appear that such opinion is founded only on rumor and newspaper reports, and not such as

to prejudice or bias the mind of the juror, he may be sworn." This demonstrates the fatal flaw in Respondents' suggestion that the "law makers" intended the statute to require a showing that Mr. Shirkey had to have some specific knowledge about the case such as reading in the newspapers before he could be stricken under subpart 1.

4. Reply to Policy Considerations

Respondents do not effectively negate any of the policy considerations raised by Appellants, and they suggest none of their own to support their opposing argument. At page 38, Respondents surmise that Appellants want "a jury made up of individuals that do not have any opinions about any of the general or specific issues involved in the case" which simply is not true. Every venireperson will have opinions. All that Appellants want, and what they are statutorily and constitutionally entitled to, are jurors whose opinions will not influence their judgment of the facts and issues from outside the law and evidence in that particular case. Mr. Shirkey was not such a juror. Their final sentence on page 38 reveals how they continue to over simplify the issue and try to cram it into subpart 2 and completely ignore subpart 1, by saying all Appellants are entitled to are venirepersons who "can nonetheless follow the law and instructions while being fair and impartial," with total disregard to their deeply biased opinions which may influence their judgment on not only the facts and issues, but also their judgment when they are asked to assess their own "fairness and impartiality."

III. REPLY TO CONCLUSION

The subpart of Section 494.470 R.S.Mo. applicable here is 1, not 2. The trial court did abuse its discretion in denying Appellants' challenge of Mr. Shirkey for cause because all of the numerous and deep-seated biases, both general and case/party specific, which at least raised legitimate concerns, or more likely unequivocally proved that such "may influence the judgment of such person" if he was allowed to serve on the jury, thus violating the mandate set forth in Section 494.470 R.S.Mo., and denying Appellants their rights to trial by a fair and impartial jury guaranteed under Article I, Bill of Rights, Section 22(a) of the Missouri Constitution, prejudice and reversible error is thereby presumed, and reversal is required.

It is necessary to review and consider the entire voir dire, and the trial court's discretion is not "endless," nor are Appellants required to show an abuse of discretion by a standard of "clear and certain."

Mr. Shirkey was at the very least equivocal in explaining his biases on different topics, if not firmly unequivocal in his statement that he "probably would be biased for the doctors," a voluntary pronouncement under oath which was never specifically recanted, changed or abandoned. Thus, the trial court was duty-bound to conduct its own independent inquiry, and failed to do so. The trial court surrendered its official duty to exercise its own discretion over to Mr. Shirkey by allowing the venireperson's self assessment to be the determining factor.

All of the case law with similar facts and circumstances hold for reversal, which is exactly what is required here.

Respectfully submitted:

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

The undersigned certifies that on this 9th day of January 2008, 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 7719 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