THE SUPREME COURT OF MISSOURI

WESLEY LEON JOY and LINDA JOY,	)	
Appellants,	)	
v.	)	Case No. SC88690
STEPHEN K. MORRISON, M.D. and JOHN W. BUCKNER, III, M.D.	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
CASE NO. 103CC1819

THE HONORABLE J. MILES SWEENEY, CIRCUIT JUDGE

RESPONDENT STEPHEN K. MORRISON, M.D.'S SUBSTITUTE BRIEF

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I. STATEMENT OF FACTS

A. Procedural History

Mr. and Mrs. Joy filed suit on April 21, 2003 against Dr. Stephen K. Morrison and Dr. John W. Buckner, III. (L.F. pp.1-2).[1] Plaintiffs' claims against Drs. Morrison and Buckner were for medical malpractice. (L.F. pp. 20-30).

This matter came on for jury trial on June 19, 2006. (L.F. pp. 15, 47). On June 30, 2006, the jury returned a verdict in favor of Drs. Morrison and Buckner and against plaintiffs. (L.F. p. 47). The court accepted the verdict and entered judgment against plaintiffs at plaintiffs' cost on July 17, 2006, with the Judgment being filed on July 18, 2006. (L.F. p. 47). The Missouri Court of Appeals, Southern District, affirmed the judgment of the trial court on June 26, 2007.

[1] Dr. Mark D. Anderson and Dr. John B. Steinberg were also defendants in the original Petition, but both were dismissed on June 7, 2006, prior to trial. (L.F. 1-2 and 12).

B. Relevant Facts [2]

Clarence Shirkey was one of the venirepersons summoned as a potential juror. (T.R. p. 44). Mr. Shirkey was seated as a juror. (T.R. p. 373).

During voir dire, Mr. Ransin, counsel for Appellants, examined Mr. Shirkey. (L.F. pp. 108-113). While there were other exchanges between Mr. Ransin and Mr. Shirkey, they are not relevant to the issue on appeal. (L.F. pp. 192-193 and 202-203). The examination of Mr. Shirkey by Mr. Ransin that is relevant to the issue presented herein is set forth below in its entirety.

> MR. RANSIN: Who else feels like Ms. Sons? I know a lot of people do. Mr. Shirkey?
>
> VENIREPERSON SHIRKEY: Yes. I kind of feel the same way. I wasn't going to say anything, but I think that things are way out of

[2] Appellants' Statement of Facts fails to comply with Supreme Court Rule 84.04(c) for the reason that it is not a fair and concise statement of the facts relevant to the questions presented for determination without argument. Rather, Appellants' Statement of Facts contains voluminous facts that are not relevant to the issue on appeal and further is tainted with argument and conjecture. The only issue on appeal is whether the trial court clearly abused its broad discretion in denying Appellants' challenge of Venireperson Shirkey for cause. As such, pursuant to Supreme Court Rule 84.04(c) only those facts relevant to the questions presented are set forth herein, with those irrelevant and extraneous facts being omitted.

hand in the country as far as lawsuits against doctors or whoever. Some of the judgments that you read about, you know, millions of dollars for this or that, at it - -

MR. RANSIN: They sound crazy, don't they?

VENIREPERSON SHIRKEY: Yeah, they sound crazy, so I just want to go on record.

MR. RANSIN: And, please - - and I'll use you as an example, if I may, please – don't be shy about telling us. The Judge already told you, we don't want to have to try this case again because of a mistrial or something else. We have to know these things from you, and that's why it's going to take all day to pick this jury, because there are a lot of strong feelings on both sides of these issues. And we need to know about it. So don't apologize about telling us. But you raise a slightly different topic about all other lawsuits, and I'm going to talk about that in a minute, or amounts of dollars the juries have signed verdicts for. Let me just focus on this doctor lawsuit type of issue like we've been talking about. How do you feel about that issue?

VENIREPERSON SHIRKEY: I don't know. I - - I probably would be biased for the doctors.

MR. RANSIN: You would be?

VENIREPERSON SHIRKEY: Probably, unless you could

persuade me.

MR. RANSIN: And that's kind of a subset of the bigger issue of just lawsuits in general, right?

VENIREPERSON SHIRKEY: Yes.

MR. RANSIN: And you have strong feelings about lawsuits in general that you have a strong bias against?

VENIREPERSON SHIRKEY: Yes.

MR. RANSIN: And I'll just tell you that the jury will be asked to award a substantial amount of money. We can't - - we can't go back in time. We can talk about future time, but we can't go back in time and change anything, and the civil law only allows compensation and to make up for and help fix things with money. And we're going to talk about that in the future, later this morning or this afternoon. But the whole concept bothers you.

VENIREPERSON SHIRKEY: I would say it probably does, yes.

MR. RANSIN: And I'm not talking amounts of money, just giving the money for injuries.

VENIREPERSON SHIRKEY: Oh, no, that doesn't.

MR. RANSIN: Okay. But it's the amounts of money?

VENIREPERSON SHIRKEY: Right.

MR. RANSIN: What kinds of amounts bother you?

VENIREPERSON SHIRKEY: Well, you hear McDonald's,

somebody that spills coffee, they get $3 million. You wonder what in the world is going on?

MR. RANSIN: Uh-huh.

VENIREPERSON SHIRKEY: Just use that as an example.

MR. RANSIN: Well, and I feel the same way, and I'm sure other people here do, too. But you realize this isn't a McDonald's coffee case?

VENIREPERSON SHIRKEY: That's right.

MR. RANSIN: There's no allegation of spilling coffee. McDonald's isn't here. Can you put that completely out of your mind?

VENIREPERSON SHIRKEY: Yes.

MR. RANSIN: Okay. You kind of hesitated.

VENIREPERSON SHIRKEY: No, no, I can put that out of my mind.

MR. RANSIN: We'll come back to this in a little bit, but while you're standing, let me cover it with you while you have it in your mind. In the context of signing a verdict for a large amount of money, would - - and you haven't heard the evidence, you don't know anything about the claims - - the mere fact that it's a large amount of money, is there a number at which you'd say I won't sign that verdict regardless of the evidence?

VENIREPERSON SHIRKEY: No.

MR. RANSIN: Okay. We'll come back and talk about that a little bit more, Mr. Shirkey, but just so that I'm - - I've got my notes clear, on the issues of lawsuits against doctors, that does trouble you substantially, that in and of - - by itself?

VENIREPERSON SHIRKEY: Yes.

MR. RANSIN: And that might very well affect your ability to listen to the experts and give them fair credence?

VENIREPERSON SHIRKEY: It could.

MR. RANSIN: Okay. Thank you, sir. (T.R. pp. 108-113).

The exchange between Mr. Ransin and venireperson Shirkey does refer to comments made by venireperson Sons which can be found at Transcript pages 104-108.

Mr. Shirkey was also examined by Kent Hyde, counsel for Respondent Morrison. Mr. Hyde's examination of Mr. Shirkey was as follows:

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 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.R. pp. 277-278).

Bruce Hunt, counsel for Respondent Buckner, further examined Mr. Shirkey. The exchange was as follows:

MR. HUNT: And, Mr. Shirkey, would you stand?

VENIREPERSON SHIRKEY: Yeah.

MR. HUNT: Wouldn't it be nice if I'd say come on down? But that's a different deal. Okay. 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, and you would not say there was any particular dollar amounts that you really could commit to without knowing anything further, and that those things could cause problems. Now, after having said that, you've heard my line of questions about not only can you be fair and unbiased, but would you be fair and unbiased if you were selected on this jury? We all are a compendium of our experiences, our background. If you are selected to serve on this jury, would you be - - starting out, would you be equally fair to both the doctors and Mr. and Mrs. Joy? Or do one side or the other start out with a real advantage.

VENIREPERSON SHIRKEY: No, I don't believe they do. I think I could be fair.

MR. HUNT: Okay.

VENIREPERSON SHIRKEY: You know, I'm a firm believer that the awards by the Court and the jury is way out of line. I think it's - - you know.

MR. HUNT: And I won't - - I'm like Kent. I want to cut to the chase. I want to know if you folks will tell the Court and jury that if you're selected you will be fair, and your answer is you would be?

VENIREPERSON SHIRKEY: Yes.

MR. HUNT: Okay. And then as far as talking about dollar amounts for - - if you were to find in favor of the plaintiffs, trying to commit anybody to a dollar amount in the future without having heard any evidence, is that the problem that you had with those lines of questions?

VENIREPERSON SHIRKEY: No.

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.R. pp. 306-308).

Mr. Hunt also asked a question of all the venirepersons regarding whether they would follow the Court's instructions. The question was as follows:

> And then, lastly, this is a question I'm intentally asking kind of in a vague area of what he's talking about. That the court will give you instructions, written instructions as I mentioned earlier, that will dictate your decision in this case. And if you get an instruction from the court that perhaps you don't really like and you wonder about, well, why are they asking this? Will you nevertheless accept the fact that it is the law and that that law governs your decisions in this case? Will you do that? Because if you can't do that, then we've got a problem. So will all of you agree to follow the court's instructions once you get the case? If you can't do that, then raise your hand. (T.R. p. 332).

Mr. Shirkey did not raise his hand in response to the question. (T.R. pp. 332-333).

Appellants made a challenge for cause as to Mr. Shirkey. (T.R. pp. 345-346). The basis of the challenge was "he was a firm believer that verdicts are way out of line" and "he was troubled about the fact that the lawsuit is against the doctor." (T.R. p. 346). In denying the challenge for cause, Judge Sweeney stated, "In Mr. Shirkey's case, I felt pretty good about his response." (T.R. p. 346).

II. ARGUMENT

A. POINT RELIED ON.

THE TRIAL COURT DID NOT CLEARLY AND CERTAINLY ABUSE ITS BROAD DISCRETION IN DENYING PLAINTIFFS' CHALLENGE FOR CAUSE AS TO VENIREPERSON SHIRKEY BECAUSE MR. SHIRKEY WAS A PROPERLY QUALIFIED JUROR IN THAT HE UNEQUIVOCALLY INDICATED HIS ABILITY TO EVALUATE THE EVIDENCE FAIRLY AND IMPARTIALLY AND HE VOWED TO FOLLOW THE INSTRUCTIONS OF THE COURT.

1. Standard of Review

The only issue on appeal is whether the trial judge should have sustained Appellants' challenge for cause as to venireperson Clarence Shirkey. (*see* Appellants' Supplemental Brief, p. 19). The trial court's decision on whether or not to remove a venireperson for cause, "is not to be overturned unless there is a clear and certain abuse of that discretion with any doubts resolved in favor of the trial judge's discretion." Morris v. Spencer, 826 S.W.2d 810, 811 (Mo.App. 1992). Determinations of the trial court regarding the qualifications of potential jurors are overturned "only when they are clearly and manifestly wrong." Rogers v. B.G. Transit Corp., 949 S.W.2d 151, 155 (Mo.App. 1997). Before such a decision by the trial court should be overturned, not only must there be a clear and certain abuse of the trial court's broad discretion, there must also be "a real probability of injury to the complaining party." State v. Feltrop, 803 S.W.2d 1, 7 (Mo. 1991) (en banc). As compared to a reviewing court, be it an Appellate

Court or the Supreme Court of Missouri, "the trial court is in the better position to determine the qualifications of potential jurors." Ray v. Gream, 860 S.W.2d 325, 331 (Mo. 1993) (en banc). "Regarding allegations of error during voir dire, appellate courts generally defer to the trial court because the trial judge can observe the venireperson's demeanor and can consider the venireperson's answers in light of those observations." Rogers at 155. "The bare possibility of prejudice will not disqualify the juror or deprive the trial judge of discretion to seat the venireman." State v. Walton, 796 S.W.2d 374, 377 (Mo. 1990) (en banc). Finally, with regard to the discretion possessed by the trial court in determining the qualifications of a potential juror, such discretion has been described as both wide and broad. Walton at 377; Edley v. O'Brien, 918 S.W.2d 898, 903 (Mo.App. 1996).

In short, the judge's determination herein regarding venireperson Shirkey's qualifications as a juror should not be overturned on appeal unless the trial court committed a clear and certain abuse of its wide and broad discretion, keeping in mind that the trial court is in a far better position to determine a potential juror's qualifications and that any doubts should be resolved in the trial court's favor.

2. Missouri Statute on Challenges for Cause, § 494.470 RSMo

Appellants make a brief analysis of Section 494.470 RSMo. and summarily conclude that sub-part (1) is the applicable provision. Appellants further and summarily conclude that the standard for striking a juror for cause in sub-section (1) is a lesser standard than that found in sub-part (2). Obviously, this is done in an effort to lessen the burden on Appellants in trying to convince this Court that the case should be remanded

for a new trial because the trial court did not strike venireperson Shirkey. However, a closer look at Section 494.470 RSMo. and the context of sub-parts (1) and (2) makes it clear that Appellants' summary conclusion and interpretation of the statute are misguided.

Section 494.470.1 discusses persons that are not qualified as jurors because of some direct connection or link to the matter up for trial, the parties thereto, or in some cases the attorneys involved. (Appendix, p. A-1). Section 494.470.1 excludes various individuals from serving as jurors as follows, "no witness or person summoned as a witness in any cause, 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, and no person who is kin to either party in a civil case or the injured, accused or prosecuting or circuit attorney in a criminal case with in the forth degree of consanguinity or affinity shall be sworn as a juror in the same case." (Appendix, p. A-1).

Essentially, this portion of the statute identifies three classes of individuals that are not qualified as jurors. The first category involves witnesses or persons summoned as a witness to testify in the case. Another category of persons identified in the statue are those that are related to the parties in the civil case or the injured party, accused or prosecuting attorney in a criminal matter. Certainly, Mr. Shirkey does not fall into either category. The final category of persons that are not qualified as jurors are those that have "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." (Appendix, p. A-1). This is the category in which Appellants attempt to pigeon hole Mr. Shirkey. The

"matter" or "material fact" referred to are those specific to the case. For instance, there are numerous reported cases where a juror has some knowledge of the specific case and its facts because of media exposure or rumor. This is the category of venireperson with which Section 494.470.1 deals. It is not intended to address venirepersons who may have general opinions about such things as lawsuits against doctors or what amounts to a reasonable figure for damages. It is also unreasonable to think that the law makers would group individuals with very specific connections to a case (i.e. witnesses and relatives of the parties) together with those individuals having very general opinions or beliefs about such things as the type of claim being made or the amount of money being sought. Such general opinions, which we likely all have, are addressed by Section 494.470 in sub-part (2) which is further discussed below. *See* State v. Debler, 856 S.W.2d 641 (Mo. 1993) (en banc).

The matter that was tried herein was whether Dr. Morrison and Dr. Buckner deviated from the standard of care or were negligent. There is no evidence in the transcript that Mr. Shirkey had any knowledge whatsoever of the underlying facts or circumstances of the case. (T.R. pp. 294-296). There is no evidence that Mr. Shirkey had any knowledge or exposure to the fact that a dispute even existed as between Appellants and Respondents prior to being seated on the jury venire. There is no evidence that Mr. Shirkey had knowledge of any material fact in dispute. It therefore goes without saying that Mr. Shirkey had not formed or expressed any opinion concerning "the matter" or "any material fact" in controversy. Rather, Mr. Shirkey simply expressed some general thoughts on the reasonableness of damages and arguably on lawsuits against doctors. As

noted by the appellate court below, “The opinions and beliefs expressed by Mr. Shirkey related to his opinions about lawsuits and doctors in general, and had no relation to anything specific to the facts of the case.”

General opinions such as those offered by Mr. Shirkey are addressed in Section 494.470.2. This provision states, “persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors in that case.” (Appendix, p. A-1). Pursuant to subsection (2) of Section 494.470, those “opinions or beliefs” only disqualify a venireperson if they “preclude” the venireperson from following the law as declared by the court in its instructions. In other words, just having opinions and beliefs regarding issues such as lawsuits against doctors and the reasonableness of other jury verdicts is not enough to disqualify a juror. The juror’s opinions and beliefs must also preclude the juror from following the law and instructions. Debler, 856 S.W.2d at 645. It is sub-part (2) that should be considered herein rather than sub-part (1).

This issue was specifically addressed in State v. Debler, 856 S.W.2d 641 (Mo. 1993) (en banc). Therein, the Supreme Court evaluated Section 494.470, and noted an important distinction between sub-parts (1) and (2). Id. at 645. The Supreme Court first noted that sub-part (1) deals specifically with venirepersons "who are witnesses, who have formed an opinion on the material facts of the case, and who are kin to the defendant, the victim or the prosecutor." Id. The court then considered sub-part (2). In doing so, the court stated, "the other type of bias focuses on opinions about `larger issues.' To some extent, all members of the pool have this form of bias. To exclude

venirepersons solely because of their views on such issues violates the fair-cross section requirement." Id. In other words, issues such as lawsuits against physicians and what damages are fair and reasonable are "larger issues" which must be dealt with pursuant to Section 494.470.2 RSMo. Consistent with the statute, the Supreme Court in Debler stated, "therefore, these individuals are excluded only if their views would preclude following the instructions given by the court." As the court below correctly stated, "Accordingly, the issue here is whether Mr. Shirkey's opinions and beliefs were such that they would have precluded him from following the directions of the trial court and, thereby, excluding him as a juror pursuant to Section 494.470.2." Given that sub-part (2) of Section 494.470 RSMo. is the applicable portion of the statute herein, the analysis should end as Appellants have conceded that Mr. Shirkey's opinions did not preclude him from following the law as given to him by the court's instructions. (Appellants' Substitute Brief, p. 33). Furthermore, Appellants limit their argument only to a discussion of whether Mr. Shirkey should have been stricken under sub-part (1) of Section 494.470. It appears Appellants also concede that sub-part (2) of the statute would not require the striking of Mr. Shirkey. With this concession, the trial court's actions in refusing to strike Mr. Shirkey should be affirmed.

Ultimately, what Appellants argue is that if a venireperson has an opinion about any general issue that has any relevance to the matter being tried, sub-part (1) of 494.470 is applicable. Following Appellants' argument to its logical conclusion, sub-part (1) would render sub-part (2) meaningless. If opinions regarding lawsuits filed against physicians fall within sub-part (1) of Section 494.470, it is difficult to imagine what type

of opinions would fall within sub-part (2). To decide this case under sub-part (1) would result in setting the precedent that all venirepersons with opinions about general issues that might have some relevance to the case being tried will be struck for cause even if the venireperson could follow the law and instructions given by the trial court. Such a holding would also be inconsistent with the numerous reported cases assessing whether a venireperson with opinions regarding general issues should be excluded as a juror pursuant to sub-part (2) of Section 494.470 RSMo.

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

In their brief, Appellants attempt to convey that Mr. Shirkey had many significant biases such that he should have been stricken for cause. However, a review of Mr. Shirkey's statements during voir dire clearly establishes he discussed only one primary issue regarding what is a fair and reasonable award of damages. Appellants argue that Mr. Shirkey had some deep seeded bias with regard to lawsuits as against doctors. As discussed below, when the entire context of the questions to Mr. Shirkey and his responses are considered, it becomes apparent that Mr. Shirkey did not have such a bias.

Appellants want this Court to believe that Mr. Shirkey adopted in whole the comments made by venireperson Sons. Mr. Shirkey made no such adoption. Mr. Ransin asked the panel of venirepersons, "Who else feels like Mrs. Sons?" (T.R. p. 108). Mr. Shirkey responded "I kind of feel the same way." (T.R. p. 108). Mr. Shirkey went on to explain his response by saying "I wasn't going to say anything, but I think that things are way out of hand in the country as far as lawsuits against doctors **or whoever**." (T.R. pp.

108-109) (emphasis added). Clearly, Mr. Shirkey's opinions about lawsuits and the damage awards was not specific to cases against doctors, but was with regard to damage awards in general. Mr. Shirkey clearly and unequivocally stated he has no problem awarding money damages in personal injury cases. (T.R. p. 111). Mr. Shirkey also plainly stated he didn't have a problem signing a verdict for a large sum of money. (T.R. p. 112). He also had no pre-established dollar figure above which he would not award. (T.R. p. 112).

Mr. Shirkey's issue with damage awards was finally made clear during voir dire examination by counsel for Respondents. Mr. Shirkey responded to Mr. Hyde that he would have no problem deciding the amount of and awarding damages in the face of negligence. (T.R. p. 277). In response to questions by Mr. Hunt, Mr. Shirkey said that his thoughts on jury and court awards being out of line were that he did not think they were fair and reasonable. (T.R. p. 308). Mr. Shirkey clearly established that he could award fair and reasonable damages and would listen to and take into account other jurors' opinions. (T.R. p. 308). This is all the Appellants are entitled to with regard to damages; a fair cross-section of jurors that will award fair and reasonable damages if the Respondents were negligent. Appellants are not entitled to have stricken for cause those jurors that feel some verdicts in other publicized cases are unreasonable. We need to look no further than M.A.I. 21.03 to determine what plaintiffs are entitled to in the way of damages in a medical malpractice case. M.A.I. 21.03 states, "If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained [and is reasonably certain

to sustain in the future] as a direct result of the occurrence mentioned in the evidence." In short, all Mr. Shirkey did was establish that he has heard of verdicts that awarded plaintiffs more than would "fairly and justly" compensate for the damages sustained. However, Mr. Shirkey clearly and unequivocally stated that he has no problem awarding damages to a plaintiff if they are fair and reasonable.

Appellants next argue that Mr. Shirkey had deep biases against lawsuits for medical malpractice. Mr. Shirkey was asked by Mr. Ransin the following question, "Let me just focus on this doctor lawsuit type of issue like we've been talking about. How do you feel about that?" (T.R. p. 109). Mr. Shirkey answered, "I don't know. I - - I probably would be biased for the doctors." (T.R. pp. 109-110). Mr. Ransin then asked, "You would be?" (T.R. p. 110). Mr. Shirkey replied, "Probably, unless you could persuade me." (T.R. p. 110). Later in voir dire, the following exchange took place:

> MR. RANSIN: Okay. We'll come back and talk about that a little bit more, Mr. Shirkey, but just so that I'm - - I've got my notes clear, on the issue of lawsuits against doctors, that does trouble you substantially, that in and of - - by itself?
>
> VENIREPERSON SHIRKEY: Yes.
>
> MR. RANSIN: And that might very well affect your ability to listen to the experts and give them fair credence?
>
> VENIREPERSON SHIRKEY: It could. (T.R. pp. 112-113).

These are the only places in the voir dire transcript where Mr. Shirkey makes any comment to ever suggest that he has any bias regarding lawsuits against doctors. At no

point does Mr. Shirkey give any indication that his opinions or beliefs would preclude him from following the law or instructions.

This issue was further addressed by counsel for Respondents. Counsel for Dr. Morrison questioned some of the venirepersons about this topic. In doing so, Mr. Hyde made the following comments:

> MR. HYDE: Okay. Now, let's go back to something that was probably the biggest part of our day, this business of tipping the scales and whether it's 50/50 or whatever it is. The Judge - - at the end of the case after you've heard all of the evidence, seen the medical records, heard witnesses, heard from the Joys, heard from the doctors, heard from the experts, the Judge will give you the instructions, and it will say that if you find either of the defendants negligent - - okay? - - and it will define what that is, and that's the failure - - negligence in this case is the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances, period. And so if, based on the evidence you find that, and you find that it caused or contributed to any of Leon's injuries, then you can award him anything you believe is fair and reasonable, okay? Period. (T.R. pp. 272-273).

When he came to Mr. Shirkey, the following exchanges occurred:

> MR. HYDE: Okay, And, Mr. Shirkey, same questions 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 how much, you can do that?

VENIREPERSON SHIRKEY: Yes.

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

VENIREPERSON SHIRKEY: Yes. (T.R. pp. 277-278).

Counsel for Dr. Buckner also addressed this issue with Mr. Shirkey. Mr. Hunt and Mr. Shirkey had the following exchange:

MR. HUNT: And, Mr. Shirkey, would you stand?

VENIREPERSON SHIRKEY: Yeah.

MR. HUNT: Wouldn't it be nice if I'd say come on down? But that's a different deal. Okay. 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, and you would not say there was any particular dollar amounts that you really could commit to without knowing anything further, and that those things could cause problems. Now, after having said that, you've heard my line of questions about not only can you be fair and unbiased, but would you be fair and unbiased if you were selected on this jury? We all are a compendium of our experiences, our background. If you are selected to serve on this jury, would you be - - starting out, would

you be equally fair to both the doctors and Mr. and Mrs. Joy? Or do one side or the other start out with a real advantage.

VENIREPERSON SHIRKEY: No, I don't believe they do. I think I could be fair.

MR. HUNT: Okay.

VENIREPERSON SHIRKEY: You know, I'm a firm believer that the awards by the Court and the jury is way out of line. I think it's - - you know.

MR. HUNT: And I won't - - I'm like Kent. I want to cut to the chase. I want to know if you folks will tell the Court and jury that if you're selected you will be fair, and your answer is you would be?

VENIREPERSON SHIRKEY: Yes. (T.R. pp. 306-307).

Mr. Hunt also addressed the entire venire panel with questions that deal with this issue as follows:

MR. HUNT: Will all of you, if you're selected to serve on the jury, promise me, Dr. Buckner, all the parties, all the attorneys, and the Court that if you're selected to serve, you'll keep an open mind until you've heard all of the evidence? Because if you don't do that, you're doing a disservice to all of us.

Can you do that? Will you do that? If you think there's a problem with that, raise your hand now, because you shouldn't be serving on this jury or any other, if you can't do that.

> And then, lastly, this is a question I'm intentionally asking kind of in a vague area of what he's talking about. But the Court will give you instructions, written instructions as I mentioned earlier, that will dictate your decision in this case. And if you get an instruction from the Court that perhaps you don't really like and you wonder about, well, why are they saying this? Will you nevertheless accept the fact that it is the law and that that law governs your decisions in this case? Will you do that?
>
> Because if you can't do that, then we've got a problem. So will all of you agree to follow the Court's instructions once you get the case? If you can't do that, then raise your hand. (T.R. pp. 331-332).

Mr. Shirkey did not respond to any of the questions posed and therefore agreed that he could keep an open mind until all the evidence was heard and would follow the court's instructions.

After voir dire, Appellants did make a challenge for cause as to Mr. Shirkey. (T.R. p. 345). Obviously, the trial judge had been present for and attentive during voir dire. The court, having heard the voir dire questions and answers and assessing Mr. Shirkey's demeanor, stated, "In Mr. Shirkey's case, I felt pretty good about his response." (T.R. p. 346). Appellants wish to make an issue of the trial judge relying only on Mr. Hyde's examination of Mr. Shirkey in overruling the challenge for cause. However, the real issue is, when considering the entire voir dire, did the trial court clearly abuse its

broad and wide discretion in not striking Mr. Shirkey for cause. "Initial reservations expressed by venirepersons do not determine their qualifications; consideration of the entire voir dire examination of the venireperson is determinative." State v. Feltrop, 803 S.W.2d 1, 8 (Mo. 1991) (en banc). When the entire voir dire is considered, the judge did not err in his decision. The appellate court below concluded, "It is our view, much like that of the trial court, that the tenor of [Mr. Shirkey's] testimony overall was that he could be fair and impartial." Furthermore, "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." Feltrop at 8.

Appellants, in their brief, analyze a sampling of cases dealing with for cause strikes as to venirepersons. In doing so, Appellants place the cases into one of four categories (some categories have sub-categories). However, Appellants then conclude that the case at bar falls into one of the distinct categories. Specifically, Appellants conclude that this matter falls within "category two." Thus, to avoid a prolonged and irrelevant discussion of cases that Appellants claim are not applicable, Respondent will simply discuss and distinguish those cases which Appellants claim are "category two" cases.

The first case relied upon by Appellants is Acetylene Gas Co. v. Oliver, 939 S.W.2d 404 (Mo.App. 1996). In this Eastern District case, a juror indicated that he did not think he could treat both parties the same because the plaintiff was a corporation and the defendants were individuals. Id. at 411. The venireperson stated he would likely not be able to follow the law and instructions because of his feelings in this regard. Id. The

entire venire panel was then questioned as to whether they would follow the law and instruction to which the subject venireperson did not respond. Id. The trial court was found to have abused its discretion in failing to strike the venireperson for cause. Id. at 412 In reaching its holding, the appellate court noted that the general question to the entire panel did not specifically address the venireperson's bias regarding individuals versus corporations. Id. Specifically, the court stated, "this question did not address the particular venireperson's attitude regarding individuals and corporations, and his lack of response did not unequivocally indicate that he would fairly and impartially evaluate the evidence." Id.

Appellants argue that the holding in Acetylene Gas required the trial judge below to conduct an independent examination of Mr. Shirkey. Acetylene Gas requires no such thing. The court in Acetylene Gas simply stated that if the venireperson's responses are equivocal that further inquiry "by the trial court **or counsel**" is required. Id. at 412 (emphasis added).

In the case at bar, further inquiry was made regarding Mr. Shirkey's alleged biases. Mr. Shirkey was specifically questioned about the alleged biases and on both issues unequivocally stated he could be fair, impartial, and follow the law and instructions given by the court. (T.R. pp. 111-112 and 306-308). Even Appellants agree that there is no issue whether Mr. Shirkey's opinions precluded him from following the law as stated in the court's instructions. (Appellants' Substitute Brief, p. 33). In fact, when questioning Mr. Shirkey about whether he would be a fair and impartial juror, counsel for Dr. Buckner referred specifically to Mr. Shirkey's prior statements regarding

amounts of jury verdicts and lawsuits against doctors and any problems those opinions may cause if he were a juror. (T.R. 306-308). In short, Mr. Shirkey did unequivocally indicate both that he would fairly and impartially evaluate the evidence and that he would treat the parties equally. (T.R. 306-308). He also clearly stated that he had no problem or issue in awarding fair and reasonable damages. Assuming Mr. Shirkey's initial responses were equivocal and assuming Acetylene Gas would then require further inquiry, such requirements were satisfied by counsel. Based upon Mr. Shirkey's response to further inquiry, the trial court did not abuse its discretion in refusing to strike Mr. Shirkey.

The second case relied upon by Appellants is Brown v. Collins, 46 S.W.3d 650 (Mo.App. 2001). In this Western District case, the plaintiff challenged a venireperson for cause because of the venireperson's response regarding chiropractors. Id. at 651-652. The venireperson indicated that because the plaintiff was treated by a chiropractor it would affect her ability to be a juror even after hearing the evidence and instructions of the court. Id. at 651. No follow up was made regarding the venireperson's bias against chiropractors. Id. The appellate court determined that the trial judge abused his discretion in failing to strike the juror for cause. Id. at 653.

The same distinction applies to Brown as does Acetylene Gas referred to above. Mr. Shirkey was specifically questioned about his alleged bias against medical malpractice cases and issues related to damages. On both issues, Mr. Shirkey unequivocally stated he could be fair, impartial, and reasonable. (T.R. pp. 111-112 and 306-308).

A third case relied upon by Appellants is State v. Holland, 719 S.W.2d 453 (Mo.App. 1986) (en banc). In this criminal case, a venireperson stated he would hold it against the defendant if he did not testify. Id. at 453-454. No attempt was made to rehabilitate the juror on this issue. Id. at 454. Therefore, the trial judge erred in not striking the venireperson for cause. Id. at 455.

The same distinction applies to Holland as does the above cases. Mr. Shirkey was rehabilitated on the specific issues raised in voir dire by Appellants' counsel. As such, the trial court herein did not clearly abuse its broad discretion in denying Appellants' challenge for cause as to venireperson Shirkey. (*See also* State v. Sanders, 842 S.W.2d 916 (Mo.App. 1992) wherein Holland was distinguished for similar reasons).

A fourth case cited as support for Appellants' position is State v. Thompson, 541 S.W.2d 16 (Mo.App. 1976). During the voir dire in this criminal case, venireman Moore related that he had been held up and robbed years earlier. Id. at 17-18. The defendant therein was being charged with robbery in the first degree. Id. at 16. The venireman stated that he would try to be impartial but that he would have a hard time putting his own experience out of his mind. Id. at 17-18. To the contrary, Mr. Shirkey stated that he could and would be impartial as between Appellants and Respondents and that he would be fair and reasonable with regard to damages. (T.R. pp. 111-112 and 306-308). These statements were made without equivocation as opposed to the comments made by venireperson Moore in Thompson. Furthermore, the judge in Thompson simply refused to strike the juror because the juror's self-assessment was that he thought he could be impartial. Id. at 18. With regard to Mr. Shirkey, the able trial judge independently

passed judgment on Mr. Shirkey's responses by stating, "In Mr. Shirkey's case, I felt pretty good about his response." (T.R. p. 346).

Finally, Appellants cite Edley v. O'Brien, 918 S.W.2d 898 (Mo.App. 1996). In this Southern District medical malpractice case, Mr. Ransin was also counsel for Plaintiffs/Appellants. In Edley, the trial court's denial of Appellants motion to strike a venireperson for cause was upheld on appeal. Id. at 904. Appellants attempt to distinguish Edley from the current matter by concluding that the appellate court erred in affirming the trial court's actions therein.

In Edley, venireperson Pollet responded affirmatively to the following questions:

> Is there anyone here who feels that someone should not be permitted to come into court if they feel they've been done wrong and seek recovery for a parent's death? …anybody have a moral or religious or just some type of particular scruples or convictions that that shouldn't be permitted?
>
> …
>
> Does anyone feel that if you are forced to suffer such a loss [a loss resulting from the death of an older person] as a result of someone being careless that that is not a loss that can be translated into a monetary amount? Anybody feel that way?
>
> …
>
> Should the person who has been injured, disabled, or killed for that matter have any less right to make it – to right the situation and be compensated

> if it is a private citizen in an automobile or a doctor in a hospital? Should these two situations be different simply because we're dealing with doctors versus automobiles? Anybody feel that way?
>
> …
>
> Is there anything that hasn't been covered that someone has in their mind, a thought, or a belief, scruples, morals, religious, philosophical, or otherwise, that makes you feel that maybe you really shouldn't be on the jury, and that you might be disadvantaging one side or the other? Id. at 903-904.

Later in voir dire, defense counsel asked the entire panel, "if any of them believed they could not sit and listen to the evidence and, regardless of their individual beliefs, decide the case based on what they would hear from witnesses and see from the exhibits." Id. at 904. Mr. Pollet did not respond.

The plaintiff in Edley moved to strike venireperson Pollet for cause and the trial court denied the same. Id. On Appeal, the court held, "Pollet, along with the other prospective jurors, was asked if he could put aside individual beliefs and decide the case based on what was presented at trial. Anyone who believed they could not was asked to respond. Pollet did not respond. The trial court, being in a better position than this court to evaluate the responses, could have found that to be an unequivocal indication that Pollet could evaluate the evidence fairly and impartially." Id. The Edley court also noted that M.A.I. 2.03 "directs jurors that the court's instructions constitute the law of the case and are binding on them. Jurors are presumed to follow the instructions of the trial

court." Id. at footnote 3, 904-905. It should also be noted that this Court denied Appellants' Application for Transfer in Edley.

In the present case, Mr. Shirkey not only affirmed his ability to be fair and impartial, he also unequivocally affirmed that he could and would follow the law and instructions given by the court. (T.R. pp. 306-308). There is no meaningful distinction between Edley and the present matter. This is made obvious by Appellants' claims that Edley is simply wrong. Edley is squarely on point. There has been no change in the law on this subject since Edley was handed down. If anything, Mr. Shirkey's responses are even more clear than those at issue in Edley that he could and would be fair and impartial. In short, as in Edley, the trial court's actions must be affirmed.

In addition to Edley, there are other cases which support the trial court's denial of Appellants' challenge for cause as to venireperson Shirkey. In Morris v. Spencer, 826 S.W.2d 10 (Mo.App. 1992), the trial court denied the appellants' challenge for cause as to two venirepersons. In this medical malpractice case, venireperson Thornberg had been treated successfully by the defendant physician. Id. at 12. However, the venireperson indicated that she could be fair to both sides. Id. Venireperson Carson was also a patient of the defendant physician. Id. Venireperson Carson also indicated that the physician defendant was a friend of the family. Id. However, venireperson Carson indicated that despite being the defendant's patient and despite the defendant being a family friend, he could be fair and impartial. The appellate court affirmed the trial court's decision not to strike the venirepersons for cause.

Rogers v. B.G. Transit Corp., 949 S.W.2d 151 (Mo.App. 1997) is a case strikingly similar to the one at bar. Therein, the appellate court was asked to determine whether the trial court abused its discretion in failing to strike some of the venirepersons. During voir dire, venireman Holdorf stated, "I feel like the law nowadays makes it too easy for people to sue." Id. at 155. He further indicated that because of this, he might have leanings toward the defense. Id. Venireperson Rios stated he would have difficulty awarding future wage losses. Id. He further stated that he would likely hold the plaintiff to a higher burden of proof in establishing diminished wage earning capacity. In fact, venireman Rios stated, "you would have to definitely convince me." Id. Finally, venireperson Jones also indicated some concern in awarding future lost wages.

In reviewing the case, the appellate court stated, "these discussions did not persuade this court that any of the three veniremen above could not be impartial or fair jurors." Id. at 156. The court went to state, "while venireman Holdorf may have expressed a general feeling against excessive lawsuits, it was not clear that that translated into a bias against appellants. Mere equivocation is not enough to disqualify a juror." Id. (*See also* Trejo v. Keller Industries, Inc., 829 S.W.2d 593 (Mo.App. 1992) wherein the trial court's refusal to strike two jurors for cause was upheld on appeal despite one juror indicating he had strong feelings against the actions of the plaintiff and another juror indicating that he thought he could be able to listen to the evidence and impartially follow the instructions if it was presented in such a way that he understood what he was doing.)

Ray v. Gream, 860 S.W.2d 325 (Mo. 1993) (en banc), is also instructive. In Ray the decedent's will was being contested with regard to who should receive certain real

property. Id. at 327. The proponents of the will were not blood relatives of the deceased, but were to receive 140 acres of property under the will. Id. The contestants of the will were blood relatives claiming they should get the aforementioned property. Id. During voir dire the venire was asked whether "anyone [has] any preconceived notion or otherwise about leaving property to someone outside your family?" Id. Seven of the jurors indicated their preference for property to be left to family members and because of these feelings they would not or might not be able to render a fair verdict. Id. at 327-329. At this point the trial judge questioned the seven jurors. In doing so the judge explained that the court will instruct each of the jurors as to the law as it pertains to the case and asked the jurors if they could set aside their preconceived notions and render a fair and impartial decision based on the evidence and the court's instructions. Id. at 329-331. All but one of the seven jurors said they could or that they thought they could. Id. These jurors were not stricken for cause. Id. at 331. The appellate court held that the trial court erred in not striking the jurors, but on transfer to this court the trial court's actions were affirmed. Id. at 326.

This Court in Ray wrote, "As the trial court aptly observed in its examination of the prospective jurors, 'all of us have preconceived thoughts about a myriad of things.'" Id. at 332. "Nevertheless, a distinction may be made between deep-seated and enduring bias that is often borne of a personal, specific and directly adverse experience…and a general opinion or belief that may be prejudicial in nature but moderate in degree – one that would not necessarily impact on a juror's ability to be impartial." Id. This court went on to state, "we first note that it is proper for the trial court to consider the juror's

testimony concerning his or her ability to act impartially." Id. at 334. "[T]he self-assessment of prospective jurors that they can set aside their bias is, in most cases, sufficient evidence, in and of itself, to support the trial court's determination that the juror is not disqualified…[R]eliance on such evidence is the common and long-accepted practice of our trial courts." Id.

The only real difference between Ray and the case at bar is who asked the follow up questions of the subject venirepersons. In Ray the court interrupted voir dire and asked questions. In this case, the follow up questioning was performed by the respective counsel for Respondents. In both cases the prospective jurors were told the court would give them the law and instructions in the case. Ray at 329 and (T.R. pp. 272-273, 332). In both cases it was discussed with the prospective jurors that everyone has thoughts and opinions based upon their past experiences. ("[A]ll of us have preconceived thoughts about a myriad of things." Ray at 329. "We all are a compendium of our experiences, our background." (T.R. 306).) In both cases the prospective jurors thereafter agreed they could be fair and impartial. Ray at 332 and (T.R. 306-307). In both cases the trial judge correctly refused to strike the prospective jurors.

Appellants suggest that the trial judge herein had a duty to perform an independent examination of Mr. Shirkey and that the failure to do so undercuts the basis for the trial court's discretion. In response to this argument, Respondents note this Court's holding in State v. Walton, 796 S.W.2d 374 (Mo. 1990) (en banc). "The trial court has a duty to make an independent inquiry only when a venireman equivocates about his ability to be fair and impartial. However, where an answer to a question suggests a possibility of bias

and upon further questioning, the venireman gives unequivocal assurances of impartiality, the bare possibility of prejudice will not disqualify the juror or deprive the trial judge of discretion to seat the venireman." Walton at 377 (internal citations omitted). As established above, on further questioning, Mr. Shirkey clearly and unequivocally assured his impartiality. Thus, the trial judge was not deprived of his discretion and aptly exercised the same in refusing to strike Mr. Shirkey as a juror. (*See also* State v. Walls, 744 S.W.2d 791, 795 (Mo. 1988) (en banc), "We realize that the trial court's failure to further question a juror regarding any possible prejudice may undercut the trial court's discretion, but here, in response to additional questions … [the vernireman] stated he could set aside any feelings and decide the case on the evidence.")

4. Policy considerations

In discussing policy considerations regarding our judicial system and the striking of jurors for cause, Appellant's first cite Williams by and through Wilford v. Barnes Hospital, 736 S.W.2d 33 (Mo. 1987) (en banc). Respondents do not necessarily disagree with the quotes taken from Williams but think it is important to point out the context in which they were written. Williams dealt with allegations that members of the jury intentionally failed to disclose pertinent information in voir dire. Id. at 34. The point in Williams was that jurors who are untruthful in voir dire and intentionally conceal information thwart our judicial system. Id. at 36-37. There is no claim that Mr. Shirkey was dishonest during voir dire. Thus, while Respondents do not disagree with the spirit of Williams, it simply deals with a different issue and does not provide any useful guidance herein. A juror that intentionally fails to disclose information robs counsel of

the opportunity to explore the withheld information and discover if it would provide a basis to have the juror stricken for cause. Appellants claim that Mr. Shirkey disclosed biases. However, upon examination by counsel for Respondents, it became clear Mr. Shirkey was able to be fair, impartial, and follow the law and instructions provided by the court. This is the very process Williams promotes: The honest disclosure of information by jurors such that counsel can inquire further of the juror.

Appellants next contend that the ease of excusing a venireperson and the risk of a new trial should cause the judge to err on the side of caution and strike jurors such as Mr. Shirkey. Implicit in this argument is a concession by Appellants that even from their perspective whether or not to strike Mr. Shirkey is a close call. Otherwise, Appellants would not feel compelled to argue that the trial judge should have "erred on the side of caution" and sustained the for cause challenge to Mr. Shirkey. Regardless, such a policy consideration does not change the fact that Mr. Shirkey clearly and unequivocally indicated his ability to be fair, impartial and follow the law and instructions given by the court. As such, the trial judge exercised his discretion in refusing to strike Mr. Shirkey from the venire. One of the cases relied upon by Appellants for their policy considerations makes this clear in stating, "nevertheless, [Appellants] in this case failed to elicit facts sufficient to overcome the prospective jurors' assurance of impartiality and to permit an inference of actual prejudice." State v. Walton, 796 S.W.2d 374, 379 (Mo. 1990) (en banc).

Finally, with regard to policy considerations, Appellants argue that if there is "any doubt" about a venireperson, the person should be stricken. Appellants rely upon State v.

Carter, 544 S.W.2d 334 (Mo. App. 1976), for this contention. Appellants even put the words "any doubt" in quotes presumably to suggest that such language comes from the opinion in Carter. However, the phrase "any doubt" does not even exist in that opinion. It is not the law or policy of Missouri to strike all venirepersons about which there is "any doubt". Such a policy would create great difficulty in selecting a jury as able trial attorneys could create doubt with regard to nearly all venirepersons, especially in light of the fact that "all of us have preconceived thoughts about a myriad of things." Ray at 332.

Taking Appellant's policy considerations together, Appellants seem to argue they are entitled to a jury made up of individuals that do not have any opinions about any of the general or specific issues involved in the case. This is not what our jury system requires and is likely impossible. Rather, our jury system requires a jury comprised of a fair cross-section of members of the public who may have opinions about issues in the case, but whose opinions will yield to the law and instructions provided by the court. This is what Appellants enjoyed at the trial level. A fair cross-section of jurors will include individuals with differing opinions of what amounts are fair and reasonable with regard to damages and lawsuits against physicians. Having jurors with diverse thoughts and opinions on such issues is what makes the judicial system fair to all litigants, not just plaintiffs. It is not the point of voir dire to exclude all individuals with opinions on issues that may be relevant to the matter being tried. The point is to determine which venirepersons can nonetheless follow the law and instructions while being fair and impartial. *See* State v. Feltrop, 803 S.W.2d 1, 8 (Mo. 1991) (en banc).

III. CONCLUSION

There is a single issue for determination herein. Did the trial court clearly abuse its broad and wide discretion in denying Appellants' challenge for cause as to venireperson Shirkey? In answering this question, it must be kept in mind that the trial court is in a far better position to determine a perspective juror's qualifications. Furthermore, any doubts with regard to the trial court's conduct should be resolved in the trial court's favor. Appellants argue that Mr. Shirkey should have been stricken for cause because he had strong biases with regard to lawsuits against doctors or physicians and against awarding monetary damages for personal injury. Alleged biases such as these fall within Section 494.470.2 rather than sub-part (1) of the statute. When the entire voir dire is considered, including questions by counsel for both Appellants and Respondents, both specifically to Mr. Shirkey and generally to the entire venire panel, it is clear that the trial court did not clearly and certainly abuse its wide and broad discretion. Furthermore, when all things are considered, it can only be concluded that Mr. Shirkey unequivocally stated that he was able to and would award fair and reasonable damages in the face of negligence. Also, Mr. Shirkey established that as between Appellants and the doctor Respondents, he would be fair and impartial and that any alleged bias he had against medical malpractice lawsuits would yield to the law and instructions given by the court. For these reasons, the trial court's denial of Appellants' challenge for cause as to venireperson Shirkey must be affirmed.

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IN THE SUPREME COURT OF MISSOURI

WESLEY LEON JOY and LINDA JOY,	)	
	)	
Appellants,	)	
	)	
vs.	)	**No. SC88690**
	)	
STEPHEN K. MORRISON, M.D. and JOHN W. BUCKNER, III, M.D.,	)	
	)	
Respondents.	)	

CERTIFICATION OF ATTORNEY OF RESPONDENT STEPHEN K. MORRISON, M.D. PURSUANT TO RULE 84.06(c)

COMES NOW, the attorney for Respondent Stephen K. Morrison, M.D., pursuant to Supreme Court Rule 84.06(c), and states to the Court as follows:

1. Respondent Stephen K. Morrison, M.D.'s brief complies with the limitations contained in Supreme Court Rule 84.06(b); and

2. Respondent Stephen K. Morrison, M.D.'s brief contains 9,809 words as indicated by the word-processing system used to prepare said brief.

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By_____
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APPENDIX

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