SC96034

IN THE SUPREME COURT OF MISSOURI

Thaddeus Thomas, a Minor, by and through his Next Friend, Marlin Thomas, and Marlin Thomas and Ma Sheryll Joy Thomas, Individually,

Appellants,

vs.

Mercy Hospitals East Communities, d/b/a Mercy Hospital – Washington

and

Mercy Clinic East Communities, f/k/a Washington Women's Health and/or STLMC Women's Health –Washington,

Respondents.

Appeal from the Circuit Court of Franklin County, Missouri
20th Judicial Circuit
The Honorable Gael D. Wood, Judge

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal challenges the Judgment entered in favor of Defendants/Respondents following a jury verdict and follows the Order of the trial court overruling the Plaintiffs/Appellants' timely-filed Motion for New Trial. LF 30; 46-52; 174-178.[1] More specifically, the issue on appeal is whether the trial court erred in failing to strike a juror for cause. The Court of Appeals, Eastern District reversed and ordered a new trial. This Court transferred this cause on application of Respondents; therefore this Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 10, of the Constitution of Missouri (as amended 1976).

[1] References to the Legal File are referred to as "LF," to the Supplemental Legal File as "Supp. LF," to the Transcript as "Tr.," and to the Appendix as "A."

STATEMENT OF FACTS

The only issue on appeal contests the trial court's failure to strike venireperson 24, who later became juror 12, due to venireperson 24's bias for Defendants Mercy Hospital and Mercy Clinic (hereinafter "Defendants Mercy"). Therefore, few facts from the trial beyond voir dire are necessary for resolution of this appeal.

On August 8, 2012, Plaintiff Joy Thomas called Mercy Clinic because she had not felt her unborn baby, Thaddeus, move inside her since that morning. Tr. 121. Joy was told to go to the hospital so that her baby could be monitored Tr. 122. At the hospital, an ultrasound of Thaddeus was taken and Joy was admitted under the care of Dr. David Glover. Tr. 126. Dr. Glover proceeded to induce labor around 9:00 p.m. Tr. 691, 854. Fetal heart rate tracing continued to deteriorate throughout the night and attempts to induce Joy were largely ineffective. Tr. 130, 854. Dr. Glover stopped induction around 2:30 a.m. and Joy was taken to the operating room for delivery via C-section. Tr. 131, 854. Thaddeus was delivered and born with brain damage. Tr. 339, 426, 451, 703.

During voir dire, the Plaintiffs' attorney, Mr. Bradshaw, informed the venire panel that the case "involves Mercy Clinics, Mercy Clinic Physicians, as the defendant and Mercy Clinic Hospital." Tr. 5. Mr. Bradshaw asked the panel, "[j]ust knowing that they are defendants in this case, is there anyone that feels they might start off the case a little bit more in favor of one party or the other?" Tr. 5. Several jurors raised their hands, including venireperson 24. Tr. 13. After Mr. Bradshaw acknowledged that venireperson 24 raised her hand, the following exchange occurred:

PROSPECTIVE JUROR 24: My sister works at the Big St. John's. She's an R.N. Are they affiliated?

MR. BRADSHAW: Sorry?

PROSPECTIVE JUROR 24: Is Big St. John's and this hospital affiliated?

MR. BRADSHAW: Probably -- well, you called it St. John's, and I used to call them St. John's because I grew up in Missouri. But I think -- I would --

PROSPECTIVE JUROR NO. 24: It's Mercy.

MR. BRADSHAW: Yeah, that's it, right.

PROSPECTIVE JUROR NO. 24: But it used to be called St. John's so.

MR. BRADSHAW: Right. And you will – the child was eventually transferred to Mercy, Big Mercy as you called it, at some point.

PROSPECTIVE JUROR NO. 24: That's what they call it.

MR. BRADSHAW: Okay. So the same question, because you know people there, know -- have some knowledge of that and a relationship with that organization indirectly, would you tend to give them more credibility or that defendant maybe, in this case the local one, start off --

PROSPECTIVE JUROR NO. 24: I don't think so.

MR. BRADSHAW: Okay. I think I hear where you're going with this, but as a lawyer, I have to try to make sure things are clear. You say you don't think so, but later on you did decide you were -- they started off a step in advance, that would be --

PROSPECTIVE JUROR NO. 24: Well, I've heard my sister have lots of

opinions of St. John's so, you know.

MR. BRADSHAW: So ultimately, can you sit through this whole case without starting off a little bit in favor of Mercy or St. John's, as you call them, or would you start off with them having a touch in favor of them?

PROSPECTIVE JUROR NO. 24: I don't -- maybe -- yeah, probably.

MR. BRADSHAW: Maybe you would be slightly in favor of them?

PROSPECTIVE JUROR NO. 24: Yep, probably.

MR. BRADSHAW: Okay. And, you know, that's – that's all I'm trying to get is the best answer you can give, and you seem confident in that answer; is that correct?

PROSPECTIVE JUROR NO. 24: Uh-huh.

MR. BRADSHAW: Okay. Thank you.

Tr. 13-15.

At this point, defense counsel Mr. Bean asked to approach and the following discussion was had at the bench:

MR. BEAN: I just want to point out that I don't think any of -- in my personal opinion, none of these questions have yet gotten to the point of whether they are biased and prejudiced and won't put aside their friendship with these people and listen fairly and impartially to the evidence and follow your instructions. So Mr. Bradshaw keeps asking, do they think they'll start out ahead. Sure, I think I start out ahead, but it doesn't mean that I -- ahead when I sit in the jury box. So I'm just warning Mr. Bradshaw

that that's going to be my position when we get to the end of this. That is not the ultimate question. The ultimate question is whether their feelings are going to prejudice the way they sit and listen to the evidence and follow the Court's instructions.

MR. BRADSHAW: And, Judge, if I may just interject. I think that's not the law. It is on jury instructions, but there's two reasons for questioning the jurors. One, can I follow the instructions; and the other one is based upon knowledge and experience, do they start off with a bias for one side or the other? There's many ways to ask about bias, and one of those is do you start off in favor of one side or the other.

THE COURT: Well, I think Mr. Bean can attempt to rehabilitate on his voir dire, and we'll see where we are.

Tr. 15-16.

Mr. Bradshaw then questioned Venireperson 24 about her ability to follow the court's instructions.

MR. BRADSHAW: So just to be clear, I've asked you about if you'd tend to start out maybe just a little bit, even just a touch, in favor of one side or the other. I haven't asked you the other question, which is: If the judge gives you an instruction, will you read that instruction and follow that instruction to the best of your ability?

PROSPECTIVE JUROR NO. 24: Yes.

MR. BRADSHAW: Okay. It doesn't change where you are in your past

experiences as far as knowledge and understanding of your relationship to the defendant; is that also fair?

PROSPECTIVE JUROR NO. 24: Yes.

MR. BRADSHAW: Okay. Thank you.

Tr. 17.

Defense counsel then asked venireperson 24 about her answers to Mr. Bradshaw's questions:

MR. BEAN: Thank you. You rolled your eyes once when Mr. Bradshaw was asking you questions. You probably thought I wasn't looking, and I wasn't sure if that was a good thing or a bad thing, so I've got to ask. You probably don't remember it, but let me -- let me look at my notes for a second. So I think you indicated that your sister -- sister works as a registered nurse at Big St. John's.

PROSPECTIVE JUROR NO. 24: Yeah.

MR. BEAN: You did not think that had an impact. You heard lots of things from your sister.

PROSPECTIVE JUROR NO. 24: She's worked there 25 years.

MR. BEAN: She's worked there 25 years. Same place?

PROSPECTIVE JUROR NO. 24: Burn ICU – ICU unit.

MR. BEAN: Oh, the burn unit.

PROSPECTIVE JUROR NO. 24: Yes.

MR. BEAN: That's a great unit. You said you may be unfair, but then you told us you would follow the instructions. So here's the question: Your sister's a nurse, there are claims against nurses here. Can you put that aside and assure the Court that you will do your level best currently to decide this case based on what you hear in this courtroom, not what your sister has told you, not anything about Mercy, just on the evidence from that box and the judge's instructions?

PROSPECTIVE JUROR NO. 24: Yes. I've heard good and bad. I've heard both.

MR. BEAN: We both have, and there's nothing wrong with that. Okay. She doesn't work in obstetrics, does she?

PROSPECTIVE JUROR NO. 24: No, burn unit.

Tr. 96-97.

During the discussion as to strikes for cause, Mr. Bradshaw asked that venireperson 24 be struck:

MR. BRADSHAW: The next one is 24. She went back and forth.

THE COURT: Yeah, I'm not going to strike her.

MR. BRADSHAW: Okay. If I could just make a record, Judge, on that one.

THE COURT: Okay.

MR. BRADSHAW: She said that she may be unfair. Ken asked her if she would do her best, and she said that -- I think she said she would do her best, but he didn't specifically ask the follow-up, And be fair and impartial,

et cetera. He just said, Will you do your best, and she said yes. But again, she said earlier she may be unfair. Just for that record. Over objection, I trust, Your Honor.

MR. BEAN: I disagree with his interpretation. We agree with the Court.

THE COURT: Very well. All right. Next?

MR. BRADSHAW: So that one will be allowed over our objection?

THE COURT: Yes.

MR. BRADSHAW: Thank you, Judge.

MR. BEAN: Allowed over your objection, your objection is -- your motion to strike is denied.

THE COURT: Correct.

Tr. 108-109. Appellants' attorney also raised this issue in a Motion for New Trial which was denied. LF 30; 46-52; 174-178.

POINTS RELIED ON

POINT I. The trial court erred in failing to strike Venireperson 24, who became Juror 12, because Venireperson 24 was precluded from serving on the jury in this case according to RSMo. §494.470.1, in that Venireperson 24 repeatedly expressed a bias in favor of the Defendants and was not rehabilitated.

State v. Debler, 856 S.W.2d 641 (Mo. banc 1993).

State v. Lovell, 506 S.W.2d 441 (Mo. banc 1974).

Joy v. Morrison, 254 S.W.3d 885 (Mo. banc 2008).

RSMo. § 494.470

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

ARGUMENT

POINT I. The trial court erred in failing to strike Venireperson 24, who became Juror 12, because Venireperson 24 was precluded from serving on the jury in this case according to RSMo. §494.470.1, in that Venireperson 24 repeatedly expressed a bias in favor of the Defendants and was not rehabilitated.

A. Standard of Review

When a venireperson indicates unequivocally his ability to evaluate the evidence fairly and impartially, the trial court's decision not to strike that venireperson is reviewed for an abuse of discretion. *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 199 (Mo. App. 2012). However, the trial court has a "duty to make an independent inquiry as to a potential juror's qualifications . . . when the venireperson equivocates about his ability to be fair and impartial." *State v. Burgess*, 800 S.W.2d 743, 746 (Mo. banc 1990) (citing *State v. Wheat,* 775 S.W.2d 155, 158 (Mo. banc 1989)). The trial court's failure to conduct an independent inquiry "makes it difficult or impossible for a reviewing court to judge whether the trial court abused its discretion in refusing to strike the venireperson." *Rodgers v. Jackson Cty. Orthopedics, Inc.*, 904 S.W.2d 385, 388 (Mo. App. 1995) (citing *State v. Ealy,* 624 S.W.2d 490, 493–94 (Mo. App. 1981)). "'[I]n the absence of an independent examination by the court after equivocal responses, the appellate court is justified in conducting a more thorough review of the challenged juror's qualifications.'" *Id.* at 388 (quoting *Catlett v. Illinois C.G.R. Co.,* 793 S.W.2d 351 (Mo. banc 1990)). In this case, venireperson 24's answers demonstrate that she was biased in favor of the

Defendants. Thus, "the lack of an independent examination by the trial court … justifies a more searching consideration by the appellate court of the appropriateness" of the trial court's failure to strike for cause. *State v. Wolff*, 701 S.W.2d 777, 778 (Mo. App. 1985) (citing *State v. Holliman,* 529 S.W.2d 932, 939 (Mo. App. 1975)).

Appellants' attorney preserved this issue by raising it in a Motion for New Trial which was denied. LF 30; 46-52; 174-178.

B. Legal Analysis

RSMo. § 494.470.1 precludes from jury service any person who has "formed or expressed an opinion concerning the matter or any material fact in controversy that may influence" her judgment. A3. Venireperson 24 repeatedly stated that she would start off in favor of Defendants Mercy. Venireperson 24's statements clearly expressed an opinion concerning the case that may influence her judgment – *i.e.,* that more likely than not she would hear the case with an advantage to the defense built into her view of the evidence. Neither defense counsel nor the court asked Venireperson 24 if she would hear the case impartially, without an advantage to the defense built into how she viewed the evidence. Because the totality of the voir dire did not provide a clear, unequivocal assurance of venireperson 24's impartiality, the trial court abused its discretion in not striking her for cause.

1. The difference between RSMo. § 494.470's subsections 1 and 2.

The Missouri constitution guarantees civil litigants the right to a jury of twelve impartial jurors. Mo. Const., Art. I, Sec 22(a); A4; *Hudson v. Behring*, 261 S.W.3d 621, 624 (Mo. App. 2008). Missouri courts have stressed the importance of *twelve* impartial

jurors despite the fact a case can be decided by as few as nine. *Hudson*, 261 S.W.3d at 624.

RSMo. § 494.470 contains two subsections relating to juror ineligibility. Subsection 1 disqualifies any juror "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." RSMo. § 494.470.1; A3 (emphasis added). Thus, subsection 1 disqualifies any juror that expresses bias or impartiality about a material aspect of the case – *e.g.*, a juror with a bias for one of the parties. By contrast, subsection 2 disqualifies jurors that may not have expressed a bias or impartiality about some aspect of the case but who nevertheless have "opinions or beliefs [that] preclude them from following the law as declared by the court in its instructions." *See* RSMo. § 494.470.2; A3.

State v. Debler noted an important distinction between jurors excluded under subsection 1 versus those excluded under subsection 2. 856 S.W.2d 641, 645 (Mo. banc 1993). Because subsection 2 "focuses on opinions about 'larger issues[,] [t]o 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. Therefore, these individuals are excluded only if their views would preclude following the instructions given by the court." *Id.* (citing § 494.470.2 RSMo. Supp.1992) (internal citations omitted).

In *Joy v. Morrison*, this Court again noted:

> The difference between subsections 1 and 2 is that under subsection 1 such persons having 'formed or expressed an opinion concerning the matter or

> any material fact in controversy' shall not be sworn as a juror in the same cause. Subsection 2, on the other hand, precludes potential jurors who are unable to follow the court's instructions due to their "opinions or beliefs."

254 S.W.3d 885, 889 (Mo. banc 2008). In other words, jurors who give equivocal answers about their impartiality as to a specific aspect of the case must be struck under RSMo. § 494.470.1 without regard to whether they believe they can follow the court's instructions, whereas jurors who have general opinions about broader issues must be struck under RSMo. § 494.470.2 only if their opinions preclude them from following the court's instruction.

The juror in question in *Joy* did not express a subsection 1 bias because "[t]he opinions and beliefs expressed by [the juror] related to his opinions about lawsuits and doctors *in general* and had no relation to anything specific to the facts of the case." *Id.* at 889-890 (emphasis added). "While [the juror] may have expressed a general feeling against excessive lawsuits, it was not clear that that translated into a bias against Joy." *Id.* at 890. He "stated that neither side had 'a real advantage' in his opinion and that he could be equally fair to all parties." *Id.* Thus, the type of bias expressed by the *Joy* juror was a subsection 2 bias.

Moreover, the *Joy* juror's opinion about lawsuits and doctors *in general* did not disqualify him under subsection 2 because he gave no indication that his opinion would prevent him from following the court's instructions. *Id.*

2. Unlike the *Joy* juror who expressed a subsection 2 general opinion about medical malpractice suits, venireperson 24 expressed a subsection 1 specific opinion in favor of Defendants Mercy.

Unlike the *Joy* juror who only had a general feeling against excessive lawsuits and specifically stated that neither side had an advantage, venireperson 24 expressed a specific bias for Defendants Mercy and stated she would start off in favor of the defense.

The central issue at trial would be whose witnesses the jury believed more, either the Defendants' witnesses or the Plaintiffs' witnesses. But each side's witnesses were not starting off evenly with venireperson 24. Venireperson 24 essentially admitted that she would view the evidence at trial through a lens favorable to the defense by stating five times that she was slightly in favor of the Defendants: first, when she raised her hand to the question "is there anyone that feels they might start off the case a little bit more in favor of one party or the other?" Tr. 5, 13; second, when she responded, "maybe -- yeah, probably" to the question "would you start off with them having a touch in favor of them?" Tr. 14-15; third, when she responded, "Yep, probably" to the question "Maybe you would be slightly in favor of them?" Tr. 15; and fourth, when she responded, "Uh-huh" when asked if she was *confident in her answer* that she would be slightly in favor of Defendants. Tr. 15 (emphasis added).

When Mr. Bradshaw continued his questioning, he made it clear that his initial questions pertained to whether venireperson 24 was biased and that his next question was if she would follow the court's instructions. Tr. 17. Significantly, after venireperson 24 agreed she would follow the instructions, Mr. Bradshaw clarified that the fact that she

would follow instructions did not change the fact that she was already biased in favor of Mercy: "It doesn't change where you are in your past experiences as far as knowledge and understanding of your relationship to the defendant; is that also fair?" Tr. 17. Venireperson 24 responded, "Yes." Tr. 17. This was essentially the fifth time that venireperson 24 confirmed her bias in favor of Defendants.

In addition to these five statements, venireperson 24 explained that her sister worked as a nurse at Mercy and had worked there for twenty-five years. Tr. 25. Venireperson 24 even referred to Mercy as St. John's, which had not been the hospital's name for years at the time of trial. Additionally, like venireperson 24's sister, some of the Defendants' witnesses whose credibility she would be required to judge would be Mercy nurses.

Defendants' response to Plaintiffs' Motion for New Trial argued that venireperson 24's answers indicate that her sister worked for Mercy Hospital-Saint Louis because she used the phrase "Big St. John's." LF 86. Regardless of which Mercy entity actually employed the sister, venireperson 24 never gave any indication that she considered the Mercy entities separately in her mind when she repeatedly answered that she favored Defendants.

Moreover, subsection 1 excludes jurors whose bias *may* influence their judgment. Venireperson 24's answers about her sister working at Mercy and about her own bias for Mercy demonstrate that the Mercy connection had the *possibility* of influencing her judgment regardless of whether the entities are actually the same. In *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189 (Mo. App. 2012), the trial court took corrective action when

it realized that a party's right to an impartial jury was *possibly* infringed. In *Khoury*, defense counsel asked venirepersons to hold up their hand if they could not treat the corporate defendant the same as the human plaintiff. *Id.* at 200. Three venirepersons interpreted the question to inquire about corporate bias and disclosed that they could not be fair to defendant ConAgra, but the venireperson in question (who became an alternate juror) did not disclose potential bias. *Id.*

After the jury was seated, defense counsel found anti-corporation sentiments on that juror's Facebook page and blog. *Id*. The trial court examined the juror and asked whether he "would have answered the original voir dire question by ConAgra's counsel differently if he had understood it to be inquiring as to any interests relevant to corporations and the attachment of those interests to the possibility of corporate bias[.]" *Id.* at 201. The juror responded: "It's hard to say, to go back, *but possibly*. It just wasn't really on my mind necessarily. But, yes, *it's possible*." *Id*. (emphasis added)

> The trial judge sustained the motion to strike the alternate juror:
>
> *What I'm shooting for here is a fair and impartial jury*. And what we've got now is 15 people who have passed the muster by any way that you want to measure it. . . . *I think it's a very close call whether Mr. Piedimonte should have been removed at all.* I'm actually following through on what is my heartfelt conviction that my primary duty in voir dire is to *make sure that any opportunity for bias or prejudice to filter into the jury deliberations is extinguished.*

Id. at 201 (emphasis in original).

The Western District affirmed, holding that the trial court's decision to remove a juror "'is an appropriate remedy when there is a *possibility* of bias.'" *Id.* (quoting *Hudson*, 261 S.W.3d at 624.) (emphasis added).

Venireperson 24's five statements in favor of Defendants Mercy expressed an opinion concerning the case that may influence her judgment and, thus, required that she be struck under RSMo. § 494.470.1.

3. Rehabilitation of a juror who expressed bias requires a clear, unequivocal assurance of impartiality.

A prospective juror who has expressed a subsection 1 bias "may only be rehabilitated 'if the rehabilitation is responsive to the indication of partiality, providing there is a clear, unequivocal assurance that the juror would not be partial.'" *White v. State*, 290 S.W.3d 162, 166 (Mo. App. 2009) (quoting *State v. Edwards,* 740 S.W.2d 237, 243 (Mo. App. 1987)). Thus, "[t]o ensure impartiality where a venireperson's answer suggests bias, follow-up questions designed to elicit unequivocal assurances of impartiality must be asked." *Id.* (citing *James v. State,* 222 S.W.3d 302, 305 (Mo. App. 2007)).

In *State v. Lovell*, this Court found that a juror was not successfully rehabilitated when the juror was essentially pressured by the trial court to say that he would be impartial. 506 S.W.2d 441 (Mo. banc 1974). The potential jurors in *Lovell* were asked by defense counsel if there was any reason why they could not fairly and impartially give the defendant a fair trial. *Id.* at 442. Juror Black responded, "It's possible of all the things I read in the papers—and, to me, the policemen's hands are tied today, more or less tied,

the things they're trying to do—I feel that I could judge right on this, but I don't know." *Id.*

After juror Black continued to express concerns about being able to give the defendant a fair trial, the judge asked, "The only question in this case, Mr. Black, is whether or not you can give defendant a fair trial. Is there any reason why you cannot hear the evidence in the case and go by the instructions of the Court in deciding whether or not this defendant is guilty of the crime charged? ... Is there any reason why you cannot give this defendant a fair and impartial trial under the evidence and the law?" *Id.* at 443. Potential Juror Black responded, "I don't think so." *Id.*

Even though the *Lovell* trial court secured from juror Black the answer that he did not think there was any reason why he could not give the defendant a fair and impartial trial, this Court evaluated the juror's entire examination and not merely his final response to the judge's question. *Id.* at 444. "In exercising [its] discretion, the decision of the trial court should rest upon the facts stated by the juror with reference to his state of mind and should not be allowed to depend upon the conclusions of the juror whether he could or would divest himself *of a prejudice he admitted to exist in his mind*." *Id.* (emphasis added). *Lovell* found that "[t]he only basis for the court's ruling is the conclusion or opinion of the juror himself, and the total examination shows doubt whether Mr. Black could have accorded defendant his right, a fair and impartial trial." *Id.* "*With such doubt present*, the trial court should have excused him upon defendant's challenge for cause[.]" *Id.* (emphasis added).

Relying on the above-quoted language from *Lovell*, *State v. Carter* reversed a trial court for failing to strike juror Whaley, a former police officer who expressed a bias for police. 544 S.W.2d 334, 336 (Mo. App. 1976). Juror Whaley was asked if "as a former policeman" he could keep an open mind and he responded, "I would like to say yes, I think I can, but, I mean, it's been nine years. . . . I couldn't say one way or another if it would affect me or not. I can't say positively." *Id.* at 336. However, when asked, "Deep in your heart do you feel you could be honest and impartial?" Juror Whaley responded, "Yes, I do. I do believe that." *Id.* Later, juror Whaley was asked, "as a former police officer and just a human being, would you be more inclined to believe the testimony of a security officer or policemen just because of their position?" and he responded that there was a possibility that he would be inclined to believe the officer. *Id.* at 337.

Carter found that a "consideration of the entire voir dire examination of Whaley reveals great uncertainty in the juror's mind as to his ability to be impartial because of his past association with law enforcement." *Id.* The *Carter* court recognized the trial court's discretion but also noted *Lovell*'s direction that the trial court "'should not be allowed to depend upon the conclusions of the juror whether he could or would divest himself of a prejudice he admitted to exist in his mind.'" *Id.* (quoting *Lovell*, 506 S.W.2d at 444) "In the presence of equivocal answers by the prospective juror, the trial judge made no effort to question the juror to explore possible prejudice." *Id.*

In deciding that Whaley should have been excluded, the *Carter* court cautioned that not only should a jury "'be impartial in fact, but also if we are to hold true to our ideals and retain the confidence of the community, the jury should also give every

outward appearance of impartiality.'" *Id.* at 338. (quoting *State v. Holliman*, 529 S.W.2d 932, 942 (Mo.App.1975)). *Carter* closed with an admonishment that "retention of a juror as questionable as Juror Whaley and the resulting necessity for a new trial is an illogical expenditure of the citizenry's time and money in light of the large pool of potential jurors made available for service in criminal cases. *Errors in the exclusion of potential jurors should always be made on the side of caution*." *Id.* (emphasis added).

The admonishment to err on the side of caution and dismiss jurors who equivocate on their impartiality was reiterated in *State v. Willis*, 688 S.W.2d 38, 41 (Mo. App. 1985). In *Willis*, juror Tracy explained that because his cousin was a police officer, he "may place a little more reliance on a policeman." *Id.* at 39. When other jurors expressed that they believed a trained officer would be better than a lay witness at observing and identifying people, juror Tracy agreed. *Id.* at 40. Finally, juror Tracy was asked, "based on your relationship with your cousin and giving more weight and credibility to a police officer before you hear the testimony, whether you feel you can be a fair and impartial juror in this case." Tracy responded, "I feel I am apprehensive about it." *Id.*

The *Willis* trial court overruled the motion to strike because "I feel he has stated that his only feeling is that a police officer is a trained observer, since he agreed with the others that his only prejudice would be with that respect." *Id.* at 40.

The Eastern District reversed, finding that juror Tracy was "never rehabilitated" and disagreeing with the trial court's characterization of Tracy's bias:

> Mr. Tracy's expressed opinions went beyond a mere agreement with Veniremen Wolfe and Mulcahy that a police officer was a trained observer.

> Tracy was related to a law enforcement officer, and because of that relationship was "apprehensive" about his ability to give the defendant a fair trial. Further, the credibility of the police officers who testified was the key issue in the case, thus making the failure to strike this venireman more significant.

Id. at 41 (internal citations omitted).

Willis repeated the admonishment that "'errors in the exclusion of potential jurors should always be made on the side of caution.'" *Id.* (quoting *Carter,* 544 S.W.2d at 338).

In *State v. Hopkins*, this Court also cautioned trial courts to excuse jurors who indicate reservations about their impartiality. 687 S.W.2d 188 (Mo. banc 1985). In *Hopkins*, venireman McKay revealed that his son had been a police officer and was killed while executing a search warrant. *Id.* at 190. Venireman McKay indicated he "wanted and hoped to be impartial. At the same time, he spoke of lingering thoughts of his son, his feelings that 'somebody should have paid a little bit,' and that the anniversary of his son's death had been but one month prior to voir dire and was a particularly upsetting time." *Id.* at 191. The following exchange occurred between the trial court and venireman McKay:

> THE COURT: Now, the questions asked by counsel for the defendant was properly trying to elicit from you whether at this point you are free of any prejudice against the defendant ... and ... you indicated there was a possibility it would revive some memories. But what I want to ask is even if it revived memories, could you base your verdict solely on the evidence and the Instructions.

VENIREMAN McKAY: I certainly would try.

THE COURT: All right.

VENIREMAN McKAY: I can't say what I'm going to do. I know what I want to do, but I can't tell you what the possibilities are going to be. Like the lawyer just asked me, when we get into the trial, will it bring back things like memories of what happened. Well, yeah, there's a great possibility that can happen. Right now I have nothing.

Id. at 190.

The Supreme Court reversed the conviction because "[n]ot once did Venireman McKay unequivocally state he could try the case impartially; at most, he said he would 'try' to be impartial." *Id.* at 191.

Judge Blackmar concurred separately "simply to express concern about the many cases presented to our Court and the Court of Appeals in which a juror indicates doubt about his or her ability to function impartially, and is nevertheless continued on the panel tendered to counsel for strikes." *Id.* at 191 (J. Blackmar, concurring). Typically "the trial judge or the prosecutor will ask questions until the juror gives assurance of efforts of impartiality. The suspicion remains that the juror's initial reaction persists, and that the assurances are only what might be expected from interrogation by a high authority figure." *Id.* Therefore, trial courts "should fully sustain challenges to jurors who indicate reservations about their impartiality. *Replacement jurors are easily available in the metropolitan areas, and it should not be difficult to ensure adequate supply of jurors in other parts of the state*." *Id.* (emphasis added).

Several cases have held that questions about following the court's instructions do not address the bias expressed by the juror and, therefore, do not elicit from the juror the unequivocal assurances of impartiality required under subsection 1. In *State v. Byrd*, 646 S.W.2d 419, 422-423 (Mo. App. 1983), several veniremen indicated they would draw an adverse inference if the defendant did not testify. The Court asked, *"[e]ven those of you who expressed questions in your mind as to why a Defendant would not take the stand . . .* Under the law a Defendant has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the Defendant did not testify. That is an instruction of law." *Id.* at 423. The court asked if anyone could not follow that instruction and when no veniremen raised a hand, the court stated, "I take it by your silence that you would all follow that instruction as well as any other of the Court." *Id.* at 423.

The *Byrd* court held that the trial court should have struck the veniremen who expressed a bias regarding the defendant's choice not to testify. *Id.* Although no veniremen raised their hand when the court asked if they could follow the instructions given about not drawing an inference of guilt from the defendant's failure to testify and about the state having the burden of proof, they were not rehabilitated because "none were questioned individually as to whether they recanted from their previous statements as to how they would regard appellant's failure to testify or present evidence in his own behalf." *Id.* at 424.

In *State v. Roberts*, 604 S.W.2d 765, 767 (Mo. App. 1980), the jurors "admitted prejudice which they frankly revealed and which effectively disqualified them. The

subsequent general questions to the entire venire as to whether they would follow the instructions of the court, to which no juror responded, did not serve to rehabilitate the challenged veniremen."

Similarly in *State v. Edwards*, 740 S.W.2d 237, 241 (Mo. App. 1987), the appellate court held that the instruction read by the court did not overcome the juror's stated predisposition to believe a police officer when comparing his testimony with that of a non-police officer. "It does not touch the qualifications of a venireperson who candidly informed the court that she would tend to believe a police officer and would be uncomfortable finding against the testimony of a police officer or thereby become the subject of criticism by her husband, a former police officer, if she did." *Id.* "Where any question of partiality is raised, but not *directly* refuted by other answers and its application remains in the case in light of the evidence, then it is an abuse of discretion not to sustain a challenge for cause." *Id.* at 243.

Because the court's duty to ensure an impartial jury is so fundamental, trial courts have granted new trials after deciding they had erred in refusing to strike a biased juror. In *Tate v. Giunta*, the plaintiff had a back injury and juror Blackburn indicated he would be biased by his own back injury experience. 413 S.W.2d 200, 202 (Mo. 1967).

The plaintiff's attorney followed up asking juror Blackburn whether he could hear the evidence, weigh the medical testimony offered on each side, listen to the instructions, "and then render a verdict fair and impartially to both sides, absent any feeling that you have already developed favorable to one side or the other." *Id.* Juror Blackburn

responded, "[w]ell, I believe so, but I still think that you still have a little there that you can remember back to something like that." *Id.*

The court then inquired, "I don't think it is necessary that you be called upon to forget your own experiences because we all carry those with us, even in the jury room, but the question is can you fairly and truly decide the case between these parties based on the evidence" to which potential juror Blackburn answered, "I believe so." *Id.*

The trial court denied the defense's request to strike Blackburn: "I think the sum total of this witness' statements, a very candid statement, that like all of us he has certain things in his experience that makes him understand certain things more than something that he hasn't experienced, but he says that he can judge this case by the evidence that is on the stand and determine it according to that evidence and the instructions of the Court." *Id.*

After a verdict for the plaintiff, the trial court granted the defense's motion for new trial on the ground that Blackburn should have been struck. *Id.* at 203. On appeal, this Court affirmed the order granting the new trial because the parties agreed that plaintiff's complaints related primarily to back injuries and the trial court concluded that Blackburn would have been influenced by the back injury. *Id.* at 204.

4. Venireperson 24 was not rehabilitated because she never gave an unequivocal assurance of impartiality.

Venireperson 24 was not rehabilitated because Mr. Bean's questions were not "'responsive to [her] indication of partiality'" *White v. State*, 290 S.W.3d 162, 166 (Mo. App. 2009) (quoting *Edwards,* 740 S.W.2d at 243). "To ensure impartiality where a

venireperson's answer suggests bias, follow-up questions designed to elicit unequivocal assurances of impartiality must be asked. *Id.* (citing *James v. State,* 222 S.W.3d 302, 305 (Mo. App. 2007)).

During Mr. Bradshaw's questioning, venireperson 24 stated five times that she was biased in favor of Defendants; once she even stated she was confident in her answer. Mr. Bean interjected during Mr. Bradshaw's questioning and argued to the court, "So, Mr. Bradshaw keeps asking do they think they'll start ahead. . . That is not the ultimate question. *The ultimate question is whether their feelings are going to prejudice the way they sit and listen to the evidence* and follow the instructions." Tr. 15-16. (emphasis added). But when it was Mr. Bean's turn to question venireperson 24, he never asked whether her feelings in favor of Defendants may prejudice the way she would sit and listen to the evidence.

Mr. Bean asked venireperson 24 one question pertaining to her qualifications and the words "fair" and "impartial" were never used:

> MR. BEAN: You said you may be unfair, but then you told us you would follow the instructions. So here's the question: Your sister's a nurse, there are claims against nurses here. Can you put that aside and assure the Court that you will do your level best currently to decide this case based on what you hear in this courtroom, not what your sister has told you, not anything about Mercy, just on the evidence from that box and the judge's instructions?

PROSPECTIVE JUROR NO. 24: Yes. I've heard good and bad. I've heard both.

Tr. 97.

Venireperson 24's answer that she would do her "level best" to put aside that her "sister's a nurse, there are claims against nurses, here" and decide the case on "not what your sister has told you, not anything about Mercy, just on the evidence from that box and the judge's instructions" did not establish that she *would* be fair and impartial. Mr. Bean's question did not address the fact that venireperson 24 had clearly and confidently expressed that she would view all of "the evidence from that box" through a lens favoring the defense. Thus, Mr. Bean's questions were not "'responsive to [venireperson 24's] indication of partiality'" that she would hear the case with an advantage to the defense built into her view of the evidence. *White*, 290 S.W.3d at 166 (quoting *Edwards,* 740 S.W.2d at 243).

Mr. Bradshaw pointed out that Mr. Bean's questioning was deficient because he "didn't specifically ask the follow-up, And be fair and impartial, et cetera. He just said, Will you do your best, and she said yes. But again, she said earlier she may be unfair." Tr. 108. For all of these reasons, defense counsel's voir dire question was not responsive to venireperson 24's indication of partiality in the specific manner required to provide an unequivocal assurance of her impartiality.

But even if this Court finds that Mr. Bean's question was responsive to venireperson 24's indication of partiality, her answer that she would do her "level best" did not successfully rehabilitate her. When the rehabilitation in this case is viewed in

conjunction with the five times venireperson 24 expressed her bias, it is even more lacking than in *Lovell* where this Court reversed because juror Black had not been successfully rehabilitated.

In *Lovell*, juror Black repeatedly stated that he would have a hard time being impartial to the defendant. But, he also answered affirmatively when asked if he would "start both parties at the time, start them both equally." 506 S.W.2d at 443. Venireperson 24 said the opposite of juror Black in terms of the parties starting equally; venireperson 24 indicated that Defendants would start slightly ahead.

In *Lovell*, the trial court asked juror Black, "Is there any reason why you cannot give this defendant a fair and impartial trial under the evidence and the law?" *Id.* Juror Black responded, "I don't think so." *Id.* In this case, the trial court never fulfilled its duty to independently inquire whether venireperson 24 could give Plaintiffs a fair and impartial trial and Mr. Bean never asked questions directed at her ability to do so.

Even though juror Black eventually answered that he did not think there was any reason why he could not give the defendant a fair and impartial trial, this Court reversed because "[t]he only basis for the court's ruling is the conclusion or opinion of the juror himself, and the total examination shows doubt whether Mr. Black could have accorded defendant his right, a fair and impartial trial." *Id.* at 444.

Like Black's total examination, venireperson 24's total examination shows doubt whether she could have afforded Plaintiffs their right to a fair and impartial trial. Venireperson 24's agreement to do her "level best" to decide the case on the evidence

after indicating five times that she was biased is even less reassuring than juror Black's eventual response that he did not think there was any reason he could not be impartial.

Finally, multiple facts distinguish this case from decisions where this Court found the trial court did successfully rehabilitate biased jurors. For example, in *Ray v. Gream*, the trial court successfully rehabilitated two jurors who initially expressed a bias for the family members who were contesting a will that designated the decedent's property to non-family members. 869 S.W.2d 325 (Mo. banc 1993). The two jurors in question were Pujol and Richards. *Id.* at 331. After Pujol heard other jurors say that they would start off in favor of the family, Pujol said that he felt the same. *Id.* at 328-329. Pujol said that he could listen to the evidence but the non-family would have to overcome his presumption for the family. *Id.* at 329. He stated he could not be totally impartial. *Id.*

Juror Richards stated that she had a preconceived notion to "probably lean more toward the family. But if it could be presented, you know, where I could understand why someone would leave property to people outside their family, I could go with that. But something that [counsel] said about the [non-family] going to the hospital with their power of attorney and their will, that struck me as wrong." *Id.* at 329. Richards explained that counsel's comment put a preconceived notion in her head and would have "some influence" on if she could sit on the jury. *Id.* She was asked if she could "render an impartial decision" and she responded, "I would hope I could." *Id.* When pressed to give a yes or no, she said, "I don't know probably so." *Id.*

After several jurors expressed the opinion that property should go to family, the trial court interjected:

> The Court, during the course of this trial today, will instruct each of the jurors as to the law as it pertains to this case. And the attorneys have asked you about preconceived thoughts. And, of course, all of us have preconceived thoughts about a myriad of things especially concerning a situation like this. And it's only logical that you might have a preconceived thought.
>
> As Mr. Rost said, the $64,000 question is if you were selected as a juror, could you follow the instructions of the Court concerning the law, set aside any lifetime experience you've had or preconceived thought and decide this evidence only from the evidence that you hear from the witness stand and apply that evidence to the law that the Court will give you to guide you in this case?
>
> . . .
>
> And I believe all the people have said, well, I believe what you have should go to your family. If you polled a large segment of the community that would be probably a random selection but would tell you—a certain amount would tell you they do believe that. But the law will tell you that it is not wrong to give something to somebody else. You're not bound to give what you have to your family.

Id. at 329-330. Thereafter, the court asked Pujol, "Could you follow the law and the instructions that the Court gives you and listen to the evidence and be a fair and impartial

juror in this case" to which Pujol responded, "Yeah, I could do that." *Id.* at 330. Next, the court asked Richards if she could follow the law and evidence and she said, "Yes." *Id.*

But not every juror changed her mind. Juror Sanders was struck for cause because she told the court that even knowing more about the law and evidence that would be presented, she could not be impartial. *Id.* at 331.

Ray referenced *State v. Debler* in footnote 1 and described a subsection 1 bias as a "deep-seated and enduring bias that is often borne of a personal, specific and directly adverse experience" and a subsection 2 bias as "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.* at 332. The *Ray* jurors expressed a subsection 2 bias because they did not favor the family due to any specific opinion they had of that particular family or the facts of that case; rather, the jurors favored the family because the jurors possessed the general, broad opinion that property should be left to family. The *Ray* jurors are like the *Joy* juror who expressed a general, broad opinion about excessive lawsuits against doctors but had no particular opinion of the doctors in that case. By contrast to the *Ray* and *Joy* jurors, venireperson 24 expressed a clear bias for Defendants Mercy that stemmed from her sister working for Mercy; she did not just favor hospitals generally.

Also unlike this case, the *Ray* trial court exercised its duty to question the jurors. It also educated them that under the law "You're not bound to give what you have to your family" when it became clear that the jurors were all repeating a general opinion that property should go to family. After these comments by the court, Pujol and Richards said

they would set aside their preconceived notions when hearing the evidence and follow the law.

For all of these reasons, venireperson 24's eventual affirmative response to defense's counsel's question whether she would do her "level best" to judge the case based on the evidence and instructions – after clearly expressing her bias for Defendants Mercy – was not successful rehabilitation.

5. Trial courts must protect the constitutional right to an impartial jury by erring on the side of caution and striking jurors who express a case-specific bias.

This Court has repeatedly cautioned that trial "judges should sustain challenges to jurors whose responses make questionable their impartiality. The time saved by not doing so is not worth the serious risk it involves to defendant's right to an impartial jury, which, if violated, inevitably results on having to try the case over again." *State v. Stewart,* 692 S.W.2d 295, 299 (Mo. banc 1985). See also, *Carter*, 544 S.W.2d at 338 ("retention of a juror as questionable as Juror Whaley and the resulting necessity for a new trial is an illogical expenditure of the citizenry's time and money . . . *Errors in the exclusion of potential jurors should always be made on the side of caution*.")

This Court has also repeatedly stressed that a trial court cannot simply rely on a juror's statement that she can be fair and impartial after she already expressed bias. See *Hopkins,* 687 S.W.2d at 191 (J. Blackmar, concurring) ("In the typical case the trial judge or the prosecutor will ask questions until the juror gives assurance of efforts of impartiality. The suspicion remains that the juror's initial reaction persists, and that the assurances are only what might be expected from interrogation by a high authority figure.

Trial judges should fully sustain challenges to jurors who indicate reservations about their impartiality."). Such "interrogation by a high authority figure" was what got juror Black to "recant" in *Lovell* despite his obvious bias. *Lovell*, 506 S.W.2d at 443 ("[t]he only basis for the court's ruling is the conclusion or opinion of the juror himself, and the total examination shows doubt whether Mr. Black could have accorded defendant his right, a fair and impartial trial. With such doubt present, the trial court should have excused him upon defendant's challenge for cause[.]").

In real-world practice, the only way to ensure impartial juries is to dismiss jurors who clearly express a bias instead of trying to lasso them back into the jury box with leading questions aimed at getting them to say magic words that will only give them the appearance of impartiality. The Missouri constitution demands that jurors actually be impartial, not just appear impartial. That is why this Court did not let the *Lovell* judgment stand and should not let this judgment stand.

Venireperson 24 repeatedly admitted that she was biased in favor of Defendants and was never rehabilitated. There was no reason venireperson 24 should have been retained as a juror (especially in light of the trial court's own words, "we've got plenty of jurors."). Tr. 107. Plaintiffs were deprived of their right to have twelve impartial jurors decide their case. For these reasons, the judgment should be reversed and the case should be remanded.

CONCLUSION

The trial court committed prejudicial error by refusing to strike venireperson 24 who repeatedly expressed bias for Defendants and was never asked by defense counsel or the court if she could be fair and impartial. Because venireperson 24 was not rehabilitated after she expressed her bias for Defendant, Point I should be granted, the judgment should be reversed, and the case should be remanded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant certifies that the foregoing brief complies with the limitations contained in Rule 84.06 (b). The brief was completed using Microsoft Word in Times New Roman size 13 font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix the brief contains 8,945 words. The undersigned counsel further certifies that the brief and appendix have been scanned for viruses through the Kaspersky Anti-Virus software and were found to be virus-free.

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CERTIFICATE OF SERVICE

On this 9th day of January, 2017, electronic copies of Appellants' Substitute Brief and Appellants' Substitute Brief Appendix were placed for delivery through the Missouri e-filing system to counsel for Respondent, Kenneth Bean at kbean@sandbergphoenix.com.

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