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 REPLY BRIEF

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REPLY TO ARGUMENTS RAISED BY RESPONDENTS

Because Appellants' brief sufficiently addresses each of the arguments raised in Respondent's brief, a lengthy reply is not necessary. However, Appellants wish to reply to Respondent's claim that "Defense counsel's questioning sufficiently clarified that venireperson 24 was not biased—under section 494.470.1 or otherwise." Resp. Br. p. 28.

First, it is abundantly clear that venireperson 24 was biased. As described in Appellants' opening brief, venireperson 24 expressed her favor for Defendants Mercy five times. Once, she even stated she was confident in her answer that she was in favor of Defendants.

Second, defense counsel's questioning was not responsive to her indications of bias. Defense counsel's questioning 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.

Third, defense counsel could not have rehabilitated venireperson 24 even if he had asked her questions that were responsive to her expressions of bias because she had already stated her bias so confidently that any recantation after defense counsel's questioning would be disingenuous. "A court should assess a juror's ability to be fair and impartial based on the genuineness of his or her statements, not on whether the juror has reached a sufficient level of discomfort to reject or conceal genuinely-held feelings." *Matarranz v. State*, 133 So.3d 473, 489 (Fl. Supreme Court 2013).

In *Matarranz*, the defendant was charged with burglary and one of the potential jurors identified herself when the trial court asked if anyone thought she could not be fair.

Id. at 477. The juror explained that because her family's home was burglarized during Christmas when she was eight years old, and because one of her family members had been a victim of fraud, she was concerned she would be biased against the defendant. *Id.*

The prosecutor asked the juror if she would be able to listen to the evidence with an opened mind and she responded, "I could have an open mind about it, but it is still—knowing myself I think I would lean more towards the State of Florida. . ." *Id.* at 478. The prosecutor followed up "can you follow the law and not say I'm going to be more for the defendant or more for the State and just sit here and listen to the evidence and make the State prove our case beyond a reasonable doubt, because that is what we have to do?" to which the juror responded, "yes." *Id.* The prosecutor then asked "even though you may feel more sympathetic particular towards one side or the other. Can you put aside your feelings and sit here with an open mind and see whether or not the State of Florida at the end of the case has proved the charges of murder in the first degree against the defendant, can you do that honestly?" *Id.* The juror responded that she thought she could but maybe would lean a little more to the prosecution's side. *Id.* The prosecutor told her that she "can't lean" and then asked if she could put aside her feelings for each party "and listen to the evidence that comes forward on the case and make a determination at the conclusion of all the evidence as to whether or not the State of Florida has proved these two charges against the defendant. Can you do that, honestly?" The juror responded "yes." *Id.* at 479.

During voir dire the next day, the juror reported, "I have a more opened mind about it and I gave a thought and I have opened mind and that anything that happened to

me in the past has nothing to do with this case." *Id.*

The trial court denied the defense's motion to strike the juror for cause, explaining:

> *Having only had heard testimony from yesterday, I would have been inclined to grant it,* but her testimony yesterday includes the fact that there had been this burglary when she was eight years old, that was emotional for her because it included the theft of her Christmas toys and today based on her demeanor, I believe from her reflection, I think she was *embarrassed* and she said that she thought about it last night and she said that she felt that she had more of an opened mind today and that she could be fair and she realized that that burglary that happened to her had nothing to do with this case.

Id. at 479.

The Florida Supreme Court agreed with the defendant that the juror should have been struck. *Id.* at 490. Responding to the State's arguments that the juror was rehabilitated, the Court stressed that "[a]ssurances of impartiality after a proposed juror has announced prejudice is questionable at best." *Id.* at 485. The Court referred to its prior *Johnson v. Reynolds* decision, wherein it recognized the realities of human nature when it reversed the lower court's decision not to remove a juror for cause who acknowledged personal bias, but also appeared to reject that sentiment over the course of voir dire. *Id.* at 484. The *Reynolds* Court stated, it is "difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind,

in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?" *Id.* (quoting *Johnson v. Reynolds*, 121 So. 793, 796 (Fl. Supreme Court 1929)).

Analyzing the *Matarranz* juror's initial indications of bias and supposed recantation, the Court found:

> Although the Juror was eventually embarrassed and urged into a posture that she could distinguish her personal experiences from Matarranz's trial, the majority of her responses—and particularly her initial reactions—raised sufficient doubt as to her ability to be impartial. Initial reactions and comments from a prospective juror offer a unique perspective into whether an individual can be fair and unbiased. Here, the Juror's responses clearly indicated that she was not suited to serve in this trial. It was only after skillful lawyering and questioning that the process produced a contradiction from the Juror. Which statements do we trust?
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> . . .
>
> Any lawyer who has spent time in our courtrooms, whether civil or criminal, has experienced the frustration of prospective jurors expressing extreme bias against his or her client and then recanting upon expert questioning by the opposition, which generates such embarrassment as to produce a socially and politically correct recantation. When a juror expresses his or her unease and reservations based upon actual life

> experiences, as opposed to stating such attitudes in response to vague or academic questioning, it is not appropriate for the trial court to attempt to "rehabilitate" a juror into rejection of those expressions—as occurred here. At no point should prospective jurors feel compelled to reject genuine feelings regarding actual life experiences because courts or counsel have engaged in a dialogue that generates embarrassment, nor should our courts empanel jurors who maintain attitudes and feelings regarding the issue currently before the court that are anything but impartial.

Id. at 490.

At the beginning of the voir dire in *Matarranz*, the juror in question raised her hand when the trial court asked if anyone thought she could not be fair. *Id.* at 477. The juror's initial reaction was that she was biased. Venireperson 24's initial reaction was the same. Plaintiffs' attorney informed the venire panel that the case "involves Mercy Clinics, Mercy Clinic Physicians, as the defendant and Mercy Clinic Hospital." Tr. 5. Plaintiffs' counsel 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. Venireperson 24 raised her hand. Tr. 13.

Venireperson 24 persisted in that bias. Like the majority of answers given by the juror in *Matarranz*, the majority of answers given by venireperson 24 indicated a bias for one of the parties. Thus, even if defense counsel had been able to obtain a recantation – which Appellant does not concede occurred – such a recantation would have been disingenuous and the result of venireperson 24 giving into pressure to reject her prior,

"confident" statements of bias.

Respondents argue that if the trial court is reversed for failing to strike venireperson 24, "serious consequences will result in future cases." Resp. Br. p. 32. But those consequences described by Respondents all revolve around judicial efficiency and economy.

Judicial efficiency and economy are important but not as important as the right to trial by an impartial jury. "Our Missouri opinions declare that '(u)nder our system of jurisprudence there is no feature of a trial more important and more necessary to the pure and just administration of the law than that every litigant shall be accorded a fair trial before a jury of his countrymen, who enter upon the trial totally disinterested and wholly unprejudiced.'" *Ozark Border Elec. Co-op v. Stacy*, 348 S.W.2d 586, 590 (Mo. App 1961) (quoting *Theobold v. St. Louis Transit Co.*, 90 S.W.354 (Mo. 1905)).

Because Plaintiffs did not receive the most important trial right –the right to an impartial jury – the judgment must be reversed and a new trial must be granted without consideration of the cost.

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. The brief contains 1,995 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.

/s/ Bradley L. Bradshaw
Bradley L. Bradshaw, Mo Bar #41683

CERTIFICATE OF SERVICE

On this 14th day of February, 2017, electronic copies of Appellants' Substitute Reply Brief were placed for delivery through the Missouri e-filing system to counsel for Respondent, Kenneth Bean at kbean@sandbergphoenix.com.

/s/ Bradley L. Bradshaw
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