IN THE SUPREME COURT OF MISSOURI

NO. SC96034

THADDEUS THOMAS, a Minor, by and through his Next Friend, Marlin Thomas, and MARLIN THOMAS and MA SHERYLL JOY THOMAS, Individually,
Plaintiffs/Appellants

v.

MERCY HOSPITALS EAST COMMUNITIES d/b/a MERCY HOSPITAL – WASHINGTON and MERCY CLINIC EAST COMMUNITIES,
Defendants/Respondents

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

SUBSTITUTE BRIEF OF DEFENDANTS/RESPONDENTS *MERCY HOSPITALS EAST COMMUNITIES d/b/a MERCY HOSPITAL – WASHINGTON and MERCY CLINIC EAST COMMUNITIES*

SANDBERG PHOENIX & von GONTARD P.C.

Kenneth W. Bean, #28249
Mohsen P.K. Pasha, #67373
600 Washington Ave., 15th Floor
St. Louis, MO 63101-1880
314-231-3332
314-241-7604 (Fax)
kbean@sandbergphoenix.com
mpasha@sandbergphoenix.com

Attorneys for Defendants/Respondents

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Statement of Facts

Plaintiffs/Appellants Thaddeus Thomas, a Minor, by and through his Next Friend, Marlin Thomas, and Marlin Thomas and Ma Sheryll Joy Thomas, individually, (collectively, and hereinafter, "Plaintiffs") brought this alleged medical obstetrics negligence lawsuit in the Circuit Court of Franklin County against Defendants/Respondents 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 (collectively, and hereinafter, "Defendants"). (LF 32, 41, 44.)

A nine-day jury trial commenced on March 16, 2015 and concluded on March 26, 2015. (LF 46, 82.) Although Defendants disagree with the conclusions drawn by Plaintiffs in their recitation of the "medical facts," Defendants will not address those facts because they are not relevant to this appeal.

The only issue on appeal relates to the claimed abuse of discretion by the trial court in not striking venireperson 24 for cause. At the beginning of his voir dire, Plaintiffs' counsel stated:

> [T]his case I should also mention involves Mercy Clinics, Mercy Clinic Physicians, as the defendant and Mercy Clinic Hospital. Just 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, lines 12-18.) Notably, Plaintiffs' counsel did not explicitly identify the correct defendants in this case: Mercy Hospitals East Communities and Mercy Clinic East Communities. Venireperson 24 responded: "My sister works at the Big St. John's. She's an R.N. Are they affiliated?" (Tr. 13, lines 10-12.) After making that statement, the following exchange occurred between Mr. Bradshaw and venireperson 24:

> **Venireperson 24**: Is Big St. John's and this hospital affiliated?
>
> **Plaintiffs' counsel**: 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 –
>
> **Venireperson 24**: It's Mercy.
>
> **Plaintiffs' counsel**: Yeah, that's it, right.
>
> **Venireperson 24**: But it used to be called St. John's so.
>
> **Plaintiffs' counsel**: Right. And you will -- the child was eventually transferred to Mercy, Big Mercy as you called it, at some point.
>
> **Venireperson 24**: That's what they call it.

(Tr. 13, lines 14-25; Tr. 14, lines 1-3.) At this point, Plaintiffs' counsel still had not properly identified the defendants in this lawsuit. "Big St. John's" is a reference to Mercy Hospital St. Louis (formerly known as St. John's Mercy Medical Center), which is a separate hospital from Mercy Hospital – Washington, where this delivery took place. Plaintiffs' counsel proceeded with his questioning:

> **Plaintiffs' counsel**: 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 –

Venireperson 24: I don't think so.

(Tr. 14, lines 4-11.) At this point in the voir dire, there is no indication of bias as venireperson 24 noted that she would not give "more credibility" to the local Mercy entity. Plaintiffs' counsel, however, continued his questioning:

Plaintiffs' counsel: 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 --

Venireperson 24: Well, I've heard my sister have lots of opinions of St. John's so, you know.

Plaintiffs' counsel: 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?

Venireperson 24: I don't –maybe -- yeah, probably.

Plaintiffs' counsel: Maybe you would be slightly in favor of them?

Venireperson 24: Yep, probably.

Plaintiffs' counsel: 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?

Venireperson 24: Uh-huh.

Plaintiffs' counsel: Okay. Thank you.

(Tr. 14, lines 12-25; Tr. 15, lines 1-11.) Plaintiffs' counsel, therefore, finally convinced venireperson 24 that she might start off having a touch of favor or slightly in favor of some Mercy hospital, although it is unclear which one.

After that exchange, defense counsel asked to approach the bench and the following took place:

> **Defense counsel**: 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 [Plaintiffs' counsel] 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 [Plaintiffs' counsel] 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.
>
> **Plaintiffs' counsel**: 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 [defense counsel] can attempt to rehabilitate on his voir dire, and we'll see where we are.

Plaintiffs' counsel: All right.

(Tr. 15, lines 12-25, Tr. 16, lines 1-22.) Plaintiffs' counsel then proceeded to further question venireperson 24:

Plaintiffs' counsel: . . . 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?

Venireperson 24: Yes.

Plaintiffs' counsel: 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?

Venireperson 24: Yes.

Plaintiffs' counsel: Okay. Thank you.

(Tr. 17 at 1-15.) Plaintiffs claim in their brief that this questioning "made it clear that [Plaintiffs' counsel's] initial questions pertained to whether venireperson 24 was biased." (Pls.' Brief at 18.) As discussed below, Defendants challenge this

assertion, and point to defense counsel's questioning where this potential bias was addressed with venireperson 24:

> **Defense counsel**: Thank you. You rolled your eyes once when [Plaintiffs' counsel] 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.
>
> **Venireperson 24**: Yeah.
>
> **Defense counsel**: You did not think that had an impact. You heard lots of things from your sister.
>
> **Venireperson 24**: She's worked there 25 years.
>
> **Defense counsel**: She's worked there 25 years. Same place?
>
> **Venireperson 24**: Burn ICU – ICU unit.
>
> **Defense counsel**: Oh, the burn unit.
>
> **Venireperson 24**: Yes.
>
> **Defense counsel**: 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?

Venireperson 24: Yes. I've heard good and bad. I've heard both.

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

Venireperson 24: No, burn unit.

Defense counsel: Okay.

(Tr. 96, lines 6-25, Tr. 97, lines 1-19.) As will be discussed below, if venireperson 24 expressed bias, this exchange sufficiently clarified that she could be fair and impartial in her jury service.

Additionally, it is important to note those areas where venireperson 24 did not respond to Plaintiffs' counsel's questions regarding pro-corporate or pro-hospital bias. There are multiple examples of this. First, Plaintiffs' counsel asked:

We claim there was negligence; that is, the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances and it caused or contributed to cause harm. That's a mouthful right there, but that's just a little snippet of some of the information you will hear about.

So just having heard that information alone, is there anybody here who cannot set aside their personal experiences in life and feel they cannot sit on this jury panel just based on that information? I see no hands.

(Tr. 4, lines 12-24.) Venireperson 24 did not respond.

Second, Plaintiffs' counsel also asked:

> Anybody here who has not already spoken -- some of you have already spoken about good experiences -- that has had such a good experience with either the hospital here or somewhere else that you think you would start off a little bit in favor of the hospital because of your good experiences? I see a few hands being raised.

(Tr. 39, line 25, Tr. 40, lines 1-7.) Venireperson 24 did not raise her hand.

Third, Plaintiffs' counsel asked:

> So the judge will give you an instruction if you're on this jury about the definition of negligence, failing to use that degree of skill and learning ordinarily used under the same or similar circumstances. I think we can all agree that the vast, vast, vast majority of the time if the doctor uses his best judgment he is going to fall within the standard of care. He is not going to be negligent. But there may be times -- there may be times when a doctor says, I used my best judgment, but in using that best judgment you as a jury may say that's not doing what a reasonable doctor would do under the same or similar circumstances or as the definition is given to you. And so my concern is that jurors – I've had jurors say, Look, I know what the definition of negligence is, [Plaintiffs' counsel]. I saw that. But he used his best judgment and that's all we can ask. So even if he was negligent, I'm not going to find against him, because he used his best judgment. He did the best he could. . . . [I]s there anybody who will get back in the jury room

> and will not follow the judge's instruction if they say to themselves and the other jurors, Well, I understand that instruction, but he did the best he could and used his best judgment. Anybody who would disregard the judge's instruction?

(Tr. 46, lines 11-25, Tr. 47, lines 1-14.) When Plaintiffs' counsel asked this question to the entire jury pool, venireperson 24 did not respond.

Finally, Plaintiffs' counsel asked:

> I mentioned earlier that this is a case involving the corporation, Mercy Clinics Physicians, Mercy Clinics Hospital. Some people say that they don't like – don't want to be in cases like that. They think the person who did something wrong or was negligent or alleged to be negligent, I should say, that that's the person that needs to be sued, not the corporation. Some people say, [w]ell, no, you know, if an airline goes down because a mechanic screwed up or made a mistake, you don't always sue the mechanic; it's usually the airline that gets sued. So it's okay to sue the corporation and not bring the individual into the courtroom as a defendant. Anybody here who will have a problem, even just a little bit, finding against a corporation if they believe the corporation was negligent and under the judge's full instructions, anybody who would have a problem with finding against the corporation rather than the individual? I see no hands going up.

(Tr. 82, lines 2-22.) Again, venireperson 24 did not respond.

Plaintiffs moved to strike for cause venireperson 24. (Tr. 108-109.) The following discussion took place:

Plaintiffs' counsel: The next one is 24. She went back and forth.

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

Plaintiffs' counsel: Okay. If I could just make a record, Judge, on that one.

THE COURT: Okay.

Plaintiffs' counsel: She said that she may be unfair. [Defense counsel] 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, [a]nd 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.

Defense counsel: I disagree with his interpretation. We agree with the Court.

THE COURT: Very well. All right. Next?

Plaintiffs' counsel: So that one will be allowed over our objection?

THE COURT: Yes.

Plaintiffs' counsel: Thank you, Judge.

Defense counsel: Allowed over your objection, your objection is -- your motion to strike is denied.

THE COURT: Correct.

(Tr. 108, lines 9-25, Tr. 109, lines 1-10.) (Emphasis added.) Even in his oral motion to strike at trial, Plaintiffs' counsel noted venireperson 24 went "back and forth." The trial court denied Plaintiffs' oral motion to strike venireperson 24 for cause, (Tr. 109), and she was seated as juror 12 (LF 48, 83).

Following a nine-day trial, the jury returned its verdict on March 26, 2015, finding for Defendants. (LF 204.) Plaintiffs moved for a new trial on May 5, 2015, challenging the trial court's denial of their motion to strike venireperson 24. (LF 46-55.) Following briefing and a hearing on the motion, the trial court denied Plaintiffs' motion on July 31, 2015. (LF 30.) Plaintiffs appealed. After an opinion by the court of appeals, this Court granted transfer.

Point Relied On

I. The trial court did not err in denying Plaintiffs' for cause challenge of venireperson 24 because (1) she did not demonstrate a disqualifying bias against Plaintiffs or in favor of the Defendants; (2) if she initially demonstrated bias covered by section 494.470.1, defense counsel's questioning clarified that such a bias did not exist because she agreed to set aside her sister's status as a nurse in a different hospital, explained that she would do her "level best" to decide the case, and noted that she would decide the case without considering "anything about Mercy"; and (3) if she did demonstrate any bias, it was bias covered under section 494.470.2 and she was successfully rehabilitated because she unequivocally told both Plaintiffs' counsel and defense counsel that she could follow the court's instructions.

(Addresses Plaintiffs/Appellants' Point I)

Joy v. Morrison, 254 S.W.3d 885, 888 (Mo. banc 2008).

Ray v. Gream, 860 S.W.2d 325 (Mo. banc 1993).

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

Section 494.470, RSMo 2000.

Argument

I. The trial court did not err in denying Plaintiffs' for cause challenge of venireperson 24 because (1) she did not demonstrate a disqualifying bias against Plaintiffs or in favor of the Defendants; (2) if she initially demonstrated bias covered by section 494.470.1, defense counsel's questioning clarified that such a bias did not exist because she agreed to set aside her sister's status as a nurse in a different hospital, explained that she would do her "level best" to decide the case, and noted that she would decide the case without considering "anything about Mercy"; and (3) if she did demonstrate any bias, it was bias covered under section 494.470.2 and she was successfully rehabilitated because she unequivocally told both Plaintiffs' counsel and defense counsel that she could follow the court's instructions.

(Addresses Plaintiffs/Appellants' Point I)

Introduction

The trial court did not abuse its discretion in denying Plaintiffs' for-cause challenge of venireperson 24. First, Plaintiffs misstate the standard of review. The abuse of discretion standard applies and not "a more thorough review" as suggested by plaintiffs. Second, Judge Wood did not abuse his discretion. Judge Wood saw and heard venireperson 24, determined that she was fair and impartial, and exercised his discretion to deny Plaintiffs' for-cause challenge. The first thing venireperson 24 said was that she would not give Mercy more credibility. (Tr. 14, line 8.) Under the facts and the law, Judge Wood properly exercised his discretion. Plaintiffs' arguments to the contrary fail.

Venireperson 24 did not express a disqualifying bias under either prong of section 490.470,[1] which governs for-cause challenges against venirepersons. Section 494.470 states in pertinent part:

> 1. No witness or person summoned as a witness in any case, 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 to the injured party, accused, or prosecuting or circuit attorney in a criminal case within the fourth degree of consanguinity or affinity shall be sworn as a juror in the same cause.
>
> 2. 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 on that case.

(Emphasis added.) Venireperson 24 did not express any bias explicitly referenced in section 494.470.1, because she never formed or expressed an opinion on the matter or a material fact or issue in controversy. The reality of jury selection is that potential jurors frequently express a starting preference for one side or the other, but without more, venireperson 24 did not express a disqualifying bias.

Even if section 494.470.1 applied, venireperson 24's answers to defense counsel's questioning showed she did not expressed a section 494.470.1 bias. Venireperson 24

[1] All statutory citations are to RSMo 2000.

assured defense counsel she would set aside her sister's status as a nurse in a different hospital, explained that she would do her "level best" (with the word "level" signifying fairness in the context of the question), and noted that she would decide the case based on the evidence presented at trial, would not consider "anything about Mercy." (Tr. 96, lines 6-25, Tr. 97, lines 1-19.) Perhaps most telling, venireperson 24 told the parties and the court that she had heard both "good" and "bad" about Mercy, thus she had heard positive and negative things about Mercy, which hardly constitutes a bias against Plaintiffs.

Finally, if venireperson 24 expressed any bias, it was bias covered by section 494.470.2—and under section 494.470.2, a venireperson is excluded only if his or her views would preclude following the court's instructions. Here, venireperson 24 unequivocally explained to both Plaintiffs' counsel and defense counsel that she could follow the court's instructions, meaning she satisfied section 494.470.2.

If the voir dire testimony presented here—which showed (1) a bare possibility of bias upon Plaintiffs' counsels repeated line of leading questions; and (2) subsequent clarifications on defense counsel's questioning—is sufficient to lead to a reversal of a nine-day trial that presented no evidentiary or other issues on appeal, then serious problems will result in future cases, as will be discussed in greater detail below. Accordingly, the trial court did not abuse its discretion and Defendants respectfully request that this Court affirm.

Standard of Review

Contrary to Plaintiffs' insinuations, the abuse of discretion standard applies here. In *Joy v. Morrison*, 254 S.W.3d 885, 888 (Mo. banc 2008), this Court set out the standard

of review on this precise issue: "A trial court's ruling on a challenge for cause will be upheld on appeal ***unless*** it is clearly against the evidence and is a ***clear abuse of discretion***." (Emphasis added.) The Court also noted:

> The relevant question is whether a venireperson's beliefs preclude following the court's instructions so as to prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. A venireperson's qualifications as a prospective juror are not determined by an answer to a single question, but by the entire examination. The trial court is in the best position to evaluate a venireperson's qualifications to serve as a juror and has broad discretion in making the evaluation.

Id. (internal citations and quotation marks omitted).

Despite *Joy*'s clear pronouncement on this issue just nine years ago, Plaintiffs' suggest in their standard of review section that some standard of review more stringent than abuse of discretion applies because the trial court here did not conduct an independent inquiry of venireperson 24. (Pls.' Br. at 13-14.) Plaintiffs are wrong. In ***some*** cases, "in 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." *Rodgers v. Jackson Cty. Orthopedics, Inc.*, 904 S.W.2d 385, 387-88 (Mo. App. 1995). But a trial court need not always independently examine a venireperson after an equivocal response.

Specifically, when opposing counsel successfully rehabilitates a venireperson, a trial court's independent inquiry and an appellate court's "more thorough review" are unnecessary. In both cases Plaintiffs cite, *Rodgers* and *State v. Ealy*, 624 S.W.2d 490 (Mo. App. 1981), the courts applied the independent-inquiry rule in situations where opposing counsel did not attempt to rehabilitate.

In contrast, this Court in *Joy* explained that although the venireperson's initial answers were equivocal, the trial court did not need to conduct an independent inquiry because of opposing counsel's rehabilitation questioning. 254 S.W.3d at 891. The Court explained: "Such an inquiry was not necessary in the present matter, because any potential equivocation or possible prejudice in [the venireperson's] initial responses was cleared up by the voir dire questioning." *Id.* Therefore, the Court did not consider any form of "a more thorough review," and instead, applied an abuse of discretion standard. As discussed in greater detail below, like in *Joy*, defense counsel successfully rehabilitated any potentially equivocal response from venireperson 24, meaning an independent court inquiry was unnecessary here. There is nothing in this record to suggest that Judge Wood had any duty to make a further inquiry. To suggest that on this record would require all trial judges to voir dire every venireperson who answers any substantive questions on voir dire.

Accordingly, the abuse of discretion standard applies, as opposed to "a more thorough review." But even if this Court must conduct "a more thorough review," Missouri precedent suggests that "a more thorough review" must be done under the abuse of discretion standard. Defendants' review of Missouri precedent has not revealed a case

in which "a more thorough review" is defined as a separate standard of review from "abuse of discretion." In *Rodgers*, where the court did conduct "a more thorough review," the court explained:

> Plaintiffs correctly note that, where a venireperson's answers are equivocal as to his or her qualifications to be a juror, it is incumbent upon the trial judge to question the juror further to either confirm the lack of qualifications to serve, or to rehabilitate the venireperson. A failure to do so makes it difficult or impossible for a reviewing court to judge whether the trial court abused its discretion in refusing to strike the venireperson. For that reason . . . in 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.

904 S.W.2d at 387-88 (emphasis added) (internal citations and quotation marks omitted). The *Rodgers* court's use of the "whether the trial court abused its discretion" language combined with the "more thorough review" language indicates that "a more thorough review" is only used to determine whether an abuse of discretion occurred. Thus, "a more thorough review" is done under an abuse of discretion standard.

And as this Court has noted, the "abuse of discretion review standard is quite severe." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 73 (Mo. banc. 1999). "Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* If ***reasonable persons***

can differ about the propriety of the action taken by the trial court, then it ***cannot*** be said that the trial court abused its discretion." *Anglim v. Missouri Pac. R. Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992) (emphasis added).

Moreover, on a venireperson challenge issue, the interplay between the standard of review and the governing law is significant. This Court has reiterated multiple times that "[t]he trial court is in ***the best position*** to evaluate a venireperson's qualifications to serve as a juror and ***has broad discretion*** in making the evaluation." *Joy*, 254 S.W.3d at 888 (emphasis added); *State v. Christeson*, 50 S.W.3d 251, 264 (Mo. banc 2001); *State v. Johnson*, 22 S.W.3d 183, 187 (Mo. banc 2000). A venireperson's answer to a voir dire question is not considered in isolation, and instead, **courts analyze the entire voir dire examination**. Specifically, "[i]nitial reservations expressed by venirepersons do not determine their qualifications; consideration of the entire voir dire examination of the venireperson is determinative." *Joy*, 254 S.W.3d at 891. Further, "[i]f the trial court is convinced that a juror can be fair and impartial ***after consideration of the entire voir dire examination***, then the court is not required to disqualify a juror merely because a certain response, ***when considered alone***, raises the ***bare possibility*** of prejudice." *Andersen v. Osmon*, 217 S.W.3d 375, 379 (Mo. App. 2007). Here, the abuse of discretion standard applies, and under that standard, the facts of this case, and the law, Judge Wood's decision should be affirmed.

A. Judge Wood saw and heard venireperson 24, determined that she was fair and impartial, and exercised his discretion to deny Plaintiffs' for-cause challenge—discretion that, under the facts of this case, should not be disturbed on appeal.

Judge Wood did not abuse his discretion in refusing Plaintiffs' for-cause challenge of venireperson 24. Judge Wood was in the best position to see and hear the interplay between counsel and venireperson 24, and decided that venireperson 24 was fair and impartial. Venireperson 24 started out confused as to the hospitals involved in the litigation and then assured Plaintiffs' counsel she would not give Mercy any more credibility than the plaintiffs. (Tr. 14.) Then upon repeated leading questions, Plaintiffs' counsel swayed venireperson 24 to initially indicate that she might start off "slightly" in favor "Mercy" because of the "lots of opinions" she heard from her sister. But as this Court noted in *Ray v. Gream*, 860 S.W.2d 325, 332-33 (Mo. banc 1993):

> [A]ll of us have preconceived thoughts about a myriad of things. 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. . . . It is not every opinion of a juror concerning the matter in litigation which will operate as a disqualification. To have that effect it must be such an opinion as will influence his judgment in the consideration of the cause. . . . Opinions formed, but not of

> a fixed character, and which readily yield to evidence, do not disqualify the juror.

(Internal quotation marks omitted.) (Internal citation omitted.)

Venireperson 24's statements certainly did not express a "deep-seated and enduring bias," or an opinion "of a fixed character." In fact, in response to defense counsel's questioning, she noted that she had heard "good" and "bad" about "Mercy." Moreover, she explained that she could decide this case based solely on the evidence she heard in the courtroom and "***not anything*** about Mercy." (Tr. at 94, lines 2-14.) (emphasis added). Additionally, she told both Plaintiffs' counsel and defense counsel separately that she could follow Judge Wood's instructions. This was after she told Plaintiff's counsel she would not give more credibility to Mercy. Likewise, defense counsel framed his questioning in terms of venireperson 24's fairness. As Judge Wood recognized, the totality of the voir dire examination showed that venireperson 24 could be fair and impartial, and his discretion should not be disturbed on appeal.

Judge Wood saw and heard venireperson 24. As one appellate court noted, "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. As such, the trial court is in a far better position to determine a potential juror's qualifications than we are." *McClain v. Petkovich*, 848 S.W.2d 33, 35 (Mo. App. 1993) (internal citation omitted). Judge Wood determined that venireperson 24 was qualified to serve on the jury, and Plaintiffs' arguments to the contrary fail.

B. Plaintiffs misconstrue the statutory framework on for cause challenges:

Plaintiffs seek to disturb Judge Wood's discretion, but in doing so, misunderstand the statutory framework at issue. Section 494.470 is quite limited and states in pertinent part:

> 1. No witness or person summoned as a witness in any case, 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 to the injured party, accused, or prosecuting or circuit attorney in a criminal case within the fourth degree of consanguinity or affinity shall be sworn as a juror in the same cause.
>
> 2. 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 on that case.

(Emphasis added.)

Plaintiffs utilize the difference in language between the two subsections to contend that section 494.470.1 covers bias, while section 494.470.2 only covers the venireperson's ability to follow the court's instructions. (Pls.' Br. at 15-17.) Plaintiffs assert that defense counsel deficiently rehabilitated venireperson 24 because his questioning only addressed venireperson 24's ability to follow the courts instruction, and did not address the supposed bias she expressed. Plaintiffs, therefore, argue that this Court must analyze this case under section 479.470.1 and not section 479.470.2.

Plaintiffs are wrong because both subsections cover bias, and venireperson 24 did not express a bias covered under section 479.470.1 (which is explained in greater detailed in Subsections C and D, below). In fact, the cases Plaintiffs cite illustrate their mistake.

For instance, in *State v. Debler*, 856 S.W.2d 641 (Mo. banc 1993), this Court explained that ***both*** section 494.470.1 and section 479.470.2 cover bias. The Court first cited section 494.470.1 and explained: "One type of bias involves venirepersons who are witnesses, who have formed an opinion on the ***material facts of the case***, or who are kin to the defendant, the victim or the prosecutor. § 494.470.1." *Id.* at 645 (emphasis added). The court then noted that section 494.470.2 also covers bias:

> 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. Therefore, these individuals are excluded ***only if*** their views would preclude following the instructions given by the court. § 494.470.2.

Id. (emphasis added) (internal citation omitted). The Court did not define "larger issues." By logical deduction, "larger issues" would constitute any bias not defined under section 494.470.1. Thus, in civil cases, a venireperson is biased under section 494.470.1 if he or she: (1) is a witness at trial; (2) is related to a party or is a party; or (3) expressed an opinion concerning the matter or any material fact in controversy in the case that may influence the judgment of such person. Any other form of bias is covered by section 494.470.2. Here, venireperson 24 did not express any bias covered by section 494.470.1.

Even if her responses to Plaintiffs' counsel's questionings may have indicated a section 494.470.1 bias, defense counsel's questioning sufficiently clarified that venireperson 24 did not form or express such a bias.

C. Venireperson 24 never formed or expressed an opinion on the matter or a material fact in controversy that may influence her judgment, i.e. that she would be unfair and partial, and rather, simply responded to unclear questioning from Plaintiffs' counsel.

Venireperson 24 did not demonstrate any bias against Plaintiffs or in favor of Defendants. Plaintiffs argue that venireperson 24 expressed a bias covered by section 490.470.1 because she said she might start off with a "touch of favor" for an unidentified Mercy hospital. (Tr. 14-15.) But such statements do not fall within section 494.470.1 because they have nothing to do with the matter or any material fact in controversy. This Court's decision in *Joy* explains why.

Joy was a medical malpractice action in which the venireperson expressed skepticism over high damages awarded in lawsuits against physicians. 254 S.W.3d at 887. After noting "that things are way out of hand in the country as far as lawsuits against doctors," the venireperson stated: "I probably would be biased for the doctors." *Id.* at 892. The trial court denied the plaintiff's motion to strike the venireperson and after a defense verdict the plaintiff appealed and argued that the venireperson should have been struck for cause under section 494.470.1. This Court disagreed.

The Court explained the venireperson did not express a bias covered by section 494.470.1: "[n]othing in the record . . . suggests [the venireperson] had any knowledge

concerning ***the matter or any material fact*** in controversy." *Id.* at 889 (emphasis added). Instead, the venireperson "only had basic information, such as the fact that the litigation involved a medical malpractice action." *Id.* Thus, the Court held that "[t]he opinions and beliefs expressed by [the venireperson] 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.

Joy controls here. Venireperson 24's statements pale in comparison to the statements made by the *Joy* venireperson, who specifically stated that he would be "biased" for the defendant doctors. Section 494.470.1 is very limited and requires the venireperson to form or express an opinion on the matter or any material fact in controversy that may affect their judgment. Venireperson 24, like the *Joy* venireperson, did not make any statements that fell within the scope of section 494.470.1.

First, venireperson 24 did not form or express an opinion on any material fact in controversy in this case that may have influenced her judgment. Venireperson 24 had no knowledge about this case and expressed no opinions on the material facts of the case; rather she stated that her sister worked at a different hospital and on a different unit. These statements simply "had no relation to anything specific to the facts of the case" that were in controversy. *See Joy*, 254 S.W.3d at 889-90. Like in *Joy*, the facts in controversy were whether specific medical acts were negligent and caused injury to the minor plaintiff. Venireperson 24 made absolutely no comment on any alleged negligent acts, obstetrics, newborn care, nursing or medicine in general, and therefore, she could not have made a statement constituting an opinion about a "material fact in controversy."

Second, venireperson 24 did not form or express an opinion on "the matter." The statute does not define "matter," but "[t]he primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute . . . Absent a statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary." *State ex rel. Richardson v. Green*, 465 S.W.3d 60, 64 (Mo. banc 2015). Black's Law Dictionary defines "matter" as either "[a] subject under consideration, especially involving a dispute or litigation" or "[s]omething that is to be tried or proved; an allegation forming the basis of a claim or defense." BLACK'S LAW DICTIONARY 1067 (9th Ed. 2011). Venireperson 24 did not express an opinion about the case's subject matter or an allegation forming the basis of Plaintiffs' claim. "Mercy" was not the "matter." The "matter" was whether certain obstetrics acts fell below the applicable standard of care, which venireperson 24 did not comment upon. Venireperson 24 statements, therefore, do not fall within section 494.470.1.

Plaintiffs attempt to distinguish *Joy* from this case by claiming that the *Joy* venireperson expressed a "general" bias, while venireperson 24 expressed a "specific" bias. But the *Joy* venireperson "specifically" stated that he would be biased for the doctors, who were the defendants in that action. Additionally, the *Joy* decision did not turn on whether the venireperson expressed a "general" or "specific" bias. Instead, the Court in *Joy* focused on the categories of bias covered by section 494.470.1, and determined that the venireperson's statements did not fall into any of those categories. Like in *Joy*, venireperson 24 did not form or express any disqualifying bias referenced in section 494.470.1.

Instead, venireperson 24 made a statement that her sister worked in the burn unit (when this was an obstetrics case) at "Big St. John's," a hospital where none of the care at issue took place. (Tr. at 13, lines 10-12, Tr. at 14, lines 4-11.) Further when first asked by Plaintiffs' counsel whether she would give "them more credibility or that defendant maybe, in this case the local one" she responded "I don't think so." (Tr. 14.) Then after three questions, Plaintiffs' counsel finally convinced venireperson 24 that she "probably" would "slightly" start in favor of an unidentified Mercy entity. (Tr. at 14, lines 21-25 & at 15, lines 1-2.)

Notably, section 494.470.1 requires that formation or expression of an opinion concerning the matter or any material fact in controversy be one "that may influence the judgment of such person." Yet, Plaintiffs' counsel never asked venireperson 24 what "slightly" favor meant—would it cloud her judgment, would it influence the way she listened to the evidence, or would it bias her against Plaintiffs? Plaintiffs' counsel also never questioned venireperson 24's ability to fairly judge the evidence. Not only did Plaintiffs' counsel not ask, but also none of venireperson 24's answers indicated that her knowledge of "Mercy" gained through her sister would influence her ability to view the evidence. Plaintiffs' counsel could have easily asked these questions himself, or even asked Judge Wood to conduct additional voir dire. Plaintiffs' counsel, however, did no such thing. Perhaps this is why Plaintiffs' counsel noted in his oral motion that venireperson 24 "went back and forth."

Moreover, prior to stating that she might "slightly" favor an unidentified Mercy hospital, venireperson 24 had already stated that she would not give the defendants "more

credibility" despite her sister's employment. (Tr. 14, lines 8-11.) Additionally, venireperson 24 did not respond to any of Plaintiffs' counsels questions designed to identify pro-corporate or pro-hospital bias. (Tr. 4, lines 12-24; Tr. 39, line 25; Tr. 40, lines 1-7; Tr. 46, lines 11-25; Tr. 47, lines 1-14; Tr. 82, lines 2-22.)

The reality of jury selection is that potential jurors frequently express a starting preference for one side or the other. Such a preference, without more, does not make a potential juror biased, does not constitute a statement that a venireperson would be unfair and partial, and does not fall within section 494.470.1. Accordingly, venireperson 24 did not express any disqualifying bias covered section 494.470.1. The trial court did not abuse its discretion in denying Plaintiffs' for-cause challenge and Defendants respectfully request that this Court affirm the trial court's judgment.

D. Defense counsel's questioning sufficiently clarified that venireperson 24 was not biased bias—under section 494.470.1 or otherwise.

Even if Plaintiffs are correct that this case must be analyzed under section 494.470.1, Plaintiffs' argument still fails. Venireperson 24's responses to Plaintiffs' counsel cannot be taken in isolation. As this Court has explained, "[i]nitial reservations expressed by venirepersons do not determine their qualifications; consideration of the entire voir dire examination of the venireperson is determinative." *Joy*, 254 S.W.3d at 891.

Plaintiffs complain that venireperson 24 expressed bias for Defendants because of what she learned from her sister who worked in the burn unit at "Big St. John's," and that defense counsel only addressed whether venireperson 24 could follow the court's

instructions. Defendants disagree. Defense counsel directly addressed any presumed favoritism towards Mercy by asking if venireperson 24 could set aside what she learned from her sister and about Mercy. The questions defense counsel asked venireperson 24 covered bias *independent of* whether she could follow the court's instructions, and the essence of the questions and answers during defense counsel's questioning showed that venireperson 24 would be fair and impartial. The questioning in full stated:

> **Defense counsel**: So I think you indicated that your sister -- sister works as a registered nurse at Big St. John's.
>
> **Venireperson 24**: Yeah.
>
> **Defense counsel**: You did not think that had an impact. You heard lots of things from your sister.
>
> **Venireperson 24**: She's worked there 25 years.
>
> **Defense counsel**: She's worked there 25 years. Same place?
>
> **Venireperson 24**: Burn ICU – ICU unit.
>
> **Defense counsel**: Oh, the burn unit.
>
> **Venireperson 24**: Yes.
>
> **Defense counsel**: 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 <u>anything</u> about*

Mercy, just on the evidence from that box and the judge's instructions?

Venireperson 24: Yes. I've heard good and bad. I've heard both.

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

Venireperson 24: No, burn unit.

(Tr. 96, lines 6-25, Tr. 97, lines 1-19.) (Emphasis added.)

The totality of the voir dire examination of venireperson 24 fails to indicate anything more than an indirect relationship through her sister with a possibly affiliated Mercy hospital and the barest potential of bias either "good" or "bad." Plaintiffs complain that defense counsel did not use the words "fair" and "impartial" in his questioning. Defense counsel, however, did confront this in his question by framing the question about her being potentially "unfair." As a consequence, defense counsel (1) acknowledged venireperson 24's earlier answer where she indicated she might slightly favor an unidentified Mercy entity; and (2) framed the rest of the question to address her relationship to her sister and knowledge of Mercy.

Defense counsel then asked, "Can you . . . do your ***level best*** currently to decide this case based on what you hear in this courtroom . . . ***not anything about Mercy***, just on the evidence from that box . . . ?" (Tr. at 94, lines 2-14.) (emphasis added). Despite not using the phrase "fair and impartial," defense counsel's use of "level best" had the same impact. "Level best" implies fairness, especially in the context of the entire question.

For example, in *Sapp v. Morrison Bros. Co.*, 295 S.W.3d 470, 481-82 (Mo. App. 2009), the trial court, in denying a request to strike a venireperson, explained: "I think this is a woman who will do her very level best to be fair." The court of appeals affirmed. Yes, defense counsel did not use the word "fair" after "level best." But Plaintiffs have not cited a case that states that defense counsel must use magic words like "fair" and "impartial" to conduct a successful rehabilitation. Here, defense counsel discussed elsewhere in the same question: (1) fairness; (2) venireperson 24's sister; and (3) venireperson 24's "connection" with "Mercy." Like in *Sapp*, the term "level best" here invokes the concept of fairness.

Additionally, questions to venirepersons using the phrase "best of your ability" are commonly used by trial counsel and, quite frankly, all we can expect of a juror in voir dire. In fact, here, Plaintiff's counsel used a similar phrase when he asked venireperson 24 :

> **Plaintiffs' counsel**: . . . 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?
>
> **Venireperson 24**: Yes.

(Tr. 17, lines 1-9.)

Defense counsel, therefore, inquired into venireperson 24's sister's employment at "Big St. John's" and whether venireperson 24 could set aside what she heard from her

sister and any knowledge about Mercy. In response, venireperson 24 gave an unequivocal "Yes" answer. Defense counsel's questioning satisfied Plaintiffs' flawed interpretation of section 494.470, and venireperson 24 made no statement covered by section 494.470.1. The trial court, therefore, did not abuse its discretion.

E. Venireperson 24 was not disqualified under section 494.470.2.

If venireperson 24 expressed any bias, section 494.470.2, and not section 494.470.1, governs this case's analysis. Because venireperson 24's statement clearly did not fall under section 494.470.1, the analysis shifts to section 494.470.2, under which "individuals are excluded ***only if*** their views would preclude following the instructions given by the court." *Debler*, 856 S.W.2d at 645. Despite venireperson 24's statement that she would "slightly" favor an unidentified Mercy entity, she told ***both*** attorneys on separate occasions that she would follow the court's instructions. (Tr. 17, 96.) Venireperson 24's response, therefore, satisfied *Debler*, *Joy*, and section 494.470.2 because she unequivocally stated that her earlier answer that possibly indicated unfairness would not preclude her from following the court's instructions. Venireperson 24 also did not make a statement covered by section 494.470.1. Accordingly, the trial court did not abuse its discretion in denying Plaintiffs' for-cause challenge.

F. If Judge Wood's discretion is ignored, serious consequences will result in future cases.

If the voir dire testimony presented here—which showed (1) a bare possibility of bias upon Plaintiffs' counsels repeated line of leading questions; and (2) subsequent clarifications on rehabilitation—is sufficient to lead to a reversal of a nine-day trial that

presented no evidentiary or other issues on appeal, then serious problems will result in future cases. For example, if a mere second-hand vague familiarity through a relative with a business potentially related to a defendant is sufficient to disqualify a venireperson under section 494.470.1, it would be nearly impossible to seat a jury in case involving a large corporate defendant. Courts have an interest in judicial efficiency and must protect the jury pools. If Judge Wood's decision is reversed, circuit clerks will need to summon two or three times the current number of jurors summoned for jury duty. Counsel on both sides will have to ask significantly more questions and voir dire will take hours-upon-hours. Trial judges will need to voir dire each venirepereson who answers any substantive question. Finally, unnecessary appeals involving alleged juror bias will run rampant.

Yes, Plaintiffs' correctly assert their right to a fair trial. But there was nothing unfair about this nine-day trial. If venireperson 24 expressed bias, she was rehabilitated. Moreover, the defense is also entitled to a fair trial and a balanced jury pool, which happened below. Finally, potential jurors have the right to serve—a right which may be impeded if this Court reverses the trial court's judgment.

Accordingly, the trial court did not abuse its discretion in denying Plaintiffs' for-cause challenge. This Court has reiterated multiple times that "[t]he trial court is in ***the best position*** to evaluate a venireperson's qualifications to serve as a juror and ***has broad discretion*** in making the evaluation." *Joy*, 254 S.W.3d at 888 (emphasis added); *State v. Christeson*, 50 S.W.3d 251, 264 (Mo. banc 2001); *State v. Johnson*, 22 S.W.3d 183, 187 (Mo. banc 2000). Judge Wood—who had been on the bench since 2001—heard and saw

venireperson 24. Judge Wood denied the Plaintiffs' motion immediately; it was that clear to him. After stating that she might "slightly" favor "Mercy," Venireperson 24 stated that she would (1) do her level best (with "level" signifying fairness); (2) put aside what he sister had told her—"good" and "bad"—and anything she had heard about "Mercy"; (3) decide the case solely based upon what she heard in the courtroom; and (4) follow the instructions. Quite frankly you cannot ask more of a juror.

Venireperson 24's sister worked at a different hospital, and in a different specialty. She explained that she would not give "Mercy" more credibility After reviewing the entire voir dire testimony, the trial court's decision to deny the motion to strike does not shock the conscience or amount to "a judicial act which is untenable and clearly against reason and which works an injustice." *Egelhoff v. Holt*, 875 S.W.2d 543, 550 (Mo. banc 1994). Defendants, therefore, respectfully request that this Court affirm the trial court's judgment.

G. The cases Plaintiffs cite are distinguishable.

Plaintiffs rely on a variety of cases to support their position, but those cases are easily distinguished and do not control here.

1. *Rogers v. Jackson County Orthopedics, Inc.* does not apply because defense counsel there did not conduct a rehabilitation inquiry.

Plaintiffs cite *Rogers v. Jackson County Orthopedics, Inc.*, 904 S.W.2d 385 (Mo. App. 1995), to argue that appellate courts have reversed trial courts for failing to strike a juror who expressed a bias and never gave an unequivocal assurance of impartiality. But in *Rodgers*, after the venireperson gave an equivocal response, defense counsel *did not*

attempt to rehabilitate, and the trial judge did not conduct any additional voir dire. *See id.* at 387. Thus, *Rodgers* is inapposite because here, defense counsel successfully rehabilitated venireperson 24 and she gave an unequivocal response that she would do her level best to decide the case based on the evidence and the judge's instructions.

2. *State v. Hopkins* and *Tate v. Guinta* do not apply because the venirepersons in those cases responded to rehabilitation questioning by expressing indecision as to their future case analysis.

Plaintiffs reliance on *State v. Hopkins*, 687 S.W.2d 188 (Mo. banc 1985), and *Tate v. Guinta*, 413 S.W.2d 200 (Mo. 1967), is also misplaced. In both case, the venirepersons in question qualified their responses with statements indicating future uncertainty as to how they would analyze the case at trial. *Hopkins*, for example, involved a capital murder trial and the venireperson's son was a police officer who was killed in the line of duty. 687 S.W.2d at 189. After being asked "even if [the case and testimony] revived memories [about his son's murder], could you base your verdict solely on the evidence and the Instructions," the venireperson responded "I certainly would try"—but then added:

> 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.

A similar situation occurred in *Tate*. There, the plaintiff's claim involved a back injury, and the venireperson in question also had a back injury that never fully healed. 413 S.W.2d at 201. Plaintiff's counsel, who was attempting to rehabilitate, asked a similar question to the one asked by defense counsel here:

> The question, as I understand the law anyhow, is whether or not you could hear the evidence that would be developed at this trial, weigh the medical testimony offered on each side, listen to the Court's 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. Now, can you do that or not?

Id. at 202. The venireperson response responded, "Well, 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 *Tate* trial court granted the plaintiff's motion for new trial and the appellate court affirmed, again deferring to the discretion and judgment of the trial court.

Unlike in *Hopkins* and *Tate*, venireperson 24 did not qualify her answers. And also unlike in *Hopkins* and *Tate*, she did not express uncertainty regarding her future ability to analyze the case. Instead, venireperson 24 gave an unequivocal "Yes" when being asked if she could do her level best to decide the case based upon the evidence presented, ignoring her sister's relationship with "Big St. John's," and follow the court's instructions.

3. Judge Blackmar's *Hopkins* concurrence does not control here because his concern was with regard to elected officials and not private attorneys.

Plaintiff also places heavy reliance on Judge Blackmar's concurrence in *Hopkins.* There, Judge Blackmar stated:

> I concur, and write separately simply to express concern about the many cases presented to our Court and the Court of Appeals in which a juror indicates doubt about his or her ability to function impartially, and is nevertheless continued on the panel tendered to counsel for strikes. In the typical case the trial judge or the prosecutor will ask questions until the juror gives assurance of efforts of impartiality. The suspicion remains that the juror's initial reaction persists, and that the assurances are only what might be expected from interrogation by a high authority figure.

687 S.W.2d at 191 (Blackmar, J., concurring). Defense counsel did not ask multiple questions to receive an assurance. Instead, he only asked one question and venireperson 24 responded unequivocally. Rather, Judge Blackmar's concurrence warns against the type of questioning Plaintiffs' counsel utilized. Plaintiffs' counsel needed three questions before he finally convinced venireperson 24 that she might favor an unidentified Mercy entity.

Additionally, *Hopkins* was a criminal matter and the "high authority figure" language refers to judges and prosecutors who are often elected or appointed and do hold high office. A private attorney is not elected and has no sway over ordinary jurors.

4. *State v. Lovell* is inapposite because venireperson 24 did not express any indication that she would hold Plaintiffs to a higher standard than instructed by the court.

The concerns that the court expressed in *State v. Lovell*, 506 S.W.2d 441 (Mo. banc 1974), also do not exist here. *Lovell* involved a felony conviction and a juror who repeatedly told the prosecutor and the defense attorney that based upon media coverage it seemed like the police had their hands tied and that the defendant may have a greater burden than the one imposed on the state. *Id.* at 442-43. The trial court denied the defense's motion to strike the juror and the Supreme Court reversed, noting:

> [H]e believed the hands of police officers were tied that he might feel a defendant should have a greater burden in his own defense than that imposed upon him by the standard of reasonable doubt, and that he might have trouble adhering to that rule; that he would try to judge properly, but that he might be affected by his feelings, and they might remain in the back of his mind if he sat on the case.

Id. at 444. Thus, *Lovell* involved a case where the juror was going to impose a higher burden of proof on the prosecution, which is not applicable here.

Plaintiffs argue that this case presents an even stronger showing of a lack of rehabilitation than in *Lovell* because the *Lovell* venireperson answered affirmatively when asked if he would "start both parties at the time, start them both equally." *Id.* at 443. Plaintiffs, however, ignore that a court's decision to strike a venireperson for cause depends on the entire voir dire. The entire voir dire questioning in *Lovell* presented

significant concerns not present here and this actually proves the defense's point; it is not where a venireperson starts out, but rather, how they will view the evidence. As noted earlier, section 474.710.1 requires some proof that the opinions expressed by the venireperson on the matter and issues may influence their judgment; that proof is lacking here.

Here, venireperson 24 gave an emphatic "Yes" when asked if she could do her level best to decide the case and follow the court's instructions. Moreover, unlike in *Lovell*, venireperson 24 did not call into question her ability to follow rules, or that she would be affected by her feelings, or that her sister's position at a Mercy entity (that was not even in the case) would remain in the back of her mind, or that she would impose a greater burden on Plaintiffs. She gave one response indicating that she might slightly favor an unidentified Mercy entity, but later confirmed that she would decide the case based upon the evidence, put aside her feelings about Mercy, and follow the court's instructions.

5. *Khoury v. Conagra Foods, Inc.* also does not apply because it arose in a different procedural context.

Plaintiffs also cite *Khoury v. Conagra Foods, Inc.*, 368 S.W.3d 189 (Mo. App. 2012). In *Khoury*, the court excused a juror already selected and seated an alternate after learning that the juror was posting on Facebook about "corporate criminals"—despite the juror failing to respond to a voir dire question about corporate bias. *Id.* at 200. Faced with that information, the court questioned the juror and determined that he probably did not understand the questions asked of him during voir dire and if he had fully understood,

there was a chance that the court would have found him biased against the corporate defendant. *Id.* This is markedly different from the issues presented here.

Here, there is nothing in this case that "so clearly indicated a possible bias" as Plaintiffs suppose. First, there is no indication that venireperson 24 misunderstood any of the questions posed by Plaintiffs' counsel regarding bias towards Defendants during examination. Further, unlike in *Khoury*, venireperson 24 did not fail to answer questions regarding her feelings about Defendants. In fact, venireperson 24 admitted that she "heard good and bad" about "Mercy." (Tr. at 94, lines 2-14.) If anything, this could be construed as a possibility of bias against one or both defendants.

A key conclusion of the *Khoury* decision is not whether the possibly biased juror was removed or not. In fact, the court concluded either decision would have survived appellate review. 368 S.W.3d at 202. Instead, the critical factor is the deference to the trial judge to exercise his or her discretion in making such "close calls" based on the ability to "eyeball" the prospective jurors and evaluate their ability to discharge their duties. *Id.* That same difference applies here and there is no reversible error.

H. This Court's decisions in *Joy v. Morrison* and *Ray v. Gream* provide comparable factual scenarios to the one here and indicate that venireperson 24 was successfully rehabilitated.

Instead of Plaintiffs' cited cases, Defendants respectfully request this Court be guided by *Joy* and *Ray v. Gream*, 860 S.W.2d 325 (Mo. banc 1993).

With regard to *Joy*, venireperson 24 she did not provide multiple expressions of doubt like the *Joy* venireperson, or express any equivalent to the deep-seated beliefs

expressed by the *Joy* venireperson. As noted above, the *Joy* venireperson stated that he would be biased for the doctors in a medical malpractice action. In light of that bias, defense counsel attempted to rehabilitate the venireperson by asking if he would decide the case based upon the evidence, and even after assurances noted: "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." *Id.*

The *Joy* venireperson, therefore, had a deep-seated belief against awarding high damages in cases against physicians, and he stated he would be biased in favor of the doctors (the individuals being sued in *Joy*). He repeated that belief on multiple occasions, but subsequently reassured the court that he could be fair. This Court found that reassurance sufficient to affirm the trial court's denial of the plaintiff's for-cause challenge. *Id.* at 891. The Court explained:

> Mere equivocation is not enough to disqualify a juror. If the challenged venireperson subsequently reassures the court that he can be impartial, the bare possibility of prejudice will not deprive the judge of discretion to seat the venireperson. Initial reservations expressed by venirepersons do not determine their qualifications; consideration of the entire voir dire examination of the venireperson is determinative.

Id. at 890-91. Taking that standard into account, the Court held that although "[the venireperson] may have expressed a general feeling against excessive lawsuits, it was not clear that that translated into a bias against [the plaintiff]." *Id.* at 890. The Court,

therefore, concluded that "trial court did not abuse its discretion in finding that the tenor of his testimony overall was that he would be fair and impartial." *Id.*

Like in *Joy*—and considering the entire voir dire examination—the overall tenor of venireperson 24's testimony was that she would be fair and impartial. Defense counsel queried venireperson 24's ability to ignore any possible impartiality she might have had towards any Mercy entity by stating "not anything about Mercy" when he asked if she was able to do her "level best" when hearing the case. "Level best" implies fairness. Venireperson 24 gave an unequivocal "Yes" answer. Defense counsel's questioning, therefore, satisfies Plaintiffs' flawed interpretation of section 494.470.

In *Ray*, a will left property to non-family members. 860 S.W.2d at 326. The testator's family members challenged the will, arguing that the will failed to comply with statutory requirements for the execution of wills as well as fraud and lack of testamentary capacity. *Id.* at 327. During voir dire, several members of the jury pool stated that they were against leaving non-family members property through a will. *Id.* at 327-29. This essentially amounted as bias against the non-family members/will proponents. The trial judge then conducted an independent inquiry:

> THE COURT: Let me kind of—We've worked ourselves into a box here and we're getting deeper and deeper. 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?

Id. at 329. The trial court did not strike the juror and the Supreme Court affirmed, explaining:

> Although those jurors initially indicated a bias in favor of the family members contesting the will and against the non-family members who were proponents of the will, the court found, after its independent inquiry, that the jurors could set aside any "preconceived notions" and judge the case fairly and impartially by the facts presented and the applicable law.

Id. at 332.

Like in *Ray*, venireperson 24 expressed a possible preference towards one party when she stated "probably" would "slightly" start in favor of an unidentified Mercy defendant. But then defense counsel conducted rehabilitation questioning—and his question was quite similar to the trial court's question in *Ray*. Venireperson 24 then answered affirmatively and unequivocally to a question asking if she could do her level

best and follow the court's instructions. Defense counsel's question and venireperson 24's answer, therefore, constituted a successful rehabilitation.

As *Joy* explained, "[t]he critical question in these situations is always whether the challenged venireperson indicated unequivocally his or her ability to fairly and impartially evaluate the evidence." 254 S.W.3d at 891. Venireperson 24 made that unequivocal indication. The trial court, therefore, did not abuse its discretion in denying the motion to strike.

Conclusion

The trial court did not abuse its discretion when it denied Plaintiffs' motion to strike venireperson 24 for cause. The trial court listened to the entire voir dire, observed the demeanor of venireperson 24, and in its discretion, determined that venireperson 24 did not express a disqualifying bias or had been successfully rehabilitated; there was no abuse of discretion.

WHEREFORE Defendants pray this Court affirm the judgment of the trial court.

SANDBERG PHOENIX & von GONTARD P.C.

By:*/s/ Kenneth W. Bean*
Kenneth W. Bean, #28249
Mohsen P.K. Pasha, #67373
600 Washington Ave., 15th Floor
St. Louis, MO 63101-1880
314-231-3332
314-241-7604 (Fax)
kbean@sandbergphoenix.com
mpasha@sandbergphoenix.com

Attorneys for Defendants/Respondents

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The undersigned certifies a copy of this brief was filed electronically this 30th day of January, 2017, causing automated delivery to the following counsel of record:

Bradley L. Bradshaw, #41683
C.J. Moeller, #39238
1736 E. Sunshine, Suite 600
Springfield, MO 65804
Tel: 417-889-1992
Fax: 417-889-9929
brad@bradbradshaw.com

/s/ Kenneth W. Bean
Kenneth W. Bean

Attorney for Defendants/Respondents

Rule 84.06(c) Certificate of Compliance

The undersigned counsel, attorney of record of Respondents, certifies as follows:

1. This brief complies with the requirements of Rule 55.03;

2. This brief complies with the limitations in Rule 84.06(b) because the brief contains 11,535 words. This word count includes the entire brief, with the exception of the cover, the certificate of service, the certificate required by Rule 84.06(c), and signature block;

3. This brief has been prepared in a proportionally spaced typeface (13-point Times New Roman) using Microsoft Word 2010 for Windows.

/s/ Kenneth W. Bean
Kenneth W. Bean

Attorneys for Defendants/Respondents