IN THE SUPREME COURT OF MISSOURI

No. SC 95890

JOSEPHINE WILSON,
Appellant,

v.

P.B. PATEL, M.D., P.C., and ROHTASHAV DHIR, M.D.,
Respondents.

Appeal from the Circuit Court of Buchanan County, Missouri
Fifth Judicial Circuit
Hon. Weldon C. Judah, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff appeals from a judgment for defendants in a medical malpractice. She claims Rohtashav Dhir, M.D., and his employer P.B. Patel, M.D., P.C., performed an unnecessary procedure on December 8, 2009, in St. Joseph, MO, which caused a tear in her esophagus. This Court has jurisdiction by reason of its order transferring the cause from the Court of Appeals after opinion under Rule 83.04. Missouri Const., Art. 5, §9; Rule 83.09.

STATEMENT OF FACTS

A. *General Factual Background.* Josephine Wilson had a history of acid reflux and trouble swallowing; she had been treated for them since about 2000 (Tr. 506-7). She underwent balloon dilation of her esophagus for reflux in 2004 and 2005 (Tr. 507, 635, 678-9) which provided some long-term relief (Tr. 508).

Mrs. Wilson saw Dr. Scott Knappenberger, an ear, nose and throat specialist, on September 21, 2009, and a couple times afterward (Supp.Tr.-Knappenberger 6-13). His initial and final diagnoses, after three examinations, a CT scan and some treatment, were chronic pharyngitis (inflamation of the throat lining) and globus sensation (subjective feeling

of something stuck in the throat, resulting in difficulty swallowing, but without physical findings to suggest an abnormality) (id. 14-24). He referred her to a gastroenterologist--Dr. Dhir--for consultation and evaluation (id. 20-21, 25-27, 48-50, 54). He did not request, would not have requested, and would not have authorized his office staff to request, that Dhir perform an esophagogastroduodenoscopy ("EGD," or sometimes "endoscopy") (id. 48-52).

Dhir first saw Mrs. Wilson in his office on December 2, 2009, and prescribed medication for her reflux (Tr. 381-2, 427-8, 438, 449-50). An appointment was set for an EGD on December 8 at an outpatient clinic he and others owned (Tr. 382-3). An endoscope is used to visualize the esophagus and stomach down to the duodenum (Tr. 411-2, 415, 679-80).

Dhir found a normal duodenum -- "nothing in the duodenum that would stimulate any further action on my part or important to be noted" (Tr. 384-5). He found gastritis in her stomach, and a single polyp near the top of the esophagus which he removed with forceps (Tr. 384-5). His operative report stated her "GE junction [where the stomach meets the esophagus] and the esophagus appear to be normal" (Tr. 385). Dhir found nothing about her esophagus that he felt needed to be recorded in the medical record (Tr. 386, 774). Had Dhir found any inflamation, cancer, irritation, infection, swelling, strictures,[1] dilation,[2] scarring,

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[1]Strictures are narrowed areas of the esophagus (Tr. 406).

[2]"[D]ue to some disease conditions," the esophagus "may itself dilate [or] be larger than it normally would be" (Tr. 407). That meaning of "dilated" is to be distinguished from a physician's act of stretching or enlarging a narrowed area (Tr. 407-8).

retained food or fluid, structural disorder, or erosion, he would have recorded that (Tr. 386-7, 389-91, 392-6, 771-3). His note is silent as to all of those things (Tr. 389-96).

Esophageal Dilation. Although the EGD was normal, Dhir performed an esophageal dilation procedure (sometimes called "dilatation") or stretching of Mrs. Wilson's esophagus (Tr. 680-1). He used a 51-French Savary guidewire dilator for that procedure, which is a solid, rubbery large bore dilator (Tr. 387-8, 653, 683). The process was described in testimony (Tr. 680-1). As the dilator is manually pushed down the esophagus, the doctor is supposed to feel for resistance of the dilator going through a narrowing (Tr. 681, 684). Dhir testified the "dilation went smooth" and he felt nothing other than the expected mild resistance (Tr. 388, 775). He saw no scarring (Tr. 772-3) and did not record that he was breaking up scar tissue (Tr. 775).

Upon withdrawal of the dilator, he noticed the guidewire was kinked (Tr. 388). Dhir then performed another endoscopy of plaintiff's esophagus and observed a tear in the esophageal lining that he concluded had been caused by his dilation (Tr. 388-9). One of the risks of dilation is tearing or perforating the esophagus (Tr. 415-6, 455-6).

It is plaintiff's theory the esophageal dilation was unnecessary, and thus below the standard of care, because she had a normal esophagus without signs or findings of a stricture or other abnormality, and so no reason to stretch it (Tr. 406-8, 436-8, 443-4, 448, 463).[3]

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[3]When this procedure is performed on a normal esophagus it is called an empiric dilation (Tr. 406).

Plaintiff's expert Dr. Richard Dwoskin testified that the standard of care established in 2006 and applicable in 2009 was, "Don't dilate unless you see a structural abnormality" (Tr. 413-4, 435-7, 443-4). Guidelines published by the American Society for Gastrointestinal Endoscopy in 2006 and 2014 are consistent with that standard (Tr. 405-6, 444-8, 450, 452-5, 475-6), although compliance is not absolutely mandatory in all situations (Tr. 446-7). Mrs. Wilson's dysphagia[4] was caused by reflux and could have been treated with medication alone because she was responding well to that (Tr. 427-8, 437-8, 448-50, 677). Empiric dilation fell out of favor by 2006 because medical research since failed to establish any benefit to dysphagia patients that outweighed the risks, and medication was effective and less risky (Tr. 413-4). Defendants should have continued treating plaintiff with medication, set a follow-up appointment, and evaluated her progress at that future time (Tr. 437-8). Plaintiff does not contend the EGD was unnecessary, or that the dilation technique itself was substandard or negligent (Tr. 455-7).

Defendants contend Dhir exercised his judgment in deciding to perform the dilation because he believed it would help Mrs. Wilson (Tr. 344-6). His stated reason for the dilation was to address her "symptoms of dysphagia with food getting stuck in the upper esophagus and losing weight because she could not eat because of that" (Tr. 392, 731, 740-1).

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[4]"Dysphagia is just the sensation of trouble swallowing" (Tr. 443). It could be caused by many things including a "structural abnormality of the esophagus, or it can be an abnormality in the central nervous system," or a stroke or various diseases (id.).

Both sides agreed that during the course of the procedure her esophagus was perforated which required emergency repair surgery (Tr. 338-9, 345, 696; Supp.Tr.-Zink p. 23). That plaintiff's injuries stemmed from the dilation was never in dispute (Tr. 368).

Dr. Robert Zink, a cardiothoracic surgeon, repaired the esophageal tear, describing the surgery in detail, along with her recovery and prognosis (Supp.Tr.-Zink pp. 9-22, 24-6). After opening her left chest wall, spreading the ribs and exposing her esophagus during that surgery, Zink observed no esophageal abnormalities other than the 4mm tear, no fibrous tissues and no abnormal tissues (id. pp. 11-13, 24-5).

Dhir's expert Dr. William Ginsberg, a gastroenterologist, disagreed with Dhir, Zink and Dwoskin, opining her esophagus was not normal. He stated she had a stricture that Dhir failed see during the endoscopy (Tr. 654-5) and failed to appreciate as he performed the dilation (Tr. 726). He inferred the presence of a stricture from the fact of the esophageal tear on dilation (Tr. 662, 721).

B. *Facts Relating to Points on Appeal.*

POINTS I and II: Informed Consent. Plaintiff pursued only one theory at trial, that defendants performed an unnecessary esophageal dilation (Tr. 332, 343, 406, 435-6, 443-4).[5]

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[5]Notwithstanding ¶6 of the petition (LF 16), both sides had agreed and the court understood before voir dire that all other theories were expressly abandoned (Tr. 345-6) because plaintiff's expert (Dr. Richard Dwoskin) had given just one standard-of-care opinion against defendants in his deposition--that the esophageal dilation was unnecessary.

Plaintiff contended the procedure was unnecessary because, in his December 2, 2009, office note (from Plt.Exh. 3; App A5-A7) after her first appointment with him, Dhir wrote (in part):

> An EGD will be performed. The procedure was discussed with the patient today. The patient voices understanding. She might need dilation of the esophagus depending on the findings. (App A7; Tr. 429)

Mrs. Wilson testified that, after the 12/2/2009 office visit, an esophageal dilation was conditioned upon a medical finding of a stricture or other problem only (Tr. 511-2). She said she understood after that office visit that Dhir "was going to go in and do a scope like Dr. McCormick had done [in 2004 and 2005], and if there was any problem, that he would fix it like Dr. McCormick had done in the past" (Tr. 511). She told Dhir that if he saw "something wrong" he should "take care of it" (Tr. 511). Plaintiff testified that Dhir did not tell her that he "would stretch your throat even if he didn't see anything wrong" and she "would not expect him to stretch something that didn't need to be" inasmuch as she had had EGDs without dilation before (Tr. 511). But if he found a stricture or some problem with her throat, she "probably would have had him do like McCormick had done before" (Tr. 511-2).

Plaintiff's sole theory was that the dilation was unnecessary because Dhir found a normal esophagus. She did not plead the elements of a "failure to provide informed consent" theory, did not offer or attempt to offer lay or expert evidence sufficient to support a submission on that theory, and did not proffer an instruction setting out that theory.

Dhir agreed that his recommendation was to perform an EGD (Tr. 609), and agreed

"she might have [a need] for a dilation of the esophagus, depending on the findings" (Tr. 610, 764-5). He agreed he found nothing worth reporting (Tr. 771-775).

The first mention of "informed consent" was in defendants' opening statement (Tr. 345, 362-3). The next came during defense counsel's cross-examination of plaintiff, in which she was shown "an informed consent" document dated 12-8-09 (Tr. 552-3). That two-page consent form is MR1957-1958 and is part of Def.Exh. 201 (App A8-A9). It lists the Proposed Procedure as "Esophagogastroduodenoscopy w/ Biopsy" and is entitled "Consent to Treatment and Rendering of Other Medical Services," not "Informed Consent." It reads in part:

> We are required to obtain your consent for your planned surgery/medical procedure. What you are being asked to sign is a confirmation that your doctor has discussed the nature and purpose of the surgery/medical procedure and the risks and benefits associate with it. . . . By reading and signing this document, you agree to the following:
>
> 1. I understand that medical procedures and operations may involve risks, unsuccessful results, serious complications, injury, or even death, from both known and unknown causes, and no warranty or guarantee of success has been made regarding results or cures.
>
> 2. My doctor has explained the nature of the surgery/medical procedure, the risks and benefits, possible complications, expected benefits or effects, and alternative treatment available to me and has answered all the questions that

I asked. The information has been presented in a clear manner that I understand. . . .

5. I authorize my doctor to perform any other incidental/minor surgery or medical procedure that, in his/her judgement is medically necessary for my well-being. In some cases, my doctor will not be able to identify ahead of time just what the additional surgery/medical procedure might be. I understand this. If there are surgeries or procedures that I do not want performed, I have informed my doctor. . . .

My signature below certifies (1) that I have read and understood the information provided in this form; (2) that the surgery/medical procedure noted above has been adequately explained to me by my doctor; (3) that I have had a chance to ask questions; (4) that I have received all of the information I need concerning the surgery/medical procedure; (5) that I accept any substantial and significant risks of the procedure; and (6) that I authorize and consent to the performance of the surgery/medical procedure.

When asked if her signature appeared at the bottom of that document, plaintiff acknowledged that it was (Tr. 552). She said she was handed that form to sign along with several others "right before you go in for surgery," did not read all 14 paragraphs of it before signing, and did not understand it (Tr. 552-4). She was only told that it was a "consent form to do surgery" (Tr. 554). She was "aware prior to the EGD and dilation that [she] had with

Dr. Dhir in December of 2009 that he might dilate [her] esophagus" (Tr. 553).

The next mention of "informed consent" occurred in direct exam of defense expert Ginsberg (Tr. 649). Dhir testified he discussed the risk of perforation and other risks with Mrs. Wilson before the surgery (Tr. 393-4, 611, 733), but the next two references to "informed consent" came later when Dhir was asked in direct exam whether, before patients undergo a procedure at the outpatient surgery center, "they are asked to sign an informed consent document" (Tr. 731). Plaintiff's "relevancy" objection was overruled (Tr. 731-2). Dhir described how his nursing staff presents the form and "ultimately" obtains the patient's signature, outside his presence (Tr. 732-6). Plaintiff cross-examined Dhir about the documents patients must sign at his surgery center, including the "consent form" (Tr. 761-4).

At several points in the testimony, perforation of the esophagus was described as a "known complication" of dilation (Tr. 455-6, 659-60, 756, 790).

Plaintiff requested Instruction A be given to remove "informed consent to the esophageal dilation" from the jury's consideration (Tr. 794-5; LF 36; App A3). Defense counsel objected to that withdrawal instruction because she did not "believe that these matters have been abandoned by either party whatsoever" and "the instruction would confuse and mislead the jury to somehow think that they're not supposed to consider the informed consent, when I think it is part and parcel of the plaintiff's willingness to proceed with the procedure and that she was aware and knowledgeable about the potentiality of her esophagus being stretched based upon the findings and the decision-making of Dr. Dhir" (Tr. 795-6).

Plaintiff pointed out she had not pleaded "informed consent" or put on any evidence of it (Tr. 796). The court refused Instruction A (Tr. 805).

In closing defense counsel reiterated her theory that Mrs. Wilson had knowingly consented to the dilation and thus to the "known complication" of perforation:

> Ms. Wilson was aware and she agreed that there was a possibility that Dr. Dhir might do a dilation upon her. Unfortunately, during the dilation Ms. Wilson experienced what we have all heard from every gastroenterologist that came to this courtroom and told you that's a known complication, which means that it can and does occur. It's not a common occurrence. It's rare, but it can happen, even when due care is taken to perform a procedure. (Tr. 837)

Defense counsel also repeatedly referred to the "known complication" of perforation (Tr. 853, 857, 859, 863), which she described as a situation where "patients can and do . . . experience an event or injury, an unexpected outcome, despite or in spite of appropriate care and treatment" (Tr. 853).

During deliberation the jury asked for "a copy of the consent form that Ms. Wilson signed before the procedure with Dr. Dhir" (Tr. 871; LF 38). It was given to them (LF 38).

POINTS III and IV: Informed Consent and Eosinophilic Esophagitis. Plaintiff also requested Instruction B to remove both "informed consent" and "eosiniphilic esophagitis" from the jury's consideration (Tr. 794-7; LF 37).

Eosinophilic esophagitis (or EoE) is "an allegic reaction to food" (Tr. 585, 634). It can

cause an inflamation of the esophagus and possibly explain a patient's difficulty swallowing (Tr. 585-6, 634). It is also accepted medical practice that esophageal dilation of patients with EoE is contraindicated because they are "much more prone to esophageal laceration or perforation" (Tr. 470-1, 634-5).

However, Mrs. Wilson never had EoE, as all parties and experts agreed; several tests for it proved negative (Tr. 357, 584-5, 586, 633-4, 668, 710).

Using a 2005 medical article that Dr. Dwoskin had brought to his deposition that neither Dwoskin nor any other expert had identified as authoritative, and that referred in a footnote to a guideline published by the American Gastroenterology Association, defendants sought Dwoskin's agreement with this statement: "In the patient with a normal-appearing esophagus without evidence of eosinophilic esophagitis, the American Gastroenterology Association practice guidelines suggest empiric dilatation of the esophagus" (Tr. 472-5). Dwoskin disagreed and noted that was not the standard in 2006 or afterward (Tr. 472).

Dr. Ginsberg stated that EoE was an issue in the case because of the difficulty in recognizing it in 2006 (Tr. 668, 710), even though he agreed that in 2005 it was known that Mrs. Wilson never had it. In redirect Ginsberg stated, "it was a concern around the country [in 2006] to be careful about dilating people if you didn't see a stricture, because we didn't recognize who did and didn't have eosinophilic esophagitis" (Tr. 710).

Additionally, EoE appears in a passage from a 2006 Guideline, "Esophageal dilation," published by the American Society for Gastrointestinal Endoscopy (ASGE) that plaintiff's

expert Dr. Dwoskin characterized as authoritative outside the jury's presence (Tr. 479-80, 486-8). The Guideline was marked as Exh. A (Tr. 487; App A10-A15). Dwoskin stated it was authoritative with respect to the matter of "empiric dilation" (id.).

That particular passage mentioning EoE was later quoted to only one witness -- defense expert Ginsberg -- in cross-examination (Tr. 689-90). A copy of the entire Guideline was attached as Exh. A to plaintiff's Motion for New Trial (LF 49-54). The passage quoted to Ginsberg is highlighted (LF 50; App A11) and reads:

> Although some endoscopists suggest that large-bore dilators be passed empirically if the endoscopy has normal results, results from two of three studies have shown that empiric dilation does not improve dysphagia scores. Thus, because of the potential risk of perforation with use of large-bore dilators, *particularly in patients with unrecognized eosinophilic esophagitis*, empiric dilation cannot be routinely recommended if no structural abnormalities are seen at endoscope. (Emphasis added; footnotes omitted.)

Ginsberg was asked if he agreed with that statement (Tr. 690); his answer was:

> I agree to a point. But, no, I don't agree. I mean, in my career, I have empirically dilated many people that benefited from it. So I think if the point of that is if you look at that whole document, first off, they don't say "don't dilate." And, secondly, they put papers in the bibliography that show benefit from empirical dilatation. (Tr. 690-1)

On redirect examination, defense counsel asked Ginsberg to review the Summary portion of the 2006 Guideline (LF 52; App A13). Plaintiff then objected that such articles could not be used for rehabilitation but only for cross-examination (Tr. 711). In the ensuing colloquy (Tr. 711-6), the court overruled that objection on the ground that, since plaintiff had "quoted out of context and attempted to impeach his unfamiliarity with treatises . . . [defense counsel] has an opportunity to supply the information in a full fashion" (Tr. 711). The court declared:

> [Plaintiff is] not going to be able to pull one sentence out of some treatise a number of pages long, ask him if he agrees with it and have him say no, when the rest of the treatise itself may not even agree with that one sentence and say that it would be fairly used, that we fairly used it and they weren't deprived of any substantial rights. I'm going to permit it over their objection.

(Tr. 713, 716). Plaintiff added a "hearsay" objection (Tr. 716), but that was overruled. At that point defense counsel was allowed to ask Ginsberg to review and comment upon the Summary of the 2006 Guideline (LF 52) and testify about its content (Tr. 717):

> Q. Dr. Ginsberg, I've put in front of you the 2006 ASGE guidelines that were discussed by Mr. McIntosh with you before, and would just simply ask you the question that in the summary of those guidelines, does it say anywhere that empiric dilatation was contraindicated in a patient that has no endoscopic findings of stricture?

A. No, it doesn't say that.

Actually, no part of the Summary of the 2006 ASGE Guideline mentions "empiric dilation" or "endoscopic findings of stricture" in any context (LF 52; App A13). The Summary itself had not been characterized by any expert as authoritative on any subject.

Later, defense counsel objected to Instruction B withdrawing both informed consent and EoE, asserting that plaintiff had "read and crossed witnesses with . . . the statement out of the [2006] ASGE guidelines . . . on multiple occasions." (Tr. 798-9). She argued it should not be withdrawn because "[i]t's very important to refute their allegation that this is the mandate, that we can't do it [*i.e.*, perform empiric dilation], that the jury knows, because she did not have unrecognized eosinophilic esophagitis" (Tr. 799). Counsel added her theory that the Instruction B was "an attempt to remove factual issues that the plaintiff doesn't like about their case. I don't think these are false issues. I don't think there's been improper evidence, and I don't think that there's no theory. I think these are just factual issues that are in the case, that are part and parcel of the physician/patient relationship" (Tr. 799-800).

The court refused Instruction B (Tr. 805).

Before closing arguments began, the court approved defense counsel's intent to discuss the content of the medical articles to the jury (Tr. 805-7):

> MS. CHRISTOPHER: I expect to talk about generally -- I wasn't going to read it to the jury. I was just going to argue about why it didn't apply in this case.
>
> THE COURT: . . . I will wait and listen to objections and I will attempt to rule

on them the best that I can. It sounds as if Ms. Christopher has accepted the Court's limitations on the purpose for which these documents may be used and the manner in which they may be argued to the jury. If not, I'll await an objection that you find appropriate.

In closing (Tr. 818-9), plaintiff's counsel referred to and paraphrased Dwoskin's testimony about the standard of care, the ASGE Guideline in 2006 that was applicable in 2009, and earlier medical research and literature in the early 2000's, recommending that empiric dilation not be performed on patients having no structural abnormality because no significant benefit was shown, about which he had been examined and cross-examined (*see* Tr. 405-6, 413-4, 435-7, 444-8, 450, 452-6, 475-6). Plaintiff's counsel did not specifically refer to the passage from the 2006 ASGE Guideline (Exh. A) that he had quoted to Ginsberg or paraphrase its content or mention "empiric dilation" or EoE in that context (Tr. 818-9). He criticized Ginsberg's disagreement with the Guideline as a reflection of his lack of credibility (Tr. 819).

In her closing, defense counsel argued in favor of the significance of EoE at two places:

It's interesting, because plaintiff's counsel says, "Well, it doesn't matter. We know she didn't have EoE." Well, it does matter to some extent, because one of those guidelines that they have referenced and talked about says particularly in patients with unrecognized EoE, or eosinophilic esophagitis. That statement

doesn't apply to Ms. Wilson. She didn't have unrecognized EoE or eosinophilic esophagitis. She's been biopsied three different occasions. She doesn't have it, so that doesn't apply to her circumstances. (Tr. 840-1)

And: They read one sentence out of a large article, took it out of context, and it doesn't say what they're saying. Nowhere does that say that you cannot perform a dilation. It doesn't say that. What it says is, in the sentence that they read, and you have heard it, it says, "particularly in patients with unrecognized eosinophilic esophagitis," that it cannot routinely be recommended. I don't think that there's a dispute that it could not routinely be recommended. I think Dr. Ginsberg told you if you had a patient that came in that's never had problems with reflux, that hadn't had prior esophageal stricture and dilation, and you didn't know if they had eosinophilic esophagitis, a dilation wouldn't be appropriate if you had a normal-appearing mucosal lining of the esophagus. (Tr. 854-5)

POINT V: Use of Content of Medical Article in Redirect Examination of Defense Expert. As noted (*supra* at 17), one of the documents Dwoskin identified as authoritative "with regard to empiric dilation" outside the jury's presence was the 2006 ASGE Guideline, "Esophageal dilation" (Exh. A; LF 49-54; App A10-A15).[6]

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[6] Three more documents were identified and marked as Exh. B, C and D (Tr. 479-80, 486-8; LF 55-73), and quoted to Ginsberg in cross-examination (Tr. 692-3, 694-5, 725-6).

Also as noted above (at 18-9), over plaintiff's objections that authoritative articles could only be used on cross-examination (Tr. 711) and such articles were hearsay (Tr. 716), defense counsel was allowed to ask Ginsberg on redirect examination to review the Summary of the 2006 Guideline (LF 52; App A13) and testify about its content (Tr. 713, 716). When asked, Ginsberg agreed that the Summary "didn't say [anywhere]" that "empiric dilatation was contraindicated in a patient that has no endoscopic findings of stricture" (Tr. 717). Also as noted above (at 19), the Summary actually does not address "empiric dilation" or the absence of "endoscopic findings of stricture" (LF 52; App A13).

With the court's approval of her stated intention to discuss the content of the medical articles to the jury in closing (Tr. 805-7), defense counsel revisited and restated her question to Ginsberg about the content of the 2006 ASGE Guideline's Summary and his answer, arguing that plaintiff had misrepresented the thrust of the entire Guideline:

> They read one sentence out of a large article, took it out of context, and it doesn't say what they're saying. Nowhere does that say that you cannot perform a dilation. . . . So nowhere does it say -- if you go to -- we handed -- I handed it to Dr. Ginsberg and I said, "Look at the 'Conclusions.'" When you get an article and you read an article, or you read something at school and come to a chapter, you go to the summary. You go to the conclusions in the back. It says the bullet points. There's five bullet points in that, and nowhere does it say that you don't --

(Tr. 854, 855). Another objection was overruled; defense counsel was directed to "finish the point and move on," but nothing more was said (Tr. 856-7).

POINTS VI and VII: Failure to Strike Jurors Cox and Streck for Cause. During voir dire, plaintiff asked the panel members this question:

> I kind of want to ask you a few things about your attitudes and opinions and belief about the legal system and claims and lawsuits. Whenever I turn on the TV and listen to the radio or read the paper, I hear a lot about the fact that there's too many lawsuits, jury awards are too high, people are too ready to sue, lawyers are costing us too much money and we need for them to lose them. Starting off with the too many lawsuits, how many of you feel, even a little bit, just a little bit, that there are too many lawsuits?

(Tr. 24-5). After a show of hands, counsel directed follow-up questions to specific jurors (Tr. 25-31). Venireperson Dinning said, "I guess I just feel like there's too many lawsuits going on; especially, you know, watching the news and you hear all this stuff that goes on. The first thing that comes to my mind is the McDonald's lawsuit where somebody spilled coffee on somebody and, you know, they got a whole bunch of money. I guess that's just kind of what I was thinking" (Tr. 31-2). After some back-and-forth, venireperson Jason Streck spoke:

> Yeah, I feel the same. I feel that -- I have a relative that's had a couple surgeries, and both times they went after the physicians for some sort of an ailment. And it's just given me a -- you know, a sour taste for people that go

after physicians.

(Tr. 33). Streck admitted he had "a pretty strong feeling about that" (Tr. 33). He said, "I don't know if it would cause me to favor [one side over the other], but it's my opinion that, you know, I may lean more towards one side than the other, yes" (Tr. 34). He agreed that, "as we stand here right now, one of the parties may have a lead on the other" (Tr. 34).

Douglas Cox raised his hand and stated:

> I do see . . . that there's somebody suing someone for some type of injury or some type of negligence. You see it more and more, and it's almost become -- with the media, it's almost like a circus going on. Just everyone seems to be trying to get an extra piece of pie.

(Tr. 34). Asked how that opinion affects him, Cox stated, "Well, you go in with a -- not necessarily a preconceived notion, but you've got more hesitation to fully believe one side over the other" (Tr. 35). Asked whether he had an opinion that one side may be more believable than the other, he said, "Maybe just a bit, but not--it's not a deep-seated feeling" but he was "leaning . . . just a bit" toward one side (Tr. 35). He "really [did not] think it would affect me as a juror, to speak of, just kind of lean one way or the other. But until I hear the evidence, I really don't know anything" (Tr. 35). He added, "I really don't think it would make it that difficult. I try to see things as they are, not what -- the way they may be" (Tr. 35-6). Then this dialogue took place (Tr. 36):

Q. That feeling that maybe one is -- one side is just a little bit ahead of the

other, is that a pretty firmly-set feeling that you have?

A. Yeah, I -- I do feel that it would be, but not a big head start, I guess you would say.

Plaintiff later asked, "How many of you, if a loved one were harmed by negligence, would not sue?" (Tr. 53). Several jurors responded, including Streck, who said:

> I don't think I would sue right away. I mean, if the doctor or someone is trying to make right on something that they had done or something that happened during the procedure, you know, if they're trying to make right, I don't -- I wouldn't just jump at the opportunity to sue someone because of something that went on with the surgery. I mean, obviously there's risk involved even when you get a tooth pulled; okay? So, you know, I think that if the procedure was done to the best of their ability for the doctor that you had selected and there were minor issues or issues involved, that if they were dealt with appropriately and they're trying to make right, then, you know, obviously I just wouldn't jump at the opportunity to sue." (Tr. 56).

He explained that "trying to make right" meant, "perhaps go in before even another surgery or, you know, help with the care of the injury that happened after the surgery, you know, things along that line" (Tr. 56). Streck did not know how that might affect him as a juror "because I don't know if those things were -- happened or not. I mean, if there was -- you know, I don't know those facts. . . . So I wouldn't know if it would affect me or not" (Tr. 56).

He said, "It wouldn't make it any harder [to be a juror]. I would just have to hear the information and the facts about the procedure and what happened and how it was cared for afterwards" (Tr. 57).

Streck also indicated his sister, wife, stepmother and stepsister were all nurses with Mosaic Life Care system in St. Joseph, but did not think that would affect him (Tr. 136-7). His mother has an ongoing personal injury claim against one or more doctors about a bladder mesh, but he does not discuss that "with her" (Tr. 146). Streck acknowledged he may have "strong feelings" about that, but did not indicate what they were (Tr. 285-6). He thought he could be fair and impartial and listen to the evidence in spite of the fact that "family members . . . have done things we may like or not like" (Tr. 286).

Plaintiff asked whether panel members felt doctors should be held accountable for his negligence if it causes injury, whether any felt he should not be held accountable, and whether any were neutral on the subject (Tr. 61-2). Cox indicated he was neutral because he had heard no evidence, but acknowledged that he kind of favored one side over the other "a little bit, yeah. As far as the straight evidence goes, no" (Tr. 66). Cox was later reminded that he had said that he "leaned a little bit toward one side, and one side had a head start," and admitted that that position was "probably not" going to change during the trial (Tr. 108-9).

Later, on the subject of medical shows on television, Cox denied his interest in "House" would affect his ability to hear the case and be fair: "I can be fair,' he said (Tr. 257).

Defense counsel reminded Cox of earlier statements and asked if he thought anything

"would prevent you from listening to the evidence and being fair and impartial" to both sides and following the court's instructions. He said, "I don't believe I would be unable to stay impartial to that. . . . [T]here seems to be a rising trend in seemingly the frivolous lawsuits, not -- naturally not all lawsuits are frivolous, but not all of them are legitimate, either" (Tr. 283-4). He was then asked, "Do you think you could be fair and listen to the evidence and follow the instructions in this case and make a decision based upon the evidence in this case?" His answer was, "Yes" (Tr. 284).

Plaintiff's motions to strike Cox and Streck for cause were overruled (Tr. 301-3, 318) and both were on the jury (Tr. 324).

C. *Procedural History*. Plaintiff filed suit on November 23, 2011 (LF 1). Trial commenced December 8, 2014 (LF 11). Jury instructions were read on December 11 (LF 12). The jury retired at 11:18 a.m. and around 12:15 p.m. sent a question to the court: "May we have a copy of the 'consent form' that Mrs. Wilson signed before the procedure with Dr. Dhir?" (LF 38). That document (from Def.Exh. 201, App A8-A9) was given to the jury (LF 38). A unanimous verdict was rendered that afternoon for defendants (LF 41-2). Judgment was entered on December 24, 2014 (LF 12, 43-4). Plaintiff timely filed her motion for new trial on January 15, 2015 (LF 12, 45-6), with additional suggestions filed later (LF 13, 82-101, 111-5). The motion was overruled on April 3, 2015 (LF13, 116-6), and the notice of appeal was timely filed April 10, 2015 (LF 13, 118).

POINTS RELIED ON

I. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN REFUSING PLAINTIFF'S INSTRUCTION "A" WITHDRAWING ALL EVIDENCE OF AND THE MATTER OF PLAINTIFF'S ALLEGED INFORMED CONSENT TO THE ESOPHAGEAL DILATION IN THAT HER ALLEGED CONSENT WAS IRRELEVANT AND NOT A COGNIZABLE DEFENSE TO HER SOLE THEORY THAT THE ESOPHAGEAL DILATION WAS UNNECESSARY.

Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004)

Brady v. Urbas, 111 A.3d 1155 (Pa. 2015)

Miller v. Werner, 431 S.W.2d 116 (Mo. 1968)

MAI 34.01A and B

II. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN PERMITTING THEM TO ARGUE THAT PLAINTIFF CONSENTED TO THE ESOPHAGEAL DILATION IN THAT HER ALLEGED CONSENT WAS IRRELEVANT AND NOT A COGNIZABLE DEFENSE TO HER SOLE THEORY OF UNNECESSARY SURGERY.

Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004)

Miller v. Werner, 431 S.W.2d 116 (Mo. 1968)

Carrel v. Wilkerson, 507 S.W.2d 82 (Mo.App.1974)

Hart v. Forbes, 633 S.W.2d 90 (Mo.App.1982)

III. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN REFUSING PLAINTIFF'S INSTRUCTION "B" WITHDRAWING ALL EVIDENCE OF AND THE MATTERS OF (A) PLAINTIFF'S ALLEGED INFORMED CONSENT TO THE ESOPHAGEAL DILATION AND (B) OF EOSINOPHILIC ESOPHAGITIS IN THAT: (A) HER ALLEGED CONSENT WAS IRRELEVANT AND NOT A COGNIZABLE DEFENSE TO HER SOLE THEORY THAT THE ESOPHAGEAL DILATION WAS UNNECESSARY; AND (B) EOSINOPHILIC ESOPHAGITIS WAS IRRELEVANT AND A FALSE ISSUE SINCE ALL PARTIES AND EXPERT WITNESSES AGREED PLAINTIFF DID NOT HAVE AND NEVER HAD EOSINOPHILIC ESOPHAGITIS.

MAI 34.01A and B

Stevens v. Craft, 956 S.W.2d 351 (Mo.App.1997)

IV. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN PERMITTING THEM: (A) TO ARGUE THAT PLAINTIFF CONSENTED TO THE ESOPHAGEAL DILATION IN THAT HER ALLEGED CONSENT WAS IRRELEVANT AND NOT A COGNIZABLE DEFENSE TO HER SOLE THEORY OF UNNECESSARY SURGERY; AND (B) TO ARGUE AND ENCOURAGE THE JURY TO CONSIDER THE FALSE ISSUE OF EOSINOPHILIC ESOPHAGITIS, TO MISSTATE AND EMPHASIZE

THE IMPROPER TESTIMONY ON THAT SUBJECT, AND TO INVITE THE JURY TO CONSIDER THE INADMISSIBLE HEARSAY EVIDENCE ON THAT SUBJECT.

Kelly v. St. Luke's Hosp. of Kansas City, 826 S.W.2d 391 (Mo.App.1992)

Gathright v. Pendegraft, 433 S.W.2d 299 (Mo. 1968)

V. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN ALLOWING A DEFENSE MEDICAL EXPERT, WHO HAD BEEN ASKED IN CROSS-EXAMINATION WHETHER HE AGREED WITH ONE AUTHORITATIVE STATEMENT FROM A MEDICAL JOURNAL ARTICLE, TO BE QUESTIONED AND TO TESTIFY IN REDIRECT EXAMINATION ABOUT THE SUBSTANTIVE CONTENT OF A DIFFERENT PORTION OF THAT ARTICLE (ITS SUMMARY) IN THAT (A) SUCH PROCEDURE WAS IMPROPER, AND (B) THE SUMMARY'S CONTENT WAS NEVER CHARACTERIZED AS AUTHORITATIVE AND WAS INADMISSIBLE HEARSAY.

Gridley v. Johnson, 476 S.W.2d 475 (Mo. 1972)

Kelly v. St. Luke's Hosp. of Kansas City, 826 S.W.2d 391 (Mo.App.1992)

State ex rel. Nixon v. Estes, 41 S.W.3d 25 (Mo.App.2001)

Hamilton v. Missouri Petroleum Products Co., 438 S.W.2d 197 (Mo. 1969)

VI. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO STRIKE JUROR DOUGLAS COX II FOR CAUSE IN THAT HE ADMITTED PARTIALITY AND BIAS IN FAVOR OF DEFENDANTS.

Kendall v. Prudential Ins. Co. of America, 327 S.W.2d 174 (Mo.banc 1959)

State v. Stewart, 692 S.W.2d 295 (Mo.banc 1985)

State v. Edwards, 740 S.W.2d 237 (Mo.App.1987)

Catlett v. Illinois Cent. Gulf R. Co., 793 S.W.2d 351 (Mo.banc 1990)

VII. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO STRIKE JUROR JASON STRECK FOR CAUSE IN THAT HE ADMITTED PARTIALITY AND BIAS IN FAVOR OF DEFENDANTS.

Kendall v. Prudential Ins. Co. of America, 327 S.W.2d 174 (Mo.banc 1959)

State v. Stewart, 692 S.W.2d 295 (Mo.banc 1985)

State v. Edwards, 740 S.W.2d 237 (Mo.App.1987)

Catlett v. Illinois Cent. Gulf R. Co., 793 S.W.2d 351 (Mo.banc 1990)

ARGUMENT

Standard of Review. Each challenged ruling herein is reviewed under the abuse of discretion standard. Swartz v. Gale Webb Transp. Co., 215 S.W.3d 127, 129-30 (Mo.banc 2007)(refusal of withdrawal instruction); Gleason v. Bendix Commercial Vehicle Sys., LLC, 452 S.W.3d 158, 178 (Mo.App.2014)(control of closing argument); Peterson v. Progressive Contractors, Inc., 399 S.W.3d 850, 869 (Mo.App.2013)(admission of evidence); Joy v. Morrison, 254 S.W.3d 885, 888 (Mo.banc 2008)(strikes for cause). Discretion is abused "when a 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." Swartz, supra at 130.

I. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN REFUSING PLAINTIFF'S INSTRUCTION "A" WITHDRAWING ALL EVIDENCE OF AND THE MATTER OF PLAINTIFF'S ALLEGED INFORMED CONSENT TO THE ESOPHAGEAL DILATION IN THAT HER ALLEGED CONSENT WAS IRRELEVANT AND NOT A COGNIZABLE DEFENSE TO HER SOLE THEORY THAT THE ESOPHAGEAL DILATION WAS UNNECESSARY.

Plaintiff requested this withdrawal instruction concerning the matter of her alleged "informed consent" to the esophageal dilation (Tr. 794-7; LF 36; App A3):

> The evidence and matter of plaintiff's informed consent to the

esophageal dilation is withdrawn from the case and you are not to consider such evidence or matter in arriving at your verdict.

Refusal of that instruction was raised in the motion for new trial (LF 58-68).

Giving a withdrawal instruction is appropriate "*when* during the course of the trial *a false issue, improper evidence*, or *evidence of an abandoned issue has been injected*. . . . [and] *when [the court] has received evidence upon an issue which is later abandoned either by choice or by reason of inadequate proof for final submission to the jury*." MAI 34.01A and B; Stevens v. Craft, 956 S.W.2d 351, 355 (Mo.App.1997) (when there is evidence that "*might mislead the jury*" or that "*might easily raise a false issue*"). The structure of MAI 34.01A and B as well as Committee Comment B to MAI 34.02 ("its use is not limited to withdrawing evidence which is accidently or improperly admitted") confirm that a withdrawal instruction is available even to a party who has first introduced the evidence sought to be withdrawn. Sampson v. Missouri Pac. R. Co., 560 S.W.2d 573, 583-4 (Mo.banc 1978); Womack v. Crescent Metal Products, Inc., 539 S.W.2d 481, 482-5 (Mo.App.1976); DeMoulin v. Kissir, 446 S.W.2d 162, 166 (Mo.App.1969). The court may act *sua sponte* because of its duty to instruct the jury *fully* as well as correctly to guard against false issues. Estes v. Desmoyers Shoe Co., 155 Mo. 577, 56 S.W. 316, 319 (1900).

This affirmative duty imposed on the trial court means that the complaining party's failure to object to a false issue at the first opportunity does not preclude giving a withdrawal instruction. No objection requirement exists in either the language of MAI 34.01A and B, or

in controlling court decisions. Indeed, in Sampson, supra, the plaintiff's own witness first mentioned payments to him of workers compensation benefits for medical bills, to which the plaintiff obviously did not object. The trial court later granted his request and withdrew that evidence. This Court affirmed, stating the controlling principle: "*[W]here the evidence is of a character that might easily lead to the raising of a false issue, the court ought to guard against such an issue by appropriate instructions.*" 560 S.W.2d at 584 (citing Estes, supra).

Similarly in Womack, supra, "[t]he first reference to the term Workmen's Compensation came in during plaintiff's case as a voluntary statement which was not responsive to any question." 539 S.W.2d at 482. Thereafter, the witness was asked several questions about the workers compensation benefits on cross-examination, and again on redirect, and again on recross. Id. at 483. When the plaintiff later testified, her own attorney "felt it necessary to elicit the information that medical expenses in the sum of $5317.20 and temporary disability in the sum of $1908 had been paid by the compensation carrier," and additional information was brought out. Id. "On cross-examination counsel for [defendant] questioned plaintiff with respect to her pending claim for permanent partial disability. In all there were at least 28 references to 'Workmen's Compensation' before the jury." Id. At the close of the case, the plaintiff unsuccessfully moved for a mistrial, then submitted a withdrawal instruction regarding the workers compensation benefits, which was also refused by the trial court. The court explained reversing the judgment this way (adding emphasis):

[W]here the evidence in a case is such that it may lead to the raising

of a false issue it is not sufficient to merely instruct as to the issues properly raised but it is necessary to guard against the consideration of the false issue by a proper instruction. Id. at 484 (emphasis added).

> . . . Workmen's Compensation became one of the dominant issues in the case and under the circumstances of this case it became necessary to give the tendered instruction withdrawing that issue from the jury's consideration of the case. . . . *The primary question at issue here is whether the jury was fully instructed.* The evidence of Workmen's Compensation benefits was wholly irrelevant to the determination of liability or of damages. *Whether the evidence came in by reason of inadvertence on the part of plaintiff or whether it was erroneously before the jury, it injected a false issue in the case.* The court should have given the withdrawal instruction. The failure to do so under the circumstances of this case constituted reversible error. Id. at 485.

Sampson teaches that discretion on the matter of a withdrawal instruction "should be guided by the degree to which evidence has been introduced which might mislead the jury in their consideration of the case as it is pleaded." Id. at 584 (citing DeMoulin v. Kissir, supra 446 S.W.2d at 166). No other material consideration (specifically, an overruled objection) was cited, discussed or urged by the Court. Sampson's pronouncement was quoted three years later in Dunn v. St. Louis-San Francisco Ry. Co., 621 S.W.2d 245, 252 (Mo.banc 1981) -- this Court's most recent pronouncement on this subject. The admonition to instruct the jury

"fully" to prevent jury consideration of a false issue runs continuously backward--through Roberts v. Emerson Elec. Mfg. Co., 362 S.W.2d 579, 582 (Mo. 1962), to the seminal case of Estes v. Desmoyers Shoe Co., supra--and forward to the MAI Committee Comment (7th ed.) at LIV (discussing trial court's nondelegable duty "to give a complete charge to the jury") and the explicit, ongoing directives of MAI 34.01A and B.

Informed Consent Was a False Issue. Plaintiff proceeded to trial on just one theory, and her expert supported just that theory -- defendants were negligent in performing an unnecessary esophageal dilation (Tr. 332, 343, 406, 435-6, 443-4). It was unnecessary because during the EGD Dhir found a normal esophagus, without any inflamation, cancer, irritation, infection, swelling, strictures, dilation, scarring, retained food or fluid, structural disorder or erosion (Tr. 386-7, 389-91, 392-6, 771-3) -- nothing that he recorded in the medical record and nothing significant he felt needed to be recorded (Tr. 386, 389-96, 772-4). As of December 2, 2009, Dhir's recommendation to Mrs. Wilson was another EGD (Tr. 609); he had not intended to perform a dilation unless his findings justified or warranted it (Tr. 610, 764-5).

Consistent with that, at her first office visit, plaintiff set an appointment only for an EGD on December 8 (Tr. 511). She did not expect an esophageal dilation on that date unless Dhir found a "problem" or "something wrong," as had been her past experience (Tr. 511-2), particularly because of the risks of serious injury or death from dilation (Tr. 415-7, 455-6, 700). Dhir's choice was to continue treating her dysphagia with medication that was working

(Tr. 427-8, 438, 448-50, 677) or perform an empiric dilation with its attendant risks (Tr. 701). His selection of empiric dilation was negligent (Tr. 435-8).

"Informed consent" to the esophageal dilation was not a defense to plaintiff's theory of an unnecessary procedure. She had not pleaded an "informed consent" theory, did not offer or attempt to offer lay or expert evidence sufficient to support its submission, and did not tender a jury instruction positing that theory.

Nevertheless, defense counsel raised that theory and her signature on a consent document first in opening statement (Tr. 345, 362-3), and repeatedly after that in multiple forms in testimony and closing (Tr. 552-4, 649, 731-6, 837-8), including the argument that perforation was a "known complication" (Tr. 455-6, 659-60, 756, 790). Plaintiff was compelled to cross-examine Dhir as to the knowing and voluntary nature of her signature on the form (Tr. 761-4).

And in its first question the jury asked for a copy of the signed consent form about an hour after it retired to deliberate (LF 12, 38).

"A *prima facie* case of medical malpractice consists of three general elements: (1) an act or omission of the defendant failed to meet the requisite medical standard of care; (2) the act or omission was performed negligently; and (3) the act or omission caused the plaintiff's injury." Edgerton v. Morrison, 280 S.W.3d 62, 68 (Mo.banc 2009).

By contrast, the doctrine of informed consent is a type of negligence that essentially relates to the duty of a doctor to disclose pertinent information to a patient. The three basic

elements of this theory are: "1) nondisclosure, 2) causation, and 3) injury. To prove nondisclosure, the plaintiff is required to produce expert testimony to show what disclosures a reasonable medical practitioner would have made under the same or similar circumstances." Wilkerson v. Mid-America Cardiology, 908 S.W.2d 691, 696 (Mo.App.1995) (citing Aiken v. Clary, 396 S.W.2d 668 (Mo. 1965)). As such, informed consent is a subset of ordinary medical malpractice, but is a separate and distinct theory.

Aiken itself distinguished between the typical theory of negligence that "consists of improper care and treatment" (plaintiff's theory in this case) and one based on the "alleged failure to inform the patient sufficiently to enable him to make a judgment and give an informed consent if he concludes to accept the recommended treatment." Id. at 673. This distinction was recognized in Miller v. Werner, 431 S.W.2d 116, 118 (Mo. 1968), holding that a claim for negligence in removing cysts from plaintiff's chin was separate and distinct from a claim for failure to obtain informed consent:

> It is apparent that evidence necessary to support an allegation of negligence in performance of surgery has nothing to do with and would not support or prove a charge of negligence in failing to secure an informed consent for such surgery. The first has to do with the act of operating and attendant exercise of skill; the latter, of necessity, is a matter preceding surgery.

Accord, Cress v. Mayer, 626 S.W.2d 430, 435-6 (Mo.App.1981) (recognizing that claims of lack of informed consent, unnecessary surgery and negligence in performing surgery were

separate theories; instruction submitting all three disjunctively was erroneous because claim of unnecessary surgery had not been pleaded in petition).

"It is a plaintiff's prerogative to choose the theory upon which he will submit his case, so long as that theory is supported by the pleadings and the evidence." Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 437 (Mo.banc 1984). Plaintiff's theory of unnecessary dilation was tried by consent and supported by the evidence; in fact, defense expert Ginsberg agreed that a physician "is never allowed to perform unnecessary surgery" (Tr. 667). A defendant cannot highjack a plaintiff's case by distorting her theory, then present evidence that is irrelevant to plaintiff's theory and that cannot form the basis for either a plaintiff's negligence submission or an affirmative defense.

Allowing the evidence and matter of informed consent to remain in the case and to be argued in closing resulted in misleading and confusing the jury about the single liability issue of unnecessary surgery, not whether plaintiff consented to defendants' negligence in choosing unnecessary surgery.[7]

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[7]Gross v. Robinson, 203 Mo.App. 118, 218 S.W. 917, 922-3 (1920) (recognizing it would be "contrary to the precepts of public policy" to hold a that patient who was advised of risks of X-rays had consented to or assumed the risk of negligent treatment--"though plaintiff should be regarded as having assumed by his express agreement such risks as attend the employment of the X-ray, this agreement essentially implied a careful and skillful application thereof on the part of defendant").

Missouri courts have not addressed this issue but several other states have unanimously agreed that allowing such "informed consent" evidence is error in this situation.

Somewhat similar factually is Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004), where, after performing diagnostic laparoscopic surgery on the plaintiff to discover the source of her chronic pelvic pain, the defendant physician found a cyst on her urachus which he then excised and placed staples to close the affected area. The physician claimed this was done "away from the bladder." Id. at 309. Following the surgery, plaintiff began to experience urinary frequency and urgency with bladder spasms. Another surgeon discovered and removed six surgical staples from her bladder, apparently left there from the laparoscopic surgery to remove the cyst. Id. Plaintiff's theory was that the doctor failed to follow proper medical procedures by injuring an organ (the bladder) away from his operative field (the urachus), because he failed to properly visualize the plane of the bladder during the surgery and thus got too close to it when firing staples. Id. at 312. The trial court overruled plaintiff's motion *in limine* to preclude "evidence of discussions between herself and Dr. Kaye as to the risk of injury to the bladder during an urachal cystoscopy." Id. at 317. The Virginia Supreme Court held that was error for these reasons:

> In resolving this issue, it is a particularly salient fact that Wright does not plead or otherwise place in issue any failure on the part of the defendant to obtain her informed consent. Her claim is simply that Dr. Kaye was negligent by deviating from the standard of care in performing the medical

procedure at issue.

Seen in that context, evidence of information conveyed to Wright concerning the risks of surgery in obtaining her consent is neither relevant nor material to the issue of the standard of care. Further, the pre-operative discussion of risk is not probative upon the issue of causation: whether Dr. Kaye negligently performed the procedure.

Wright's awareness of the general risks of surgery is not a defense available to Dr. Kaye against the claim of a deviation from the standard of care. *While Wright or any other patient may consent to risks, she does not consent to negligence*. Knowledge by the trier of fact of informed consent to risk, where lack of conformed consent is not an issue, does not help the plaintiff prove negligence. Nor does it help the defendant show he was not negligent. *In such a case, the admission of evidence concerning a plaintiff's consent could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery. In effect, the jury could conclude that consent amounted to a waiver, which is plainly wrong*. Id.

See also Fiorucci v. Chinn, 764 S.E.2d 85, 87 (Va. 2014) (extending Wright "to claims premised on pre-operative negligent treatment, specifically including negligent diagnosis").

The same analysis and result obtained in Waller v. Aggarwal, 116 Ohio App.3d 355, 688 N.E.2d 274, 275 (Ohio App. 11 Dist. 1996):

> In the instant case, the trial court referred to the "affirmative defense" of informed consent from voir dire through the close of the trial. We can find no law which states that informed consent constitutes an affirmative defense. It is therefore clear that such reference by the trial court was error.
>
> Furthermore, appellant was substantially prejudiced by the references to informed consent. *As appellant correctly contends, the action brought against appellee sounded in negligence. It did not sound in battery for a nonconsensual procedure. Nor did appellant allege that she was not fully apprised of the risks of the procedure. Instead, appellant alleged that appellee negligently performed the procedure. The fact that appellee informed appellant that injury to the bladder was a possible risk of the procedure could not be a defense to the claim of negligence brought by appellant. Thus, the admission of evidence pertaining to that issue and references to that issue carried great potential for the confusion of the jury.*
>
> As a result, we hold that the references to informed consent made during the trial constituted plain error, as they were both apparent on their face and prejudicial.

The Pennsylvania Supreme Court agreed in Brady v. Urbas, 111 A.3d 1155 (Pa. 2015):

> [T]he fact that a patient may have agreed to a procedure in light of the known risks does not make it more or less probable that the physician was negligent in either considering the patient an appropriate candidate for the operation or in performing it in the post-consent timeframe. Put differently, there is no assumption-of-the-risk defense available to a defendant physician which would vitiate his duty to provide treatment according to the ordinary standard of care. The patient's actual, affirmative consent, therefore, is irrelevant to the question of negligence. Id. at 1159-62.

Accord, Hayes v. Camel, 283 Conn. 475, 927 A.2d 880, 888-9 (2007) (holding that "evidence of the risks of a medical procedure, as communicated to a patient by a physician, is unduly prejudicial or confusing . . . in a medical malpractice action that does not include a claim of lack of informed consent"); Schwartz v. Johnson, 206 Md.App. 458, 49 A.3d 359, 373-5 (2012) (after noting that, although breach of informed consent and medical malpractice claims both sound in negligence, they are "*separate, disparate theories* of liability," *held*, trial court correctly excluded evidence of informed consent, citing Hayes, Wright and Waller); Warren v. Imperia, 252 Or.App. 272, 287 P.3d 1128, 1132-3 (2012) (trial court properly excluded evidence of informed consent where no "lack of informed consent" claim was brought because such evidence was irrelevant and, to the extent relevant, unfairly prejudicial and confusing to the jury); Baird v. Owczarek, 93 A.3d 1222, 1232-3 (Del.Supr. 2014) (holding that "evidence of informed consent, such as consent forms, is both irrelevant

and unduly prejudicial in medical malpractice cases without claims of lack of informed consent"); Matranga v. Par. Anesthesia of Jefferson, LLC, 170 So.3d 1077, 1093-4 (La.App. 5th Dist. 2015) (where plaintiffs stipulated that informed consent would not be at issue at trial, "any evidence regarding [decedent's] informed consent was irrelevant and should have been excluded from consideration by the jury"; it "also presented a danger of jury confusion" and "could easily lead to the conclusion that [decedent] acquiesced to her injury and subsequent death").

Consistent with the concerns expressed in Wright v. Kaye, 593 S.E.2d at 317 ("evidence concerning a plaintiff's consent could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery") and these other cases, it is significant that the jury's first question to the court after retiring to deliberate asked for "a copy of the consent form," which was then provided (LF 38).

Plaintiff's Instruction A was necessary to remove false issue and should have been given.

II. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN PERMITTING THEM TO ARGUE THAT PLAINTIFF CONSENTED TO THE ESOPHAGEAL DILATION IN THAT HER ALLEGED CONSENT WAS IRRELEVANT AND NOT A COGNIZABLE DEFENSE TO HER SOLE THEORY OF UNNECESSARY SURGERY.

Plaintiff incorporates by reference the argument and authorities set out in Point I, particularly Miller v. Werner, supra; Gross v. Robinson, supra; Wright v. Kaye, supra; and Brady v. Urbas, supra.

> The court erroneously believed the issue of informed consent was in the case: That document regarding the consent was presented to your client. She had the opportunity to read it and she signed it. . . . It would be inconceivable that anybody would ever have the foresight to be able to draft a fully informed consent document for somebody who's doing an exploratory procedure. . . . (Tr. 803) . . . The whole thing is here, your client was injured by virtue of a procedure that the doctor did that he should not have done and of which she would not have approved if she had known about it. That sounds like consent to me. The Court has marked Exhibits A and B. 34.02 respectively withdrawn -- or refused to be given. (Tr. 805)

With that ruling, defendants were free to "argue the evidence" that Mrs. Wilson had given her informed consent to the esophageal dilation, and by extension the "known

complication" of perforation, and they did make that argument:

> Ms. Wilson was aware and she agreed that there was a possibility that Dr. Dhir might do a dilation upon her. Unfortunately, during the dilation Ms. Wilson experienced what we have all heard from every gastroenterologist that came to this courtroom and told you that's a known complication, which means that it can and does occur. It's not a common occurrence. It's rare, but it can happen, even when due care is taken to perform a procedure. (Tr. 837) . . .
>
> Ms. Wilson had a perforation, a known complication that occurred as a result of this dilation. (Tr. 857) . . .
>
> [Our witness Dr. Ginsberg] told you this was not an unnecessary procedure, that it was unfortunate that she had -- she was the 1 in 1,000 that can have the perforation, but he told you that was a known complication that can and does occur. (Tr. 859)

This argument was factually incorrect and contrary to law and allowed defendants to mislead the jury in evaluating the evidence. "The permissible field of jury argument is broad, but the law does not contemplate that counsel may go beyond the issues or record and urge prejudicial matters, or *urge a theory of claim or defense which the law does not justify*." Carrel v. Wilkerson, 507 S.W.2d 82, 85 (Mo.App.1974); Hart v. Forbes, 633 S.W.2d 90, 92 (Mo.App.1982). "[T]here is no room for the exercise of judicial discretion on an issue of law." Carrel, at 86.

III. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN REFUSING PLAINTIFF'S INSTRUCTION "B" WITHDRAWING ALL EVIDENCE OF AND THE MATTERS OF (A) PLAINTIFF'S ALLEGED INFORMED CONSENT TO THE ESOPHAGEAL DILATION AND (B) OF EOSINOPHILIC ESOPHAGITIS IN THAT: (A) HER ALLEGED CONSENT WAS IRRELEVANT AND NOT A COGNIZABLE DEFENSE TO HER SOLE THEORY THAT THE ESOPHAGEAL DILATION WAS UNNECESSARY; AND (B) EOSINOPHILIC ESOPHAGITIS WAS IRRELEVANT AND A FALSE ISSUE SINCE ALL PARTIES AND EXPERT WITNESSES AGREED PLAINTIFF DID NOT HAVE AND NEVER HAD EOSINOPHILIC ESOPHAGITIS.

Plaintiff incorporates by reference the arguments and authorities set out in Point I with respect to withdrawal instructions generally and the court's refusal to withdraw the evidence and matter of plaintiff's alleged informed consent to the esophageal dilation.

Plaintiff's Instruction B would have withdrawn not only "informed consent" but all evidence of and the matter of "eosinophilic esophagitis" as well (Tr. 794-7, 798-802; LF 37; App A4):

> The evidence and matters of plaintiff's informed consent to the esophageal dilation and of eosinophilic esophagitis are withdrawn [from] the case and you are not to consider such evidence or matters in arriving at your verdict.

The court's refusal (Tr. 805) was raised in the new trial motion (LF 46, 99-100).

Eosinophilic esophagitis was not an issue because Mrs. Wilson never had it (Tr. 357, 584-5, 586, 633-4, 668, 710).

Yet defendants and Dr. Ginsberg attempted to make an issue out of it. First they suggested that in a patient like Mrs. Wilson with a normal-appearing esophagus and without evidence of EoE, empiric dilations were accepted practice according to the American Gastroenterology Association (Tr. 470-5), as if having EoE were the only contraindication for an empiric dilation.

Ginsberg attempted to repeat that argument later, after he was asked in redirect about a statement on empiric dilation that had been quoted to him by plaintiff's counsel from the 2006 ASGE Guideline and in which EoE was mentioned in passing: "because of the potential risk of perforation with use of large-bore dilators, *particularly in patients with unrecognized eosinophilic esophagitis*, empiric dilation cannot be routinely recommended if no structural abnormalities are seen at endoscope" (Tr. 689-90; LF 50; App A8).[8]

And in closing, defense counsel argued that EoE "does matter to some extent" and then misstated the thrust of the 2006 ASGE Guideline (LF 50). Counsel twice asserted

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[8]Although he did not comment on EoE at that time, Ginsberg later asserted that EoE "was an issue in this case" because of the difficulty in recognizing it in 2006 (Tr. 710), apparently echoing the defense position that undiagnosed EoE was the sole reason that dilating patients in whom "you didn't see a stricture" could be contraindicated (Tr. 710).

incorrectly that the recommendation against empiric dilations of patients with normal EGD results applied *only* to patients having "unrecognized eosinophilic esophagitis," and thus not to Mrs. Wilson (Tr. 840-1, 854-5). In fact, the Guideline recommends against empiric dilation of any patient with normal EGD findings, and "*particularly* in patients with undiagnosed [EoE]," because of the potential risk of perforation and the unproven benefits for dysphagia sufferers (LF 50; App A8).

Had Instruction B been given, such an incorrect argument could not have been made. Consequently, because the 2006 ASGE Guideline was inadmissible hearsay and was never received as an exhibit, the jury only heard that passage read on one occasion, when it was quoted to Ginsberg (Tr. 689-90). Thus the jury could not "fact-check" defense counsel's misstatement about the import of the Guideline and its applicability to the plaintiff, or effectively assess Ginsberg's credibility for disagreeing with it -- the very purpose of using authoritative texts, treatises and articles in Missouri (*infra* at 56-7, 59-60).

EoE was a false issue that was used to mislead the jury about the applicable standard of care, the reasons routine dilation should not be done, and the credibility of the experts. Sound discretion strongly favored its withdrawal. MAI 34.01A and B; Stevens v. Craft, 956 S.W.2d at 355.

IV. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN PERMITTING THEM: (A) TO ARGUE THAT PLAINTIFF CONSENTED TO THE ESOPHAGEAL DILATION IN THAT HER ALLEGED CONSENT WAS IRRELEVANT AND NOT A COGNIZABLE DEFENSE TO HER SOLE THEORY OF UNNECESSARY SURGERY; AND (B) TO ARGUE AND ENCOURAGE THE JURY TO CONSIDER THE FALSE ISSUE OF EOSINOPHILIC ESOPHAGITIS, TO MISSTATE AND EMPHASIZE THE IMPROPER TESTIMONY ON THAT SUBJECT, AND TO INVITE THE JURY TO CONSIDER THE INADMISSIBLE HEARSAY EVIDENCE ON THAT SUBJECT.

Plaintiff incorporates by reference the arguments and authorities in Points I, II and III.

Without repeating whole portions of those Points, suffice to say that the court's refusal of Instruction B gave the green light to defendants to argue the irrelevant evidence and matter of plaintiff's alleged "informed consent to the esophageal dilation" as a defense to the charge of negligence in performing an unnecessary procedure.

Additionally, that refusal permitted them to present again in closing the hearsay content of the 2006 ASGE Guideline Summary (LF 52; App A13) at two places (Tr. 840-1, 854-5). Kelly v. St. Luke's Hosp. of Kansas City, 826 S.W.2d 391, 396 (Mo.App.1992) (medical articles are hearsay, not independent evidence). The court even acknowledged such articles are hearsay (Tr. 474), yet evidently believed that its earlier ruling allowing Ginsberg to comment on the Summary portion (at Tr. 717) transformed his testimony into "evidence"

because plaintiff's objection was overruled (Tr. 855-6). Defense counsel certainly viewed her earlier question to Ginsberg about the Summary and his answer to be "the evidence" properly admitted in the case (Tr. 855), and that she was free to "argue the evidence" in closing. The court did not disagree, but merely limited the extent of argument on that subject (Tr. 855-6).

This court-sanctioned procedure gutted plaintiff's attempt to impeach Ginsberg by showing his disagreement with a statement from an authoritative source -- the only legitimate purpose for using a learned text or treatise in cross-examination (*infra* at 56-7, 59-60).[9]

Furthermore, as explained in Point III above, plaintiff had no effective means to show the jury that defense counsel's argument was incorrect because the statements in that Summary were never identified as authoritative nor admitted into evidence. Plaintiff attempted to clarify the meaning of the 2006 Guideline passage with respect to EoE he had quoted to Ginsberg (Tr. 869-70), but since no actual exhibit existed to show the jury, and it only heard that passage read just once, the efficacy of that effort seems dubious.

"[C]ounsel is not entitled to make an unfair, misleading, and prejudicial argument on immaterial facts which happen to get into the record." Gathright v. Pendegraft, 433 S.W.2d 299, 316 (Mo. 1968).

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[9]To justify admission of this hearsay testimony the court of appeals (slip op at 12-3) erroneously applied a "rule of completeness" -- a doctrine having no applicability here (*infra* at 59-60).

V. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN ALLOWING A DEFENSE MEDICAL EXPERT, WHO HAD BEEN ASKED IN CROSS-EXAMINATION WHETHER HE AGREED WITH ONE AUTHORITATIVE STATEMENT FROM A MEDICAL JOURNAL ARTICLE, TO BE QUESTIONED AND TO TESTIFY IN REDIRECT EXAMINATION ABOUT THE SUBSTANTIVE CONTENT OF A DIFFERENT PORTION OF THAT ARTICLE (ITS SUMMARY) IN THAT (A) SUCH PROCEDURE WAS IMPROPER, AND (B) THE SUMMARY'S CONTENT WAS NEVER CHARACTERIZED AS AUTHORITATIVE AND WAS INADMISSIBLE HEARSAY.

In accordance with the procedure mandated by the Supreme Court in Gridley v. Johnson, 476 S.W.2d 475, 481 (Mo. 1972), outside the jury's presence plaintiff's expert Dr. Dwoskin testified that certain passages in four medical articles were authoritative "with regard to empiric dilation" (Tr. 479-80, 486-8; LF 49-73).

Plaintiff's counsel later quoted short passages from those articles to defense expert Ginsberg in cross-examination and asked whether he agreed with them (Tr. 689-90, 692-3, 694-5, 725-6). Gridley, 476 S.W.2d at 481.

This Point concerns only one--the 2006 ASGE Guideline "Esophageal dilation" (Exh. A, LF 49-54; App A7-12). The quoted passage reads:

> Although some endoscopists suggest that large-bore dilators be passed empirically if the endoscopy has normal results, results from two of three

> studies have shown that empiric dilation does not improve dysphagia scores. Thus, because of the potential risk of perforation with use of large-bore dilators, particularly in patients with unrecognized eosinophilic esophagitis, empiric dilation cannot be routinely recommended if no structural abnormalities are seen at endoscopy.

(LF 50; App A8). Ginsberg disagreed with that passage (Tr. 690-1).

On redirect examination, defense counsel asked Ginsberg to review a different portion of that Guidline, the Summary (LF 52; App A13). Plaintiff objected that such articles could not be used for rehabilitation but only for cross-examination (Tr. 711). A discussion followed (Tr. 711-6), and the court overruled that objection on the ground that, since "you quoted out of context and attempted to impeach his unfamiliarity with treatises . . . [defense counsel] has an opportunity to supply the information in a full fashion" (Tr. 711). Plaintiff denied defendants' accusation he had mischaracterized and misused the article (Tr. 712-3).

The court then stated plaintiff was "not going to be able to pull one sentence out of some treatise a number of pages long, ask him if he agrees with it and have him say no, when the rest of the treatise itself may not even agree with that one sentence and say that it would be fairly used, that we fairly used it and they weren't deprived of any substantial rights. I'm going to permit it over their objection." (Tr. 713)

Plaintiff cited the correct procedure from Gridley v. Johnson without success (Tr. 714). Plaintiff added a "hearsay" objection, but that, too, was overruled (Tr. 716).

At that point defense counsel asked Ginsberg to review and comment upon the Summary of the 2006 Guideline (LF 52, App A13) and testify about its content (Tr. 717):

> Q. Dr. Ginsberg, I've put in front of you the 2006 ASGE guidelines that were discussed by Mr. McIntosh with you before, and would just simply ask you the question that in the summary of those guidelines, does it say anywhere that empiric dilatation was contraindicated in a patient that has no endoscopic findings of stricture?
>
> A. No, it doesn't say that.

This court-sanctioned procedure was erroneous and highly prejudicial for multiple reasons; so, too, was its ruling that defense counsel could argue the content of the 2006 ASGE Guideline in closing (Tr. 717).

First and foremost, permitting counsel's question and Ginsberg's answer concerning the Summary of the 2006 Guideline allowed defendants and their witness to mislead the jury about the real content of the Summary. No part of it mentions "empiric dilation" or "endoscopic findings of stricture" in *any* context, as counsel's question implied (LF 52, App A13).[10] And the Summary does not even address the notion whether empiric dilation is either

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[10]The **SUMMARY** reads in full (A13):

"For the following points: (*A*), prospective controlled trials; (*B*), observational studies; (*C*), expert opinion.

- Dilation is indicated in patients with symptomatic esophageal strictures (*B*).

indicated, approved or appropriate, or conversely contraindicated, in patients having no endoscopic findings of stricture, as defense counsel's question implied. While Ginsberg's answer to the precise question is literally correct, it is deceptive. The Summary's only statement about dilation reads: "Dilation is indicated in patients with symptomatic esophageal strictures," which was precisely plaintiff's theory of the case.

That prejudice recurred in closing argument when defense counsel accused plaintiff

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- Fluroscopy is recommended when using non-wire-guided dilators during dilation of complex esophageal strictures or in patients with a tortuous esophagus (*B*).
- Bougie and balloon dilators are equally effective in relief of dysphagia in patients with esophageal strictures (*A*).
- The rule of 3 should be followed when dilation of esophageal strictures is performed with bougie dilators (*B*).
- Injection of corticosteroids into recurrent or refractory benign esophageal strictures may improve the outcome after esophageal dilations (*B*).
- Pneumatic dilation with large-diameter balloons is effective for the treatment of achalasia (*A*).
- Botulinum toxic therapy is the preferred endoscopic treatment for achalasia in poor operative and nonoperative patients (*B*).
- Administration of PPIs is effective in preventing recurrence of esophageal strictures and the need for repeat esophageal dilation (*A*)."

of misstating the import of the 2006 ASGE Guideline as a whole (Tr. 840-1, 854-5). Her first argument delved into the content of the Guideline on the subject of EoE (Tr. 840-1), which was hearsay. Her second comment likewise suggested that the entirety of the Guideline discourages routine dilation only because of the increased risk of esophageal perforation in patients with unrecognized EoE (Tr. 854-5). She advised the jury that the "bullet points" in the Summary did not support the plaintiff's theory. That, too, conveyed inadmissible hearsay.

When medical texts or articles are sought to be used at trial, Missouri courts have consistently identified significant limitations and foundational requirements:

First, a text characterized as authoritative can *only* be used in *cross-examination* to challenge the expert's credibility, as Gridley noted nine times in three paragraphs. 476 S.W.2d at 481 ("Text books on technical subjects may be used in cross examination of an expert witness by reading therefrom and inquiring whether the witness agrees"). *See also* Powers v. Ellfeldt, 768 S.W.2d 142, 148 (Mo.App.1989); Cooper v. Atchison, T. & S.F.R. Co., 347 Mo. 555, 148 S.W.2d 773, 779-80 (1941); MacDonald v. Metropolitan St. Ry. Co., 219 Mo. 468, 118 S.W. 78, 86 (1909).

Second, the text or article itself (or any passage from it) remains *hearsay* and is *not admissible as substantive evidence*. Powers v. Ellfeldt, 768 S.W.2d at 148 ("Authoritative texts, however, are not of themselves direct and independent evidence" and "material from authoritative texts never rises to the level of independent evidence proving the fact asserted in the text"); Cooper v. Atchison, T. & S.F.R. Co., 148 S.W.2d at 780 ("it is well-settled that

the contents of medical texts are not independent evidence"); MacDonald v. Metropolitan St. Ry. Co., 118 S.W. at 86 (same).

The court of appeals squarely addressed both limitations in Kelly v. St. Luke's Hosp. of Kansas City, 826 S.W.2d 391, 396 (Mo.App.1992) (adding emphasis):

> The record establishes that appellants, during direct examination, attempted to introduce the content of the article through the testimony of their expert witness to prove the truth of the matter asserted in the article. The Missouri Supreme Court has recognized "that text books on technical subjects are not of themselves direct and independent evidence." * * * Learned treatises, such as the article involved in this appeal, may be used during cross-examination to test or challenge an expert's testimony. * * * However, *the article is inadmissible hearsay during direct examination of appellants' expert witness*.

Third, before it may be used in cross-examination a text, treatise or article must be characterized (in whole or in pertinent part) as authoritative. Gridley, supra at 481; Crain v. Newt Wakeman, M.D., Inc., 800 S.W.2d 105, 107 (Mo. App.1990) ("a prerequisite" to its use). This may be done either by having the expert being cross-examined agree that it is authoritative, or by having the inquiring party's own expert do so outside the presence of the jury. Id. No witness ever identified the 2006 ASGE Guideline Summary as authoritative.

"To be admissible, a hearsay statement must meet the requirements of an exception to the rule." Rouse v. Cuvelier, 363 S.W.3d 406, 420 (Mo.App.2012). Passages from

authoritative texts and articles are not such an exception. The court has no discretion to allow inadmissible evidence. "It is hornbook law that a witness may not testify to facts if those facts are based on hearsay. It is no less a violation of the hearsay rule to set up a set of circumstances by the testimony of a witness which invites the inference of hearsay." Gevermuehle v. Geimer, 619 S.W.2d 320, 322-3 (Mo.App.1981).

Rules of evidence "require strict compliance." State ex rel. Nixon v. Estes, 41 S.W.3d 25, 27 (Mo.App.2001). "By requiring strict compliance with the rules of evidence, we help to insure that a decision . . . is made only on reliable, credible and relevant evidence." Id.

Plaintiff's objections as to improper procedure and hearsay were erroneously overruled. Defendants' question on redirect called for hearsay, and the doctor's answer incorporated that hearsay by conveying the substantive content of the article as if it were true.

The non-authoritative, hearsay content of the Guideline Summary the court allowed in was not admissible under any legal theory. The court inaccurately accused plaintiff of quoting one part "out of context" and unfairly misrepresenting the whole article (Tr. 711, 713); defendants inaccurately asserted plaintiff had mischaracterized the article and misused it (Tr. 712-3). Plaintiff immediately denied those charges. He mischaracterized nothing, and no inconsistency exists -- the Summary does not even address empiric dilation or endoscopic findings of stricture (LF 52; A13). Comparing plaintiff's quote (Tr. 689-90) with the entire Guideline (A10-A15) proves those accusations unfounded. Yet the court allowed defense "an opportunity to supply the information in a full fashion" (Tr. 711, 713, 716).

The court's stated reason is contrary to every appellate ruling cited herein discussing proper foundation and usage of authoritative texts, treatises and articles for impeachment[11] and its improper use for other purposes. If affirmed, that rationale would completely obliterate the limitations mandated by the courts. Identifying some part of a text or article as authoritative and using it to impeach one expert would then somehow transmogrify the entire document into authoritative, substantive evidence -- none of it would be hearsay, and it could be used freely by any party for any purpose. Our courts do not countenance that. That procedure would chill any effort to impeach an opponent's expert with a learned treatise.

Yet the court of appeals asserted that the "rule of completeness" permitted its admission (slip op. 12-3). That rule "holds that a party may introduce evidence of the circumstances of a writing, statement, conversation, or deposition so the jury can have a complete picture of the contested *evidence introduced by the adversary*." State ex rel. Kemper v. Vincent, 191 S.W.3d 45, 49-50 (Mo.banc 2006) (emphasis added). It is clearly inapplicable here because the quoted part of the 2006 ASGE Guideline was never introduced as *substantive evidence*. The court of appeals cited Stewart v. Sioux City & New Orleans Barge Lines, Inc., 431 S.W.2d 205, 211-2 (Mo. 1968). Stewart does not mention a "rule of

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[11] Powers v. Ellfeldt, supra 768 S.W.2d at 148: "the fact that an authoritative text writer has expressed an opinion or stated a fact with which the expert witness disagrees is appropriate for the jury to consider in deciding whether to give credence to the expert witness's opinion."

completeness." The legal issue there differs markedly from the situation here. It involved part of a medical record (a physician's diagnosis) the trial court excluded even after defendant read to the jury all of the factual bases for the diagnosis contained in that record. Id. Stewart relied upon Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S.W.2d 663 (1956), the seminal case interpreting the "business records as evidence" statute. The statute, as Allen declared, removes the first level of hearsay objection to properly qualified medical records -- it makes the record admissible "generally," but does not make "all parts of the record automatically admissible." S.W.2d at 666. "[S]pecific and legally proper objections" must be lodged to other parts of the record "on grounds other than hearsay generally" to have them excluded. Id. Allen expressly held that "a proper expert medical opinion contained in a hospital record" is admissible if not objectionable on a substantive ground. Id. at 667. Stewart's holding was not based on a "rule of completeness"; it was dictated by Allen.

Stewart is distinguishable because, unlike the "business records" statute, the content of learned texts, treatises and articles *remains* hearsay throughout the trial. Case law carefully circumscribes the right to use it and the manner of its use. If its exclusive, legitimate purpose as impeachment is to be maintained and respected, then using a hearsay statement from the document in the manner specified in Gridley does not make all the rest of the hearsay statements admissible, substantive evidence. A contrary holding would overrule Gridley.

The rule of curative admissibility, or "invited error," is similar to the "rule of completeness." Although not advanced here as a rationale for admitting non-authoritative,

hearsay portions of learned treatises, it was addressed in Womack v. Crescent Metal Products, Inc., supra 539 S.W.2d at 484-5, in the context of a withdrawal instruction for evidence of workers compensation benefits: "when a party has introduced *illegal evidence* '. . . the opponent may reply with similar evidence whenever it is needed for *removing an unfair prejudice which might otherwise have ensued from the original evidence, but in no other case*' " (emphasis added). That rule is inapplicable here because the quoted passage from the 2006 ASGE Guideline was not "illegal evidence," was never proffered or received as substantive evidence, and was properly received for its limited purpose and no other. It did not result in, and could not have resulted in, *unfair* prejudice to the defendants that could justify admission of "countervailing illegal evidence 'of the same caliber.' " Id. at 485 (citation omitted); Adams v. Burlington Northern R. Co., 865 S.W.2d 748, 751 (Mo.App.1993).

The prejudice in allowing defense counsel to pose the question to Ginsberg and receive his hearsay answer was compounded by the later ruling to permit counsel to argue the content of the hearsay during closing. Plaintiff's use of the authoritative text was intended to challenge Ginsberg's credibility. Powers v. Ellfeldt, supra. Defendants' misuse of that text not only confused its value as impeachment but also completely shifted the import of the passage from the text to one of substance. It was likely to have been misunderstood by the jury as supplying substantive evidence on a medical issue because the court allowed Ginsberg to convey hearsay testimony about the substance of the article.

This evidence, as properly offered and used by the plaintiff, centered upon the crucial

issue of expert credibility, but the court's erroneous admission of that witness' hearsay testimony tended to obscure the real issue and also negate defendants' breach of duty. The prejudice to plaintiff caused by its admission was patent as well as presumed. Hamilton v. Missouri Petroleum Products Co., 438 S.W.2d 197, 201-2 (Mo. 1969); State ex rel. State Highway Comm'n v. Baker, 505 S.W.2d 433, 437 (Mo.App.1974).

VI. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO STRIKE JUROR DOUGLAS COX FOR CAUSE IN THAT HE ADMITTED PARTIALITY AND BIAS IN FAVOR OF DEFENDANTS.

The constitutional right to a fair and impartial jury, composed of twelve qualified jurors, lies at the cornerstone of the judicial system. Williams By Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo.banc 1987). A litigant is entitled to a fair trial before jurors "who enter upon the trial totally disinterested and wholly unprejudiced." Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S.W. 354, 359 (1905). "It is fundamental that jurors should be thoroughly impartial as between the parties." Kendall v. Prudential Ins. Co. of America, 327 S.W.2d 174, 177 (Mo.banc 1959). Denial of a legitimate challenge to excuse a partial or prejudiced venireperson constitutes reversible error. Catlett v. Illinois Cent. Gulf R. Co., 793 S.W.2d 351, 353 (Mo.banc 1990). "Even if the jury had been unanimous in returning a verdict for defendant, plaintiffs would be entitled to a new trial *if* one or more of the persons

who actually sat on the jury was not qualified." Rodgers v. Jackson County Orthopedics, Inc., 904 S.W.2d 385, 388 fn. 5 (Mo.App.1995).

Cox believed that too many lawsuits created a "circus" atmosphere, with everyone "trying to get an extra piece of pie" (Tr. 34). He conceded that, for him, ***in this case*** "one side may be more believable than the other" (Tr. 35). Although at first he did not think his "leaning just a bit" toward one side would affect him as a juror, because he had not heard the evidence (Tr. 35), he later said this "leaning" was "pretty firmly-set" but was not giving one side "a big head start" (Tr. 36). He repeated later on that he favored one side ***in this case*** "a little bit," "leaned a little bit toward one side and one side had a head start," then admitted that his position was "probably not" going to change during the trial as the evidence came in (Tr. 108-9).

Then, toward the end of voir dire, he stated twice he could be fair, listen to the evidence, follow the instructions and make a decision based on the evidence (Tr. 257, 284).

That final statement, in response to a frankly coercive leading question,[12] was unworthy of belief and too insubstantial to warrant the refusal to strike Cox for cause. The court did not explain its rationale, but presumably treated Cox's statement as somehow erasing his bias or eradicating it root and branch. That was an abuse of discretion.

Cox never made an unequivocal disavowal of his bias against an entire class of persons -- those who sue. He never claimed that his firmly-set bias had somehow

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[12]State v. Houston, 803 S.W.2d 195, 197 (Mo.App.1991).

disappeared, nor explained how that had or could have happened. He gave no assurance that, during the interim between his admission of bias and the statement he thought he could be fair and impartial (and without the benefit of any actual evidence), he had changed his opinion that the credibility of those who voluntarily join the "circus" of litigation was suspect and inherently diminished. Cox was never asked if, and never said that, he could set aside his bias against the plaintiff ***in this case***. *Cf.* State v. Edwards, 740 S.W.2d 237, 238 (Mo.App.1987) (juror was never asked whether she could set aside her avowed bias in favor of credibility of the entire class of police officers as witnesses). This case is unlike Joy v. Morrison, 254 S.W.3d 885, 890 (Mo.banc 2008), where the juror's "general feeling against excessive lawsuits" was not shown to have "translated into a bias against Joy."

> Not surprisingly, the Supreme Court observed long ago this human frailty:
>
> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

Crawford v. United States, 212 U.S. 183, 196, 29 S. Ct. 260, 265, 53 L. Ed. 465 (1909) (quoted with approval in Murphy v. Cole, 338 Mo. 13, 88 S.W.2d 1023, 1024 (1935)). *See also* Kendall v. Prudential Ins. Co. of America, supra 327 S.W.2d at 176-7.

Human nature has not changed over the last century, as Missouri has consistently

recognized in this area. Thus, "[e]rrors in the exclusion of potential jurors should always be made on the side of caution." State v. Stewart, 692 S.W.2d 295, 298 (Mo.banc 1985). "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 [a party's] right to an impartial jury, which, if violated, inevitably results on having to try the case over again." Id. at 299; Brown v. Collins, 46 S.W.3d 650, 652 (Mo.App.2001).

VII. THE COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANTS BECAUSE IT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO STRIKE JUROR JASON STRECK FOR CAUSE IN THAT HE ADMITTED PARTIALITY AND BIAS IN FAVOR OF DEFENDANTS.

Plaintiff incorporates the argument and legal authorities cited in Point VI.

Juror Streck said he felt the same as a previous juror (Dinning), that "there's too many lawsuits going on" (Tr. 31-2, 33). Streck added, "it's just given me a . . . sour taste for people that go after physicians" (Tr. 33). He had "a pretty strong feeling about that" and admitted "I may lean more towards one side than the other" ***in this case*** and "one of the parties may have a lead on the other" ***in this case*** (Tr. 34).

Streck expressed a hesitancy about suing a physician for negligence, explaining that he would not do so "right away" (Tr. 56). Factors he identified that would influence his decision to sue included whether "the procedure was done to the best of [the doctor's] ability

. . . and there were minor issues or issues involved," whether they "were dealt with appropriately" by the doctor, and whether the doctor tried to "make [it] right" by "go[ing] in before even another surgery" or "help[ing] with the care of the injury" he caused (Tr. 56). Streck was unable to say how these views "might affect him as a juror" because he had not heard any evidence "about the procedure and what happened and how it was cared for afterwards" (Tr. 57).

Streck disclosed his mother had a pending personal injury suit but that he did not discuss that "with her" (Tr. 146). Near the end of voir dire, he acknowledged he had some "strong feelings" about some "relatives that had gone after some physicians over care and treatment they had received," but did not indicate what those feelings were (Tr. 285-6). He was then asked whether, in view of "things that have happened in [the] past" and having "family members that have done things we may like or not like," he thought he "could be fair and impartial and listen to the evidence and be a juror that would be fair to Mrs. Wilson and to Dr. Dhir," and answered, "Yes" (Tr. 286).

Here, again, the attempted rehabilitation did not address the specific bias Streck admitted in the beginning. Streck never made an unequivocal disavowal of his bias against that whole class of persons who sue doctors. State v. Edwards, supra. He never claimed that his "pretty strong feeling" had disappeared, nor explained how that had or could have happened. He gave no assurance that, during the interim between his admission of bias and the statement he thought he could be fair and impartial (and also without the benefit of any

actual evidence), he had abandoned his bias. Streck was never asked if, and never said that, he could set aside his "sour taste" and his view that caused him to "lean more towards one side than the other" ***in this case*** and his willingness to give "one of the parties" ***in this case*** a lead over the other (Tr. 34). As with Cox, Streck confessed a bias against this plaintiff he never disavowed. Joy v. Morrison, supra.

Here, too, the court did not explain its rationale. But Streck's statement that he could be fair and impartial was unworthy of belief. Crawford v. United States, supra; Murphy v. Cole, supra; Kendall v. Prudential Ins. Co. of America, supra. Streck's statement did not erase his admitted bias. The court abused its discretion in denying the motion to strike. State v. Stewart, supra.

CONCLUSION

Allowing the jury to consider the false issues of plaintiff's alleged informed consent to unnecessary surgery and of the matter of non-existent eosinophilic esophagitis, inadmissible and misleading hearsay from a medical article that no witness identified as authoritative, and defendants' misleading arguments on those subjects, as well as denying meritorious strikes for cause, separately and in combination, deprived plaintiff of a fair trial. The judgment should be reversed and the cause remanded for a new trial.

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Substitute Brief fully complies with the provisions of Rule 55.03; that it contains 16,607 words/1358 lines and complies with the word/line limitations contained in Rule 84.06(b); and that one copy of the Substitute Brief was served by electronic mail, in pdf format, and a hardcopy thereof was mailed, by U.S. Mail, postage prepaid, this 16th day of November, 2016, to BK Christopher/Justin D. Fowler, 2600 Grand Blvd., Ste. 1100, Kansas City, MO 64108.

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