SC 95890

IN THE SUPREME COURT OF MISSOURI

JOSEPHINE WILSON,

Appellant

vs.

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

Respondents

APPEAL FROM THE CIRCUIT COURT OF
BUCHANAN COUNTY, MISSOURI
DIVISION NO. 2
HONORABLE WELDON JUDAH, CIRCUIT JUDGE

RESPONDENTS' SUBSTITUTE BRIEF

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SUPPLEMENTAL STATEMENT OF FACTS

Respondents adopt and incorporate Appellant's Statement of Facts as though fully set forth herein, and in addition offer the following supplemental statement of facts.

Prior to performing an esophagogastroduodenoscopy (hereinafter "EGD") on Appellant in December 2009, Respondent Dr. Dhir was already considering that he might need to dilate Appellant's esophagus after completing the EGD. Tr. 429, 610. Appellant discussed on direct examination the fact that she and Dr. Dhir had an informed-consent conversation, and she was aware that he might choose to dilate her esophagus after performing the EGD. Tr. 511, 553.

Dr. Dhir felt that Appellant would benefit from having her esophagus dilated following the EGD in December 2009. Tr. 740-41.

Respondents did not argue that Appellant consented to suffering a "known complication," or that informed consent was a defense to Appellant's claim of negligence. Tr. 837, 853, 859, 893.

The fact that Appellant does not have eosinophilic esophagitis (hereinafter "EoE") was relevant and important to Dr. Dhir when considering treatment options for Appellant. Tr. 585.

The 2006 American Society of Gastroenterology Endoscopy (hereinafter "ASGE") guideline pertaining to esophageal dilation that Appellant's expert, Dr. Dwoskin, used to support his opinions contains a qualifier – the recommendation was "particularly" true in patients with EoE due to an increased risk of perforation in such patients. LF 50. Appellant does not have the increased risk of perforation, and the guideline's recommendation is not

particularly true in her case, because she does not have EoE. Tr. 357, 584-85. When Dr. Dwoskin discussed the guideline's recommendations, he did not advise the jury of the "EoE" portion of the guideline. Tr. 444-48.

The trial court allowed counsel for Respondents to question defense expert, Dr. Ginsberg, regarding the 2006 ASGE guideline on esophageal dilation after Appellant had used the guideline in an attempt to impeach Dr. Ginsberg. The court stated that Respondents' counsel was entitled to do so because Appellant's counsel "quoted out of context and attempted to impeach [Dr. Ginsberg's] unfamiliarity with treatises," and therefore Respondents had "an opportunity to supply the information in a full fashion." Tr. 711.

The trial court permitted further inquiry into the content of the 2006 ASGE guideline in order to prevent the potential of Appellant mischaracterizing the treatise as a whole. Tr. 713.

Appellant discussed the 2006 ASGE guideline as substantive evidence in her closing argument, arguing that the guidelines "apply . . . to ensure community safety for every patient that goes to the doctor." Tr. 819.

During voir dire, venireperson Streck confirmed that he "could be fair and impartial and listen to the evidence and be a juror that would be a juror that would be fair to [Appellant] and [Respondents]." Tr. 286.

POINTS RELIED UPON

I. THE TRIAL COURT WAS CORRECT IN REFUSING APPELLANT'S WITHDRAWAL INSTRUCTION "A" PERTAINING TO INFORMED CONSENT—AND DID NOT ABUSE ITS DISCRETION IN DOING SO—BECAUSE THE ISSUE WAS PROPERLY BEFORE THE JURY IN THAT APPELLANT FIRST INTRODUCED EVIDENCE OF THE ISSUE, AND BECAUSE RESPONDENT DID NOT USE INFORMED CONSENT AS A DEFENSE TO APPELLANT'S ALLEGATION OF NEGLIGENCE.

(Response to Appellant's Points Relied On I – II)

Brizendine v. Bartlett Grain Co., 2015 WL 9310052 (Mo. App. W.D. Dec. 22, 2015)

Miles v. Dennis, 853 S.W.2d 406 (Mo. App. W.D. 1993)

Norton v. Johnson, 226 S.W.2d 689 (Mo. 1950)

Steinmeyer v. Baptist Memorial Hosp., 701 S.W.2d 471 (Mo. App. W.D. 1985)

Wilson v. Lockwood, 711 S.W.2d 545 (Mo. App. W.D. 1986)

II. THE TRIAL COURT WAS CORRECT IN REFUSING APPELLANT'S WITHDRAWAL INSTRUCTION "B"—AND DID NOT ABUSE ITS DISCRETION IN DOING SO—BECAUSE THE ISSUES OF INFORMED CONSENT AND EOSINOPHILIC ESOPHAGITIS WERE PROPERLY BEFORE THE JURY AND WERE RELEVANT ISSUES.

(Response to Appellant's Points Relied On III – IV)

State v. Yole, 136 S.W.3d 175 (Mo. App. W.D. 2004)

Stewart v. Sioux City & New Orleans Barge Lines, 431 S.W.2d 205 (Mo. 1968)

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING RESPONDENTS' MEDICAL EXPERT TO BE QUESTIONED AND TO TESTIFY DURING REDIRECT EXAMINATION REGARDING AN AUTHORITATIVE MEDICAL TEXT USED BY APPELLANT DURING CROSS-EXAMINATION BECAUSE THE PROCEDURE USED BY RESPONDENTS TO QUESTION THE EXPERT AND THE SUBJECT MATTER OF THE SUBSEQUENT TESTIMONY WERE BOTH PROPER.

(Response to Appellant's Point Relied On V)

Ball v. Burlington Northern R. Co., 672 S.W.2d 358

Ellison v. Simmons, 447 S.W.2d 66 (Mo. 1969)

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

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Kelley v. Hudson, 407 S.W.2d 553 (Mo. App. 1966)

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State ex rel. Kemper v. Vincent, 191 S.W.3d 45 (Mo. banc 2006)

State v. Yole, 136 S.W.3d 175 (Mo. App. W.D. 2004)

IV. THE COURT PROPERLY EXERCISED ITS SOUND DISCRETION IN DENYING APPELLANT'S MOTIONS TO STRIKE JURORS DOUGLAS COX AND JASON STRECK, AS BOTH WERE IMPARTIAL JURORS CAPABLE OF FOLLOWING THE COURT'S INSTRUCTIONS.

(Response to Appellant's Points Relied On VI - VII)

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

Revised Statutes of Missouri § 494.470

ARGUMENT

(Response to Appellant's Points Relied On I – II)

I. THE TRIAL COURT WAS CORRECT IN REFUSING APPELLANT'S WITHDRAWAL INSTRUCTION "A" PERTAINING TO INFORMED CONSENT—AND DID NOT ABUSE ITS DISCRETION IN DOING SO—BECAUSE THE ISSUE WAS PROPERLY BEFORE THE JURY IN THAT APPELLANT FIRST INTRODUCED EVIDENCE OF THE ISSUE, AND BECAUSE RESPONDENT DID NOT USE INFORMED CONSENT AS A DEFENSE TO APPELLANT'S ALLEGATION OF NEGLIGENCE.

A. Standard of Review

Giving a withdrawal instruction is left to the sound discretion of the trial court. *Wagner v. Bondex Intern., Inc.*, 368 S.W.3d 340, 357 (Mo. App. W.D. 2012). On appeal, discretionary rulings are presumed correct, and the appellant bears that burden of showing an abuse of discretion. *Id*. at 357. A trial court's determination "to refuse a withdrawal instruction will not be disturbed on appeal absent an abuse of discretion." *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 129-30 (Mo. banc 2007). An abuse of discretion occurs "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." *Brizendine v. Bartlett Grain Co.*, 2015 WL 93100052 (Mo. App. W.D. Dec. 22, 2015) (upholding a trial court's decision to refuse to give a withdrawal instruction).

The giving of a withdrawal instruction rests within the sound discretion of the trial court and, absent an abuse of such discretion, refusal to give a withdrawal instruction constitutes no basis for complaint. *Helming v. Adams*, 509 S.W.2d 159, 169 (Mo. App. 1974). A withdrawal instruction is "only to be given when during the course of trial a false issue, improper evidence, or evidence of an abandoned issue has been injected." *Weisbach v. Vargas*, 656 S.W.2d 797 (Mo. App. W.D. 1983). Ordinarily, it is not error to refuse a withdrawal instruction. *Norton v. Johnson*, 226 S.W.2d 689, 710 (Mo. 1950).

B. Argument

i. *The trial court did not err in refusing the "informed consent" withdrawal instruction.*

There was no error in the trial court's refusal to give Appellant's withdrawal instruction related to the issue of informed consent. Appellant has failed to establish an abuse of discretion that would justify intervention by the appellate court.

The issue in this case was whether Respondent Dr. Dhir was negligent in his choice to dilate Appellant's esophagus after performing an EGD on her December 2009. The facts of this case include that, as part of the physician-patient relationship, Appellant and Dr. Dhir discussed that Dr. Dhir might choose to dilate Appellant's esophagus after performing the EGD. Simply put, this discussion is a part of the chronology of the case, and shows that Dr. Dhir was already thinking in the pre-procedure period that he might need to dilate Appellant's esophagus. In a case where Dr. Dhir's decision-making is essentially the primary issue, this discussion between physician and patient is relevant.

The jury was permitted to hear evidence from Appellant and Respondents throughout trial, on direct examination as well as cross-examination, regarding the fact that such a conversation occurred. Respondents referenced in their opening statement that Appellant was aware that Dr. Dhir might feel it necessary to dilate her esophagus after performing the EGD. Tr. 345, 362-63. This reference was made as part of counsel's recitation to the jury of the chronology and facts in the case. It should also be noted that the term "informed consent" was used only once during Respondents' opening statement, and was made in reference to the name of a document signed by Appellant. *Id.*

But it was Appellant who first introduced informed consent in the evidentiary context. On her direct examination, Appellant called into question the validity of the informed-consent discussion that she had with Dr. Dhir, and disputed the nature of their conversation. Tr. 511. Once she did so, Appellant injected informed consent into the case, and opened the door for Respondents to explore the topic. Respondents' counsel did address the issue with Appellant on cross-examination, but only to the extent necessary to clarify that Appellant was, in fact, aware that Dr. Dhir might choose to dilate her esophagus after doing the EGD. Tr. 553. Respondents' counsel did not belabor the point, and moved on once the issue was clarified. *Id.*

On redirect, Appellant's counsel asked Appellant about signing various informed-consent documents. Tr. 554. Appellant then chose to delve into the issue of informed consent once again in the cross-examination of Dr. Dhir. Appellant took Dr. Dhir back through the informed-consent conversation, as well as the consent forms that he uses. Tr. 762-65.

Dr. Dhir advising Appellant that he might need to dilate her esophagus is relevant to his decision-making, and his decision-making is what was at issue at trial. It is also a conversation that occurred as part of the physician-patient relationship. Where the evidence is relevant and admissible, it is not error to refuse a withdrawal instruction asking the court to withdraw that evidence from the jury's consideration. *Miles v. Dennis*, 853 S.W.2d 406, 409 (Mo. App. W.D. 1993).

While Respondents deny that there was error, if there was error in admission of the issue of informed consent, the above references to the record show that it was invited and an Appellant may not rely on invited error on appeal. *City of Kansas City v. Hayward*, 954 S.W.2d 399, 402 (Mo. App. W.D. 1997). This Court most recently addressed the refusal to give a withdrawal instruction in *Brizendine*. 2015 WL 93100052. In finding that the trial court did not abuse its discretion in refusing to give the requested withdrawal instruction, this Court noted that, because of the "invited error" rule, a party cannot complain of an error that they invited. *Id.* at 12, n.2 (citing *Rouse v. Cuvelier*, 363 S.W.3d 406, 416 n.6 (Mo. App. W.D. 2012)).

When a party opens up a matter at trial, that party may not object to the matter's further development by the opposing party. *Yaeger v. Olympic Marine Co.*, 983 S.W.2d 173, 187 (Mo. App. E.D. 1998). Thus, even if the evidence was inadmissible and subsequent argument was improper, Appellant cannot complain. *Id.*

Here, Appellant chose to discuss informed consent during her direct examination, which injected the issue into evidence. She also chose to cross-examine Dr. Dhir fairly extensively about informed consent and the use of consent forms. A party will not be heard

to complain of alleged error in which, by his own conduct at the trial, he joined or acquiesced. *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850 (Mo. App. W.D. 2013) (citing *Rouse v. Cuvelier*, 363 S.W.3d 406 (Mo. App. W.D. 2012)) (holding that under the invited error rule, where a Appellant is the first to inject a complained of issue into evidence before the jury, the party is estopped from complaining of error). It was not error for the court to refuse Appellant's withdrawal instruction.

ii. *Appellant relies on cases that are specific to use of withdrawal instructions concerning evidence of payments in Worker's Compensation cases, and are not applicable to the instant case.*

"[T]he function of instructions to the jury is to tell the jury what the issues are rather than to tell them what they are not." *Steinmeyer v. Baptist Memorial Hosp.*, 701 S.W.2d 471 (Mo. App. W.D. 1985). "Giving a withdrawal instruction rests within the sound discretion of the trial court, and absent an abuse of such discretion, refusing to give a withdrawal instruction constitutes no basis for complaint." *Wilson v Lockwood*, 711 S.W.2d 545, 554 (Mo. App. W.D. 1986).

Appellant cites two cases to support her contention that the trial court erred in refusing her Instruction "A" regarding the issue of informed consent. Those cases, *Sampson v. Missouri Pac. R. Co.*, 560 S.W.2d 573 (Mo. banc 1978), and *Womack v. Crescent Metal Products, Inc.*, 539 S.W.2d 481 (Mo. App. 1976), both involved introduction of testimony regarding the receipt of worker's compensation benefits. Appellant's reliance on these cases is misguided, though, as they appear to outline the

standard for when a withdrawal instruction should be given in worker's compensation cases.

"It is well settled in this state that evidence that payments made to a plaintiff under the Workmen's Compensation Act, are not ordinarily admissible in an action for that injury against a third party as a defense to the tort action or for the purpose of mitigating the damages recoverable." *Womack*, 539 S.W.2d at 483-484. "We ordinarily look with disfavor upon the introduction of evidence of payments under the workmen's compensation act … because of the danger that a false or foreign issue will thereby be raised and distort the contention of the parties as pleaded." *Sampson*, 560 S.W.2d at 584. Missouri courts are wary of introducing such evidence in employment injury cases because "the most likely reaction of a jury … will be that receipt by [a] plaintiff of workmen's compensation benefits mean that to that extent his loss or damage has already been covered." *Id*.

If evidence of worker's compensation benefits is introduced as a defense to the alleged tort or for the purpose of mitigating damages, with no other relevant purpose, the trial court should give a withdrawal instruction. *Womack*, 359 S.W.2d at 485. The cases to which Appellant has cited illustrate that courts have little discretion in deciding whether to submit a withdrawal instruction regarding worker's compensation benefits.

While Missouri law is settled regarding the use of withdrawal instructions following mention of worker's compensation benefits, there is no firmly established law requiring a withdrawal instruction following a relevant discussion of informed consent in a medical injury case. For example, *Wilson v. Lockwood*, 711 S.W.2d 545 (Mo. App.

W.D. 1986), is a medical malpractice action wherein the infant plaintiff suffered complications following circumcision. *Id*. at 547. The defendant doctor appealed from a jury verdict for the plaintiff. *Id*. The doctor alleged multiple points of error, including the trial court's refusal to submit a withdrawal instruction on the issue of whether the parents gave their informed consent. *Id*. at 554. The court found no abuse of discretion in the trial court's refusal to submit such an instruction. *Id*.

Contrary to Appellant's argument that the court erred in refusing to submit a withdrawal instruction regarding her informed consent, the holding in *Wilson* demonstrates that Missouri law does not require such an instruction. Instead, giving a withdrawal instruction in a case such as the instant matter rests within the sound discretion of the trial court, and absent an abuse of such discretion, refusing to give a withdrawal instruction constitutes no basis for complaint. *Wilson*, 711 S.W.2d at 554. *Sampson* and *Womack*, and their narrow holdings concerning worker's compensation, are inapplicable to the issues presented by the case before this Court.

iii. *Respondents did not argue at trial that informed consent was a defense to Appellant's claim of negligence.*

Appellant suggests that Respondents argued that she had somehow consented to the perforation of her esophagus, or consented to a complication, and used informed consent as a defense to Appellant's claim of negligence. This is not true. At no point—whether in their opening statement, the presentation of evidence, or their closing argument—did Respondents suggest that the fact that Appellant was aware that Dr. Dhir might choose to dilate her esophagus was a defense to Appellant's claim. Respondents did not in any way

argue that they could not be found negligent because such a conversation occurred, or because Appellant signed a document.

iv. *Appellant's cited authorities are not controlling upon this Court, and are distinguishable from the case at hand.*

Appellant cites to a number of cases in support of her argument on this point. Appellant's Brief, pp. 38-43. These cases are not Missouri cases, and are therefore not controlling upon this Court.

Beyond that, the holdings of those cases are distinguishable from the issue before the court. The cases are not persuasive to this court because they deal with the exclusion of evidence, whereas this case deals with evidence already part of the record. Appellant takes issue with references to informed consent during Respondents' opening and during the cross-examination of Appellant, but Appellant did not object in either instance. Moreover, as noted above, it was Appellant who first put the discussion between Dr. Dhir and Appellant into evidence by addressing it during her direct examination.

Excluding evidence, which was the task before the trial courts in these cases cited by Appellant, involves consideration of what to prevent a jury from hearing; withdrawal instructions prevent a jury from considering evidence already admitted. These cases are not binding or persuasive on this court.

v. *Giving the withdrawal instruction requested by Appellant would have likely created confusion for the jury.*

Where a withdrawal instruction would confuse the jury upon issues of case as submitted, that instruction should not be given. *Nelson v. O'Leary*, 291 S.W.2d 142, 148

(Mo. 1956). The better practice is to tell the jury what the issues are rather than to tell them what they are not. *Id.* The trial court is in the best position to determine whether the offered testimony will help explain a witness's testimony or merely confuse the jury. *See Nguyen v. Haworth*, 916 S.W.2d 887, 889 (Mo. App. W.D. 1996) (finding the trial judge sits as an intimate observer and is in the best position to determine the effect of evidence on the case).

Appellant also argues that the fact that the jury asked for a copy of the "consent form" that she signed proves that the jury was confused by the issue of informed consent. It is speculation to reach that conclusion. Moreover, the "consent form" is not the only thing that the jury requested—the jury also asked to see billing records for Appellant, arguably suggesting that the jury was considering how much to award in damages at that point. LF 38. The jury also asked for a number of other items. LF 39. To be sure, there is no basis to conclude that the jury's request for the "consent form" means that the trial court abused its discretion in refusing to issue the withdrawal instruction.

The trial court found that Appellant signing an informed consent form prior to the procedure, and being aware that Dr. Dhir might choose to dilate her esophagus, were facts of the case that could not be extracted from the case without confusing the jury.

C. Conclusion

Dr. Dhir's decision to dilate Appellant's esophagus after performing an EGD is at issue in the underlying lawsuit. Before performing the EGD, Dr. Dhir discussed with Appellant the fact that he might need to dilate her esophagus. This conversation shows that Dr. Dhir was already considering before the EGD that he might need to dilate the

esophagus, particularly in light of Appellant's medical history. This is probative of Dr. Dhir's decision-making. This conversation occurred as part of the physician-patient relationship. It is simply part of the facts of this case, and there is no basis for extracting it. Appellant attacked the discussion on her direct examination, injecting the issue into evidence. Respondents clarified the nature of the discussion, but at no point argued or intimated that the existence of such a conversation absolved them of negligence, or was a defense to Appellant's allegation of negligence. The trial court did not abuse its discretion in refusing Appellant's withdrawal instruction regarding informed consent.

(Response to Appellant's Points Relied On III – IV)

II. THE TRIAL COURT WAS CORRECT IN REFUSING APPELLANT'S WITHDRAWAL INSTRUCTION "B"—AND DID NOT ABUSE ITS DISCRETION IN DOING SO—BECAUSE THE ISSUES OF INFORMED CONSENT AND EOSINOPHILIC ESOPHAGITIS WERE PROPERLY BEFORE THE JURY AND WERE RELEVANT ISSUES.

A. Standard of Review

In response to Appellant's third and fourth Points Relied On, Respondents have previously articulated the appropriate standard of review in this matter. *See supra*, Point I.A. In the interest of economy, Respondents will not restate those principles herein. Instead, Respondents submit that the exact same standard of review applies to Appellant's third and fourth points, and thus incorporate their prior discussion by reference as though fully set forth herein.

B. Argument

Points III and IV pertain to a withdrawal instruction that included both informed consent and EoE. Respondents addressed the reasons that the trial court was correct in refusing a withdrawal instruction of informed consent in Section I above, and therefore incorporate those arguments into this Section, as though set forth verbatim herein, as their response to the informed consent portion of Withdrawal Instruction "B." Additionally, the standards and case law governing use of withdrawal instructions apply equally in the context of EoE, so in the interest of brevity Respondents will not repeat those standards in this Section, and hereby incorporate those in response to Points III and IV of Appellant's

brief. Instead, Respondents will address why EoE was a relevant issue, and why the trial court was correct in refusing to issue a withdrawal instruction regarding EoE.

i. *The trial court did not err in refusing the "EOE" withdrawal instruction because that issue was relevant to Respondent Dr. Dhir's analysis of Appellant's medical condition.*

There was no error in the trial court's refusal to give Appellant's withdrawal instruction related to the issue of EoE. Appellant has failed to establish an abuse of discretion on this issue that would justify intervention by the appellate court.

The issue in this case was whether Respondent Dr. Dhir was negligent in his choice to dilate Appellant's esophagus after performing an EGD on her December 2009. Upon completion of the EGD, Dr. Dhir had to analyze the results of that procedure, in conjunction with his knowledge of Appellant's medical history, in order to determine what he felt would benefit Appellant.

In assessing a patient's condition to diagnose what condition he or she has, it is important for the practitioner to know what the patient <u>does not</u> have so that the practitioner can rule out possible causes of the patient's symptoms. Dr. Dhir knew from a review of Appellant's medical history that she did not have EoE, and therefore knew that that condition could not be the cause of her problems. EoE is relevant for this reason. Dr. Dhir also knew that dilation of the esophagus could be contraindicated in a patient with EoE, so it was important for him to point out that she did not have this contraindication to dilation. EoE was relevant for this reason, as well. Respondents' expert, Dr. Ginsberg, also testified as to why EoE was relevant to his analysis of this case. Tr. 710-11.

ii. *Appellant injected EoE into the case through the use of authoritative medical literature during trial.*

Appellant's expert, Dr. Dwoskin, testified that a 2006 ASGE guideline was authoritative. Tr. 479-80. Appellant relied on one particular passage in support of her case:

> 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.

LF 50 (emphasis added). Dr. Dwoskin looked to this guideline as support for his opinion that Dr. Dhir violated the standard of care. Tr. 444-48. He concluded his testimony on direct examination by stating that "there was no reason to deviate from the guideline." Tr. 448.

Absent from Dr. Dwoskin's testimony is the fact that the guideline contains a qualifier. The recommendations of this guideline were "particularly" true in patients with EoE. Because Appellant did not have EoE, the qualifying portion of the guideline does not apply to her. Tr. 357, 584-85. Respondents were permitted to point out that Appellant did not fall into the category of patients for whom this recommendation was "particularly" true.

The "rule of completeness" assures that statements and other matters are not taken and admitted out of context. Under this concept, where one party introduces part of a writing, conversation, or statement, an opponent has a right to introduce evidence of, or inquire into, other relevant parts of that writing. *Stewart v. Sioux City & New Orleans*

Barge Lines, 431 S.W.2d 205, 211-2 (Mo. 1968). The purpose of this rule is to ensure that matters are not taken out of context, and therefore eliminate distortion or confusion or to facilitate the jury's evaluation of the original portion. *State v. Yole*, 136 S.W.3d 175, 179 (Mo. App. W.D. 2004).

Appellant introduced a guideline that discussed the risk of perforation when an esophagus is dilated. Patients with EoE have an increased risk of perforation according to this guideline; therefore, Respondents were properly permitted to show that this increased risk did not apply to Appellant.

C. Conclusion

Dr. Dhir's decision to dilate Appellant's esophagus after performing an EGD is at issue in the underlying lawsuit. Before performing the dilation, Dr. Dhir had to analyze what conditions Appellant had, as well as what conditions she did not have. He also had to consider whether there were any contraindications to dilation. For these reasons, EoE was a relevant issue. In addition, EoE presents an increased risk of esophageal perforation according to a guideline that Appellant deemed authoritative—it was relevant for Respondents to establish that this increased risk of perforation did not apply to Appellant. The trial court did not abuse its discretion in refusing Appellant's withdrawal instruction regarding EoE.

(Response to Appellant's Point Relied On V)

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING RESPONDENTS' MEDICAL EXPERT TO BE QUESTIONED AND TO TESTIFY DURING REDIRECT EXAMINATION REGARDING AN AUTHORITATIVE MEDICAL TEXT USED BY APPELLANT DURING CROSS-EXAMINATION BECAUSE THE PROCEDURE USED BY RESPONDENTS TO QUESTION THE EXPERT AND THE SUBJECT MATTER OF THE SUBSEQUENT TESTIMONY WERE BOTH PROPER.

A. Standard of Review

In Appellant's fifth point, she argues that the trial court erred in allowing Respondent's expert witness, Dr. Ginsberg, to testify regarding a medical text that he was questioned about during redirect examination. When reviewing a trial court's evidentiary ruling, this Court must respect the "considerable discretion" allotted to the trial court in the "'admission or exclusion of evidence.'" *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011) (quoting *State v. Mayes*, 63 S.W.3d 615, 629 (Mo. banc 2001)). The decision of the trial court to enter Dr. Ginsberg's testimony regarding an authoritative medical text shall not be reversed unless appellant is able to establish a "'clear abuse of discretion'" by the trial court. *Id.* Absent a clear abuse of discretion, a trial court's determination about the admissibility of an expert witness's testimony will not be reversed. *Byers v. Cheng*, 238 S.W.3d 717, 729 (Mo. App. W.D. 2007). Further, specifically regarding redirect examination, the "scope and extent to which the redirect examination of a witness shall be permitted to go is a matter to be left largely to the sound discretion of

the trial court and its ruling in this respect will not be disturbed unless an abuse of discretion is clearly shown." *Johnson v. Miniham*, 200 S.W.2d 334, 336 (Mo. 1947).

B. Argument

Appellant postures that the court erred in permitting counsel for Respondents to question their medical expert, Dr. Ginsberg, in redirect examination about a portion of an authoritative medical text that was used by opposing counsel during Appellant's cross-examination of Dr. Ginsberg (the text at issue is a 2006 guideline from the ASGE pertaining, in part, to empiric dilation of the esophagus). Appellant alleges that permitting Respondents to reference the text in redirect was improper and that this questioning amounted to inadmissible hearsay.

The Missouri Supreme Court's opinion in *Gridley v. Johnson* sets forth the proper procedure for questioning medical experts about medical literature during cross-examination. 476 S.W.2d 475 (Mo. 1972). In *Gridley*, the Supreme Court held that once a text is established as "standard or authoritative" sufficient foundation has been laid "to use the [text] in cross-examination." *Id.* at 481.

At trial, Appellant established the authority of the 2006 ASGE guideline regarding esophageal dilation through their own expert, Dr. Dwoskin, outside the hearing of the jury, as permitted by *Gridley*. *Id.*; Tr. 479-80, 486-88. Appellant then questioned Dr. Ginsberg on a very limited passage of that text regarding empiric dilation. Tr. 689-90. In doing so, Appellant attempted to discredit Dr. Ginsberg's expert knowledge and credibility. Appellant's extremely limited use of the text resulted in a mischaracterization of the text as a whole, and thus improperly reflected upon Dr. Ginsberg's expert knowledge and

qualifications. As a result, Respondents returned to this line of questioning during redirect examination in order to rehabilitate their expert. Tr. 711-17.

Appellant has misconstrued *Gridley* to allow questioning regarding an authoritative text *only* during cross-examination; however, nowhere in the *Gridley* holding is questioning regarding an authoritative text limited exclusively to cross-examination. Respondents' questioning regarding the text was proper during redirect because "[a]fter a witness has been cross-examined, the party calling him may by redirect examination afford the witness opportunity to make full explanation of the matters made the subject of cross-examination so as to rebut the discrediting effect of his testimony on cross-examination and correct any wrong impression which may have been created." *Turner v. Caldwell*, 349 S.W.2d 493, 496 (Mo. App. 1961).

Further, if a party "opens up a line of inquiry which is designed to discredit the witness in the eyes of the jury" on cross-examination, the court may permit the other party to discuss those aspects favorable to the witness on redirect. *Johnson*, 200 S.W.2d at 336. Once Appellant's counsel asked Dr. Ginsberg about the article at issue in an attempt to discredit his expert opinion, Appellant opened the door to the article being used in the redirect examination of Dr. Ginsberg. Defense counsel was properly allowed to "rebut the discrediting effect of his testimony on cross-examination and correct any wrong impression which may have been created." *Id.*

Appellant further argues that Dr. Ginsberg's testimony regarding the 2006 ASGE guideline should have been limited to only the specific passage used by Appellant during cross-examination. But nothing in *Gridley*, or in any Missouri precedent, limits the use an

authoritative text to a particular portion of the text meticulously selected by counsel. Rather, once a text is established as authoritative, the entirety of that authoritative text is available for use in evaluating the credibility of an expert witness. *See Gridley*, 476 S.W.2d 475 (Mo. 1972) (allowing the use of an entire book in cross-examination after concession that the text was authoritative).

Appellant next argues that counsel for Respondents' questioning of Dr. Ginsberg regarding the 2006 ASGE guideline amounted to inadmissible hearsay. Appellant misses the point of Respondents' line of questioning. In questioning Dr. Ginsberg about the text that Appellant used to challenge his credibility, counsel for Respondents was not attempting to offer the text itself as independent evidence, but rather was working to correct the attempted discrediting of Dr. Ginsberg by Appellant—something that was specifically recognized and properly allowed by the trial judge. Tr. 713-16. It should also be noted that the trial court did limit the use of the literature by defense counsel during the redirect examination of Dr. Ginsberg, and any such questioning was brief. Tr. 716-17. Appellant was restricted from relying upon the 2006 ASGE guideline as substantive evidence, and so were Respondents.

Appellant argues that the Western District misapplied the "rule of completeness" in its holding. As cited in Appellant's brief, the "rule of completeness" 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*." *See* Appellant's Substitute Brief, Page 60 (citing *State ex*

rel. Kemper v. Vincent, 191 S.W.3d 45, 49-50 (Mo. banc 2006)) (emphasis in Appellant's Substitute Brief).

In support of her argument that the appellate court misapplied the "rule of completeness" in affirming the trial court's discretion to allow Respondents to supply context to Appellant's excerpted use of the 2006 ASGE Guideline, Appellant argues that the "rule of completeness" is "clearly inapplicable here because the quoted part of the 2006 ASGE Guideline was never introduced as *substantive evidence*." *See* Appellant's Substitute Brief, Page 60 (emphasis in original). In making this argument, Appellant runs afoul of controlling legal precedent in that Appellant improperly adds the qualifier "substantive" to evidence and Appellant discounts the evidentiary nature of authoritative texts as impeachment evidence. Appellant's use of the authoritative text as impeachment evidence—not substantive evidence—invoked the trial court's discretionary power to apply the "rule of completeness", and such an invocation of the "rule of completeness" following the use of incomplete impeachment evidence is consistent with controlling precedent in Missouri.

As evident from its absence in controlling precedent, the applicability of the "rule of completeness" is not contingent upon the incomplete evidence being *substantive* evidence. *See State ex rel. Kemper, supra; see also State v. Jackson,* 313 S.W.3d 206, 211 (Mo. App. E.D. 2010) ("The adverse party is entitled to introduce or to inquire into other parts of the whole exhibit in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced"). In her brief, Appellant cites no authority that draws a distinction between substantive and

impeachment evidence for purposes of applying the "rule of completeness." To the contrary, Missouri courts have explicitly endorsed the application of the "rule of completeness" when *impeachment* evidence is offered in an incomplete and acontextual manner. *See State v. Daly*, 798 S.W.2d 725, 731 (Mo. App. W.D. 1990) ("The trial court has broad discretion to admit into evidence additional portions of a statement used to impeach a witness"); s*ee also Ellison v. Simmons*, 447 S.W.2d 66, 70 (Mo. 1969) ("We have said that [t]he trial court has a broad discretion in determining the extent to which additional portions of a statement may be read into evidence to show the context of and circumstances under which the impeaching portion was made for the purpose of minimizing its impeaching force").

Furthermore, the use of authoritative texts for cross-examination of expert witnesses is clearly contemplated as evidence, and in particular, impeachment evidence. Under Missouri law, "[a]rticles and treatises identified by one party's expert as authoritative publications may be used to impeach the testimony of an opposing party's expert." *Ball v. Burlington Northern R. Co.*, 672 S.W.2d 358, 363 (Mo. App. E.D. 1984) (citing *Gridley v. Johnson*, 476 S.W.2d 475, 481 (Mo.1972)). When a party uses an authoritative text to cross-examine an expert witness "the material from publications which have been proved authoritative is ***evidence*** the jury should consider in passing on the credibility of the expert witnesses." *Powers v. Ellfeldt*, 768 S.W.2d 142, 148 (Mo. App. W.D. 1989) (emphasis added). "Authoritative texts are proper for the jury to consider in passing on the credibility of an expert witness…; ***[t]hus they are evidence***

which may be relevant to the jury's task." *Herrera v. DiMayuga*, 904 S.W.2d 490, 494 (Mo. App. S.D. 1995) (internal citation omitted) (emphasis added).

Missouri trial courts are afforded broad discretion in applying the "rule of completeness" to admit or exclude evidence at trial. *See State v. Yole*, 136 S.W.3d 175, 179 (Mo. App. W.D. 2004). As with other evidentiary issues, the trial court is afforded this broad discretion because the trial court is in the best position to evaluate the potential prejudice of admitting or excluding evidence. *See Pittman v. Ripley County Memorial Hosp.*, 318 S.W.3d 289, 294 (Mo. App. S.D. 2010). The evidentiary "rule of completeness" 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, supra*, 191 S.W.3d at 49–50 (Mo. banc 2006) (emphasis added). "This rule seeks to ensure that an exhibit is not admitted *out of context.*" *State v. Jackson*, 313 S.W.3d 206, 211 (Mo. App. E.D. 2010) (emphasis added). "The adverse party is entitled to introduce or to inquire into other parts of the whole exhibit in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced." *Id.*

Here, the trial court determined that the Appellant quoted the 2006 ASGE Guideline "out of context" and that Respondent had the opportunity to supply the information in a full fashion. Tr. 711. The trial court also expressed concerns about Appellant pulling "one sentence out of some treatise a number of pages long" when the "rest of the treatise itself may not even agree with that one sentence and say that it would be fairly used." Tr. 713. In its exclusive "best position" to make this discretionary

determination, the trial court found that Appellant's impeachment evidence was introduced "out of context" and in a "fragmentary and incomplete character" and allowed Respondents an opportunity to provide a more complete picture of the nature of this authoritative text to the jury. In doing so, the trial court acted within its discretion and in accordance with controlling Missouri precedent on the applicability of the "rule of completeness."

In an attempt to downplay the discretionary application of the "rule of completeness," Appellant argues that the "content of learned texts, treatises and articles *remains* hearsay throughout the trial" and that applying the "rule of completeness" to allow contextual completion would effectively overrule the Missouri framework set forth in *Gridley v. Johnson* on introducing authoritative texts on cross-examination. *See* Appellant's Substitute Brief, Page 61. Contrary to this assertion, it is Appellant, in actuality, who seeks to overrule the longstanding Missouri framework pertaining to the "rule of completeness." Logically speaking, the "rule of completeness" inherently involves evidence—such as "hearsay"—which would otherwise be disallowed by the trial court; if the evidence sought to be admitted under the "rule of completeness" was allowed without evidentiary question, then the "rule of completeness" would be an unnecessary and toothless doctrine. Missouri Courts, in their application of the "rule of completeness," have made this point readily apparent. *See State ex rel. Kemper*, *supra*, 191 S.W.3d 45, 49-50 (Mo. banc. 2006) (allowing admission of a polygraph test for purposes of "rule of completeness" when the polygraph would otherwise not be admissible); *see also Kelley v. Hudson*, 407 S.W.2d 553, 557 (Mo. App. 1966)) ("One

may not elicit from his adversary, to his own advantage, those parts of a conversation in which the adversary was the speaker, and then withhold from the jury, to his adversary's disadvantage, the responses of the other party to the conversation which fill out and explain the sense of it, ***even though such responses are hearsay.”***) (emphasis added).

Thus, far from overruling the *Gridley v. Johnson* framework for admission of authoritative texts as impeachment evidence, the application of the “rule of completeness” is a complementary doctrine which arises in situations in which the trial court determines that the excerpted portion of the authoritative text, used as impeachment evidence, lacks context and misleads the jury. The standard in *Gridley* is unaffected by subjecting misleading and incomplete impeachment evidence to the “rule of completeness,” and allowing the jury a more complete, fair, and contextual picture of the authoritative text used for impeachment.

Finally, in her brief, Appellant makes reference to the doctrines of “curative admissibility” and “invited error.” But in raising the doctrines of “curative admissibility” and “invited error,” Appellant has presented this Court with a classic red herring, as neither respondent nor the inferior courts have argued that Appellant’s introduction of the authoritative text on cross-examination was error. Rather, Respondents have taken the position that Appellant’s introduction of the incomplete excerpted portion of the 2006 ASGE guideline lacked context and misled the jury and, thus, used the 2006 ASGE summary to provide the jury with some much-needed context and clarity. The doctrines of “curative admissibility” and “invited error” bear no application to the issues at hand.

The "rule of completeness" has been appropriately applied in this case, and supports Respondents' use of the text on redirect examination.

Appellant also alleges that she was prejudiced by Respondents' reference to the 2006 ASGE guideline during closing arguments. Appellant's counsel and Respondents' counsel both made reference to the guideline during their respective closing arguments. Tr. 819, 854. Appellant relied heavily upon the guideline, improperly using it as substantive evidence, in order to argue that the guideline established a standard of care for the medical community. Tr. 819; S*ee Powers v. Ellfeldt*, 768 S.W.2d 142,148 (Mo. App. W.D. 1989) (holding authoritative texts are not of themselves direct and independent evidence). In reference to the authoritative text and Dr. Ginsberg's prior testimony, counsel for Appellant improperly argued during closing: "[t]hose are the guidelines. Those are the guidelines that apply to this community to ensure the community safety for every patient that goes to the doctor." Tr. 819.

During Respondents' closing argument, counsel did acknowledge the guidelines; however, Respondents were required to do so in order to cure and correct Appellant's misuse and misstatement of the authoritative text—just as the trial court permitted during redirect examination of Dr. Ginsberg. In reference to Appellant's reliance upon the guideline, counsel for Respondents stated: "[t]hey read one sentence out of a large article, took it out of context, and it doesn't say what they're saying." Tr. 854. If not for Appellant's inclusion of the guideline in her closing argument, no need would have existed for Respondents to address the guideline during their own closing argument.

Further, the impact of Respondents' comments were properly evaluated by the trial court. Appellant objected to Respondent's statements regarding the guideline and the trial court sustained the objection. Tr. 855-57. The trial court was in the best position to evaluate Respondents' statements during closing argument with which Appellant now takes issue. The trial court addressed this matter during closing arguments, ultimately ruled in favor of Appellant, and did not abuse its discretion.

C. Conclusion

Permitting Dr. Ginsberg to be questioned briefly about the authoritative 2006 ASGE guideline during redirect examination was proper under the circumstances, and was not an abuse of the trial court's discretion. Dr. Ginsberg's testimony regarding the authoritative text, initially offered by counsel for Appellant, was on a proper subject matter and was not inadmissible hearsay. The trial court exercised its sound discretion in controlling the scope and extent of Dr. Ginsberg's redirect examination and in doing so did not enter any ruling amounting to an abuse of that discretion. Both parties referenced the literature in their closing arguments, and the trial court did not abuse its discretion in its handling of those arguments.

(Response to Appellant's Points Relied On VI - VII)

IV. THE COURT PROPERLY EXERCISED ITS SOUND DISCRETION IN DENYING APPELLANT'S MOTIONS TO STRIKE JURORS DOUGLAS COX AND JASON STRECK, AS BOTH WERE IMPARTIAL JURORS CAPABLE OF FOLLOWING THE COURT'S INSTRUCTIONS.

A. Standard of Review

Appellant's sixth and seventh points request this Court to review the trials court's decisions to deny Appellant's motions to strike jurors Douglas Cox and Jason Streck for cause during voir dire. This Court must uphold the trial court's denial of Appellant's motion "unless it is clearly against the evidence and is a clear abuse of discretion." *Joy v. Morrison*, 254 S.W.3d 885, 888 (Mo. 2008) (quoting *State v. Christeson*. 50 S.W.3d 251, 264 (Mo. banc 2001)).

In order to prevail on this point, Appellant must prove that the trial court's exercise of its discretion in not striking venirepersons Cox and Streck for cause "was clearly against the logic of the circumstances then before the court and [was] so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Anglim v. Missouri Pacific Railroad Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992). This burden of proof is difficult to overcome because Appellant may rely only upon "the facts…that were before the trial court when it ruled" and those facts must be "viewed in a light favorable to the result of the trial court." *Id*. Further, the discretionary rulings of the trial court must be presumed as correct on appeal. *Id*.

B. Argument

i. *Missouri law governing motions to strike jurors for cause*

During voir dire, trial judges are bestowed a great amount of discretion with which to conduct and control jury selection. *Joy*, 254 S.W.3d at 888. The determination of a juror's qualifications "is a matter for the trial court in the exercise of sound judicial discretion." *Id*. Missouri rules establish that jury members are ineligible to serve on a jury based upon their opinions only when those "opinions or beliefs preclude them from following the law as declared by the court in its instructions." Revised Statutes of Missouri § 494.470. When evaluating a venireperson's eligibility to serve pursuant to § 494.470, the trial court must determine whether a juror's beliefs "preclude following the court's instructions so as to 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Joy*, at 888 *(*quoting *State v. Johnson*, 22 S.W.3d 183, 187 (Mo. banc 2000)).

A juror's qualifications are not determined by a single answer to a question during jury selection, but rather by the entire examination and selection process. *Id.* Even when a potential juror expresses an opinion or belief which may weigh upon his or her eligibility, "mere equivocation is not enough to disqualify a juror," nor is the "bare possibility of prejudice" enough to deprive the trial court of discretion to ultimately seat that individual on the jury. *Joy*, 254 S.W.3d at 890-91 (citing *McClain v. Petkovich*, 848 S.W.2d 33, 35 (Mo. App. E.D. 1993).

A venireperson who may initially demonstrate traces of bias is not disqualified from jury service. General feelings expressed in voir dire do not clearly translate into bias

against a party and are therefore not grounds to automatically strike a panel member for cause. *Joy*, 254 S.W.3d at 890. The ultimate question before the trial court when evaluating a venireperson for bias is "whether the challenged venireperson indicated unequivocally his or her ability to fairly and impartially evaluate the evidence." *Id*. at 891 (citing *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 411 (Mo. App. E.D. 1996). When said venireperson is able to offer "unequivocal assurances of impartiality," he is to be considered rehabilitated and should not be disqualified as a juror. *State v. Grondman*, 190 S.W.3d 496, 498 (Mo. App. W.D. 2006). Impartiality is satisfactorily established when the overall tenor of a venireperson's testimony is that he or she would be "fair and impartial." *Joy*, 254 S.W.3d at 891.

The Missouri Supreme Court's decision in *Joy v. Morrison* is directly controlling upon the issue currently before this Court. As in this case, *Joy* arises from a medical malpractice action in which plaintiff appealed the decision of the trial court not to strike a juror for cause. *Id*. at 888. In *Joy*, plaintiff argued that the potential venireperson at issue was not properly qualified to serve on the jury due to his responses to questions during voir dire. *Id*. During voir dire, the potential juror expressed some initial bias for the defendant doctors. *Id*. at 890. The venireperson at issue ultimately stated that he would be able to award damages in favor of plaintiff if he found negligence, and he would be able to find in favor of the doctor if he did not find negligence. *Id*. Further, the juror at issue stated he "would be 'fair and reasonable' in evaluating the evidence and the opinions of the other jurors." *Id*. The trial court declined to strike the panel member, and he was seated on the

jury. *Id*. at 888. The Missouri Supreme Court affirmed the decision to seat this individual on the jury and did not find an abuse of discretion in the trial court's decision. *Id*. at 891.

ii. *The trial court was correct in not striking venireperson Cox for cause.*

In Point VI on appeal, Appellant takes issue with venireperson Cox's statements at the beginning of jury selection indicating that he leaned a "bit" toward one side. Tr. 34-36. While Cox did initially express that he might lean "just a little bit toward one side as to the other," he immediately clarified these preliminary sentiments by unequivocally stating that he "really [did not] think [these feelings] would affect [him] as a juror" and that they would not make being a juror "difficult" for him, as he tries "to see things as they are, not what—the way they may be." Tr. 35. Venireperson Cox later described himself as "neutral," and ultimately affirmed unequivocally to the trial court that he "could be fair and listen to the evidence and follow the instructions…and make a decision based upon the evidence." Tr. 66, 284.

For these reasons, venireperson Cox's testimony as a whole during voir dire—which is what the court must consider—established that he was not biased against Appellant. Any statements potentially indicating bias were fully rehabilitated as voir dire continued. Mr. Cox plainly established that he would be able to be fair and impartial and follow the court's instructions, as required by Missouri law. Refusing to strike venireperson Cox for cause was a correct exercise of the trial court's sound discretion, as the trial court was in the best position to evaluate the testimony of Mr. Cox during jury selection.

iii. *The trial court was correct in not striking venireperson Streck for cause.*

In Point VII of her appeal, Appellant argues that venireperson Streck expressed bias in his comments regarding the number of lawsuits currently being filed, especially those against physicians. While venireperson Streck did state initially that he has somewhat of a "a sour taste for people that go after physicians," he later explained that any "leaning," that he may have held prior to trial "wouldn't make it any harder" for him to serve on the jury because he would be willing and able to listen to the evidence as presented and make a decision upon that evidence. Tr. 57.

By the conclusion of jury selection, venireperson Streck unequivocally established his ability to be impartial:

> MS. CHRISTOPHER: But as you sit here, Mr. Streck, and you've listened to all the voir dire and you have heard what we're really just trying to do, we know that everyone has things that have happened in their past. We have family members that have done things we may like or not like, but do you think you could be fair and impartial and listen to the evidence and be a juror that would be fair to Ms. Wilson and to Dr. Dhir?
>
> VENIREMAN STRECK: Yes.

Tr. 286. Mr. Streck's testimony during voir dire, when evaluated as a whole—which, again, is what the court must consider—clearly demonstrates that he was capable of being impartial during trial, as well as capable of following the trial court's instructions. For these reasons, the trial court did not abuse its sound discretion is denying Appellant's motion to strike venireperson Streck.

C. Conclusion

The trial court correctly exercised its sound discretion in finding Mr. Cox and Mr. Streck capable to sit on the jury during the trial of this matter. Each of these potential jurors established that he was willing and able to be impartial in his review of the evidence, and to follow the instructions of the trial court. The trial court was in the best position to evaluate their respective responses, and the trial court did not abuse its discretion when denying Appellant's motions to strike venirepersons Cox and Streck.

CONCLUSION

There was no error by the trial court and the jury's verdict should be affirmed in all respects.

The trial court did not abuse its discretion in refusing Appellant's withdrawal instructions regarding informed consent and EoE. The jury's task was to evaluate Dr. Dhir's decision to dilate Appellant's esophagus, and these issues are probative of Dr. Dhir's decision to perform the dilation. Appellant attacked the informed-consent discussion on her direct examination, injecting that issue into evidence. Similarly, it was relevant for Respondents to establish that the increased risk of perforation identified in Appellant's literature did not apply to her since she does not have EoE. The trial court properly rejected Appellant's withdrawal instructions regarding informed consent and EoE, and Points I, II, III, and IV of Appellant's appeal should be denied.

The trial court did not abuse its discretion in permitting Dr. Ginsberg to be questioned briefly about the authoritative 2006 ASGE guideline during redirect examination. The trial court exercised its sound discretion in controlling the scope and extent of Dr. Ginsberg's redirect examination. Both parties referenced the literature in their closing arguments, and the trial court did not abuse its discretion in its handling of those arguments. Point V of Appellant's appeal should be denied.

The trial court did not abuse its discretion in finding Mr. Cox and Mr. Streck both capable to sit on the jury during the trial of this matter. Each of these potential jurors established that he was willing and able to be impartial in his review of the evidence, and to follow the instructions of the trial court. The trial court was in the best position to

evaluate their respective responses for potential bias, and the trial court properly denied Appellant's motions to strike these jurors. Points VI and VII of Appellant's appeal should be denied.

Appellant has failed to establish an abuse of discretion by the trial court that would justify intervention of this Appellate Court, and the judgment should be reaffirmed in all respects.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing Respondents' Substitute Brief complies with the provisions of Rule 55.03. I further certify that, to the best of my knowledge, information, and belief, and after reasonable inquiry, this brief complies with the limitations of Rule 84.06(b). There are 10,293 words in this brief.

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CERTIFICATE OF SERVICE

This will certify that on the 12th day of December, 2016, a copy of the above and foregoing document was served on the following counsel of record via email in PDF format, and via U.S. Mail in hardcopy format:

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