SUPREME COURT of MISSOURI
en banc

SC97640

ABRAHAM J. EOFF and CRYSTAL M. EOFF, Individually and as Plaintiffs Ad Litem for SOPHEE R. EOFF	)
Plaintiffs/Appellants,	)
V.	)
JENNIFER K. MCDONALD, D.O., and SEASONS HEALTHCARE FOR WOMEN, P.C.	)
Defendants/Respondents.	)

Appeal from the Missouri Circuit Court Twenty-First Judicial Circuit
St. Louis County Cause No.: 13SL-CC01135
THE HONORABLE KRISTINE KERR, CIRCUIT JUDGE

SUBSTITUTE BRIEF OF APPELLANTS ABRAHAM J. EOFF AND CRYSTAL M. EOFF

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JURISDICTIONAL STATEMENT

This appeal follows the entry of judgment in a jury tried case on October 3, 2017 against the Appellants, and on behalf of the Respondents. As this appeal involves questions of whether the trial court erred in denying the Appellants' Motion for New Trial following said judgment, this Court has general appellate jurisdiction under the Missouri Constitution, Article 5, Section III and the Missouri Revised Statute § 512.020(5).

STATEMENT OF FACTS

Appellants Abraham J. Eoff and Crystal R. Eoffs ("Eoff') tried their claim of improper health care against Respondents Jennifer K. McDonald, D.O. and Seasons Healthcare for Women, P.C. ("McDonald"), beginning on Monday, September 25, 2017. (Tr. p. 2, lines 2-4). Following the assemblage of the venire panel upon the first day of trial, voir dire began with Eoffs counsel initiating the same in the morning of the first day of trial. (*Id.*) Before noon, voir dire was suspended for lunch, and continued with their voir dire after 1:30 p.m. that day. (Tr. p. 59, lines 16-21). McDonald's counsel followed with their voir dire later that same day.

Prior to the conclusion of voir dire inquiries, the trial court advised Eoff s counsel that he needed to conclude his voir dire inquiry that day and that it was the trial court's desire to seat a jury the following morning, September 26, 2017, with all voir dire inquiries, by both Eoff and McDonald's counsel to be concluded that day. (Tr. p. 135, lines 18-12). The trial court further and informed the venire panel that it was her hope that voir dire questioning would be concluded by the end of the first day of trial. (Tr. p. 154, lines 10-12, 21-24).

Following the conclusion of McDonald's counsel's voir dire questioning, the trial court inquired of Eoff s counsel as to whether he had concluded his voir dire questioning. (Tr. p. 215, lines 5-6). At that time, Eoff's counsel advised the trial court that he desired to ask the jury the "insurance question", in reference to McDonald's medical malpractice insurance carrier, which question had been approved by the trial court in camera, and off the record, prior to voir dire. (Tr. p. 215, lines 12- 20).

Eoff's proposed insurance question was: "Is anyone here employed by or have a financial interest in Missouri Doctors Mutual Insurance Company?" (Tr. 215, lines 12-14). Specifically, the following dialog occurred between the trial court, as well as Eoff's and McDonald's counsel:

> MR. GUIRL: Your Honor, I in my haste to move in, and looking at my buried and entrenched question, forgot to ask the insurance question. So now I'm in the problem of I can't ask it by itself in -- standing alone, I have three questions I can ask at this juncture. But I apologize, it's partly my negligence. My effort was try to resolve getting my end sped up.
>
> THE COURT: I know I was hurrying you.
>
> MR. ECKENRODE: Yeah, well, no, the one thing I'd say is obviously even if he has three question now the insurance question becomes highlighted. I mean, the one thing we've said many times in all these cases is, there's not a single person in this room who's related to Missouri Doctors Mutual Insurance Company because the insurance company's out of St. Joe, all the employees are in St. Joe. And the only insurers are doctors, and there's no doctors on this jury. So there's nobody that has any rational, reasonable basis to answer that question yes.
>
> THE COURT: Except for that one guy in the back corner who's got relatives who are doctors who could talk to him about how much malpractice insurance is going up.
>
> MR. ECKENRODE: The could, but he's not an employee of Missouri Doctors Mutual, he made that clear. He's not an insurer of Missouri Doctors Mutual. So he wouldn't answer that question affirmatively anyhow. so if you ask the question now even surrounded by two innocuous questions, it's highlighted.
>
> MR. GUIRL: Well, my remedy would be to do exactly what I said, Judge. Ask three questions and put it in the middle.

THE COURT: That's the insurance company, Missouri Doctors Mutual?

MR. ECKENRODE: Correct, Your Honor.

THE COURT: Is correct to say from your point of view that they're based out of Kansas City?

MR. GUIRL: St. Joseph, Missouri, Judge.

THE COURT: Just north. It's not a big place?

MR. BAUMAN: 20 or so people working for them, Your Honor, and they're all based out of St. Joseph, Missouri, which is 50 miles north of Kansas City and note of them live here.

THE COURT: And you've met all the employees?

MR. BAUMAN: I've met all the employees, Your Honor.

THE COURT: Okay. I don't think there's much of a risk, I think the risk is greater if I let you ask it in the middle of three questions, given what I know geographic, logistically about this insurance company. So this is what I'd like to do, I'd like to stop for a second, I'd like to put the jurors out into the hallway, I'd like to figure out of all our problem children, our working bees and our doctor appointment bees, if we can let them all go by the end of the day and stop giving them heart attacks, and then bring everybody back so we can make selections from those who remain. How does that sound to everybody.

MR. GUIRL: So the court will be --

THE COURT: I'm not inclined to let you ask the question.

MR. BAUMAN: I felt like a joker over here.

THE COURT: I know you do, and I'm sorry because I feel like I rushed you.

MR. GUIRL: Well, whether that occurred or not, it's still my

responsibility, Judge.

> THE COURT: So I am going to say no given that I don't perceive possible, honestly, likely - - I'm like going how could he be prejudiced, there's only 20 employees, it's on the other side of the state, the answer of yes is pretty much no - - I mean, so of us having any likely answers of yes. So really the prejudice is more to the other side by unduly highlighting it. All right. Let me explain to you jury what we're doing.
>
> (Tr. 215, lines 12-25, Tr. 216, lines 1-25, Tr. 217, lines 1-25 and Tr. 218, lines 1-15.)

As such, Eoff's counsel advised the trial court that although he would not ask said "insurance question" by itself, standing alone, in that he advised the trial court that he had three additional voir dire questions, and he could place said "insurance question" in the middle of the same. (Tr. p. 215, lines 14-17, p. 216, lines 17-19) Eoffs counsel further advised the trial court that he had failed to ask said "insurance question" as a result of the trial court's request that voir dire questioning be concluded on the first day of trial. (Tr. p. 215, lines 17-19). The trial court advised Eoffs' counsel that it was aware that it was hurrying Eoffs' counsel in concluding his voir dire. *(Id.* line 20).

McDonald's counsel objected to the same, advising the Trial court that Eoffs counsel's request would highlight the "insurance question." (Tr. p. 215, lines 21-25, p. 216, lines 1-6). He further advised the Court that there was not a single member of the voir dire panel who was related to McDonald's insurance carrier, Missouri Doctors Mutual Insurance Company, as said organization was located in St. Joseph, Missouri, and that the only insurers were doctors. (Tr. p. 215, lines 21-25, p. 216, lines 1-6). The trial court thereafter inquired as to the location of Missouri Doctors Mutual Insurance Company, located in St. Joseph, Missouri, and McDonald's counsel further advised the trial court that there were 20 or so people working for said insurance company, and that he had met all of Missouri Doctor's Mutual Insurance Company's employees. (Tr. p. 216, lines 20-25, p. 217, lines 1-10).

The trial court denied Eoff s counsel's request to conduct the additional voir dire

questioning regarding the "insurance question", finding that asking said "insurance question" in the middle of three (3) additional voir dire questions risked highlighting the same. (Tr. p. 217, lines 11-15). The trial court further stated that given what was presented to her regarding the geographic location of Missouri Doctors Mutual Insurance Company, allowing Eoff's counsel to ask said "insurance question" in the middle of three (3) additional questions risked highlighting the same. *Id.* Thereafter, the Trial court denied Eoff s counsel's request to ask the jury said "insurance question", as to whether anyone on the jury panel was employed by, or had a financial interest in, Missouri Doctors Mutual Insurance Company. (Tr. p. 217, lines 24-25).

The jury began its deliberations in this matter in the afternoon of October 2, 2017. (D. 1, p. 42). On the following day, October 3, 2017, at 4:20 p.m., the jury advised the trial court that it has reached a verdict. (Id.). Verdict was entered on behalf of McDonald, and against Eoff. (D. 4, p. 1).

POINTS RELIED ON

I. The trial court erred in denying Appellants the right to ask the "insurance question" in voir dire, because as a matter of law, the trial court had no discretion to deny Appellants said right, and that said denial is reversible error.

Callahan v. Cardinal Glennon Hosp.,
863 S.W.2d 852, 851 (Mo. bane 1993)

Ivy v. Hawk,
878 S.W.2d 442 (Mo. 1994)

Buckallew v. McGoldrick,
908 S.W.2d 704 (Mo. App. W.D. 1995)

Pollock v. Searcy,
816 S.W.2d 276,278 (Mo. App. S.D. 1991)

ARGUMENT

STANDARD OF REVIEW

"The nature and extent of voir dire examination is primarily a matter of trial court discretion and will not be disturbed on appeal absent a manifest abuse of discretion." *Robnett v. St. Louis Univ. Hosp.*, 777 S.W.2d 953, 956 (Mo. App. E.D. 1989). "This discretion also applies to the control of specific questions." *Id.*

"The rule is settled in the state that Plaintiff is entitled to qualify jurors as to relations, if any, with insurance companies interested in the result of the trial." *Smith v. Star Cab Co.,* 19 S.W.2d 467, 469 (Mo. 1929). The trial court has no discretion to deny a party the right to ask the preliminary "insurance question" if the proper foundation is laid. *Pollock v. Searcy,* 816 S.W.2d 276, 278 (Mo. App. S.D. 1991).

A proper foundation requires that a party inquire as to the name of any interested insurance company on the record prior to voir dire. *Yust v. Link,* 569 S.W.2d 236, 239 (Mo. App. E.D.1978). Once the proper foundation has been laid, the Plaintiff has the right to ask the preliminary "insurance question." *Aiken v. Clary,* 396 S.W.2d 668, 677 (Mo. 1965).

Accepted procedure in Missouri for asking the preliminary "insurance question" includes, 1) first getting the judge's approval of the proposed question out of the viewing of the jury panel, 2) asking only one "insurance question," and 3) not asking it first or last in a series of questions so as to avoid unduly highlighting the question to the jury panel. *Callahan v. Cardinal Glennon Hosp.,* 863 S.W.2d 852, 851 (Mo. banc 1993). The "insurance question" generally encompasses whether any members of the panel or their families work for or have a financial interest in the named insurance company. *Ivy v. Hawk,* 878 S.W.2d 442 (Mo. 1994).

"Litigants have a right to ascertain which jury panel members are, or might be, interested in the result of a lawsuit, and in particular plaintiffs have the right to learn if any venireman is connected with an insurance company interested in the litigation." *Carothers v. Montgomery Ward and Co., Inc.*, 745 S.W.2d 170, 172 (Mo. App. W.D. 1987). "The denial of the right to ask a proper "insurance question" is an issue of law….

a trial court has no discretion when ruling on an issue of law in a motion for new trial...." *Ivy v. Hawk*, 878 S.W.2d 442, 445 (Mo. 1994). "A denial of this right is prejudicial to the party entitled to its exercise." *Butler v. Talge*, 516 S.W.2d 824, 827 (Mo. App. 1968).

The Court of Appeals, Western District, had the opportunity to review the merits of a motion for new trial based on the factual situation where counsel laid the proper foundation to ask the "insurance question," but failed to do so *prior* to the termination of voir dire. *Buckallew v. McGoldrick,* 908 S.W.2d 704 (Mo. App. W.D. 1995)(emphasis added). In said case, counsel laid the foundation to ask the "insurance question," but "forgot" to ask the question during voir dire. Counsel thereafter made a request to recall the jury and reopen voir dire to ask the "insurance question." *Buckallew* at 704. The trial court denied counsel's opportunity to re-open voir dire to ask the same.

The court in McGoldrick noted that the appellant suggested an appeal that he could have asked "several other questions" once voir dire was re- opened, but did not call this out to the attention of the trial court. As noted infra, in the instant case Eoff's counsel did bring this option to the attention of the trial court. (Tr. p. 217, lines 11-15).

The Court of Appeals found that under the circumstances in question, it was not error to deny the motion for new trial, based on the untimeliness of counsel's request to ask the "insurance question." *Buckallew,* 908 S.W.2d at 708. For the following reasons, the facts in the instant case differ from those found in *Buckallew,* and as such, the trial court should have granted Eoff's motion for new trial.

In the instant case, Eoff's counsel was advised by the trial court in an attempt to speed up voir dire, voir dire would be concluded by the end of the first day of trial. (Tr. p. 135, lines 18-23, p. 154, lines 21-24). The trial court acknowledged that it had hurried Eoff's counsel in voir dire, following his request to ask the "insurance question." (Tr. 215, lines 12-20).

Additionally, at the side-bar conference following the conclusion of the Defendants' voir dire, the trial court questioned Eoff's counsel as to whether he had any additional voir dire questions *(Id.,* lines 5-6). Eoff's counsel advised the trial court that, as

he had not completed his voir dire questioning, he had ample further questions to ask the jury panel, and further suggested, that if he was allowed to reopen his voir dire, he would place the "insurance question" in the middle of any additional questioning, so as not to highlight the "insurance question." *(Id.,* lines 12-19).

The facts in the instant case differ from those facts found dispositive by the *Buckallew* court. First, in *Buckallew* voir dire had been closed at the time of counsel's request to ask the "insurance question," and as such, counsel was requesting that the trial court reopen voir dire and recall the jury for the sole purpose of allowing counsel to ask the "insurance question." To the contrary, in the instant case, voir dire remained open, and in fact, the trial court inquired of Eoff s counsel as to whether he had any additional voir dire questions. (Tr. p.215, lines 5-6). Second, counsel in *Buckallew* did not advise the trial court that he would ask other voir questions once voir dire was reopened, as noted above, Eoff s counsel specifically informed the trial court that he had additional voir dire questions to ask the jury, and would place the "insurance question" in the middle of said questions, not to highlight the same. (Tr. p. 215, lines 12-19).

The court of appeals in *Buckallew* ultimately found that counsel's request to reopen voir dire, recall the jury to solely ask the "insurance question" was untimely. As stated previously, Eoff's counsel concluded his voir dire prematurely, and at the conclusion of McDonald's counsel's voir dire, the trial court inquired of Eoff's counsel as to whether he had any additional questions. Further, Eoff's counsel advised the trial court that he could conduct additional voir dire, and ask the "insurance question" with other inquiries so as to not to highlight the same.

As noted in the Eoff's statement of facts infra, voir dire was still proceeding with the venire panel in the courtroom, and the trial court inquired with Eoff's counsel if he had any further questions. Thereafter, Eoff's counsel advised the court that he would, at that time, desire to ask the "insurance question", in between two other questions, so as to not highlight the same. As such, pursuant to the decision in *Ivy*, Eoff's counsel adhered to the accepted procedure in asking the "insurance question" in Missouri, so as not to ask

the same in the first or last in a series of questions. *Ivy* at 444.

The trial court, in denying Eoff's counsel the opportunity to ask the "insurance question", felt that greater prejudice was risked by allowing Eoff's counsel to ask the same, even as requested to be placed between other questions not to highlight the "insurance question", following *Ivy*. As such, the trial court relied on McDonald's counsel's oral representations that no member of the venire panel had an interest in Missouri Doctors Mutual Insurance Company. As such, said representations have been found to be insufficient in this Court. *Ivy* at 445.

Additionally, this court has found that it is unwilling to place the burden of proving prejudice on or as it relates to the preliminary "insurance question." *Id.* "The plaintiff have the right to a fair and impartial jury and should not be required after the trial to establish whether they were denied this right because the trial court failed to allow them to properly voir dire the panel. A trial court's denial of the right to ask the preliminary "insurance question" is prejudicial as a matter of law. *Id. Carothers* 745 S.W.2d at 172.

Accordingly, the trial court had no discretion to deny the Eoff's the right to ask the "insurance question" based on a prejudice weighing analysis as it occurred in the instant case. As noted previously, this court has held that the trial court's denial of the right to ask a proper and approved insurance question is prejudicial as a matter of law. *Ivy* at 446. Plaintiffs have a constitutional right to a fair and impartial jury and should not be required after the trial to establish whether they were denied this right because the trial court failed to allow them to properly voir dire the panel. *Id.*

This court has ruled that when properly submitted, the trial court must allow Plaintiffs to ask the insurance question as a matter of law. *Ivy* at 442. Here, McDonald does not dispute that the "insurance question" to be submitted by Eoff was according to the guidelines set out in *Ivy*. Instead, McDonald argues that Eoff should not be allowed to ask the "insurance question" based on an exception to the *Ivy* rule which states that there may be some circumstances where "… there [is] no possibility that a member of the panel or his family could be a stockholder, officer, director or agent of the insurance

company, that questions relating thereto could serve no useful purpose, and that such questions could not be asked in good faith." *Id.*

This court, in *Aiken v. Clary*, found that oral representations by counsel as well as an affidavit stating that no members of the jury panel could have a financial interest in the insurance company involved in the trial were insufficient to show lack of financial interest of a potential juror in the outcome of the case. *Aiken v. Clary*, 396 S.W.2d 688, 677 (Mo. 1965). The court found that proof made by affidavit, depriving the plaintiff of an opportunity to cross examine the affiant, was not enough to satisfy the trial court that there was no possibility that the member of the panel or his family could be interested in the litigation. *Id.* The court found that the trial court erred in not allowing the plaintiff the right to ask the "insurance question", and remanded the case for new trial. *Id.*

Accordingly, the trial court had no discretion to deny Eoff's request to ask the "insurance question." *Pollock,* 186 S.W.2d at 278. As such, the trial court, therefore, should have granted the Eoff's motion for new trial as Eoff was denied the right to ask the jury the "insurance question" in voir dire. *Ivy v. Hawk,* 878 S.W.2d 442,445 (Mo. 1994).

CONCLUSION

For the foregoing reasons, Eoff respectfully request that this Court overturn the trial court's December 21, 2017 Order dismissing Eoff's Motion for New Trial and accordingly remand this action to the trial court for a new trial, and for any and all other further relief that this Court deems just and proper under the circumstances.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above was served upon all counsel of record, this 25th day of March, 2019, via the Court's Electronic Filing System, as follows:

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CERTIFICATE OF COMPLIANCE

This Substitute Brief is in compliance with Rule 84.06(b) as it contains 3,625 words.

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