IN THE SUPREME COURT OF MISSOURI

SC97640

ABRAHAM J. EOFF and CRYSTAL M. EOFF, Individually and as Plaintiffs Ad Litem for SOPHEE R. EOFF

***Appellants*,**

v.

JENNIFER K. MCDONALD, D.O., AND SEASONS HEALTHCARE FOR WOMEN, PC

***Respondents*.**

Appeal from the Missouri Circuit Court of St. Louis County - 21st Judicial Circuit
Cause No.: 13SL-CC01135
The Honorable Kristine Kerr, Circuit Judge

RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Following a jury verdict in favor of Respondents, Judgment was entered on October 3, 2017 in favor of Respondents. Thereafter, Appellants filed a Motion for New Trial, which was denied on December 21, 2017 and his appeal followed. This Court has appellate jurisdiction under RsMo §512.020 (5).

STATEMENT OF FACTS

Appellants Abraham and Crystal R. Eoff ("Appellants") brought claims for alleged medical negligence and wrongful death against Dr. Jennifer McDonald (OB/GYN) ("Respondent McDonald") and her employer, Seasons Healthcare for Women, PC (collectively "Respondents") relating to the labor of Crystal Eoff, which resulted in the delivery of Sophee Eoff in the early morning hours of February 1st, 2012. (D2, p. 2, ¶ 7–8). Specifically, Appellants claimed Respondent McDonald was negligent in allegedly using excessive force with a vacuum extractor during delivery, continuing to use the vacuum extractor in the absence of fetal descent and/or failing to timely perform a Caesarean Section resulting in an extensive subgaleal hemorrhage. (D2, p. 2, ¶ 9 and p. 6, ¶ 21). At trial, it was undisputed that the infant unfortunately experienced a subgaleal bleed, which is a rare complication associated with the use of the vacuum and occurs without any negligence on the part of the delivering OB/GYN. Both Appellants' and Respondents' OB/GYN experts agreed it was appropriate for Defendant McDonald to use the vacuum to assist with delivery. Since there was no evidence that Defendant McDonald could have or should have recognized that a subgaleal bleed was occurring, the central issue at trial was whether or not Defendant McDonald was negligent in the number of times or length of time the vacuum was used. (D7, p. 2-3).

The trial commenced on Monday morning September 25, 2017. (D1, p. 41). After the court took up some preliminary matters with counsel, voir dire began mid-morning with the court informing the panel that Appellants' attorney would have an

opportunity to ask questions and then the lawyers for the defense would have an opportunity to do so. (D1, p. 41; Tr. I, p. 7, L 6-14). Prior to voir dire, the court and counsel discussed the court's desire that the parties conclude jury selection on the first day of trial given the trial schedule including numerous out of town witnesses being called by the parties. In accordance with this objective, Appellants' counsel informed the jury early on in voir dire: "… hopefully we'll get to the bottom of this, by the end of the day and get a jury picked, get the job going and you can start seeing the evidence." (Tr. I, p. 10, L 18–21).

After Appellants' counsel had initially questioned the prospective jury panel for an hour and fifteen minutes to an hour and a half and while dismissing the jury panel for lunch (Tr. I, p. 57, L 2-25), the court reiterated to the panel and counsel its' goal regarding the timing of jury selection: "My goal is to get a jury ready to start tomorrow morning." (Tr. I, p. 59, L 10-11). Over the noon hour on Monday, the court, counsel and individual jurors addressed juror specific issues that had arisen during Appellants' questioning that morning. (Tr. I, p. 57–82). Following the lunch break, the court then turned the questioning back over to Appellants' counsel. (Tr. I, p. 82, L 17 – p. 83, L 16). After Appellants' counsel's questioning of the jury panel continued for most of the afternoon (Tr. I, p. 82–144), the court mentioned to Appellants' counsel at side bar of the need to "wrap it up" so Respondents' counsel would have some time to question the panel. (Tr. I, p. 144, L 18–23). Specifically, the court noted: "I can give you a few more minutes, we need to wrap it up, these guys need time. I'm going to get a jury if we can,

be ready to seat them tomorrow morning. We can do strikes tomorrow but I don't want to do questions tomorrow, okay." (Tr. I, p. 144, L 18-23). Thereafter, Appellants' counsel continued to inquire. (Tr. I, p. 144–163). Later in the afternoon, in discussing the court's desire to give the jury panel their afternoon break, Appellants' counsel indicated: "Why don't we go ahead and break, Judge, and then I can pick up and finish in a couple of minutes." (Tr. I, p. 158, L 9–24).

During the afternoon break, the court and counsel addressed issues affecting individual jurors and upon the jury reconvening, Appellants' counsel continued to question the jury for an extended period of time. (Tr. I, p. 159 – p. 180). During the latter stages of his inquiry, Appellants' counsel transitioned from general questions to specific questions of panel members who counsel believed had not responded to prior questioning or had spoken very little. (Tr. I, p. 167-181). Appellants' counsel then indicated he was finished questioning the panel. (Tr. I, p. 180, L24 – p. 181, L2). Respondents' counsel began questioning the prospective jurors shortly before 4:00 PM concluding approximately an hour or so later.

Once the questioning of the panel was concluded, Appellants' counsel stood up and the trial judge in a confirmatory manner stated in open court: "Appellants' side, you're done as well?" Appellants' counsel requested to approach the bench and then informed the court for the first time that he forgot to ask the "Insurance Question." (Tr. I, p. 224, L 12–19). Appellants' counsel indicated: "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." (Tr.

I, p. 224, L 14–17). Respondents' counsel objected since allowing Appellants' counsel to ask the "Insurance Question" at that juncture would have unduly highlighted the question, even if asked with two (2) other questions. (Tr. I, p. 224, L 21-24). The trial court agreed: "So really the prejudice is more to the other side by unduly highlighting it." (Tr. I, p. 227, L12 – 14). Further, Defendant's counsel pointed out the insurance company (Missouri Doctors Mutual Insurance Company) is a mutual company based out of St. Joseph, Missouri that only insures doctors and there were no doctors or employees of the company on the panel. (Tr. I, p. 224, L 25 - p. 226, L 10). The court felt the question would be unduly highlighted given the timing even if asked with two (2) other questions, both parties had their opportunity to question the panel and certain issues needed to be addressed to move forward with the trial. (Tr. I, p. 226, L 11 – p. 228, L 11). Appellants' counsel did not indicate a desire to pursue additional questions unrelated to the "Insurance Question" or that he needed more time to inquire as to other topics.

The following morning the jury panel was sworn in and trial proceeded. (D1, p. 41). Appellants presented evidence over the course of the next several days and Respondents' evidence began on Friday September 29th and concluded on Monday morning (October 2, 2017). Following closing arguments Monday afternoon, jury deliberations commenced and carried over into the following day with the jury returning its' verdict in favor of Respondents in the afternoon on October 3, 2017 with the trial court entering Judgement thereon. (D1, p. 42; D4, p. 1; D5, p. 1). Subsequently,

Appellants filed a Motion for New Trial (D6), which the trial court heard and denied and this appeal followed. (D8, p.1)

POINT RELIED ON

I. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR NEW TRIAL IN THAT APPELLANTS WERE GIVEN A REASONABLE OPPORTUNITY TO ASK THE "INSURANCE QUESTION" AND FAILED TO DO SO AND ASKING IT IN THE MANNER PROPOSED BY APPELLANTS' COUNSEL AFTER BOTH PARTIES HAD QUESTIONED THE PANEL WOULD HAVE UNDULY HIGHLIGHTED THE "INSURANCE QUESTION."

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

Callahan v. Cardinal Glennon Hosp., 836 S.W.2d 852 (Mo. banc 1993)

Carothers v. Montgomery Ward & Co., 745 S.W.2d 170 (Mo.App. 1987)

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

Pollard v. Whitener, 965 S.W.2d 281 (Mo. App. 1998)

Robnett v. St. Louis University Hospital, 777 S.W.2d 953 (Mo. App. 1989)

Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879 (8th Cir. 2006)

Yust v. Link, 569 S.W.2d 236 (Mo. App. 1978)

Rule

Rule 84.13 (b) Materiality of Error

Fed. R. Civ. P. 47(a)

ARGUMENT

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR NEW TRIAL IN THAT APPELLANTS WERE GIVEN A REASONABLE OPPORTUNITY TO ASK THE "INSURANCE QUESTION" AND FAILED TO DO SO AND ASKING IT IN THE MANNER PROPOSED BY APPELLANTS' COUNSEL AFTER BOTH PARTIES HAD QUESTIONED THE PANEL WOULD HAVE UNDULY HIGHLIGHTED THE "INSURANCE QUESTION."

I. **Background**: Historically, Missouri case law has allowed litigants the reasonable opportunity to inquire of prospective jurors' potential interest in the insurer that may be responsible for a satisfying a judgment, as long as certain procedural safeguards are followed. It is well settled that under Missouri law a party may inquire in a limited fashion of prospective jurors about their interest in or connection with an insurance carrier interested in the outcome of the case provided it is done in a proper manner. Yust v. Link, 569 S.W.2d 236, 239 (Mo. App. 1978); *See also* Callahan v. Cardinal Glennon Hosp., 836 S.W.2d 852, 871 (Mo. banc 1993). The opportunity to inquire is not without limitation or restriction recognizing that if asked in a prejudicial manner, it can deprive the defendant of his right to a fair trial. Id. It is equally well settled law that the nature and extent of voir dire examination is primarily a matter of the trial court's discretion, which includes control of specific questions, and the trial court's discretion will not be disturbed on appeal absent manifest abuse of discretion. Robnett v. St. Louis University Hospital, 777 S.W.2d 953, 956 (Mo. App. 1989). "An abuse of

discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court, and is so arbitrary and unreasonable that it shocks the sense of justice' and indicates a lack of careful consideration." Pollard v. Whitener, 965 S.W.2d 281, 286 (Mo. App. 1998).

In order to ask what has come to be known as the "Insurance Question", the initial safeguards the courts have put in place require a proper foundation be laid by inquiring on the record out of the hearing of the jury as to the name of any insurance company or companies interested in the outcome of the case. Yust at p. 239. Missouri's three (3) step process for counsel desiring to ask the "Insurance Question": (1) obtain approval from the trial court judge of the proposed question out of the hearing of the jury panel; (2) ask only one "Insurance Question"; and (3) not ask it first or last in a series of questions so as to avoid unduly highlighting the question to the jury panel. Ivy v. Hawk, 878 S.W.2d 442, 444-45 (Mo. banc 1994). It has been recognized that asking the "Insurance Question" in a separate portion of voir dire would improperly emphasize or unduly highlight the question and it is within the trial court's discretion to deny a request to ask the question when counsel forgot to do so during their initial questioning of the panel. Buckallew v. McGoldrick, 908 S.W.2d 704, 708 (Mo. App. 1995).

II. **Analysis**: In the present case, after both Appellants and Respondents had questioned the prospective jurors extensively for the better part of the first day of trial (September 25, 2017) and concluded their questioning, Appellants' counsel informed the court he forgot to ask the "Insurance Question" and wanted to do so. At that time,

Appellants' counsel suggested he would conclude voir dire by asking three (3) questions with the "Insurance Question" in the middle of the three (3) questions. (Tr. I, p. 224, L16-17; P. 225, L17-19). Respondents' counsel objected since asking the "Insurance Question" at that juncture in the manner proposed would unduly highlight the question and prejudice of the Respondent defendants. The trial court agreed that asking the "Insurance Question" at that time would unduly highlight the issue of insurance and that the risk of prejudice to the Respondents outweighed any potential prejudice, if any, to Appellants. (Tr. I, p. 227, L 12–15).

The following morning the jury panel was sworn in and trial proceeded (D1, p. 41) with opening statements. The evidence was presented over the next several days and closing arguments were given on Monday October 2, 2017 with the jury deliberations commencing thereafter and carrying over into the following day. The jury returned a verdict in favor of Respondents the afternoon on October 3, 2017. (D1, p. 42; D4, p. 1). Subsequently, Appellants filed a Motion for New Trial (D6), which the trial court heard and denied with this appeal following. (D8, p.1; A2).

As a result, the sole issue before this Court is whether or not the trial court judge abused her discretion in determining that asking the "Insurance Question" at the time and in the manner proposed was improper.

A) **Buckallew v. McGoldrick Analysis**: The appellate court's Opinion herein that the trial court had no discretion to deny an untimely (i.e., after both parties had concluded questioning of the jury panel) request to ask the "Insurance Question", even

though in the trial court's judgment it would unduly highlight the question, is contrary to and misapplies existing Missouri case law as set forth in Buckallew and Ivy. Contrary to the appellate court's Opinion below that the right to ask the question is an absolute right regardless of timing, Missouri courts have consistently held a trial judge has discretion to determine how and when the "Insurance Question" is asked and if it is not *proper* (i.e., unduly highlighted, untimely, etc.) and thus deemed waived. Buckallew at p. 704.

In Buckallew, a jury returned a verdict finding both drivers (appellant and respondent) involved in a near head on collision in foggy weather were zero percent at fault. As in the present case, in Buckallew, counsel had received approval to ask the "Insurance Question" prior to voir dire, but forgot to ask it. The Buckallew court noted that if the judge had simply refused at the outset to allow the "Insurance Question" to be asked, then reversal would be necessary under Ivy. However, the trial court judge properly exercised discretion in later denying the request based on the timing after counsel forgot to ask the question during his voir dire. In explaining the factual distinction between Buckallew and Ivy, the Court stated:

> If the judge had simply denied leave to ask the "insurance question" … reversal would be necessary, since Ivy reveals that the court has no discretion to refuse one's right to ask a proper "insurance question." Mr. McGoldrick's case is distinguishable from Ivy, however, because the court initially granted counsel the right to ask the proffered question. It was only after counsel "forgot" to ask the question during voir dire that the court made the denial which is now contested.
> …
> The trial court offered counsel *reasonable opportunity* to inquire as to the panel's insurance connections. Counsel failed to seize that opportunity and therefore *waived* the right to ask the "insurance question." A new trial is

> only required upon the denial of "the right to ask a proper 'insurance question.'" *See* Ivy, 878 S.W.2d at 445 (emphasis added). The proposed question in Mr. McGoldrick's case was not proper, due to its untimeliness.

Buckallew, 908 S.W.2d at 708. [emphasis added]

The Buckallew opinion correctly interprets Ivy as recognizing a trial court's retained discretion to deny an untimely (thus *not proper*) request to ask the "Insurance Question."

In the instant case, the trial court did not deny Appellants' counsel's request to ask the "Insurance Question" outright. There is no question the trial court properly ruled Appellants' counsel could ask the proposed "Insurance Question" during Appellants' voir dire in a manner so as to not to unduly highlight the question. However, Appellants' counsel forgot to ask the "Insurance Question" during a long and thorough voir dire. He only remembered after counsel for Respondents had concluded voir dire. At that juncture, Appellants counsel had waived the reasonable opportunity the trial court had given him to ask the "Insurance Question." The trial judge, similar to the trial judge in Buckallew, made a discretionary ruling that the "Insurance Question" would be improper due to the timing and manner proposed to ask the question in a segregated portion of voir dire thereby unduly highlighting the question.

The appellate court Opinion herein initially acknowledges the trial court has discretion (although the Opinion defines it as "limited discretion") regarding asking of the "Insurance Question" and then attempts to define the limitations to the court's discretion. Particularly, the Opinion stated: "… specifically that the question not differ substantially from that which was approved and that the question not be asked in a

manner that would unduly highlight it to the jury such as by asking it in an exaggerated way." (Op. at 4). The appellate court's Opinion cites Ivy and/or Carothers v. Montgomery Ward & Co., 745 S.W.2d 170, (Mo.App. 1987) for this proposition; however, counsel was unable to locate a passage in either case defining "unduly highlight" as "asking in an exaggerated way." As a practical matter, asking the "Insurance Question" in an exaggerated way is one of a variety of reasons a trial court judge could make a discretionary determination that the "Insurance Question" is being unduly highlighted. In the present case, the trial court judge determined that asking the "Insurance Question", in a concluding portion of jury selection after both parties had extensively questioned the panel in between two (2) other questions, would result in the question being unduly highlighted. In accordance with applicable case law, the trial court's ruling should not be subject to a de novo standard of review as the appellate court applied herein, but rather should be analyzed under an abuse of discretion standard. In any event, under either standard applicable Missouri case law would lead to the trial court being affirmed.

Appellants' counsel was certainly familiar with the procedure of requesting approval to ask the question prior to voir dire, asking only one question, and taking steps to ensure the question was not unduly highlighted (i.e., by asking the question in the middle of Appellants' voir dire not the first or last in a series of questions). However, Appellants' counsel forgot to ask the "Insurance Question." During Appellants' counsel's four (4) plus hours of questioning, he did not ask or even attempt to ask the

approved "Insurance Question." According to transcript, Appellants' counsel simply forgot to ask the "buried and entrenched" question in his outline on the record, which of course illustrates Appellants' counsel's understanding of the necessity to ask the "Insurance Question" in an innocuous manner in the middle of voir dire. In accordance with Buckallew, Appellants' counsel's failure to properly ask the "Insurance Question" after being given a reasonable opportunity to do so is tantamount to a waiver.

Respondents' counsel objected to the "Insurance Question" being asked in an untimely manner due to it being unduly highlighted if asked in the manner proposed (i.e., in an isolated portion at the end of voir dire between two (2) other "innocuous" questions). The trial court agreed. In addition, Respondents' counsel pointed out various reasons why there was no possibility Appellants could be prejudiced while there was significant potential prejudice to the defense. For the sake of a complete analysis, the trial court judge did point out (similar to the trial court judge did in Buckallew) that given that the insurer was a company with approximately twenty (20) employees located on the other side of the state that it was unlikely any employees were on the panel. Of course, as expected, none of the panel members noted in response to the Questionnaires available to all counsel prior to and during voir dire that they were employees of the professional liability insurer, Missouri Doctors Mutual Insurance Company. Further, the panel was asked whether they were health care professionals and no physicians were on the panel. Since only physicians are policy holders of Missouri Doctors Mutual Insurance Company and there were no physicians on the panel, all involved were well aware no one had a

financial interest in the professional liability carrier. As a result, the record clearly reflects that had the panel been asked: "Is anyone here employed by or have a financial interest in Missouri Doctors Mutual Insurance Company?" there would have been no positive responses. Regardless, it was apparent given the timing the "Insurance Question" would have been unduly highlighted and no further analysis is necessary or required. The other two (2) questions Appellants' counsel planned to couple with the "Insurance Question" were never presented to the trial court for consideration.

Although in argument and briefing, Appellants' counsel acknowledged Buckallew was on point, the appellate court determined: "We find Buckallew inapposite here." (Op. at 9). The appellate court's Opinion herein attempts to distinguish Buckallew by saying: "This case is different. Voir Dire remained open." (Op. at 9). In actuality, the Buckallew decision does not indicate voir dire had ended, but rather in Footnote 1 the Buckallew Court indicated: "At that time, voir dire was essentially complete, though several panel members were scheduled to take part in private interviews during the lunch break, because they did not wish to speak about certain matters in front of the other members." Id. at p. 707 n.1. The appellate court's Opinion herein, in an attempt to distinguish Buckallew, appears to incorporate a new standard. The standard would require a trial judge to formally declare in open court voir dire is over before it is *essentially complete* and only then would it be within the trial judge's discretion to determine the "Insurance Question" question untimely and unduly highlighted, if asked. Such an arbitrary standard would effectively deny the trial court judge, who is in the best position to assess whether

or not the question is improper due to being untimely and/or unduly highlighted, essential discretion in overseeing voir dire.

The appellate court's Opinion and Appellants' Substitute Brief filed with this Court, attempt to draw subtle distinctions between the present case and Buckallew, including citing the fact that the trial court in the present case asked Appellants' counsel if he was done after defense counsel concluded his questioning. Of course, context is important, the trial court asked the question in a confirmatory manner when Appellants' counsel stood up at the end of voir dire: "Plaintiffs' side, you're done as well?" Appellants' counsel then asked to approach and stated that he forgot to ask the "Insurance Question." (Tr. I, pg. 224, L5-6). Given the appellate court's analysis in the present case and Appellant's argument, it appears that had the trial court judge instructed counsel that he could approach once the jury exited the courtroom into the hallway the case would be identical to Buckallew and thus, result in the trial court being affirmed. Of course, in both cases voir dire was *essentially complete* and the trial court judges thought asking the "Insurance Question" would have resulted in the question being unduly highlighted and exercised judicial discretion in denying the untimely requests.

B) **Additional Issues Raised by Appellants**: Appellants' Substitute Brief filed with this Court includes the following passage:

> "Eoff's counsel advised the 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

Appellants' Substitute Brief p. 8. [emphasis added].

The passage is noteworthy for a couple of reasons. First, Appellants' counsel represents that he informed the trial court he had ample questions and was not finished with voir dire. Appellants' statement is simply not consistent with the transcript, which does not reflect Appellants' counsel ever indicating a proposal that he would ask "ample" additional questions (or for that matter that he requested that the trial court give him more time to initially question the panel). The requirement that the trial court be given the first opportunity to correct any alleged error is incorporated into our rules, which state: "…allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case." Rule 84.13(a). The only relief requested by Appellants' counsel at trial relates to his forgetting to ask the "Insurance Question" and requesting that the trial judge allow him to ask three (3) additional questions of the panel in a separate conclusory session of voir dire with the "Insurance Question" being in the middle of two (2) other questions. There is no issue before this Court relating to Appellants' counsel asking ample additional questions in a conclusory portion of voir dire since the issue was not presented to or ruled on by the trial court.

Further, the above cited passage from Appellants' Substitute Brief acknowledges that Appellants' counsel recognized, as did everyone else in the court room, that the jury selection process had concluded by stating: "…*if he was allowed to reopen his voir dire*".

The argument Appellants' counsel was "hurried" and thus forgot to ask the "Insurance Question" is a red herring and has no bearing on this appeal. Even though the question is not before this Court, it is noteworthy that control of the voir dire is within the discretion of the trial court [and] only an abuse of discretion and likely injury will justify reversal. Pollard v. Whitener, 965 S.W.2d 281, 286 (Mo. App. 1998) (holding the trial court did not abuse its discretion in limiting plaintiff's counsel to an hour and forty-five minutes in voir dire). Of course, medical negligence (and other civil) cases tried in federal court may be subject to significant limitations on the length of voir dire and/or have voir dire conducted entirely by the district court judge pursuant to Fed. R. Civ. P. 47(a). In Smith v. Tenet Healthsystem SL, Inc., the district court questioned the prospective jurors about experiences involving medical malpractice and gave each party twenty minutes to supplement the court's examination. 436 F.3d 879, 884-85 (8th Cir. 2006). In the present case, the trial court judge and the parties attempted to keep the process moving forward and on schedule, which is routine in medical negligence cases of this nature that involve multiple retained experts from out of town and may present challenging scheduling issues. Regardless, the trial court judge allowed counsel wide latitude in questioning the panel for the better part of the first day of trial and did not set any arbitrary abbreviated time frame for voir dire. It is noteworthy Appellants' counsel never requested additional time to inquire of the panel, did not bring to the court's attention any areas where he felt inquiry was incomplete and then prior to sitting down, indicated to the jury panel he had concluded his questioning while thanking them for their

jury service. (Tr. I, p. 180, L24 – p. 181, L2). As a result, Appellants did not raise the issue of the length of voir dire (i.e., 4 plus hours of Appellants' counsel questioning the panel) with the trial court judge at the time or in Appellants' Motion for New Trial or in the Notice of Appeal.

On the issue of the nature and extent of voir dire, the appellate court's Opinion below misinterprets certain pertinent facts of this case. For example, the Opinion states:

> Indeed, partway through voir dire the court told Plaintiffs' counsel to 'wrap it up' because Defendants needed time to ask questions that day if the court were to seat a jury the following morning. At that point Plaintiffs' counsel stood down to allow Defendants' counsel to inquire of the panel, though Plaintiffs' counsel did not state that he was finished with his voir dire questioning.

Op. at 2.

Appellants' counsel did not "stand down" when the trial court judge at side bar politely asked him to "wrap it up." Rather, Appellants' counsel then went on to inquire of the panel for a significant period of time (from pg. 144 to pg. 180 per the Transcript) without interruption by the court or opposing counsel. Further, after transitioning from general to specific juror questions, Appellants' counsel continued to question the panel and on his own accord thanked the panel for their jury service in concluding his questioning. Everyone in the courtroom (i.e., trial court judge, Appellants' counsel, Respondents' counsel, and the prospective jurors) certainly thought Appellants' counsel had completed his questioning. Respondents' counsel then questioned the panel for a little over an hour and likewise concluded his voir dire. The mindset of those in the court

room that voir dire was essentially complete is important because it plays a role in assessing the trial court judge's use of her judgment in determining whether or not asking the "Insurance Question" at that time would be untimely and result in the question being unduly highlighted.

Yet another issue not before this Court and only referenced because the appellate court's Opinion makes note in Footnote 2 that they could not locate "jurisprudence in Missouri supporting the notion that voir dire shall consist of only one opportunity for each side to put questions to the panel and must thereafter be closed." (Op. at p. 9). Likewise, counsel was unsuccessful in locating a case on point discussing entitlement to "rebuttal" voir dire. Of course, had Appellants' counsel at the end of voir dire suggested he have a follow-up question to one of the responses given by a juror during Respondents' questioning, the trial court judge would have being dealing with a different scenario and addressed it accordingly.

C) **Precedential Impact**: The appellate court's Opinion herein cites Ivy v. Hawk in noting: "Allowing plaintiffs to ask this question has been the accepted practice in Missouri for many years, and the procedures for asking it are simple, straightforward, and easy to apply." (Op. at 5-6). Yet in the present case, Appellants' counsel failed to follow the simple, straightforward and easy to apply procedure (i.e., making a record of the question before voir dire, asking only one question, and *avoiding unduly highlighting the question*). Neither the Appellants' appellate briefs nor the appellate court's Opinion attempt to explain why Appellants' counsel's failure to follow the simple, straightforward

and easy to apply procedure somehow eliminates the trial court's discretion to determine whether the "Insurance Question" would be unduly highlighted if asked in an untimely improper manner. As a result, the question then becomes whether we change the procedure and applicable law by eliminating a trial judge's discretion to determine whether the "Insurance Question" is being asked in a proper manner simply because Appellants' counsel forgot to properly ask the allowed question. There is no doubt Appellants' counsel's failure to ask the question had no bearing on the outcome of this seven (7) day trial since the empaneled jurors, evidence presented, and verdict would all have been the same regardless. If this decision stands and attorneys are now allowed to ask the "Insurance Question" at the conclusion of voir dire or in a segregated portion of voir dire after defense counsel has concluded questioning the panel as long as they ask two (2) other questions, the procedure well known to most, if not all, trial attorneys will be turned into a form of gamesmanship with trial strategy used to emphasize the "Insurance Question" as much as possible. Litigants will likely be left with a procedure of three (3) questions at the end of voir dire with one being the "Insurance Question" for the sole purpose of highlighting the issue of insurance, which is absolutely contrary to the intent of applicable Missouri case law.

CONCLUSION

The trial court applied the procedure set forth under applicable Missouri case law allowing Appellants a reasonable opportunity to ask the "Insurance Question" yet Appellants waived that right by failing to properly ask the question. Therefore, the trial court judge appropriately utilized her broad discretionary authority in overseeing voir dire and the trial in determining the question would be unduly highlighted if asked in a separate portion of voir dire between two (2) other questions. For all of the foregoing reasons, Respondents respectfully request that this Court affirm the trial court's denial of Plaintiffs' Motion for New Trial.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limits of Rule 84.06 (b) and that this brief contains 5,636 words, as determined by Microsoft Word (not including the cover page, certification, and signature blocks).

Further, the undersigned hereby certifies that a true and correct copy of the above was served upon the following counsel using the Missouri e-filing system, this 15th day of April, 2019:

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