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, P.C.

Respondents

Appeal from the Missouri Circuit Court Twenty-First Judicial Circuit

St. Louis County Case No. 13SL-CC01135

The Honorable Kristine Kerr, Circuit Judge

AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENTS
FOR MISSOURI ORGANIZATION OF DEFENSE LAWYERS

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INTERESTS OF THE *AMICUS CURIAE*

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of over 1,300 lawyers in Missouri who are involved in defending litigation, including medical negligence litigation, involving Missouri citizens and health care providers. Two of MODL's stated goals are to eliminate court congestion and delays in civil litigation and to promote improvements in the administration of justice. To that end, MODL members work to advance and exchange information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individuals. MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

In this case, MODL supports the Respondents' position that the trial court correctly denied Appellants' motion for new trial. Unnecessarily highlighting the insurance question during voir dire can inject prejudice into litigation and encourage the jury panel to consider information which is legally irrelevant to the ultimate issues they will be asked to decide for those chosen as jurors. Statistically, juries tend to return larger verdicts when they believe that an insurance company, rather than the defendant, will pay the judgment. See Mock v. J.W. Githens Co., 719 S.W.2d 79, 83 (Mo.App.1986). This

shifts the jury's focus from liability and damages to the consideration of what it will "cost" the defendant. If Appellants' proposed method of conducting voir dire is given approval, Plaintiffs may wait until after Defense completes its voir dire before injecting the issue of insurance at the end of voir dire. The segregation of the "insurance question" will unduly highlight it in contravention of Missouri's process.

MODL urges this Court to affirm the trial court's denial of Appellants' Motion for New Trial because it is vital to preventing prejudice on the basis of existing insurance coverage.

CONSENT OF THE PARTIES

Respondents have consented to the filing of this brief. Appellants declined to provide consent to the filing of this brief. Filed contemporaneously herewith, in accordance with Rule 84.05(f)(3), is a Motion for Leave to file this brief with the Court.

JURISDICTIONAL STATEMENT

MODL hereby adopts the Jurisdictional Statement of Respondents.

STATEMENT OF FACTS

MODL hereby adopts the Statement of Facts of Respondents.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR A NEW TRIAL BECAUSE APPELLANTS WERE ALLOWED A REASONABLE OPPORTUNITY TO ASK THE "INSURANCE QUESTION" AND ASKING IT AFTER BOTH PARTIES CONCLUDED THEIR VOIR DIRE WOULD BE UNDULY PREJUDICIAL.

a. Historical Development of the "Insurance Question"

Many Missouri cases have addressed the right of a plaintiff to inquire into possible connections of jurors to insurance companies and the reasonable limitations placed on this inquiry. Over 100 years ago Meyer v. Gundlach-Nelson Mfg. Co. noted that "[i]t was clearly proper for plaintiff's counsel to ascertain fully the situation of the juror as to parties interested in the suit, to enable him to exercise his statutory right of peremptory challenge, as well as to lay ground for challenges for cause." 67 Mo. App. 389, 391–92 (1896). Likewise, Kinney v. Metro. St. Ry. Co. held that it was proper to inquire during voir dire examinations whether jurors were connected with a certain insurance company liable to pay any judgment obtained against defendant. 169 S.W. 23 (1914). Generally, in the years after Kinney and Meyer, recognizing the need for a fair trial, courts repeatedly held that plaintiffs were permitted to inquire as to whether potential jurors had connections with a defendant's insurance company. *See* Smith v. Star Cab Co., 19 S.W.2d 467, 469 (1929); Galber v. Grossberg, 25 S.W.2d 96, 98 (1930); Smith v. Lammert, 41 S.W.2d 791, 791 (Mo. 1931). And yet, even as a line of cases hold that a

plaintiff is permitted to inquire into juror connections with insurance, Missouri courts also recognize reasonable limitations.

In Kelley v. Sinn, the court noted:

> A party litigant should be allowed within reasonable limits to elicit such facts from the jurors on voir dire examination as will enable him intelligently to exercise his right to peremptory challenge; but a trial court should promptly check any attempt to use the privilege of ascertaining the qualifications of jurors as a mere ruse to impart the information to the jury that the defendant is protected by liability insurance, and that an insurance company will ultimately be called upon to pay any judgment that may be rendered in the case.

277 S.W. 360, 362 (Mo. App. 1925).

Other Missouri cases hold that the issue of insurance can inject prejudice into proceedings – prejudice for the plaintiff if a member of the panel has a connection to the insurance company, and prejudice for the defendant because the existence and nature of insurance will prejudice some jurors. For example, Carter v. Rock Island Bus Lines recognized the longstanding rule that it is prejudicial to a defendant to suggest that insurance coverage may be responsible to pay an underlying judgment rather than the defendant himself. 139 S.W.2d 458, 462 (1940). "If good faith is not shown the injection of the fact or suggestion that the defendant carries insurance and that some invisible insurance company may have to pay the judgment is prejudicial error, even if adroitly

done only on voir dire examination of the jury panel." Id. Carter recognized the influence of insurance coverage and found no abuse of discretion by the trial court in refusing to allow questioning of jurors regarding insurance. Id.

This Court has long held that the constitutional right to trial by jury includes the right to a fair and impartial jury. Moore v. Middlewest Freightways, 266 S.W.2d 578, 586 (Mo.1954). As the law surrounding the inquiry into insurance on voir dire developed over time, so too did the acceptable method by which a plaintiff could make an inquiry. In Barrett v. Morris, the court held that it was not an abuse of discretion for the trial court to allow plaintiff's counsel to inquire using the name and address of a branch of Allstate Insurance. 495 S.W.2d 100, 103 (Mo. App. 1973). Later, in Hulahan v. Sheehan, another court noted that adding the term "insurance" to the corporate name of a company which is engaged in the insurance business could constitute prejudicial error. 522 S.W.2d 134, 144 (Mo. App. 1975). Ultimately, courts recognize that the trial court is best positioned to make the determinations of the prejudice injected by specific questions and lines of questioning. Id.

Yust v. Link held that it was not an abuse of discretion for the trial court to deny plaintiff the opportunity to inquire into insurance connections where the plaintiff did not lay a proper foundation or act in good faith. 569 S.W.2d 236, 239 (Mo. App. 1978). Likewise, in Morrow v. Zigaitis, plaintiff's counsel failed to follow proper procedure for inquiring regarding an interested insurance company, and the court held it was not an

abuse of discretion to deny plaintiff the opportunity to ask the question. 608 S.W.2d 427, 428 (Mo.App. E.D. 1980).

Finally, more recent cases address the contours and limits of when plaintiff may inquire regarding insurance during voir dire. In Callahan v. Cardinal Glennon Hosp., this Court recognized the broad discretion vested in the trial court for determining the propriety of questions during the voir dire. 863 S.W.2d 852, 866 (Mo. 1993). Callahan provided the form for properly asking the "insurance question": 1) first getting the judge's approval of the proposed question out of the hearing 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. *Id.* at 871. This procedure is still followed today.

In reviewing the judicial history of the insurance question *in toto*, it is clear that Missouri Courts have always strived to strike a balance in fairness to both the Plaintiff and the Defense. Specific structures have been created which allow the insurance question to be asked with as little prejudice as possible. Plaintiffs are only asked to follow these structures. When they fail to do so, the safeguards put in place over the last 100 years of jurisprudence come crashing down.

b. Appellants' Reliance on *Buckallew* is Misplaced

Appellants rely heavily on Buckallew v. McGoldrick, 908 S.W.2d 704 (Mo.App. W.D. 1995). This case does not support Appellants' contentions and, in fact, supports the position that the trial court has discretion to refuse to allow the insurance question in the case at bar.

Buckallew dealt with a factually similar scenario. In Buckallew, prior to voir dire, the plaintiff requested permission to ask the insurance question to the potential jurors, and the court consented to it being asked. Id. at 707. Counsel for plaintiff "forgot" to ask the insurance question during his voir dire examination. Id. After defense counsel inquired of the jury panel and the judge closed voir dire, but before challenges for cause and preemptory challenges, counsel for plaintiff requested leave to reopen voir dire to allow him to ask the previously approved insurance question. Id. Plaintiff contended that the court had no discretion to deny him the right to ask the question. Id. The trial court stated, "The opportunity to re-call the panel at this time would have the effect of emphasizing that, and would, in my view, be prejudicial to do that at this time. So the request is denied at this time." Id. at 706. The Judge understood that by asking the insurance question in a separate segment of voir dire, it would be impossible to keep from unduly highlighting the insurance issue. Id.

On appeal, the plaintiff relied on previous cases to suggest that the trial court abused its discretion because it, in fact, had no discretion to deny plaintiff's request to ask the insurance question. Id. at 708. The appellate court agreed with the proposition that

had the trial court issued a blanket denial to ask the insurance question it would require reversal; however, because the trial court approved the question and plaintiff failed to ask it during Plaintiff's voir dire, the opportunity was waived. Id.

The Buckallew court highlights the key point for consideration by this Court:

> . . . the segregation of this question would have unduly highlighted it – even more so than placing it last in a series of questions. Such an approach would have been in contravention of Missouri's three-step process. . . . [I]t is not unreasonable to conclude that [plaintiff counsel's] strategy of asking several questions would still place undue emphasis on the issue of insurance.

Id. Buckallew articulates the danger associated with allowing the insurance question to be split off from the remainder of voir dire – that it will necessarily be highlighted. Id.

All that Missouri courts require is that a plaintiff be allowed a reasonable opportunity to inquire as to a panel's insurance connections. Id. The trial court has the duty to allow that reasonable opportunity but also has the discretion to deny the question when the reasonable opportunity is squandered by a party. Id. Under the facts of Buckallew, which closely align with this case, the court's discretion disallowing the insurance question was upheld, just as it should be here.

In this case, prior to beginning voir dire, the insurance question had been approved by the Court. (Tr. p. 215, lines 11-20). Appellants' counsel questioned the jury panel for approximately four (4) hours. (*See* Tr. I, p. 180, L24 – p. 181, L2). While the trial court

encouraged Appellant to move along Plaintiff's voir dire, it did not terminate it. That said, a trial court may limit voir dire as it finds appropriate. *See* Pollard v. Whitener, 965 S.W.2d 281, 286 (Mo. App. 1998). By failing to take advantage of the opportunity to ask the insurance question during Plaintiff's voir dire, Appellant waived it. Appellant cites no case that stands for the proposition that there is a "re-direct" allowed on voir dire. Rather, Plaintiff cites Buckallew, which recognizes that by failing to ask the insurance question during plaintiff's portion of voir dire, plaintiff waives the opportunity to do so.

Appellants distinguish Buckallew by stating that voir dire in this case was not "closed" by the court as it was in Buckallew. However, whether voir dire was "closed" ignores the point that Plaintiff's portion of voir dire was finished in both cases. In this case, as in Buckallew, Appellants sought to ask additional questions, out of time, but before the jury was selected. This imaginary line does not provide a distinction on the facts presented.

Both Appellants in Buckallew and in the instant case were allowed the opportunity throughout their portion of voir dire to ask the insurance question, and both failed to do so. Where a reasonable opportunity to ask the insurance question is given, counsel has not been denied their right to ask the insurance question – they have waived it. Most lawyers, with the benefit of hindsight, or based upon the questions raised by opposing counsel, wish they had asked the jury panel one more question. Buckallew correctly holds that this desire to ask additional questions does not trump the trial court's discretion to deny them.

c. Appellant's Proposed Segregation of the "Insurance Question" Would Unduly Highlight It

This Court previously recognized the accepted procedure for asking the insurance question in Missouri. Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 871 (Mo. 1993). This includes 1) first getting the judge's approval of the proposed question out of the hearing 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. Id. The appellate court in Buckallew correctly decided that isolating the insurance question during a separate segment of voir dire would unduly highlight it. Buckallew, 908 S.W.2d at 708.

Appellants' counsel proposed a separate, unauthorized segment of voir dire after Respondents' counsel was finished to ask three questions, one being the insurance question. After four hours of questioning by the Appellant and an hour by the Respondent, allowing Appellant to resume voir dire with three questions – one of them containing the "insurance question" would inappropriately highlight it. To assume jurors will not recognize the insurance issue between two unrelated questions is naïve and unbelievable. Additionally, by asking the insurance question at the end of a five-hour voir dire, it is difficult to understand how that would not be at the end of a series of questions as prohibited by Callahan. The recency effect, where individuals place greater weight on information presented later, is a recognized concern in jury selection. Norbert L. Kerr & Jiin Jung, Should Jurors Be Allowed to Discuss Trial Evidence Before

Deliberation?: New Research Evidence, 42 Law & Hum. Behav. 413, 416 (2018). The recency effect would no doubt be present here, as the asking of the "insurance question" immediately before the conclusion of voir dire would leave it prominently in the minds of jurors. Appellants' proposed approach would be in contravention to Missouri's process for balancing the need of plaintiffs to inquire into whether potential jurors have an interest in an insurance company with the need of defendants to avoid suffering undue prejudice from jurors learning that a third party with the ability to pay will be on the hook.

CONCLUSION

The rule that should be applied to this case is that plaintiffs have the reasonable opportunity to inquire into insurance following the three step process laid out in Callahan but can waive the right by failing to ask the question. Trial courts correctly have broad discretion in overseeing jury trials. Asking the "insurance question" after both plaintiff and defense have concluded voir dire unfairly highlights insurance coverage and, if this Court permits it, will become standard practice for plaintiffs as a way to leave jury pools with the question about insurance fresh in their minds. The allowed inquiry into insurance this Court has framed contemplates the potential prejudice to both plaintiff and defendant and provides a structure for counsel to ask the question in the proper way. Allowing a plaintiff a reasonable opportunity to ask the "insurance question" does not foreclose the court's discretion to deny it under circumstances such as these. Appellants' motion for a new trial was properly denied.

Based on the foregoing, *Amicus Curiae* Missouri Organization of Defense Lawyers respectfully suggest that this Court affirm the judgment in favor of Respondents.

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CERTIFICATE OF COMPLIANCE

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 3,059 words.

/s/ Joshua L. Hill
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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I filed a true and accurate Adobe PDF copy of this Amicus Curiae Brief via the Court's electronic filing system, which notified the following of that filing:

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