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

APPEALLANTS' SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

In the afternoon of the day of trial, during Appellants' counsel's voir dire inquiries, the trial court advised the parties that she desired to give the voir dire panel an afternoon break. (Tr. pg. 149, lines 9-10) The trial court advised Appellant's counsel that he could ask one more question of the venire panel, and then the venire panel would be dismissed for an afternoon break. (*Id*. lines 1-18) Thereafter, Appellant's counsel advised the trial court that following said break, he would continue his voir dire questioning and complete the same in a couple of minutes. (*Id*. lines 19-21)

Following said recess, the trial court spoke with four members of the jury panel who approached the bench outside of the presence of the remainder of the venire panel to discuss concerns they had with the trial court regarding serving on the jury. (Tr. pgs. 150-156) The trial court advised panelist Tracy that it was her desire to have voir dire questioning conclude that day. (Tr. pg. 151, lines 3-6) During the discussion with panelist Scheloeman, the trial court stated that it hoped to have the question and answer portion of this case done by the afternoon. (Tr. pg. 154, lines 10-12) The trial court further advised panelist Scheloeman and counsel that it hoped to conclude voir dire questioning by the end of the day. (Tr. pg. 154, lines 20-25, pg. 155, lines -12) Following its discussions with the venire panel, above, the full venire panel returned to open court. (Tr. pg. 156, lines 22-23)

After the full venire panel returned to the courtroom, Appellant's counsel continued to question the venire panel for a short period. (Tr. pgs. 157-171) Appellant's counsel advised the venire panel that "… I'm going to stop and let the defendant take over not because I don't want to talk to you anymore." (Tr. pg. 172, lines 1-2) Thereafter, Respondents' counsel began their voir dire. (*Id.* line 8) Appellants' counsel did not indicate to the venire panel that he had finished his inquiries at that time.

Respondents' counsel conducted his inquiries of the venire panel late in the afternoon of the first day of trial, and concluded his voir dire inquiries shortly after 4 o'clock. (Tr. pg. 187, lines 16-25, pgs. 187-215) At which time Respondents' counsel

concluded his questioning. (Tr. pg. 215, lines 3-4) Following which the trial court stated: "Plaintiffs' side, you're done as well?" (Tr. pg. 215, lines 5-6) After which Appellants' counsel approached the bench, and advised the trial court that in an effort speed up his questioning, he had inadvertently failed to ask the "insurance question" (Tr. pg. 215, lines 12-19) Trial court responded by stating that it was aware that it had hurried Appellants' counsel to conclude his questioning. (*Id.* line 20)

Respondents' counsel objected to the timing of said question, as well as advising the trial court that:

> "…There's not a single person in this room who's related to Missouri Doctors Mutual Insurance Company…and that 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." (Tr. pg. 215, lines 21-25, pg. 216, lines 1-6)

Trial court acknowledged the possibility existed that a member of the panel could respond affirmatively to the "insurance question". (Tr. pg. 216, lines 7-10)

Respondents' counsel followed:

> "The (sic) 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." (Tr. pg. 216, lines 11-16)

Next, the trial court inquired as to the name of the insurance company, Missouri Doctors Mutual. (*Id.*, lines 20-21) The trial court was advised that said insurer was based outside of Kansas City in St. Joseph, Missouri. (*Id.*, lines 23-25) Respondents' counsel then advised the court that:

> "Twenty 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 none of them live here." (Tr. pg. 217, lines 3-6)

Next the trial court asked Respondents' counsel whether he had met all of the employees, and Respondents' counsel responded in the affirmative. (*Id.*, lines 7-10)

Thereafter, the trial court stated as follows:

> "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." (Tr. pg. 217, lines 11-15)

The trial court thereafter denied Appellants' counsel his request to ask the "insurance question", further stating that:

> "So I'm 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 really more to the other side by unduly highlighting it." (Tr. pg. 218, lines 7-14)

ARGUMENT

I. Background

"This court has held that the constitutional right to a trial by jury includes the right to a fair and impartial jury." *Ivy v. Hawk*, 878 S.W.2d 442, 444 (Mo. banc 1994). Parties have a right to know if jurors or their families have an interest in the outcome of the litigation and the trial court "has no discretion to deny a party the right to ask the preliminary single 'insurance question' if the proper foundation is laid." (*Id.*) Counsel has laid a proper foundation when he or she requests, prior to voir dire and on the record that he or she be permitted to ask the "insurance question." (*Id.*)

"The rule is settled in the state that a Plaintiff is entitled to qualify the jurors as to their 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).

The 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 hearing of the panels, 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, 871 (Mo. banc 1993). 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 trial court's denial of the right to ask the preliminary "insurance question" is prejudicial as a matter of law. *Carothers v. Montgomery Ward and Co., Inc.,* 745 S.W.2d 170, 172 (Mo. App. W.D. 1987).

Where a proper and approved insurance question was to be asked, the trial court has no discretion to deny the right to ask the insurance question based on a prejudice-balancing analysis. This court has been clear on this point in holding that the "possibility of taint resulting from some connection between a juror and an interest in an insurer, even though the disclosure of the latter's interest is unlikely, outweighs the prejudice that might result from an inquiry naming the insurance company during voir dire." *Callahan,* 863 S.W.2d at 871 (citing *Skinner v. Sisters of St. Mary's,* 686, S.W.2d 858 (Mo. App. E.D. 1985).

II. Buckallew v. McGoldrick Analysis

Appellants waived their right to ask the proposed insurance question when they failed to ask it at the first opportunity and attempted to do so after Respondents had conducted their voir dire questioning, and the trial court invited further voir dire questioning from Appellants' counsel. For the following reasons, *Buckallew v. McGoldrick,* 908 S.W.2d 704 (Mo. App. W.D. 1995), is inapposite.

In *Buckallew*, the court noted that as voir dire was "essentially complete", resuming voir dire for the sole purpose of asking the "insurance question" would be prejudicial. *Buckallew*, 908 S.W.2d at 708, footnote 1 at 710. The court in *Buckallew* based its decision on counsel's request to reopen voir dire to solely ask the "insurance question" *Buckallew* at 708. Further, it should be noted that McGoldrick's counsel in *Buckallew* did not advise the trial court that he could have asked "several other questions" once voir dire was reopened, which option was not brought to the attention of the trial court. (*Id.*)

In the instant case, the trial court invited Appellants' counsel to continue his questioning and did not deny Appellants' counsel the right to ask the question based on the basis that voir dire was closed, but rather, as a result of its prejudice-balancing analysis. As noted above, the venire panel, unlike in *Buckallew*, was still present in the courtroom, and heard the trial court's invitation to Appellants' counsel to continue his voir dire if desired. At which point, Appellants' counsel approached the bench and advised the trial court that he wished to continue voir dire, as well as to ask the "insurance question".

As such, the holding in *Buckallew* does not support Respondents' claim that the trial court correctly denied Appellants' counsel to ask the "insurance question." As the venire panel remained in the courtroom, and the trial court invited Appellants' counsel to continue voir dire, the facts are substantially different than in the instant case. Further, McGoldrick's counsel in *Buckallew* failed to advise the court of his intention to place the "insurance question" with other questions, as to not unduly highlight the same. For these reasons, Respondents' reliance on *Buckallew* to support their claim that the trial court correctly denied Appellants' counsel the opportunity to ask the "insurance question" is without merit.

III. Additional issues raised by Respondents

Respondents next suggest that the trial court based its ruling denying Appellants' counsel the right to ask the "insurance question" on the fact that

Appellants' counsel suggested to the trial court that he would ask the "insurance question" in the middle of three questions, placing said "insurance question" in the middle. As evidenced in the record, the trial court did not base its denial Appellants' request in based on the same.

Respondents' counsel objected to the Appellants' counsel's request to ask said question based on Respondents' counsel's assertions to the trial court that "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." (Tr. pg. 215, lines 21-25, pg. 216, lines 1-6) The trial court responded by stating that: "except for that one guy in the back corner who's got relatives that are doctors who could talk to him about how much malpractice insurance is going up." Respondents' counsel replied stating: "The (sic) 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." (Tr. pg. 216, lines 11-16)

The trial court went on to question Respondents' counsel as to the location of Respondents' insurance carrier, Missouri Doctors Mutual Insurance Company. (Tr. pg. 216, lines 23-24) Thereafter, Respondents' counsel advised the trial court of the respective size of said insurance company, as well as the location therein. (Tr. pg. 217, lines 3-6) And the court went on the question Respondents' counsel as to whether he had met all of their employees. (*Id.*, line 7-8) After Respondents' counsel advised the court that he had met all of the employees, the court denied Appellants' counsel request to ask the "insurance question" stating that "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 geographically, logistically about this insurance company." (Tr. pg. 217, lines 11-15)

As such, the trial court based its decision to deny Appellant's counsel his request to ask the "insurance question" that there was no possibility that a member of the panel or his or her family could be employed by, or have a financial interest in, Missouri Doctors Mutual Insurance Company. As this court has found, defense counsel's oral representation that no member of the panel had an interest in the insurance company in question is insufficient. *Ivy*, 878 2d at 445. Further, this court has found that this source of proof, defense counsel's oral representations, were inadequate to overcome the Plaintiffs' right to ask the insurance question and that it also failed to adequately show that "…there was no possibility that any member of the panel or his family could…" have an interest in the defendants' insurance company. *Aiken v. Clary*, 396 S.W.2d 668, 677 (Mo. 1965).

As such, the trial court improperly engaged in a prejudice-balancing analysis in denying Appellant's request to ask the insurance question. Accordingly, Respondents's point in this regard is also without merit.

IV. Precedential Impact

As note infra, Appellant's counsel did follow the procedure outlined in *Ivy* in propounding his request to ask the insurance question. The trial court, as noted before, based its decision to disallow the same finding that what was known geographically and logistically about the insurance company in question.

Further, as the trial court invited further voir dire questioning from Appellants' counsel, it cannot be suggested, as indicated by the Respondents, that Appellant's counsel requested asking the insurance question in a "segregated portion" of voir dire.

If the decision of the Appellate Court is affirmed, it is difficult, if not impossible, to suggest that asking the insurance question, as outlined in *Ivy*, would be handled differently by any trial court in the future. Trial courts across the state would continue to have discretion in advising trial counsel to parameters of asking the insurance question going forward and as such, this point is without merit as well.

CONCLUSION

For the foregoing reasons, the trial court failed to allow Appellants reasonable opportunity to ask the insurance question, and Appellants did not waive that right in their request to ask the same. Accordingly, the trial court improperly denied Appellants' counsel the right to ask the insurance question based on a prejudice-balancing analysis. As such, the trial court's ruling was prejudicial as a matter of law, and accordingly, the Appellants respectfully request that this court remand this action to the trial court for a new trial, and for any and all further relief that this court seems just and proper under the circumstances.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that I prepared this Substitute Reply Brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this Substitute Reply Brief complies with the word limits of Rule 84.06(b) and that this Substitute Reply Brief contains 2,641 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 17th day of May, 2019:

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