IN THE SUPREME COURT OF MISSOURI

DOUGLAS STEWART, Plaintiff/Respondent, v. KRIKOR O. PARTAMIAN, M.D. and PHOENIX UROLOGY OF ST. JOSEPH, INC., Defendants/Appellants.	)	Case No. SC94120

Appeal from the Circuit Court of Buchannan County, Missouri
Fifth Judicial Circuit, Division 2
The Honorable Wendal C. Judah, Judge

APPELLANTS' BRIEF OF KRIKOR O. PARTAMIAN, M.D. AND PHOENIX UROLOGY OF ST. JOSEPH, INC.

James E. Meadows, Mo. Bar No. 50874
Emma R. Schuering, Mo. Bar No. 65169
POLSINELLI, P.C.
901 St. Louis, Suite 1200
Springfield, MO 65806
(417) 869-3353 Telephone
(417) 869-9943 Telecopier
Email: jmeadows@polsinelli.com
Email: eschuering@polsinelli.com

Richard AuBuchon, Mo. Bar No. 56618
AuBuchon Law Firm, LLC
121 Madison St., Gallery Level
Jefferson City, MO 65101
(573) 616-1845 Telephone
Email: rich@rmalobby.com

Attorneys for Appellants
Krikor O. Partamian and Phoenix Urology of St. Joseph, Inc.

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL COURT CASE

STATE COURT CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

SECONDARY SOURCES

JURISDICTIONAL STATEMENT

Appellants Krikor O. Partamian, M.D. ("Dr. Partamian") and Phoenix Urology of St. Joseph, Inc. ("Phoenix Urology") appeal from a January 13, 2014 judgment of the Circuit Court of Buchanan County, Missouri, Division 2, the Honorable Wendal Judah, Judge, in favor of Respondent Douglas Stewart ("Plaintiff") in the total amount of $4,300,000.00. (CLF 168-170).[1] Dr. Partamian and Phoenix Urology have challenged the constitutionality of a portion of § 538.300 RSMo., which prohibits defendants in medical negligence claims from seeking remittitur of an adverse judgment. Because the constitutionality of a state statute is at issue, Dr. Partamian and Phoenix Urology filed their Notice of Appeal with this Court on April 2, 2014. (CLF 431-432). Under Article V, Section 3 of the Missouri Constitution, this Court has "exclusive appellate jurisdiction in all cases involving the validity . . . of a statute or provision of the Constitution of this State."

[1] Documents in the Corrected Legal File are referred to, by page number, as "CLF," portions of the Corrected Transcript are, by page number, "CTR," documents in the Supplemental Legal File are referred to, by page number, as "SLF" and all exhibits are referred to by the number assigned at trial. Any exhibits referred to in this brief will be filed with this Court under Missouri Court Rule 81.16.

STATEMENT OF FACTS

Procedural Background

Plaintiff filed suit against Dr. Partamian and Phoenix Urology in the Circuit Court of Buchanan County, Missouri on June 29, 2012. (CLF 11). The Petition alleged one count of medical negligence against Dr. Partamian and Phoenix Urology. (CLF 11). Plaintiff claimed Dr. Partamian and Phoenix Urology, as Dr. Partamian's employer, were negligent in not draining an abscess in Plaintiff's prostate before the abscess ruptured on or before May 17, 2009. (CLF 14, 16-17). As a result of the alleged negligence, Plaintiff claimed he had "permanent damage, deformity, and loss of function of his penis, resulting in pain and suffering, lost earnings, medical expenses and a loss of sensation and inability to physically respond to or engage in sexual activity." (CLF 17-18).

Both Dr. Partamian and Phoenix Urology denied all the core allegations of Plaintiff's petition and asserted affirmative defenses, including the right to rely on the provisions of Chapter 538 RSMo., which govern actions against health care providers. (CLF 21-23). Trial began on December 2, 2013 with jury selection and hearings on pre-trial motions. (CLF 6). Opening statements and the presentation of evidence to the jury began on December 3, 2013. (CLF 6). After hearing only three days of evidence, the jury deliberated for slightly less than three hours and returned a verdict of $4,300,000.00 in favor of Plaintiff and against Phoenix Urology and Dr. Partamian. (CLF 7).

Pre-trial Motions and Objections

On November 18, 2013, Dr. Partamian and Phoenix Urology filed a joint motion in limine asking, among other requests, that the trial court prohibit "Plaintiff, Plaintiff's

counsel and Plaintiff's witnesses, from offering into evidence, referring to or otherwise disclosing to the jury, either directly or indirectly, any facts indicating the" . . . "personal practice" of any witnesses and any testimony regarding "lawsuits or claims involving Defendants or expert witnesses." (CLF 43, 48-50). At approximately the same time, Plaintiff filed deposition designations from the deposition of Dr. John Riordan, a doctor who worked at Phoenix Urology at the time Plaintiff was treated and was involved in Plaintiff's care with Dr. Partamian. (CLF 5-6, 60-66, 159-66; SLF 143-85).

Plaintiff designated extensive passages from Dr. Riordan's deposition for use during the trial, including passages concerning a lawsuit Dr. Riordan had pending against Phoenix Urology and passages discussing the reasons for Dr. Riordan's termination from Phoenix Urology. (CLF 143-45; Ex. 115, 26:18-27:15, 28:9-18; Ex. 116). Dr. Riordan's designated testimony included a discussion of a "partnership dispute" between Dr. Riordan and Phoenix Urology and how he and Phoenix Urology had "different philosophies about how to best practice medicine." (SLF 154; Ex. 115 26:18-27:15). Dr. Riordan testified that his contract was "not renewed" with Phoenix Urology because Phoenix Urology was concerned that Dr. Riordan was not "bringing in enough money to the group." (SLF 154; Ex. 115 27:6-15, 28:9-18).

Plaintiff also designated a passage from Dr. Riordan's deposition regarding how Dr. Riordan had, on occasions prior to treating Plaintiff with Dr. Partamian, personally treated prostate abscesses. (SLF 143-44, 155; Ex. 115 32:13-33:13, 33:22-25). Dr. Riordan testified that, "since graduating medical school," he had treated prostate abscesses "maybe half a dozen times." (SLF 155; Ex. 115 32:13-33:13, 33:22-25; Ex.

116). Dr. Riordan had treated, at the same hospital where Plaintiff was being treated, a prostate abscess that he had drained just a few weeks prior to Plaintiff being hospitalized. (SLF 155; Ex. 32:13-33:13, 33:22-25; Ex. 116). Plaintiff then followed up by asking "on the other prostate abscesses that you were involved in the treatment, did you end up draining those abscesses as well?" (SLF 155). Dr. Riordan replied "yes." (SLF 155; Ex. 115, 32:13-33:13, 33:22-25; Ex. 116).

Dr. Partamian and Phoenix Urology filed extensive objections to Plaintiff's designations of Dr. Riordan's videotaped deposition. (CLF 163-66).[2] While they did not object to the section from Dr. Riordan's testimony informing the jury that Dr. Riordan was involved in a contractual dispute with Phoenix Urology, Dr. Partamian and Phoenix Urology did object to Plaintiff's designation that Dr. Riordan was terminated from Phoenix Urology for not "bringing in enough money to the group." (SLF 154; CLF 163). They also objected to Dr. Riordan's testimony that he had drained all the prior prostate

[2] While the objections of Dr. Partamian and Phoenix Urology to Plaintiff's deposition designation of Dr. Riordan's testimony have the file stamp of January 3, 2014, it appears they were filed prior to the trial, likely in open court, and simply did not get file stamped and entered into the Circuit Clerk's records until sometime after trial. The Certificate of Service on the Objections states that they were filed on "the 23rd day of November, 2013." (CLF 166). Additionally, Plaintiff filed responses to Dr. Partamian and Phoenix Urology's objections on November 25, 2013. (CLF 60-66).

abscesses he had treated, and specifically his testimony about the abscess he drained at the same hospital a few weeks before Plaintiff was treated. (CLF 159-162).

The trial court overruled Dr. Partamian and Phoenix Urology's objections and allowed Dr. Riordan's testimony to be presented to the jury via videotape. (Ex. 115, Ex. 116; CTR 217, 389). The Court also ruled on the parties' motions in limine, prior to the jury being sworn. (CTR 4-7). The trial court granted Phoenix Urology and Dr. Partamian's motion in limine preventing testimony regarding any testimony of the "personal practice" of any of the witnesses and regarding "lawsuits or claims" involving any of the Defendants or expert witnesses, among others. (CLF 43; CTR 4).

Testimony and Argument at Trial

Trial began on December 2, 2013. (CTR 4-7). After the jury was sworn, Plaintiff began his opening statement. (CTR 7-8). Dr. Riordan and his involvement in Plaintiff's treatment was one of the main, if not the main, focuses of Plaintiff's opening statement. (CTR 34-35, 37, 44, 46-48, 57). Plaintiff told the jury that Dr. Riordan was "a doctor in his first year out of completing his education" and went with Dr. Partamian during rounds and was involved in seeing and treating Plaintiff with Dr. Partamian. (CTR 34). Plaintiff then immediately turned the jury's focus to the fact that Dr. Riordan was "no longer with" Phoenix Urology because Dr. Riordan and Phoenix Urology "had a contract dispute and a falling out." (CTR 35).

Plaintiff stressed to the jury that Dr. Riordan and Dr. Partamian had a conversation, after evaluating Plaintiff's condition in the hospital, during which Dr. Riordan asked Dr. Partamian "why don't we just go ahead and drain this abscess" and

told Dr. Partamian that he had treated a "similar situation a few weeks earlier and that he thought that was the way to go." (CTR 37). Near the end of his opening statement, Plaintiff came back to that discussion between Dr. Riordan and Dr. Partamian about draining the abscess, emphasized it again, and stated that Plaintiff's "life changed when the choice was made not to drain that prostate abscess until it was too late." (CTR 66).

Plaintiff called Dr. Partamian as his first witness. (CTR 94). Dr. Partamian testified that he is and has been a board certified urologist since 1976 and an employee of Phoenix Urology since 1992. (CTR 96-97). When Dr. Partamian first met Plaintiff, Plaintiff had been treated by his primary care physician for "prostatitis," a different condition than a prostate abscess. (CTR 104). A CT scan of Plaintiff had been ordered and Dr. Partamian, after examining the scan, discovered that Plaintiff had a 3.9 x 2.3 x 3.3 mm abscess at the base of his prostate, instead of prostatitis. (CTR 109, 110). Dr. Partamian explained that an abscess is a "collection of pus or purulent material" that results from a bacterial infection which kills cells and that the "body starts fighting" with an "inflammatory response." (CTR 113). The body then forms a wall around the infection and the pus, trying to keep it from harming the rest of the body. (CTR 113-14).

Plaintiff's prostate abscess was first treated with antibiotics, which Dr. Partamian gave "time to work" and intended to "evaluate in the morning" the seriousness of Plaintiff's true condition. (CTR 119-20). In treating prostate abscesses, Dr. Partamian testified that the standard of care is to give antibiotics and, if that does not work, drain the abscess by breaking it open with a tool and allowing the pus to drain out through the urinary tract. (CTR 130). This procedure, called a "TURP," was an option in Plaintiff's

case, but Dr. Partamian was concerned about side effects, including ejaculatory dysfunction, introducing infection into the blood stream and causing "strictures" within the urethra. (CTR 130-32, 140).

Plaintiff also elicited testimony from Dr. Partamian about the potential dangers to a patient if a prostate abscess ruptured. One of those dangers was that the pus could continue to "feed . . . into the blood stream" and be "a continuing source of sepsis," a life threatening condition. (CTR 140-41). Additionally, rupture of a prostate abscess makes the infection "very difficult to get out," by spreading it to all the adjoining tissues, including the penis, scrotum, pelvis and peritoneum. (CTR 140-42). Dr. Partamian testified that in his entire medical career, he had only done three TURP procedures to drain prostate abscesses. (CTR 141-42).

After several days of treating Plaintiff with antibiotics and monitoring his condition, Dr. Partamian and Dr. Riordan examined Plaintiff in the hospital. (CTR 182). Dr. Riordan created progress notes for Dr. Partamian about this visit. (CTR 182). Plaintiff used the progress notes at trial to ask Dr. Partamian about whether or not he had a discussion with Dr. Riordan, as Dr. Riordan would later testify, about "the option to drain or not to drain" Plaintiff's prostate abscess. (CTR 183). Plaintiff immediately emphasized yet again that Dr. Riordan was now in a "contract dispute" with Phoenix Urology, that there was a lawsuit and a "falling out" between Dr. Riordan, Dr. Partamian and Phoenix Urology. (CTR 184-85). Plaintiff continued to question Dr. Partamian, asking if Dr. Partamian denied that he had a conversation with Dr. Riordan, after examining Plaintiff on May 15th during which Dr. Riordan asked "why don't we go ahead

and drain the abscess," and strongly suggested to Dr. Partamian that the abscess needed to be drained. (CTR 188-89).

Three days later, which was May 17th, Plaintiff's seventh day in the hospital, Dr. Partamian examined Plaintiff again and, concerned about Plaintiff's condition, ordered another CT scan. (CTR 208-09). From the CT scan, Dr. Partamian discovered that the prostate abscess had "doubled in size and ruptured." (CTR 209). Dr. Partamian went to the hospital and performed surgery on Plaintiff. (CTR 210). Because the pus from the abscess was now "spilling out into the adjacent tissues," Dr. Partamian had to make an incision between Plaintiff's anus and scrotum to drain the pus and put in multiple drains to allow the pus to continue to drain. (CTR 211-12). After the surgery on May 17, Dr. Partamian's direct involvement in Plaintiff's treatment, while in the hospital, essentially ended, as Dr. Partamian had to leave town. (CTR 212).

The trial court, due to the late time of day, interrupted testimony and then allowed Plaintiff to present the videotaped testimony of Dr. Riordan. (CTR 215-16; Ex.115; Ex. 116). Among the portions of the transcript played for the jury were Dr. Riordan's testimony concerning the "difference in philosophies," between Phoenix Urology and Dr. Riordan, Dr. Riordan's termination for not bringing in enough money to Phoenix Urology and Dr. Riordan's testimony of having drained, at the same hospital a few weeks prior to Plaintiff's treatment, a prostate abscess and having drained all other prostate abscesses he had encountered in his career. (Ex. 115 32:13-33:13, 33:22-25; Ex. 116).

The next day, Plaintiff called his expert witness, Dr. Malcom Schwartz, to the stand. (CTR 220). Dr. Schwartz testified that a prostate abscess is "not a very common

type of problem" and that you see "prostatitis," Plaintiff's original diagnosis, or infection of the prostate "frequently." (CTR 234). He testified that the "gold standard or typical standard" for treating a prostate abscess is to do a "TURP, or transurethral resection of the prostate, which uses a device that we place into the urethra, thread it up to the level of the prostate, which is right at the bladder neck." (CTR 238). He testified that it was "a very reasonable thing to do" to begin treating Plaintiff with antibiotics, like Dr. Partaminan did when he first diagnosed Plaintiff's abscess, and that "99% of the time" that was the right thing to do. (CTR 248-49).

After a prostate abscess is first diagnosed, draining the abscess is to be considered only if the patient is not improving with antibiotics or deteriorates based on the results of CT scans performed every 24-48 hours after the original examination. (CTR 251). A doctor is supposed to focus on, in deciding whether or not to drain a prostate abscess, if a "patient's deteriorating," based on fever, how the patient feels, the patient's blood cell counts and possibilities of systematic sepsis or infection. (CTR 251). Dr. Schwartz testified that, in his medical opinion, Plaintiff's prostate abscess should have been "drained on the 13th of May." (CTR 268). Plaintiff's abscess instead ruptured four days later, on May 17th, two days after Dr. Partamian and Dr. Riordan allegedly had a discussion over whether the abscess should be drained. (CTR 297).

After examining the treatment notes created by Dr. Riordan and Dr. Partamian, Dr. Schwartz testified that on May 20th, when Dr. Riordan took Plaintiff back into surgery while Dr. Partamian was out of town, there was "gangrene" in Plaintiff and that the tissue was "black . . . it was necrotic, it was dead." (CTR 314). The dead tissue had to be cut

out and a catheter, which had been installed during Dr. Partamian's surgery on May 17th, had to be reinstalled because the urethra was "gone, due to the infection." (CTR 314). Dr. Schwartz testified that two additional surgeries and subsequent treatment Plaintiff had after May 17th would have not been necessary, as no gangrene or dead tissue would have developed, had the abscess been drained on May 13th. (CTR 321-22).

According to Dr. Schwartz, Plaintiff suffered permanent injuries as a result of the rupturing of the prostate abscess and resulting necrosis. Plaintiff's penis has "diminished blood flow to the right side . . . so his erections are somewhat distorted, disturbed, and difficult to achieve because of" his injuries. (CTR 328). Plaintiff also has incontinence, as after he urinates urine stays in his rebuilt urethra and, if he strains working or in some other way, urine dribbles out, forcing Plaintiff to wear panty liners. (CTR 332). Plaintiff has similar issues with ejaculation, as the ejaculate "doesn't come out real well because of this dilated urethra" and deformities in his urethra. (CTR 332). Plaintiff will also, according to Dr. Schwartz, have pain in the scrotum, lower abdomen, the peritoneum, with erections and a "burning sensation in the right groin area" that will always continue. (CTR 334).

Plaintiff's next witness was his wife, Mary Stewart. (CTR 389). She and Plaintiff had met in March 2009, just two months before Plaintiff entered the hospital, and she and Plaintiff became engaged and started living together in April, 2009. (CTR 391). She and Plaintiff were married after Plaintiff was released from the hospital. (CTR 389-90, 410-11). Although Plaintiff is now infertile from his injury, he and Mrs. Stewart did not plan

on having children, as Mrs. Stewart had already had a hysterectomy before they met. (CTR 391).

Plaintiff then testified, claiming that his problems, particularly incontinence and sexual dysfunction, left him feeling "embarrassed" and that he did not "feel like a complete man." (CTR 451). He testified that he had medical bills of $492,818.59, which had been satisfied with payment of $395,033.02. (CTR 457-58).

At the end of Plaintiff's testimony, Plaintiff closed his evidence and Dr. Partamian and Phoenix Urology moved for directed verdict, which was denied. (CTR 475-476). Defendants then presented their evidence, including expert testimony from Dr. Jay Cummings and direct examination of Dr. Partamian, closed their case, and filed a Motion for Directed Verdict at the close of all evidence. (CTR 477-528, 597-624, 645). Like the Motion filed at the close of Plaintiff's case, the Motion for Directed Verdict at the close of all evidence was denied. (CTR 648).

In closing argument, Plaintiff again stressed the testimony of Dr. Riordan and asked the jury to award $395,032.02 for medical expenses and $6,692.75 for lost wages, for total past economic damages of $401,725.77. (CTR 668-69, 679-83). Plaintiff's counsel requested that the jury award $1,000,000.00 in compensation for past non-economic damages, arguing that Plaintiff had "lost his dignity. He's lost his self-esteem. He doesn't feel like the man that he was." (CTR 684). Regarding future non-economic damages, Plaintiff's counsel argued that "if [Plaintiff] had completely lost his genitals and not [sic] been able to use his penis at all," the jury ought to have awarded around ten times Plaintiff's medicals, which would total "$3,951,281.00." (CTR 685). Noting that

would not be "fair and just in this case," Plaintiff instead argued the jury should award future non-economic damages of $1,975,640.50, making a total verdict of $3,377,366.27. (CTR 685). Although Plaintiff's injuries "clearly interfered with his life," the injuries here were not the worst possible case and could not justify a higher award than the $3,377,366.27 Plaintiff's attorney requested in closing argument. (CTR 685).

After deliberating only three hours, the jury returned a unanimous verdict in favor of Plaintiff and against Dr. Partamian and Phoenix Urology. (CLF 113). The jury, as requested by Plaintiff, awarded $401,726.77 for past economic damages. (CLF 113). Instead of following Plaintiff's recommendation of a $1,975,640.50 non-economic future damages award, the jury exceeded Plaintiff's request. (CLF 113; CTR 684-85). For past non-economic damages, the jury added an additional $500,000.00 not requested by Plaintiff during its closing argument or supported by any of the evidence. (CLF 113; CTR 684). In total, the jury awarded almost $1,000,000.00 more in non-economic damages, for both the past and future, than Plaintiff requested in closing argument, for total damages of $4.3 million dollars. (CLF 113, 188).

Post-Trial Motions

Following the verdict, the trial court entered judgment on January 13, 2014 for the full amount of damages found by the jury. (CLF 168-70). Dr. Partamian and Phoenix Urology filed a Motion for New Trial or, in the Alternative, for Remittitur, along with Suggestions of Law in Support of their joint motion. (CLF 171-229). Dr. Partamian and Phoenix Urology argued that the jury verdict "was the result of inflammatory and unduly prejudicial testimony" offered over their objections, that the verdict was excessive and

against the weight of evidence, that the verdict was based on passion and prejudice and that if a new trial was not ordered, remittitur in the amount of $1,000,000.00 should be entered on non-economic damages. (CLF 176).

Dr. Partamian and Phoenix Urology argued that they were entitled to request and receive remittitur even though expressly § 538.300 RSMo. denies remittitur to health care providers in medical negligence cases. (CLF 192-94). The provision of § 538.300 that prohibits the use of remittitur in medical negligence cases, Dr. Partamian and Phoenix Urology argued, denied their constitutional right to a jury trial under Article I, Section 22(a) of the Missouri Constitution, as well as additional constitutional rights. (CLF 192-99).

In response, Plaintiff argued that remittitur was not allowed under § 538.300 and that Dr. Partamian and Phoenix Urology's constitutional rights, including their constitutional right to trial, where not violated by the statute. (CLF 266-70). During oral arguments on Dr. Partamian and Phoenix Urology's post-trial motions, the trial court stated that it did not have authority to "construe the constitution" and did not even consider Dr. Partamian and Phoenix Urology's request for remittitur. (CTR 774-83).

On March 24, 2014, the Court denied Dr. Partamian and Phoenix Urology's Motion for New Trial, or in the Alternative Remittitur, specifically ruling that, "with respect to the Motion for Remittitur as provided for by Rule 78.10, it is ordered that the Motion for Remittitur is overruled." (CLF 429-30). There was no analysis of the request for remittitur included in the trial court's order. (CLF 429). This appeal followed.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN DENYING DR. PARTAMIAN AND PHOENIX UROLOGY'S REQUEST TO REMIT THE JURY VERDICT ON THE BASIS OF § 538.300 BECAUSE § 538.300's DENIAL OF REMITTITUR IN TORTS INVOLVING ALLEGATIONS OF MEDICAL NEGLIGENCE VIOLATES DR. PARTAMIAN AND PHOENIX UROLOGY'S RIGHT TO TRIAL BY JURY UNDER ARTICLE I, SECTION 22(A) OF THE MISSOURI CONSTITUTION, IN THAT REMITTITUR IS AN INTEGRAL PART OF THE COMMON LAW AND THE RIGHT TO TRIAL BY JURY HERETOFORE ENJOYED AND THE JURY VERDICT FAR EXCEEDS FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF'S INJURIES.

Chitty v. St. Louis, I. M. & S. Ry. Co., 49 SW 868 (Mo. 1899)

Lewellen v. Franklin, No. SC92871, 2014 WL 14425202 (Mo. banc Sept. 9, 2014)

Sanders v. Ahmed, 364 S.W.3d 195 (Mo. banc 2012)

Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. banc 2012)

Mo. Const. Art. I, § 22(a)

Mo. Rev. Stat. § 538.300 (Cum. Supp. 2005)

Mo. Rev. Stat. § 537.068 (2000)

Mo. R. Civ. P. 78.10

POINT RELIED ON

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING PLAINTIFF TO PRESENT DR. RIORDAN'S TESTIMONY CONCERNING HIS PRIOR TREATMENT OF UNIDENTIFIED PATIENTS WITH PROSTATE ABSCESSES BECAUSE TESTIMONY REGARDING THE PERSONAL PRACTICE OR CUSTOM OF A PHYSICIAN IS NOT ADMISSIBLE TO ESTABLISH THE STANDARD OF CARE AND EVIDENCE OF SIMILAR OCCURRENCES IS ONLY ADMISSIBLE WHEN SUCH OCCURRENCES ARE SUFFICIENTLY SIMILAR TO OUTWEIGH CONCERNS OF PREJUDICE AND CONFUSION, IN THAT DR. RIORDAN'S TESTIMONY CONTRADICTED PLAINTIFF'S EXPERT'S TESTIMONY AS TO THE STANDARD OF CARE, THE STANDARD OF CARE, THAT PROSTATE ABSCESSES ARE TO BE TREATED PRIMARILY WITH ANTIBIOTICS AND ONLY DRAINED IF ANTIBIOTICS FAIL TO WORK, AND THERE WAS NO EVIDENCE CONCERNING THE OTHER PATIENTS' INJURIES OR TREATMENTS.

Byers v. Cheng, 238 S.W.3d 717 (Mo. App. E.D. 2007)

Ladish v. Gordon, 879 S.W.2d 623 (Mo. App. W.D. 1994)

Thornton v. Gray Auto. Parts Co., 62 S.W.3d 575 (Mo. App. W.D. 2001)

Yingling v. Harting, 925 S.W.2d 952 (Mo. App. W.D. 1996)

POINT RELIED ON

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING PLAINTIFF TO PRESENT DR. RIORDAN'S TESTIMONY REGARDING THE REASONS HE NO LONGER WORKED FOR PHOENIX UROLOGY BECAUSE TESTIMONY INVOLVING AN IRRELEVANT AND PREJUDICIAL COLLATERAL MATTER IS INADMISSIBLE, IN THAT THE TESTIMONY IMPLIED TO THE JURY THAT PHOENIX UROLOGY WAS MORE CONCERNED WITH MONEY THAN QUALITY OF PLAINTIFF'S CARE.

Barr v. Plastic Surgery Consultants, Ltd., 760 S.W.2d 585 (Mo. App. E.D. 1988)

Moon v. Hy-Vee, Inc., 351 S.W.3d 279 (Mo. App. W.D. 2001)

Peters v. ContiGroup, 292 S.W.3d 380 (Mo. App. W.D. 2009)

POINT RELIED ON

IV.

THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO GRANT DR. PARTAMIAN AND PHOENIX UROLOGY'S MOTION FOR NEW TRIAL BECAUSE THE JURY'S VERDICT OF $4,300,000.00 WAS EXCESSIVE, EXCEEDING FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF'S DAMAGES, AND WAS THE PRODUCT OF PASSION AND PREJUDICE IN THAT THE JURY'S VERDICT EXCEEDED THE AMOUNT REQUESTED BY PLAINTIFF IN HIS CLOSING ARGUMENTS, WAS EXCESSIVE IN LIGHT OF THE FACT THAT PLAINTIFF SHOWED NO EVIDENCE OF FUTURE MEDICAL EXPENSES OR FUTURE LOST INCOME AND WAS CAUSED BY THE BIAS AND PREJUDICE INJECTED INTO THE CASE BY THE IMPROPER TESTIMONY OF DR. RIORDAN.

Lewis v. Envirotech Corp., 674 S.W.2d 105 (Mo. App. E.D. 1984)

Lindquist v. Scott Radiological Grp., Inc., 168 S.W.3d 635 (Mo. App. E.D. 2005)

Maddox v. Vieth, 368 S.W.2d 725 (Mo. App. K.C. 1963)

ARGUMENT

POINT RELIED ON I.

THE TRIAL COURT ERRED IN DENYING DR. PARTAMIAN AND PHOENIX UROLOGY'S REQUEST TO REMIT THE JURY VERDICT ON THE BASIS OF § 538.300 BECAUSE § 538.300's DENIAL OF REMITTITUR IN TORTS INVOLVING ALLEGATIONS OF MEDICAL NEGLIGENCE VIOLATES DR. PARTAMIAN AND PHOENIX UROLOGY'S RIGHT TO TRIAL BY JURY UNDER ARTICLE I, SECTION 22(A) OF THE MISSOURI CONSTITUTION, IN THAT REMITTITUR IS AN INTEGRAL PART OF THE COMMON LAW AND THE RIGHT TO TRIAL BY JURY HERETOFORE ENJOYED AND THE JURY VERDICT FAR EXCEEDS FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF'S INJURIES.

Standard of Review

A trial court's ruling on a motion for remittitur is typically reviewed for abuse of discretion. *Evans v. FirstFleet, Inc.*, 345 S.W.3d 297, 302 (Mo. App. S.D. 2011). While a jury is primarily responsible for assessing damages, if the trial court finds that the jury's verdict is excessive, it may order remittitur as authorized by § 537.068 RSMo. "The trial court has broad discretion in ordering remittitur because the ruling is based upon the weight of evidence and the trial court is in the best position to weigh the evidence." *Id.*

In this case, however, the typical rule does not apply. The trial court here refused to even consider the motion for remittitur because §538.300 RSMo. prohibits the use of remittitur in tort cases based upon a claim of improper health care. Failure of a trial court

to exercise discretion is itself *automatically* an abuse of discretion mandating reversal. *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 35 (Mo. banc 2013). Whether or not a statute is constitutional is an issue of law to be decided by this Court *de novo*. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 637 (Mo. banc 2012); *Lewellen v. Franklin*, No. SC92871, 2014 WL 4425202, at *9 (Mo. banc Sept. 9, 2014).

Legal Analysis

Under the Missouri Constitution, Dr. Partamian and Phoenix Urology are entitled to, at a minimum, have their request for remittitur considered by the trial court. § 538.300 unconstitutionally prohibits the use of remittitur in tort actions involving allegations of improper healthcare. *See* Bill L. Thompson, *Legislative Tort Reform: Whither Lippard, et al.*, 44 J. of the Mo. Bar 147, 155 (1988) (noting that § 538.300 eliminated remittitur in torts involving negligent health care). In denying medical professionals like Dr. Partamian and Phoenix Urology the ability to use the doctrine of remittitur, the Missouri Legislature has violated their constitutional right to a trial by jury under Article I, Section 22(a) of the Missouri Constitution.

The Missouri Constitution not only protects plaintiffs' and defendants' rights to a jury trial in civil cases, but also to all incidents of a jury trial as enjoyed prior to the Constitution's adoption in 1820. Mo. Const. Art. I, § 22(a) ("[T]he right of trial by jury as heretofore enjoyed shall remain inviolate."). The right to trial by jury enshrined in the Missouri Constitution means more than the right to have a jury of community members setting in the courtroom when a civil case is decided; it is one of the "fundamental guarantees of the Missouri Constitution." *Watts*, 376 S.W.3d at 637. Article I, Section

22(a) of the Missouri Constitution guarantees "that all the substantial incidence and consequences which pertain to the right of trial by jury, are beyond the reach of hostile legislation and are preserved in their ancient substantial extent" as existed at common law prior to the adoption in 1820. Mo. Const. Art. I, § 22(a); *Sanders v. Ahmed*, 364 S.W.3d 195, 202-03 (Mo. banc 2012). As Judge Wolff explained in *Klotz v. Saint Anthony Medical Center*, to determine whether a doctrine of procedure is included within the constitutional right to a jury guaranteed in the Missouri Constitution, this Court must undertake a "review of the history of the right to jury trial, and particularly the manner in which jury verdicts were controlled or limited at common law." 311 S.W.3d 752, 775 (Mo. banc. 2010) (Wolff, J., concurring).

The constitutional right to trial by jury necessarily includes within its scope all "the incidents of jury trial -- and the methods for controlling jury verdicts -- at common law in 1820." *Id.* at 776-77 (citing *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003)). Remittitur was one of the core incidents of the right to trial by jury, both under the historic common law and Missouri's Constitution. This Court must examine not only the applicable common law and history in Missouri, but also the federal courts' analysis of the right to trial by jury under the Seventh Amendment to the U.S. Constitution. *Id.* at 776.

Because the Missouri constitutional right to trial by jury prohibits legislative limits on damages in civil common law causes of action, the only possible limit on damages left is "judicial remittitur based upon the evidence in the case." *Watts*, 376 S.W.3d at 640. In *Watts*, and most recently in *Lewellen*, this Court has swept away all

legislative restrictions on a plaintiff's right to trial by jury on common law claims. Justice now requires that this Court do the same for defendants in medical negligence cases. As this Court has noted, once the right to a trial by jury attaches, the party "has the full benefit of that right free from the reach of hostile legislation." *Id.* at 640; *see also Lewellen*, 2014 WL 4425202, at *11.

Remittitur was and is an integral part of the common law right to trial by jury. English common law has for hundreds of years "authorized judges to exercise control over juries by granting new trials in cases in which the verdict was deemed inconsistent with the evidence." *Watts*, 376 S.W.3d at 639. Remittitur has been recognized as a part of the federal common law and as part of the Seventh Amendment right to trial by jury. *Id.*; *Dimick v. Schiedt*, 293 U.S. 474, 482 (1935). Missouri law has long recognized a defendant's right to request remittitur and that it is the duty of the trial court to use remittitur in appropriate circumstances. *Chitty v. St. Louis, I. M. & S. Ry. Co.*, 49 S.W. 868, 871-72 (Mo. 1899).

"In case the trial court believes the jury has returned a proper verdict on the issues of fact, but has assessed excessive damages, it has always been held that a remittitur could be required by the trial court." *Id.* at 871. Under Missouri's Constitution, which has used the same language guaranteeing the right to trial to jury since 1820, "it has been consistently held by this Court that it is the duty of trial courts to grant new trials when verdicts are not supported by the evidence, or when the verdict is arbitrary, or manifestly and clearly wrong, or when an injustice has been done." *Id.* It is well settled law, and has been for well over a century, that remittitur not only may be used, but *must* be used,

to control verdicts as part of the right to trial by jury. *Id.* at 872. The power of trial courts to correct verdicts by reducing excessive damages through remittitur has been upheld by the courts of England, the federal government and Missouri as part of the right to trial by jury so that a jury verdict in one case is consistent with the awards in similar cases and to avoid the delays and expenses of a retrial. *Jones v. Pa. R. Co.*, 182 S.W.2d 157, 158-59 (Mo. 1944); *Bishop v. Cummines*, 870 S.W.2d 922, 924 (Mo. App. W.D. 1994).

The right to trial by jury applies to both parties, not just plaintiffs. It necessarily includes a defendant's right to ask for and receive remittitur in appropriate cases. The "ultimate responsibility for every judgment rests upon" this Court, and it is "charged both by the constitution and the statutes with the duty of supervising the judgments" in all other courts, including allowing the use of remittitur to reduce an excessive verdict. *Norris v. Whyte*, 57 S.W.1037, 1041 (Mo. 1900). The use of remittitur does not deprive a plaintiff of her constitutional right to trial by jury and is, in fact, a well and firmly established part of the right to trial by jury as understood at common law. *Burdict v. Mo. Pac. Ry. Co.*, 27 S.W. 453, 457-58 (Mo. 1895); *see also Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 475-76 (Ohio 2007); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079-80 (Ill. 1997). It is simply "too well settled to be open to controversy" that the right to trial by jury includes the right to ask for and receive remittitur in proper cases. *McGraw v. O'Neil*, 101 S.W. 132, 135 (Mo. App. K.C. 1907), *see also Devin v. City of St. Louis*, 165 S.W. 1014, 1016 (Mo. 1914).

If there was any doubt in Missouri's jurisprudence that defendants have a constitutional right to seek remittitur as part of the right to trial by jury under Article I, Section 22(a) of the Missouri Constitution, that doubt was fully erased by this Court's holding in *Watts*. Although *Watts* directly addressed only the statutory cap on non-economic damages in medical malpractice actions, this Court elaborated at length regarding the right to trial by jury and judicial remittitur. 376 S.W.3d at 638-40. "Judicial remittitur was and is an established concept in Missouri's common law," and as this Court noted, plaintiffs "retain their individual right to trial by jury subject only to judicial remittitur based upon the evidence in the case." *Id.* at 639-40.

It is inescapable from the logic in *Watts* that defendants, as part of their constitutional right to trial by jury under Article I, Section 22(a) of the Missouri Constitution, have the right to seek remittitur. That this result is required by *Watts* has already been recognized by the Missouri Court of Appeals, Western District. *Mackey v. Smith*, 438 S.W.3d 465, 479-80 (Mo. App. W.D. 2014). As the court in *Mackey* noted, in *Watts* "the Supreme Court held that remittitur is still available in malpractice cases since it declared the statutory cap on damages unconstitutional." *Id.*

Denying parties and trial courts in medical negligence cases the ability to use remittitur, while removing statutory caps, prevents trial courts from being able to avoid either injustice to the defendant, through an excessive damages award, or injustice to both parties, by forcing them to endure the cost and uncertainty of a new trial because of unavailability of remittitur. *Lindquist v. Scott Radiological Grp., Inc.*, 168 S.W.3d 635, 647 (Mo. App. E.D. 2005). While in this case Dr. Partamian and Phoenix Urology are

harmed by the unavailability of remittitur, in other cases plaintiffs will suffer equal injustice in having to retry a successful case due to an excessive verdict.

The fact that remittitur was temporarily (and arguably incorrectly) eliminated from the common law of Missouri by this Court for a brief period in the 1980s does not change its status as part of the constitutional protected right to trial by jury. In *Firestone v. Crown Center Redevelopment Corp.*, this Court ruled that "remittitur shall no longer be employed in Missouri." 693 S.W.2d 99, 110 (Mo. banc 1985). Even assuming, for the sake of argument, that the holding in *Firestone* was constitutionally correct—which it was not—*Firestone* was immediately abrogated by the Missouri legislature, and remittitur was restored via statute. *Badahman*, 395 S.W.3d at 36.

Importantly, *Firestone* was devoid of any analysis of the constitutional right to trial by jury and simply eliminated remittitur due to difficulties in "case by case evaluations" of the judgments issued by trial courts. 693 S.W.2d at 110. That the constitutional right to trial by jury, guaranteed in Article I, Section 22(a) of the Missouri Constitution, includes the right to seek remittitur is clear from the case law cited above, was not even analyzed by the court in *Firestone*. To the extent that *Firestone* indicates remittitur is not part of the constitutional right to a jury trial under the Missouri Constitution, it should be ignored or overruled explicitly by this Court.

Remittitur was Appropriate

Dr. Partamian and Phoenix Urology's request for remittitur should have been granted by the trial court because the jury's verdict exceeds fair and reasonable compensation for Plaintiff's injuries. As already established above, § 538.300's

categorical denial of the use of remittitur in medical malpractice actions is unconstitutional. The trial court in this case failed to conduct any meaningful analysis of Dr. Partamian and Phoenix Urology's request for remittitur. Although an extensive hearing was held on post-trial motions, the trial court only examined the request for remittitur by noting it was not the appropriate court to address § 538.300's validity. (CTR 774).

Additionally, in his order denying Phoenix Urology and Dr. Partamian's post-trial motions, the trial judge simply overruled the motion with no comment. (CLF 430). The fact the trial judge here failed to conduct *any* analysis of Dr. Partamian and Phoenix Urology's request for remittitur is enough for this matter to be reversed and sent back to the trial court. This Court does not have to turn to the question of whether, under the facts and circumstances of this case, Dr. Partamian and Phoenix Urology would have been entitled to remittitur, but assuming this Court agrees that the trial court erred in failing to analyze whether on the merits remittitur should have been granted here, it is clear that Dr. Partamian and Phoenix Urology were entitled to at least remittitur of $1,000,000.00 of the $4.3 million dollar jury verdict against them.

Section 537.068 sets out the standard for remittitur. § 537.068 ("A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages."); *see also* Mo. R. Civ. P. 78.10. Remittitur should be granted when a jury has made an "honest mistake" by "awarding a verdict that is simply to bountiful under the evidence." *Henderson v. Fields*,

68 S.W.3d 455, 485 (Mo. App. W.D. 2001). An "excessive verdict," like the one here, typically occurs in two types of situations, the first, where the jury makes an "honest mistake" about the extent of damages, and the second where "the jury is biased by trial misconduct to award grossly excessive damages." *Chapman v. New Mac Elec. Coop., Inc.*, 260 S.W.3d 890, 895 (Mo. App. S.D. 2008). Remittitur is allowed when the jury has made an honest mistake, but a full new trial must be ordered when trial misconduct has occurred that led to the excessive verdict. *Id*. Remittitur may also be entered where there is simply no evidence to support the jury's award of its amount of damages. *Children Int'l v. Ammon Painting Co.*, 215 S.W.3d 194, 199 (Mo. App. W.D. 2007).

A trial court must examine seven separate factors in determining whether remittitur is appropriate: (1) present and future loss of income, (2) medical expenses, (3) age of plaintiff at time of trial, (4) nature and severity of injuries, (5) economic factors, (6) awards handed out in similar cases and (7) the superior opportunity of the trial judge and jury to examine the case. *Magnuson by Mabe v. Kelsey-Hayes Co.*, 844 S.W.2d 448, 458 (Mo. App. W.D. 1992). The purpose of remittitur is "to provide equitable compensation" and "find jury awards in line with the prevailing awards" in other cases. *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 174 (Mo. App. W.D. 1997). Excessiveness of a verdict must be judged on a case by case basis. *Id*.

The damages awarded by the jury here are clearly excessive. It exceeds, by almost $1,000,000.00, the damages Plaintiff asked the jury for in closing argument. The jury's decision to disregard Plaintiff's closing argument and award substantially more than was requested is alone enough require reversal. *Lewis v. Environtech*, 674 S.W.2d 105, 113

(Mo. App. E.D. 1984). When totaled together, Plaintiff asked the jury for approximately $3.3 million dollars in damages. (CTR 685). Instead, the jury awarded Plaintiff $4.3 million dollars. (CLF 113). Under the facts of the case, the jury had no basis for awarding an additional one million dollars in non-economic damages. There was no evidence that Plaintiff will need additional medical procedures, no testimony that Plaintiff has lost future wages or earning capacity, no testimony that Plaintiff cannot work, and no testimony that any of Plaintiff's major life activities are completely eliminated by his injuries. He still married his fiancé, to whom he was engaged at the time of his illness, and still has urinary and sexual function in his penis. The mere fact he suffers from incontinence, leading to occasional leakage of urine, and limited erectile dysfunction while still being able to have erections and engage in sexual activity, does not justify nearly $4 million dollars in non-economic damages. Under the circumstances present in this case, an award of $4.3 million dollars to Plaintiff, over 10 times his medical bills and wage loss, is grossly excessive.

This is especially true in light of verdicts that have been reduced in other cases. In *McCormick v. Capital Electric Construction Co.*, the Missouri Court of Appeals approved remittitur of a jury verdict in favor of a man who was shocked by an electrical charge, suffered seizures, brain damage, and had "severe and residual and continuing problems that will affect him probably the rest of his life." 159 S.W.3d 387, 400 (Mo. App. W.D. 2004). The Court noted that there was evidence of $1.7 dollars in economic losses, but the jury had awarded $30.4 million in favor of plaintiff. *Id.* at 401. The verdict was remitted to $7.7 million, approximately five times the economic losses. *Id.*

Here, the total verdict in favor of Plaintiff is more than ten times his economic losses, with no long term loss in earning capacity and significantly less injuries than those present in the *McCormick* case.

Similarly, this Court in *Means v. Sears, Roebuck & Co.* remitted a jury verdict of $65,000.00 by $25,000.00, resulting in a $40,000.00 total award to plaintiff. 550 S.W.2d 780, 789 (Mo. banc 1977). The plaintiff had been injured in a bicycle wreck, was off work for multiple months, and went through multiple surgeries, resulting in approximately $5,000.00 in medical bills and lost wages. *Id.* at 784. The jury's verdict was more than thirteen times the plaintiff's actual damages and was reduced by the court on remittitur to approximately eight times the plaintiff's injuries. *Id.* at 789. Here, the jury's verdict is for approximately ten times the plaintiff's true economic losses and should be reduced. To say otherwise is to put an undue emphasis on injury to one limited part of Plaintiff's body, which is shared by less than half the human species, that still can be used for all its essential functions, does not require Plaintiff to receive additional specialized medical treatment, and does not interfere with his ability to obtain an income or engage in hobbies and recreational activities.

The jury's award to Plaintiff here is clearly excessive. Although no one would claim that Plaintiff was not hurt by the alleged negligence, the jury's award of ten times Plaintiff's economic losses, particularly when Plaintiff has lost no long term earning capacity and will not need additional medical procedures, is clearly excessive. The simple fact the court failed to even analyze whether Plaintiff was entitled to remittitur due

to § 538.300 requires that this case be reversed and remanded to the trial court for consideration of remittitur.

POINT RELIED ON II.

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING PLAINTIFF TO PRESENT DR. RIORDAN'S TESTIMONY CONCERNING HIS PRIOR TREATMENT OF UNIDENTIFIED PATIENTS WITH PROSTATE ABSCESSES BECAUSE TESTIMONY REGARDING THE PERSONAL PRACTICE OR CUSTOM OF A PHYSICIAN IS NOT ADMISSIBLE TO ESTABLISH THE STANDARD OF CARE AND EVIDENCE OF SIMILAR OCCURRENCES IS ONLY ADMISSIBLE WHEN SUCH OCCURRENCES ARE SUFFICIENTLY SIMILAR TO OUTWEIGH CONCERNS OF PREJUDICE AND CONFUSION, IN THAT DR. RIORDAN'S TESTIMONY CONTRADICTED PLAINTIFF'S EXPERT'S TESTIMONY AS TO THE STANDARD OF CARE, THE STANDARD OF CARE, THAT PROSTATE ABSCESSES ARE TO BE TREATED PRIMARILY WITH ANTIBIOTICS AND ONLY DRAINED IF ANTIBIOTICS FAIL TO WORK, AND THERE WAS NO EVIDENCE CONCERNING THE OTHER PATIENTS' INJURIES OR TREATMENTS.

Standard of Review

The trial court's ruling as to the admissibility of evidence is reviewed for abuse of discretion; a trial court abuses its discretion when it makes a ruling that is "clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Teasdale & Assocs. v. Richmond Heights Church of God in Christ*, 373 S.W.3d 17, 21 (Mo. App. E.D. 2012).

Legal Analysis

The trial court erred in allowing Plaintiff to play the portion of the deposition testimony of Dr. Riordan relating to his draining of prostate abscesses in other, unidentified patients, including one just weeks prior to Plaintiff's treatment. (SLF 155; Ex. 115, 32:13-33:13, 33:22-25; Ex. 116). Dr. Riordan testified that "since graduating medical school," he had treated prostate abscesses "maybe half a dozen times" and that he had drained all the prostate abscesses he had treated. (SLF 155; Ex. 115, 32:13-33:13, 33:22-25; Ex. 116). Plaintiff elicited specific testimony about one of the prostate abscesses that Dr. Riordan drained, noting that it had occurred at the hospital where Plaintiff was treated just a few weeks prior to Plaintiff being hospitalized. (SLF 155; Ex. 115, 32:13-33:13; Ex. 116). Dr. Partamian and Phoenix Urology objected to the testimony. (CLF 159, 162; CTR 217, 389).

Dr. Riordan's testimony regarding his treatment of these other, unidentified patients should have not been allowed and prejudiced the jury against Dr. Partamian and Phoenix Urology. Evidence of similar accidents or illnesses is admissible only when the other occasions are "sufficiently similar to the injury causing incident so as to outweigh concerns of undue prejudice and confusion of the issues." *Thornton v. Gray Auto. Parts Co.*, 62 S.W.3d 575, 583 (Mo. App. W.D. 2001). To be used as part of testimony before the jury, incidents must be "of like character," "occur under substantially the same circumstances," and "result from the same cause." *Id.* Here, there was absolutely no evidence concerning these other cases. All Plaintiff and Dr. Riordan provided the jury

was simply that Dr. Riordan had treated prostate abscesses in approximately six prior cases and that in each of those cases had drained the abscess.

There is simply no relevance to Dr. Riordan's testimony regarding his prior conduct in prostate abscess cases. Plaintiff's own expert testified that the standard of care was for prostate abscesses to first be treated with antibiotics and, then, only, if the abscess did not respond to antibiotics, to drain the abscess. (CTR 249-50).

Dr. Riordan's testimony on his previous treatment of abscesses, as a treating physician, had absolutely no relevance to this case and existed only for Plaintiff to make the broad inference that Dr. Partamian and Phoenix Urology had acted negligently and violated the standard of care. "A court of law is not a public forum, and witnesses are not permitted to make general declarations about matters wholly unrelated to the parties." *Yingling v. Hartwig*, 925 S.W.2d 952, 956 (Mo. App. W.D. 1996). Statements about how unidentified individuals were treated, with unidentified medical histories and no information regarding whether antibiotics have been used, for how long antibiotics had been used, and what the patient's course of treatment was, are completely inadmissible and irrelevant. *See id.* at 956. Evidence is only relevant if it "tends to prove or disprove a fact or issue." *Deveney v. Smith*, 812 S.W.2d 810, 813 (Mo. App. W.D. 1991) (holding that a list of patients who suffered from post-operative problems, where the exact nature, duration, and extent of the problems was not disclosed in the record, was inadmissible).

The only purpose for Plaintiff using Dr. Riordan's testimony was to attempt to establish that Dr. Partamian and Phoenix Urology acted negligently in treating Plaintiff. Throughout his opening statement and case in chief, Plaintiff emphasized a conversation

between Dr. Riordan and Dr. Partamian wherein Dr. Riordan allegedly challenged Dr. Partamian on why he had not chosen to drain Plaintiff's prostate abscess. Allowing Plaintiff to admit testimony that is completely irrelevant and unrelated to the case concerning how Dr. Riordan had treated unidentified patients on prior occasions with prostate abscesses created prejudice and the implication that Dr. Partamian and Phoenix Urology acted below the standard of care with respect to Plaintiff. Facts surrounding alleged medical malpractice are introducible only if a proper foundation laid and they are sufficiently similar to the alleged malpractice in the case at trial. *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 430 (Mo. App. W.D. 1997).

Additionally, Plaintiff also improperly used Dr. Riordan's testimony to imply a "standard of care" different than that legally required in medical malpractice actions. In a medical malpractice action, an expert is allowed to testify only to the standard of care in the medical community and not upon an expert's "own undisclosed subjective conception of acceptable medical standards." *Ladish v. Gordon*, 879 S.W.2d 623, 634-35 (Mo. App. W.D. 1994). While an expert may rely on her background knowledge, professional learning and attendance at seminars for her opinion, that knowledge does not alter the applicable standard of care. *Byers v. Cheng*, 238 S.W.3d 717, 729 (Mo. App. E.D. 2007); *Dine v. Williams*, 830 S.W.2d 453, 457 (Mo. App. W.D. 1992). The use by a plaintiff of testimony from a doctor regarding his or her "individual custom of practice" is misplaced. *See Byers*, 238 S.W.3d at 729; *Dine*, 830 S.W.2d at 457. Mere evidence that the conduct of physician or surgeon did not measure up to the standards of an individual member of the profession, as opposed to the standards of the profession at large, does not

constitute evidence of medical malpractice as the standards of an individual "may be higher or lower than the standards of a profession as a whole." *Hurlock v. Park Lane Med. Ctr., Inc.*, 709 S.W.2d 872, 884 (Mo. App. W.D. 1986).

Here, the testimony of Dr. Riordan, if it served any purpose at all, served only the illegitimate purpose of confusing the jury as to the appropriate standard of care and implying that in all cases prostate abscesses must be drained, instead of first treated with antibiotics. The trial court's error in admitting this testimony was clearly prejudicial, due to the emphasis placed on Dr. Riordan's testimony with multiple mentions throughout Plaintiff's opening statements and multiple references in examining other witnesses regarding Dr. Partamian and Dr. Riordan's alleged discussion regarding whether or not the prostate abscess should be drained in Plaintiff's case. The improper admission of Dr. Riordan's testimony regarding how he treated previous prostate abscesses, over Dr. Partamian and Phoenix Urology's objection, was a prejudicial error, requiring reversal of the judgment in favor of Plaintiff.

POINT RELIED ON III.

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING PLAINTIFF TO PRESENT DR. RIORDAN'S TESTIMONY REGARDING THE REASONS HE NO LONGER WORKED FOR PHOENIX UROLOGY BECAUSE TESTIMONY INVOLVING AN IRRELEVANT AND PREJUDICIAL COLLATERAL MATTER IS INADMISSIBLE, IN THAT THE TESTIMONY IMPLIED TO THE JURY THAT PHOENIX UROLOGY WAS MORE CONCERNED WITH MONEY THAN QUALITY OF PLAINTIFF'S CARE.

Standard of Review

The trial court's ruling as to the admissibility of evidence is reviewed for abuse of discretion; a trial court abuses its discretion when it makes a ruling that is "clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Teasdale & Assocs.*, 373 S.W.3d at 21.

Legal Analysis

The trial court erred in allowing, over Dr. Partamian and Phoenix Urology's repeated objections, Dr. Riordan's testimony concerning why he was discharged from Phoenix Urology and why he and it were in a lawsuit. During his deposition, Dr. Riordan testified that his contract with Phoenix Urology was not renewed specifically because he was not bringing in enough money to the practice. (Ex. 115, 26:12-27:15, 28:9-18; Ex. 116).

Dr. Riordan's testimony regarding the reasons for him leaving Phoenix Urology and regarding the lawsuit between it and he were irrelevant and interjected a collateral

issue into the case. An issue is only relevant if it "tends to prove or disprove a fact in issue or corroborates other relevant evidence." *Peters v. ContiGroup*, 292 S.W.3d 380, 392 (Mo. App. W.D. 2009) (quoting *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991)). Evidence regarding other lawsuits or disputes is especially irrelevant when it is used solely for the purpose to make a party appear "hypocritical" and when it is not related to any matter of "material significance in the case." *Id.* at 392-93. Evidence of other lawsuits filed against a defendant medical provider in a medical malpractice action is typically irrelevant and should be excluded. *Barr v. Plastic Surgery Consultants, Ltd.*, 760 S.W.2d 585, 587 (Mo. App. E.D. 1988).

Dr. Riordan's testimony regarding why he left Phoenix Urology held no relevance to the case and harmed Phoenix Urology and Dr. Partamian's ability to receive a fair trial. Even if the testimony was in any manner logically relevant, which it was not, it was a collateral matter which brought into the case "new, controversial matters which . . . result[ed] in confusion of issues, constitute[d] unfair surprise or cause[d] prejudice wholly disproportionate to their value and usefulness of the offered evidence," and must be excluded. *Conley v. Kaney*, 250 S.W.2d 350, 353 (Mo. 1952).

While it is not improper to show bias by a witness's participation in other unrelated cases, going deeper into that case where it is not relevant the issue of whether or not Defendants acted negligently here is reversible error. *Moon v. Hy-Vee, Inc.*, 351 S.W.3d 279, 285 (Mo. App. W.D. 2001). It is particularly true the details of the other litigation show that it holds no relation to the facts present in the case at hand. *See*

Brockman v. Regency Fin. Corp., 124 S.W.3d 43, 50-51 (Mo. App. W.D. 2004); *Cantrell v. Superior Loan Corp.*, 603 S.W.2d 627, 640 (Mo. App. E.D. 1980).

The only possible purpose of Plaintiff using Dr. Riordan's testimony of why he was terminated from Phoenix Urology was to imply that Phoenix Urology was more concerned with money than patient care, or at least more so than Dr. Riordan. Plaintiff made Dr. Riordan, and his testimony concerning a discussion he had with Dr. Partamian concerning draining Plaintiff's abscess, the "star" of his case. Plaintiff mentioned Dr. Riordan, his termination from Phoenix Urology and the lawsuit prominently and repeatedly during his opening statement. (CTR 34-35, 37, 44, 46-48, 58). He focused on Dr. Riordan and his termination in his examination of Dr. Partamian and returned to this theme again in closing arguments. (CTR 183-85, 188-89, 668-69, 679-83).

Plaintiff's purpose in using and emphasizing Dr. Riordan's testimony is clear: to inflame and prejudice the jury against Dr. Partamian and Phoenix Urology by implying one or both cared more about money than patient care. The jury clearly understood and blindly accepted Plaintiff's message, returning a verdict for almost a million dollars more than Plaintiff asked for. Therefore, the trial court's error in admitting Dr. Riordan's testimony was prejudicial, and the judgment must be reversed.

POINT RELIED ON IV.

THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO GRANT DR. PARTAMIAN AND PHOENIX UROLOGY'S MOTION FOR NEW TRIAL BECAUSE THE JURY'S VERDICT OF $4,300,000.00 WAS EXCESSIVE, EXCEEDING FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF'S DAMAGES, AND WAS THE PRODUCT OF PASSION AND PREJUDICE IN THAT THE JURY'S VERDICT EXCEEDED THE AMOUNT REQUESTED BY PLAINTIFF IN HIS CLOSING ARGUMENTS, WAS EXCESSIVE IN LIGHT OF THE FACT THAT PLAINTIFF SHOWED NO EVIDENCE OF FUTURE MEDICAL EXPENSES OR FUTURE LOST INCOME AND WAS CAUSED BY THE BIAS AND PREJUDICE INJECTED INTO THE CASE BY THE IMPROPER TESTIMONY OF DR. RIORDAN.

Standard of Review

A trial court has great discretion in approving or setting aside a verdict as excessive. *Armon v. Griggs*, 60 S.W.3d 37, 40 (Mo. App. W.D. 2001). An appellate court will "interfere only when the verdict is so grossly excessive that it shocks the conscience of the court and convinces the court that both the jury and trial court abused their discretion." *Harrell v. Cochran*, 233 S.W.3d 254, 258 (Mo. App. W.D. 2007) (quoting *Armon*, 60 S.W.3d at 40). Not only must the verdict be excessive, but it must also be shown to be the product of bias or prejudice to such an extent that it was unwarranted by the evidence and was caused by a trial error or misconduct by the prevailing party. *Id.* Ultimately, this Court's task is to "consider the case on its own

facts to ultimately decide what fairly and reasonably compensates that specific plaintiff for the damages sustained." *Lindquist*, 168 S.W.3d at 644.

Legal Analysis

The $4.3 million dollar award against Dr. Partamian and Phoenix Urology is clearly excessive and was the product of both prejudice and bias. As discussed in more detail under Point I, the jury verdict greatly exceeds that approved in similar cases and is over a million dollars more what was asked for by Plaintiff in closing argument. The jury verdict exceeds Plaintiff's actual economic damages, as established by the evidence at trial, by ten times.

As discussed in detail in Points II and III, the trial court erroneously admitted testimony from Dr. Riordan, over Dr. Partamian's and Phoenix Urology's objections, to show a different standard of care than the one testified to by Plaintiff's own experts and clouded the jurors' minds with the idea that Phoenix Urology, and Dr. Partamian by association, were more interested in profits than patient care. As a result, the jury awarded $4.3 million dollars, approximately $4 million of which was for noneconomic damages, to an individual who is still able to perform most, if not all, of his major life functions. Awarding such a large verdict to Plaintiff was grossly disproportionate to that which has been allowed in other cases, as noted under Point I and can be seen as only the product of prejudice and bias against Dr. Partamian and Phoenix Urology.

The evidence in this case clearly demonstrates the excessiveness of the award in favor of Plaintiff as the result of juror prejudice and bias toward Dr. Partamian and Phoenix Urology. Plaintiff still has all function, in some capacity, of all of his organs, he

is still able to work, and his earning capacity has not been impacted in the slightest. While Plaintiff is in his late 30s, he has already determined that he does not wish to have additional children and indeed his spouse is incapable of doing so. Plaintiff is still physically able to engage in recreational activities and there is no evidence of any significant physical limitations, other than slight urinary incontinence and limited sexual dysfunction. The fact the jury's verdict greatly exceed the damages requested by Plaintiff during closing argument demonstrates that the verdict was excessive and the product of bias or prejudice. Where, as here, a jury awards substantially more than Plaintiff asks for in closing argument, a verdict is excessive and it is not error to order a new trial or remittitur in the appropriate case. *Lewis*, 674 S.W.2d at 113. An excessive damages award that is so extreme, like this one, "alone would indicate bias and prejudice." *Maddox v. Vieth*, 368 S.W.2d 725, 727 (Mo. App. K.C. 1963); *see also Anderson v. Burlington Northern R. Co.*, 700 S.W.2d 469, 478 (Mo. App. E.D. 1985).

Because of the improper and prejudicial testimony of Dr. Riordan, highlighted in Points II and III, the jury returned an excessive verdict against Dr. Partamian and Phoenix Urology. Because the jury's excessive verdict was the product of bias and prejudice, this case should be reversed and remanded for new trial.

CONCLUSION

The constitutional rights of Dr. Partamian and Phoenix Urology were violated when the trial court failed to even consider granting remittitur. Under Article I, Section 22(a) of the Missouri Constitution, the right to trial by jury cannot be abridged in any form. A defendant and a trial court's ability to rely on remittitur, which is well established under the common law, is an integral part of that right to trial by jury that cannot be abridged. Because the trial court failed to even consider granting remittitur in favor of Phoenix Urology and Dr. Partamian, this case must be reversed and sent back for further examination.

POLSINELLI PC

By: */s/ James E. Meadows*
James E. Meadows
Missouri Bar No. 50874
jmeadows@polsinelli.com
Emma R. Schuering
Missouri Bar No. 65169
eschuering@polsinelli.com
901 St. Louis Street, Suite 1200
Springfield, MO 65806
Telephone: (417) 869-3353
Facsimile: (417) 869-9943

Richard M. AuBuchon
Missouri Bar No. 56618
rich@rmalobby.com
AuBuchon Law Firm, LLC
121 Madison St., Gallery Level
Jefferson City, MO 65101
Telephone: (573) 616-1845

Attorneys for Defendants/Appellants

RULE 84.06 CERTIFICATION

The undersigned certifies that the foregoing brief complies with Supreme Court Rule 84.06(b). According to the word count function of Microsoft Word by which it was prepared, it contains 10,951 words, exclusive of cover, Certificate of Service, the Certification and signature block.

By: */s/ James E. Meadows*
James E. Meadows
Missouri Bar No. 50874
jmeadows@polsinelli.com
Emma R. Schuering
Missouri Bar No. 65169
eschuering@polsinelli.com
901 St. Louis Street, Suite 1200
Springfield, MO 65806
Telephone: (417) 869-3353
Facsimile: (417) 869-9943

Richard M. AuBuchon
Missouri Bar No. 56618
rich@rmalobby.com
AuBuchon Law Firm, LLC
121 Madison St., Gallery Level
Jefferson City, MO 65101
Telephone: 573.616.1845

Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing was served on the following named parties via the Court's electronic filing system, this 29th day of October, 2014:

Paul L. Redfearn
Michael D. Wallis
The Redfearn Law Firm, P.C.
4200 Little Blue Parkway, Ste. 630
Independence, MO 64057

Timothy M. Aylward
Matthew T. Swift
Horn Aylward & Bandy, LLC
2600 Grand Blvd., Ste. 1100
Kansas City, MO 64108

Edward D. Robertson, Jr.
715 Swifts Highway
Jefferson City, MO 65109

Attorneys for Plaintiff/Respondent

/s/ James E. Meadows
James E. Meadows