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IN THE SUPREME COURT OF MISSOURI

No. SC 95890

JOSEPHINE WILSON,
Appellant,

v.

P.B. PATEL, M.D., P.C., and ROHTASHAV DHIR, M.D.,
Respondents.

Appeal from the Circuit Court of Buchanan County, Missouri
Fifth Judicial Circuit
Hon. Weldon C. Judah, Circuit Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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REPLY

I. REFUSAL OF INSTRUCTION "A" WITHDRAWING "INFORMED CONSENT."

Defendants' spin on the evidence does not support their contention that plaintiff first introduced evidence of "informed consent" (Resp.Sub.Br. i, 3, 6, 7, 8, 9, 10, 11, 15).

Defendants first alluded to the concept of "informed consent," coupled it with the term "known complication," and stressed their combined significance with these statements in their opening (Tr. 345):

> The evidence will be that Ms. Wilson, prior to the procedure, was aware that Dr. Dhir might choose to dilate her esophagus after doing the EGD. *She agreed to the procedure*. Unfortunately, as we all know, Ms. Wilson experienced a perforation of her esophagus during the dilation procedure. A perforation of the esophagus is a *known recognized potential complication* of dilating the esophagus.

While defense counsel did not literally use the term "informed consent" at that point, the chosen term "agreed" is its synonym. They draw a distinction without a difference. They informed the jury in the first two minutes of opening statement that Mrs. Wilson understandingly agreed to a procedure that harbors a known and recognized complication, later adding (as if necessary) that known complications can occur without negligence (Tr. 659-60). Defendants reiterated that theme many times later in the examination of witnesses

(Tr. 455-6, 552-3, 649, 659, 731, 756, 790) and hammered away on it throughout closing argument (Tr. 837, 853, 857, 859, 863).

Defendants first used the actual term "informed consent" a bit later in opening statement (Tr. 362-3):

> So on December 8, 2009, Dr. Dhir does an EGD on Ms. Wilson. Ms. Wilson signs an informed consent, you'll see it later this week, prior to the procedure, saying "The risks and benefits have been explained to me. I'm aware that my doctor may choose to do other procedures if necessary." She signs it. By signing it, it says, "I've read this document."

The very next mention was again made by them in cross-examining plaintiff (Tr. 552-3):

> This is a document that's Bates No. MR-1957. It's an informed consent from the day of your EGD and dilation with Dr. Dhir. This is page 1958 dated 12-8-09. Is that your signature right here, Ms. Wilson . . . on this informed consent document . . . [s]aying that you have read and understood the information provided in the form where I've highlighted that there? . . . You were aware prior to the EGD and dilation that you had with Dr. Dhir in December of 2009 that he might dilate your esophagus?

And just before plaintiff's counsel began redirect exam, he asked for "that document," and defense counsel responded, "The informed consent?" (Tr. 553).

Defendants wrongly assert that their use of the term "informed consent" in opening

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was made merely "in reference to the name of a document signed by [Mrs. Wilson]" (Resp.Sub.Br. 8) because the document itself (Def.Exh. 201, A8) is not entitled "Informed Consent" but rather "Consent to Treatment and Rendering of Other Medical Services." Defense counsel unnecessarily attached the word "informed" to it. Plaintiff had not used the phrase "informed consent" at any point prior to these three references by defendants.

The assertion that plaintiff first raised the subject of informed consent in her direct exam (Resp.Sub.Br. 8) is belied by the record.[1] Those questions to Mrs. Wilson (Tr. 511) went directly to the *unnecessary nature* of the dilation and were essential to prove her theory of the case, not to her consent to an unnecessary procedure. "Consent" or an equivalent word was not a part of any question posed to her or answer given on direct. Only after defendants

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[1]Defendants' argument that Mrs. Wilson was "call[ing] into question the validity of the informed-consent discussion" and "disputed the nature of their conversation" (Resp.Sub. Br. 8) is also not supported by the testimony. Plaintiff and Dhir agreed on the content of their 12/2/09 discussion. She understood Dhir was going to "do a scope like Dr. McCormick had done [in 2004 and 2005], and if there was any problem, that he would fix it like Dr. McCormick had done in the past" (Tr. 511); she told him that if he saw "something wrong" he should "take care of it" (id.); and Dhir did not tell her he would dilate her throat "even if he didn't see anything wrong" (id.). Dhir testified he only planned an EGD after that meeting; the need for a dilation would "depend[] on the findings" (Tr. 429, 609-10, 764-5; Pltf.Exh. 3 [A7]).

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used the phrase in cross and referred to plaintiff's signature on the "informed consent" was Mrs. Wilson questioned on redirect about the circumstances of her signature, her failure to read it, and her lack of knowledge and understanding as to Dhir's intent to dilate her esophagus even if he found no abnormality (Tr. 554-5).

The next mention of "informed consent" occurred in defendants' direct examination of their expert Ginsberg (Tr. 649). Their next two after that came during their direct exam of Dhir himself (Tr. 731, 736), at the start and finish of several questions and answers explaining how nurses obtain patient signatures on "informed consent" forms and specific portions of its content. This included plaintiff's acknowledgment of risks of injury and death; her "authorization" for him to "any incidental/minor surgery or medical procedure that in his/her judgment is medically necessary for my well being"; her purported understanding that the doctor will not be able to identify ahead of time what those other medical procedures might be; and her acknowledgment that she will inform the doctor of any procedures she "do[es] not want performed" (Tr. 732-5). Dhir was even asked about the *anesthesiologist's* conversation with her about risks, benefits and informed consent (Tr. 735-6). In all of that time, not once did plaintiff's counsel use "informed consent" or its equivalent when the jury was present, except when objecting to its use by Dhir and his counsel and getting overruled (Tr. 731-2). Thereafter plaintiff's counsel said it twice in one sentence in closing argument only to tell the jury plaintiff "had never made a claim about informed consent" (Tr. 830).

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Defendants argue that the concept was "relevant and admissible" (Resp.Sub.Br. 9), but never explain what material fact it was relevant to establish, to corroborate, or to rebut. It was plainly immaterial to the theory of unnecessary surgery.

If defendants did not intend to influence the jury with the notion that Mrs. Wilson consented to an unnecessary procedure carrying a serious, potential complication, why did they reiterate these phrases so many times? The answer lies in defense counsel's argument against the withdrawal instruction (Tr. 795-6):

> I believe that this instruction is improper. I think it has potential to inject error and confuse and mislead the jurors. I don't believe that these matters have been abandoned by either party whatsoever in this case. . . . In fact, there's been evidence by plaintiff about this issue.[2] It's part and parcel of the entire facts of the case. . . . *So I believe to offer the instruction would confuse and mislead the jury to somehow think that they're not supposed to consider the informed consent, when I think it is part and parcel of the plaintiff's willingness to proceed with the procedure and that she was aware and knowledgeable about the potentiality of her esophagus being stretched based upon the findings and the decision-making of Dr. Dhir.*

If all these passages were insufficient to establish beyond cavil that defendants intended to use "informed consent" as a stealth defense to plaintiff's theory of liability, then

[2]Plaintiff denies this accusation. The record shows no support for it.

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their closing argument should remove any lingering doubt. Defense counsel declared that the evidence she thought the jury should consider to render a defense verdict was the plaintiff's consent, and she hitched it again to the irrelevant notion of "known complication" first mentioned in their opening (Tr. 345, 354) and later repeated with several witnesses (Tr. 455-6, 659-60, 756, 790):

> Ms. Wilson was aware and she agreed that there was a possibility that Dr. Dhir might do a dilation upon her. Unfortunately, during the dilation Ms. Wilson experienced what we have all heard from every gastroenterologist that came to this courtroom and told you that's a known complication, which means that it can and does occur. It's not a common occurrence. It's rare, but it can happen, even when due care is taken to perform a procedure. (Tr. 837)

Defense counsel did not leave the matter there but repeatedly referred to the "known complication" of perforation in closing (Tr. 853, 857, 859, 863), describing it as a situation where "patients can and do . . . experience an event or injury, an unexpected outcome, despite or in spite of appropriate care and treatment" (Tr. 853).

From plaintiff's perspective, the existence of a "known complication" establishes the gravity of the harm associated with an unnecessary procedure.

But from the defense perspective, repeated reference to "known complication" serves no purpose and has no usefulness in an unnecessary procedure case because, obviously, if the dilation had not been performed, plaintiff would have suffered no complications at all,

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much less a perforated esophagus. Thus each reference by defense counsel to "known complication" was a calculated echo of their salient idea and fall-back defense that, by consenting to the EGD knowing that dilation might be performed "depending on the findings," plaintiff had also consented to or assumed the risk of whatever happened to her.

The claim that defendants "did not argue at trial that informed consent was a defense to [plaintiff's] claim of negligence" (Resp.Sub.Br. 12-13) is squarely contradicted by the record and by defense counsel's own statement of intent in opposing the withdrawal instruction (Tr. 795-6).

Prejudice. Two Missouri cases -- Miller v. Werner, 431 S.W.2d 116, 118 (Mo. 1968), and Cress v. Mayer, 626 S.W.2d 430, 435-6 (Mo.App. 1981), which defendants do not even acknowledge or address -- have declared that informed consent is distinct from an improper or unnecessary treatment theory, and evidence of the former is irrelevant in the latter.

Moreover, the courts of eight sister states examining the consequences of admitting evidence of informed consent in a case alleging improper treatment all agreed that such evidence is irrelevant in a case where it has not been pleaded, and each recognized the high probability of juror confusion as well as undue prejudice (App.Sub.Br. 41-45). Five reversed the trial judge's admission of such evidence (Wright, Waller, Brady, Baird, Matranga), while two affirmed its exclusion at trial (Schwartz, Warren).[3] Defendants have not criticized or

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[3]The Hayes court agreed admitting the evidence was an abuse of discretion, but found no undue prejudice for a variety of reasons, all of which are absent here. 927 A.2d at 891-3.

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meaningfully distinguished any of these.

In its most recent pronouncement, this Court reiterated the legal standard for giving a withdrawal instruction: trial court discretion "should be guided by the degree to which evidence has been introduced which *might mislead the jury* in its consideration of the case as it is pleaded." Dunn v. St. Louis-San Francisco Ry. Co., 621 S.W.2d 245, 252 (Mo.banc 1981). That happened here, and corrective action was necessary.[4]

The prejudice to the plaintiff was woven into the jurors' awareness and guided their decision-making throughout the trial, with defendants' unstinting encouragement, from the first mention within two minutes into the opening statement through multiple references to

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[4]Defendants' argument that Sampson and Womack are limited to cases where evidence of workers compensation benefits was received (Resp.Sub.Br. 10-12) is misplaced. Both addressed when withdrawal instructions should be given in broad terms, neither hinting at a limitation to the same or similar fact situations. Sampson noted (560 S.W.2d at 584) that trial court discretion "should be guided by the degree to which evidence has been introduced which might mislead the jury in their consideration of the case as it is pleaded," citing DeMoulin v. Kissir, 446 S.W.2d 162 (Mo.App.1969), and Estes v. Desmoyers Shoe Co., 56 S.W. 316 (1900), neither of which involved compensation benefits evidence. Womack cited DeMoulin (539 S.W.2d at 484) and also rejected a "curative admissibility" or "invited error" argument (id. at 484-5) much like these defendants are making (Resp.Sub.Br. 9). And defendants ignore this Court's decision in Dunn and its approval of MAI 34.01 and 34.02.

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"informed consent" (including one Dhir himself volunteered on cross-exam), to the content of Def.Exh. 201 and the misleading title with which defendants branded it, to "known complications," and on into the closing argument (Tr. 345, 362-3, 455-6, 552-3, 649, 659-60, 731-6, 756, 790, 837, 853, 857, 859, 863). That was the plain purpose of these references, as counsel admitted in opposing Instruction A (Tr. 795-6). What other reason existed to cite, belabor and argue *irrelevant* evidence?

The jurors would have got this message. In terms of understanding and evaluating evidence, "[j]urors are credited with ordinary intelligence, common sense and an average understanding of the English language." Kline v. City of Kansas City, 334 S.W.3d 632, 640 (Mo.App.2011). How else could they have understood the repeated references to "informed consent" and "known complication . . . even when due care is taken to perform a procedure" (Tr. 837), except as a defense to plaintiff's theory of unnecessary treatment? Why else did they request a copy of the consent form in the first question during deliberation (Tr. 794-7; LF 36), except to determine if plaintiff had consented to the dilation in writing?[5] The judge misunderstood this issue (Tr. 805), as did defense counsel during the trial (Tr. 795-6); why expect more from jurors?

Lastly, defendants' argument that deference is owed to the court's evaluation and

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[5]That the jury also requested plaintiff's billing records and other items is immaterial. Unlike the consent form (Def.Exh. 201), repeatedly misidentified as an "informed consent" form, the billing records and other documents were relevant to the issues in the case.

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"finding" of the lack of prejudice (Resp.Sub.Br. 14) is wholly misplaced. The judge never reached that question because from the first he believed incorrectly that "informed consent" was in the case: "The whole thing is here, your client was injured by virtue of a procedure that the doctor did that he should not have done and of which she would not have approved if she had known about it. That sounds like consent to me." (Tr. 805).

II. PERMITTING ARGUMENT THAT PLAINTIFF CONSENTED TO ESOPHAGEAL DILATION.

Plaintiff incorporates her argument from Point I. Refusing Instruction A gave the go-ahead to re-emphasize plaintiff's "aware[ness]" and her "agree[ment]" that "Dr. Dhir might do a dilation upon her" and that procedure carried with it "a known complication" that "can happen, even when due care is taken to perform a procedure" (Tr. 837). That argument as well as the numerous references to "known complication" in the remainder of closing (Tr. 853, 857, 859, 863) encouraged the jury to consider evidence irrelevant to the plaintiff's theory. It crowned the fallacious theme defendants introduced in opening and brought up several times during questioning of Mrs. Wilson, her expert, Dhir, and their expert.

III. REFUSAL OF INSTRUCTION "B" WITHDRAWING "INFORMED CONSENT" AND EOSINOPHILIC ESOPHAGITIS.

Defendants' recital of the evidence concerning "guidelines" and EoE (Resp.Sub.Br. 18-19) is demonstrably incorrect. Defense counsel first mentioned "eosinophilic esophagitis" in opening statement (Tr. 356-7), then repeated it throughout the trial (Tr. 471, 472, 584-6,

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634, 710-1) and in closing (Tr. 799). Plaintiff brought up the subject only one time, with defense expert Ginsberg (Tr. 668). Their brief asserts that plaintiff "injected EoE into the case through the use of authoritative medical literature during trial" (Resp.Sub.Br. 18) -- that is, one article (the 2006 ASGE guideline concerning esophageal dilation [Exh. A - Tr. 487; LF 49-54; App A10-A15]) that her expert Dwoskin characterized as authoritative with respect to "empiric dilation" outside the jury's presence (Tr. 479-80).

But Dwoskin *never* discussed that article or its content, or even specifically identified it during direct or cross-examination. He testified generally that he reviewed "literature" (Tr. 409) and "research" (Tr. 413-4) in forming his opinions, but never identified any specific article, text or guideline. Later he was asked about "guidelines" in general and mentioned that physicians specializing in that field make a "literature evaluation" and review "articles" (Tr. 444-5) but again cited no specific documents. He said guidelines were recommendations, functioning as sources of information and education for doctors, but were not the equivalent of the legal standard of care and did not require strict compliance in all situations (Tr. 444-8).

More specifically, Dwoskin *never* explicitly "looked to [the 2006 ASGE guideline] as support for his opinion that Dhir violated the standard of care" as they allege (Resp.Sub. Br. 18). Their reference to Tr. 444-8 does not support their statement, nor does any other portion of the transcript. Dwoskin never specifically tied the 2006 ASGE guideline, or any part of it, to his standard-of-care opinions. Defendants' criticism that Dwoskin omitted its

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"qualifying" language about "undiagnosed eosinophilic esophagitis" (Resp.Sub.Br. 18) fails to recognize that he had no occasion to mention it.

Plaintiff's quotation to Ginsberg of an authoritative portion of the 2006 ASGE guideline containing the term "eosinophilic esophagitis" (Tr. 689-90) did not make that passage or any other part of the article admissible as direct, independent, substantive evidence. It was hearsay, and its sole purpose was to impeach Ginsberg over his lack of agreement with an authoritative text writer. Powers v. Ellfeldt, 768 S.W.2d 142, 148 (Mo.App.1989). The plaintiff did not "introduce" that guideline or its content into evidence for the jury to consider.

Consequently, defendants' reliance on the "rule of completeness" is misplaced.[6] That rule "holds that a party may introduce evidence of the circumstances of a writing, statement, conversation, or deposition *so the jury can have a complete picture of the contested evidence introduced by the adversary*." State ex rel. Kemper v. Vincent, 191 S.W.3d 45, 49-50 (Mo. banc 2006); State v. Yole, 136 S.W.3d 175, 179 (Mo.App.2004) ("When the State *introduces* part of a confession or admission *into evidence*, the defendant is authorized to introduce the remaining portion"), cited by defendants. It is not applicable where the writing at issue is a learned treatise that is properly used only for impeachment but not admissible -- and not

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[6]Stewart v.Sioux City & New Orleans Barge Lines, 431 S.W.2d 205 (Mo. 1968), cited by defendants, does not mention the "rule of completeness" and is not an example of its application, for reasons plaintiff has already explained (App.Subs.Br. 60-61).

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received -- as substantive evidence.

EoE was not an issue because Mrs. Wilson never had it, as defendants first adduced (Tr. 471). Dhir knew she did not have it (Tr. 584), and that is quite likely more than he needed to know about that matter in deciding how to treat plaintiff. The lack of EoE in plaintiff was relevant only to set up the applicability of that passage from the 2006 ASGE Guideline (Pltf.Exh. A) quoted to Ginsberg that mentioned "undiagnosed eosinophilic esophagitis." But there all inquiry should have ended. The 2006 ASGE Guideline quote gave no occasion for confusion because all agreed she did not have it.

Hence, if the EoE clause in the articles's passage were disregarded, or effectively removed by Instruction B, it would read:

> Although some endoscopists suggest that large-bore dilators be passed empirically if the endoscopy has normal results, results from two of three studies have shown that empiric dilation does not improve dysphagia scores. Thus, because of the potential risk of perforation with use of large-bore dilators, . . . empiric dilation cannot be routinely recommended if no structural abnormalities are seen at endoscope.

(LF 50; App A11). That is the true import of that passage *on the facts of this case*.

Defendants' admission in opening statement and the expert testimony they adduced proving plaintiff never had EoE effectively served the only legitimate purpose of the EOE reference -- to explain the meaning and lack of significance of that medical term in the

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quoted portion of the 2006 ASGE guideline.

But thereafter defendants and their expert endeavored to muddy the picture, to pervert the real meaning of the quoted passage from the 2006 ASGE Guideline, to undermine the impeachment purpose of Ginsberg's disagreement with that passage, and to transform it into substantive evidence (Tr. 470-6, 689-92, 710, 840-1, 854-5), thereby creating a false and confusing issue about the standard of care in and after 2006. The court's failure to withdraw EoE solidified and sanctioned defendants' efforts and misled the jury.

IV. PERMITTING ARGUMENT (A) THAT PLAINTIFF CONSENTED TO ESOPHAGEAL DILATION, AND (B) OF EOSINOPHILIC ESOPHAGITIS.

Plaintiff incorporates her argument from Points I and III.

Refusing Instruction B authorized defense counsel to renew their appeal for the jury to conclude Mrs. Wilson had given her informed consent to the dilation and its potential consequences, a matter that is not a viable defense in an unnecessary procedure case.

Since the risk of esophageal perforation was relevant *only* to show the gravity of harm associated with Dhir's decision to dilate despite finding a normal esophagus without structural abnormalities, and since that risk existed *only* by virtue the procedure itself (Tr. 393, 413-6, 610), the justification defendants advance -- that plaintiff was not at an *increased* risk because she did not have EoE (Resp.Sub.Br. 19) -- is illogical and inadequate. Because the risk undeniably existed, the absence of an *increased* risk had no probative value at all. That plaintiff did not have an *increased* risk because she did not have EoE is not a defense

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to the charge that the procedure should never have been performed.

The court's refusal also allowed defendants twice (Tr. 840-1, 854-5) to misstate the meaning of the only portion of the 2006 ASGE guideline that had been legitimately conveyed to the jurors under controlling law (Tr. 690-1). Since jurors heard that passage only once, defense counsel's garbling of its meaning in closing likely confused them.

And the court's rulings (Tr. 854-7) enabled defendants to encourage the jury to consider inadmissible hearsay -- the "bullet points" at the end and, by extension, the whole of the 2006 ASGE guideline never identified as authoritative -- as independent, substantive evidence and undercut plaintiff's effort to impeach Ginsberg's credibility. Kelly v. St. Luke's Hosp. of Kansas City, 826 S.W.2d 391, 396 (Mo.App.1992); Gathright v. Pendegraft, 433 S.W.2d 299, 316 (Mo. 1968).

V. REDIRECT EXAMINATION OF DEFENSE EXPERT ON CONTENT OF A HEARSAY MEDICAL ARTICLE.

These are the fallacies in defendants' argument:

First, defendants cite no cases holding authoritative texts, treatises or articles can be used in direct examination of their own expert (Resp.Sub.Br. 22) and disregard plaintiff's citations (App.Sub.Br. 57-8).[7] In Kelly v. St. Luke's Hosp. of Kansas City, 826 S.W.2d at

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[7]Johnson v. Miniham, 200 S.W.2d 334 (Mo. 1947), and Turner v. Caldwell, 349 S.W.2d 493 (Mo.App.1961) (Resp.Sub.Br. 21, 22), state general rules of cross-examination. Neither involved using authoritative texts or treatises in cross-examination to discredit an

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396, the court squarely held: "Learned treatises, such as the article involved in this appeal, may be used during cross-examination to test or challenge an expert's testimony. * * * *However, the article is inadmissible hearsay during direct examination of [the party's own] expert witness.*" Defendants have not discussed Kelly.

Second, the 2006 ASGE Guideline *as a whole* was never identified by Dwoskin as authoritative. He said it was authoritative *only* "with regard to empiric dilation" (Tr. 479-80, 486-8). Thus *only* those portions relating to empiric dilation could be used to cross-examine the defense expert, as was done (Tr. 690; LF 50). The non-qualified parts were equivalent to texts, treatises or articles not characterized as authoritative; they were hearsay and could not be presented to the jury in any form by either party, certainly not as independent, substantive evidence of the truth of the matters therein. Gridley v. Johnson, 476 S.W.2d at 481; Crain v. Newt Wakeman, M.D., Inc., 800 S.W.2d 105, 107 (Mo.App.1990); Grippe v. Momtazee, 705 S.W.2d 551, 556 (Mo.App.1986)("A prerequisite to the use of scientific texts and treatises . . . is evidence that they are authoritative").[8]

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expert, or rehabilitation by using inadmissible hearsay from them. The court lacked discretion to admit hearsay unless it fell within an exception to the hearsay rule. Rouse v. Cuvelier, 363 S.W.3d 406, 420 (Mo.App.2012); Gevermuehle v. Geimer, 619 S.W.2d 320, 322-3 (Mo.App. 1981). Defendants' theory would eviscerate the entire line of cases of which Gridley is a part.

[8]Gridley does not aid defendants at all (Resp.Sub.Br. 22, 23). The trial court had denied all cross-examination of the expert with a text for unstated reasons. Judgment was

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In defending this ruling (Resp.Sub.Br. 24-5), defendants pervert Stewart v.Sioux City & New Orleans Barge Lines, supra, by claiming without citation of pertinent authority that inadmissible hearsay in a learned text or treatise becomes admissible substantive evidence under the "rule of completeness" when a part thereof is used for impeachment. Stewart was not a "rule of completeness" case (see App.Sub.Br. 60-1).

State ex rel. Kemper v. Vincent, supra 191 S.W.3d 45, does not support that argument, either. There, this Court held that the defendant should be allowed to present otherwise inadmissible evidence that the results of a polygraph she took showing she told the truth to demonstrate that *her own subsequent confession* was obtained by the deceptive tactics of a detective who falsely told her she failed the polygraph. This Court said (at 51):

[W]here either party introduces part of an act, occurrence, or transaction, the

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reversed on other grounds, so this Court's discussion was intended "to aid the trial court and the parties" (S.W.2d at 480). It was supplying guidance for retrial, not ruling on actual facts. But it is clear that the plaintiff had not properly qualified the textbook as authoritative before attempting to impeach the defense witness (id. at 481-2), contrary to defendants' representations (Resp.Sub.Br. 23). *If* an entire text, treatise or article is qualified, all of it is available for use as impeachment material in cross-examination. But that did not happen here; only those portions of the 2006 ASGE Guideline pertaining to "empiric dilation" were deemed authoritative (Tr. 486-8) and thus available for use. Yet the trial court permitted defendants to use non-authoritative parts in redirect as substantive evidence.

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> opposing party is entitled to introduce or to inquire into other parts of the whole thereof in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary -- a rule that has been held to apply even though the evidence was in the first place illegal. . . . The polygraph test and results are admissible because they formed the circumstances surrounding the confessions that are the basis of the State's case. The credibility of a confession is a matter for the jury, and evidence of the circumstances surrounding the confession is essential in order for the jury to assess credibility.

The Kemper defendant's statements to the detective -- all of them -- were admissible as ordinary admissions. The prosecution intended to provide the jury only with the most damning of them (her confession), while suppressing or at least not presenting those other admissible statements that explained why she confessed and that revealed possible police misconduct. Fundamental fairness, in a criminal case, mandated that all of the circumstances surrounding the defendant's own confession could be revealed to the jury to shed light on her motivation, even if the defendant had the pre-existing right to object to all evidence about taking the polygraph test. The State had presented an incomplete account.

Unlike those circumstances involving a criminal defendant's own prior statements obtained by deception, this case involves a trial witness's disagreement over the inherent truth of the out-of-court statement of a non-party, accurately quoted to the witness. The

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passage from the 2006 ASE Guideline quoted to Ginsberg was neither inaccurately read, nor incomplete, nor misleading, and defendants have not shown otherwise. Nor did the court.

State v. Jackson, 313 S.W.3d 206 (Mo.App.2010), merely cited Kemper and quoted the "rule" set out above. It rejected the defendant's appeal because the "rule" was inapplicable inasmuch as the defendant himself could have supplied the evidence he claimed was missing from the State's records. Similarly, nothing prevented the defendants' witness Ginsberg from testifying about any relevant parts of the 2006 ASGE Guideline as general medical knowledge or learning without referring to the hearsay Guideline itself.

In State v. Daly, 798 S.W.2d 725 (Mo.App.1990), the defendant attempted to impeach a prosecution witness with *his own prior inconsistent statement* (which is admissible as substantive evidence in civil cases under Rowe v. Farmers Insurance Co., 699 S.W.2d 423, 427 (Mo.banc 1985)). The State was allowed to use other parts of that statement to show all of the circumstances of his own statement. No hearsay problems existed because the declarant was available for cross-examination.

Kelley v. Hudson, 407 S.W.2d 553 (Mo.App.1966), is inapplicable because it also involved prior statements by the witness himself, not those of another in a text, treatise or article. Furthermore, the true rationale for the holding was omitted by defendants (Resp.Sub. Br. 27-8):

> One may not elicit from his adversary, to his own advantage, those parts of a conversation in which the adversary was the speaker, and then withhold from

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the jury, to his adversary's disadvantage, the responses of the other party to the conversation which fill out and explain the sense of it, even though such responses are hearsay. Half-truths and false impressions go often hand in hand, and the law eschews them both; *hence the rule, that whenever an improper subject of inquiry has voluntarily been broached by one party, and such of its contents drawn off as serve to discredit the other or disparage his case, the relevant remainder may be examined, to the end that the sample produced may be more dependably analyzed in the light of the whole truth.*

Id. at 556. The italicized passage is a statement of the rule of "*curative admissibility*" explained at length in Womack v. Crescent Metal Products, Inc., supra 539 S.W.2d at 484-5: "when a party has introduced *illegal evidence* '. . . the opponent may reply with similar evidence whenever it is needed for *removing an unfair prejudice which might otherwise have ensued from the original evidence, but in no other case*' " (emphasis added).

Plaintiff addressed that rule in her main brief (App.Sub.Br. 61-2), explaining its inapplicability because, once again, the quoted passage from the 2006 ASGE Guideline was not "illegal evidence," was not misquoted, was not a mischaracterization or misrepresentation of the article as a whole (as shown more fully in paragraph *Third* below), was never proffered or received as substantive evidence, and was properly received for its limited purpose and no other. It did not result in, and could not have resulted in, *unfair* prejudice to the defendants that could justify admission of "countervailing illegal evidence 'of the same

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caliber.' " Womack at 485 (internal citation omitted); Adams v. Burlington Northern R. Co., 865 S.W.2d 748, 751 (Mo.App.1993).

The other cases defendants cite (Resp.Sub.Br. 25-6) confirm that texts, treatises and articles are at all times treated as hearsay, not substantive evidence, and can only be used for cross-examination of an opponent's expert to attack his/her credibility -- principles that defendants continue to deny.

Third, plaintiff did not "mischaracteriz[e] the text as a whole" (Resp.Sub.Br. 21). Plaintiff's counsel confined his quotation from the 2006 ASGE Guideline to one passage concerning empiric dilation (Tr. 690), and he quoted it correctly. The accusations from the court and defense counsel were immediately denied (Tr. 711-13) and are entirely unfounded, as plaintiff has already shown (App.Sub.Br. 54-7 & fn. 10, 59). This Court can read the entire Guideline and be satisfied that these accusations lack any basis in fact. The Summary Ginsberg was ultimately allowed to comment upon (LF 52) is not inconsistent with the passage plaintiff's counsel had quoted to him (LF 50) inasmuch as it does not even *address* empiric dilation. In their substitute brief defendants did not compare or match up the quoted passage with any other portion of the Guideline, including the Summary, to convince this Court a mischaracterization was made or an inconsistency exists. They have utterly failed to point out *any* discrepancy or unfairness in plaintiff's use of the 2006 ASGE Guideline passage quoted to Ginsberg. Instead they hide behind the assertion that the trial judge made such a finding (Resp.Sub.Br. 26-7), when clearly he did not. He never read the article prior

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to his surprising accusations and ruling (Tr. 711-13). But to the extent that his rationale could be seen as a finding of fact, it is completely unsupported by any substantial evidence in the record. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).

Fourth, defense counsel's question whether the Summary "say[s] anywhere that empiric dilatation was contraindicated in a patient that has no endoscopic findings of stricture" invited at least an inference of hearsay from Ginsberg -- to relate to the jury the content of an out-of-court statement for its truth (Tr. 717). His answer conveyed hearsay. Gevermuehle v. Geimer, supra.

Defense counsel revisited this subject in closing, but not in response or retaliation to plaintiff's closing as contended (Resp.Sub.Br. 29).[9] Rather she announced in advance her intention to discuss the Guideline in closing (Tr. 806). With the court's approval (Tr. 806-7,

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[9]Plaintiff did not contend in closing that guidelines always constituted the standard of care (Tr. 819-20) as defendants assert. Dwoskin had clearly delineated between the two, discussed the standard of care, and noted that guidelines were part of the learning and education of doctors to inform their judgment (Tr. 443-7). Thus that reference to "guidelines" in plaintiff's closing (Tr. 819-20) specifically reminded the jury of Dwoskin's actual testimony describing the congruity between the guideline on empiric dilation and the standard of care in plaintiff's actual situation (Tr. 448). Perhaps defense counsel did not object to plaintiff's mention of "guidelines" in closing because that congruity had been established early on in the testimony.

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855-6), she did just that, paraphrasing the judge's same invalid argument that plaintiff 's counsel "read one sentence out of a large article, took it out of context, and it doesn't say what they're saying. Nowhere does it say that you cannot perform a dilation . . . I handed it to Dr. Ginsberg and I said, 'Look at the "Conclusions."' When you get an article and you read an article . . . you go to the conclusions in the back. It says the bullet points. There's five bullet points in that, and nowhere does it say that you don't" (Tr. 854-5). The jurors could not compare the portion quoted to Ginsberg with the remainder of the article because it was never introduced as substantive evidence and never made available to them. Plaintiff had no effective means to respond.

"[I]t is axiomatic counsel should neither argue nor draw inferences from matters not in evidence and that a trial court errs in permitting such a discourse." Coats v. Hickman, 11 S.W.3d 798, 804 (Mo.App.1999). That improper argument underscored the hearsay and dissipated the impeachment. Here, too, the judge did not evaluate the prejudicial nature of improperly-received evidence or improper argument because he never saw them as erroneous. This Court should not defer to a balancing decision he never made.

VI. REFUSAL TO STRIKE JUROR COX FOR CAUSE.

Defendants cherry-pick Cox's voir dire answers while emphasizing that a juror's entire testimony must be considered. They largely disregard the damning statements and never attempt to reconcile the conflicts; nor did Cox himself.

The record establishes beyond dispute that for Cox, from the beginning, "one side may

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be more believable than the other,"--*i.e.*, the side "trying to get an extra piece of pie" was less believable (Tr. 34-5). He leaned in one direction without having heard a syllable of evidence, and one side already had "a head start"(Tr. 35, 36). The evidence was "probably not" going to change the way he leaned (Tr. 108-9) because his opinion was "pretty firmly set" (Tr. 36).

The *fact* of his leaning *against the plaintiff*, rather than the angle of it, marked Cox as biased and not "thoroughly impartial as between the parties." Kendall v. Prudential Ins. Co. of America, 327 S.W.2d 174, 177 (Mo.banc 1959). Cox's bias is not based on a single answer to one question. He repeated it several times. Agreeing with the previous juror (Cantua), he claimed to be "neutral" in light of his own experience with physicians for the reason that he had heard no evidence, but immediately acknowledged his favoritism again (Tr. 66). And even after conceding he "[didn't] know anything" without hearing evidence (Tr. 35, 66), he claims to have known, without hearing any evidence, that he could be "fair and impartial" (Tr. 283-4).

These Jekyll-and-Hyde answers -- that he "pretty firmly" afforded one side "a head start" but he could be fair -- robbed his testimony of any credibility. "A prospective juror may not be the judge of his own qualifications." Beggs v. Universal C. I. T. Credit Corp., 387 S.W.2d 499, 503 (Mo.banc 1965).

A juror's assurance that he can be fair and impartial is not magical language that trumps his other sworn and unretracted expressions of personal bias *against a party to the case*. There is no such thing as "impartiality despite a little bias." Cox's assurance cannot,

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without a persuasive explanation or distinguishing circumstances, erase his admitted partiality *against the plaintiff*, unless courts intend only to pay lip service to a professed ideal of fairness. That personal bias, never abandoned, distinguishes this situation from Joy v. Morrison, 254 S.W.3d 885, 890 (Mo.banc 2008).

"The exercise of a sound judicial discretion is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law--a discretion bounded by the rules and principles of law, and not arbitrary, capricious or unrestrained." State ex rel. Rosen v. McLaughlin, 318 S.W.2d 181, 184 (Mo.banc 1958); Harriman v. Harriman, 281 S.W.2d 566, 571 (Mo.App.1955)(an abuse of discretion is an "untenable" ruling or decision "exercised to an end or purpose not justified by, and clearly against, reason and evidence").

VII. REFUSAL TO STRIKE JUROR STRECK FOR CAUSE.

Plaintiff incorporates the argument and authorities cited in Point VI. Here, too, defendants cherry-pick Streck's voir dire answers to their advantage. Streck has "a pretty strong feeling" (Tr. 33, 285-6) against plaintiffs "that go after physicians," such that "one of the parties may have a lead on the other" (Tr. 33, 34).

Streck's was not some general feeling against lawsuits, as in Joy v. Morrison; it was expressly directed toward the class of people of whom Mrs. Wilson was a member. State v. Edwards, 740 S.W.2d 237, 238 (Mo.App.1987).

He never repudiated or disavowed that bias. He never explained how he could hold that view strongly before hearing any evidence *and* simultaneously claim he could be fair and

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impartial after hearing the evidence in a case where the plaintiff was suing her own doctor.

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Substitute Reply Brief fully complies with the provisions of Rule 55.03; that it contains 7,045 words and complies with the word limitations contained in Rule 84.06(b); and that one copy of the Brief was served by electronic mail, in pdf format, and a hardcopy thereof was mailed, by U.S. Mail, postage prepaid, this 14th day of December, 2016, to BK Christopher/Justin D. Fowler, 2600 Grand Blvd. Ste. 1100, Kansas City, MO 64108.

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