

IN THE SUPREME COURT OF MISSOURI

JOHN RHODEN, et al.,)
)
 Respondent,)
)
 vs.)
)
 MISSOURI DELTA MEDICAL)
 CENTER,)
)
 Appellant.)

Case No. SC98327

APPELLANT’S SUBSTITUTE BRIEF

Appeal from the Circuit Court of Scott County, Missouri
32nd Judicial Circuit
Honorable David A. Dolan

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment in favor of Plaintiffs John Henry Rhoden and Dorothy Jean Winfield (collectively “Plaintiffs”) and against Defendant Missouri Delta Medical Center following a trial by jury. On November 5, 2018, the Circuit Court of Scott County entered judgment in favor of Plaintiffs on the jury verdict. Plaintiffs filed a timely Motion for New Trial and for JNOV. The Circuit Court denied the Motion for New Trial and Defendant filed a timely notice of appeal. The Court of Appeals, Southern District, affirmed the judgment of the Circuit Court on December 30, 2019. Timely applications for rehearing and transfer were filed in the Southern District and denied. A timely application for transfer was filed in this Court and this Court granted transfer on April 28, 2020.

The issues on appeal are whether Plaintiffs made a submissible case on their claim for additional damages for aggravating circumstances, whether Plaintiffs made a submissible case on the issue of causation, whether the Trial Court gave an improper jury instruction relating to aggravating circumstances damages, whether one of Plaintiffs’ experts was qualified to testify, whether the Trial Court erred in excluding portions of the video-taped deposition of Plaintiffs’ expert Dr. Garber, and whether the Trial Court improperly allowed counsel for Plaintiffs to read portions of an abandoned expert witness’ deposition both in jury selection and in opening statements.

STATEMENT OF FACTS

This is an appeal from a jury verdict in a wrongful death case in favor of the family of Decedent Roosevelt Rhoden (“Mr. Rhoden”) and against Defendant Missouri Delta Medical Center, a hospital located in Sikeston, Missouri. The Plaintiffs in the case, John Rhoden and Dorothy Jean Winfield, claimed that two physicians employed by the Hospital, Dr. Linza Killion and Dr. Kevin Rankin,¹ negligently cared for Roosevelt Rhoden and that they caused his death nearly a year later. (LF Doc. 15). Plaintiffs made only a wrongful death claim. They did not make a claim for lost chance of survival. *Id.*

Roosevelt Rhoden was in his late 70’s and had a number of health issues including chronic kidney disease, diabetes, obesity, respiratory problems (Chronic Obstructive Pulmonary Disease (“COPD”)), and hypertension. (Garber Stip. 37; 41). Mr. Rhoden had been a long-time patient of Dr. Killion. (Tr. 445-446). Like many men, Mr. Rhoden developed urological issues as he aged. *Id.* His prostate gland had become enlarged. (Tr. 446-447) The prostate gland surrounds the urethra just below the bladder and, when enlarged, restricts the size of the urethra, causing diminished urine flow. (Tr. 448-449). After treating Mr. Rhoden with conservative therapy for years, Dr. Killion ultimately recommended that Mr. Rhoden should either undergo a TURP (transurethral

¹ Plaintiffs initially sued Dr. Killion and Dr. Rankin individually in addition to suing their employer, Missouri Delta Medical Center. Prior to trial, the Plaintiffs dismissed their claims against the doctors individually and proceeded to trial against the Hospital only. (LF Doc. 80).

prostatectomy) to lessen the restrictions on his urethra or, in the alternative, void via a catheter. (Tr. 447-448). Mr. Rhoden chose the TURP procedure, which involved resection of a portion of the prostate tissue so that urine could flow more easily out of the bladder, through the urethra, and out of his body. (Tr. 448–449). Dr. Killion performed this procedure on October 16, 2012. (Tr. 450-452). As part of this procedure, Dr. Killion also performed a TUIBN (transurethral incision of the bladder neck) procedure. (Tr. 450-452). This procedure involved a superficial incision of the shelving edge of the prostate to allow easier placement of a catheter. Urologists commonly use this procedure in men who do not have a gentle curvature of the urethra near the prostate and bladder neck. (Tr. 450 – 452).

Mr. Rhoden’s TURP procedure was uneventful. (Tr. 453). After the procedure, Dr. Killion, a board-certified urological surgeon and former faculty member at Vanderbilt University Medical School, placed a three-way catheter in Mr. Rhoden’s penis, guiding it through his urethra and into his bladder. (Tr. 441-443, 453). A three-way catheter has three lumens. (Tr. 454). One lumen inflates a small balloon which keeps the catheter within the bladder. (Tr. 454-455). Sterile saline fluids flow into the bladder through a second lumen. *Id.* The saline fluids and any urine then exit the bladder through the third lumen. *Id.* The three-way catheter works because the bladder is a closed pouch. The irrigation fluid that enters the body through the inbound lumen comes back out of the bladder and then out of the body through the separate outbound lumen. (Tr. 455). A three-way catheter irrigates the bladder and keeps blood clots from forming. (Tr. 454-455). A primary issue in this case was whether Dr. Killion properly placed the catheter in the bladder or whether he

somehow perforated the urethra in the vicinity of the bladder with the bladder tip ending up outside of the bladder.

Mr. Rhoden unquestionably suffered significant post-surgery complications. Soon after the TURP surgery, he began complaining of pain in his abdomen and received pain medication. (Garber Stip. P. 40). He then experienced renal failure and difficulty breathing. *Id.* On October 17, 2012, Mr. Rhoden became confused and tugged on his catheter to the extent that a nurse had to reinsert it. (Tr. 526). In response to Mr. Rhoden's condition, Dr. Killion ordered imaging studies. The imaging studies showed free air in Mr. Rhoden's abdomen below his diaphragm and in the retroperitoneal area. *Id.* Free air usually indicates a perforation of the GI tract and is a surgical emergency. *Id.* at 40-41. Dr. Killion promptly requested a surgical consultation.

General surgeon Dr. Rankin, another employee of MDMC, evaluated Mr. Rhoden and took him to surgery for an exploratory laparotomy. *Id.* at 41-42. Dr. Rankin examined Mr. Rhoden's entire GI tract and did not find a perforation. (Tr. 552-555). He identified what he described as fatty tissue in the area of the sigmoid colon. (Tr. 555-556). Plaintiffs' retained expert, Dr. Garber, testified that what Dr. Rankin observed was not fatty tissue, but a collection of fluid from the bladder perforation. (Garber Stip. P. 93-94). Importantly, Dr. Rankin did not observe a misplaced foley catheter nor did he observe any irrigation fluid in Mr. Rhoden's abdominal area. (Tr. 555, 558). Because he did not find any perforation in any part of the intestines, Dr. Rankin concluded that a ruptured diverticulum which had sealed before the laparotomy had caused the free air. (Tr. 558).

Following this surgery, Mr. Rhoden developed sepsis, and respiratory and kidney complications. (Tr. 559). Importantly, on October 31, 2012, two weeks after the TURP procedure and the placement of the catheter, MDMC's nurses removed that catheter and placed a replacement catheter. (Tr. 514). Mr. Rhoden was subsequently transferred to St. Louis University Hospital ("SLU"). (Tr. 515). When he arrived at SLU, a CT scan showed the replacement catheter outside of the bladder. (Tr. 513-514). Urologists at SLU removed that catheter and replaced it with a Coude catheter and achieved bladder drainage. (Garber Stip. P. 105-106). The doctors at SLU also drained a fluid collection from his abdomen. (Garber Stip. P. 107-108).

Mr. Rhoden began to improve and he was discharged from SLU to Landmark Hospital in Cape Girardeau, Missouri, on November 16, 2012. (Garber Stip. P. 109; Salzman Stip. P. 18). At Landmark, he continued to receive antibiotics, but went off the ventilator. (Salzman Stip. P. 18). The catheter was removed and, due to the TURP surgery, he could urinate on his own. *Id.* Mr. Rhoden continued to have weakness and trouble swallowing while at Landmark. *Id.* at 19. Mr. Rhoden suffered a stroke while at Landmark, sometime during December of 2012, and developed right-sided weakness. *Id.* at 19.

Mr. Rhoden then transferred from Landmark to the Lutheran Home, a skilled nursing facility in Cape Girardeau, Missouri, where he received treatment for a stroke, including physical therapy, occupational therapy, and speech therapy. *Id.* He stayed there for about one week, but had to return to St. Francis Hospital in Cape Girardeau due to congestive heart failure. *Id.* He returned to the Lutheran Home, but had to be readmitted to St. Francis in February 2013 for abdominal pain and shortness of breath. *Id.* He went

home, but again had to be readmitted for dehydration, was discharged, and then again returned due to swelling in his legs. *Id.* In September 2013, he returned to St. Francis with very high blood pressure and abdominal pain due to a urinary tract infection. *Id.* He improved and then returned to the nursing home. He went back to St. Francis on October 15, 2013, for abdominal pain, dilation of his intestines, and kidney problems. *Id.* at 20. He stopped breathing on October 22, 2013 due to mucus plugging and underlying emphysema. *Id.* He started bleeding in his stomach. *Id.* His kidney function, heart failure, and breathing all worsened. He aspirated, and his condition declined to the point that his family chose to focus on comfort care. *Id.* Mr. Rhoden passed away on October 31, 2013, approximately one year after his TURP procedure. *Id.*

Plaintiffs presented evidence that Dr. Killion breached the standard of care by misplacing the foley catheter outside of Mr. Rhoden's bladder during the TURP procedure and by failing to recognize this error. *Id.* at 111. Plaintiffs also presented evidence that Dr. Killion failed to order more testing to determine whether the foley catheter was in the correct position, including a cystogram, a CT scan, or a pelvic ultrasound, tests which they claim would have incidently identified the allegedly misplaced catheter. *Id.* at 84. Dr. Garber also testified that Dr. Killion failed to identify the source of the free air when Dr. Rankin did not find a perforated viscous during the exploratory laparotomy, should not have performed the TUIBN procedure, and should not have told Dr. Said (nephrologist) that there was no urine leak without conducting testing. (Garber Stip. P. 111, 115, 118, 123).

Plaintiffs' expert Dr. Vitale testified that Dr. Killion's misplacement of the catheter and failure to recognize the error fell below the standard of care. (Tr. 349). In addition, he testified that Dr. Killion's failure to order a cystogram, a CT scan of the pelvis, or a complete retroperitoneal ultrasound in response to Mr. Rhoden's declining post-operative condition also failed to meet the standard of care. (Tr. 350). Dr. Vitale further testified that Dr. Rankin fell below the standard of care when he failed to obtain additional diagnostic testing prior to surgery, failed to locate the source of the free air, and failed to do additional follow up testing to find the source of the free air. (Tr. 355-357).

As far as causation, Dr. Garber testified that additional testing would have shown the misplaced catheter and would have improved Mr. Rhoden's post-operative course. (Garber Stip. 84-85). He believed the catheter was out of place for a long time and that it resulted in increasing complications. *Id.* at 85. He testified that the post-operative infections were not caused by the TURP procedure, but were "kicked off" by the allegedly misplaced catheter. *Id.* at 97. He also testified that Mr. Rhoden developed respiratory failure, peritonitis, sepsis, and congestive heart failure as a result of the catheter misplacement. *Id.* at 99-100. Dr. Garber testified that the alleged breaches of the standard of care caused or contributed to cause Mr. Rhoden's post-operative problems and ultimately his death on October 31, 2013, a year after the TURP surgery. He did not address in any way Mr. Rhoden's multiple health problems that were just as if not more likely to have caused his death. *Id.* at 112, 123-24.

Plaintiff's other expert, Dr. Vitale, testified that Mr. Rhoden suffered from multiple diseases prior to the TURP surgery including diabetes, hypertension, heart disease,

hypercholesterolia and anemia, chronic renal disease, chronic lung disease, and obesity. (Tr. 276-77). In the area of causation, Dr. Vitale testified that the catheter caused Mr. Rhoden's post-operative complications and the need for postoperative care, including hospitalization, home health, and nursing home care. (Tr. 325, 331-34, 337-38). Dr. Vitale admitted that Mr. Rhoden's death certificate lists his causes of death as "acute kidney injury, chronic kidney disease, cardiovascular accident with dysphagia, hypertension, obesity." (Tr. 339). Dr. Vitale testified that the acute kidney injury and chronic kidney disease were caused by the catheter that was allegedly misplaced almost a year earlier. (Tr. 339-40). He testified that the acute respiratory failure and pulmonary edema, identified in the discharge/death note from St. Francis Medical Center, were also caused by the allegedly misplaced catheter. (Tr. 342). Dr. Vitale then testified that the alleged misplacement of the catheter caused Mr. Rhoden's health problems and ultimately his death. (Tr. 351, 358). If the physicians had done the correct testing, Dr. Vitale stated, "I think his hospital course would have been dramatically different, much better. I think he would have survived, yes." (Tr. 351, 358).

Defendant MDMC asserted at trial that Dr. Killion properly placed the catheter within the bladder on the day of the TURP procedure and, if he had not, the many gallons of irrigation fluid flowing into the body through the inbound lumen would have collected in Mr. Rhoden's body cavity and there would have been no return of fluid via the outbound lumen. (Tr. 460-461). The medical records reflect that, during the entire post-operative period, the three-way catheter worked properly. Essentially the same amounts of fluid entered into the body through and then exited back out of the body through the catheter,

which established that the end of the catheter was in fact in the closed space, the bladder, as intended. (Defendant's Exhibit P, Trial Exhibit Vol. III, 395-593 3 – Vol. X). If the catheter tip had been outside of the bladder space, there would have been no return of fluid or greatly reduced return and it would have been obvious to everyone the catheter was not working. (Tr. 460 – 461). Defendants further argued that, if the catheter had in fact been misplaced after the TURP, it would have been obvious to Dr. Rankin during the laparotomy because Mr. Rhoden's abdominal cavity would have been full of irrigation fluid. (Tr. 555, 558, 562).

MDMC presented expert testimony from Dr. John Price, a surgeon, that Dr. Rankin's performance of the exploratory laparotomy on October 18, 2012, met the standard of care, and did not need to order a CT scan prior to the surgery. (Tr. 617-618, 619). He opined that the finding of free air on x-ray required emergent exploratory surgery, regardless of what a hypothetical CT scan might have shown. *Id.* at 618-619. Dr. Price also testified that Dr. Rankin's post-surgical care met the standard of care. *Id.* at 620-621. When a surgeon examines the colon all the way down to where it joins the rectum, the bladder is located nearly adjacent to that area. Dr. Rankin would have seen a perforation in the bladder and the stray end of the catheter if they existed. *Id.* at 621, 627. Dr. Price also testified that the catheter must have been misplaced not by Dr. Killion after the TURP procedure, but when the nurses placed a completely new catheter on October 31, 2012, more than two weeks later. *Id.* at 635-636. Mr. Rhoden showed swelling in his scrotum after the nurses replaced the catheter. *Id.*

MDMC also presented the expert testimony of Dr. Paul Hatcher, a board-certified urologist and Professor at the University of Tennessee Medical Center. (Tr. 666–668). Dr. Hatcher testified that both the TURP and TUIBN procedures were appropriate. (Tr. 676). He testified that Dr. Killion met the standard of care in performing the TURP and TUIBN surgery on Mr. Rhoden. *Id.* at 677-678, 680. He also testified that Dr. Killion met the standard of care in placing the foley catheter during that surgery, that Dr. Killion properly placed the catheter and confirmed its proper placement. *Id.* at 678 - 681. Dr. Hatcher testified that, after Dr. Rankin’s surgery did not reveal the source of the free air, the standard of care did not require Dr. Killion or Dr. Rankin to order CT testing, a cystogram, or an abdominal pelvic ultrasound. A misplaced foley catheter would not have caused free air below the diaphragm far away physiologically from the bladder neck. *Id.* at 68. Dr. Hatcher testified that all of Dr. Killion’s care, including the TURP procedure and post-operative treatment, met the standard of care. *Id.* at 686. He also believed the catheter became misplaced, not after the TURP, but when the nurses replaced the catheter more than two weeks later on October 31, 2012. *Id.* at 687. Finally, Dr. Hatcher testified that the misplaced catheter in October of 2012 did not cause or contribute to cause Mr. Rhoden’s death. *Id.*

In regard to causation, MDMC also presented the expert testimony of Dr. Gary Salzman, a critical care physician and Professor at the University of Missouri-Kansas City School of Medicine. Dr. Salzman testified that neither Dr. Killion, nor Dr. Rankin, nor anyone else at Missouri Delta Medical Center caused or contributed to cause Mr. Rhoden’s death or his sepsis, respiratory failure, and acute kidney injury. (Salzman Stip. P. 20-23).

In fact, Mr. Rhoden's illnesses which developed at MDMC had resolved by the end of December 2012 when he was discharged from Landmark. *Id.* at 22. He no longer required a ventilator or even the catheter, and the CT scan of his abdomen had improved. *Id.* Dr. Salzman testified that Mr. Rhoden's death was caused by a subsequent stroke which he suffered in December 2012. *Id.* at 24. His resulting problems with swallowing led to his mucus plugging issues and the aspiration into his lungs that ultimately caused his death in October of 2013, a year after the TURP procedure. *Id.* Mr. Rhoden's hypertension, congestive heart failure, COPD, chronic kidney disease, and diabetes were not caused by the care he received at MDMC but were the result of his age and/or existed prior to or were independent of the TURP procedure. *Id.* at 25-26.

The parties tried the case to a jury from October 22-25, 2018. (LF Doc. 1). The jury returned a verdict against MDMC and in favor of Plaintiffs. *Id.* The jury awarded the Plaintiffs past medical damages of \$269,780.80 and past non-economic damages of \$300,000. *Id.* The jury also awarded Plaintiffs additional damages for aggravating circumstances in the amount of \$300,000.00. *Id.* The Trial Court entered its Judgment on November 5, 2018. *Id.* MDMC timely filed its motion for new trial/JNOV. *Id.* The Trial Court denied MDMC's motion on December 21, 2018. *Id.* Defendant appealed the Trial Court's judgment to the Court of Appeals, Southern District, which affirmed the judgment of the Trial Court on December 30, 2019. Defendant filed timely motions for rehearing and transfer in the Southern District which were denied. Defendant filed a timely application for transfer in this Court which was granted on April 28, 2020.

POINTS RELIED ON

1. The Trial Court erred in submitting aggravating circumstances damages to the jury and in denying Appellant's Motion for Directed Verdict and Motion for JNOV. The claim for additional damages for aggravating circumstances was not supported by clear and convincing evidence. The record contains no evidence that the health care providers demonstrated willful, wanton or malicious conduct as required by Section 538.210, RSMo.

Section 538.210, RSMo.

Dodson v. Ferrara, 491 S.W.3d 542 (Mo. banc 2016)

Bennett v. Owens-Corning Fiberglass Corp., 896 S.W.2d 464 (Mo. banc 1995)

2. The Trial Court erred in submitting Instruction No. 11 for aggravating circumstances damages and in denying Appellants' Motion for New Trial because it misstated the law. Section 538.210.8 states that the standard for punitive damages in medical negligence cases is "willful, wanton or malicious," not "complete indifference to or conscious disregard for the safety of others" as provided in the pattern MAI instruction.

Section 538.210, RSMo.

Goralnik v. United Fire and Casualty Co., 240 S.W.3d 203 (Mo. App. E.D. 2007)

Bennett v. Owens-Corning Fiberglass Corp., 896 S.W.2d 464 (Mo. banc 1995)

3. The Trial Court erred in submitting Verdicts A and B to the jury and in denying Appellant's Motion for Directed Verdict and for JNOV and the alternative Motion for New Trial because Plaintiffs failed to submit evidence that Dr. Killion's or Dr. Rankin's alleged negligence caused Roosevelt Rhoden's death in that Plaintiffs' experts Dr. Vitale

and Dr. Garber failed to testify that the medical procedures performed by Dr. Killion and/or Dr. Rankin caused Roosevelt Rhoden to die when he did.

Sundermeyer v. SSM Reg'l Health Servs., 271 S.W.3d 552 (Mo. banc 2008)

Mickels v. Danrad, 486 S.W.3d 327 (Mo. banc 2016)

Wright v. Barr, 62 S.W.3d 509 (Mo. App. W.D. 2001)

4. The Trial Court erred in permitting Plaintiff's expert Dr. Vitale to testify at trial because he was not a qualified expert witness in that he had not actively practiced within five years prior to the trial.

Section 538.225, RSMo.

Hink v. Helfrich, 535 S.W.3d 335 (Mo. banc 2018)

Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503 (Mo. banc 1991)

5. The Trial Court erred in excluding Plaintiffs' expert witness Dr. Garber's admissions that he did not know whether Roosevelt Rhoden would have died when he did if Mr. Rhoden had not had the TURP surgery because Plaintiffs were required to establish that "but for" the Defendant's negligence, Roosevelt Rhoden would not have died. Dr. Garber's excluded testimony shows he could not offer such evidence.

Mickels v. Danrad, 486 S.W.3d 327 (Mo. banc 2016)

6. The Trial Court erred in permitting Plaintiffs' counsel to comment on Defendant's dis-endorsed expert witness Dr. Schoenberg during *voir dire* and to read into evidence a portion of Dr. Schoenberg's deposition wherein he stated the amount of money he had been paid because evidence that a dis-endorsed expert was retained by a party is inadmissible. A party is prohibited from disclosing to the jury that a withdrawn expert was

retained by the opposing party. It was improper for Respondent to tell the jury that Dr. Schoenberg was one of Defendant's experts and to imply an adverse inference when he was not called as a witness at trial.

Smith v. Homestead Dist. Co., 629 S.W.2d 454 (Mo. App. S.D. 1981)

Porter v. Toys R Us – Delaware, Inc., 152 S.W.3d 310 (Mo. App. W.D. 2010)

Kampe v. Colom, 906 S.W.2d 796 (Mo. App. W.D. 1995)

ARGUMENT

FIRST POINT RELIED ON

The Trial Court erred in submitting aggravating circumstances damages to the jury and in denying Appellant's Motion for Directed Verdict and Motion for JNOV. The claim for additional damages for aggravating circumstances was not supported by clear and convincing evidence. The record contains no evidence that the health care providers demonstrated willful, wanton or malicious conduct as required by Section 538.210, RSMo.

A. Standard of Review.

Aggravating circumstances damages in wrongful death cases are governed by the same standards as punitive damages. *Call v. Heard*, 925 S.W.2d 840, 851 (Mo. banc 1996). This Court reviews the submissibility of aggravating circumstances damages *de novo*. *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 401 (Mo. App. E.D. 2014). "When reviewing the submissibility of a request for punitive damages, [the Supreme Court] view[s] the evidence in the light most favorable to submissibility and disregard[s] all adverse evidence and inferences." *Drury v. Mo. Youth Soccer Ass'n, Inc.*, 259 S.W.3d 558, 573 (Mo. App. E.D. 2008).

B. Argument.

The Trial Court erred in submitting aggravating circumstances damages to the jury. In fact, the Court specifically stated that Plaintiffs were "overreaching" in requesting the submission of aggravating circumstances. (Tr. 728). Defendant preserved this error by arguing it extensively in Appellant's Motion for Directed Verdict at the Close of All Evidence (Tr. 718), objecting to the giving of Instruction No. 11 (Tr. 733), objecting to

Instructions No. 12 and 13 and Verdict B (Tr. 733-34), and raising these issues again in the Motion for New Trial and/or JNOV. (LF 152, 156).²

² Appellant anticipates that Respondents will argue, as they did in the Court of Appeals, that Appellant failed to preserve this issue for appeal. Not true. Whether Respondents made a submissible case on punitive damages was raised orally beginning on page 718 of the transcript and the parties argued the point for an additional eleven transcript pages before the Trial Court. During this lengthy discussion, Appellant argued that Respondents had failed to present sufficient evidence for aggravating circumstances damages. Appellant also noted that the standard for aggravating circumstances/punitive damages in medical malpractice cases differs from than in other tort cases. The same discussion also included Respondents' lengthy recitation of the evidence they claimed supported the submission of aggravating circumstances to the jury. The Trial Court understood the issue as he stated that Respondents were overreaching in seeking aggravating circumstances damages. (Tr. 728). Both parties and the Trial Court also had a lengthy discussion of the opinion in *Koon v. Walden*. Finally, the transcript reveals the Trial Court's ultimate determination that it would deny Appellant's Motion for Directed Verdict at the Close of All Evidence and allow Respondents to submit the issue of aggravating circumstances damages to the jury. (Tr. 718-729). Appellant, Respondents, and the Trial Court were well-aware of the bases for Appellant's motion for directed verdict: that the evidence presented by the Respondents failed to establish "willful, wanton, or malicious" acts. (Tr. 718-721). In fact, Respondents made a lengthy argument of the evidence they believed

The Missouri Supreme Court has held that aggravating circumstances damages are equivalent to punitive damages. *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 466 (Mo. banc 1995). “To make a submissible case for aggravating circumstances damages against health care providers in a medical negligence action, a plaintiff must show that the health care provider demonstrated ‘willful, wanton or malicious misconduct’ with respect to his actions which are found to have injured or caused or contributed to cause the damages claimed in the petition.” *Dodson v. Ferrara*, 491 S.W.3d 542, 562 (Mo. banc 2016) (quoting Section 538.210.5, RSMo.). To support a claim for aggravating circumstances damages or for punitive damages, the plaintiff must present clear and convincing evidence to support the claim. *Id.*; *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 160 (Mo. banc 2000); *Rodriguez v. Suzuki*, 936 S.W.2d 104, 110 (Mo. banc 1996). This higher standard of proof requires evidence that “instantly tilts the scales” in favor of punitive damages when weighed against the opposing evidence. *Peters v. General Motors Corp.*, 200 S.W.3d 1, 15 (Mo. App. 2006). Damages for aggravating circumstances

[footnote continued]

established “reckless disregard or conscious indifference” at pages 721-723. Respondents cannot reasonably contend that Appellant failed to set forth the grounds in its oral motion for directed verdict. Mr. Hennelly stated, on the record, “Under either standard [reckless disregard or willful, wanton] what was the conduct that the doctors didn’t show that - -“ until he was cut off by Respondents’ counsel who then attempted to describe the evidence allegedly supporting the submission. (Tr. 720-721). [end of footnote]

are not generally recoverable in negligence actions because negligence, which is a mere omission of the duty to exercise care, is the antithesis of willful or intentional conduct. *Dodson*, 491 S.W.3d at 563.

The Missouri Supreme Court has previously described conduct that did not rise to the level of aggravating circumstances in *Dodson*. The family of a 34-year-old mother brought a wrongful death action against healthcare providers who had inadvertently dissected her left main coronary artery during a catheterization procedure. *Id.* at 549. The trial court directed a verdict on the punitive damages claim in the defendants' favor at the close of all evidence. *Id.* at 562. The Supreme Court affirmed this ruling, finding that plaintiff had failed to show the doctor "acted with complete indifference or a conscious disregard for the safety of others." *Id.* The evidence showed that, after noticing the dissection of the left main coronary artery, the doctor did not take immediate action to prepare to stent or bypass the artery. *Id.* at 563. But, during the following 12 minutes, the doctor called for another physician, called the operating room, and evaluated the extent of the dissection. *Id.* When assistance arrived 25 minutes later, an attempt to stent the artery was unsuccessful. *Id.* The Supreme Court correctly determined that none of these actions rose to the level of aggravating circumstances. *Id.* It stated,

Plaintiffs failed to make a submissible case demonstrating that Dr. Ferrara acted with complete indifference to or conscious disregard for the safety of Ms. Dodson. The Plaintiffs' own evidence indicates that Dr. Ferrara took affirmative action to address the dissection by placing a call to another physician for assistance and to the operating room and by inserting an intra-

aortic balloon pump to support Ms. Dodson's heart. The timeliness and appropriateness of Dr. Ferrara's decisions may be questionable, but the evidence indicates that he did take steps to save Ms. Dodson's life. His conduct may have been negligent, but it did not show a conscious disregard for Ms. Dodson's safety.

Id. at 564.

As in *Dodson*, the record here shows that Dr. Killion and Dr. Rankin took affirmative steps to address Mr. Rhoden's complications rather than acting willfully, wantonly, or maliciously. Dr. Garber identified only limited breaches of the standard of care by Dr. Killion. He testified that Dr. Killion breached the standard of care by failing to identify the supposed misplacement of the catheter, by failing to order more testing to determine the source of the free air when Dr. Rankin did not find a perforated viscous during the subsequent laparotomy, by performing the TUIBN procedure, and by telling Dr. Rankin there was no urine leak without conducting testing. (Garber Stip. P. 111, 115, 118, 123). Most of Dr. Garber's testimony related to Mr. Rhoden's difficult course following the TURP procedure. *Id.* at 40. However, Dr. Garber did not testify that Dr. Killion or anyone else at MDMC failed to treat these post-surgical complications as they occurred. He offered no testimony that the doctors provided improper treatment for Mr. Rhoden's sepsis, renal failure, or breathing problems. He offered no testimony that Dr. Killion, Dr. Rankin or anyone else at MDMC disregarded or failed to treat those complications.

Dr. Garber never identified "willful, wanton, or malicious conduct" by Dr. Killion. At most, he stated that Dr. Killion should have performed more tests to determine whether

he had properly placed the catheter. However, Dr. Killion did in fact obtain a surgical consult to locate the source of the decedent's post-operative problems. He may not have performed the precise test Dr. Garber, in hindsight, thinks he should have performed, but Dr. Killion did respond to the complications. That these were not the same steps Dr. Garber would have taken was not willful, wanton or malicious.

Similarly, Plaintiff's other expert, Dr. Vitale, failed to establish willful, wanton or malicious conduct. Dr. Vitale testified that Dr. Killion's alleged misplacement of the catheter and alleged failure to consider it could have been misplaced fell below the standard of care. (Tr. 349). In addition, he testified that Dr. Killion's failure to order a cystogram, a CT scan of the pelvis, or a complete retroperitoneal ultrasound in response to the decedent's declining postoperative condition also failed to meet the standard of care. (Tr. 350). Dr. Vitale further testified that Dr. Rankin fell below the standard of care when he failed to obtain additional diagnostic testing prior to surgery, failed to locate the source of the free air, and failed to do additional follow-up testing to find the source of the free air. (Tr. 355-357). Dr. Vitale did not testify that either Dr. Killion or Dr. Rankin disregarded (consciously or otherwise) the decedent's difficult course following the TURP procedure. Rather, he took issue with the type of response and the type of investigation Dr. Killion and Dr. Rankin employed. Dr. Vitale did not testify that Dr. Killion should not have performed the TURP surgery. Mr. Rhoden undoubtedly suffered significant complications following surgery. But, Dr. Killion, Dr. Rankin, and MDMC responded to and treated

these complications. Dr. Garber and Dr. Vitale were only critical of the type of response. These criticisms do not support an award of aggravated circumstances damages.³

In affirming the award of aggravating circumstances damages, the Court of Appeals opinion focused on Mr. Rhoden's difficult course following the TURP surgery. The Court of Appeals stated that "Dr. Killion did no investigation into Mr. Rhoden's condition" and that neither Dr. Killion nor Dr. Rankin "investigated whether the TURP procedure was properly performed and was the cause of Mr. Rhoden's post-operative problems." This is a gross misreading of the evidence. The following chart (derived from and with citations to evidence in the medical records) shows the actual interventions taken by MDMC, Dr. Killion, Dr. Rankin, and other MDMC physicians following the initial TURP surgery until Mr. Rhoden's transfer to St. Louis University Hospital:

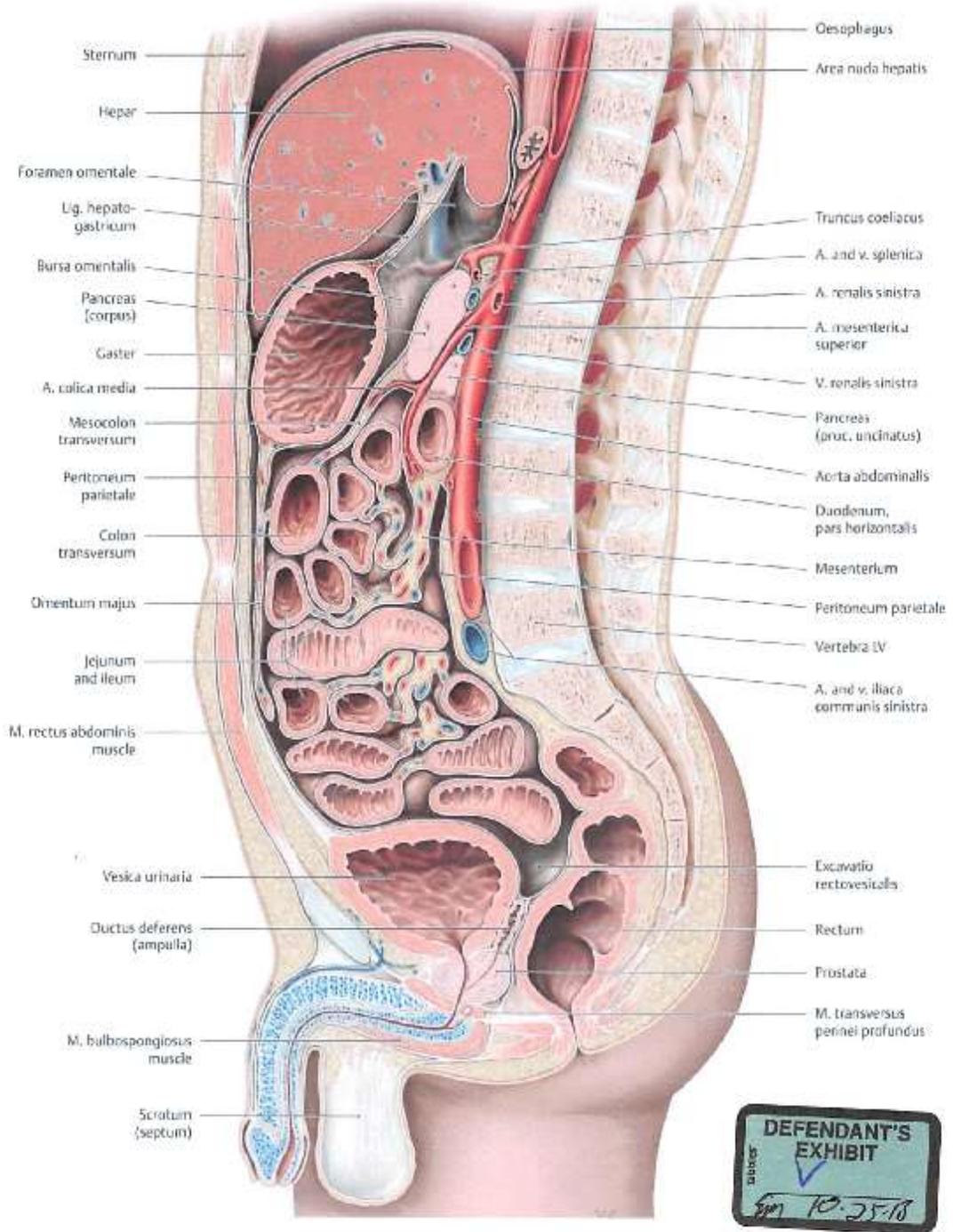
³ The Court of Appeals in its opinion suggested that the award of aggravating circumstances damages was supported by Dr. Killion taking the decedent to surgery in the first place, stating that he "proceeded with the highest risk option of surgery." However, neither Dr. Garber nor Dr. Vitale testified that Dr. Killion breached the standard of care by taking Mr. Rhoden to surgery for the needed TURP. For the Court of Appeals to affirm the award of aggravating circumstances damages at least partially due actions by Dr. Killion which were not even alleged to have been negligent by Plaintiff's experts shows a clear misunderstanding of the facts.

Summary of Roosevelt Rhoden's Examinations, Orders, and Interventions following his TURP on October 16, 2012 to his discharge from Missouri Delta Medical Center on November 6, 2012							
Provider	Examinations Performed	Laboratory Studies Ordered	Imaging Studies Ordered	Medication/IV Fluid Orders	Procedures Performed	Interventions Ordered	Exhibit P-2 Page Numbers, Vol. II-X
Linza Killion, MD	19	18		24		20	614, 617, 630, 638, 658-659, 667, 672, 1743, 1748, 1751, 1752, 1755, 1760, 1764, 1770, 1773, 1774, 1777, 1782, 1785, 1791, 1798, 1801, 1803, 1804, 1807, 1818
Michael Barnes, FNP	2	8	3	5		5	610, 618, 1737, 1740,
Mowaffaq Said, MD	14	23	1	35		35	618-620, 632, 639, 642, 644-645, 652, 657, 660, 662, 663, 667-668, 674, 676, 682, 684, 687, 694, 1364-1365, 1741, 1743, 1753, 1756, 1760, 1767, 1777-1779, 1782, 1789, 1794, 1799, 1806, 1812
Mark Henderson, MD			1		1		591, 620, 695, 1719-1720, 1738,
Kenneth Moy, DO		5	1	3		3	620, 621, 623-626
Kevin Rankin, MD	6	9	8	17	5	21	621, 622, 624, 627, 633, 640, 641, 652, 655, 662, 666, 670, 678, 683, 1366-1367, 1739, 1721-1724, 1745, 1759, 1764, 1772, 1781, 1806-1807
Dale Foster, MD	10	43	10	37		5	632, 635, 638, 661, 664-665, 669, 673, 675-677, 679-681, 1368-1371, 1744, 1748, 1751, 1775, 1784-1785, 1787, 1793, 1796, 1800, 1802
Husam Najjar, MD	18	20	2	13	1	15	592, 629, 632, 634, 636, 638, 641, 645, 647, 653, 656, 659, 660, 665, 667-668, 671-672, 676, 686, 1362-1363, 1718, 1746, 1752, 1755, 1761, 1763, 1764, 1770-1771, 1776, 1781, 1783, 1788, 1792, 1798, 1804, 1812-1813
Ly Phan, MD	2	3				3	633, 635-637, 1749, 1750
Muhammad Shaukat, MD	4	16	3	14			641-644, 646-647, 651, 1757-1758, 1762, 1765
Hollis Tidmore, MD	2						1773, 1774
Robert Perry, MD				2			666
Robert Gardner, Sr., MD	1						1360-1361, 1808
Muhammad Nazeeruddin, MD	3	11	3	3		3	646, 655, 682, 684, 687, 1772, 1805, 1348-1349, 1810-1811
T. Pedigo, APN				2			685

It is true that neither Dr. Rankin nor Dr. Killion ordered the specific tests which Plaintiffs' experts said they should have ordered. However, Dr. Killion and Dr. Rankin immediately responded to Mr. Rhoden's deteriorating condition and took actions to save his life. The medical records which were admitted into evidence, as summarized in the

chart, show that Mr. Rhoden was examined by physicians eighty-one (81) times between the TURP procedure and his transfer to SLU. Dr. Killion examined Mr. Rhoden 19 times, ordered 18 lab studies, ordered medications or fluids to be administered 24 times, and ordered 20 interventions. Dr. Rankin examined Mr. Rhoden six times, ordered nine lab studies, ordered eight imaging studies, ordered medications or fluids 17 times, ordered five procedures, and 21 interventions. Rather than showing a disregard for Mr. Rhoden, the facts of this case are analogous to *Dodson* where the Court found the record did not support the submission of aggravating circumstances damages because the physicians recognized and dealt with complications that arose.

The Court of Appeals also focused on the free air described in the x-rays on October 18, 2012. It noted, correctly, that the chest x-ray showed free air “under the right hemidiaphragm.” It wrongly assumed, however, that it was evident that this was a complication from the TURP procedure. The diagram on the following page, Exhibit V from the Trial, shows the abdominal anatomy. The abdominal cavity is a closed space. The diaphragm is fused to the area *nuda hepatis* which is shown near the top of Exhibit V. The diaphragm is located well above the bladder (shown as the *vescia urinaria*). Any free air which may have escaped from the bladder would have had to have traveled a long distance through a completely closed compartment to settle under the diaphragm. The location of the free air cannot serve as the basis for an award of aggravated circumstances damages.



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Further, Dr. Killion did not disregard the x-ray showing free air. Rather, he called in surgeon Dr. Rankin to review the situation. (Garber Stip. P. 40-41). Dr. Rankin performed a prompt laparotomy and found no evidence of a perforated viscous. While Plaintiffs claim that Dr. Killion and/or Dr. Rankin should have ordered a CT study, the gold standard for dealing with a possible perforated viscous was the laparotomy Dr. Rankin performed. (Tr. 211-212). A CT study would have added no useful information to guide the physicians' treatment. (Tr. 211-212, 239). If a CT study had identified a source of the free air, Dr. Rankin would have needed to open Mr. Rhoden's abdomen to repair the defect causing the leak. *Id.* If a hypothetical CT study had not identified a source of the free air, Dr. Rankin would have had to conduct an exploratory laparotomy to look for the perforation. *Id.* Dr. Garber testified that the free air as shown on the x-ray was a "surgical emergency." (Garber Stip. P. 40). Either way, Mr. Rhoden needed to have a laparotomy so obtaining a CT would have provided no useful information while delaying the needed procedure. That it would have, under Plaintiffs' theory, incidently shown the allegedly misplaced catheter misses the point. The catheter had worked fine and no one suspected that it had been misplaced.

The Court of Appeals also described in its opinion that "the catheter" was found to be outside of the bladder in an ultrasound at St. Louis University Hospital on November 7. What the Court of Appeals missed completely is that "the catheter" shown on the ultrasound at SLU was admittedly not the catheter placed by Dr. Killion after the TURP surgery more than three weeks earlier. Following the surgery, the three-way catheter placed by Dr. Killion worked as intended. Plaintiffs' experts did not challenge the evidence

showing the amount of catheter output, which approximated the input of irrigation fluids. Rather, they went out of their way to argue that there still could have been a problem with the catheter, despite the appearance of functioning. (Tr. 282). But, if the catheter had been placed outside the bladder at the conclusion of the surgery, as Plaintiffs claim, Mr. Rhoden's abdomen would have been filled with many, many liters of fluid and he would have weighed vastly more. (Tr. 367, 562). On October 31, two weeks after the TURP, the floor nurses removed the catheter placed by Dr. Killion and placed a new catheter. (Tr. 514). The ultrasound at SLU found the second catheter displaced, not the catheter placed by Dr. Killion.

Not only does the Court of Appeals' opinion show a serious misunderstanding of the facts in the record, and their significance, it further evidences a lack of understanding of the types of actions by a defendant that support an award of punitive damages. The Court of Appeals stated that Dr. Killion had many opportunities to "right" the medical negligence with "different types of tests." It noted, "[h]ad Dr. Rankin run any of the tests to determine whether the bladder was perforated and the catheter was outside of the bladders before conducting surgery, it is likely that surgery would not have been necessary." Further, the court stated, "Here, substantial evidence was presented that both Dr. Rankin and Dr. Killion failed to order tests that would determine whether Mr. Rhoden's bladder was perforated during the surgery." Finally, the Court of Appeals noted,

Rather than investigate, either before or after surgery, the hospital's physicians did nothing even though they knew Mr. Rhoden's condition

continued to deteriorate dramatically and a bladder perforation was ruled out on the bare assertion by Dr. Killion that he would not have done that.

All of these statements miss the point. It is not that different tests could or should have been ordered that permits the submission of aggravating circumstances damages. It is whether Dr. Killion and Dr. Rankin made a meaningful response. The Court of Appeals entirely ignored the tests and treatments Dr. Killion, Dr. Rankin, and many other physicians actually ordered in response to Mr. Rhoden's post-surgical course. They ordered many tests and procedures, just not the ones Plaintiffs alleged they should have. Under the guidance of *Dodson*, construing every fact in the Plaintiffs' favor, the physicians were at most ordinarily negligent. For aggravating circumstances damages to be warranted, Dr. Killion and Dr. Rankin would need to have failed to respond to Mr. Rhoden's condition in any meaningful way.

The facts of this case differ dramatically from those where Missouri Courts have upheld punitive damage in medical malpractice cases. In *Bell v. Redjal*, 569 S.W.3d 70, 90-91 (Mo. App. E.D. 2019), the Court of Appeals upheld the submission of punitive damages for multiple egregious instances of conscious disregard for the patient's safety. First, the physician totally disregarded a diagnostic test that showed surgery was unnecessary. *Id.* A bone scan showed no loose orthopedic hardware, but the physician completely disregarded the test, incorrectly noted in the medical record that the patient had loose components, and did the surgery anyway. *Id.* Here, unlike in *Bell*, neither Dr. Garber nor Dr. Vitale testified that Dr. Killion deviated from the standard of care by performing the TURP. Nor did any test ordered suggest the surgery was unnecessary.

Next, the *Bell* Court found punitive damages were warranted for the physician's complete disregard of a warning not to use a power corkscrew with the implanted medical device. *See id.* at 91. An employee of the device manufacturer had specifically warned the physician that using a power corkscrew to remove a polyethylene liner, instead of the tool provided by the company, would damage the locking mechanism of the device and render it unable to accept a new liner. *Id.* Despite this warning, the physician used the wrong tool, drilled into the device, damaged the locking mechanism, and rendered the device inoperable. *Id.* This required replacement of the device and removal of significant portions of the plaintiff's bone. *Id.* Neither Dr. Killion nor Dr. Rankin rejected specific warnings prior to performing the procedures.

The physician in *Bell* also fractured the patient's pelvis and attempted to hide it. *Id.* He failed to inform the plaintiff of the fracture and failed to list the fracture on the discharge diagnoses, despite: 1) admitting to another physician that he cracked the pelvis, and 2) seeing postoperative x-rays showing the fracture. *Id.* The Court found such evidence supported the admission of punitive damage instructions. *Id.* Here, neither Dr. Killion nor Dr. Rankin knew of any alleged errors or complications and nor did they conceal anything from Mr. Rhoden.

The *Bell* Court also found punitive damages warranted due to the physician's failure to treat the fractured pelvis. *Id.* at 92. He claimed that he believed the fracture would heal on its own because the plaintiff would be non-weight bearing. *Id.* However, the same physician ordered the plaintiff to be weight bearing during his recovery, in direct contradiction to his stated reasoning. *Id.* Similarly, the physician actively ordered plaintiff

to undergo weight bearing physical therapy despite the fractured pelvis and his worsening condition. *Id.* The physician’s records contained numerous inaccuracies. *Id.* Here, neither Dr. Killion nor Dr. Rankin ordered Mr. Rhoden to undergo treatment which would actually worsen his condition, despite knowing that it was not warranted. *Bell* presented a constellation of egregious actions and inactions not present in this case.

At trial, Plaintiffs argued that the circumstances here resemble those in *Koon v. Walden*, 539 S.W.3d 752 (Mo. App. E.D. 2017). There, the Court of Appeals upheld a punitive damages award against a physician who prescribed “colossal” amounts of opioids to a patient, despite signs of addiction. The physician in *Koon* knew “that there was a high degree of probability that his conduct would result in injury.” *Id.* at 773. The physician knew the risks associated with prescription of the unusually high amounts of opioids. *Id.* His decision to prescribe increasingly higher doses over several years—without adequate discussions with [plaintiff] about the risks, without any monitoring system in place, and despite warning signs that [plaintiff] had become dependent and likely addicted—demonstrated a conscious disregard for [plaintiff’s] safety and the safety of others. *Id.* The “pill mill” physician in *Koon* prescribed three different opioids at the same time as other sedatives in a “lethal combination.” *Id.*

Neither of Plaintiffs’ experts testified that Dr. Killion or Dr. Rankin were aware, or should have been aware, that their treatment of Mr. Rhoden had a high degree of probability of injuring Mr. Rhoden. Rather, they attempted to treat Mr. Rhoden’s urinary condition and responded appropriately to his post-operative complications. Neither Dr. Garber nor Dr. Vitale testified that either Dr. Killion or Dr. Rankin should have known that failing to

order the tests they claim he should have had a high degree of probability of injuring Mr. Rhoden. They testified that these alleged failures fell below the standard of care, not that they were likely to cause injury. Moreover, there was no evidence that Dr. Killion or Dr. Rankin failed to have adequate discussions about risks with Mr. Rhoden or otherwise take appropriate steps to manage risks. No reasonable jury could find that Dr. Killion or Dr. Rankin should have known that their actions or inactions would result in injury to Mr. Rhoden.

There are almost no reported cases in Missouri which show even the submission of punitive damages against healthcare providers in medical negligence cases. Those cases where punitive damages or additional damages for aggravating circumstances were awarded involved malfeasance by the defendants which is simply not present here. *See e.g. Koon v. Walden*, 539 S.W.3d 752 (Mo. App. 2018) (prescription of opioids in unusually high amounts without discussions of risks or monitoring system justified punitive damages); *Oyler v. Hy-Vee, Inc.*, 539 S.W.3d 742, 745-48 (Mo. App. W.D. 2017) (aggravating circumstances damages against a pharmacy upheld when a patient died as a result of an overdose of prescription medication and the pharmacy's corporate representative admitted the pharmacist failed to conduct a review of the patient's new prescription before dispensing it, despite being required to review it twice); *Schroeder v. Lester E. Cox Medical Center, Inc.*, 833 S.W.2d 411, 419-423 (Mo. App. S.D. 1992) (aggravating circumstances damages against a pharmacy warranted when a patient died from an improperly compounded cardioplegic solution used during the patient's open-heart surgery and the pharmacy had taken no steps to ensure its pharmacists monitored the

compounding machine while mixing the solution, despite a warning in the manufacturer's manual).

In summary, the Trial Court should not have submitted the claim for additional damages for aggravating circumstances to the jury and should have granted a JNOV as to the additional damages awarded in Verdict B. The Trial Court stated at the time that Plaintiffs were over-reaching in asking for aggravating circumstances damages. No Missouri appellate court—other than the Court of Appeals in this case—has upheld aggravating circumstances damages or punitive damages on similar facts. The record contains no evidence to support the submission of aggravating circumstances to the jury. This is the case under both the instruction actually given by the Court and under the language from Section 538.210 which sets forth the correct standard. In the alternative, the Trial Court should have granted a new trial on this issue as any award of damages in Verdict B was against the weight of the evidence.

SECOND POINT RELIED ON

The Trial Court erred in submitting Instruction No. 11 for aggravating circumstances damages and in denying Appellants' Motion for New Trial because it misstated the law. Section 538.210.8 states that the standard for punitive damages in medical negligence cases is "willful, wanton or malicious," not "complete indifference to or conscious disregard for the safety of others" as provided in the pattern MAI instruction.

A. Standard of Review.

The standard of review for giving or failing to give proffered jury instructions is *de novo*. *Marion v. Marcus*, 199 S.W.3d 887, 893 (Mo. App. W.D. 2006); Rule 70.02(a). The

Court reviews the Trial Court's instructions and evaluates whether the instructions were supported by the evidence and the law. *Id.* at 894. This Court should reverse when the error resulted in prejudice and materially affected the merits of the action. *Id.*

B. Argument.

Defendant MDMC is entitled to a new trial on the award of additional damages for aggravating circumstances on the basis of instructional error. Instruction No. 11, based on MAI 10.07 and modified, improperly used the former standard for punitive damages of "complete indifference or conscious disregard." Defendant properly preserved this error by objecting to Instruction No. 11 at trial and raising this issue again in its motion for new trial and/or JNOV. (TR. 733; LF 152, 156).⁴

⁴ Respondents will contend that Petitioner did not preserve this issue. The record shows otherwise. The parties conducted a very lengthy argument in front of the Trial Court regarding the appropriate standard for aggravating circumstances damages: "complete indifference to or conscious disregard" as set forth in MAI 10.07 or "willful, wanton or malicious" as set forth in Section 538.210, RSMo. (Tr. 719-721). Appellant's trial counsel stated, "In addition, since this is a medical malpractice case it comes under Chapter 538, even though it is wrongful death, and as such this is a completely different standard for aggravating circumstances or punitive damages than there is in a regular civil tort case." (Tr. 718-719). This lengthy argument included a discussion of *Koon v. Walden*, 539 S.W.3d 752 (Mo. App. E.D. 2017). (Tr. 719-720, 726-729). The Trial Court understood

[footnote continued]

exactly the issue he needed to decide. The Trial Court stated, “So they overruled that - - I haven’t read that case. That case overruled 538.210, which said the health care provider must demonstrate willful, wanton and malicious misconduct.” (Tr. 719-720). The following exchange occurred between the Trial Court and Respondents’ Counsel:

THE COURT: I think if that is the only thing you allege was a conscious disregard that resulted - -

MR. DOWD: No it is not.

THE COURT: - - malicious conduct, willful and wanton - -

MR.DOWD: Is conscious disregard. That is what the law is.

THE COURT: Okay.

(Tr. 725). And again later,

THE COURT: Okay. Does the instruction that you are offering use the words willful, wanton and malicious misconduct?

MR. DOWD: No, sir.

THE COURT: This case I have here says you don’t have to use those words.

MR. DOWD: Right.

(Tr. 726). And again later,

THE COURT: This claim that is complete indifference and conscious disregard is a lesser standard than willful, wanton and malicious. Okay. I’m

[footnote continued]

trying to read this. Does it say that that correct instruction to be given does not include the language from the statute?

MR. DOWD: It is in there. I gave you my copy.

THE COURT: Do you have a copy?

MR. DOWD: What they did was the defendant made the same objection in that case. And the Court put set out the instructions that was given by the trial judge. And the Court cited that. And got to - - Okay. It is right before the discussion about the submissibility of punitive damages.

THE COURT: Page?

MR. DOWD: 773. It is actually 772. The last paragraph under the standard for submitting punitive damages in the medical malpractice case. It says that "After comparing willful, wanton malicious with the conscious disregard, reckless disregard, conscious disregard, because these words and phrases are essentially synonymous in this context. An act that is found to have been done with complete indifference to or with conscious disregard for the safety of others, is also an act constituting willful, wanton or malicious conduct. The words used in MAI 10.07 correctly set forth the substance of the applicable law in Section 538."

THE COURT: That is what I am looking for.

MR. DOWD: It is right here.

[footnote continued]

THE COURT: Yours is a different one than mine.

MR. DOWD: Yes.

THE COURT: Yes. I will give your instructions. I think I had a law professor in law school that says that pigs get fat and hogs get slaughtered.

(Tr. 726-28)

Appellant challenged Instruction No. 11 on the basis that the instruction should include the standard in Section 538.210. The Trial Court understood this to be the issue. Respondents' counsel did as well, and admitted that Appellant had made the same objection to the MAI instruction raised in *Koon v. Walden*.

In the instruction conference, Appellant's counsel objected to the instructions involving punitive damages, Instructions No. 5 and No. 11, and specifically objected to Instruction No. 11 by stating, "Judge, I object to the submission of punitive damages or aggravating circumstance and particularly with the standard of conscious disregard to the jury." (Tr. 730-731, 733). In regard to Instruction No. 11, the Trial Court specifically identified it as being modified by the language used in *Koon v. Walden*. (Tr. 733). In both instances, the Trial Court overruled the objections. (Tr. 731, 733). The parties had previously argued the issue of the appropriate standard *ad nauseum*. There was no reason to conduct the same argument, in front of the same judge, again just to have it marked as being in the "Instruction Conference." Appellant's objection in the instruction conference

Instruction No. 11 reads as follows:

If you find in favor of Plaintiff John Henry Rhoden and Dorothy Jean Rhoden and against Missouri Delta Medical Center, and if you believe that:

First, Dr. Killion or Dr. Rankin failed to run a CT scan of the abdomen and pelvis, a complete retroperitoneal ultrasound, or a cystogram on Roosevelt Rhoden, and

Second, Dr. Killion or Dr. Rankin knew or had information from which Dr. Killion and Dr. Rankin, in the exercise of ordinary care, should have known that such conduct created a high degree of probability of injury, and

Third, Dr. Killion or Dr. Rankin thereby showed complete indifference to or conscious disregard for the safety of Roosevelt Rhoden, then, in Verdict A, you may find that Defendant Missouri Delta Medical Center liable for damages for aggravating circumstances.

If you find that Defendant Missouri Delta Medical Ceteris [*sic*] liable for damages for aggravating circumstances in this stage of the trial, you will

[footnote continued]

referred back to the lengthy argument held mere minutes before. Appellant properly objected to the damages instruction, stated the basis of the objection, and the Court and Respondents understood the objection. Appellant raised the issue again in the Motion for New Trial. Appellant properly preserved this issue for appeal. [end of footnote]

be given further instructions for assessing the amount of damages for aggravating circumstances in the second stage of the trial.

The phrase “ordinary care” as used in this instruction means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

(LF Doc. 153).

Since 2005, Sec. 538.201.8 provides that the standard for punitive damages in medical negligence cases is “willful, wanton or malicious.” The MAI unfortunately still uses the “old” standard. A trial court should use an MAI instruction unless it misstates the law. *Goralnik v. United Fire and Casualty Co.*, 240 S.W.3d 203, 209 (Mo. App. E.D. 2007). In arguing for the lesser indifference standard, Plaintiffs relied on the majority opinion in *Koon*, 539 S.W.3d at 772, which found the terms “willful, wanton or malicious misconduct” to be essentially synonymous with the phrasing in MAI 10.07 of “complete indifference to or conscious disregard for the safety of others.” The finding of equivalency between the two standards in *Koon* has resulted in mischief and this Court should take this opportunity to correct the *Koon* Court’s mistaken analysis and require that the MAI should be modified and the statutory standard used in medical liability cases.

The majority in *Koon* improperly relied on this Court’s discussion of MAI 10.07 in *Dodson v. Ferrara*, 491 S.W.3d 542 (Mo. banc 2016). The *Koon* majority wrongly treated the analysis of the evidence in *Dodson* to be a determination by this Court that there is no difference between the terms “willful, wanton or malicious conduct” and “complete indifference to or conscious disregard for the safety of others.” *Id.* However, as the *Koon*

concurrency pointed out, the Legislature specifically amended Section 538.210 to make clear that punitive damages in medical malpractice cases require a showing of “willful, wanton or malicious conduct.” *Id.* at 775-776. While the concurrency did not directly question whether the majority could rely on the discussion in *Dodson*, it did point out that the difference between the statutory language and MAI 10.07 was not raised in *Dodson*. *Id.* at 777.

The concurrency in *Koon* noted that, in the common understanding of the two phrases, “willful, wanton or malicious” means something different than “complete indifference to or conscious disregard for the safety of others.” *Id.* at 775. It also noted that, when the Legislature changes a statute, the change is presumed to have significance. *Id.* at 776. As noted by the concurrency in *Koon*, this Court in *Dodson* did not consider the differences between MAI 10.07 and Section 538.210.8. This Court now has the opportunity to clarify this issue. The Legislature meant something when it changed the standard for punitive damages in medical negligence cases in 1986, and it will be a very simple matter to substitute the correct statutory language to MAI 10.07 for use in medical liability cases.

Rather than submitting the incorrect, less-demanding standard in the MAI, the Trial Court should have used the proper standard contained in Sec. 538.210. The Trial Court should have recognized that, despite the language of MAI 10.07 and the holding in *Koon*, the statutory language prevails over the MAI. The phrase “willful, wanton or malicious conduct” means something different to the average juror than “complete indifference to or conscious disregard for the safety of others.” The prejudice to Appellant in this case is

clear. “[C]omplete indifference to or conscious disregard for the safety of others” is a less demanding standard than “willful, wanton or malicious conduct,” thus the jury did not receive instruction on the proper standard. The Respondents fought vociferously for the use of the lesser standard for obvious reasons. For Respondents to now claim that the two standards are essentially the same is curious given their assiduous arguments made to convince the Court to use the lower standard.

The Trial Court erred in using the older, less-demanding standard in the pattern instruction because the MAI approved instruction ignores the actions of the Missouri Legislature in passing Section 538.210, RSMo. This instructional error, at minimum, requires that this Court reverse the aggravating circumstances award and remand for a new trial. Even the Trial Court thought that Respondents’ position on this point was very iffy as suggested by his “pigs get fat, hogs get slaughtered” comment during the instruction conference.

THIRD POINT RELIED ON

The Trial Court erred in submitting Verdicts A and B to the jury and in denying Appellant’s Motion for Directed Verdict and for JNOV and the alternative Motion for New Trial because Plaintiffs failed to submit evidence that Dr. Killion’s or Dr. Rankin’s alleged negligence caused Roosevelt Rhoden’s death in that Plaintiffs’ experts Dr. Vitale and Dr. Garber failed to testify that the medical procedures performed by Dr. Killion and/or Dr. Rankin caused Roosevelt Rhoden to die when he did.

A. Standard of Review.

“Whether a plaintiff made a submissible case is a question of law subject to *de novo* review.” *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011). This Court must determine whether plaintiff made a submissible case on causation by examining whether the plaintiff “presented substantial evidence for every fact essential to liability.” *Davolt v. Highland*, 119 S.W.3d 118, 123 (Mo. App. W.D. 2003). “In determining whether Plaintiff made a submissible case, [this Court] view[s] the evidence and all reasonable inferences drawn therefrom in the light most favorable to Plaintiff, and [this Court] disregard[s] all contrary evidence and inferences.” *Id.* at 124.

B. Argument.

MDMC preserved the issue of whether Plaintiffs made a submissible case by raising the issue in its motions for directed verdict and in its motion for new trial/JNOV. “In wrongful death actions, plaintiffs must establish that, but for the defendants’ actions or inactions, the patient would not have died.” *Sundermeyer v. SSM Reg'l Health Servs.*, 271 S.W.3d 552, 554 (Mo. banc 2008) (emphasis added).

Plaintiffs’ expert witnesses did not establish that fact. Mr. Rhoden lived approximately one year after his TURP surgery. Evidence that a patient may have lived longer with a different treatment is insufficient to establish that a physician caused a patient’s death. *Mickels v. Danrad*, 486 S.W.3d 327, 328 (Mo. banc 2016). “If the death may have resulted from either of two causes, for one of which the defendant would be liable and for the other the defendant would not be liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the death.”

Mueller v. Bauer, 54 S.W.3d 652, 656 (Mo. App. E.D. 2001). “When an expert merely testifies that a given action or failure to act ‘might’ or ‘could have’ yielded a given result, though other causes are possible, such testimony is devoid of evidentiary value.” *Baker v. Guzon*, 950 S.W.2d 635, 646 (Mo. App. E.D. 1997). “A very good chance” is not the same as saying “but for” the negligence of a physician, Mr. Rhoden would have lived. See *Graham v. Ozark Mountain*, 181 F.3d 924, 926 (8th Cir. 1999). Expert testimony is insufficient when the expert merely testifies that something *might* have occurred had Defendant acted differently. See *Nadolski v. Ahmed*, 142 S.W.3d 755, 761 (Mo. App. 2004).

This case presents the Court with an opportunity to clarify what “but for” causation means in a medical negligence case. There is an apparent conflict in the case law. “In wrongful death actions, plaintiffs must establish that, but for the defendants’ actions or inactions, the patient would not have died.” *Sundermeyer v. SSM Reg’l Health Servs.*, 271 S.W.3d 552, 554 (Mo. banc 2008) (emphasis added). The *Sundermeyer* Court cited to a portion of *Harvey v. Washington*, 95 S.W.3d 93, 96 (Mo. banc 2003), for the proposition that negligence can combine with other causes, including independent intervening causes, and not run afoul of the requirement of “but for” cause. However, in *Mueller v. Bauer*, 54 S.W.3d 652, 656 (Mo. App. E.D. 2001), the Court of Appeals stated, “If the death may have resulted from either of two causes, for one of which the defendant would be liable and for the other the defendant would not be liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the death.”

In *Mueller*, the decedent suffered from a pre-existing condition which could have caused the profound bradycardia which ultimately killed the decedent. *Id.* at 655. The plaintiffs alleged that an antiarrhythmic drug cause the bradycardia. *Id.* at 654. The plaintiffs' expert could not state, to a reasonable degree of medical certainty, whether the drug, the pre-existing condition, or another condition ultimately caused the death. *Id.* at 655. There is, therefore, a clear split in authority relating to the central issue of what constitutes "but for" causation. While this Court in *Sundermeyer* distinguished *Mueller* on the issue of whether the expert's testimony was speculation, it did not overrule or attempt to reconcile the conflicting requirements for causation.

Plaintiffs' evidence here did not establish direct, "but for" causation between Dr. Killion allegedly misplacing the catheter and Mr. Rhoden's death a year later. If *Mueller* is the correct standard, then Plaintiffs were required to adduce evidence that his co-morbid conditions did not cause Mr. Rhoden's death while at the same time adducing evidence that the alleged negligence did cause his death. Neither Dr. Garber nor Dr. Vitale's testimony accomplished this. Dr. Garber testified that, if the testing Dr. Killion should have ordered would have discovered that the catheter was out of place, it would have improved his postoperative course. (Garber Stip. 84-85). He opined that the catheter was out of place for a long time, and the longer the time, the more damage done. *Id.* at 85. He testified that the post-operative infections suffered by Mr. Rhoden were not caused by the TURP procedure itself, but were "kicked off" by the allegedly misplaced foley catheter. *Id.* at 97. He also testified that Mr. Rhoden developed respiratory failure, peritonitis, sepsis, and congestive heart failure as a result of the misplacement. *Id.* at 99-100. While

Dr. Garber testified that the alleged breaches of the standard of care caused or contributed to cause Mr. Rhoden's postoperative problems and death on October 31, 2013, he did not address in any way the multiple co-morbidities Mr. Rhoden was suffering that were as equally likely to have caused his death. *Id.* at 112, 123-24. He did not testify that "but for" the alleged negligence of the Defendants, Mr. Rhoden would not have died.

Dr. Vitale admitted that Mr. Rhoden suffered from multiple diseases prior to the surgery at issue including diabetes, hypertension, heart disease, hypercholesterolia and anemia, chronic renal disease, chronic lung disease, and obesity. (Tr. 276-77). In the area of causation, Dr. Vitale testified that the allegedly misplaced catheter caused Mr. Rhoden's post-operative complications and need for post-operative care, including hospitalization, home health, and nursing home care. (Tr. 325, 331-34, 337-38). Dr. Vitale admitted that the death certificate from the coroner lists the cause of death as "acute kidney injury, chronic kidney disease, cardiovascular accident with dysphagia, hypertension, obesity." (Tr. 339). Dr. Vitale then testified that the acute kidney injury and chronic kidney disease were caused by the allegedly misplaced catheter almost a year earlier. (Tr. 339-40). He testified that the acute respiratory failure and pulmonary edema, identified in the discharge/death note from St. Francis Medical Center, were also caused by the allegedly misplaced catheter a year earlier. (Tr. 342) Dr. Vitale then testified that the alleged misplacement caused Mr. Rhoden's health problems and ultimately his death, and, if the physicians had done the testing he testified that they should have, he testified, "I think his hospital course would have been dramatically different, much better. I think he would have

survived, yes.” (Tr. 351, 358). He did not state that the cardiovascular accident, hypertension, and obesity did not cause the death, however.

Mr. Rhoden suffered from chronic kidney disease, diabetes, obesity, respiratory problems (COPD), and hypertension prior to the TURP procedure performed by Dr. Killion. (Tr. 480-81). There was also evidence that the specific postoperative complications Mr. Rhoden suffered--sepsis respiratory complications, kidney complications--were caused by a GI tract perforation, not a perforated bladder. (Tr. 359-60). Dr. Rankin specifically testified that there is no way that his surgery could have killed Mr. Rhoden over a year later. (Tr. 606).

The Court of Appeals contended that Appellant tried to argue that its evidence was more persuasive than Respondents’. In doing so, that Court completely ignored the undisputed evidence in the record of Mr. Rhoden’s multiple co-morbid conditions. Respondents’ own experts testified that Mr. Rhoden suffered from multiple co-morbid conditions prior to the TURP procedure performed by Dr. Killion including diabetes, hypertension, heart disease, hypercholesterolia and anemia, chronic renal disease, chronic lung disease, and obesity. (Tr. 276-77). Further, they admitted that the causes of death listed on the discharge from St. Francis Medical Center and the death certificate show the causes of death to include acute kidney injury, chronic kidney disease, cardiovascular accident with dysphagia, hypertension, obesity, respiratory failure, pulmonary edema, accelerated hypertension, and heart problems. (Tr. 339, 341-342). Thus, Respondents’ own evidence established that there were multiple possible causes of death for Mr. Rhoden: his pre-existing comorbid conditions, which included kidney disease, hypertension, and heart

disease, and those same conditions described by both St. Francis Medical Center and the coroner as causes of death. Given the multiplicity of potential causes of death and the long period of time between the care at issue and the decedent's death, Respondents' experts needed to rule out the other causes.

MDMC's expert witness Dr. Salzman testified that Mr. Rhoden's illnesses at MDMC had resolved by the end of December 2012. (Salzman Stip. P. 22, 46-47). Dr. Salzman testified that the causes of Mr. Rhoden's death were a stroke he suffered in December 2012 and the respiratory problems resulting from his pre-existing COPD, a respiratory disease caused by Mr. Rhoden's smoking that made it more difficult for him to breath and more likely to get pneumonia. *Id.* at 24-25. Further, the diseases Mr. Rhoden suffered, hypertension, diabetes, heart failure, etc., occur as part of the aging process. *Id.* at 25-26. Dr. Salzman pointed out that the acute kidney disease noted on the St. Francis Medical Center discharge note means that Mr. Rhoden suffered a sudden injury within a matter of hours or days as opposed to a chronic condition which had existed for a long time. *Id.* at 26-27. Dr. Salzman also noted that the chronic kidney disease listed as a cause of death had existed long before the admission to MDMC in October 2012. *Id.* at 26-27.

The medical records indicated that Mr. Rhoden suffered a stroke while admitted to Landmark in December 2012, long after his treatment at MDMC, and that he showed no signs of a stroke while at MDMC. *Id.* at 30. Mr. Rhoden had a high risk for stroke due to his many illnesses, including history of smoking, high blood pressure, and high cholesterol. *Id.* In fact, the care Mr. Rhoden received beginning in December 2012, after the TURP surgery, related almost entirely to complications from his stroke. *Id.* at 31-32. Neither of

Plaintiffs' experts testified that the alleged misplacement of the catheter and its sequelae had anything to do with the subsequent stroke.

The evidence at trial demonstrated that there were at least two likely immediate causes of Mr. Rhoden's death, the stroke in combination with other comorbid conditions identified by Dr. Salzman and the alleged negligence of Dr. Killion and Dr. Rankin identified by Dr. Garber and Dr. Vitale. In these situations, it is Plaintiffs' obligation, as required by *Mueller*, 54 S.W.3d at 656, to adduce expert testimony that not only did the defendant's negligence cause the decedent's death, but that the other potential causes did not. Plaintiffs' experts, Dr. Vitale and Dr. Garber, failed to testify that "but for" the alleged negligence of Dr. Killion and Dr. Rankin, Mr. Rhoden would not have died when he did.⁵ Plaintiffs' expert testimony, then, did not meet the required "but for" standard, and Plaintiffs did not make a submissible case on causation. At best, Plaintiffs' evidence on causation leaves the cause of injury in the realm of speculation and conjecture. *See Wright*, 62 S.W.3d at 527; *see also Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 880, 882 (Mo. Ct. App. 1985). Plaintiffs' evidence did not support the verdict against MDMC on both Verdicts A and B. The Court should recall that Plaintiffs brought only a wrongful death claim. Plaintiffs had to prove that "but for" the alleged negligence of

⁵ The Trial Court also made a serious and highly prejudicial mistake by excluding the testimony of Dr. Garber admitting that, if the TURP surgery had never occurred, he could not say when Mr. Rhoden would have died. The exclusion of this evidence (discussed in Point Five) compounds the problems discussed in this point on causation.

MDMC, Mr. Rhoden would not have died when he did a year later. They failed to offer any evidence on that point.

The Trial Court should have granted a JNOV as to the issue of causation on the claims submitted on both Verdicts A and B and entered judgment in favor of Defendant MDMC and against Plaintiffs and granted a conditional new trial on these claims. This Court should reverse the Verdicts A and B and render a judgment for Defendant Missouri Delta Medical Center. In the alternative, if the Court finds that there was some evidence to support “but for” causation, the finding of causation was nonetheless against the weight of the evidence and Defendant is therefore entitled to a new trial.

FOURTH POINT RELIED ON

The Trial Court erred in permitting Plaintiff’s expert Dr. Vitale to testify at trial because he was not a qualified expert witness in that he had not actively practiced within five years prior to the trial.

A. Standard of Review.

Evidentiary rulings are generally left to the discretion of the trial court. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo. banc 2011). An exception exists as to whether an expert is qualified pursuant to statute. *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 n. 2 (Mo. banc 2014). Thus, a trial court errs by failing to follow a statute which sets forth the qualifications of a medical expert to testify. *Id.*; *Kivland*, 331 S.W.3d at 311. This Court’s review is *de novo*, as the Trial Court failed to apply the expert witness requirements in Section 538.225 and further elucidated by this Court in *Hink v. Helfrich*, 545 S.W.3d 335 (Mo. banc 2018). *See Lozano*, 421 S.W.3d at 451 n. 2.

B. Argument.

This Court should further grant MDMC a new trial because the Trial Court erred in allowing Plaintiffs' expert Dr. Vitale to testify. Dr. Vitale, a high school friend of Plaintiffs' counsel, admittedly had not practiced medicine for more than five years prior to the time of trial. MDMC moved *in limine* to exclude his testimony. (LF Doc. 129). MDMC also objected to his testimony at trial which was also overruled. (Tr. 321-22, 348). Appellant preserved this issue for review in its Motion for New Trial/JNOV. (LF Doc. 152, 156).⁶

⁶ Respondents will contend that Appellant did not preserve this issue for appeal. Appellant objected to Dr. Vitale's opinion testimony on this basis PRIOR to Dr. Vitale offering his opinions, after Dr. Vitale had offered his initial testimony relating to his qualifications and what he had reviewed, and after he had given a long summary of Mr. Rhoden's care in which he did not express opinions as to causation or breaches of the standard of care. (Tr. 321-322). The exact testimony follows:

Q. Okay. Do you believe, do you have an opinion and all of the opinions I'm going to ask you are based upon a reasonable degree of medical certainty. Do you understand that? So I don't have to repeat that every time.

A. Yes.

Q. If there is any opinions you could have that is not within that standard, if it is possible or could, or those types of things, please indicate what is possible as opposed to what is probable.

[footnote continued]

A. Okay. Yes.

Q. Do you have an opinion what the cause of the fluid collection was?

A. Yes.

MR. JAMES HENNELLY: Your honor, I would like to renew my objection from the original Motion in Limine.

THE COURT: Which number was that?

MR. JAMES HENNELLY: On the qualification.

THE COURT: I will overrule the objection. Go ahead, sir.

(Tr. 321-322). Dr. Vitale then proceeded to offer his causation opinions. (Tr. 322-348).

Then, on page 348, Respondents' counsel asked:

Q. Thank you. I'm going to ask you some opinion question and we can do this in 15 minutes and we will be done I believe. Can I take those exhibits?

Doctor, these are going to be so-called standard of care questions that I am going to be asking you now.

MR. JAMES HENNELLY: I would like to renew my Motion in Limine objection from pre-trial.

THE COURT: I overruled that.

MR. JAMES HENNELLY: May that be a continuing objection?

[footnote continued]

THE COURT: Continuing objection on behalf of the Defendant.

(Tr. 348). It was probably unnecessary for Appellant's counsel to again state the objection, as he had raised the issue minutes before and the Court had overruled the same objection. However, out of an abundance of caution, Appellant again restated the objection. Clearly, the Trial Court understood the basis of the objection as Appellant renewed the objection made just a few minutes earlier relating to Dr. Vitale's qualifications as raised in the Motion in Limine. The Trial Court again overruled the objection. (Tr. 348). Appellant specifically and timely objected to Dr. Vitale's opinion testimony on both causation and standard of care on the basis that he was not qualified. The Trial Court overruled the objections. Appellant raised the issue again in the Motion for New Trial. Appellant fully-preserved this issue for appellate review.

The Court of Appeals incorrectly found that this issue was not preserved. In reaching this conclusion, it overlooked the testimony cited above as well as the context of the objections to Dr. Vitale's testimony. The Trial Court knew of, and had previously overruled, MDMC's motion in limine regarding Dr. Vitale's qualifications to testify. MDMC's counsel knew the Trial Court was unlikely to change his mind as to the objection. Thus, counsel stating, "I renew my objection from the original Motion in Limine" and the further description of "on the qualification" sufficed to apprise the Trial Court as to the objection without unduly injecting the issue in front of the jury. The Court of Appeals' finding that Appellant did not preserve this issue conflicted with the proceedings in the

Missouri law is clear that an expert witness in a medical malpractice action must practice substantially the same specialty as the defendant and be actively practicing or within five years of retirement to meet the minimum Missouri Health Care Affidavit requirements. *See* Section 538.225, RSMo.

In *Hink*, this Court found that the expert qualification requirements in Section 538.225 are the same as the qualification requirements for experts to testify at trial. *Id.* at 340. This Court affirmed an Order dismissing that case due to the plaintiff's failure to file a healthcare affidavit. *Id.* at 338. On appeal, Hink argued against the constitutional validity of Section 538.225, in part, because (according to Hink) the statute restricts the definition of a 'legally qualified healthcare provider' in a way that disqualifies experts who would otherwise be able to make a submissible case at trial from supplying the opinion supporting an affidavit. *Id.* at 336-37. Hink essentially argued that the requirements for providing a statutory affidavit are more strict than for a medical witness to be able to testify at trial.

This Court, however, found that the opposite is true. Reaffirming *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503 (Mo. 1991), the Court in *Hink* compared the affidavit requirements to the analysis applicable to traditionally-recognized procedures like summary judgment and directed verdicts. *Hink*, 545 S.W.3d at 339. The "affidavit

[footnote continued]

trial court. Both parties had argued this issue previously and fully understood the basis of the objection. [end of footnote]

requirement simply ‘parallels the practice already prescribed for all civil actions and is hardly more onerous to the right to trial by jury.’” *Id.* at 339-40; *see also Mahoney* at 508. Further citing to *Mahoney*, this Court in *Hink* court elaborated: “In medical malpractice actions, the substantive law requires a plaintiff to ‘prove by a qualified witness that the defendant deviated from an accepted standard of care. Without such testimony, the case can neither be submitted to the jury nor be allowed to proceed by the court.’” *Hink*, 545 S.W.3d at 341 (quoting *Mahoney* 807 S.W.2d at 510).

The *Hink* Court further noted that *Mahoney* held that the affidavit requirement is consistent with the substantive law because the purpose of requiring an “affidavit of merit” under Section 538.225 is to prevent frivolous medical malpractice lawsuits when plaintiffs cannot put forth adequate expert testimony to support their claims. *Id.* at 342. For this reason, “section 538.225’s affidavit requirement ‘denies no fundamental right, but at most merely [re]design[s] the framework of the substantive law to accomplish a rational legislative end,’ of ‘protect[ing] the public and litigants from the cost of ungrounded medical malpractice claims[.]’” *Id.* at 339 (quoting *Mahoney* 807 S.W.2d at 507, 510). (citations omitted).

Therefore, because this Court held in *Hink* that the standards for providing a report to support an affidavit of merit and to testify as a medical expert at trial are the same, an expert must have therefore practiced in substantially the same specialty and be actively practicing or practicing within the past five years to provide a written opinion in support of a statutory affidavit of merit and to offer expert testimony at trial. However, there is a recognized exception: “the [health care affidavit] statute does not require that an individual

providing the opinion be qualified to testify as an expert at trial ...” *Degand v Barnes-Jewish Hosp.*, No. 1022-CC11914, 2011 WL 11545146, at *2 (Mo. Cir. Apr. 08, 2011). In other words, a physician who is qualified to submit a healthcare affidavit **may not** be qualified to testify at trial in some situations. For example, a healthcare provider who retired from practicing medicine less than five years from the date he submitted a healthcare affidavit must be barred from testifying at trial if, by the date of his trial testimony, he no longer meets the “practicing within five years” requirement.

The above example is applicable to this case. At the time of trial, Dr. Vitale had not practiced medicine in over six and one-half years; he testified, “I retired March of 2012.” (Tr. 266). He also had no experience with the procedure at issue in this case. (Tr. 366). By his own testimony, and according to the holdings in *Hink* and *Mahoney*, Dr. Vitale was not qualified to provide testimony under Section 538.225 as he had been out of the practice of medicine entirely for more than five years, he was not a urologist, and he had never performed the TURP procedure at issue in this case. Accordingly, the Trial Court should not have permitted him to testify as an expert.

Plaintiffs mistakenly argued to the Trial Court and again before the Court of Appeals that the holding in *Klotz v. St. Anthony’s Medical Center*, 311 S.W.3d 752, 760 (Mo. banc 2010), somehow controls this situation. In *Klotz*, the defendants challenged the qualifications of one of the plaintiff’s experts by contending that he was not licensed in the same profession to provide an affidavit under Section 538.225. *Id.* The Supreme Court held, at that time, that Section 538.225 did not govern the admissibility of expert testimony and was merely a condition to the filing of a malpractice action against a health care

provider. *Id.* at 760-761. The opinion in *Klotz* pre-dates the more recent Supreme Court opinion in *Hink*.

The Trial Court's failure to follow the requirements of Section 538.225 and the holdings interpreting this statute constitute reversible error. This Court should reverse and remand for a new trial excluding the testimony of Dr. Vitale.

FIFTH POINT RELIED ON

The Trial Court erred in excluding Plaintiffs' expert witness Dr. Garber's admissions that he did not know whether Roosevelt Rhoden would have died when he did if Mr. Rhoden had not had the TURP surgery because Plaintiffs were required to establish that "but for" the Defendant's negligence, Roosevelt Rhoden would not have died. Dr. Garber's excluded testimony shows he could not offer such evidence.

A. Standard of Review.

The admission of expert testimony, when the statutory qualifications of the expert are not at issue, is generally left to the discretion of the trial court. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo. banc 2011). Thus, the standard of review is for an abuse of discretion. *Wheeler ex rel. Wheeler v. Phenix*, 335 S.W.3d 504, 515 (Mo. App. S.D. 2011). Reversal based on the exclusion of evidence requires a demonstration that "the excluded evidence would have materially affected the merits of the cause of action." *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 872 (Mo. App. E.D. 2009). The court will not find an abuse of discretion in excluding evidence "unless the materiality and probative value of the evidence were sufficiently clear, and the risk of confusion and prejudice so minimal, that we could say that it was an abuse of discretion to

exclude it.” *Id.* (quoting *McCormack v. Capital Elec. Constr. Co., Inc.*, 35 S.W.3d 410, 416 (Mo. App. W.D. 2001)).

B. Argument.

The Court erred in excluding crucial admissions from the videotaped deposition of Plaintiffs’ primary liability expert, Dr. Garber. Defendant properly preserved this issue by making an offer of proof by reading the testimony of Dr. Garber that Plaintiff objected to on the record out of the presence of the jury. (Tr. 188-190). Appellant raised the issue again in its Motion for New Trial/JNOV. (LF Doc. 152, 156).

The jury should have been allowed to hear Plaintiffs’ primary liability expert Dr. Garber admit that he could not say that, “but for” the TURP procedure and the complications arising from the procedure, Mr. Rhoden would have lived any appreciable additional time. (Tr. 189-190). The Trial Court erred in allowing Plaintiffs to cherry-pick from the testimony of Dr. Garber and by excluding the proffered testimony made in an offer of proof from Dr. Garber’s deposition, to wit:

Q: Sure, I now want to talk to you about your causation opinions. If the surgery, the TURP surgery had never occurred do you know when Mr. Rhoden would have died?

A: Unfortunately, I don’t.

Q: Just so I can move on. You believe more likely than not if Mr. Rhoden had not had the TURP surgery he would not have died when he died: But you’re not able to say how much longer he would have lived? Is that a fair statement?

A: I think that is a fair statement. Yes.

(Tr. 189-190). This testimony could not have been more important. It went to the heart of the cross examination of Dr. Garber on his causation opinions. The Trial Court should have allowed the jury to hear that Dr. Garber could not say whether, if the alleged negligence had not occurred, Mr. Rhoden would have lived another minute, another hour, another day, another month, or another year. That is not surprising given the prevalence and extent of his other preexisting and otherwise unrelated health issues and the lengthy time between the care at issue relating to the TURP procedure and his death.

The Trial Court based its exclusion on the holding in *Mickels v. Danrad*, 486 S.W.3d 327 (Mo. banc 2016). However, *Mickels* did not require the Court to exclude this testimony. In *Mickels*, the Missouri Supreme Court determined that the plaintiffs could not make a wrongful death case as the expert testimony established that the conduct of the physician did not cause the decedent's death. Instead, he died from an incurable tumor. *Id.* at 328. The plaintiffs' expert in *Mikals* conceded that, even if the physician had diagnosed the tumor when he should have, the tumor would have still killed the decedent. *Id.*

As discussed in the Third Point Relied On, there are situations where a death may have resulted from alleged negligence or from another, non-negligent cause. The evidence in the record demonstrated at least two potential causes of death for Mr. Rhoden, only one of which was allegedly the result of the medical negligence. *See* Third Point Relied On. Dr. Garber testified by video. Plaintiffs' trial presentation of Dr. Garber's testimony cherry-picked from his testimony and excluded portions which directly undercut his causation opinions. Plaintiffs were obligated to prove that MDMC's employees' alleged

negligence caused Mr. Rhoden's death. The excluded testimony of Dr. Garber significantly undermined his other testimony that MDMC caused Mr. Rhoden's death. He admitted that he did not know if the alleged negligence of Defendant caused him to die any earlier than he would have without the alleged negligence. If the jury believed that, but for the alleged negligence, Mr. Rhoden would only have lived another day, it would likely have determined that the actions of the MDMC physicians did not cause his death.

“Evidence is logically relevant if it makes the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Frazier v. City of Kansas City*, 467 S.W.3d 327, 338 (Mo. App. W.D. 2015). The fact that Dr. Garber admittedly could not testify how much, if any, longer Mr. Rhoden would have lived, in any degree, minutes, hours, days, months, or years, would have been highly relevant to the jury. Plaintiffs were obligated to prove that Defendant's negligence caused Mr. Rhoden to die when he did. Dr. Garber's testimony that he was not able to say how much, if any, longer Mr. Rhoden would have lived “but for” the alleged negligence makes the existence of this fact less probable. Nothing about the holding of *Mickels* required the Trial Court to exclude this testimony. Even if *Mickels* somehow stands for the proposition that a Plaintiff need not prove how long an injured person would have lived but for the alleged negligence, it certainly does not justify the exclusion of the crucial admissions of Plaintiffs' key causation expert that he could not opine at all on that point.

The Plaintiffs' stated reliance on *Sundermeyer v. SSM Regional Health Services*, 271 S.W.3d 552, 554 (Mo. banc 2008) fails. In *Sundermeyer*, this Court found the

plaintiff's expert causation testimony adequate to survive summary judgment. Even though the expert stated that he thought the defendant nursing facility's conduct contributed to the decedent's death, the expert also testified that his opinions were not speculation, but were based on his review of the medical records, photographs, and deposition testimony. *Id.* at 555. This Court in *Sundermeyer* nowhere addressed whether a Trial Court could exclude an expert's statement that he did not know when a decedent would have died but for the alleged negligence.

The Court of Appeals missed the import of Dr. Garber's testimony entirely. MDMC agrees that no physician has the clairvoyance to state when a person is going to die. However, to establish causation in a wrongful death case, a testifying expert must opine that a death would not have occurred when it did but for the alleged negligence. *Sundermeyer*, 271 S.W.3d at 554. Counsel for MDMC adduced the excluded testimony to cast doubt on Dr. Garber's causation testimony. It related directly to the issue of whether Mr. Rhoden's co-morbid conditions, as opposed to the alleged negligence, caused his death. If Dr. Garber could not state to a reasonable degree of certainty that Mr. Rhoden would have lived longer but for MDMC's negligence, Respondents failed to present sufficient evidence. At a minimum, Dr. Garber's testimony, which the Trial Court excluded, called into question his opinion that MDMC's negligence caused Mr. Rhoden's death and the Trial Court therefore should have admitted his testimony.

Dr. Garber's excluded testimony had clear materiality and relevance. Its admission would have not have unfairly prejudiced Plaintiffs in any way. They had the obligation to prove that Defendant's alleged negligent conduct caused Mr. Rhoden's death. There was

no risk of confusion of the jury because it heard evidence both from Respondents and Appellant that Mr. Rhoden's death was caused by multiple potential conditions as listed on his discharge report from St. Francis and the death certificate. Simply put, Dr. Garber's excluded testimony severely undermined his primary opinion and went to the heart of the case. Plaintiffs were obligated to affirmatively show that Mr. Rhoden's death did result from causes other than negligence. But, even if no obligation existed, the excluded testimony at a minimum went to the weight of Dr. Garber's opinions. The Trial Court erred in excluding this testimony and this error likely affected the jury's consideration of a key issue in the case; thus, the error requires reversal and remand.

SIXTH POINT RELIED ON

The Trial Court erred in permitting Plaintiffs' counsel to comment on Defendant's dis-endorsed expert witness Dr. Schoenberg during *voir dire* and to read into evidence a portion of Dr. Schoenberg's deposition wherein he stated the amount of money he had been paid because evidence that a dis-endorsed expert was retained by a party is inadmissible. A party is prohibited from disclosing to the jury that a withdrawn expert was retained by the opposing party. It was improper for Respondent to tell the jury that Dr. Schoenberg was one of Defendant's experts and to imply an adverse inference when he was not called as a witness at trial.

A. Standard of Review.

The admission or exclusion of evidence rests in the sound discretion of the trial court. The Trial Court's decision will be reversed only if it constitutes an abuse of discretion. *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). "The trial court

abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.” *Id.*

B. Argument.

Defendant MDMC originally designated an expert witness, Dr. Schoenberg. Prior to trial, the Hospital withdrew that designation and dis-endorsed Dr. Schoenberg as an expert. (LF Doc No. 84). MDMC is entitled to a new trial because the Trial Court allowed comments by Respondent’s counsel during *voir dire* regarding Dr. Schoenberg, and in allowing the Plaintiffs’ counsel to read to the jury, over Defendant’s objection, the amounts of money Dr. Schoenberg had been paid in this case even though he would not be testifying and had been dis-endorsed as an expert. (Tr. 51-53; 199 -201). The Court further erred in overruling MDMC’s Motion for a Mistrial after the references to Dr. Schoenberg by Plaintiffs’ counsel.

That the Court allowed counsel for Plaintiffs to take these actions was particularly egregious as Plaintiffs’ counsel did not read any other portions of Dr. Schoenberg’s deposition to the jury including any of his substantive opinions. Dr. Schoenberg was a dis-endorsed expert and MDMC did not call him at trial. However, the Trial Court allowed Plaintiffs’ counsel to refer to Dr. Schoenberg as Defendant’s expert during *voir dire* and to read portions of his deposition regarding amounts the witness was paid by Defendant MDMC.

MDMC preserved this issue in a motion in limine, during the trial prior to Plaintiffs' counsel reading from the deposition, by moving for a mistrial, and by raising the issue again in its Motion for New Trial/JNOV. (Tr. 90, 129-34, 199; LF Doc. 152, 156).⁷

⁷ Respondents will likely argue that this issue was not preserved for appeal. This is untrue. During *voir dire*, Respondents' counsel stated, "And then this Dr. Schoenberg, one of their experts, was paid \$30,000". (Tr. 51, 199-201; LF Doc No. 84). The following exchange followed:

MR. JAMES HENNELLY: Your Honor, can we approach?

MR. JAMES HENNELLY: One of the issues in the Motion in Limine is that we have dis-endorsed Dr. Schoenberg. There are many cases that state that when you dis-endorse an expert you can't draw any sort of inference whatsoever, and it is reversible error if you do, to say we hired somebody and we are not calling them. He is eluding --

MR. DOWD: I'm not going to do that.

MR. JAMES HENNELLY: You just told the jury.

MR. DOWD: I am not going to argue that.

MR. MARK HENNELLY: You just told them.

MR. DOWD: Judge, can I ask you to direct counsel to direct their comments to you, not to me, please.

[footnote continued]

THE COURT: You have thrown him into the mix as an expert witness.

MR. DOWD: I heard what they said. I would like to address my comments to you. Not argue with counsel. We have tried cases before. I respect these gentlemen.

THE COURT: Okay.

MR. DOWD: My point is I am not going to comment on their failure to call Schoenberg. What I am going to do is read his deposition testimony, just a couple of questions and answers that he was paid \$30,000. The reason for the deposition, the reason for that is Mr. Hennelly cross examined Dr. Garber last Monday and said, "How much have you made? \$26,000?" This is all about bias, right?

THE COURT: Sure.

MR. DOWD: I think that is fair game. I think I get to do that. We are not going to comment on their failure to call Schoenberg. I haven't seen cases that say what he says. That is the plan.

MR. JAMES HENNELLY: I have four of them I can show you in two seconds, number one. Number two, it is reversible error if you do that. So go right ahead and this case is going to the Court of Appeals.

MR. DOWD: Again, would you tell Mr. Hennelly to direct his comments to you?

[footnote continued]

THE COURT: Unless the evidence you read in the deposition is, "How much have you been paid?" We are not going to get that issue in front of the jury unless it evidence.

MR. DOWD: It will be evidence. I will read that.

THE COURT: You are going to read his deposition?

MR. DOWD: Yes.

MR. JAMES HENNELLY: That is drawing an inference that we failed to call him at this trial, which is reversible error if he eludes to it, when we have dis-endorsed him. I have four cases that say that.

THE COURT: Okay.

MR. DOWD: So overruled?

THE COURT: It is his case. If he wants to throw it in there, he can.

(The proceedings returned to open court.)

MR. DOWD: May I proceed?

THE COURT: Go ahead.

MR. DOWD: Thank you, Your Honor. As I was saying, Dr. Schoenberg, one of the Defendant's experts was --

MR. JAMES HENNELLY: Same objection, Your Honor.

THE COURT: Yes. Overruled.

Even though Dr. Schoenberg had been dis-endorsed as an expert witness for MDMC, Plaintiff introduced him to the jury as follows: “And then this Dr. Schoenberg, one of their (i.e. Appellant’s) experts, was paid \$30,000”. (Tr. 51, 199-201; LF Doc No. 84). Plaintiff then proceeded to read only the portion of Dr. Schoenberg’s deposition relating to how much MDMC paid for his services. *Id.* Plaintiffs did not read into evidence any opinion or other substantive matter presented in that same deposition. Plaintiffs’ statement that Dr. Schoenberg was “one of their experts” constitutes reversible error. Plaintiffs’ further reading of the deposition testimony of Dr. Schoenberg where he stated that he had billed approximately \$30,000 clearly implied that he was paid by MDMC, even if Dr. Schoenberg did not say who paid him. (Tr. 199-201). This evidence, coupled with Plaintiffs’ counsel’s statement in *voir dire*, clearly told the jury that the dis-endorsed expert had been hired and paid by MDMC.

Evidence or argument that a party initially retained and then dis-endorsed an expert is prohibited. *See e.g. Hulsey v. Schulze*, 713 S.W.2d 873 (Mo. App. 1986) (affirming exclusion of the fact a party did not call an expert witness who had previously been designated in their interrogatory answers); *Smith v. Homestead Dist. Co.*, 629 S.W.2d 451,

[footnote continued]

MR. DOWD: -- was paid \$30,000 for his deposition when that was taken a year or so ago.

(Tr. 51-53). This issue was clearly preserved both during *voir dire* and when Appellants read the portion of the deposition into evidence. [end of footnote]

456 (Mo. App. 1981) (affirming action of trial court in denying Plaintiffs' attempt to call former defense expert at trial and elicit testimony that he had been hired by defendants in an effort to comment on defendants' failure to call the witness); *Coulter v. Michelin Tire Corp.*, 622 S.W.2d 421, 432-33 (Mo. App. 1981) (holding defendant could not seek to show that an expert had originally been hired by the plaintiff). Thus, when an expert is withdrawn following his deposition, although the opposing counsel may read portions of the expert's deposition to the jury, he is prohibited from disclosing to the jury that the expert was previously retained by the opposing party. *Porter v. Toys R Us-Delaware, Inc.*, 152 S.W.3d 310 (Mo. App. W.D. 2004).

Similarly, it is improper to argue an adverse inference when an opposing party withdraws an expert. For example, in *Kampe v. Colom*, 906 S.W.2d 796, 802-803 (Mo. App. W.D. 1995), the Missouri Court of Appeals held that a plaintiff could not argue a negative inference based on a defendant's failure to call an expert and, furthermore, to do so resulted in a prejudicial error. *Id.* at 802-03 (finding it was prejudicial error to allow patient to argue to jury that it should draw negative inference from psychiatrist's failure to call previously retained expert to testify). The record in *Kampe* established that a witness who had been designated by the defendant as an expert and who had examined plaintiff in anticipation of trial and prepared a written report, but who was then not called to testify by defendant, was equally available to both parties. *Id.* at 796. Therefore, the plaintiff should not have been allowed to argue a negative inference based on defendant's failure to call the expert witness to testify.

According to the appellate court in *Kampe*:

Application of the *Hill v. Boles* factors to the facts of this case shows that Dr. Wisner was equally available to both parties. First, Mr. Kampe knew of Dr. Wisner's existence and the content of his testimony. Mr. Kampe deposed Dr. Wisner and knew that Dr. Wisner was critical of Dr. Colom's treatment of Mr. Kampe. Although Dr. Wisner examined Mr. Kampe and testified for Dr. Colom at pretrial hearings, he did not have a special relationship with Dr. Colom or even have any personal interest in the outcome of the litigation as Dr. Reed might have had in *Kelly by Kelly*. Like the physician experts in *Robnett*, Dr. Wisner was retained by Dr. Colom solely for his participation in the litigation. He was not employed by Dr. Colom. Dr. Wisner, therefore, was equally available to both parties, and the Trial Court erred in allowing Mr. Kampe to argue the adverse inference of Dr. Colom's failure to call Dr. Wisner to testify during closing argument. Because arguing the negative inference of Dr. Colom's failure to call the witness was error, Dr. Colom was prejudiced. *Kelly by Kelly*, 798 S.W.2d at 701.

906 S.W.2d at 796. Here, Plaintiffs sought to have the jury draw an adverse inference from the presentation of the amount paid by MDMC to Dr. Schoenberg. They did so with the implication that MDMC paid Dr. Schoenberg a large amount of money for an opinion that, ultimately, hurt MDMC's case. Missouri law specifically prohibits attempts to obtain just this kind of adverse inference from the withdrawal of a previously designated expert.

If Respondents had not identified Dr. Schoenberg as one of Appellant's expert witnesses in *voir dire*, their defense of reading from his deposition testimony during trial

might fly. However, Respondents' statements in *voir dire* communicated to the jury the exact information relating to Dr. Schoenberg that is not admissible at trial. Further, Respondents' contention that it did not argue that the jury should draw a negative inference because Dr. Schoenberg did not appear at trial rings hollow. The critical action occurred in *voir dire*, and Appellant could say or do nothing thereafter that would cause the jury to un-learn that an expert previously hired by Appellant received \$30,000.00 and then did not appear at trial. Respondents did not have to argue for an inference. The only possible reason for Respondents to read the portion of Dr. Schoenberg's deposition testimony on how much he was paid, after identifying him as an expert for Appellant, was to highlight for the jury that he would not be testifying, thus his opinions must have been harmful for Appellant.

The Court of Appeals' finding that Appellant was not prejudiced by this issue is simply incorrect. As the opinion in *Kampe* shows, allowing this type of inference is prejudicial error in itself. *See* 906 S.W.2d at 802-803. This Court should grant Appellant a new trial due to the Court's error in allowing counsel for Plaintiff to comment about Dr. Schoenberg and to read a limited portion of his deposition relating to the amounts he charged in reviewing the case.

CONCLUSION

The Trial Court erred in submitting aggravating circumstances damages to the jury and in denying Appellant's Motion for Directed Verdict and Motion for JNOV because no evidence in the record supported the jury's award of additional damages. This is true under both the correct statutory standard and under the standard in the MAI instruction. This Court should reverse and render judgment for Appellant MDMC on the Appellees' claim for additional damages for aggravating circumstances.

In the alternative, the Trial Court erred in submitting Instruction No. 11 for aggravating circumstances damages and in denying Appellants' Motion for New Trial due to instructional error. Instruction No. 11 misstated the law because Section 538.210.8 provides that the standard for punitive damages (and concomitantly aggravating circumstances damages) in medical negligence cases is "willful, wanton or malicious," not "complete indifference to or conscious disregard for the safety of others." For this reason, even if this Court finds against Appellant on the First Point, and finds that the record supported the submission of aggravating circumstances to the jury, the Court should reverse the award of additional damages and remand that claim for retrial with the jury to be instructed to apply the proper statutory standard.

The Trial Court erred in submitting Verdicts A and B to the jury and in denying Appellant's Motion for Directed Verdict and for JNOV because Plaintiffs failed to submit evidence that Dr. Killion or Dr. Rankin's alleged negligence caused Roosevelt Rhoden's death in that Plaintiffs' experts Dr. Vitale and Dr. Garber failed to testify that the medical procedures performed by Dr. Killion and/or Dr. Rankin caused Roosevelt Rhoden to die

when he did. If this Court agrees, the Court should reverse and render the entire judgment, including the actual damages awarded and the additional damages for aggravating circumstances. In the alternative, the jury's implicit finding on causation was against the weight of the evidence and Judgment entered on Verdicts A and B should be remanded for retrial.

The Trial Court erred in permitting Plaintiff's expert Dr. Vitale to testify at trial and in denying Appellant's Motion for New Trial. Dr. Vitale did not qualify as an expert witness because he had not actively practiced within five years before the trial. For this reason, this Court should reverse the entire judgment and remand the case for retrial.

The Trial Court erred in excluding Plaintiffs' expert witness Dr. Garber's deposition admissions that he did not know whether Roosevelt Rhoden would have died when he did if Mr. Rhoden had not had the TURP surgery. Plaintiffs were required to establish that "but for" Defendant's negligence, Roosevelt Rhoden would not have died. Dr. Garber's excluded testimony showed that he could not offer such evidence. For this reason, this Court should reverse the entire judgment and remand the case for retrial.

The Trial Court erred in permitting Plaintiffs' counsel to comment on Defendant's dis-endorsed expert witness Dr. Schoenberg during *voir dire* and to read into evidence a portion of his deposition wherein he stated the amount of money he had been paid. Evidence that a party dis-endorsed an expert is inadmissible. Respondent improperly sought to obtain an adverse inference when MDMC did not call a withdrawn expert witness at trial. For this reason, this Court should reverse the entire judgment and remand the case for retrial.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant, pursuant to Rule 84.06(c), hereby certifies to this Court that:

1. The brief filed herein on behalf of Appellant contains the information required by Rule 55.03.
2. The brief complies with the format requirements of Rule 30.06 and 84.06(a) and (b).
3. The number of words in this brief, according to the word processing system used to prepare this brief, is 18,517, exclusive of the cover, certificate of service, this certificate and the signature block.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Appellant’s Brief has been sent via the Court’s electronic filing system and overnight delivery on the 18th day of May, 2020 to the following:

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