IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOSEPH DUDLEY, SARAH DUDLEY, M.D., J.R., and L.G., Plaintiffs, v. IOWA PHYSICIANS CLINIC MEDICAL FOUNDATION d/b/a UNITYPOINT CLINIC FAMILY MEDICINE/URGENT CARE-SOUTHGLEN and MELANIE B. CHOOS, PA-C, Defendants.	CASE No. LACL138335 **PLAINTIFFS' TRIAL BRIEF**

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I. INTRODUCTION

This is an action for medical malpractice and loss of consortium by Joseph Dudley, his wife, Sarah, and his children.

II. VOIR DIRE

1) The Iowa Constitution, Court Rules, and Case Law Guarantee Impartial Trials by Jury

The Iowa Constitution holds the right to a trial by jury as inviolate. Iowa Const. art. I, § 9. Iowa Courts have reinforced this right, stressing that parties are "entitled to a fair and impartial trial before a jury of [their] peers, uninfluenced by any bias, prejudice, or preconceived notions." *State v. Meyer*, 164 N.W. 794, 797 (Iowa 1917); *see also State v. Larmond*, 244 N.W.2d 233, 235 (Iowa 1976). This right is a "bedrock component of our system of justice." *State v. Webster*, 865 N.W.2d 223, 232 (Iowa 2015).

Juries which are free from bias or prejudice provide the foundation for fair trials. To ensure fair and impartial juries, the Iowa Supreme Court has enacted court rules requiring potential jurors to be examined under oath, and grants the parties or their attorneys the right to conduct this examination. Iowa R. Civ. Pro. § 1.915(2). Most importantly, the Supreme Court has enacted a rule which allows courts to exclude for cause jurors who would be unlikely to decide a case impartially—or, in other words, jurors who "show[] a state of mind which will prevent the juror from rendering a just verdict." Iowa R. Civ. Pro. § 1.915(6)(j).

The United States Supreme Court stated: "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by '*impartial*' jurors . . . ." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) (emphasis added). Iowa Rule of Civil Procedure 1.915(6)(j) instructs that a juror may be challenged for cause by a party "when it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows

a state of mind which will prevent the juror from rendering a just verdict." Iowa R. Civ. Pro. 1.915(6)(j).

"Due process requires fundamental fairness in a judicial proceeding." *In re Detention of Morrow*, 616 N.W.2d 544, 549 (Iowa 2000). Fundamental fairness includes the right to trial before an impartial decision maker. *Singer v. United States*, 380 U.S. 24, 36 (1965). When a juror finds facts without the appropriate mindset, the viability of the jury system is seriously undermined. *In re Detention of Hennings*, 744 N.W.2d 333, 338 (Iowa 2008). To be denied the jury to which one is entitled under the Constitution is prejudicial. The wrongful denial of a challenge for cause may not seem to present a serious "tangible" harm to an individual litigant if the panelists who are biased are stricken with peremptory challenges. But the failure to excuse for cause jurors who are biased denies one party the jury he or she was, in fact, constitutionally entitled to have. The United States Supreme Court and Iowa federal courts have long recognized that while there is no "constitutional right" to peremptory challenges, the challenges constitute a necessary part of trial by jury. *See U.S. v. Johnson*, 403 F. Supp. 2d 721, 775–76 (N.D. Iowa 2005), citing *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("We have long recognized that peremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury.").

When a juror who should have been removed for cause is not, and a party must then remove the juror using a peremptory challenge, the party effectively loses that peremptory challenge to which he or she is entitled by law. *See Montana v. Good*, 43 P.3d 948, 956 (Mont. 2002). This failure to excuse jurors for cause violates the Equal Protection Clauses of the United States and Iowa Constitutions. U.S.C.A. Const. Amend. 14; Iowa Const. Art. 1 § 6. Any potential juror who expresses concern about his or her ability to be fair should be immediately

excused. Attempts to "rehabilitate" jurors should be forbidden. In the treason case of Aaron Burr, Chief Justice John Marshall sitting as the trial judge wrote:

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices, he is determined to listen to the evidence, and be governed by it; but the law will not trust him . . . Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.

U.S. v. Burr, 25 F. Cas. 49, 50 (D. Vir. 1807).

What the Chief Justice recognized so long ago remains true, and has been exacerbated by the efforts of tortfeasors to destroy the public's faith in and understanding of the civil justice system. Any panel member who expresses hesitation about his or her ability to serve fairly must be excused without any questioning designed to persuade or intimidate the panelist into agreeing that he or she "would follow the court's instruction" or similarly worded leading questions. As Justice Marshall recognizes, the panelist may say and even believe that he or she can be governed by the evidence, but that will actually be impossible. *Id.* The panelist is likely to hear only the evidence that confirms his or her previously held beliefs and opinions and to ignore any evidence that does not confirm his or her previously held beliefs and opinions. The panelist must be excused for cause under Iowa Rule of Civil Procedure 1.915(6)(j).

In this case, the most likely reason a perspective juror may be challenged by a party for cause is under Iowa Rule of Civil Procedure Section 1.915(6)(j): "When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows a state of mind which will prevent the juror from rendering a just verdict."

Plaintiff's position is illustrated in *Knop v. McCain*. 561 So. 2d 229, 234 (Ala. 1989). In that case, two prospective jurors should have been disqualified for cause on the motion of plaintiff's counsel in a medical malpractice case. *Id.* at 234. Although both prospective jurors responded to defense questions by stating that they could determine the case based on the evidence and the law given them by the court, one prospective juror stated that in her opinion people were "too quick to sue" and that "evidence would have to be overwhelming" for the plaintiff before the perspective juror would be "willing to give her money." *Id.* at 232. The other prospective juror stated that she "probably" could be fair and impartial although there was "some" doubt. *Id.* That was enough doubt for the appellate court, which reversed the case. *Id.* at 235.

If a party makes a challenge on the basis of cause, the judge should not attempt to rehabilitate the juror. The Iowa Judicial Bench Book, vol. 5, Rule 187(f) explains:

> Particular care should be taken if the court undertakes to rehabilitate a juror because of the juror's likely retreat from his/her position under the court's questioning. For example, see *State v. Beckwith*, 242 Iowa 228, 46 N.W.2d 20 (1951). Therefore, the better rule would be to sustain the challenge when there appears to be an open question.

The Kansas Supreme Court has described the duty of providing for an impartial and unbiased jury as follows:

> [T]here is no more important feature of a trial than the impaneling of an impartial and unbiased jury, and the courts are very liberal in allowing inquiries into the competency and qualifications of persons called as jurors. The examination serves a double purpose – first, to learn whether there is a disqualification or cause for challenge, and, second, to enable a party to determine whether he shall exercise the right of peremptory challenge given by statute. So careful is the law that a fair jury may be obtained that it not only provides for the exclusion of those shown to be partial or prejudiced, but it gives each party the added right to challenge a certain number not shown to be prejudiced or disqualified, whom the parties may desire to exclude for reasons not recognized by law. Apart from admitted bias or prejudice, persons may be excluded from the panel because of possible prejudice on account of pecuniary interest, relationship, or business connection with the parties to the action.

Mathena v. Burchett, 369 P.3d 487, 490 (Kan. 1962).

Other courts have found reversible prejudice occurs when peremptory challenges must be used to strike jurors that should have been removed for cause.[1] For example, when the Kentucky Supreme Court overruled the "presumed prejudice/per se reversible error" standard that had been applied in that state for over 170 years, the Court was deeply divided. *Morgan v. Commonwealth of Kentucky*, 189 S.W.3d 99 (Ky. 2006). Justice Cooper's scathing and historically detailed nineteen page dissent was the basis of the reversal of *Morgan* a mere eighteen months after it had been decided. *See Shane v. Kentucky*, 243 S.W.3d 336 (Ky. 2007). There is an implicit recognition that a litigant is entitled to due process and if an act of the trial court negates such process, reversal is required. *Id.*

2) Effective Voir Dire Prevents Bias and Prejudice from Tainting Trial

A fair trial "requires an absence of actual bias" and prejudice. *In re C.L.C. Jr.*, 798 N.W.2d 329, 335 (Iowa 2011). But preventing bias and prejudice from influencing a trial requires a thorough and vigorous vetting of potential jurors. "The underlying purpose [of *voir dire*] is to secure a fair and impartial jury." *State v. Windsor*, 316 N.W.2d 684, 687 (Iowa 1982). This is particularly true in

[1] *See also Busby v. Florida*, 894 So.2d 88, 96–105 (Fla. 2004) (rejecting *Ross* and retaining its per-se reversible error rule); *Fortson v. Georgia*, 587 S.E.2d 39, 41 (Ga. 2003) (recognizing that forcing defendant to use peremptory challenge to strike juror that should have been removed for cause is per se harmful error); *Maine v. McLean*, 815 A.2d 799, 805 (Me. 2002) ("[W]hen a defendant's right to have jurors selected in the manner prescribed by the Rules is impaired, as it was in this case, it would be virtually impossible for the State to show after conviction that the injury to the defendant is harmless, and equally difficult for the defendant to demonstrate prejudice."); *Whitney v. Maryland*, 857 A.2d 625, 633 (Md. 2004) (refusing to abandon "per se" rule); *Montana v. Good*, 43 P.3d 948, 959–60 (Mont. 2002) (prejudice presumed if juror should have been excused for cause, peremptory strike is used and defendant's peremptory strikes are exhausted – structural error not subject to harmless error analysis); *New York v. Cahill*, 809 N.E.2d 561, 578 (N.Y. 2003) (error in denying challenge for cause not rendered harmless because juror is later excused by peremptory challenge – the loss of the peremptory challenge constitutes the harm); *Hanson v. Oklahoma*, 72 P.3d 40, 48–49 (Okla. Ct. App. 2003) (reversal required when juror should have been removed for cause, defendant exhausted peremptories and identified an additional juror he would have stricken); *Brown v. Virginia*, 533 S.E.2d 4, 8 n.2 (Va. Ct. App. 2000) (prejudicial error occurs when trial court forces defendant to use peremptory challenge afforded by statute to excuse juror who should have been excused for cause); *Johnson v. Texas*, 43 S.W.3d 1, 10–11 (Tex. Ct. App. 2001) (Johnson, J. concurring) (primary rationale for peremptory challenges is to help secure the constitutional guarantee of trial by impartial jury; new trial required when trial court improperly denies challenge for cause forcing use of peremptory challenge).

cases like the present one, where potential jurors might have had similar experiences. By discovering bias and prejudice, *voir dire* safeguards against the corruption of jury panels, the erosion of our civil justice system, and the degradation of litigants' right to trial by jury.

Unfortunately, bias and prejudice are innate characteristics often deeply ingrained and concealed from our own self-examination. The United States Supreme Court recognized this when it said that "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence." *Crawford v. United States*, 212 U.S. 183, 196 (1909). In addition, bias or prejudice can exist in someone "who was quite positive that he had no bias and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence." *Id.* The Iowa Supreme Court has echoed this sentiment, finding "unsatisfying the notion that the principal consideration in determining bias is the potentially biased juror's own assurances that he or she can be impartial." *State v. Webster*, 865 N.W.2d at 248 (J. Hecht, concurring in part, dissenting in part).

Prospective jurors often cannot or do not acknowledge their own biases and prejudices when asked general *voir dire* questions. *See id.* Other courts have also noted this inherent shortcoming, even among honest panel members. The Tenth Circuit Court of Appeals has stated that a panel member may be deemed biased and struck for cause despite an honest belief that he or she can be impartial. *Gonzales v. Thomas*, 99 F.3d 978, 989 (10th Cir. 1996). This is notable if similarities exist between the panel member's experience and the incident at issue at trial "that would inherently create in [the] juror 'a substantial emotional involvement adversely affecting impartiality.'" *Id.* Put another way, "the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced," not the juror's own professions of impartiality. *U.S. v. Powell*, 226 F.3d 1181, 1188 (10th Cir. 2000).

The American Bar Association, in guidelines dedicated to improving juries and jury trials, has echoed the importance of striking jurors who might be biased. Among its formal recommendations for *voir dire*, it advocates the following:

> At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties . . . or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.
>
> In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from trial.

Ex. 4, *American Bar Association, Principles for Juries & Jury Trials*, p. 14 (2005) (emphasis added). The parties and this Court should strive to seat an impartial jury. If reasonable doubt exists about a panel member's ability to be impartial, that panel member should be struck for cause.

3) Rehabilitation of Panel Members Should be Limited and Used with Caution

Juror rehabilitation is likely to be ineffective at removing the bias expressed by a potential juror. Simply put, jurors do not come equipped with an on/off switch. A juror's own bias towards one side or another, or towards one particular position on the law cannot be turned off simply at the command of the judge. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (Winter 2010). Rather, jurors may potentially harbor such biases throughout the trial, making the administration of justice prejudicial to one side or another. *Id.*

These biases, known as implicit biases, are outside of the control of an individual's own conscious mind. They can manifest themselves in any form, whether based on race, beliefs about the law, or any other subject of importance to a particular case. *Id.* By trying to "rehabilitate" jurors during *voir dire* instead of opting to excuse the jurors for cause, a judge can allow prejudiced jurors

to be impaneled. This can lead to jurors paying little attention to evidence one party presents because their subconscious has already decided how they are going to rule on the case. *See id.* Thus, this Court should follow the Iowa Judicial Bench Book's recommendation not to try to rehabilitate jurors that should be struck for cause as discussed in the prior section regarding the Iowa Constitution.

To seat an impartial jury, "wide latitude is necessarily afforded counsel in examining jurors." *State v. Tubbs*, 690 N.W.2d 911, 915 (Iowa 2005). Close ended questions that suggest one correct answer, for example—"Mrs. Smith, you could certainly set aside your feelings about the plaintiff and look at the evidence impartially, couldn't you?"—do not suffice, particularly if such questions come from the judge, who is a respected authority figure.[2]

The American Bar Association Report said that courts should not allow jurors to "self-qualify," or to issue a blanket assertion that they would be able to cast aside acknowledged biases or prejudice and serve impartially. (Ex. 4). Only the Court can decide if a potential juror is impartial.

> The trial court is a fact-finder when it rules on challenges for cause. Because a juror's credibility depends on his or her answers to the court's or counsel's questions as well as his or her demeanor, it is important that the court evaluate both when making such a ruling.

(Ex. 4 at 75, citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)).

Social science teaches that peoples' belief systems are fixed and virtually immovable. The notion that such beliefs can be set aside is both wrong and dangerous. A few loaded questions from an authority figure cannot suffice to assure a fair trial from panel members who

[2] A judge holds one of the most esteemed positions in society. In the courtroom, the judge is referred to as "Your Honor," is distinguished by attire, is physically elevated over everyone else, and has near plenary power. Because of this high status, many potential jurors will seek approval when answering questions from a judge—even at the expense of hiding their true feelings and opinions. *See* Susan E. Jones, *Judge- Versus Attorney- Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUMAN BEHAV. 131, 143 (1987) ("Subjects changed their answers almost twice as much when questioned by a judge as they did when interviewed by an attorney . . . [I]t appears that there may be implicit pressures in the courtroom toward conformity to a 'perceived standard' that differs depending upon who conducts *voir dire*.").

have already stated in public that they are, in fact, biased. Rehabilitation should not be permitted because it is simply impossible. To permit biased juries to serve deprives plaintiff of her constitutional right to a fair trial.

A trial judge who seeks to rehabilitate a prospective juror may unconsciously become an advocate for the juror's impartiality and may create unreliable responses from the juror. *See McGill v. Virginia*, 391 S.E.2d 597, 600 (Va. Ct. App. 1990). "A juror's desire to 'say the right thing' or to please the authoritative figure of the judge, if encouraged, creates doubt about the candor of the juror's responses." *Id*., citing *Foley v. Virginia*, 379 S.E.2d 915, 921 (Va. 1989). It is imperative that a court not become an advocate of any party's cause. *State v. Cuevas*, 288 N.W.2d 525, 531 (Iowa 1980). A court's rehabilitative efforts towards jurors may have such a residual effect. The *McGill* court noted:

> A trial judge who actively engages in rehabilitating a prospective juror undermines confidence in the voir dire examination to assure the selection of fair and impartial jurors. The proper role for a trial judge is to remain detached from the issue of the juror's impartiality. **The trial judge should rule on the propriety of counsel's questions and ask questions or instruct only where necessary to clarify and not for the purposes of rehabilitation**.

McGill, 391 S.E.2d at 600 (emphasis added).

The Iowa Supreme Court has agreed with this notion and Iowa has historically held peremptory strikes to be invaluable to the jury selection process and the protection of fair trials. "Confidence in the fairness and impartiality of each member of the jury . . . is of the greatest importance to the welfare of the state. Indeed, it is of such paramount importance to every citizen that the time and expense necessary to secure jurors as to whom no doubt may rightly exist is an insignificant consideration." *State v. Beckwith*, 46 N.W.2d 20 at 26, abrogated by *State v. Neuendorf*, 509 N.W.2d 743 (Iowa 1993) (in which the Court again stated the importance of an impartial jury, but held that error in denying a challenge for cause does not automatically require

reversal.). In *Beckwith*, the Court reviewed the denial of a motion of dismissal for cause. 46 N.W.2d at 20. The juror in question had some actual knowledge of the issue in the case, stating "I think that what I have heard might influence me in my verdict even though I tried not to let it do so." *Id.* at 24. The court then examined the juror, asking:

> Well, you understand that if you were selected as—to sit as a juror in this case you take an oath and you are to arrive at your verdict solely upon the evidence that you hear in the court room or the exhibits that are introduced? A. Yes, sir.
>
> The Court: And accordingly apply those facts according to the law as the court gives it to you in the instructions? A. Yes.
>
> The Court: You understand that? A. Yes.
>
> The Court: Notwithstanding any prejudice or opinion that you might now have. Can you do that? A. Yes, I can do it.
>
> The Court: Will you do it? A. Yes.
>
> The Court: Challenge is overruled.

Id.

Upon review, the Iowa Supreme Court stated "[The court] succeeded in eliciting statements that the juror would arrive at a verdict solely upon the evidence and the instruction. The effect of these answers, however, is much weakened by the fact that the court first instructed the juror that it would be his duty to do just that." *Id.* at 25. The Court went on to state "it seems to us that the effect [of the court's questioning] was to put a considerable degree of pressure upon the juror to make the answers that would show him qualified." *Id.* at 26. For these reasons, the Court held that "it seems abundantly clear" that the challenge for cause should have been sustained, rejecting the attempt by the trial court judge at "rehabilitating" the biased juror. *Id.*

In *Black v. CSX Transportation, Inc*., an asbestos exposure case, the court found that a prospective juror who had expressed bias against personal injury lawyers, asbestos case plaintiffs, and damage awards predicated on anything other than pure objective science should

have been excused for cause, even though he had also stated that he could render a verdict based upon the evidence and the law. 648 S.E.2d 610, 616–17 (W. Va. 2007). The Court reiterated that trial judges "must resist the temptation to 'rehabilitate' prospective jurors simply by asking the 'magic question' to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could be reasonably questioned." *Id*. at 616.

In *State v. John,* a prospective juror stated that he had already formed an opinion on the issue and it would take considerable evidence to convince him otherwise. 100 N.W. 193 (Iowa 1904). The judge asked him "Do you think you could give a fair verdict in this case, solely on the evidence and charge of the court, laying aside any opinion that you may have had heretofore?" *Id.* at 196. To which the juror answered, "I could." *Id.* The trial court then overruled the challenge for cause. *Id.* The Supreme Court overturned this ruling as an abuse of discretion, again rejecting the trial court judge's attempt at rehabilitating the juror. *Id.*

Similarly, in *Walls v. Kim,* 549 S.E.2d 797 (Ga. Ct. App. 2001), *aff'd by Kim v. Walls,* 563 S.E.2d 847 (Ga. 2002), the court found that the trial court should have excused a biased juror for cause despite her affirmative answers to rehabilitative questions from the judge. It stated as follows:

> [W]e disagree with the way that the 'rehabilitation' question has become something of a talisman relied upon by trial and appellate judges to justify retaining biased jurors. Especially when the better practice is for judges simply to use their discretion to remove such partial jurors, even when the question of a particular juror's impartiality is a very close call. **A trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is the only person in a courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury**. While the parties to litigation operate under the guise of selecting an impartial jury, the truth is that having a jury which is truly fair and impartial is not their primary desire. Instead, their goal is to select a jury which, because of background or experience or whatever other reason, is inclined to favor their particular side of the case.

Id. at 798 (emphasis added); *accord*, *McConnell v. Akins*, 586 S.E.2d 688, 690 (Ga. Ct. App. 2003); *Mulvey v. Georgia*, 551 S.E.2d 761, 764 (Ga. Ct. App. 2001).

The *Walls* rationale has been repeatedly applied by the Georgia Court of Appeals in order to support the impropriety of juror "rehabilitation" from the bench. For example, in *Ivey v. Georgia*, 574 S.E.2d 663, 665 (Ga. Ct. App. 2002), the Court proclaimed:

> In too many cases, trial courts confronted with clearly biased and partial jurors use their significant discretion to 'rehabilitate' these jurors by asking a version of this loaded question: After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law? Not so remarkably, jurors confronted with this question from the bench almost inevitably say, 'yes'. Such biased jurors even likely believe that they can set aside their preconceptions and inclinations – certainly every reasonable person wants to believe he or she is capable of doing so. Once jurors affirmatively answer the 'rehabilitation' question, judges usually decide to retain these purportedly rehabilitated jurors.

See also, *Doss v. Georgia*, 590 S.E.2d 208, 213 (Ga. Ct. App. 2003) ("it is completely improper for counsel, and especially for the trial court, to browbeat the juror into affirmative answers to rehabilitative questions by using multiple, leading questions.").

In *Guoth v. Hamilton*, a prospective juror admitted during voir dire that her ability to be impartial was impaired by her knowledge of the parties and of the facts of the case. 615 S.E.2d 239, 243–44 (Ga. Ct. App. 2005). The appellate court found that the trial court erred in failing to disqualify the prospective juror for cause and that the court's requests that she be impartial did not outweigh her previously stated bias. *Id*.

The Kansas Supreme Court has stated that counsel should receive wide latitude in questioning jurors who have answered "stock questions" about their ability to be fair and follow instructions. Counsel, the court said,

> should not necessarily be limited to "stock questions" such as "Have you formed an opinion as to the accused's innocence or guilt?" or "Will you be able to determine guilt based only on the evidence presented?" Answers to such questions do, of course, go to the heart of the inquiry and are given under oath and

> therefore deserve a heavy presumption of correctness. Nevertheless, it is conceivable that prospective jurors with the purest of intentions may, in the heat of the moment in front of their peers, underestimate their own bias. Consequently, "[c]onsiderable latitude should be allowed counsel in the examination of jurors, so that all who have bias or prejudice, or are otherwise disqualified, may be eliminated." Ultimately, whether ruling on challenges for cause or the scope or extent of questioning, trial courts should consider special circumstances that may be present.

Kansas v. Hayes, 258 908 P.2d 597, 599 (Kan. 1995).

In Florida, a new trial is mandated if there is a reasonable doubt as to whether a juror is impartial. *Four Wood Consulting, LLC v. Fyne*, No. 4D06-4586, 2007 WL 2376685, at *2 (Fla. Ct. App., Aug. 22, 2007). "Reasonable doubt" has been found where a juror displays or admits to bias or prejudice, even though the juror later asserts that he or she could probably follow the court's instructions. *See Imbimbo v. Florida*, 555 So.2d 954 (Fla. 4th 1990). For example, in *Bell v. Greissman*, the district court held that a medical malpractice plaintiff was entitled to a new trial as a remedy for the trial court's failure to grant the plaintiff's challenge for cause against a juror whose comments were not indicative of a "neutral mind." *See* 902 So.2d 846 (Fla. Ct. App. 2005). During voir dire, the juror in question stated that he believed in damages caps and that the absence of such had been detrimental to the healthcare system. *Id*. at 847. He also stated the he would try to keep an open mind and that he would be fair. *Id*. The court denied the plaintiff's challenge for cause and also denied another challenge as to a different juror. *Id*. The plaintiff exhausted her peremptory challenges, thereby precluding her from challenging two other jurors that she identified as ones against whom she wanted to use peremptory strikes. *Id*. The reviewing court concluded that the totality of the juror's remarks raised reasonable doubt as to his ability to be impartial. *Id*. It stated that, "A juror is not impartial when one side must overcome a pre-conceived opinion in order to prevail." *Id*.; *see also, Salgado v. Florida*, 829 So.2d 342, 345 (Fla. Ct. App. 2002) (even when a prospective juror eventually states that he will follow the law, the

court should grant a challenge for cause if it appears that the prospective juror is nevertheless not in the state of mind to do so).

Instead of directing "rehabilitation" questions that suggest only one correct answer, the Court should permit the attorneys to ask open-ended questions that better assess bias and impartiality, and that advance our state's guarantee to a fair trial. Furthermore, the court should be highly suspicious of any guarantees of impartiality offered by potential jurors, especially when said guarantees are elicited by the court's own questioning.

A fair and impartial jury is inextricably linked to the parties' constitutional right to a fair trial. This Court has a duty to oversee a thorough and efficient *voir dire*. That duty includes striking panel members for cause if the Court has a reasonable doubt about their ability to serve impartially. And it includes limiting the ability for any party or the Court to attempt to rehabilitate any panel member who has expressed any hesitancy about his or her ability to be fair. The Iowa Constitution demands no less.

4) Preponderance of Evidence Standard

The burden of proof that the Plaintiffs are held to for every issue, including damages, is the preponderance of the evidence. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 231 (Iowa 1995). Plaintiffs' counsel, throughout the course of her career, has found that some individuals are not comfortable with the preponderance standard. Some individuals require that they be "100% certain" in their decisions, or "75% certain," particularly with respect to damages. This is not the standard that Plaintiffs are required to prove his or her case, and is a standard above even what is required for a criminal case.

If a prospective juror states that he or she cannot, will not, or might not follow the preponderance standard, he or she should not be seated on the jury. If Plaintiffs discover a prospective juror who requires more certainty than required by the preponderance of evidence

standard, Plaintiffs will move to challenge the juror for cause and the juror must be struck for cause. Plaintiffs are entitled to a completely impartial jury; to be able to get an impartial jury by using all of their peremptory challenges for reasons not related to cause; and to have any panelist who expresses doubt be excused for cause.

5) Special Challenges Relating to Public Perception

The dynamics of the present case make our State's guarantee of a fair trial particularly important. In this action, dealing with polarizing topics, the Court must carefully scrutinize potential jurors for bias and prejudice. In essence, this Court serves as the trier of fact in determining whether prospective jurors can serve impartially and provide the parties a fair trial. *See State v. Rhoades*, 288 N.W. 98 (Iowa 1939), citing *State v. Hassan*, 128 N.W. 960 (Iowa 1910)("In the examination of jurors as to their qualifications to try a case, the sole question to be determined by the trial court is whether they can fairly and impartially hear the evidence, and render a verdict thereon which shall be entirely free from the aid or influence of previous knowledge or preconceived opinions."). Under the Iowa Court Rules, the appearance of partiality is a basis for this Court to strike that prospective juror for cause. Iowa R. Civ. Pro. 1.915(6)(j).

While Iowa law is less specific on the particulars of an "appearance of impartiality," other state courts have had occasion to clarify. Trial courts may not rely solely on a prospective juror's isolated and extracted statement of impartiality, but must consider the juror's conduct throughout the entire voir dire. *Foster v. Georgia*, 574 S.E.2d 843, 850 (Ga. Ct. App. 2002). Nor may a prospective juror's assurances of impartiality overcome a bias where the record shows on its face that such a bias is present. *Cannon v. Georgia*, 552 S.E.2d 922, 924 (Ga. Ct. App. 2001), *overruled on other grounds by Jackson v. Georgia*, 562 S.E.2d 847 (Ga. Ct. App. 2002). Trial courts must resolve any question of possible bias or prejudice in favor of the party seeking to strike for cause. *O'Dell v. Miller*, 565 S.E.2d 407, 410 (W.Va. 2002). Accepting a juror's

statement that she can set aside a stated bias and be impartial creates a great risk of seating biased jurors and creates "a clear appearance of prejudice" to a party. *Id*. at 411.

This issue is of utmost importance considering the dim view that many citizens have of the civil justice system. Survey results related to lawsuits, insurance costs, and damages are stunning. For example, a 2003 survey conducted by Mercury Public Affairs and publicized by the American Tort Reform Association and the American Medical Association found the following:

- 83% of those surveyed believe that there are too many lawsuits filed in America;
- 67% agreed that excessive lawsuits are causing "good" companies to go bankrupt;
- 61% of Americans feel that lawsuits result in personal injury lawyers getting rich;
- Voters favor tort reform (45% favor while 6% oppose) as a means to curb "frivolous" lawsuits.

See Gretchen Shaefer, *Voters Say "Too Many Lawsuits," According to New National Poll on Tort Reform*, AMERICAN TORT REFORM ASSOCIATION, February 27, 2003. (Ex. 1). Other studies confirm the problems faced by injured people in accessing an impartial jury:

- 74% of the American public believes that the cost of insurance is in a state of crisis or is a major problem (Ex. 2: Gallup Poll, March 26-29, 2007);
- 76% believe that a large verdict against an insurance company would cause insurance rates to rise (Ex. 2).

Furthermore, advertising campaigns sponsored by business and insurance groups disguised as grass-roots organizations, such as Citizens Against Lawsuit Abuse, Truth and Fairness in Litigation Coalition, as well as distorted media coverage of lawsuits (such as in the McDonalds' coffee case) contribute to the perception that there is a civil litigation "crisis." There

is no reason to believe that the statistics discussed above do not fairly represent the views of the people of Iowa. From focus group research and post-verdict juror interviews conducted by litigation consulting firms,[3] it is abundantly clear that jurors who are preconditioned to believe assertions about meritless lawsuits and the litigation "crisis" are more likely to favor the defense or to argue for lower awards if a plaintiff's verdict is reached. Because of this significant potential bias against plaintiffs, courts and counsel must scrupulously avoid efforts to "rehabilitate" individuals on the panel that exhibit signs of such preconditioning. To do so would prejudice plaintiffs and deny them justice.

III. ELEMENTS FOR MEDICAL MALPRACTICE CAUSE OF ACTION

In order to recover in their claim for medical malpractice, Plaintiff's must prove all of the following propositions:

1) Defendant Melanie Choos Was Negligent in One or More of the Following Particulars

a. Failing to conduct a proper and complete examination; or

b. Failing to order appropriate diagnostic tests and studies; or

c. Failing to properly diagnosis Plaintiff's medical condition; or

d. Failing to have a doctor examine Plaintiff during his medical visit; or

e. Failing to refer Plaintiff to a doctor who could properly diagnose and treat him; or

f. Failing to act competently in accordance with her medical training; or

g. Failing to have the requisite training, degree of skill and knowledge to provide general practice medical services; or

[3] For example, Ex. 3, Declaration of Lin S. Lilley Consulting Firm, Austin, Texas, Signed September 10, 2001.

h. Failing to have the requisite training degree of skill and knowledge to provide emergency medical services; or

i. Failing to act as reasonably as a general practice medical provider; or

j. Failing to act as reasonably as an emergency medicine medical provider.

2) Defendant Choos Negligence Was a Cause of Damage to the Plaintiffs

3) The Nature and Extent of the Damage

IV. EVIDENTIARY ISSUES

1) Leading Questions May be Used to Refresh Recollection

Because over eight years have passed since the events at issue, it is likely that some witnesses will not have complete recollection of the facts. It may become necessary for counsel to refresh the witnesses' recollection. The Iowa Rules of Evidence specifically permit the use of leading questions under these circumstances: "Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop that witness's testimony*." Iowa R. Evid. 5.611(c) (emphasis added); *see also*, Moore's Fed. Practice § 611.3(c) p. 268-69; 3 Wigmore §§ 774-778.

McCormick on Evidence (Chapter 2, § 6 p. 12) states the rule clearly:

> Similarly, when a witness has been fully directed to the subject by non-leading questions without securing from him a complete account of what he is believed to know, his memory is said to be "exhausted" and the judge may permit the examiner to ask questions which by their particularity may revive his memory but which of necessity may thereby suggest the answer desired.

This court should permit counsel to use leading questions to refresh a witness's recollection at trial, should the need arise.

2) Leading Questions and Interrogating Adverse Witnesses

Generally, a party interrogating a witness on direct examination may not use leading questions except as may be necessary to develop a witness's testimony. I.C.A. Rule 5.611(c).

The rule, however, makes an exception for the situation where a party calls an adverse witness on their direct examination. *Id.* The rule states that "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." *Id.*

On the cross-examination of the adverse witness by the party they share a bias in favor of, that party may not lead the witness. While the Iowa Court Rule 5.611(c) states that "ordinarily leading questions should be permitted on cross-examination," the advisory committee's notes to the Federal Rule of Evidence, which the Iowa advisory committee notes suggest should be used for analysis because of the absence of relevant state law, I.C.A. Rule 5.611 advisory committee's note, and *McCormick on Evidence* suggest that in the situation where a witness is biased in favor of the party cross-examining them, that party should not be permitted to use leading questions. FED. R. EVID. 611 advisory committee's note; MCCORMICK ON EVIDENCE, §6 at 13, (3rd ed. 1984). The advisory committee's comment states:

> The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

FED. R. EVID. 611 advisory committee's note. Also, the term "ordinarily" in the rule is used specifically to allow the court to prohibit a party from using leading questions on cross-examination when the witness is biased in their favor. MCCORMICK ON EVIDENCE, §6 at 13, (3rd ed. 1984) (citing *Moody v. Rowell*, 34 Mass. (17 Pick.) 490, 498 (1835)).

In the present case, Plaintiff intends to call witnesses that are either adverse parties or are in some other way biased in favor of the Defendants. The Plaintiff intends to partially or

completely use leading questions on his direct examination of his adverse witnesses in accordance with Iowa Court Rule 5.611(c). When the Defendants question the witness biased in their favor, the Court should not allow them to use leading questions in accordance with the above authorities and conform to the "traditional view that the suggestive powers of the leading question are as a general proposition undesirable." FED. R. EVID. 611 advisory committee's note.

3) Only the Questioner May Move to Strike Any Part of the Witness's Answer

The questioner has an interest in seeking responsive answers to his or her questions. The opponent does not. The mere fact that an answer is unresponsive is not an objection available to the opponent. Only the questioner may move to strike on that basis. If the non-responsive answer is otherwise objectionable, the opponent may move to strike it because the answer was not anticipated and contains material which is not permitted. *See, e.g.*, McCormick on Evidence 3rd, Chapter 6 § 52 p. 127; Graham on Evidence, NITA, Chapter XV, § 3 p. 730. However, that objection cannot be based on the non-responsiveness.

V. CONCLUSION

Plaintiff Christopher Godfrey suffered significant and on-going harm as a result of Defendants' conduct. Plaintiff was harmed by Defendants' conduct, and he comes before the Court at long last seeking to be made whole for the damages he has experienced. Plaintiff asks the Court to facilitate an impartial jury trial through the thorough vetting of perspective jurors by way of a comprehensive voir dire, and that the court refuse to "rehabilitate" jurors who have expressed a bias for one side of the other, or to permit Defense counsel to do so.

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