No. 126507

IN THE SUPREME COURT OF ILLINOIS

THOMAS ITTERSAGEN,	)	On Appeal from
	)	the Appellate Court of
	)	Illinois, First Judicial District
	)	No. 1-19-0778
	)	
Plaintiff-Appellant	)	There Heard from the Circuit No.
	)	Court of Cook County, Illinois,
	)	County Department,
	)	Law Division, No: 16-L-003532
v.	)	
	)	The Honorable
ADVOCATE HEALTH AND HOSPITALS	)	Rena Van Tine
CORPORATION and ANITA	)	Judge Presiding
THAKADIYIL, M.D.,	)	
	)	
Defendants – Appellees.	)	

DEFENDANTS-APPELLEES' RESPONSE BRIEF

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DEFENDANTS-APPELLEES' RESPONSE BRIEF

To the Honorable Justices of
the Illinois Supreme Court

NATURE OF THE CASE

Defendants-Appellees object and move to strike Plaintiff's statement of the "Nature of the Case." As presented, it is argumentative, overly detailed, and does not comport with the requirements of Illinois Supreme Court Rule 341(h)(2). It contains multiple references to alleged facts that are neither "facts" nor linked to any citation to the Record. Further, it attempts, from the very beginning of the Brief, to sow confusion by referring to the Defendant, Advocate Health and Hospitals Corporation, generically as "Advocate." From there, Plaintiff improperly uses the "Nature of the Case" to set in the minds of this Court the notion that any reference to "Advocate" by Juror Glascott must have been a reference to this Defendant, when that is simply not accurate. This Court shoud not take the bait. Defendants would posit the following as a more appropriate statement of the "nature of the case":

"This action was brought to recover damages occasioned by the alleged negligence of the Defendants in providing medical care and treatment to the plaintiff. The jury rendered a verdict for the Defendants, upon which the Trial Court entered the judgment from which this Appeal is taken. No questions are raised on the pleadings."

ISSUES PRESENTED ON APPEAL

Defendants also object and move to strike Plaintiff's "Issues Presented on Appeal." As presented, Plaintiff's "Issues" are grossly argumentative, and in clear violation of

Supreme Court Rule 341(h)(3). The second "Issue," in particular, should be stricken as it is not only absurdly argumentative, but asks this Court to find that the Appellate Court committed "reversible error," whatever that may mean. The only relief requested by Plaintiff is a new trial. [Appellant's Brief at p. 43.] Plaintiff does not identify any relief he seeks for the supposed "reversible error" of the First District Appellate Court. The only issue properly before this Court for review is:

1. Whether the trial court erred in declining to remove a juror for cause during the trial.

Further, neither of Plaintiff's "Issues Presented on Appeal" matches the arguments raised in Plaintiff's Petition for Leave to Appeal. This Court has previously held that it need not consider an argument that a party raises in a later brief but fails to raise in its Petition for Leave to Appeal. *Dineen v. Chicago*, 125 Ill. 2d 248, 265 (1998).

STATUTES CONSTRUED

For the first time in the long history of this litigation, and in the long history of the appellate process, Plaintiff now relies upon the Uniform Prudent Management of Institutional Funds Act, 760 ILCS 51/1, and Illinois Rule of Evidence 201(d) and (f). As the Statute and Rule were never raised at any stage of the appellate process, including Plaintiff's original appeal, petition for rehearing, nor the motion for leave to cite additional authority, and the Statute was first referenced in the Petition for Leave to Appeal to the Supreme Court, Plaintiff should not be permitted to raise these issues for the first time at this stage. Any such arguments and references should be stricken, and Defendants request that relief. Nonetheless, in the interest of completeness, these Defendants will address Plaintiff's arguments and references to 760 ILCS 51/1 and Illinois Rule of Evidence 201.

STATEMENT OF RELEVANT FACTS

As in Plaintiff's Petition for Leave to Appeal, Plaintiff's "Statement of Relevant Facts" is improper. Supreme Court Rule 341(h)(6) provides that a Statement of Facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment…". Plaintiff's Statement of Facts repeatedly violates the Rule as it contains numerous inaccuracies, and a great deal of argument and comment not supported by the Record. Plaintiff's Statement should be stricken in its entirety, or at a minimum, those portions that violate the requirements of Supreme Court Rule 341(h)(6) should be stricken.

The second subheading under Plaintiff's "Statement of Relevant Facts" is argumentative, inaccurately asserting that a juror "reports that he has a fiduciary relationship with Advocate." [Appellant's Brief at p. 6.] Juror Glascott never "reported" that he personally had any fiduciary relationship with the defendant, Advocate Health and Hospitals Corporation. He was prompted by Plaintiff's counsel with a leading question about fiduciary duty, which is the first time the word "fiduciary" ever came up. [R. 1886.] In that context, Juror Glascott was clearly interpreting the "you" as his company, Green Courte Partners, which is the "general partner" in the financial relationship with the "endowment" and dozens of other investors. [R. 1886.]

Throughout the Statement of Relevant Facts, and throughout Plaintiff's Appellant's Brief, Plaintiff continues the use of the term "Advocate" to try to erase in this Court's mind any distinction between the defendant, Advocate Health and Hospitals Corporation d/b/a Advocate Medical Group and other Advocate entities, or the "endowment" to which Juror Glascott referred. [R. 1880.] The case, in fact, did not even involve any care at any

Advocate Health and Hospitals Corporation owned hospital. This Court should not be distracted by this tactic, designed to skew the issues before the actual facts in the Record are reviewed. This Court should strike and/or disregard the subheading at page six of the Appellant's Brief.

At page 9 of the Appellant's Brief, Plaintiff asserts that Juror Glascott claimed "if he brought in investors to invest in the fund, he also got a bonus." [Appellant's Brief at p. 9, citing R. 1885.] That is not what Juror Glascott said. In fact, in the very next sentence quoted in Plaintiff's Brief, Juror Glascott testified on examination by Plaintiff's counsel that his compensation is "not tied to raising capital." [R. 1885.]

At the bottom of page 10 of the Appellant's Brief, Plaintiff asserts, "Juror Glascott then stated for the fourth time that he had a fiduciary duty to Advocate." [Appellant's Brief at p. 10, citing R. 1889.] This is spin, not a "fact." The Record and *voir dire* testimony of Juror Glascott speak for themselves, and should not be subjected to the editorializing by Plaintiff in his "Statement of Relevant Facts." [R. 1879-1889.]

Finally, at the bottom of page 13 of the Appellant's Brief, Plaintiff asserts, without basis and in nonsensical fashion, that "Since Advocate did not have an endowment, defense counsel's representations that the endowment was separate per se from the defendant, which the Appellate Court had relied on, were plainly false." [Appellant's Brief at p. 13.] This is plain argument, and not anything approaching a statement of any "fact." Further, the notion that a tax form which denies the existence or ownership of an endowment somehow proves the endowment referred to by Juror Glascott must have been owned by the Defendant, Advocate Health and Hospitals Corporation, is illogical. Such argument should be stricken from the Statement of Relevant Facts.

STANDARD OF REVIEW

Plaintiff "suggests" the applicable standard of review here might be *de novo*, relying upon a Federal Court citation out of the Ninth Circuit Court of Appeals. [Appellant's Brief at p. 14.] This Court has long held that the determination of whether to strike a juror for cause is within the sound discretion of the trial judge. *People v. Harris*, 38 Ill. 2d 552, 556 (1967). The ability of the trial court to observe the demeanor of a juror, and determine the independence and impartiality of the juror based upon those observations, is also part of the discretion afforded trial judges. See, *People v. Cole*, 54 Ill. 2d 401, 411-15 (1973). Further, in reviewing the trial judge's determination, the entire *voir dire* examination of the potential juror should be considered, as opposed to selected responses. *People v. Peeples*, 155 Ill. 2d 422, 462-63 (1993). Because the trial judge is in the best position to observe the potential juror's demeanor and ascertain the meaning of his or her remarks, the trial judge's determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Id.*

Plaintiff asserts, "This Court has never stated a standard of review for a court's failure to apply the presumption of bias." [Appellant's Brief at p. 14.] Yet, this Court has repeatedly held determinations of juror bias are left to the sound discretion of the trial court. *People v. Harris*, 38 Ill. 2d 552, 556 (1967). This Court has never taken away the trial court's discretion to determine when bias may be presumed based upon a supposed relationship between a juror and a party. Plaintiff concedes this point. [Appellant's Brief at pp. 14-15.]

Instead, Plaintiff relies upon the Federal case of *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000). Even in that case, the Ninth Circuit cited several circumstances,

all involving criminal trials, wherein so-called "implied bias" was found, none of them approaching the facts of the case at bar. *Id.*, 214 F.3d at 1112-13. As the Court noted, implied or "presumed" bias can only be found in "extraordinary circumstances." Id., 214 F.3d at 1112.

Plaintiff certainly cannot cite to any case, Federal or State, wherein the court found an irrefutable presumption of juror bias under facts similar to the facts of the case at bar. There is no case in Illinois law, nor one Plaintiff has found in Federal law, that presumes juror bias because a juror discloses working for a company that invests financial assets of an endowment that may or may not be related to the defendant corporation. The proper standard of review here is an abuse of discretion.

Plaintiff similarly overcomplicates the standard of review applicable to the appellate court's decision to decline to take "judicial notice" of the tax document referenced in Plaintiff's Appeal. Illinois Rule of Evidence 201, upon which Plaintiff now attempts to rely, provides that a court shall take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information. Ill. R. Evid. 201. The rule further provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Ill. R. Evid. 201. "However, only documents that were properly before the trial court can be part of the record on appeal." *Radosevich v. Industrial Comm'n*, 367 Ill. App. 3d 769, 772, 856 N.E.2d 1, 305 Ill. Dec. 469 (2006) (party may supplement the record on appeal only with documents that were before the circuit court).

Thus, the issue is neither proper judicial notice nor a "request to consider evidence." Rather, Plaintiff is attempting to use Illinois Rule of Evidence 201, regarding judicial notice of adjudicative facts, to ask this Court to find the First District should have taken judicial notice of a **document** that was not before the Trial Court. The First District properly refused. Plaintiff has not articulated any "adjudicative fact" of which either this Court or the First District could appropriately take judicial notice. To the extent there is any issue here about judicial notice, this Court has articulated, in *People v. Davis*, 65 Ill. 2d 157, 164 (1976) that a court **may** take judicial notice of other proceedings in other courts, which is not at issue here. If it were, this would at least imply a discretionary standard.

ARGUMENT

Plaintiff asks this Court to overturn the considered judgment of the jury because of one juror's honest and forthright disclosure in the middle of trial of an attenuated business relationship between the company for which he works and an entity Plaintiff failed to establish as being related to the Defendant at issue in this case. Plaintiff's argument relies largely upon sleight of hand, generically using the term "Advocate" to circumvent Plaintiff's failure to establish an actual relationship between the Defendant in this case, Advocate Health and Hospitals Corporation, and the entity with which Juror Glascott's company had some investment relationship, much less any relationship with Juror Glascott individually. From there, Plaintiff invites this Court to create a new rule, essentially wiping out much of the discretion historically afforded trial judges in evaluating the veracity and demeanor of jurors challenged for cause. This Court should decline the invitation.

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EVALUATING JUROR GLASCOTT THROUGH VOIR DIRE EXAMINATION IN THE TRIAL JUDGE'S CHAMBERS, AND THEN DECLINING TO REMOVE HIM FROM THE JURY.

Plaintiff's argument begins with the assertion, "The doctrine of implied or presumed bias is well-settled in the law." [Appellant's Brief at p. 16.] Based upon the case citations in the "Introduction" section of this portion of Plaintiff's Brief, what Plaintiff means by "well-settled" is that it is well-settled in Federal law, and more specifically Federal criminal law. Further, Plaintiff fails to analyze the circumstances under which the Federal implied or presumed bias doctrine has been applied.

Plaintiff cites *Conaway v. Polk*, 453 F.2d 567, 586-87 (4th Cir. 2006) for the proposition that, "Implied bias dates back to the very founding of this country." [Appellant's Brief at p. 16.] What Plaintiff fails to note is that the doctrine's long history has related to criminal cases under a Sixth Amendment analysis. *Conaway*, 453 F.3d 567 generally.

Plaintiff next cites *United States v. Torres*, 128 F.2d 38 (2d Cir. 1997), which is certainly quite instructive on the issues before this Court, but not for the reasons Plaintiff asserts. [Appellant's Brief at p. 16.] There the court noted, "The doctrine of implied bias is reserved for 'exceptional situations' in which objective circumstances cast concrete doubt on the impartiality of a juror." *Id.*, 128 F.3d at 46, citing *Smith v. Phillips*, 455 U.S. 209, 222 (1982). The *Torres* court further noted, "Our court has **consistently refused to create a set of unreasonably constricting presumptions** that jurors be excused for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case, where there is no showing of actual bias or prejudice (emphasis added)." *Id.*

In *Smith*, the United States Supreme Court declined to impute bias to a seated juror who, while the case in which he sat was being tried, applied for a job in the very district attorney's office in charge of the prosecution of the same case. The Supreme Court found that a conclusive presumption of bias was inappropriate because it was possible to determine in a post-trial hearing whether or not the juror had been biased. *Smith*, 455 U.S. at 215-18.

Plaintiff's "Introduction" continues with the myth that Plaintiff somehow unequivocally established Juror Glascott had an ongoing fiduciary duty of his own to the defendant, Advocate Health and Hospitals Corporation, and/or that he was somehow a "partner" of the Defendant. [Appellant's Brief at p. 17.] That was never established, and contradicts the testimony of Juror Glascott. [R. 1879-89.] Plaintiff continues to rely upon this fallacious argument to push an "implied bias" theory because Plaintiff knows the Trial Court thoroughly *voir dired* Juror Glascott, and properly found he could be fair. There can be no argument that the Trial Judge correctly exercised her discretion in evaluating Juror Glascott for potential bias. Thus, a tortured analysis of implied or presumed bias is all that remains to Plaintiff in attempting to overturn this jury's verdict.

Nothing Plaintiff presented at trial, nor even the tax record upon which Plaintiff now so heavily relies, but which is not properly a part of the Record, establishes that the endowment to which Juror Glascott referred is synonymous with the defendant, Advocate Health and Hospitals Corporation. Further, nothing Plaintiff presented, nor any of the testimony or questioning of Juror Glascott, establishes he had a direct fiduciary relationship or responsibility to the defendant, Advocate Health and Hospitals Corporation. Juror Glascott agreed that any fudiciary duty he may have had was to this "endowment" and to

his own company. [R. 1888.] It was his employer, Green Courte, that operated various investment funds through limited partnerships, one of which included the "endowment" referred to by Juror Glascott, along with dozens of other investors. [R. 1886.]

Despite various leading questions designed to confuse him, at most what has been shown was that Juror Glascott was an employee of a corporation that was a general partner in a limited partnership with a number of other limited partners. Juror Glascott was not the owner of that company, not a "partner" of anyone or any party, not a licensed financial advisor, and certainly never had a one to one relationship with whatever entity was one of the limited partners, or to the Defendant, Advocate Health and Hospitals Corporation. [R. 1879-89.]

There has not been one scintilla of evidence presented to suggest Juror Glascott ever in his life had any direct communication with anyone employed by or working for the "endowment." He oversaw the investment of a "pool of money," one contributor to which was this "endowment." [R. 1884; 1886.] There is certainly no evidence he ever communicated directly with anyone at the Defendant, Advocate Health and Hospitals Corporation, that he provided advice to them, or counseled them in any fashion, particularly in any one on one fashion. That Juror Glascott did not even recall any relationship he may have had with anything involving an "Advocate" entity is further evidence of the tenuous nature of this supposed "relationship." Juror Glascott literally did not even know what relationship the endowment may, or may not, have had with this Defendant. [R. 1883.]

Juror Glascott himself pointed out he was never directly asked during jury selection a question about any business relationship he did or did not have with Advocate. [R. 1880.]

Given how forthcoming he was during the in chambers *voir dire*, there is no reason to believe he would not have disclosed the same information if asked during jury selection. Yet, Plaintiff's counsel has not made the jury selection part of the Record. [See footnote 1 to Plaintiff's Appellant's Brief.] As this Court noted in *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92 (1984), an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.

Here it was Plaintiff's obligation to establish, through proper and complete citation to the Record, that Plaintiff had not waived this issue. Plaintiff raised no issue as to Juror Glascott prior to his being empaneled, or prior to his volunteering information, despite the fact Plaintiff's counsel continued to investigate Juror Glascott during the first seven days of the trial. [R. 1874-77.] Although he moved to strike Juror Glascott, he did not request an additional peremptory challenge, or move for mistrial. *Marcin v. Kipfer*, 117 Ill. App. 3d 1065 (4th Dist. 1983).

A. No Prior Decision of This Court Requires Removal.

As he did at the Appellate Court level, Plaintiff relies heavily upon the case of *Naperville v. Wehrle*, 340 Ill. 579 (1930), claiming *Naperville* is one of the few Illinois cases to examine professional and financial relationships between a juror and a party. [Appellant's Brief at p. 19.] In fact, *Naperville* had nothing to do with a juror. Further, no Illinois case that has ever cited or relied upon *Naperville v. Wehrle* has involved jurors, or

evaluation of a trial court's decision whether to excuse a juror. All of the cases citing *Naperville* involved administrative bodies, not juries.

Contrary to the assertion in the Appellant's Brief at pp. 19-20, this case does not present a relationship similar to that evaluated in the *Naperville* case. In *Naperville*, this Court reversed the outcome of an administrative proceeding wherein the City of Naperville appointed three compensated commissioners to determine whether property had been appropriately assessed, and property owners appropriately compensated for property taken by condemnation. *Naperville*, 340 Ill. 579, 580. One of the commissioners, Truman Myers, was the compensated Secretary of a school district whose lands were among those whose assessments he would be reviewing as part of the commission. *Id.* 340 Ill. At 581. Thus, this Court's ruling in *Naperville* was based upon the very direct financial interest Commissioner Myers' employer had in the outcome of the administrative proceedings he was overseeing. His involvement in the hearing would determine the taxation on his own employer, not indirectly, but very directly. And the issue was not a fiduciary relationship. The word "fiduciary" appears nowhere in the *Naperville* decision. *Id.*

In the case at bar, there is no evidence Juror Glascott had any financial interest in the outcome of this litigation. In fact, Juror Glascott specifically testified he did not, and explained why. [R. 1887.] There has never been any evidence or suggestion that a verdict against Advocate Health and Hospitals Corporation in the litigation at bar would have had anything to do with the invested funds of the referenced "endowment," whether it had any relationship to this Defendant or not. The Record is devoid of any evidence suggesting Juror Glascott or his company had any oversight over Advocate Health and Hospitals Corporation's financial assets, that either he or Green Courte advised the Defendant on

litigation matters, what portion of the so-called "endowment" was invested in the Green Courte fund, or that whatever money already invested from this endowment was somehow impacted by unrelated litigation. The only evidence in the Record, from Juror Glascott himself, is that the litigation would have no impact on his compensation whatsoever. [R. 1887.] *Naperville* is not analogous.

Plaintiff then refers to "business partners," and tries to use word play to suggest Juror Glascott himself was a "partner" of this "endowment," and therefore to "Advocate." [Appellant's Brief at p. 20.] Despite multiple references, the Record is abundantly clear this endowment, whatever it was, was not "his limited partner." [R. 1789-99.] It was a limited partner in one venture with Juror Glascott's employer, along with dozens of other limited partner investors. [R.1886.] Plaintiff attempts to erase this distinction because no case Plaintiff has uncovered has ever applied the so called "implied bias" standard without a more direct relationship than is demonstrated by any reading of the facts of this case.

Plaintiff then asserts "Nearly every state and federal court across this country has adopted the doctrine of implied bias and has expressly held that the relationship alone can and must require removal." [Appellant's Brief at p. 21, citing *U.S. v. Torres*, 128 F.3d at 45; and the Appendix to Appellant's Brief at A. 45 – A. 65.] As will be discussed in much greater detail in Section I (H) of Defendants' Appellees' Brief, this statement is false, misleading, and unsupported by the citations Plaintiff provides in either the Appellant's Brief or the Appendix thereto.

Plaintiff cites *People v. Cole*, 54 Ill. 2d 401 (1973) for the general principle that a relationship between a juror and a party might be of such a nature that the relationship alone requires the removal of the juror. [Appellant's Brief at pp. 21-22.] *People v. Cole*

is instructive in its analysis of where this Court has historically chosen not to go in finding implied bias based upon certain relationships. *Id.* Despite its discussion of implied bias principles, the *People v. Cole* court still held, "The burden of showing that the juror possesses a disqualifying state of mind is on the party challenging the juror." *Id.,* 54 Ill. 2d at 413.

Defendants take no issue with the notion that, in certain extraordinary circumstances, certain **direct** relationships between jurors and parties might be of such a nature as to require removal, regardless of other proof of bias. Defendants recognize a very limited application of this principle has been established both in Illinois and in Federal courts. Where Defendants take issue is the notion that this principle should be broadly expanded to include the types of attenuated relationships alleged here, as well as Plaintiff's claim of establishing such a relationship in the case at bar.

The facts in *People v. Cole* are instructive. In that case the juror at issue, Russell Davis, personally knew both the state's attorney and the assistant state's attorney prosecuting the case against the criminal defendant. He had actually spoken with one of the murder victims about a year before the trial. He knew one of the witnesses for the State, who used to live next-door to him and had been his family physician. The sister-in-law of another witness for the State was the juror's daughter-in-law. Perhaps most compelling, he was also personal friends with the arresting sheriff and had discussed the case with him before the trial. *Id.*, 54 Ill. 2d at 411-412.

Despite all of the aforementioned connections between the juror and the parties and witnesses involved in the prosecution, and the 6th Amendment issues relevant in a criminal trial, the Illinois Supreme Court upheld the jury's verdict. The Illinois Supreme Court

reversed the decision of the Fourth District Appellate Court and remanded the case after the Fourth District had thrown out the verdict for failure of the trial court to remove the juror for cause. *Id.*, 54 Ill. 2d at 415-16. This Court found the aforementioned relationships not to have been of a nature to require the presumption that the juror could not be fair, that the juror be excused, or that the jury's verdict be overturned. *Id.*

If anything, *People v. Cole* reinforces the proposition that a trial judge is and should be vested with broad discretion in determining potential juror bias, and that "implied bias" should only be applied in extreme or extraordinary circumstances. *Id.* Judge Van Tine did exactly what she was supposed to do in finding any alleged relationship in the case at bar did not rise to the level of the sort of direct relationship to which the implied bias doctrine should be applied. She then thoroughly voir dired Juror Glascott and appropriately determined, after evaluating his answers, his demeanor, and the totality of the circumstances, that he would be fair. This was a very appropriate exercise of judicial discretion.

Plaintiff points out this Court, in *People v. Cole*, declined to define what specific relationships would be considered so direct that bias should be presumed, and the trial court's discretion removed. [Appellant's Brief at bottom of p. 22, citing *Cole*, 54 Ill. 2d at 413.] However, Plaintiff's Brief strays from reality two sentences later, when Plaintiff claims, "This Court in *Naperville*, consistent with the majority of jurisdictions in this (country), specifically delineated fiduciary relationships between a juror and a party as too close to allow a juror to serve." [Appellant's Brief at bottom of p. 22.] Again, the word "fiduciary" appears nowhere in the *Naperville* decision, nor in virtually any of the cases,

statutes and rules of procedure cited in the Appellant's Brief or the Appendix thereto. [App. pp. 45-65.] That is simply Plaintiff's creation.

Rather, this Court used terms such as "master, servant, steward, counselor or attorney of either party." *Naperville*, 340 Ill. 582. None of those terms can appropriately be applied to Juror Glascott on this Record. Plaintiff's assertions also completely ignore the undisputed fact Juror Glascott was not a general or limited partner of anyone. The relationship at issue, whatever it may have been, was between some entity Plaintiff keeps referring to as "Advocate" and Juror Glascott's employer, not Juror Glascott himself.

B. The Appellate Court Properly Determined the Trial Court Did Not Need to Remove Juror Glascott.

Plaintiff suggests the First District decided this matter solely based upon its finding that, "The evidence was insufficient to demonstrate any express fiduciary relationship between Juror Glascott and Defendant Advocate Medical." [Appellant's Brief at p. 23, citing First District decision at paragraph 64 (the quote is actually in paragraph 63).] The First District's decision was not based merely upon some distinction between an express versus an indirect fiduciary relationship, though the lack of a direct relationship is certainly a relevant consideration. *Ittersagen*, 2020 IL App (1st) 190778 at par. 62-63. The First District concluded, **based upon the entire record**, "That plaintiff has failed to demonstrate Juror Glascott's relationship with defendant Advocate Medical rises to the level of presumed bias." *Id.* at par. 63. In other words, the Appellate Court considered the issue of presumed bias, but correctly determined Plaintiff failed to establish a relationship between the juror and a party that would justify such a presumption here.

This Court reached a similar conclusion after a similar analysis in *People v. Porter*, 111 Ill. 2d 386, 404 (1986), a case cited by Plaintiff. In that case, Court held that the

criminal defendant failed to meet his burden of establishing that the relationship between the juror and a party was of such a character that a presumption of prejudice would arise from it, even in that criminal case. [See Appellant's Brief at p. 23, citing *Porter*, 111 Ill. 2d at 404.] The Supreme Court emphasized and clarified that it is the burden of the party alleging bias to support those allegations. As this Court articulated, "It was incumbent upon him to establish the nature of the relationship between the juror and the victim's mother." *Id.* The *People v. Porter* court went further:

> Although the defendant argues that the juror was a friend of the victim's mother, nothing in the record supports this conclusion. All that the record shows is that the juror, during the course of the trial, learned or realized that she knew the victim's mother as someone who attended the same church that she attended. The record does not even disclose the name of the victim's mother, nor does it disclose that the juror knew her name. Not only should the defendant have shown the nature of the relationship between the juror and the victim's mother, **but he also had the burden of showing that he was prejudiced by this juror's service** (emphasis added). *Id.*

As in *People v. Porter*, the burden was upon Plaintiff to establish that the nature of the relationship between Juror Glascott himself and Advocate Health and Hospitals Corporation, rather than a relationship between some "endowment" and Juror Glascott's employer, was of such a character that a presumption of prejudice would arise therefrom. *Id.* Plaintiff failed to do so in the case at bar at trial, and at every stage of the appellate process thereafter.

C. Plaintiff Continues to Misstate the Evidence of Any Supposed Relationship Between "Advocate" and "Advocate's Endowment."

The tax document upon which Plaintiff relies is not properly part of the Record before this Court, for the reasons set forth in the Standard of Review section *supra*. Any argument relying upon this document should be stricken as improper, and not based upon the Record.

Even if this Court were to consider the tax return filed by Advocate Health and Hospitals Corporation, Plaintiff falsely posits that the return somehow establishes "Advocate's endowment was not separate from Advocate." [Appellant's Brief at p. 24, again using the generic term "Advocate".] Plaintiff makes that assertion by failing to specify the legal entity to which he refers. Plaintiff uses terms like "Advocate Healthcare System Endowment" as if that is some legal entity identified anywhere in any part of the Record of this case. Plaintiff then asserts, without benefit of citation to the Record, that the Defendant, Advocate Health and Hospitals Corporation, is "the very corporation that owns and operates the Advocate Healthcare System," whatever that means. There is no such legal entity known as the "Advocate Healthcare System," and so the Record is devoid of any proof of its existence, much less its relationship to the Defendant, Advocate Health and Hospitals Corporation.

If this Court wanted to take judicial notice of anything, it should take notice that the Illinois Secretary of State's public website identifies corporations registered with the State. *People v. Whittaker*, 45 Ill.2d 491, 495 (1970). Other entities registered with the Secretary of State with similar names include Advocate Charitable Foundation, Advocate Health Care, Advocate Health Care Network, and Advocate Health Partners, all of which are separately incorporated corporate masters, and neither assumed names of nor synonymous with Advocate Health and Hospitals Corporation.

Although Plaintiff asks this Court to find error in the First District's refusal to take "judicial notice" of the tax form (Appellant's Brief at p. 2), Plaintiff provides no basis for doing so. As cited in Plaintiff's own brief, Illinois Rule of Evidence 201 states "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1)

generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." [See Appellant's Brief at p. 3.] So what "fact" is Plaintiff asking this Court to take judicial notice of? That Advocate Health and Hospitals Corporation filed a tax return? That the return indicated Advocate Health and Hospitals Corporation did not maintain any endowment?

The question asked in the form was "Did the organization, **directly or through a related organization**, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments (emphasis added)?" [See Appellant's Brief at p. 13.] The form specifically asked whether the filing entity held such funds in an endowment "directly." So how does the answer "No" prove the allegedly incontrovertible "fact" that Advocate Health and Hospitals Corporation held such funds **directly**? It does not. Plaintiff's argument is nonsensical.

Illinois Rule of Evidence 201(d) only allows for judicial notice of facts in two circumstances. The first is clearly inapposite here, as the tax filing and alleged relationship between Advocate Health and Hospitals Corporation and some "endowment" is certainly not "generally known with the territorial jurisdiction of the trial court." If it was, Plaintiff should have identified it at trial. But even Juror Glascott did not know who owned what, or where the money went. [R. 1883.]

The second circumstance where a Court may take judicial notice of an adjudicative fact (not a document) is if the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Illinois Rule of Evidence 201(c)(2). The supposed relationship between the Defendant, Advocate Health and

Hospitals Corporation and the $6 billion endowment referred to by Juror Glascott is not "capable of accurate and ready determination" by a tax form wherein Advocate Health and Hospitals Corporation disclaims holding any funds in an endowment, directly or indirectly.

Apparently recognizing the flaw in his judicial notice argument, Plaintiff then asserts "Glascott's fiduciary relationship to the $6 billon Advocate Endowment, if it was somehow separate from the defendant, was equally disqualifying" because "[T]he money under Glascott's care, whether invested in the name of the defendant or the defendant's own endowment, *belonged to the defendant* (emphasis in the original)." [Appellant's Brief at p. 25.] In other words, "even if we can't prove what we claim, the Court should just assume everything is connected because...."

The entire paragraph is devoid of citation to the Record. Plaintiff has presented precisely zero evidence that the money to which Juror Glascott referred "belonged to the defendant." The tax return filed by Advocate Health and Hospitals Corporation has no $6 billion asset line. There is no evidence of what Plaintiff refers to as the "Advocate Endowment." The tax form to which Plaintiff cites disclaims any assets held in an "endowment" by Advocate Health and Hospitals Corporation, directly or indirectly. The rest of Plaintiff's argument simply ignores that fact and pretends any reference to "Advocate" had to mean "Advocate Health and Hospitals Corporation," the Defendant in this case, while offering nothing to back this up.

D. Juror Glascott's Testimony Does Not Establish a Direct Relationship Between "Advocate" and "Its Own Endowment."

Juror Glascott's testimony could not possibly have established any "direct relationship between Advocate and its own endowment," since Juror Glascott did not know what that relationship was, if one even existed. He specifically testified, "I don't know

who owns what, where that money goes. R. 1882-83." At best, Juror Glascott was speculating about a relationship that was so tenuous it did not even come to his mind when being questioned during *voir dire* prior to the trial. [R. 1881.]

Ironically, Plaintiff cites to *People v. Stone*, 61 Ill. App. 3d 654, 667 (5th Dist. 1978) for the proposition that, "A court should not single out certain statements but should regard the examination of each prospective juror as a whole." [Appellant's Brief at p. 29.] The quotation is absolutely correct. Plaintiff's application of it is not. Instead, Plaintiff cherry-picks certain quotes from Juror Glascott's testimony, and then provides spin as to what they mean, while disregarding others. [Appellant's Brief at pp. 26-28.] Both the Trial Court and the First District Appellate Court considered the entirety of the *voir dire* examination of Juror Glascott in correctly concluding Plaintiff failed to meet his burden of establishing either bias or a relationship to the defendant, Advocate Health and Hospitals Corporation, that required a presumption of bias.

Contrary to Plaintiff's assertion, Juror Glascott never told the trial court "that the endowment belonged to the defendant." [Appellant's Brief at p. 26.] A straightforward reading of Juror Glascott's testimony makes clear he did not know or understand what "Advocate" entity, if any, was related to the $6,000,000,000 endowment that was one of dozens of investors in one of Juror Glascott's employer's investment pools. He never once described the "Advocate Health and Hospitals Corporation's endowment." Rather, he referred to some entity known as "Advocate Healthcare System Endowment." [R. 1882] When asked if he believed it was the medical group involved in this case, he indicated, "No, no, no, the overall $6,000,000,000 endowment." [R. 1882] He clearly did not know who owned what, or where the money went. [R. 1883]

Plaintiff further argues Juror Glascott had a financial interest in the outcome of this litigation. [Appellant's Brief at p. 29.] This directly contradicts Juror Glascott's sworn testimony. [R. 1887.] Not only did he indicate his compensation is "not at all dependent on a malpractice suit," but that "the people we interface with wouldn't even know about (the litigation)." [R. 1887.]

E. The First District No More Relied Upon Statements of Advocate's Attorney as Evidence Than It Did Statements by Plaintiff's Counsel.

Contrary to Plaintiff's assertion, the First District's decision did not rely upon any representation by defense counsel, even though the First District correctly articulated what occurred. Rather, the First District referenced the comments by defense counsel, agreed to by Juror Glascott, as showing how unclear the issues were, and thus how Plaintiff had failed to meet **his burden** of sufficiently establishing a relationship to create the presumption of bias. Ironically, it was Plaintiff's counsel who suggested to Juror Glascott he oversees "the money that Advocate invests" (R. 1884), and that Juror Glascott had "described Advocate as a partner" (R. 1885) when Juror Glascott had not. It was Plaintiff's counsel who first injected the term "fiduciary duty" into the conversation (R. 1886). The First District examined the entirety of the voir dire of Juror Glascott and its implications. *Ittersagen*, 202 IL App (1st) 190778 at paragraphs 58-62. From there, the court found "Based on this record, we conclude that plaintiff has failed to demonstrate Juror Glascott's relationship with Advocate Medical rises to the level of presumed bias. *Id.* at par. 63. The suggestion that either the Trial Court or the First District based their decisions solely on statements by defense counsel is baseless.

F. Illinois Law Does Not "Compel the Conclusion" That Juror Glascott Had a Direct Fiduciary Relationship to the Defendant, Advocate Health and Hospitals Corporation.

This section of Plaintiff's Appellant's Brief raises an argument never before raised during the trial, the briefing and argument on Plaintiff's Post Trial Motion, Plaintiff's Motion to Supplement the Record on the Post Trial, Plaintiff's Appeal, Plaintiff's Motion to Cite Additional Authority for the Appeal, or Plaintiff's Petition for Rehearing in the First District. Yet, now Plaintiff asks this Court to overturn the judgment of the Trial Court, and the decision of the First District on both the Appeal and the Petition for Rehearing, based upon a citation with which neither Court was provided.

Even if this Court were to consider this argument, the analysis is so tortured as to lend no support to Plaintiff's Appeal. It lacks any citation to the Record, and relies upon several unsupported assumptions. Contrary to Plaintiff's assertion, Juror Glascott did not testify "that the defendant used its endowment to invest money for its own use – to support the growth and expansion of its own healthcare system." [Appellant's Brief at p. 33.] What he testified was, "The endowment raises money for the growth and expansion of the hospital system overall. So they have a pool of money that they invest to grow the hospital system. I mean, it's all a part of the same – I don't know who owns what, where that money goes." [R. 1882-83.] Juror Glascott never specified that it was the defendant at issue in this litigation who had the endowment, used the endowment, or had any direct relationship of any kind with either Juror Glascott or his corporation. That was and remains a creation by Plaintiff's counsel. A new apocryphal reference to the Illinois Prudent Management of Institutional Funds Act lends no support to Plaintiff's argument.

G. The First District's Opinion as Referenced in Plaintiff's Appeal Does Not Conflict with the Fourth District's Opinion as Cited in Plaintiff's Appeal.

Plaintiff argues the First District's opinion in the case at bar is "in direct conflict with the Fourth District's decision in *Marcin v. Kipfer*, 117 Ill. App. 3d 1065, 1067 (4th Dist. 1983)." [Appellant's Brief at p. 33.] It is not. The *Marcin* case involved two jurors who were patients of the defendant physician. *Id.* They both even indicated they would consult with the defendant doctor if they got sick during the trial. *Id.* This was an infinitely more personal and intimate relationship than whatever attenuated relationship Juror Glascott, through his corporation, discussed in the case at bar. Even the *Marcin* court noted the limited application of its holding, and distinguished a case where a juror was a patient of the murder victim in a criminal trial. *Id.*

Similarly, this Court recognized the very limited applicability of the holding in *Marcin* when the case was discussed in *Roach v. Springfield Clinic*, 157 Ill.2d 29, 47 (1993). As this Court noted in the *Roach* case, the *Marcin* court was careful to limit its holding, making it clear that only the very close relationship of the two jurors with their doctor required their exclusion. 157 Ill.2d at 47. This Court in *Roach* went on to distinguish the facts of the *Roach* case from those in *Marcin*, noting that in *Roach* it was the spouse of the juror in question who was a patient of the defendant, and that alone was insufficient to establish bias. *Id.*, 157 Ill.2d at 48. Thus, this Court refused to invoke the doctrine of implied bias absent a more direct relationship between juor and party, even where the wife of the juror in question was a patient of the defendant. *Id.*

Similarly, in the case at bar it was not Juror Glascott who had a direct relationship with "Advocate," even if this Court were to assume "Advocate" to mean Advocate Health and Hospitals Corporation. Rather, Juror Glascott's employer was a general partner in a

partnership wherein an endowment that Plaintiff alleges was somehow related to the Defendant was one of dozens of limited partners. To suggest that sort of a relationship was remotely analogous to *Marcin* strains credibility.

In *Roach*, this Court also reiterated the standard from *People v. Cole* that, "The determination of impartiality is not purely objective; it is proper for the Court to consider a statement of the juror as evidence of his state of mind." *Id.* As in the case at bar, the juror at issue in *Roach* stated that he did not know until mid-trial that his wife was a patient of the defendant, and even then, he did not think it significant enough to report. *Id.* Thus, this Court took into consideration both the indirect nature of the relationship, and the obvious lack of impact it had on the juror. *Id.* In affirming the verdict in favor of the defendant physician, the *Roach* court once again quoted *People v. Cole* for the proposition that mere suspicion of bias or impartiality is not evidence and does not disqualify a juror. *Id.* The burden of showing the juror is biased or prejudiced is on the party challenging the juror. *Id.* The Supreme Court's decision in *Roach* clearly demonstrates why the First District's opinion was not only correct but does not conflict with *Marcin*.

H. Plaintiff Misrepresents and Selectively Chooses Case Law from Outside of Illinois on This Issue.

Both the heading and content of Plaintiff's argument in this section are inaccurate and misleading. Plaintiff presents a chart with misleading citations to various state statutes or Rules of Procedure Plaintiff claims govern the issue of implied juror bias in those states. [Appellant's Brief at p. 35, citing to chart created by Plaintiff's counsel, Appendix pp. 45-65.] The suggestion these other jurisdictions "would have removed Glascott from the jury" is simply unsupported. Plaintiff's argument is overly vague, and substitutes conclusory assertions for any detailed analysis.

The referenced section of Plaintiff's Appendix also appears to be a 20 page, single spaced end around on the page limitations in Supreme Court Rule 341. [Appendix at pp. A. 45 to A. 65.] Supreme Court Rule 342 sets forth the requirements for a proper Appendix, and does not provide for a lengthy review of cases and statutes from other cases as a way to supplement a Brief through the Appendix.

Nonetheless, in the second paragraph in this section, Plaintiff asserts, "25 states have codified statutes that specifically disqualify fiduciary relationships between a juror and a party akin to those enumerated in *Naperville v. Wehrle*..." [Appellant's Brief at p. 35, citing Appendix at A. 45 to A. 53.] Plaintiff then asserts "15 of those states have specifically codified the rule that if a prospective juror is a partner of a party, that juror must be excluded." [Appellant's Brief at p. 35.] Finally, Plaintiff asserts "In states that do not enumerate disqualifying relationships by statute, judicial decisions in those states overwhelmingly recognize professional and financial relationships between a juror and a party as grounds to imply bias and remove the juror. [Appellant's Brief at p. 36, citing Appendix at A. 54 to A. 61. and specifically referencing the law in Connecticut, Georgia, Kentucky, and Pennsylvania – all explored only in the Appendix.]

As will be shown, all three statements are demonstrably false. To properly frame the issue, **Juror Glascott was not a partner of anyone,** even within the company he worked for. He was an employee. It was his employer that partnered with some entity that Plaintiff claims is related to the Defendant, Advocate Health and Hospitals Corporation. [R. 1879-89.] This is hardly a distinction without a difference. The personal relationships between actual partners and between employees of limited partnerships is very different. This is evidenced by Juror Glascott not even recalling any business relationship with any

Advocate entity, and not relating any communication he ever directly had with anyone from Advocate regarding any issue, until he got a random LinkedIn request. [R. 1881-82.]

Further, the states referenced have not "specifically codified" the rule that if a prospective juror is a partner of a party, "that juror must be excluded." Unfortunately, although cumbersome, a state-by-state analysis will be necessary to demonstrate the misleading nature of Plaintiff's assertions in this section of the Argument, and to elucidate when an adoption of what Plaintiff proposes in his Appeal would be a dramatic departure from the norm. Thus, Defendants present the following state-by-state analysis:

Alabama – The referenced code section speaks to the juror himself, not to the juror's employer. [Appendix to Appellant's Brief at p. 45.] There is no reference to fiduciary duty, and the section only relates to what is considered "good ground for challenge of a juror by either party." [Code of Alabama, Section 12-15-150.] Nothing in this section mandates removal of the juror, or takes away the discretion of the trial court to make that determination.

Alaska – Plaintiff cites Alaska Rules of Civil Procedure Section 47(c)(10) and (13). The introduction portion of Alaska Rule of Civil Procedure 47(c) indicates, "After the examination of prospective jurors is completed and before any juror is sworn, the parties may challenge any juror for cause. A juror challenged for cause may be directed to answer every question pertinent to the inquiry. Every challenge for cause shall be determined by the court." Thus, Plaintiff's suggestion that the categories listed at page 45 of the Appendix to Appellant's Brief require disqualification of a juror in Alaska under those circumstances is simply false. This section also refers to "the person," not the person's employer. As Juror Glascott made clear, he had no personal financial interest in the outcome of the case.

Arizona – Plaintiff cites Arizona Rule of Civil Procedure 47. Once again, that Rule refers to the juror himself or herself, not the juror's employer. It makes no mention of fiduciary duty. Arizona Rule of Civil Procedure 47(d)(2) indicates, "The court must rule on challenges for cause. A prospective juror who is challenged for cause may be examined under oath by the court or, with the court's permission, by a party." In other words, there is no automatic disqualification, and the procedure followed by Judge Van Tine in this case is exactly what would have occurred in Arizona.

Arkansas – Plaintiff's citation to Arkansas Code 16-33-304 is actually to the procedure for selection of jurors in **criminal** trials, not in civil trials. The appropriate section for challenges for cause in civil proceedings is Section 16-33-202, which indicates, "A challenge for cause shall be decided by the court, and, in order to determine the challenge, the particular juror challenged may be sworn, or, at the instance of either party, all of the jurors may be sworn to make true and perfect answers to such questions as may be demanded of them, touching their qualifications as jurors." It is at best misleading to ignore this process, completely consistent with what the Trial Judge did in this case, and cite to Arkansas' different procedures in criminal cases.

California – Plaintiff cites to California Code of Civil Procedure Section 229. That section begins with a preamble left out of Plaintiff's citation, which is, "A challenge for implied bias **may be taken for one or more of the following causes, and for no other** (emphasis added)." The very next section, Section 230, provides, "Challenges for cause shall be tried by the court. The juror challenged and any person may be examined as a witness in the trial of the challenge, and shall truthfully answer all questions propounded

to them." Again, there is no automatic disqualification, but rather the trial judge is vested with the discretion to evaluate potential bias.

Colorado – Plaintiff's citation is to Colorado Revised Statute 16-10-103, which addresses selection of jurors in criminal proceedings. However, the text is from Colorado Rule of Civil Procedure 47. That Rule does not mention fiduciary duty anywhere. However, in the very next paragraph from the one cited by Plaintiff, it indicates, "Such challenges shall be tried by the court, and the juror challenged, and any other person, may be examined as a witness." [Colorado Rule of Civil Procedure 47(f).] Again, nothing inconsistent with what happened at trial in the case at bar.

Florida – Plaintiff cites Florida Rule of Civil Procedure 1.431. Here, at least, Plaintiff has provided a complete and accurate citation. Yet, the citation makes no mention of fiduciary duty. Juror Glascott clearly disclaimed any financial interest in the action, and was not an employee of any party. None of the grounds listed would apply to the facts of the case at bar, much less mandate disqualification.

Idaho – Once again, Plaintiff's citation to the Idaho Rules of Civil Procedure 47 is accurate. However, none of the categories listed therein would apply to Juror Glascott, and the Rule specifically provides, "Challenges for cause, as provided by law, must be tried by the court." There is no automatic disqualification. The trial judge makes the determination based upon examination of the juror.

Iowa – Once again, none of the bases for challenge for cause would have applied to Juror Glascott. Further, Iowa Rule of Civil Procedure 1.915(3) provides, "The court shall determine the law and fact as to all challenges, and must either allow or deny them."

Kansas – Unfortunately, Plaintiff's citation once again is to challenges for cause in **criminal** trials. Kansas Code 60-247 addresses jurors in civil trials. Section (c) of that statute provides, "All challenges for cause, whether to the array or panel or to individual prospective jurors, shall be determined by the court." While not supportive of Plaintiff's argument, it is certainly fairer to cite the Rules of Civil Procedure than those of criminal procedure. Yet, Plaintiff doubles down on this misrepresentation by exclaiming "Kansas specifically prohibits a fiduciary from serving by statute," (Appellant's Brief at top of p. 36), while neglecting that little detail about it **applying only in criminal cases**.

Louisiana – Although Plaintiff's citation is correct, none of the bases set forth in the Louisiana Code of Civil Procedure would have applied to Juror Glascott. Further, the Rule simply sets forth the circumstances under which a juror "may be challenged for cause," not when a juror must be disqualified.

Michigan – Here Plaintiff's citation is accurate, but not supportive of Plaintiff's argument. The Michigan Rules of Civil Procedure provide, "The court shall rule on each challenge." Further, "A juror challenged for cause may be directed to answer questions pertinent to the inquiry." Again, this is exactly the procedure that occurred in the case at bar. As cited by Plaintiff, the Michigan Rule simply states what are permissible grounds to make a challenge, not what requires disqualification. Further, as cited therein, the challenge applies when "the person (9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney." [Appellant's Brief, Appendix p. 49.] None of these apply to Juror Glascott individually, and even if they did, the Michigan Rule allows the trial court to make the determination. The words "shall be disqualified" or something similar appear nowhere.

Minnesota – Here, Plaintiff's citations are accurate, but Juror Glascott was not a "guardian, ward, attorney, client, employer, employee, landlord, tenant, or family member" of any party. Further, as with all of the other cited statutes, this merely sets forth the bases upon which a challenge for cause can be made. That challenge is then ruled upon by the trial judge. The cited statute does not set forth any mandatory disqualification, nor any circumstance under which the discretion of the trial judge is removed.

Montana – Here, the citation is accurate, but sets forth nothing other than the circumstances under which a challenge for cause "may be taken." There is no reference to mandatory disqualification, and Juror Glascott himself was not a partner to anyone.

Nevada – While the citation is accurate, none of the referenced categories would have applied to Juror Glascott, and there is no reference to fiduciary duty. Further, Plaintiff fails to note the next section, Nevada Revised Statute Section 16.060, which provides, "Challenges for cause shall be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge."

New Hampshire – While Plaintiff's citation is accurate, it addresses nothing other than what questions a juror may be required to answer. This is not a list of required disqualifications, and nothing in the citation takes away the discretion of the trial judge to rule upon challenges for cause.

New York – Plaintiff's citation is accurate, but none of the categories would apply to Juror Glascott. He was neither an employee of Advocate Health and Hospitals Corporation, nor a shareholder or stockholder therein. The remainder applies to insurance companies, which is not even relevant to the case at bar. Further, NY CPLR Section 4108 provides, "A challenge of a juror, or a challenge to the panel or array of jurors, shall be

tried and determined by the court." Again, just as in Illinois, the trial court retains discretion to make this determination.

North Dakota – Again, the citation is accurate, but inapposite to the issues of this case. Juror Glascott was not a guardian or ward, master or servant, debtor or creditor, employer or employee, attorney or client, or principal or agent to any party in the case, and certainly was not anyone's family member. Further, Section 28-14-07 of the same statute provides, "Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge." As with all of these other states, there is no mention of automatic disqualification, and the notion that the jurors may be questioned on these subjects clearly indicates judicial discretion resulting in the issue being "tried by the court."

Ohio – While Plaintiff's citation to the Ohio statute is accurate, none of the bases for challenges for cause would have applied to Juror Glascott. Further, the statute specifies that the validity of each such challenge for cause shall be tried by the court. Nothing about Ohio's procedures are inconsistent with the manner in which the Juror Glascott issue was handled by the trial judge in the case at bar.

Oklahoma – Plaintiff once again provides a misleading citation to Oklahoma statutes on criminal procedure. Further, the same statute indicates, "A challenge for implied bias may be taken for all or any of the following cases, and for no other." Since Juror Glascott was not a guardian or ward, attorney or client, master or servant, or landlord or tenant of Advocate Health and Hospitals Corporation, nor a family member of any party, there would have been no basis to excuse him for cause, even in a criminal proceeding in Oklahoma.

Oregon – This citation is accurate, but none of the categories would apply to Juror Glascott, much less mandate his removal. As with so many of these statutes, Oregon simply indicates challenges for cause "may be taken" based upon the delineated circumstances, none of which apply to the case at bar.

South Dakota – None of the bases for cause cited by Plaintiff would have applied to Juror Glascott in the case at bar. Further, Plaintiff leaves out the citation to Section 15-14-9 of the South Dakota Codified Laws, which states, "Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge." Again, nothing in the statute would have even served as a basis to excuse Juror Glascott, much less mandated his disqualification, or removed the trial court's discretion.

Texas – Here, Plaintiff's citation is accurate, but has absolutely no relevance to the case at bar. Juror Glascott specifically disclaimed any interest in this litigation, and none of the other disqualification provisions would remotely apply here.

Utah – As with the other states, Utah provides various categories that simply permit a challenge for cause. As with all of the other states, it does not provide for automatic disqualification that removes the trial court's discretion. As with all of the other states, none of the specific bases permitted for a challenge for cause would have applied to Juror Glascott, and even if they had, this would merely have subjected Juror Glascott in Utah to an examination as a witness, and a hearing and determination by the trial judge. In other words, the exact same thing done by the trial judge in the case at bar.

Washington – Although Plaintiff's citation is accurate, it actually demonstrates why Plaintiff's argument is incorrect. The Washington state legislature specifically limited

challenges for implied bias to delineated circumstances, none of which would have applied to Juror Glascott. He was not a guardian or ward, attorney or client, master or servant, or landlord or tenant to any party, and certainly not a family member. Plaintiff would not even have been permitted to raise an implied bias argument as to Juror Glascott in Washington.

Wyoming – Wyoming simply delineates the circumstances under which a challenge for cause can be made. Section 1-11-204 of the same statute provides, "All challenges for cause shall be tried by the court, and the juror challenged, and any other persons may be examined as witnesses upon the trial of the challenge." As with all of the aforementioned, this does not support any suggestion that Wyoming, or any of these other states, lay out relationships mandating disqualification of jurors without judicial discretion.

This lengthy evaluation of the citations in Plaintiff's Appendix proves two of the statements in Plaintiff's Argument are false. First, it is simply untrue that 25 states "have codified statutes that specifically disqualify fiduciary relationships between a juror and a party…" [Appellant's Brief at p. 35.] None of the referenced statutes "specifically disqualify" jurors, and none of them (other than the improperly cited criminal code statute from Arkansas) even reference fiduciary duty.

Plaintiff's claim "15 of those states have specifically codified the rule that if a prospective juror is a partner of a party, that juror must be excluded" is also false. [Appellant's Brief at p. 35.] Again, Juror Glascott individually was not a partner of anyone, and Plaintiff cannot establish anything to the contrary. Further, the statutes do not mandate that the "juror must be excluded." None of the statutes cited say that. These are simply grounds under which a challenge for cause may be brought.

Having utterly failed to support the assertions in Plaintiff's Argument, Plaintiff then turns to a recitation of various cases from different states with inaccurate and incomplete citations and conclusions drawn therefrom. Plaintiff's citations to both State and Federal case law fail to support the absurd conclusion that failing to reverse what the Court did in the case at bar would cause Illinois to "stand alone" in the country. [Appellant's Brief at p. 38.]

To avoid going through the same lengthy exercise as with the statutory citations, Defendants will focus on those states singled out in Plaintiff's Brief as supposedly "overwhelmingly" recognizing "professional and financial relationships between a juror and a party as grounds to imply bias and remove the juror." [Appellant's Brief at p. 36, citing the states of Connecticut, Georgia, Kentucky, and Pennsylvania.]

Connecticut – Here, Plaintiff relies upon a Connecticut criminal court case, *State v. Benedict*, 323 Conn. 654 (2016), which cites to a Connecticut civil court case from 1925, *McCarten v. Connecticut Company*, 103 Conn. 537 (1925). [Appendix to Appellant's Brief at p. 54.] Of interest, in both of those cases the verdicts were upheld against the challenging party. In *State v. Benedict*, a conviction for sexual assault was upheld despite an objection by the defendant that one of the jurors should have been struck for cause because he was a police officer overseeing a criminal sexual assault case. *Id.* The court noted an important principle of direct relevance to this Court's consideration of the type of expansion of the "implied bias" doctrine Plaintiff would have this Court announce in the case at bar. "This court has sought to avoid creating a set of unreasonably constricting presumptions that jurors be excused for cause; since a defendant's right to an impartial jury

is also protected through a showing of actual bias or prejudice." *State v. Benedict*, 323 Conn. at 664.

As for the *McCarten* case, the challenged juror there was a pensioner for a railroad company which owned all of the stock in the defendant's company. *McCarten*, 103 Conn. 537 at 544. In deciding whether the failure to excuse that juror for cause should have resulted in a new trial, the court held:

> In the case before us, a possible pecuniary interest on the part of the juror, and the result of the trial, is **too remote to merit serious consideration**. The ground of disqualification, if any, was one of possible bias, and if it had a technical existence, was a harmless one unless it created an actual prejudice or bias in the mind of the juror (emphasis added). [*Id., 103 Conn. At 545.]*

Plaintiff's case citations from Connecticut not only fail to support Plaintiff's argument, but clearly refute it.

Georgia -- Plaintiff cites *Kim v. Walls*, 275 Ga. 177 (2002). Plaintiff's reliance upon *Kim* is not only misplaced, but puzzling. While Plaintiff's citation to the case is correct, Plaintiff ignores the next several sentences in the decision, which read as follows:

> Thus, when a prospective juror has a relationship with a party to the case that is either close or subordinate, or one that suggests bias, the trial court must do more than "rehabilitate" the juror through the use of any talismanic question. The court is statutorily bound to conduct voir dire adequate to the situation, whether by question of its own or through those asked by counsel. In the present case, the prospective juror expressed partiality in favor of the defendant because of the nature of her professional relationship with him. Though we do not see this interest as necessarily or categorically requiring her exclusion from the jury, we do see this interest as requiring the trial court to conduct voir dire of sufficient scope and depth to ascertain any partiality. [*Id.*, 275 Ga. at 178-79.]

Thus, a thorough reading of the Georgia Supreme Court's decision in *Kim v. Walls* supports precisely what the Trial Court did in the case at bar, and refutes Plaintiff's

arguments here. The Trial Court in the case at bar did far more than simply attempt to rehabilitate Juror Glascott with "talismanic" questions. [R. 1879-89.]

The remainder of the cases cited on page 55 of the Appendix to Appellant's Brief all deal with situations where a trial court's excusing of a juror for cause was upheld, not where the refusal to excuse a juror for cause was found to be error. Further, per Plaintiff's citations, they refer to circumstances where a juror expressed his or her doubt about their ability to be impartial. Here, the exact opposite is the case. Juror Glascott repeatedly indicated his belief that whatever relationship existed between his employer and this endowment would not bias or prejudice him, and he could be fair. [R. 1874; 1881.]

Kentucky – Here, Plaintiff cites to *Butts v. Commonwealth of Kentucky*, 953 S.W.2d 943 (1997), noting the court's statement that, "The prevailing rule [in Kentucky] is that a juror should be disqualified when the juror has a close relationship with a victim, a party or an attorney, even if the juror claims to be free from bias." [Appellant's Brief at Appendix p. 56.] Once again, however, Plaintiff's citation is both incomplete and misleading. In refusing to find that the trial court in that case erred in failing to strike a juror for cause, the Kentucky Supreme Court explained its reasoning as follows:

> In the instant case, appellant argues that the juror was too close factually to such a situation to serve on the jury without bias. However, the juror stated upon questioning that she could view the facts impartially. She went on to point out several differences between the case at hand and what had happened to her. In the instant case the victim knew appellant, there were no allegations of rape, and there was a charge of burglary, while in the juror's experience, she did not know the perpetrator, the incident was three months prior in time, no burglary was committed, and the perpetrator remained at large. Due to these differences and **the broad discretion of the trial court to rule on such issues**, we discern no abuse of discretion on the part of the trial court in not excusing this juror for cause (emphasis added). *Id.,* 953 S.W.2d at 945.

The *Butts* case is another example of another state Supreme Court supporting what the Trial Court did here, and refuting Plaintiff's argument. Plaintiff's citation to *Ward v. Commonwealth of Kentucky*, 695 S.W.2d 404 (1985) is also unavailing. There, the court found no error, and the discussion of juror bias was *dicta*, and involved three jurors who were actually related to the prosecuting attorney. *Id.* As to Plaintiff's citation to *Bowman v. Perkins*, 135 S.W.3d 399 (2004), the relationship at issue was two jurors who were current patients of the defendant healthcare clinic. *Id.* This relationship, similar to the one found in *Marcin v. Kipfer*, is infinitely more direct and personal than anything Plaintiff has established in the case at bar.

Pennsylvania – Here, Plaintiff cites to *Shinal v. Toms*, 640 Pa. 295 (2017). In that case, the Supreme Court of Pennsylvania upheld the decision of the trial court not to exclude certain jurors who worked for a company the parent company of which was also the parent company of the defendant's employer. *Id.* In so ruling, the Pennsylvania Supreme Court articulated its reasoning as follows:

> Because the case presents an **indirect employment relationship**, it was incumbent upon the trial court to engage the jurors in questioning to reveal whether they believed that their or their family member's current or former employer would be financially harmed by an adverse verdict or whether the relationship would affect the jurors' respective abilities to be impartial. In assessing the trial court's acceptance of the jurors' answers, we apply a deferential standard of review and will review the trial court upon a palpable abuse of discretion (emphasis added). *Id.*, 640 Pa. at 326-27.

Thus, we find ourselves in the same position as with the other states referred to in Plaintiff's Appendix. We know Juror Glascott did not have a "direct employment relationship" with the Defendant, Advocate Health and Hospitals Corporation. Thus, the Pennsylvania Supreme Court would have expected the trial judge to question Juror Glascott as to his relationship to this endowment, whether he had any financial interest in the

outcome of the case, and whether it affected his impartiality. That is precisely what the Trial Court did here.

All of the aforementioned are the states' statutes and cases Plaintiff posits as supporting a broad expansion of implied bias, and removal of trial judge discretion in evaluating the credibility of a juror who says he can be fair despite some potential attenuated relationship. Neither the statutes nor the cases support Plaintiff's position. They do just the opposite. Contrary to Plaintiff's assertion, Illinois would "stand alone" if it accepted Plaintiff's position. This Court should find Plaintiff has failed to establish the existence of the type of relationship that would require a finding of implied bias, and thus remove from the trial court the discretion to evaluate the credibility and demeanor of a juror who clearly and unequivocally said he could be fair.

None of the federal court cases cited by Plaintiff (Appellant's Brief at pp. 36-37) are analogous to the case at bar. The connections referenced in the cited cases were all more direct than the one alleged here. In *Caterpillar v. Sturman Indus. Inc.,* 387 F.3d 1358 (Fed. Cir. 2004), the juror's husband was employed by the plaintiff, not by a company that did some business with an endowment that might have been related to the defendant. In *U.S. v. Polichemi*, 219 F.3d 698 (7th Cir. 2000), a criminal case, the juror was a fifteen-year employee of the prosecutor's office prosecuting the case. In *Getter v. Wal-Mart Stores*, Inc., 66 F.3d 1119 (10th Cir. 1995), the juror owned stock in the defendant company, and his wife was employed by them.

Although different courts have handled the issue differently, no case Plaintiff has cited from any jurisdiction at any level is factually analogous to the case at bar. Here the juror in question was not even originally aware of his connection to the "endowment," did

not oversee it directly, but rather as part of a pool of money with dozens of other investors, and had no financial interest in the outcome of the case. This was not a situation where he or his spouse was an employee of Advocate Health and Hospitals Corporation, or that he owned stock in it, or owned stock in the "endowment" for that matter. Finally, Plaintiff has simply failed to establish any connection between Advocate Health and Hospitals Corporation and this "endowment." If we head further down this road courts are going to have to evaluate mutual fund investments by jurors to see if they might include an interest tangentially related to a party.

II. THE FIRST DISTRICT PROPERLY HANDLED THE ISSUE OF PLAINTFF'S ATTEMPT TO USE ADVOCATE'S 2018 TAX FORM.

In presenting this aspect of Plaintiff's Argument, Plaintiff presents a misleading and incomplete recitation of the Record before this Court. First, Plaintiff asserts he first became aware of the tax return form "while this appeal was pending in the Appellate Court." [Appellant's Brief at p. 38.] In fact, Plaintiff's Appeal had been fully briefed, including multiple extensions provided to Plaintiff, and ruled upon by the First District Appellate Court, and Plaintiff had filed a Petition for Re-Hearing before Plaintiff ever requested leave to cite additional authority. As noted in the Appellant's Brief, at page 38, Advocate Health and Hospitals Corporation's tax form was available on November 15, 2019, well before Plaintiff originally filed his appellate reply brief with the First District on March 16, 2020, and before the appellate court issued its original Rule 23 Order on May 14, 2020. Plaintiff then filed a Petition for Re-Hearing on June 24, 2020, and a request to supplement the record on appeal on July 20, 2020. It was only thereafter, on August 14, 2020, that Plaintiff first moved to cite additional authority in support of the appeal.

This also was not the first time Advocate's tax form 990 has been raised in pleadings by Plaintiff. As far back as 2013, before the case was voluntarily dismissed and refiled, Plaintiff obtained and referred to Advocate's tax form 990 on an issue not germane to this Appeal. [Supplemental Record from before the refiling, at Sup C 961, transcript p. 14, lines 15-17.] The Attorney Affidavit (R. 3/3/21) cited at p. 38 of Plaintiff's Brief suggests Plaintiff's counsel just learned about these types of tax returns from a colleague by happenstance. The Supplemental Record shows otherwise.

Plaintiff argues, "In this tax return, Defendant swore under penalty of perjury that it did not have a separate endowment." [Appellant's Brief at p. 38.] Actually, the tax document indicates Advocate Health and Hospitals Corporation did not have **any** endowment, separate or direct. [See language quoted at p. 13 of Appellant's Brief.]

A. The First District Correctly Refused to Take Judicial Notice of the Tax Document Because Judicial Notice Would Not Have Been Appropriate.

Plaintiff cites Illinois Rule of Evidence 201(d), claiming judicial notice was mandatory here because Plaintiff requested it. [Appellant's Brief at p. 39.] Illinois Rule of Evidence 201(a) specifically limits the "scope" of the rule: "This rule governs only judicial notice of adjudicative facts." Plaintiff asks this Court to find the First District should have taken judicial notice of a tax return. A tax return is not an "adjudicative fact." Plaintiff has not identified what "adjudicative fact" Plaintiff asked the First District to take notice of, or what it asks this Court to take judicial notice of now. The First District properly declined Plaintiff's request, and this Court should do the same.

As to notice of "public records," the rule is not the same as that for "adjudicative facts." Plaintiff confuses the two. As Plaintiff's own case citations make clear, the court "may" take judicial notice of a "public record." *Union Electric Co. v. Dept. of Revenue*,

136 Ill.2d 385 (1990). The reason for the difference should be apparent. An adjudicative fact is a limited category. Such a judicially noticed fact must be one not subject to reasonable dispute. Ill. Rev. Evid. 2.01(b) (Eff. 2011).

For all the reasons discussed *supra*, the meaning of the subject tax return is, at best, open to various interpretations. The document itself is not an "adjudicative fact" subject to Ill. Rev. Evid. 2.01. Further, Juror Glascott was never aware of the contents of the tax return. He had no understanding of whether the endowment was legally held by or related to the Advocate entity that was actually the Defendant in this case.

Plaintiff's counsel had prior knowledge going back to at least 2013 of tax returns filed by Advocate Health and Hospitals Corporation. The tax return Plaintiff alleges should have been considered for the first time in Plaintiff's Petition for Rehearing to the First District elucidates nothing in this case. To the extent Plaintiff thought it might, Plaintiff could have asked for an evidentiary hearing as part of the Post Trial motion, but did not. *People v. Porter*, 111 Ill.2d 386, 403 (1986). The failure of Plaintiff to raise the issue of the tax return until the Petition for Rehearing was properly ruled upon by the First District.

III. ARGUMENT - AMICUS CURIAE BRIEF FILED BY THE ILLINOIS TRIAL LAWYERS ASSOCIATION

In their motion seeking leave to file a brief amicus curiae, the Illinois Trial Lawyers Association asserted, "The author of the brief has conferred with counsel for Plaintiff to make certain that the proposed brief is not duplicative of arguments counsel will make in that brief." That assertion has proven inaccurate. The amicus filed by the Illinois Trial Lawyers Association posits three arguments, each of which mimic arguments thoroughly explored in the Appellant's Brief. ITLA cites some of the same cases, and the citations and discussion of the *Naperville* case are very nearly identical. The primary difference

between the arguments in ITLA's brief and the Appellant's Brief seems to be that ITLA's brief is unburdened by much reference to the Record. Despite the aforementioned, a brief discussion of ITLA's brief is warranted.

Like the Appellant's Brief, ITLA's brief is rife with generic references to "Advocate" and the "Advocate endowment" to suggest something has been proven that was not, namely that the Advocate entity to which Juror Glascott referred was the Defendant. ITLA also twice refers to Juror Glascott himself as the "general partner" of the endowment, which is patently false. [ITLA brief at pp. 2 and 6.] ITLA also suggests, without benefit of reference to the Record, that the Trial Court "bent over backwards" to keep Juror Glascott on the jury. This is an absurd attack on the integrity of a trial judge who "bent over backwards" to conduct a thorough voir dire. [R. 1874-1889.]

One must question why the Illinois Trial Lawyers Association chose to insert itself into this argument with no new facts, arguments, statistics or other pertinent information. Further, the cover page of Plaintiff's Appellant's Brief contains the name of at least one attorney and his firm who have never signed any document nor filed any appearance at any stage of this litigation. Again, the purpose for this is apocryphal. If ITLA's purpose was nothing more than to repeat, as an organization, the same fallacious arguments and factual inaccuracies relied upon by Plaintiff, that should not serve as a basis for this Court's determination.

V. Conclusion

The Plaintiff received a fair trial. The Trial Court extensively questioned and evaluated the one juror about whom Plaintiff raises any issue and determined the juror could be fair. The trial judge was in the best position to make that evaluation, and did so

thoroughly. The Record does not support the application of "implied bias" here. Plaintiff's attempt to establish a bright line rule under facts that do not support it, and to overturn the considered judgment of the jury in finding in favor of the Defendants, is neither warranted nor serves the ends of justice. Finally, Plaintiff incorrectly attempts to invoke the principle of "judicial notice" in trying to introduce into the Record a document properly refused by the First District. Plaintiff's Appeal should be denied in its entirety, and the decision of both the Trial Court and the First District should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Rules 341(a) and (b). The length of this Brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the Brief under Rule 342(a) is 44 pages.

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CERTIFICATE OF SERVICE

Robert L. Larsen, one of the attorneys for the Defendants-Appellees, Advocate Health and Hospitals Corporation and Anita Thakadiyil, M.D., hereby certifies that on June 21, 2021, he electronically submitted the foregoing **DEFENDANTS-APPELLEES' RESPONSE BRIEF** to the Supreme Court of Illinois via the Odyssey electronic filing system to be filed electronically.

Robert L. Larsen further certifies that on June 21, 2021, he caused copies of the aforementioned DEFENDANTS-APPELLEES' RESPONSE BRIEF to be served upon the following by electronic mail via the Odyssey electronic filing system, and separate courtesy copy email:

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IN THE SUPREME COURT OF ILLINOIS

THOMAS ITTERSAGEN,	) On Appeal from the) Appellate Court of) Illinois, First Judicial District) No. 1-19-0778
Plaintiff-Petitioner	) There Heard from the Circuit No.) Court of Cook County, Illinois,) County Department,) Law Division, No: 16-L-003532
v.	)
ADVOCATE HEALTH AND HOSPITALS CORPORATION and ANITA THAKADIYIL, M.D.,	) The Honorable) Rena Van Tine) Judge Presiding
Defendants – Appellees.	)

NOTICE OF FILING DEFENDANTS-APPELLEES' RESPONSE BRIEF

PLEASE TAKE NOTICE that on June 21, 2021, I electronically submitted DEFENDANTS-APPELLEES' RESPONSE BRIEF to the Supreme Court Clerk through the Odyssey e-filing system. A copy of DEFENDANTS-APPELLEES' RESPONSE BRIEF is attached to this notice and served on you.

Respectfully submitted,

By: Robert L Larsen

Robert L. Larsen,
One of the Attorneys for
Defendants-Appellees

CERTIFICATE OF SERVICE

I, Robert L. Larsen, an attorney, served the foregoing DEFENDANTS-APPELLEES' RESPONSE BRIEF on the individual listed below by emailing her on June 21, 2021 and served through the Odyssey E-Filing system. Under penalties of perjury as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

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