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-Petitioner,	)
	) There Heard from the Circuit Court) of Cook County, Illinois,) County Department,) Law Division, No.: 16-L-003532
vs.	)
	) The Honorable Rena Van Tine,) Judge Presiding
ADVOCATE HEALTH AND HOSPITALS CORPORATION and ANITA THAKADIYIL, M.D.	)
Defendants-Respondents	)

AMICUS CURIAE BRIEF BY ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-PETITIONER

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POINTS AND AUTHORITIES

I.
AS SOON AS JUROR GLASCOTT SAID, "I HAVE A FIDUCIARY RESPONSIBILITY TO THE ENDOWMENT OF ADVOCATE," THE COURT SHOULD HAVE EXCUSED HIM.

Mr. Glascott was put in an impossible position by the trial court. Once he realized his fiduciary relationship to the defendant corporation, he disclosed it to the Court. Had this disclosure been made in *voir dire*, plaintiff would have pressed for a challenge for cause, and failing that, would have been able to excuse him with a peremptory challenge. Mr. Glascott would not have served. Because of the timing of Mr. Glascott's disclosure, it appeared the trial court bent over backwards to keep him on the jury even though at least one alternate juror was available. This, respectfully, should not have happened. Mr. Glascott should have been excused.

A fiduciary owes his client the highest duty of care. *Labovitz v. Dolan*, 189 Ill. App. 3d 403, 408 (1st Dist. 1989) (general partner owes limited partners the highest degree of good faith and loyalty); *Smith v. First Nat'l Bank*, 254 Ill.App.3d 251, 261 (4th Dist. 1993) ("Our supreme court has stated where one person occupies a relation in which he owes a duty to another, he shall not place himself in any position which will expose him to the temptation of acting contrary to that duty or bring his interest in conflict with that duty."). The fiduciary must put his client's

interests first above other considerations. *Carter v. Carter*, 2012 IL App (1st) 110855, ¶29. (A fiduciary must be mindful of a beneficiary's interests and cannot act inconsistently with those interests).

An investment advisor owes his clients both statutory and common law fiduciary duties of loyalty. *Van Dyke v. White*, 2019 IL 121452, ¶74. The advisor must act in his client's best interests. *Van Dyke, supra at* ¶76. Mr. Glascott owed Advocate a fiduciary duty to grow their fund of assets. *R1882-1883.* He would have acted contrary to that fiduciary duty had he participated in awarding a multimillion-dollar verdict for the plaintiff. Plaintiff impermissibly had a higher burden to prove to Mr. Glascott that Advocate was legally responsible in view of his relationship to Advocate.

In addition to his fiduciary duties as an investment advisor, Mr. Glascott owed similar duties as a general partner of an investment firm that had the defendant corporation as a limited partner. *Labovitz, id.*

Had Mr. Glascott deliberated to reach a multimillion-dollar verdict against Advocate, he would have harmed his client and harmed his employer. The company where he worked provided investment management for Advocate's endowment. Advocate, as with all other investment clients, could have transferred the management to another firm, thereby depriving Mr. Glascott and his employer of income. A conceivable outcome of Mr. Glascott's jury rendering a multimillion-dollar verdict could well be personal losses for Mr. Glascott.

In this setting, bias should have been impliedly and irrefutably presumed.

II.
IMPLIED PRESUMPTION OF JUROR BIAS HAS BEEN RECOGNIZED FOR MORE THAN TWO CENTURIES IN THE U.S.

The concept of implied bias is well established in our common law. Under the doctrine, a court must excuse a juror for cause if there are certain relationships between the juror and a party to the cause. The Second Circuit traced the doctrine back to Chief Justice Marshall from an 1807 decision. *United States v. Burr*, 25 F. Cas. 49, F. Cas. No. 14692g (No. 1492g) (C.C.D. Va. 1807), quoted in *U.S. v. Haynes,* 398 F.2d 980, 984 (2nd Cir. 1968). Illinois courts accept the doctrine, *Naperville v. Wehrle,* 340 Ill. 579, 583 (1930); *People v. Ryder,* 2019 IL App (5th) 160027, ¶33.

Wehrle is instructive. Quoting *Crawford v. United States*, 212 U.S. 183 (1909), our high Court said:

> … [O]*ne is not a competent juror in a case if he is master, servant, steward, counselor or attorney of either party*. In such case a juror may be challenged for principal cause as an *absolute disqualification of the juror*. * * * Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side.
>
> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize

> its existence, and it might exist in the mind of one (on account of his relations with one of the parties) 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. The law therefore most wisely says that with regard to some of the relations which may exist between the juror and one of the parties, *bias is implied and evidence of its actual existence need not be given." Wehrle, supra at* 582-583. *Emphasis added.*

While the word "steward" is out of common usage, its meaning can be easily discerned. One of its prime definitions is "one who transacts the financial and legal business of a manor on behalf of the lord." *Compact Oxford English Dictionary,* p. 3047 (1971). See also, *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 162 (2004) (being a "good corporate steward" entails caring for the principal's land and making prudent investments in rehabilitating the property of the principal); *Gorczynski v. Nugent*, 402 Ill. 147, 154-55 (1948) (stewards of the Illinois Racing Board were given general supervision over owners and other persons on behalf of the Board); *County of Cook v. Illinois Labor Rels. Board*, 2017 IL App (1st) 153015, ¶ 29 (the role of a Chief Union Steward entails arguing grievances, handling scheduling for cases to be heard for professional review, and other duties on behalf of the local Sheriff's union); *Millikin v. Edgar County*, 142 Ill. 528, 530 (1892) (steward is akin to the keeper or overseer of a public house). Mr. Glascott's role met this definition. He was entrusted with the responsibility to grow Advocate's endowment through investments as its steward.

III.
THE APPELLATE COURT'S REFUSAL TO ACCEPT LATER CREATED EVIDENCE CONTRADICTING DEFENSE COUNSEL'S ASSERTIONS ABOUT THE RELATIONSHIP BETWEEN ADVOCATE AND THE JUROR WAS COMPLETELY UNREASONABLE.

This eleven-day trial began on October 25, 2018. Mr. Glascott disclosed his relationship with the defendant on trial on the seventh day of the trial. *R1874*. The trial ended four days later. *R3284-3285*. The federal tax return for the corporate defendant was not signed by an Advocate corporate officer until November 15, 2019. *R. 3/3/21 Attorney Affidavit p. 1*. When plaintiff obtained it and recognized it contradicted assertions made by the defense on which the trial court relied, plaintiff brought it to the attention of the Appellate Court where the case was then pending. The Appellate Court disallowed plaintiff's request to supplement the record because the request should have been made to the trial court. *R. 3/3/21 Motion Denied*. The trial court did not have jurisdiction over the case at that time so plaintiff could not get relief. A perfect *Catch 22.*[1]

The idea that the "endowment fund" was separate from the defendant corporation on trial came from representations made by defense counsel. Those representations are contradicted by the tax return according to plaintiff's petition to this Court. The discredited assertions by defense counsel were a basis for the trial court's decision to

[1] In Joseph Heller's book, Yossarian could not ask to be declared crazy to avoid combat duty because if he made the request, he would prove he was not crazy. https://www.youtube.com/watch?v=yUC7yqD1-dA.

rely on its assessment of the juror's impartiality rather than enforce the long recognized implied bias rule and dismiss the juror. Considering all the facts, the trial court was operating under a misapprehension of fact that led to the improper decision to keep Mr. Glascott on the jury. The Appellate Court was wrong not to consider the later prepared tax return on the propriety of the trial court's denial of the motion to strike Mr. Glascott.

CONCLUSION

Mr. Glascott was impliedly biased in favor of the corporate defendant in this case in view of the important fiduciary duties he owed both as investment advisor for the endowment and as general partner of a firm that had Advocate as a limited partner. When he brought these facts to the attention to the trial court, he should have been excused from further service as plaintiff requested. The refusal to do so denied plaintiff his right to an impartial jury.

Respectfully Submitted,

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 or words 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 6 pages.

/s/Bruce R. Pfaff

CERTIFICATE OF SERVICE

I, Bruce R. Pfaff, certify that I electronically filed the foregoing Illinois Trial Lawyers Association Brief Amicus Curiae with the Clerk of the Illinois Supreme Court, on May 11, 2021, via Odyssey eFileIL.

I further certify that on May 11, 2021, an electronic copy of the Illinois Trial Lawyers Association's Brief Amicus Curiae is being served on the following counsel of record via Odyssey eFileIL:

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Under penalties as provided by law pursuant to Sec 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), I certify that the statements set forth in this instrument are true and correct.

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