No. 126507

IN THE SUPREME COURT OF ILLINOIS

THOMAS ITTERSAGEN,	)	On Petition for Leave to 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.	)	
ADVOCATE HEALTH AND HOSPITALS CORPORATION and ANITA THAKADIYIL, M.D.,	)	The Honorable Rena Van Tine Judge Presiding
Defendants – Respondents.	)	

PLAINTIFF – APPELLANT'S BRIEF AND APPENDIX

Leslie J. Rosen
Leslie J. Rosen, Attorney at Law, P.C.
180 N. LaSalle Street
Suite 3650
Chicago, IL 60601
(312) 994-2435
ljr@rosenlegal.net

Todd A. Smith
Smith Lacien LLP
Three First National Plaza
70 West Madison, Suite 5770
Chicago, IL 60602
(312) 509-8900
tsmith@smithlacien.com

Carla A. Colaianni
Law Office of Carla Colaianni
1841 N. Drake Avenue
Chicago, IL 60601
(312) 405-7027
carlacolaianni@yahoo.com

Michael T. Sawyier
Law Office of Michael T. Sawyier
830 E. Sidewalk Road
Chesterton, IN 46304
(219) 926-4200
michael@eplindiana.com

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II.

THE FIRST DISTRICT SHOULD HAVE TAKEN JUDICIAL NOTICE OF ADVOCATE'S 2018 TAX FORM WHICH SHOWED THAT ADVOCATE DID NOT HAVE A SEPARATE ENDOWMENT.

NATURE OF THE CASE

Plaintiff, Thomas Ittersagen, appeals from judgment entered on a jury verdict for defendants, Advocate Health & Hospitals Corporation ("Advocate") and Dr. Anita Thakadiyil, in a medical malpractice case arising out of defendants' allegedly negligent failure to diagnose plaintiff with sepsis and treat him appropriately. Plaintiff alleged that as a result of defendants' deviations from the standard of care, he had to have both of his legs amputated.

The case was a classic trial by experts. On the seventh day of the eleven-day trial, however, one of the jurors, William Glascott, the Chief Investment Officer at Greene Court Partners, a private equity investment firm, reported to the court that he had a business relationship with Advocate that he had forgotten to disclose during *voir dire*. He told the court that Advocate's $6 billion hospital endowment was a limited partner in his firm's private equity fund, and that his firm was the general partner of that investment partnership. He repeatedly told the court that he had a fiduciary duty to Advocate. Advocate's counsel told the court that the endowment was separate from Advocate. Upon questioning by the court, Glascott stated that he could be fair. The court allowed Glascott to remain on the jury, over plaintiff's objection, even though there was an alternate juror sitting. The jury returned a verdict in favor of defendants.

The Appellate Court affirmed, but while the appeal was pending, plaintiff was able to obtain a copy of Advocate's federal Form 990 tax return for the year of the trial. It showed that Advocate's endowment was not separate from Advocate as defense counsel had told the trial court judge. Plaintiff asked the Appellate Court to take judicial notice of this information. The Appellate Court denied plaintiff's request.

ISSUES PRESENTED ON APPEAL

I. Was it was reversible error to allow a juror to remain on the jury when that juror reported, in the middle of the trial, that he was in an ongoing fiduciary relationship with the $6 billion Advocate endowment that he had forgotten to disclose during *voir dire*, and when questioned about his relationship, he admitted that: (a) as the Chief Investment Officer of the general partner, he had a fiduciary duty to Advocate, (b) as the Chief Investment Officer he personally oversaw Advocate's investment, (c) Advocate paid his firm an asset management fee, which his firm used to pay salaries and bonuses at the firm, and (d) the income generated by the investment under his care would be used to grow and expand Advocate's entire healthcare system?

II. Was it was reversible error for the Appellate Court to refuse to take judicial notice of Advocate's federal Form 990 tax return, a public record that was created by defendant only after the trial had ended and the case was on appeal, where that tax return conclusively demonstrated that: (a) the juror's fiduciary duty ran directly toward the defendant, (b) defense counsel's statements that the endowment was separate from the defendant per se were false, and (c) the Appellate Court relied on defense counsel's false statements in denying plaintiff's appeal?

JURISDICTION

This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315. The Appellate Court entered its opinion on September 10, 2020. (Appendix at A. 1). Plaintiff filed his Petition for Leave to Appeal from the Appellate Court's Opinion on October 15, 2020.

STATUTES CONSTRUED

The Uniform Prudent Management of Institutional Funds Act
760 ILCS 51/1 (2) (Eff. June 30, 2009)

(2) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

Illinois Rule of Evidence 201 (d), (f)
Ill. R. EVID. 201 (Eff. Jan. 1, 2011).

Rule 201. Judicial Notice of Adjudicative Facts

(a) *Scope of Rule*. This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of Facts*. 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.

(c) *When Discretionary*. A court may take judicial notice, whether requested or not.

(d) *When Mandatory*. A court shall take judicial notice if requested by a party and supplied with the necessary information.

* * * *

(f) *Time of Taking Notice*. Judicial notice may be taken at any stage of the proceeding

* * * *

STATEMENT OF RELEVANT FACTS

The occurrence and Plaintiff's injuries

Thomas Ittersagen, a 31-year-old diabetic, went to a clinic operated by Advocate for treatment of an infected carbuncle on July 8, 2010. (R. 829). His vital signs were recorded at 11:01 am. (R. 1495). He had a fever of 101.1; his heart rate was 112 beats

per minute; his respiratory rate was 14 breaths per minute; and his blood pressure was 102/68. (R. 912). He had body aches and a general ill feeling. (R. 1462-1463). Dr. Anita Thakadiyil, an Advocate employee, treated him that day. (R. 1446). She did not consider sepsis in her differential diagnosis. (R. 1471). She decided to incise and drain the carbuncle in the office. (R. 1485). After she performed the procedure, she prescribed an oral antibiotic and sent plaintiff home. (R. 1498).

Plaintiff took the prescription to a pharmacy and then went with his fiancé and young daughters to Burger King to wait for the prescription to be filled. (R. 1135-1136). While waiting, plaintiff felt markedly worse. He became nauseous and vomited. (R. 1136). He continued to get worse. His fiancé rushed him to an emergency room near their home. (R. 1137). In triage, at 2:09 p.m., his fever had risen to 103.2 degrees, his pulse rate was up to 162 beats per minute, his respiratory rate to 22 breaths per minute, and his blood pressure had dropped to 98/42. (R 1232). He was diagnosed with sepsis (R. 1243) and immediately started on I.V. fluids and I.V. vancomycin. (R.1229 - 1230). Plaintiff was in shock. Cultures taken on his arrival showed Staphylococcal Enterotoxin B (SEB) in the carbuncle and in his bloodstream. (R. 2133). He was subsequently diagnosed with Toxic Shock Syndrome. (R 1269). Plaintiff's blood pressure continued to drop, and he was put on vasoconstrictors to try to maintain his blood pressure at a life sustaining level. (R. 1216). Plaintiff survived the sepsis, but he lost blood flow to his lower extremities and his legs developed gangrene. (R. 1216). Both legs had to be amputated. (R. 1290).

On July 6, 2012, Plaintiff filed suit against Dr. Thakadiyil and Advocate, who employed Dr. Thakadiyil and operated the clinic under the assumed business name,

Advocate Medical Group. (C. 112). This case was originally filed as 2012 L 007599, and then refiled as 2016 L 003532. (C. 49).

Relevant Trial Court Proceedings

Trial began on October 25, 2018. During the eleven-day trial, both sides presented extensive expert testimony from board-certified physicians who testified to the standard of care and causation. Plaintiff presented a family physician, Dr. Bernard Ewigman, who testified that Dr. Thakadiyil deviated from the standard of care. (R. 816). Critical care physician, Dr. Kyle Hogarth, testified that Dr. Thakadiyil's treatment caused plaintiff to go into shock and caused the loss of his legs. (R. 1214 - 1215). Dr. Patrick Schlievert, a microbiologist and leading expert on Toxic Shock Syndrome, explained how Dr. Thakadiyil's incision and drainage caused Toxic Shock Syndrome to develop, (R. 1043), and that the immediate administration of I.V. fluids would have prevented Toxic Shock Syndrome. (R. 1088). Dr. Thakadiyil was called as an adverse witness and she admitted that plaintiff presented to the clinic with general variables for sepsis. (R. 1466 - 1467).

In their case in chief, defendants presented a family physician, Dr. William Schwer, who testified that Dr. Thakadiyil met the standard of care. (R. 1922). For causation, defendants presented Dr. Marc Dorfman, an emergency medicine physician, (R. 1604); Dr. Patrick Fahey a critical care specialist; Dr. Bruce Hanna, a microbiologist; and Dr. Fred Zar, an infectious disease and internal medicine physician, who testified that plaintiff did not have sepsis on presentation (R. 2105) and that Dr. Thakadiyil's treatment did not cause his injuries. (R. 2091). Dr. Zar further opined that I.V. fluids given at the time of the incision and drainage would not have made a difference. (R. 2122). Dr.

Thakadiyil testified in her own defense that she complied with the standard of care. (R. 1769).

In the middle of the trial, a juror reports that he has a fiduciary relationship with Advocate.

During the defense case in chief, on the morning of the seventh day of the trial, Juror Glascott presented a note to the trial judge, informing the court that he had a business relationship with Advocate that he had forgotten to disclose during *voir dire*.[1] (R. 1874). The judge read the note to the attorneys in chambers:

> Although I don't believe it would bias me, I thought I should disclose that my firm has a business relationship with Advocate. I apologize. I did not realize or think of this until last night. Bill Glascott. *Id*.

Plaintiff's counsel moved to strike Juror Glascott for cause, arguing that had this information been disclosed, counsel would have had the opportunity to move to strike him for cause or use a peremptory challenge. (R. 1874 - 1875). The trial judge called the juror into chambers for further questioning about his relationship with Advocate. (R.1874):

> THE COURT: So you forgot to disclose that you had a business relationship with Advocate?
>
> JUROR GLASCOTT: I just didn't realize it when we were going through the jury selection. You know, the questions were, were you -- there wasn't a specific question, I don't think, if you had a business relationship. It was more have you been to Advocate Hospital, are you familiar with them. I just didn't make the connection, and so the nature of my firm's relationship is such that I just didn't remember. I didn't think to even bring it up given the nature of the questions. (R. (R. 1880).

[1] The two-day jury selection process was not transcribed and is not in the record. It was undisputed that Juror Glascott did not disclose his relationship to Advocate during jury selection. (R. 1879 – 1889).

The court asked Juror Glascott to explain the nature of the relationship with Advocate.

THE COURT: What is the nature of your firm's relationship?

JUROR GLASCOTT: So their hospital endowment invests in one of our -- we're a private equity company that raises funds to invest in real estate. They're one of our limited partners that invests through one of our funds. So they're 1 of 50 investors in one of our funds. I don't know if that's the right number, but they're one of our investors. (R. 1880 – 1881).

The juror stated that he thought he would be able to make the separation and be impartial but felt he had to disclose his relationship to Advocate to the court. (R. 1881)

When asked what suddenly prompted him to remember this relationship, Juror Glascott explained:

JUROR GLASCOTT: Last night I went back to the office, and I got a LinkedIn update for someone I'm connected with at Advocate that got a promotion or something. So then I said, oh, that's right. I forgot that I'm --- (R. 1881-1882).

Defense counsel cut in and asked:

MS. DAYAL: You said it's the hospital endowment that you've been –

JUROR GLASCOTT: Right, the Advocate Health Care system endowment.

MS. DAYAL: It's not the medical group that's here?

JUROR GLASCOTT: No, no, no, the overall $6 billion dollar endowment. (R. 1882).

Defense counsel then told the juror and the trial court:

MS. DAYAL: The endowment people are separate from the Medical Group per se, and you understand that this is Advocate Health and Hospitals, Advocate Medical Group, and one of its doctors? This case is the –

JUROR GLASCOTT: Oh, yeah, yeah. *Id*.

The Court asked if the endowment paid either defendant in any way and juror Glascott explained that the endowment was used to grow and expand the Advocate health care system overall:

> JUROR GLASCOTT: I don't know how all that – I mean, 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.
>
> THE COURT: So you don't know one way or the other?
>
> JUROR GLASCOTT: I believe the endowment's purpose is to grow by hospitals, grow hospitals, you know, fund growth of -- you know, build buildings, that type of thing. (R. 1882 – 1883).

Defense counsel then volunteered to the court that:

> MS. DAYAL: The salaries and compensation for Medical Group comes specifically from Medical Group operations. They do not come from any other endowment, and that's part of the employment contract. (R. 1883).

Then plaintiff's counsel questioned the juror. Juror Glascott explained that he was the Chief Investment Officer for Green Courte Partners. *Id*. As Chief Investment Officer, he personally oversaw all new investments, including the money that Advocate invested. (R. 1884).

> MR. WILLIAMS: So do you oversee the money that Advocate invests?
>
> JUROR GLASCOTT: I oversee all of the new investments that we make, which is Advocate's money goes into -- in a pool of money that we invest. *Id*.

Juror Glasscott was asked about his compensation. He explained that Advocate paid his firm a fee for asset management and that fee was used to pay salaries at Green Courte: *Id*.

> MR. WILLIAMS: Okay. Do you keep a percentage of -- what's your profitability or how are you profitable? What's your revenue stream?

> JUROR GLASCOTT: Sure. So we get an asset management fee on the assets under management.· So when we raise a fund, we charge a fee based on that. When I say we, the firm charges a fee based on the money that we raise, and that income stream goes to pay salaries, bonuses, rent, keep the lights on. Then we get an incentive. If we invest that money successfully and make a certain return above a certain threshold, then we get a piece of that. *Id*.

Moreover, Juror Glascott explained that if the fund did well in a particular year, he would get a bonus. (R. 1884). If he brought in investors to invest in the fund, he also got a bonus. (R. 1885).

> JUROR GLASCOTT: Well, it's not tied to raising capital. So I get a salary and a bonus, and then I invest my own money alongside of our investors, and if we succeed, I get a piece of that incentive.

He explained that the goal of the investment was to make a return so that all of the investors benefitted, which would also result in a bonus for Glascott:

> JUROR GLASCOTT: No, I get a bonus if I have a good year, which is largely measured by getting the money invested in that year. There's really no measure. Time will tell if we're successful, and if that happens and we sell everything, return all the money, and make a return, then I'll get compensated based on the growth of the assets, but my year-to-year compensation is a salary and then a bonus based on if we get money invested. *Id*.

Plaintiff's counsel then dug deeper into the nature of the relationship:

> MR. WILLIAMS: And then you said a word that I need to explore, and I don't mean to be rude, sir. You described Advocate as a partner?
>
> JUROR GLASCOTT: A limited partner.
>
> MR. WILLIAMS: They are a limited partner?
>
> JUROR GLASCOTT: Uh-huh. So in a private equity fund, you have a general partner and a series of limited partners, and I said the 50 investors, or whatever the number, they're one of the investors that -- Green Courte Partners is the general partner, Green Courte Partners managing under whatever, and then all of the limited partners are investors.
>
> MR. WILLIAMS: Right, and you have a fiduciary duty as a general partner; correct?

JUROR GLASCOTT: Correct. (R. 1885 -1886).

Glascott again affirmed his fiduciary duty to Advocate.

MR. WILLIAMS: But you have a fiduciary duty to Advocate?

JUROR GLASCOTT: I do, correct. (R. 1886).

The court asked if his financial compensation would be affected by the verdict. Glascott said it would not. (R. 1887).

Then the trial judge asked the juror if he had a fiduciary relationship with either of the defendants. First, Juror Glascott said no, but he immediately changed his answer.

THE COURT: Do you have a fiduciary duty to either defendant here?

JUROR GLASCOTT: No.

THE COURT: And what is your basis for saying that?

JUROR GLASCOTT: Well, so one of the defendants, being Advocate, I guess –

MR. WILLIAMS: Advocate Health and Hospitals Corporation?

MS. DAYAL: Wait. *Id*.

Defense counsel interrupted. She asked if his fiduciary duty was actually only to his own company. (R. 1888). Juror Glascott, instead, confirmed once again that he had a fiduciary duty to Advocate, his investor and limited partner.

> JUROR GLASCOTT: Right, but we have a fiduciary responsibility to all of our investors. So the endowment -- I have a fiduciary responsibility to the endowment of Advocate. *Id*.

Juror Glascott then stated for the fourth time that he had a fiduciary duty to Advocate. (R. 1889). The juror was sent back to the jury room. (R. 1889).

Plaintiff again moved to strike the juror, arguing that the juror's fiduciary duty and ongoing financial relationship with Advocate Health & Hospitals Corporation was

too close to allow him to serve. (R. 1890). He pointed out that Juror Glascott managed the defendant's money and had a fiduciary duty to act in Advocate's best interest. *Id*. Plaintiff argued that an alternate juror was present and could be immediately substituted with no delay or prejudice. (R. 1897).

The trial court denied Plaintiff's motion to strike the juror for cause. The trial court explained that her ruling was based on his demeanor and his statements that he could be fair:

> THE COURT: This ruling is based just really completely on the demeanor of the juror and what he says. When he says that he does not believe that he would be biased, he was pretty adamant that he could be fair all the way through. It just seemed to me that in an abundance of caution, he decided to disclose this information now after he got reminded of it with this LinkedIn e-mail. I find that he has not -- there is no directed fiduciary duty between this juror and either of the defendants in the case. He's not someone who is responsible for Advocate or managing the money. Advocate is not responsible for him any way. So he didn't even know about this at all, and it really is not something that he believes would even factor into his decision. So in really scrutinizing this juror, this is the reason why I had him come back here so that I could really take a good look at him. If I thought that he couldn't be fair or that there was a risk with his demeanor that he couldn't be fair, I would have excused him right away, but I find that he could be fair and that he would be fair and will be fair. So the motion to excuse him for cause is denied, so the said juror will continue to serve. (R. 1898 - 1899).[2]

Four days later, the jury, including Juror Glascott, returned a verdict in favor of Advocate and Dr. Thakadiyil and the trial court entered judgment on the verdict. (C. 3284 - 3285). Plaintiff raised this issue in his motion for a new trial, (C. 3423) which the trial court denied. (C. 5095).

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[2] In the order denying Plaintiff's post-trial motion, the court offered these additional findings: If there was any type of business relationship with the defendant, it was extremely attenuated; he had a business relationship with a company that had a business with an unspecified Advocate endowment; his compensation was not impacted by the case or the defendants. (C. 5095 V4)

Relevant Appellate Court Proceedings

On appeal, plaintiff argued that plaintiff was deprived of a fair trial by the trial court's failure to remove a juror with a fiduciary duty to the defendant. The Appellate Court affirmed the trial court on all grounds in a Rule 23 Order issued on May 14, 2020. *Ittersagen v. Advocate Health & Hospitals Corp.*, 2020 IL App (1st) 190778-U.

On the issue of juror bias, the Rule 23 Order held that plaintiff did not present sufficient evidence of a connection between the defendant and its own endowment. *Id. at* ¶ 64. In refusing to presume bias, the court specifically noted "that defense counsel represented that the salaries and compensation for Advocate Medical came from Advocate Medical operations not from the endowment and that this information could be found in the physicians' employment contracts. In sum, the evidence was insufficient to demonstrate any express fiduciary relationship between juror Glascott and defendant Advocate Medical." *Id.*

Plaintiff filed a Petition for Rehearing on June 24, 2020. (R. 5/10/21: Petition for Rehearing).[3] Plaintiff requested rehearing by a different panel upon learning that Justice Eileen O'Neil Burke had concurred in the decision. Prior to her appointment to the Appellate Court, Justice Burke had presided as a motion judge in this very case and she had specifically reviewed and issued rulings on the physician employment contracts discussed in the Rule 23 Order. (Sup. C. 631); (Petition for Rehearing at p. 1-2). Plaintiff

[3] This Court ordered the Clerk of the First District Appellate Court to transmit Pleadings and Orders from the Appeal to be added to the record. They are not included in the common law record and are not paginated. For citation purposes, plaintiff has used the following format: R. date uploaded to ReSearch:IL, title of pleading/order, page number.

also asked the court to reconsider its ruling on juror bias because the Rule 23 Order specifically relied on statements from defense counsel as evidence and had not considered relevant testimony from the juror. (*Id*. at p. 4)

While the Petition for Rehearing was pending, plaintiff obtained a copy of Advocate Health and Hospitals Corporation's Form 990 tax return for tax year 2018, the year of the trial. Plaintiff filed a motion requesting leave to cite the tax return as additional authority and requested that the First District take judicial notice of Advocate's Form 990 return as it was a public record and a sworn party statement. (R. 3/4/21: Motion to Cite Additional Authority, filed on August 14, 2020 p. 1-2). Advocate's 2018 return was signed under penalty of perjury by a corporate officer on November 15, 2019 and made available to the public on www.IRS.gov sometime thereafter. (R. 3/3/21: Attorney Affidavit to Motion, filed August 14, 2020 p. 1). Form 990 requires not-for-profit corporations, like Advocate, to report all endowments that support the organization. Specifically, the Form asked: "Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments or quasi-endowments?" (R. 3/3/21: Exhibit B to Motion - Advocate's 2018 Form 990 return, filed August 14, 2020). The Defendant, under penalty of perjury, answered "No." *Id*. Plaintiff pointed out 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. *Id*. The Appellate Court denied the motion and refused to take judicial notice. (R. 3/3/21: Order - Motion to Cite Additional Authority Denied, entered August 31, 2020); (Appendix at A. 43).

The same day that the court denied that motion, it entered another order withdrawing the Rule 23 Order. (R. 3/3/21: Order- Petition for Rehearing Denied, entered August 31, 2020). On September 10, 2020, the First District reissued exactly the same Rule 23 Order, this time as a published Opinion. *Ittersagen v. Advocate Health & Hospitals Corp.*, 2020 IL App (1st) 190778. Justice Robert Gordon replaced Justice Burke as the third justice deciding this case. *Id.* Plaintiff timely filed his Petition for Leave to Appeal, which was allowed on January 27, 2021.

STANDARD OF REVIEW

Plaintiff suggests that the proper standard of review for implied bias is *de novo*, as implied bias is a mixed question of law and fact. This Court has never stated a standard of review for a court's failure to apply the presumption of bias. However, the Federal Courts have a well-developed body of case law on this doctrine. Because determinations of impartiality may be based in large part upon demeanor, a reviewing court typically accords deference to the district court's determinations and reviews a court's findings regarding actual juror bias under the manifest error or abuse of discretion standard. In contrast, "implied bias presents a mixed question of law and fact which is reviewable *de novo*." *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000); see also, *Fields v. Brown*, 503 F.3d 55, 770 (9th Cir. 2007).

Alternatively, if this Court does not believe the *de novo* standard applies, then the determination of the trial court as to the competency of a juror should not be set aside unless it is against the manifest weight of the evidence. *People v. Cole*, 54 Ill. 2d 401, 414-15 (1973). A ruling is against the manifest weight of the evidence only when an

opposite conclusion is apparent, or when the findings appear to be unreasonable, arbitrary, or not based on evidence. *Leonardi v. Loyola Univ.*, 168 Ill. 2d 83, 88 (1995). Here, the legal and factual findings made by the lower courts concerning the relationship between Juror Glascott and Advocate were contradicted by the juror's own sworn statements during trial and by Advocate's own sworn tax filing, which confirmed that there was no separate endowment.

Plaintiff has found no case law discussing the standard of review for a court's ruling on a request to take judicial notice of a public document. In light of that, plaintiff suggests that the proper standard is *de novo* because the Court is construing an Illinois Rule of Evidence promulgated by this Court. That is akin to construing a Supreme Court Rule or a statute. When interpreting a Supreme Court Rule, the Court applies the same rules used to interpret a statute. *Hill v. Joseph Behr & Sons, Inc.*, 293 Ill. App. 3d 814, 817 (1997); *Friedman v. Thorson*, 303 Ill. App. 3d 131, 135 (1st Dist. 1999). When construing a statute, the Court applies a *de novo* standard. *People v. Davis*, 199 Ill. 2d 130, 135 (2002).

Alternatively, if the Court deems the issue purely to be whether the First District erred in denying a request to consider evidence, then the abuse of discretion standard would apply. *Russo v. Corey Steel Co.*, 2018 IL App (1st) 180467, ¶ 55. Under either standard, the court's ruling constituted prejudicial error.

ARGUMENT

I.

THE FAILURE TO REMOVE JUROR GLASCOTT FROM THE JURY AFTER HE ACKNOWLEDGED THAT HE WAS ADVOCATE'S FIDUCIARY DEPRIVED PLAINTIFF OF HIS FUNDAMENTAL RIGHT TO A TRIAL BY AN UNBIASED JURY.

Introduction

The doctrine of implied or presumed bias is well-settled in the law. It is a constitutional safeguard that protects an individual's fundamental right to a trial by an unbiased jury. Implied bias dates back to the very founding of this country. *Conaway v. Polk*, 453 F.3d 567, 586-87 (4th Cir. 2006). The concept of implied has been traced all the way back to Chief Justice Marshall's opinion in Aaron Burr's treason trial, wherein Marshall explained that a juror acting under a personal prejudice may declare that, notwithstanding that prejudice, he will be governed by the evidence, "*but the law will not trust him*." *Conaway* at 586 587, citing *United States v. Burr*, 25 F. Cas. 49, 50 (D. Va. 1807). The doctrine of implied bias continues to be recognized as a fundamental protection of an individual's right to a fair trial today.

Implied bias is "bias conclusively presumed as a matter of law." *United States v. Torres*, 128 F.3d 38, 45 (2d Cir. 1997), citing *U.S. v. Wood*, 299 U.S. 123 (1936). Implied bias is attributed to a prospective juror on account of a juror's relationship to a party or the case at issue, regardless of actual partiality. *Torres*, *supra* at 45. Therefore, unlike actual bias, a juror's statements on *voir dire* or on questioning by the court about his ability to impartial are totally irrelevant and may not be considered by the court. *Id*. For that reason, a trial court's assessment of a juror's credibility or partiality is not afforded discretion. *Brooks v. Dretke*, 418 F.3d 430, 434 (5th Cir. 2005). The law

recognizes that the "relationship is so close that the law errs on the side of caution." *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000). Therefore, exclusion of the juror for implied bias is mandatory. *Torres, supra* at 45.

The implied bias rule has historical common law roots stemming from Blackstone's *Commentaries*. *Id*. Under the common law, jurors were presumptively biased and excusable due to kinship, interest, former jury service in the case, or because the prospective juror was a master, servant, counselor, steward, or of the same society or corporation. *Polichemi*, *supra* at 704. These relationships between a juror and a party continue to be grounds for removal today.

In this case, the trial court allowed a juror who, at the time of the trial, was actively in an ongoing fiduciary relationship with the defendant to remain on the jury. As the chief investment officer of the general partner in his investment partnership with Advocate, this juror had a fiduciary duty to manage and grow Advocate's money. As a juror, he was asked to award to the plaintiff many millions of dollars from the very defendant that compensated him and his firm to manage and grow that defendant's money. The First District of the Appellate Court affirmed that ruling. That ruling was not grounded in the law of Illinois, the evidence presented, or logic. That ruling deprived plaintiff of his fundamental right to trial by an unbiased jury. This is a right "so basic that a violation of the right requires a reversal." *People v. Cole*, 54 Ill. 2d 401, 411 (1973).

The First District's decision in this case conflicts with this Court's prior rulings in *Naperville v. Wherle*, 340 Ill. 879 (1930); *People v. Cole*, 54 Ill. 2d 401 (1973); and *People v. Porter*, 111 Ill. 2d 386 (1986). It also conflicts with the Fourth District's decision in *Marcin v. Kipfer*, 117 Ill. App. 3d 1065, 1067 (4th Dist. 1983). If allowed to

stand, this ruling would create a different standard for implied bias in the First and Fourth Districts of the Appellate Court. The decision also conflicts with the law of state and federal courts across the country that expressly prohibit a fiduciary to a party from serving as a juror. While no litigant is entitled to a perfect trial, every litigant is entitled to a fair trial. *DOT v. Dalzell*, 2018 IL App (2d) 160911, ¶ 127. Ensuring that right is not and never should be a "mundane exercise of trial court discretion" as the defendants suggest. (R. 11/15/20, PLA Answer p. 1). Instead, as Justice Simon stated in *Porter*, "[t]he question of juror bias, unlike a mere evidentiary irregularity, goes to the heart of the judicial process." *People v. Porter*, 111 Ill. 2d 386, 415 (1986) (Simon, J., dissenting). The presumption of bias, in the rare situations it applies, is an essential safeguard to ensure the right to a fair trial guaranteed by the Illinois and U.S. Constitutions. The First District, in allowing a juror who was a fiduciary to a party to remain on the jury, turned its back on over a century of well-settled law.

A. This Court's prior decisions require the removal of a juror with a fiduciary relationship to a party.

This Court has recognized the general principles stated above. Over 90 years ago, in *Naperville v. Wehrle*, 340 Ill. 579, 582 - 83 (1930), this Court adopted a fundamental principle of law that applies in full force today:

> [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.
>
> ***
>
> 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.

This case concerns just such a relationship. In *Naperville*, this Court reversed the outcome of an administrative proceeding regarding the imposition of a special tax. Reversal was required because a commissioner serving as a fact finder in the proceeding was a compensated officer of the school board within that tax district. This Court explained, "that a commissioner whose duty it was to assess benefits against the property of the corporation of which he was an officer and from which he was receiving compensation was neither 'competent' nor 'disinterested' would seem too clear, in the light of the above principles, to require discussion." *Id.* (internal quotations in the original).

It should be equally clear here that a juror who had a fiduciary duty to manage and grow Advocate's assets, for which his firm was compensated, was neither 'competent' nor 'disinterested' to serve as a juror against that defendant. Just as in *Naperville*, reversal is required here. If one juror is biased, "his participation infects the action of the whole body and makes it voidable." *Id.* at 581.

Naperville is one of the few Illinois cases to examine professional and financial relationships between a juror and a party. It is particularly relevant in this case because it deals with presumed bias arising out of *fiduciary relationships*. *See, e.g., Ditis v. Ahlvin Const. Co.*, 408 Ill. 416, 426- 27 (1951) (master/servant - fiduciary in character); *In re Imming*, 131 Ill. 2d 239, 253 (1989) (attorney/client - fiduciary as a matter of law).

If *those* fiduciary relationships were disqualifying, then this juror's fiduciary relationship to Advocate, chief investment officer of the general partner in the limited partnership, must be as well. *See e.g., Pielet v. Hiffman*, 407 Ill. App. 3d 788, 789 (1st Dist. 2011) (general partner/limited partner - fiduciary as a matter of law); *Van Dyke v.*

White, 2019 IL 121452, ¶ 76 (2019) (investment advisor/client – fiduciary as a matter of law).

Naperville explains *why* fiduciaries and business partners, like this juror, must be presumed biased and not be allowed to serve -- human nature and common sense:

> 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.
>
> *Naperville* at 583.

That reasoning is as valid today as it was 90 years ago and should have been controlling here. Juror Glascott, as an officer and general partner, owed the highest duty of loyalty and trust to Advocate, his limited partner. As Justice Cardozo so famously wrote about the trust and loyalty between business partners, "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 463-64, 164 N.E. 545, 546 (1928).

Here, the lower courts failed to consider that the very standard of behavior required by his acknowledged fiduciary duty created the risk that this juror would "look somewhat more favorably, though perhaps frequently unconsciously" upon the side of Advocate, his partner, rather than the plaintiff. *Naperville, supra* at 583. After all, his limited partner stood to lose many millions of dollars if the jury found for the plaintiff.

This Court, like courts across the nation, recognizes that the risk of bias "on account of [a juror's] relation with one of the parties" is so great that bias must be *presumed*, even when the juror "was quite positive that he had no bias." *Id.* 582-583. Therefore, a juror's statements that he could be fair, no matter how credible or sincere,

are not to be considered. *Id*. *See also*, *Torres* at 45 (regarding implied biased, a juror's "statements upon *voir dire* [about his ability to be impartial] are totally irrelevant."); *United States v*. *Greer*, 285 F.3d 158, 172 (2d Cir. 2000) (holding that "implied bias does not depend on "determinations of demeanor and credibility," but rather is bias presumed as a matter of law.").

In this case, the trial court specifically stated that Juror Glascott's demeanor and his statements that he could be fair were the basis for allowing him to remain on the jury. (R. 1898- 1899). This was error.

While *Naperville* concerned an administrative proceeding, its holding applies to this civil jury trial. This Court specifically held that commissioners, the fact-finders in an administrative action, "are quasi-jurors, and should be, like them, '*omni exceptions majores*.'" *Id*. at 582. (emphasis in the original).

Defendants have attempted to minimize the impact of *Naperville* on this case. They have claimed that "neither *Naperville*, nor any case interpreting *Naperville*, has ever suggested that the relationship alone is determinative of whether a trial court has any discretion in ruling on a motion to excuse a juror for cause." (R. 11/5/20: PLA Answer p. 6). Defendants are wrong. Nearly early every state and federal court across this county has adopted the doctrine of implied bias and has expressly held that the *relationship alone* can and must require removal. *See*, *Torres* at 45 (holding that "disqualification on the basis of implied bias is mandatory."); *See*, *also*, (Appendix at A. 45 – A. 65).

Without citing *Naperville*, this Court reiterated the doctrine of presumed bias in *People v*. *Cole,* 54 Ill. 2d 401 (1973):

> There are certain relationships which may exist between a juror and a party to the litigation which are so direct that a juror possessing the same

> will be presumed to be biased and therefore disqualified. In such a case it is not necessary to establish that bias or partiality actually exists.

Cole, like *Naperville*, stands for the principle that the relationship alone can require the removal of the juror. In *Cole*, a juror had social connections to some of the witnesses and the trial attorneys and had met the murder victim once, a year prior to the trial. *Id*. at 411. The *Cole* Court did not apply the presumption of bias in that case because the *Cole* juror's "connections to participants in the trial" did not constitute bias as a matter of law. *Id*. at 414-415. Even though the *Cole* court did not apply the presumption in that case, this fundamental principle is still valid here. None of the *Cole* juror's connections concerned a business partnership or a fiduciary relationship to a party, like Juror Glascott's relationship to the defendant in this case.

In *Cole*, because bias was not presumed, it was appropriate for the trial court to consider the juror's statements that he could be fair. It is only "[b]eyond these situations which raise a presumption of partiality" that a court can examine the juror's state of mind. *Id*. at 413. Cole instructed that, with regard to the examination for actual bias, there must be more than a "mere suspicion" of bias to warrant removal. *Id*. at 415. This is as opposed to presumed bias where it is "not necessary to establish that bias or partiality actually exists." *Id*. at 413.

The *Cole* Court declined to define what specific relationships were so direct that the bias would be presumed. *Cole* at 413 ("We are not concerned with these disqualifications in this case and deem it unnecessary to specify them here."). Nor did the Cole court define "so direct." But this Court in *Naperville*, consistent with the majority of jurisdictions in this county, specifically delineated fiduciary relationships between a juror and a party as too close to allow a juror to serve. *Naperville* at 582; *See,*

also, (Appendix at A. 45- A. 65). In this case, Glascott had a fiduciary duty to manage and grow Advocate's assets so that Advocate could grow the very hospital system, that through its physician, was on trial. Glascott's fiduciary relationship to Advocate was so direct that it required the presumption of bias. This Court's prior rulings compelled Glascott's removal from the jury.

B. The Appellate Court erred in holding that plaintiff was required to demonstrate an "express fiduciary" relationship.

The First District held that plaintiff did not meet his burden to establish presumed bias, but the court applied the wrong burden. The court held "the evidence was insufficient to demonstrate any express fiduciary relationship between juror Glascott and defendant Advocate Medical." *Ittersagen v. Advocate Health & Hospitals Corp.*, 2020 IL App (1st) 190778, ¶ 64. Illinois law specifically rejects the First District's requirement that plaintiff demonstrate an "express fiduciary relationship" between the juror and a party for the presumption of bias to apply. Rather, in *People v. Porter*, 111 Ill. 2d 386, 404 (1986), this Court held that plaintiff's burden was only to establish that the relationship between the juror and a party was of such a character that a presumption of prejudice would arise from it.

In *Porter,* a criminal defendant argued on appeal that he had been denied a fair trial because, after the entry of a guilty verdict in his murder trial, a juror disclosed that she attended church with the mother of one of the murder victims. In determining whether to grant a new trial due to implied bias, this Court held that the defendant either had to show that he was actually prejudiced, or "[i]f the defendant could not show that he was actually prejudiced, then the burden was on the defendant to establish that the relationship between the juror and the victim's mother *was of such a character that a*

presumption of prejudice would arise therefrom. If the State could not rebut this presumption, the court could have granted a new trial." *Id*. at 404. (emphasis added).

The *Porter* burden recognized that in the context of *juror bias*, a party seeking to remove a juror for cause cannot issue discovery, conduct depositions, or call witnesses and has only moments to question the juror during *voir dire*. Plaintiff met the burden established by *Porter*. Glascott had a fiduciary relationship to Advocate; he personally oversaw Advocate's investment; and his firm was compensated by Advocate to Glascott's own personal benefit.

Porter did not define how the presumption of bias could be rebutted. But it is universally accepted that the presumption of implied bias cannot be rebutted by a juror's statement that he can be fair. *Cole* at 413; *Naperville* at 582 – 583; *See, also*, (Appendix at A. 45- A. 65).

C. There was no distinction between Advocate and Advocate's endowment. Glascott had a fiduciary duty to the defendant - which required his removal.

The lower courts' refusal to presume bias was premised on an erroneous and illogical distinction between the Advocate Healthcare System Endowment and the defendant itself, the Advocate Health & Hospitals Corporation, the very corporation that owns and operates the Advocate Healthcare System. There was no distinction at all. Advocate's endowment was not separate from Advocate

In its Form 990 tax return, defendant swore under penalty of perjury that it did not have a separate endowment. This sworn statement directly contradicted the unsworn statements made by defense counsel and relied on by the lower courts that the endowment was "separate" from the defendant "*per se*". Since Advocate did not have a separate endowment at all, Glascott's fiduciary relationship ran directly toward Advocate,

the defendant in this case. The holding that Glasscot had a fiduciary relationship to the endowment, but not to Advocate itself, was legally and factually untenable. The lower courts' conclusion is impossible to reconcile with the evidence. Therefore, the decision was against the manifest weight of the evidence and requires reversal. *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001).

Even if this Court does not consider defendant's sworn tax return and looks only at the evidence presented to the trial court during Juror Glascott's questioning in the middle of the trial, the presumption of bias was still required. Glascott's fiduciary relationship to the $ 6 billion Advocate Endowment, if it was somehow separate from the defendant, was equally disqualifying. The *money* under Glascott's care, whether invested in the name of the defendant or the defendant's own endowment, *belonged to the defendant*. The benefit of Glascott's investment acumen accrued *directly to the defendant*. The defendant paid Glascott's firm an asset management fee to manage *defendant's investment*. Simply put, Juror Glascott had a fiduciary duty to make more money *for the defendant*. The First District's finding that Glascott had a fiduciary relationship to the *defendant's* endowment, but no relationship to the *defendant* itself defies the evidence, the law, and any semblance of logic. *Long v. Mathew*, 336 Ill. App. 3d 595, 600-601 (2003) (holding that abuse of discretion means "clearly against logic.").

D. Juror Glascott's testimony established the direct relationship between Advocate and its own endowment.

The First District's specifically found that "no evidence was presented to the trial court regarding the relationship between defendant Advocate Medical and the Advocate Endowment." *Ittersagen at* ¶ 64. That finding ignored Juror Glascott's sworn testimony about that relationship. The failure to consider Glascott's testimony as evidence was

error. No evidence beyond juror Glascotts's testimony was required to be presented. Nor could any outside evidence practicably have been presented during the brief questioning in chambers following his surprise admission in the middle of the trial. During that questioning, he specifically told the trial court that the endowment *belonged* to the defendant:

> JUROR GLASCOTT: So *their* hospital endowment invests in one of our -- we're a private equity company that raises funds to invest in real estate. They're one of our limited partners that invests through one of our funds." (R. 1880). (emphasis added).

Then, Juror Glascott's testified that the endowment's purpose was to financially benefit the defendant by raising money to grow and expand defendant's entire hospital system:

> THE COURT: Does the endowment pay the defendant, either of the defendants in any way?
>
> JUROR GLASCOTT: I don't know how all that, I mean, *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. 1882-1883) (emphasis added).

And further that:

> JUROR GLASCOTT: I believe the endowment's purpose is to grow by hospitals, grow hospitals, you know, fund growth of -- you know, build buildings, that type of thing.

The finding that "no evidence" was presented cannot be reconciled with the evidence, directly from Glascott, which established that the endowment belonged to the defendant; and that it was used by the defendant to raise money for that defendant's exclusive financial benefit, specifically, to fund the growth of the hospitals owned by

Advocate. (Sup. C. 239). That evidence, by itself, established a direct relationship between defendant and its own endowment.

The lower courts also failed to properly consider Juror Glascott's sworn testimony about his direct relationship to Advocate. The First District found that Juror Glascott "clarified that he did not have a business relationship with Advocate Medical, but with the "Advocate Health Care system endowment."" *Ittersagen* at ¶ 63 (internal quotations in the original); also, that "[a]ccording to juror Glascott, he has a fiduciary duty as a general partner and to the Advocate endowment, but he does not have a fiduciary duty to either of the defendants." *Id*. at ¶ 61.

But *Juror Glascott* made no such clarification or denial. Those clarifications and denials came only from *defense counsel*. A review of the questioning in its entirety plainly demonstrates that from start to finish, Glascott referred to Advocate, the defendant, and Advocate's endowment interchangeably:

- Glascott's note disclosing the relationship in the middle of the trial said. "my firm has a business relationship with *Advocate*."
- Glascott was reminded of his relationship by a LinkedIn update he got the night before from someone he is connected with "at *Advocate*."
- When plaintiff's counsel asked if he oversaw the money "*Advocate* invests" he affirmatively answered that he personally oversees all new investments which "*Advocate's* money goes into."

When questioned about his fiduciary relationship by plaintiff's counsel, Glascott specifically agreed that he had a fiduciary duty to *Advocate* as a general partner, without making any distinction that this fiduciary relationship was limited only to the endowment:

> MR. WILLIAMS: And then you said a word that I need to explore, and I don't mean to be rude, sir. You described *Advocate* as a partner?

JUROR GLASCOTT: A limited partner.

MR. WILLIAMS: They are a limited partner?

JUROR GLASCOTT: Uh-huh. So in a private equity fund, you have a general partner and a series of limited partners, and I said the 50 investors, or whatever the number, they're one of the investors that -- Green Courte Partners is the general partner, Green Courte Partners managing under whatever, and then all of the limited partners are investors.

MR. WILLIAMS: Right, and you have a fiduciary duty as a general partner; correct?

JUROR GLASCOTT: Correct.

He reaffirmed his fiduciary duty to *Advocate* again a moment later:

MR. WILLIAMS: But you have a fiduciary duty to *Advocate*?

JUROR GLASCOTT: I do, correct.

The First District ignored all of this evidence and instead based its finding that he did not have a fiduciary duty to the defendants on *one single statement*, which came only after defense counsel had told the juror that the endowment was separate from the defendants in this action:

THE COURT: Do you have a fiduciary duty to either defendant here?

JUROR GLASCOTT: No.

The First District considered that statement, but ignored the remainder of this very same exchange, where he changed his answer:

THE COURT: And what is your basis for saying that?

JUROR GLASCOTT: *Well, so one of the defendants, being Advocate, I guess –*

MR. WILLIAMS: Advocate Health and Hospitals Corporation?

MS. DAYAL: Wait.

A court should not single out certain statements but should regard the examination of each prospective juror as a whole. *People v. Stone*, 61 Ill. App. 3d 654, 667 (5th Dist. 1978). Had the lower court applied this legal precept, it would have found that this juror did not distinguish or limit his fiduciary duty or relationship only to the endowment. Since the juror did not make that distinction, there was no basis for the First District to create a such a distinction.

Further, in addition to Juror Glascott's admittedly ongoing fiduciary relationship, which by itself, should have compelled his removal, the evidence also demonstrated that Glascott's financial interests were aligned with those of the defendant, thus creating the risk of bias. Advocate paid his firm a fee for asset management, and that fee was used to pay salaries and bonuses at his company. If Glascott brought in investors to invest in the fund, he got a bonus, and if the fund did well in a particular year, he would also get a bonus. Glascott invested his own money alongside his investors.

If Juror Glascott had awarded a verdict in the millions of dollars against defendant, it might have had repercussions for his firm. Glascott's personal financial interests were directly aligned with the financial interests of the defendant. This, too, is disqualifying under Illinois law. A personal interest can be disqualifying even without a direct pecuniary interest in the outcome of the case. *Bender v. Board of Fire & Police Comm'rs*, 254 Ill. App. 3d 488, 490 (1st Dist. 1993). Rather, "a personal interest or bias can be pecuniary *or any other interest that may have an effect on the impartiality of the decisionmaker*." *Girot v. Keith*, 212 Ill. 2d 372, 380 (2004), citing *City of Naperville v. Wehrle*, 340 Ill. 579, (1930).

E. Statements from Advocate's attorney were improperly considered as evidence requiring reversal.

The First District improperly relied on unsupported and factually incorrect statements by defense counsel as though those statements were evidence. They were not. The First District found, "It was juror Glascott's understanding that the endowment is separate and apart from Advocate Medical and has no relationship with Dr. Thakadiyil." *Ittersagen* at ¶ 63. But that was not the j*uror's* understanding at all. That information came directly from *defense counsel*:

> MS. DAYAL: You said it's the hospital endowment that you've been -
>
> JUROR GLASCOTT: Right, the Advocate Health Care system endowment.
>
> MS. DAYAL: It's not the medical group that's here?
>
> JUROR GLASCOTT: No, no, no, the overall 6 billion dollar endowment.
>
> And then, defense counsel told the juror and the trial court that:
>
> MS. DAYAL: The endowment people are separate from the Medical Group per se, and you understand that this is Advocate Health and Hospitals, Advocate Medical Group, and one of its doctors? This case is the –
>
> JUROR GLASCOTT: Oh, yeah, yeah.
>
> MS. DAYAL: And you don't know the doctor?
>
> JUROR GLASCOTT: No, never met her.

And then, a moment later, after Juror Glascott explained that the purpose of the endowment was to fund the growth of defendant's hospitals, defense counsel interjected that:

> MS. DAYAL: The salaries and compensation for Medical Group comes specifically from Medical Group operations. They do not come from any other endowment, and that's part of the employment contract.

THE COURT: Any additional questions?

Defense counsel's statements about the employment contracts were pure argument to the trial court, unrelated to any question to or response from the juror. Glascott did not respond or comment at all. Further, the Medical Group was an *assumed business name* under which the defendant employed Thakadiyil and ran the medical clinic where Plaintiff was treated. (Sup. C. 259). As merely one of defendant's numerous assumed business names, the "Medical Group" was not separate from the defendant. Nor was it separate from the endowment that raised money to grow and support the entire Advocate healthcare system. The Advocate healthcare system included all of Advocate's physicians and clinics.

The only suggestion that the endowment was separate from the defendant came from Advocate's defense counsel. Defense counsel represented to the court that the endowment was separate *per se*, but Glascott stated under oath, that "it's all a part of the same." The First District was required to consider Glascott's sworn testimony, not the defense counsel's arguments. "A prospective *juror's statements are proper evidence* for the court to consider and weigh." 54 Ill. 2d at 414. *People v. Stremmel*, 258 Ill. App. 3d 93, 113 (2d Dist. 1994) (emphasis added). It should be axiomatic that defense counsel's arguments are not. *People v. Emerson*, 189 Ill. 2d 436, 508 (2000) (noting that arguments of the attorneys are not evidence and that arguments not based on the evidence should be disregarded).

Here, instead of disregarding defense counsel's unsupported argument as required by Illinois law, the Appellate Court specifically *relied* on defense counsel's argument about the employment contracts as a *basis* of its decision:

> In addition, defense counsel represented that the salaries and compensation for Advocate Medical came from Advocate Medical operations not from the endowment. She further indicated that this information could be found in the physicians' employment contracts. In sum, the evidence was insufficient to demonstrate any express fiduciary relationship between juror Glascott and defendant Advocate Medical.
>
> *Ittersagen v. Advocate Health & Hospitals Corp.*, 2020 IL App (1st) 190778.

These physician employment contracts were not available to the trial judge, nor were they available to the First District. Accordingly, the physician employment contracts were not evidence and should not have been considered as such. "A trier of fact is limited to the record before him, and it is a denial of due process of law for the court to consider matters outside the record." *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1st Dist. 1976). *See also, People v. People v. Thunberg*, 412 Ill. 565, 567 (1952). Since the First District specifically relied on counsel's unsupported statements about those contracts as a stated basis of its Opinion, the First District improperly relied on evidence outside of the record and deprived plaintiff of a fair trial. *Bowie, supra* at 180. Because it is clear from the Opinion that the First District relied on defense counsel's statements as a specific basis of its Opinion, the First District is not entitled to any deference or presumption that the court only considered proper evidence. *People v. Collins*, 21 Ill. App. 3d 800, 805-06 (1st Dist. 1974). Therefore, reversal is required.

F. Illinois law compels the conclusion that Glascott's fiduciary duty to the endowment is a direct fiduciary relationship to Advocate.

The Illinois Prudent Management of Institutional Funds Act is directly on point with regard to Advocate's relationship with its own endowment. 760 ILCS 51/1 (LexisNexis) (eff. 6-30-2009). Under that statute: "an 'endowment fund' means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly

expendable by the institution on a current basis. The term does not include "*assets that an institution designates as an endowment fund for its own use*." 760 ILCS 51/2 (emphasis added).

Glascott testified that the defendant used its endowment to invest money for its own use - to support the growth and expansion of its own healthcare system. Therefore, under the above statute, the endowment at issue could not possibly constitute a separate endowment fund. As that endowment's purpose was only to support and grow the defendant corporation, that endowment was "an asset of the institution" that Advocate merely "designate[d] as an endowment fund for its own use." Defendant's internal designation does not create a separate entity.

Since these endowment funds were an asset of the institution - Advocate - Glascott, as the Chief Investment Officer, was personally responsible for that institution's money. Glascott and his firm were compensated by Advocate to manage Advocate's own money. His fiduciary duty to the defendant was in direct contrast to his duty as a juror to award money damages against the defendant should he find for plaintiff.

G. The First District's opinion conflicts with the Fourth District's Opinion on the same issue.

The First District's refusal to presume bias in this case is in direct conflict with the Fourth District's decision in *Marcin v. Kipfer*. 117 Ill. App. 3d 1065, 1067 (4th Dist. 1983). If the First District's decision stands, a juror who is presumed to be biased in the Fourth District will not be presumed to be biased in the First District.

Marcin concerned two jurors who were patients of the defendant physician. Both were challenged for cause; both testified under oath that they could be fair, and that the relationship with the defendant would not bias them. Because they said they could be

fair, the trial judge allowed them to remain on the jury. The Fourth District did not agree. In reversing, the *Marcin* Court stated, "[t]he trend of authority is to exclude from juries all persons who by reason of their business and social relations, past or present, with either of those parties, could be suspected of possible bias." *Id*. at 1068, citing Hunter, *Trial Handbook for Illinois Lawyers*, sec. 15:14 (5th ed. 1983).

The Fourth District, consistent with *Porter*, looked at the *character* of the relationship, and, consistent with *Naperville*, considered the effect that relationship could have on the juror's ability to be impartial. The *Marcin* Court determined that the "trust and confidence" inherent in the doctor–patient relationship could make it more difficult for the jurors to find for the plaintiff and against the defendant doctor, with whom they had a relationship grounded in trust. *Marcin*, *supra* at 1068. Therefore, the jurors were presumed to be biased, even though they said they could be fair. "The relationship of a prospective juror to a party can be so close that, considering the nature of the case, fairness requires that the juror be discharged. This is such a case." *Id*. at 1067.

This too is such a case. The partnership relationship between Juror Glascott and Advocate was built on the same "trust and confidence" as that of a physician and patient. *See*, *Updike v. Wolf & Co*., 175 Ill. App. 3d 408, 417 (1st Dist. 1988) ("The relationship between partners is one of trust and confidence"). Juror Glasscott, as the Chief Investment Officer of the general partner, had a duty of loyalty that required him to act in the best interest of all of his limited partners, including Advocate. As in *Marcin*, the First District should have considered that the trust and confidence demanded by Juror Glascott's fiduciary relationship could have made it more difficult for him to find for the plaintiff and against his own business partner, even though he said he could be fair.

In *Roach v. Springfield Clinic*, 157 Ill. 2d 29 (1993), this Court reviewed *Marcin* and specifically upheld its central tenet, that a juror whose relationship to a party was based on trust and confidence, was impliedly bias and must be removed. *Id.* at 47.

H. State and federal jurisdictions outside Illinois would have removed Glascott from the jury.

The actual application of implied bias is rare, because in most circumstances a juror with a close connection to a case never makes it on the jury in the first place. That juror is excused either for cause or by use of a peremptory challenge. However, a nationwide search reveals not a single case where a court has held that a juror, who by his own admission had a fiduciary duty to a party, was a proper juror. While the doctrine is rarely applied, the principle itself has been accepted nationwide. *See*, (Appendix at A. 45 – A. 65). Courts outside of Illinois have consistently held, either by statute or judicial decision, that a relationship between a potential juror and a party which is fiduciary or financial in nature, is by definition, implied bias and requires the absolute disqualification of that potential juror. *Id.*

Twenty-five states have codified statutes that specifically disqualify fiduciary relationships between a juror and a party akin to those enumerated in *Naperville v. Wherle*. *See, e.g.*, Nev. Rev. Stat. Ann. § 16.050(1)(c), prohibiting the relationship of "master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party or a partner, or united in business with either party." Glascott was a fiduciary to the defendant. (Appendix at A. 45 to A. 53).

Moreover, fifteen of those states, have specifically codified the rule that if a prospective juror is a *partner* of a party, that juror must be excluded. *Id.*, *see*, Alabama, Alaska, Arizona, California, Colorado, Idaho, Michigan, Montana, Nevada, North

Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming). Kansas specifically prohibits a *fiduciary* from serving by statute, and New Hampshire prohibits any *advisor* to a party from serving on a jury. Glascott, was a fiduciary, partner and investment advisor to Advocate.

In states that do not enumerate disqualifying relationship by statute, judicial decisions in thouse overwhelming recognize professional and financial relationships between a juror and a party as grounds to imply bias and remove the juror. (Appendix at A. 54 to A. 61, *see, e.g.*, Connecticut, Georgia, Kentucky, and Pennsylvania).

Federal courts throughout the country have adopted the doctrine of implied bias. *Conaway v. Polk*, 453 F.3d 567, 587-88 (4th Cir. 2006). *See also,* Appendix at A. 62 – A. 65). Our federal courts have analyzed several factual scenarios where a juror's relationships to a corporation required a new trial. See e.g., *Caterpillar, Inc. v. Sturman Indus., Inc.*, 387 F.3d 1358, 1372 (Fed. Cir. 2004) (finding that a juror whose husband worked for the plaintiff at the time of trial should have been struck for cause under the doctrine of implied bias); *United States v. Polichemi*, 219 F.3d 698, 704-05 (7th Cir. 2000) (finding that a fifteen-year employee of the prosecutor's office handling the prosecution should have been struck); *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122 (10th Cir. 1995) (striking a juror for implied bias because the challenged juror owned stock in the defendant's company and his spouse worked for the defendant).

All jurisdictions agree that a juror's statement that he can be fair is not to be considered in determining whether implied bias applies. Appendix at A. 54 – A. 61, see, e.g., Colorado, Georgia, Indiana, Kentucky, Pennsylvania and Vermont). Therefore, instead of the individual juror's state of mind, the accepted standard courts are to

consider is "whether an average person in the position of the juror in controversy would be prejudiced." *United States v. Torres*, 128 F.3d 38, 45 (2d Cir. 1997) (quoting *United States v. Wood*, 299 U.S. 123, 133 (1936)).

Here, Juror Glascott had a legal duty of the utmost loyalty to his fiduciary, client, and partner, the defendant in this case. Glasscott's firm received direct compensation from Advocate through its management fee. By Glascott's own admission, this fee was used to pay salaries and bonuses at his company, and so to some degree, it contributed to his personal income. It strains credulity to say that an average juror in Glascott's position would not have been more inclined to look more favorably on Advocate than on plaintiff, particularly where he was being asked to award plaintiff many millions of dollars from Advocate, whose very assets he had a duty to manage and grow.

Nearly all states afford great discretion to a trial court in challenges for cause. However, notwithstanding that rule, other jurisdictions have developed a rule of caution which favors striking jurors with relationships to a party because the right to an unbiased jury is so fundamental. See, e.g.; *State v. Deatore*, 70 N.J. 100, 106, (1976) (holding "the obvious and practical way to handle the situation of a prospective juror having connections with a party or witness which might possibly affect impartiality is to excuse the juror."); *Carratelli v. State*, 961 So. 2d 312, 318 (Florida 2007) (holding that close cases should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality); *Trim v. Shepard*, 300 Ga. 176, 179, (2016) (noting "if a trial court were to err in assessing the impartiality of prospective jurors, it would be better that the trial court "err on the side of caution" by dismissing the juror); *People v. Furey*, 2011 NY Slip Op 9000, ¶ 3 (advising trial courts to exercise caution in these situations by leaning toward

disqualifying a prospective juror of dubious impartiality); *See, also*, Appendix A. 54 – 65).

Defendants state that the law outside of Illinois does not "establish some pattern of formulaic juror exclusion that should serve as any sort of guide to replace the discretion afforded trial judges." (R. 11/5/20: PLA Answer p. 11-12). Defendants are wrong. Juror Glascott's fiduciary relationship to Advocate would require his removal from the jury in the *majority of other jurisdictions in this country*. Unless this decision is reversed, Illinois, by allowing a fiduciary to a party to serve as a juror, will stand alone among the courts of this country in effectively eliminating this long-held constitutional protection.

II.

THE FIRST DISTRICT SHOULD HAVE TAKEN JUDICIAL NOTICE OF ADVOCATE'S 2018 TAX FORM WHICH SHOWED THAT ADVOCATE DID NOT HAVE A SEPARATE ENDOWMENT.

Introduction

As detailed in the Statement of Facts, while this appeal was pending in the Appellate Court, plaintiff obtained defendant's Form 990 federal tax return for tax year 2018, the year of this trial. (R. 3/3/21: Attorney Affidavit p. 1). Defendant's return was signed by an officer of Advocate Health & Hospitals Corporation on November 15, 2019 and was made available to the public via the I.R.S. website sometime thereafter.

In this tax return, defendant swore under penalty of perjury that it did not have a separate endowment. That meant that defense counsel's statements to the trial court that the endowment was separate per se from the Medical Group were false.

Plaintiff filed a motion requesting that First District to take judicial notice of the return and consider it as evidence of Juror Glascott's bias. The First District refused. (Appendix at A. 43). The First District's refusal conflicts with Illinois Rule of Evidence 201 and with the long-standing precedent set forth by this Court.

A. There was no valid basis for the First District refusal to take judicial notice.

Illinois Rule of Evidence 201(d) states as follows: "When Mandatory**:** A court shall take judicial notice if requested by a party and supplied with the necessary information." Ill. R. Evid. 201 (Eff. Jan. 1, 2011). Here, Plaintiff requested judicial notice by motion and supplied the First District with the necessary information, the complete tax form. Therefore, judicial notice was mandatory.

All other elements of Rule 201 were met. The tax return was a document that was capable of being judicially noticed. As a 501(c)(3) organization, Advocate's 2018 Form 990 tax return is a public record. *See*, *26 USCS § 6104(a)1(A)*. Courts may take judicial notice of public records. *Union Electric Co. v. Department of Revenue,* 136 Ill. 2d 385, 389 (1990). Further, the Defendant's return was available to the public through www.IRS.gov and judicial notice is proper of information acquired from governmental websites. *People v. Vara*, 2016 IL App (2d) 140849, ¶ 37. Finally, pursuant to 201(f), judicial notice may be taken *at any stage* of the proceeding. *Id*.

Therefore, under the rule, the First District was required to take judicial notice. The failure to follow an evidentiary rule promulgated by this Court was prejudicial error. "Supreme court rules are not merely suggestions to be complied with if convenient but rather obligations which the parties and the courts are required to follow." *Medow v. Flavin*, 336 Ill. App. 3d 20, 36 (1st Dist. 2002).

The First District cited multiple grounds for its refusal in a written order entered on August 31, 2020. (Appendix at 43). None of those grounds bear out under Illinois law. The first reason given was that plaintiff should have presented the tax return to the trial court because "it could easily have been acquired at the time of the hearing and considered by the trial court." But the return for the year 2018 - the only return relevant to the year of the trial - did not exist at the time of the trial. An Advocate officer signed the return on November 15, 2019, more than one year after the trial had ended, and the turn-around time for the IRS to make the returns of 501(c)(3) corporations available to the public on their website is typically a year to 18 months. *See*, Guidestar, https://help.guidestar.org. There was no possible way that this highly relevant evidence could have been submitted to the trial court. By the time it was created, this case was already under the jurisdiction of the Appellate Court.

The second reason given for refusing to take judicial notice was that plaintiff could not raise a new argument in a Petition for Rehearing pursuant to Illinois Supreme Court Rule 341(h)(7). But no new argument was raised. That Advocate's endowment was not separate and that Glascott's fiduciary relationship ran directly to the defendant were exactly the same arguments plaintiff made when Juror Glascott first disclosed this relationship in the middle of the trial, in his motion for a new trial, and throughout his appellate briefs. Instead of a new argument raised by plaintiff, defendant's subsequent sworn admissions in a public record were *newly discovered evidence* that specifically demonstrated that the First District relied on factually inaccurate information in reaching its decision.

The third reason given was that plaintiff did not cite authority that a reviewing court may take judicial notice of evidence that should have been presented to the trial court. (Appendix at A. 43). But, as discussed above, this evidence could not have been presented to the trial court because it did not exist at that time. Therefore, the First District's reliance on *People v. James*, 2019 IL App (1st) 170594, is not persuasive because that case is factually distinct. *James* concerned an attempt by the State of Illinois to have an individual registered as a life-time offender under the Sex Offender Registry Act. In order to meet the requisite elements of the statute, the State was required to submit evidence, at the time of the hearing, as to when the offender was released from prison, which triggered the registration period. That evidence was available at the time of the hearing, but the State failed to present it. Therefore, in that case, the First District refused to take judicial because the evidence at issue went directly to an element of the claim and because it was available at the time of trial. *Id.* at ¶ 15. Similarly, in *People v. Jones*, 2017 IL App (1st) 143718, which presented a similar factual situation, the First District noted that it could take judicial notice of the public record at issue but had declined to so because those records *were available at the time of trial*. *Id.*

Here, plaintiff was not trying to submit new evidence to prove any element of the underlying medical malpractice claim. Rather, this evidence, created only after the trial had ended, went directly to *juror bias*. It is well accepted in Illinois that evidence of juror bias often does not become available until after the trial has ended. In those circumstances, counsel may submit new evidence support the claim of juror bias to the reviewing court. *People v. Porter*, 111 Ill. 2d 386, 403 (1986) (counsel could have submitted evidence of the extent of juror's relationship in post-trial proceedings). The

evidence discovered after the trial and offered by plaintiff in this case, was exactly the sort of evidence that the courts of Illinois consider favorably when reviewing juror bias in the post-trial period. The tax return was "specific, detailed and nonconjectural" evidence offered in support of the juror's relationship to the defendant. *People v. Witte*, 115 Ill. App. 3d 20, 30 (1983). As a sworn party statement, Advocate's federal return was admissible evidence that met those requirements. It should have been judicially noticed and considered as evidence of Juror Glascott's bias.

Finally, courts of review, including this Court, routinely take judicial notice of evidence that was not submitted to the trial court. In *May Dep't Stores Co. v. Teamsters Union*, 64 Ill. 2d 153, 159 (1976), this Court took judicial notice of an NLRB letter of determination, even though judicial notice was denied by the appellate court. In taking judicial notice, this Court noted, "No sound reason exists to deny judicial notice of public documents." *Id.* See also, *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118 (indicating that the appellate court may take judicial notice of information on a public website even though the information was not in the record on appeal); *Rural Electric Convenience Cooperative Co. v. Illinois Commerce*, 118 Ill. App. 3d 647, 651 (4th Dist. 1983) (holding that judicial notice may be taken by an appellate tribunal at any time, even if judicial notice was denied by the trial court or the parties did not seek it below).

The law of Illinois overwhelmingly demonstrates that the First District's refusal to take judicial notice of the tax return was error and greatly prejudiced plaintiff. As this Court has instructed, if taking judicial notice will "aid in the efficient disposition of a litigation, its use, where appropriate, is to be commended." *People v. Davis*, 65 Ill. 2d 157, 165 (1976). Here, judicial notice was mandatory, and it would have aided in the

disposition of this case because Advocate's return conclusively demonstrated that Glascott had a direct fiduciary relationship to the defendant and that his firm was paid by the defendant to manage it money. Therefore, the relationship between Juror Glascott and Advocate required his removal under Illinois law. Plaintiff asks this Court to take judicial notice of Advocate's return which is in the record supplied to this Court.

CONCLUSION

The right to a trial by an unbiased jury is "fundamental to our system of jurisprudence." *People v. Taylor*, 357 Ill. App. 3d 642, 647, (1st Dist. 2005). A denial of that right "is a denial of the procedural due process guaranteed litigants under both the United States (U.S. Const, amend. XIV) and Illinois (Ill. Const. 1970, art. I, §2) Constitutions." *People v. Hattery*, 183 Ill. App. 3d 785, 801 (1989). Since Thomas Ittersagen's fundamental right to a fair trial was violated, reversal is the only proper remedy. *Cole* at 411.

Wherefore, plaintiff respectfully requests this Honorable Court to reverse the trial verdict entered in his case and to remand this case for a new trial.

Respectfully submitted,

/s/ Carla A. Colaianni

Carla A. Colaianni

Carla A. Colaianni
LAW OFFICE OF CARLA COLAIANNI
1841 N. Drake
Chicago, IL 60647
(312) 405-7027
carlacolaianni@yahoo.com

Leslie J. Rosen
LESLIE J. ROSEN ATTORNEY AT LAW, P.C.
180 N. LaSalle Street
Suite 3650

Chicago, IL 60601
(312) 994-2435
ljr@rosenlegal.net

Todd A. Smith
SMITH LACIEN LLP
Three First National Plaza
70 West Madison, Suite 5770
Chicago, IL 60602
(312) 509-8900.
tsmith@smithlacien.com

Michael T. Sawyier
LAW OFFICES OF MICHAEL T. SAWYIER
830 E. Sidewalk Road
Chesterton, IN 46304
(219) 926-4200
michael@eplindiana.com

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 44 pages ~~or words~~.

By: /s/ Carla A. Colaianni

Carla A. Colaianni
LAW OFFICE OF CARLA COLAIANNI
1841 N. Drake
Chicago, IL 60647
(312) 405-7027
carlacolaianni@yahoo.com
One of the Attorneys for Plaintiff-Appellant, Thomas Ittersagen

APPENDIX

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Carolyn Taft Grosboll
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TABLE OF CONTENTS OF THE APPENDIX

Ittersagen v. Advocate Health & Hosps. Corp.

Appellate Court of Illinois, First District, Fourth Division

September 10, 2020, Decided

No. 1-19-0778

Reporter
2020 IL App (1st) 190778 *; 2020 Ill. App. LEXIS 604 **

THOMAS ITTERSAGEN, Plaintiff-Appellant, v. ADVOCATE HEALTH AND HOSPITALS CORPORATION D/B/A ADVOCATE MEDICAL GROUP and ANITA THAKADIYIL, M.D., Defendants-Appellees.

Subsequent History: Appeal granted by *Ittersagen v. Advocate Health & Hosps. Corp., 2021 Ill. LEXIS 64 (Ill., Jan. 27, 2021)*

Prior History: [**1] Appeal from the Circuit Court of Cook County. No. 16 L 3532. Honorable Rena Van Tine, Judge Presiding.

Ittersagen v. Advocate Health & Hosps. Corp., 2020 IL App (1st) 190778-U, 2020 Ill. App. Unpub. LEXIS 842 (May 14, 2020)

Disposition: Affirmed.

Core Terms

juror, trial court, sepsis, standard of care, incision, drainage, infection, defense counsel, emergency room, opined, antibiotic, carbuncle, endowment, toxin, closing argument, diagnose, medicine, motion in limine, misstatement, bacteria, fever, blood pressure, fluids, toxic shock syndrome, heart rate, patients, blood, family practice, cross-examination, presentation

Case Summary

Overview
HOLDINGS: [1]-In this medical malpractice action, the trial court did not abuse its discretion when it denied patient's motion to remove a juror for cause because the trial court examined the juror's state of mind and found him to be unbiased; [2]-Patient failed to establish that defense counsel's misstatement resulted in substantial prejudice to him or prevented a fair trial where counsel's commentary was not a pure misstatement of the evidence.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Jury Trials > Jurors > Qualifications

Evidence > Burdens of Proof > Allocation

HN1[] **Jurors, Qualifications**

There are certain relationships which may exist between a juror and a party to the litigation which are so direct

that a juror possessing the same will be presumed to be biased and therefore disqualified. However, beyond these situations which raise a presumption of partiality, impartiality is not a technical concept but, rather, it is a state of mind. More specifically, a person is not competent to sit as a juror if his or her state of mind is such that with him or her as a member of the jury, a party will not receive a fair and impartial trial. In addition, the burden of demonstrating that a juror is partial rests on the party challenging the juror and more than a mere suspicion of bias must be established.

Governments > Courts > Court Personnel

HN2 **Courts, Court Personnel**

The trial court is in a superior position from which to judge a juror's candor.

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Torts > ... > Proof > Custom > Medical Customs

HN3 **Expert Witnesses, Qualifications**

An expert witness is a person who, because of education, training, or experience, possesses specialized knowledge beyond the ordinary understanding of the jury. In medical malpractice cases, it must be established that the expert is a licensed member of the school of medicine about which he proposes to express an opinion citation and the expert witness must show that he is familiar with the methods, procedures, and treatments ordinarily observed by other physicians, in either the defendant physician's community or a similar community. Whether the plaintiff's medical expert is qualified to testify is not dependent on whether he is a member of the same specialty or subspecialty as the defendant, but, rather, whether the allegations of negligence concern matters within his knowledge and observation.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Civil Procedure > Pretrial Matters > Motions in Limine > Exclusion of Evidence

Civil Procedure > Pretrial Matters > Motions in Limine > Appellate Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN4 **Standards of Review, Abuse of Discretion**

While courts have stated that the foundational requirements of an expert's qualifications are reviewed as a matter of law de novo, it has also been said that a trial court's determination regarding whether someone is qualified to testify as a medical expert is ultimately reviewed for an abuse of discretion. An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view. In determining whether there has been an abuse of discretion, the appellate court does not substitute its own judgment for that of the trial court, or even determine whether the trial court exercised its discretion wisely. This same deferential standard also applies to a trial court's decision on a motion in limine.

Civil Procedure > Pretrial Matters > Motions in Limine > Exclusion of Evidence

Evidence > Burdens of Proof > Allocation

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN5 **Motions in Limine, Exclusion of Evidence**

Motions in limine are not designed to obtain rulings on dispositive matters but, rather, are designed to obtain rulings on evidentiary matters outside the presence of the jury. Erroneous evidentiary rulings are only a basis for reversal if the error was substantially prejudicial and affected the outcome of trial. An appellate court will not reverse if it is apparent that no harm has been done. Importantly, when erroneously admitted evidence is cumulative and does not otherwise prejudice the objecting party, error in its admission is harmless. The burden rests with the party seeking reversal to establish prejudice.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN6[] Standards of Review, Abuse of Discretion

An appellate court reviews the trial court's admission of evidence for an abuse of discretion. An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view.

Civil Procedure > Pretrial Matters > Motions in Limine > Appellate Review

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

Civil Procedure > Pretrial Matters > Motions in Limine > Exclusion of Evidence

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN7[] Motions in Limine, Appellate Review

A denial of a motion in limine does not preserve an objection to disputed evidence later introduced at trial. When a motion in limine is denied, a contemporaneous objection to the evidence at the time it is offered is required to preserve the issue for review. Absent the requisite objection, the right to raise the issue on appeal is forfeited. The same principle rings true for a party's failure to raise an objection to a *Ill. Sup. Ct. R. 213* violation.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Trials > Closing Arguments > Improper Remarks

HN8[] Judges, Discretionary Powers

The standard of review in the examination of specific remarks made during closing argument is whether the comments were of such character as to have prevented the opposing party from receiving a fair trial. Ultimately, a trial court is given discretion in the scope of closing argument and its judgment as to the propriety of the comments therein will not be reversed unless the remarks are of a character that prevented a fair trial.

Civil Procedure > Trials > Closing Arguments > Improper Remarks

Evidence > Inferences & Presumptions > Inferences

HN9[] Closing Arguments, Improper Remarks

During closing argument, attorneys have wide latitude to comment and argue based on the evidence presented at trial as well as draw any reasonable inferences from that evidence. However, when arguing to the jury, attorneys should not unfairly appeal to its emotions. The jury must decide the case based on the evidence and issues presented at trial unencumbered by appeals to its passion, prejudice or sympathy. One line of argument repeatedly found to improperly elicit passion, prejudice, or sympathy from the jury is asking it to place itself in the position of either the plaintiff or the defendant. The alleged improper comments must be viewed not in isolation, but within the context of the entire closing argument. As a result, some golden rule arguments, while technically improper, may not elicit passion, prejudice, or sympathy from the jury.

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN10[] Standards of Review, Reversible Errors

It is well established that improper remarks during closing argument generally do not constitute reversible error unless they result in substantial prejudice. Substantial prejudice means that absent the remarks, the outcome of the case would have been different.

Civil Procedure > Trials > Closing Arguments > Improper Remarks

HN11[] Closing Arguments, Improper Remarks

A misstatement by counsel will not deny the losing party a fair trial where the misstatement comprises only a small segment of the closing argument and the jury is

instructed that closing arguments are not evidence.

Counsel: For Appellant: Jason R. Williams, and Carla A. Colaianni, of JR Williams Law, of Chicago, Illinois.

For Appellee: Robert L. Larsen, of Cunningham, Meyer & Vedrine, P.C., of Warrenville, Illinois.

Judges: JUSTICE REYES delivered the judgment of the court, with opinion. Presiding Justice Gordon and Justice Lampkin concurred in the judgment and opinion.

Opinion by: REYES

Opinion

JUSTICE REYES delivered the judgment of the court, with opinion.

Presiding Justice Gordon and Justice Lampkin concurred in the judgment and opinion.

OPINION

[*P1] Plaintiff Thomas Ittersagen brought a medical malpractice action in the circuit court of Cook County naming as defendants Advocate Health and Hospitals Corporation d/b/a Advocate Medical Group (Advocate Medical) and Dr. Anita Thakadiyil. Plaintiff claimed that defendants were negligent when Dr. Thakadiyil failed to diagnose him with sepsis, failed to refer him to the emergency room for treatment, and by performing an incision and drainage in an outpatient setting without first administering intravenous fluids and antibiotics. Plaintiff further claimed that defendants' negligence caused [**2] bacteria and toxins to enter his system and toxic shock syndrome to develop, resulting in a below the knee amputation of both legs. After a jury trial, the trial court entered judgment on the jury's verdict in favor of defendants. Plaintiff now appeals, arguing the trial court committed numerous errors including: (1) failing to dismiss a juror for cause; (2) granting a motion *in limine* preventing one of his experts from testifying as to Dr. Thakadiyil's standard of care; and (3) allowing defendant's expert to testify about his personal practices despite a motion *in limine* prohibiting such testimony. Plaintiff further argues that he was prejudiced by certain statements made by defense counsel during closing argument. For the reasons that follow, we affirm.[1]

[*P2] BACKGROUND

[*P3] Motion to Strike

[*P4] Prior to setting forth the facts of this case, we briefly address defendants' motion to strike plaintiff's statement of facts as set forth in their brief. Defendants argue that plaintiff's statement of facts violates *Illinois Supreme Court Rule 341(h)(6)* (eff. May 25, 2018), which requires that the statement of facts "contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." According [**3] to defendants, plaintiff's statement of facts is argumentative, inserts matters that are of no relevance to this court's consideration of the issues, and results in a skewed and inaccurate presentation of the facts of the trial.

[*P5] While defendants strenuously argue that plaintiff's statement of facts should be stricken (indeed five pages of their brief address this subject), we note that defendants themselves failed to set forth an appropriate statement of facts before this court. They too have essentially utilized the statement of facts section of their brief to argue instead of bringing a separate motion to strike. Accordingly, this court has not been provided an appropriate statement of facts from either party.

[*P6] This court may strike a statement of facts when the improprieties hinder our review. *John Crane Inc. v. Admiral Insurance Co., 391 Ill. App. 3d 693, 698, 910 N.E.2d 1168, 331 Ill. Dec. 412 (2009)*. We are also

[1] This decision was initially filed in May 2020 with Justice Burke as a member of the panel. Subsequently, Justice Burke recused and the previous decision was withdrawn. This new opinion is now being filed with Justice Gordon as the new panel member. Justice Gordon has read the briefs, record, and filings in this case, and has concurred with the majority opinion.

within our rights to dismiss an appeal for failure to provide a complete statement of facts. *Burmac Metal Finishing Co. v. West Bend Mutual Insurance Co., 356 Ill. App. 3d 471, 478, 825 N.E.2d 1246, 292 Ill. Dec. 235 (2005)*. Here, the medical malpractice case, which was conducted over numerous days, involved multiple expert witnesses and technical subject matter. This was not a simple, straightforward case. Indeed, our review of the record reveals that this court was not provided with reports of proceedings [**4] from numerous days of the trial, including jury selection, which is relevant to our decision. Plaintiff's appendix further relied on the circuit court of Cook County's general statement of the contents of the record to create a table of contents. For example, it merely identifies in which portion of the record a "hearing" occurs, but does not indicate which witnesses testified that day. This general statement does not accurately identify the nature of the proceedings below and does not assist us in our review of the voluminous record.

[*P7] Despite the fact we lack an appropriate statement of facts, we decline to grant the defendants' motion. As noted, the record is not complete and thus the absence of any pertinent portion of the record will be construed against the appellant. *Foutch v. O'Bryant, 99 Ill. 2d 389, 392, 459 N.E.2d 958, 76 Ill. Dec. 823 (1984)*. We do, however, have enough of the trial record to render determinations on the issues presented. Accordingly, we now turn to set forth those facts pertinent to this appeal. We note that the omission of any facts one would expect to find in a review of a medical malpractice action (*e.g., voir dire*, the testimony of plaintiff and his family members, and evidence regarding the damages sustained) is due to plaintiff's [**5] failure to provide us with a sufficient record.

[*P8] Pretrial

[*P9] The record demonstrates that this matter was contentiously litigated. The parties raised numerous motions *in limine* prior to trial. Of those motions *in limine*, only two are pertinent to this appeal. The first motion *in limine* in contention involved defendants' request to bar Dr. Hogarth, a pulmonologist and critical care expert, from rendering opinions as to the standard of care as it applied to Dr. Thakadiyil, a family practice physician. After hearing lengthy argument from counsel, the trial court granted the motion *in limine* and barred Dr. Hogarth from rendering an opinion on Dr. Thakadiyil's standard of care. The trial court, however, stated it would allow Dr. Hogarth to testify about his familiarity and diagnosis of sepsis, that plaintiff had sepsis at time of the office visit, that the incision and drainage procedure worsened plaintiff's condition, and that Dr. Thakadiyil's treatment caused plaintiff's injury. The trial court also granted defendant's motion *in limine* and did not allow personal practice testimony from any of the witnesses on direct.

[*P10] Trial

[*P11] The matter then proceeded to a jury trial where the following evidence [**6] was adduced. On July 8, 2010, at 11 a.m., plaintiff, a diabetic, was seen by Dr. Thakadiyil, a family practice physician, at her office. Plaintiff's chief complaint was a carbuncle (an infection of the hair follicles) in his left armpit, body aches, and a general unwell feeling. Plaintiff's vital signs were taken by a medical assistant. He had a fever of 101.1, a heart rate of 112, a respiratory rate of 14, and a blood pressure of 102/68. Dr. Thakadiyil then conducted an overall physical examination of plaintiff and discussed with plaintiff his medical history and current condition. Plaintiff's medical chart revealed a history of elevated heart rate with infection. After considering plaintiff's entire clinical presentation and medical history, Dr. Thakadiyil determined the best course of action was to perform an incision and drainage on the carbuncle. With plaintiff's permission she made a small incision in the carbuncle with a scalpel, drained the carbuncle of pus, took a culture of the infected area, and packed and dressed the wound. Dr. Thakadiyil wrote plaintiff a prescription for Bactrim, an oral antibiotic, and instructed him to follow up with her in 48 hours.

[*P12] After plaintiff [**7] left Dr. Thakadiyil's office, he went to Walgreens to have the prescription filled. Then, instead of waiting for the prescription at the pharmacy, plaintiff went to Burger King for lunch. While at Burger King plaintiff vomited and began feeling more unwell. He then went home.

[*P13] At 2 p.m., plaintiff went to the emergency room at Riverside Medical Center. At that time, plaintiff's heart rate was 162 beats per minute, his blood pressure was 98/54, his respiratory rate was 22, and he had a fever of 103.2 degrees. Plaintiff was experiencing nausea, vomiting, headaches, and abdominal pain. Plaintiff was in septic shock and treated with intravenous fluids and the antibiotic vancomycin. At 8 p.m., plaintiff's condition worsened. Lab results revealed that he was experiencing renal failure and he was put on vasopressors to maintain his blood pressure. He was

put on a ventilator at 10 p.m. and at 12 a.m. he began dialysis.

[*P14] The following day, plaintiff was formally diagnosed with toxic shock syndrome. By 11 a.m., the oxygen saturation level in his feet was 12% and they appeared dusky in color and were cold. That afternoon, plaintiff's condition began to improve, however, his legs developed gangrene [**8] and had to be amputated below the knee.

[*P15] *Plaintiff's Expert Witnesses*

[*P16] Regarding a family practice physician's standard of care, plaintiff introduced the expert testimony of Dr. Bernard Ewigman, a family practice physician. Upon his review of the medical records and depositions in this case, Dr. Ewigman opined that Dr. Thakadiyil deviated from the standard of care in two ways: (1) when she failed to diagnose plaintiff with sepsis and (2) when she performed the incision and drainage procedure and sent plaintiff home instead of to the emergency room. According to Dr. Ewigman, plaintiff's presentation of symptoms at 11 a.m. demonstrated that plaintiff was suffering from a systemic infection and should have raised concerns in Dr. Thakadiyil that plaintiff had sepsis. Dr. Ewigman explained that, at the time Dr. Thakadiyil treated plaintiff, the medical community was guided by the systemic inflammatory response syndrome (SIRS) criteria to determine whether an individual had sepsis. The SIRS criteria are as follows: (1) heart rate above 90 beats per minute; (2) respiratory rate above 20; (3) temperature above 100.9; and (4) a white blood cell count. If two of the criteria are positive in the [**9] presence of an infection or suspected infection, then a physician must investigate further to rule out sepsis. Here, where plaintiff was a diabetic with a carbuncle and systemic issues, the standard of care required that sepsis must be considered and ruled out.

[*P17] On cross-examination, Dr. Ewigman testified that plaintiff was alert, oriented, had normal respirations, and a systolic blood pressure above 90 when he was treated by Dr. Thakadiyil. Dr. Ewigman further testified that plaintiff's medical history demonstrated he had previously exhibited at least two of the SIRS criteria in an outpatient setting on numerous occasions but did not have sepsis. Dr. Ewigman also testified that sepsis is not common in the outpatient setting.

[*P18] Dr. Douglas Kyle Hogarth, a board-certified pulmonologist and critical care specialist, testified as plaintiff's expert regarding causation. As a critical care specialist, Dr. Hogarth testified he treated thousands of sepsis patients. Based on his education, training, and experience as well as the medical records, depositions, and medical literature, Dr. Hogarth opined that plaintiff was septic when he was seen by Dr. Thakadiyil and the incision and drainage she [**10] performed worsened plaintiff's condition by releasing bacteria and products into his blood stream ultimately caused him injury. Dr. Hogarth based his opinion that plaintiff had sepsis when seen by Dr. Thakadiyil on the fact that plaintiff met two of the SIRS criteria (fever and heart rate) and had an infection (the carbuncle).

[*P19] Dr. Hogarth further opined that if plaintiff had received intravenous fluids and antibiotics prior to the incision and drainage procedure being performed, he would not have developed this course of septic shock and toxic shock. Dr. Hogarth explained that if plaintiff had not developed septic shock, he would not have had bilateral amputations.

[*P20] On cross-examination, Dr. Hogarth testified that he does not perform incision and drainage procedures. Dr. Hogarth also acknowledged that the carbuncle was present for five to seven days prior to seeing Dr. Thakadiyil. Dr. Hogarth opined that if plaintiff had been seen by a physician before sepsis onset, the injury potentially would not have occurred.

[*P21] Dr. Paul Collier, a board-certified vascular surgeon, testified as one of plaintiff's retained experts. Based on plaintiff's medical records and the other documents in this [**11] case, Dr. Collier opined to a reasonable degree of medical certainty that plaintiff did not have any significant vascular disease prior to July 8, 2010. In rendering this opinion, Dr. Collier did take into account the fact that plaintiff was a 31-year-old smoker with a four-year history of diabetes.

[*P22] Dr. Collier further opined that plaintiff lost his legs because he had a profound state of shock and had prolonged treatment with vasopressors, drugs that constrict blood vessels thereby reducing the amount of blood to the extremities. Dr. Collier explained that this restriction of blood flow to the extremities led plaintiff to develop blood clots and ultimately develop gangrene in both legs. According to Dr. Collier, had plaintiff not gone into shock and been placed on vasopressors he would not have lost his legs.

[*P23] Dr. Anita Thakadiyil testified as an adverse witness that she has been a board-certified family medicine physician since 2006. The first and only time she treated plaintiff was on July 8, 2010. On that day,

plaintiff presented with a .5 cm carbuncle, a soft tissue infection of hair follicles, body aches, and a general unwell feeling. Her observations of plaintiff revealed the [**12] plaintiff was alert, oriented, and, while his heart rate was elevated, he had regular vital signs. Dr. Thakadiyil also reviewed plaintiff's medical history and noted that he was a diabetic. As a diabetic, plaintiff was more at risk for severe infections. Dr. Thakadiyil performed an incision and drainage procedure on plaintiff. This involved a superficial incision into the carbuncle, excising the pus, and then packing and dressing the wound with gauze. Dr. Thakadiyil also took a culture of the carbuncle which was submitted to a lab for further testing. At no point did Dr. Thakadiyil suspect sepsis.

[*P24] Dr. Thakadiyil further testified that while plaintiff met some of the SIRS criteria on July 8, 2010, this criteria consists of "general variables" for sepsis and does not account for a patient's history and physical presentation. Dr. Thakadiyil testified she ruled out sepsis based on his history, physical presentation, and vital signs. Had she suspected sepsis she would have sent plaintiff to the emergency room.

[*P25] On cross-examination, Dr. Thakadiyil testified that most patients with the flu meet the SIRS criteria, as well as those with skin infections and strep throat. These patients make [**13] up 80-90 percent of her practice. She does not send them all to the emergency room.

[*P26] Patrick Schlievert, Ph.D., testified as plaintiff's expert in microbiology and immunology. Schlievert testified that he is the world expert on toxic shock syndrome and has authored 450 articles on the subject. Schlievert opined to a reasonable degree of microbiology certainty that when plaintiff's carbuncle (a typically low-oxygen environment) was opened and exposed to oxygen the toxin production rapidly increased causing plaintiff's toxic shock syndrome. Pursuant to his calculations, Schlievert opined to a reasonable degree of microbiology certainty that plaintiff had a deadly dose of toxins in his blood stream between 11:20 a.m. and 2 p.m. on July 8, 2010.

[*P27] On cross-examination, Schlievert testified that it is unknown if hemoglobin has an effect on toxin production. According to Schlievert, if the particular toxin that was in plaintiff's blood is exposed to hemoglobin it "may be" able to multiply. Schlievert further acknowledged that while, in his opinion, plaintiff had 20,000 times the lethal dose of toxin in his blood stream at 2 p.m., plaintiff was still alert, oriented, talking, and had a normal [**14] blood pressure.

[*P28] *Defendants' Expert Witnesses*

[*P29] Dr. Thakadiyil testified again during her case-in-chief regarding her treatment of plaintiff and her opinion that she followed the standard of care of a reasonably well-trained family medicine physician. On July 8, 2010, plaintiff had been a patient of Advocate Medical, however, he had not been seen by her previously. Plaintiff's chief complaint was that he had tender nodules in the left axilla that had previously drained pus. Dr. Thakadiyil inquired whether plaintiff had experienced any chest pain, shortness of breath, pain in his joints, or headache. Plaintiff responded he had not. Dr. Thakadiyil then conducted a physical examination of plaintiff, finding two cyst-like nodules side-by-side in his left underarm. Based on the responses to his inquiries and her physical examination, Dr. Thakadiyil diagnosed plaintiff with a carbuncle and uncontrolled diabetes. Plaintiff recommended that the best treatment was for him to have the carbuncle drained. Draining the carbuncle would get rid of the source of the infection. Plaintiff agreed. Dr. Thakadiyil cleaned the carbuncle with an alcohol swab, made a vertical incision with a scalpel, drained [**15] the pus, put packing in, took a swab of the area, and placed a dressing on the wound. She then provided plaintiff with a prescription for Bactrim, an oral antibiotic.

[*P30] Dr. Marc Dorfman, a board-certified emergency medicine physician, testified as defendants' retained expert. Based on his review of the records in this case as well as his knowledge, training, and experience, Dr. Dorfman testified that Dr. Thakadiyil's care was appropriate and did not cause plaintiff's injury. According to Dr. Dorfman, had plaintiff been seen in an emergency room setting with the same vital signs, fever, and complaint of a carbuncle at 11 a.m. on July 8, 2010, the treatment would have been the same as the treatment Dr. Thakadiyil provided. No intravenous fluids or antibiotics would have been administered to plaintiff and he would have been discharged with a prescription for an antibiotic. Dr. Dorfman further testified that if plaintiff had come into the emergency room with a diagnosis of sepsis his treatment would have been the same. Dr. Dorfman also testified that the hypothetical administration of intravenous fluids and antibiotics at 11 a.m. would not have changed the outcome in this case because plaintiff [**16] received such fluids and antibiotics within three hours.

[*P31] On cross-examination, Dr. Dorfman admitted that plaintiff had two out of the four SIRS criteria and an infection. Dr. Dorfman explained, however, that there was a question if plaintiff had sepsis at 11 a.m. because there was no direct explanation for the cause of his fever; the fever could have been caused by his elevated heart rate or by the infection. Dr. Dorfman further explained that he based his opinion that plaintiff did not have sepsis when seen by Dr. Thakadiyil on the fact that plaintiff was able to walk into the office, leave the office, and go to Burger King thereafter as well as the fact that Dr. Thakadiyil found the source of the infection.

[*P32] Dr. William Schwer, a board-certified family practice physician, testified regarding Dr. Thakadiyil's standard of care. According to Dr. Schwer, based on his review of the records in this case, along with his knowledge and experience as a family practice physician, Dr. Thakadiyil met the standard of care in her diagnosis and treatment of plaintiff. Dr. Schwer testified that it is very common for family practice physicians to see patients with elevated heart rates and fevers in [**17] the office setting. Dr. Schwer also opined that plaintiff did not have bacteria in his blood at 11 a.m. because he did not look toxic, had a low-grade fever, and his vital signs were stable.

[*P33] Dr. Schwer further opined that Dr. Thakadiyil did not need to include sepsis in her differential diagnosis of plaintiff based on his overall clinical presentation and medical history. Dr. Thakadiyil's treatment of plaintiff was proper and she had no reason to send plaintiff to the emergency room. The standard of care also did not require Dr. Thakadiyil to administer intravenous fluids and antibiotics prior to the incision and drainage procedure.

[*P34] On cross-examination, Dr. Schwer defined sepsis as the presentation of a significant fever, neurological changes, confusion, fatigue, rapid heart rate, and low blood pressure. Dr. Schwer also explained that the SIRS criteria were for screening patients who might be at a higher risk for sepsis, not diagnosing sepsis.

[*P35] Dr. Fred Zar, a physician board-certified in infectious disease and internal medicine, testified as follows. Dr. Zar opined that when Dr. Thakadiyil treated plaintiff he had a localized infection and did not have sepsis. Dr. Zar based this opinion [**18] in part on plaintiff's normal blood glucose reading that morning. In people with diabetes, blood sugar increases when hormones are released to fight infection. Plaintiff had normal blood pressure and his medical history demonstrated that when he had infections in the past his heart rate was a similar rate. This opinion was further based on the fact that plaintiff did not demonstrate abdominal pain, headache, chills, or vomiting at the time of the office visit. Had plaintiff exhibited such symptoms it would have indicated that bacteria had entered his blood stream.

[*P36] Dr. Zar further explained that the SIRS criteria is not a diagnosis for sepsis, it is a research definition that was developed to see if, by just looking at vital signs, a physician would be able to predict who would have a serious infection. In the early 2000s, a study demonstrated that the SIRS criteria were of no benefit. Thereafter, the SIRS criteria turned out not to be reliable, so societies began abandoning its use.

[*P37] Dr. Zar further opined regarding the incision and drainage procedure. According to Dr. Zar, the incision and drainage procedure is very common, and he had even performed one on his daughter when her belly [**19] button piercing had become infected.[2] The purpose of the incision and drainage procedure is to control the source of infection. By draining the area, one is able to remove most of the bacteria but not all. Antibiotics are then prescribed to treat the remaining infection and kill the bacteria. Incision and drainage procedures are performed on patients with sepsis. Dr. Zar opined that the incision and drainage procedure performed by Dr. Thakadiyil did not cause bacteria and toxins to enter plaintiff's system.

[*P38] Dr. Zar further opined that the administration of intravenous fluids and antibiotics prior to the procedure would not have changed anything. This is because plaintiff's blood pressure was normal during the office visit and when he was seen in the emergency room. As such, his blood pressure demonstrated that he was not missing any fluids.

[*P39] Dr. Zar also explained that he is a hospitalist, a physician who determines who to admit to the hospital from the emergency room. Dr. Zar opined that had he seen plaintiff in his capacity as a hospitalist at 11 a.m. on July 8, 2010, he would have examined him, realized the infection was localized, had the incision and drainage performed, prescribed [**20] an oral antibiotic and sent him home. As an infectious disease doctor, he would have treated plaintiff in the same manner.

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[2] Plaintiff's counsel did not object to this testimony.

[*P40] Dr. Zar also disagreed with Schlievert's opinion that the incision and drainage procedure caused the toxin to multiply. Dr. Zar explained that millions of incision and drainage procedures are performed every year and therefore, if it were true that toxins so multiplied, physicians should be seeing hundreds of cases of toxic shock syndrome. In reality, toxic shock syndrome is very rare and there are less than 1000 cases a year. Dr. Zar further disagreed with Schilevert's opinion that plaintiff had a deadly amount of toxin in his blood stream before he arrived at the emergency room. Dr. Zar explained that plaintiff's blood pressure was within the normal range when he arrived at the emergency room and therefore he was not in shock and his blood pressure remained in the normal range for several hours thereafter.

[*P41] Lastly, Dr. Zar offered his own opinion as to how plaintiff's toxic shock syndrome developed. According to Dr. Zar, plaintiff was administered vancomycin in the emergency room. Vancomycin is an antibiotic that kills staph bacteria by effectively "poking holes" [**21] into the bacteria but doing so releases the toxin if the toxin is present. Since the toxin was present in his blood, it was the antibiotic that caused the release of the toxin, not the incision and drainage procedure. When it was suspected that plaintiff had toxic shock syndrome, his treating physicians changed the antibiotic from vancomycin to clindamycin. Clindamycin kills the bacteria differently and does not cause the release of toxins as the bacteria dies.

[*P42] *Closing Arguments and Verdict*

[*P43] In closing, plaintiff's counsel argued that the standard of care required Dr. Thakadiyil to follow a strict definition of sepsis, two SIRS criteria and infection, which plaintiff clearly met when at the office visit. Counsel asserted that Dr. Thakadiyil failed to follow this standard of care where she did not even consider sepsis in her diagnosis. Counsel further maintained that Dr. Thakadiyil was additionally negligent when she performed the incision and drainage, spreading the bacteria and toxins throughout plaintiff's body. Thus, but for these negligent actions, plaintiff would not have suffered the bilateral amputation.

[*P44] In response, defense counsel argued that the evidence demonstrated the diagnosis [**22] of sepsis was not a "cookbook definition" a physician was required to follow. Instead, clinical judgment and medical history was a significant part of diagnosing plaintiff. Here, Dr. Thakadiyil used her clinical judgment and based on plaintiff's medical history, his vital signs at the time of the office visit, and his overall appearance and demeanor, she believed the infection was localized to the carbuncle and treated it as such. Accordingly, Dr. Thakadiyil acted within the standard of care of a reasonably well-trained family medicine physician and did not cause plaintiff's ultimate injury.

[*P45] After being instructed, the jury deliberated and ultimately found in favor of defendants. The jury further found that the sole proximate cause of plaintiff's injury was something other than the conduct of defendants.

[*P46] *Motion for a New Trial*

[*P47] Plaintiff thereafter moved for a new trial due to what he believed were the trial court's numerous errors. Specifically, plaintiff argued, in pertinent part, that the trial court allowed a biased juror to remain on the jury, the trial court erred in barring Dr. Hogarth from offering standard of care opinions against Dr. Thakadiyil, Dr. Zar's undisclosed testimony [**23] about incising and draining an area near his daughter's bellybutton was a highly prejudicial *Illinois Supreme Court Rule 213* (eff. Jan. 1, 2007) violation, and that defense counsel made improper, prejudicial statements during closing argument.

[*P48] The trial court denied plaintiff's motion. In so ruling, the trial court first addressed plaintiff's contention that it erred when it allowed juror Glascott to continue to serve as a juror when, in the middle of the trial, he self-reported that his private investment firm was responsible for investing the funds of the "Advocate endowment." In finding no error occurred, the trial court reiterated that it found juror Glascott was not biased and that "if there were any type of business relationship with the defendant, it was extremely attenuated." According to the trial court, "After extensively questioning the juror, the court believed that any relationship was remotely attenuated. It was the court's impression that the relationship was so insignificant to this juror that he didn't even recall it at the time of *voir dire*[.]" The court noted it closely scrutinized juror Glascott's demeanor and he was questioned by the court and counsel. The court found he was "clearly credible [**24] when he responded that he would be truthful, fair and unbiased." The court further explained its determination:

> "It's the court's impression that [juror Glascott] was embarrassed that he forgot to volunteer the information during *voir dire* because the information

> was so insignificant to Mr. Glasscott [*sic*] that he did not think to do so as he did not recall it then. It was apparent that he did not know which Advocate entity was involved with the endowment or exactly which fiduciary responsibilities he might have had. Whatever they were, they were extremely attenuated to the point they were insignificant to the juror. Moreover, his compensation was not impacted in any way by the case or defendants."

[*P49] The trial court next addressed plaintiff's contention that it erred in barring Dr. Hogarth from offering standard of care opinions against Dr. Thakadiyil. The court reaffirmed its prior ruling explaining, "Dr. Hogarth, a pulmonary and critical care physician, was appropriately barred from offering standard of care opinions against Defendant Dr. Thakadiyil, a generalist trained in family medicine who had no training or certifications as a pulmonary or critical care physician." The court indicated [**25] it had reviewed Dr. Hogarth's deposition testimony and disclosures and found "it was apparent Dr. Hogarth had never disclosed that he was offering his opinion from a family practice physician's perspective and level of proficiency." Accordingly, in the absence of any *Rule 213* disclosure that the standard of care was the same for a generalist trained in family medicine and a pulmonary and critical care physician, the trial court granted the motion *in limine*. The trial court further emphasized that "Dr. Hogarth never specifically disclosed or previously testified that the standard of care was the same for both specialties for the procedure at issue." In addition, the court found that, "Dr. Hogarth represented that he does not practice as a primary care physician and did not consider himself to be one."

[*P50] The trial court further observed that plaintiff "competently presented similar testimony from Dr. Ewigman — an expert who had the same board certification and area of expertise as Dr. Thakadiyil." Dr. Ewigman testified extensively as to the standard of care including testimony regarding the proper timing and management of an incision and drainage in a patient who presented with plaintiff's signs [**26] and symptoms. The court then found that, given the wide degree of latitude it gave to Dr. Ewigman and Schlievert during their testimonies, any additional testimony from Dr. Hogarth would have been merely cumulative.

[*P51] Regarding Dr. Zar's undisclosed testimony about an incision and drainage he performed on his daughter, the trial court first observed that there was no objection made to the testimony the first time it was volunteered. Because plaintiff had no objection at the time the testimony was initially rendered, the trial court had no opportunity to rule on it the first time it was made and found the objection to be forfeited. The trial court further noted that this anecdote was "not a new opinion pertaining to the care and treatment of the plaintiff." The trial court also acknowledged that when Dr. Zar again raised this anecdote on redirect, plaintiff objected to the testimony and the court sustained the objection. The trial court observed that it had provided "clear instructions to the jury on objections [that] were made even before opening statements began" and, "[i]n the court's opinion, this jury understood its obligation to disregard the questions and responses to any of the [**27] objections that were sustained, including the belly button ring anecdote."

[*P52] Lastly, the trial court addressed the propriety of defense counsel's comments during closing argument. Plaintiff complained that defense counsel violated the "golden rule" when she "essentially told the jury to place themselves in the position of Dr. Thakadiyil" and misstated the evidence when she indicated that it was "unrefuted" that the SIRS criteria were abandoned in the early 2000s. Ultimately, the trial court found that no prejudice resulted from defense counsel's "golden rule" statement where the objection was sustained, thus curing any prejudice. The court further found that the prejudice was similarly cured from its numerous admonishments throughout the trial, and during counsel's argument, that the arguments of the attorneys are not evidence. According to the trial court, the jury was attentive and well instructed on the purpose of closing arguments. This appeal followed.

[*P53] ANALYSIS

[*P54] Plaintiff now appeals arguing the trial court committed numerous errors including: (1) failing to dismiss a juror for cause; (2) granting a motion *in limine* preventing one of his experts from testifying as to Dr. Thakadiyil's [**28] standard of care; and (3) allowing defendant's expert to testify about his personal practices despite a motion *in limine* prohibiting such testimony. In his fourth argument, asserts that he was prejudiced by certain statements made by defense counsel during closing argument. We address each issue in turn.

[*P55] Juror Bias

[*P56] Plaintiff's first contention on appeal is that juror

Glascott's relationship with defendant Advocate Medical was so prejudicial to him as to warrant a new trial. He claims that the trial court's finding that no fiduciary duty existed between juror Glascott and defendant Advocate Medical was incorrect as a matter of law. He further asserts that the trial court's ultimate determination that juror Glascott was not biased was against the manifest weight of the evidence where juror Glascott represented he had a direct relationship with defendant Advocate Medical.

[*P57] Plaintiff directs us to the case of *People v. Cole, 54 Ill. 2d 401, 298 N.E.2d 705 (1973)*, as being instructive on this issue. **HN1**[] In *Cole*, our supreme court stated that "there are certain relationships which may exist between a juror and a party to the litigation which are so direct that a juror possessing the same will be presumed to be biased and therefore disqualified." [**29] *Id. at 413*. However, "[b]eyond these situations which raise a presumption of partiality," impartiality is not a technical concept but, rather, it is a state of mind. *Id.* More specifically, a person is not competent to sit as a juror if his or her state of mind is such that with him or her as a member of the jury, a party will not receive a fair and impartial trial. *Id.* In addition, the burden of demonstrating that a juror is partial rests on the party challenging the juror and more than a mere suspicion of bias must be established. *Davis v. International Harvester, Co., 167 Ill. App. 3d 814, 821, 521 N.E.2d 1282, 118 Ill. Dec. 589 (1988)*.

[*P58] Looking first at whether there was a presumption of bias based on plaintiff's assertion that juror Glascott had a fiduciary relationship with defendant Advocate Medical, we conclude that plaintiff has failed to meet his burden. The record reveals that, after plaintiff had rested and while defendants were presenting their case-in-chief, juror Glascott self-reported to the court as follows: "Although I don't believe it would bias me, I thought I should disclose that my firm has a business relationship with Advocate. I apologize. I did not realize or think of this until last night." Plaintiff moved to strike juror Glascott for cause. During *voir dire* Juror Glascott [**30] had identified himself as the chief information officer of a private investment firm. The trial court then conducted a hearing outside the presence of the jury and questioned juror Glascott regarding his relationship with defendant Advocate Medical.

[*P59] According to juror Glascott, in his role as chief information officer, he oversees all the new investments that his company makes, which would include the money the Advocate endowment invests. In exchange, his company receives an asset management fee on the assets under management. While he receives a salary, his bonus is tied to the growth of the investments and whether he invests his own money as well. When directly asked, "if the defendant wins or loses in the case, is your financial compensation affected in any way by the verdict," juror Glascott responded, "No."

[*P60] Juror Glascott further informed the court that the Advocate endowment is a limited partner. Juror Glascott explained that "in a private equity fund, you have a general partner and a series of limited partners, and I said the 50 investors, or whatever the number, they're one of the investors" and his company is the general partner. According to juror Glascott, he has a fiduciary [**31] duty as a general partner and to the Advocate endowment, but he does not have a fiduciary duty to either of the defendants.

[*P61] When asked why he waited to so inform the court, juror Glascott replied that he "just didn't realize" his business relationship with an Advocate entity during jury selection. Juror Glascott noted that there was no specific question during *voir dire* regarding whether he had a business relationship with Advocate Medical. It was for this reason that he did not make the connection. Regarding the nature of his firm's relationship with defendant, juror Glascott explained:

> "So their hospital endowment invests in one of our -- we're a private equity company that raises funds to invest in real estate. They're one of our limited partners that invests through one of our funds. So they're 1 of 50 investors in one of our funds. I don't know if that's the right number, but they're one of our investors." Juror Glascott further explained that "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."

The trial court then asked juror Glascott if his relationship with the hospital [**32] endowment "in any way color[s] the view that you have of the evidence," to which juror Glascott replied, "No." Juror Glascott further stated he could stay neutral and unbiased to both parties.

[*P62] Juror Glascott clarified that he does not have a business relationship with Advocate Medical, but with the "Advocate Health Care system endowment." It was juror Glascott's understanding that the endowment is separate and apart from Advocate Medical and has no relationship with Dr. Thakadiyil. Juror Glascott further

addressed the court's inquiries into whether the endowment pays either of the defendants. Juror Glascott acknowledged that he was not sure where the funds from the endowment are applied, but that he believes the endowment's purpose is to grow hospitals by "build[ing] buildings, that type of thing." Defendants' counsel then represented that the salaries and compensation for Advocate Medical comes specifically from Advocate Medical operations, not from the endowment. She further indicated that this information could be found in the physicians' employment contracts.

[*P63] Based on this record, we conclude that plaintiff has failed to demonstrate juror Glascott's relationship with defendant [**33] Advocate Medical rises to the level of presumed bias. No evidence was presented to the trial court regarding the relationship between defendant Advocate Medical and the Advocate endowment. Juror Glascott himself did not know the nature and extent of the relationship. It was his understanding, however, that he would not be affected financially by the result of this lawsuit. In addition, defense counsel represented that the salaries and compensation for Advocate Medical came from Advocate Medical operations not from the endowment. She further indicated that this information could be found in the physicians' employment contracts. In sum, the evidence was insufficient to demonstrate any express fiduciary relationship between juror Glascott and defendant Advocate Medical.

[*P64] Plaintiff argues that *Naperville v. Wehrle, 340 Ill. 579, 173 N.E. 165 (1930)*, *Cole*, and *Marcin v. Kipfer, 117 Ill. App. 3d 1065, 454 N.E.2d 370, 73 Ill. Dec. 510 (1983)*, compel a different result. These cases, however, are factually inapposite as they demonstrate there was a direct relationship between the juror and one of the parties to the litigation.

[*P65] We next turn to consider whether the trial court abused its discretion when it denied plaintiff's motion to excuse juror Glascott for cause. The trial court denied the motion asserting the following:

> "This ruling [**34] is based just really completely on the demeanor of the juror and what he says. When he says that he does not believe that he would be biassed [*sic*], he was pretty adamant that he could be fair all the way through. It just seemed to me that in an abundance of caution, he decided to disclose this information ***.
> I find that he has not — there is no direct[] fiduciary duty between this juror and either of the defendants in this case. He's not someone who is responsible for Advocate or managing the money. Advocate is not responsible for him in any way. So he didn't even know about this at all, and it really is not something that he believes would even factor into his decision.
> So in really scrutinizing this juror, this is the reason why I had him come back here so that I could really take a good look at him. If I thought that he couldn't be fair or that there was a risk with his demeanor that he couldn't be fair, I would have excused him right away, but I find that he could be fair and that he would be fair and will be fair."

[*P66] Based on this record, we cannot say that the trial court abused its discretion when it denied plaintiff's motion to remove juror Glascott for cause. Pursuant to *Cole* *[**35]* , the trial court was to first consider whether a direct relationship existed between the juror and a party to the litigation creating a presumption of bias. See *Cole, 54 Ill. 2d at 413*. Second, if no presumed bias existed, then the trial court was to examine the juror's state of mind. See *id.* As previously discussed, the trial court correctly found that plaintiff presented no evidence of a direct relationship between defendant Advocate Medical and the Advocate endowment. The trial court then went on to examine juror Glascott's state of mind and found him to be unbiased. ***HN2***[⬆] The trial court was clear in its order that it based this determination on juror Glascott's demeanor, and it is well-established that the trial court is in a superior position from which to judge the juror's candor. See *Jones v. Rockford Memorial Hospital, 316 Ill. App. 3d 124, 129, 736 N.E.2d 668, 249 Ill. Dec. 474 (2000)* (The trial court is in a superior position to observe the demeanor of a juror and judge his or her credibility). A trial court's decision whether to discharge a juror during trial is within the sound discretion of the trial court and based on the record before us we see no reason to disturb the trial court's judgment in this instance. See *Addis v. Exelon Generation Co., LLC, 378 Ill. App. 3d 781, 791, 880 N.E.2d 685, 316 Ill. Dec. 949 (2007)*. Accordingly, we conclude that no error occurred regarding the issue of juror bias. [**36]

[*P67] Motion *in Limine*

[*P68] Plaintiff next contends that the trial court committed reversible error in barring his expert, Dr. Hogarth, from testifying to the standard of care for diagnosing sepsis because he was not a member of the same medical specialty as Dr. Thakadiyil. In response,

defendants assert that the trial court's decision was proper where Dr. Hogarth testified at his discovery deposition that he was offering standard of care opinions from the perspective of a critical care specialist and pulmonary physician, not as an internal medicine or family practice physician. In the alternative, defendants argue that plaintiff's alleged error was harmless where the trial court, in its discretion, barred Dr. Hogarth's standard of care testimony as cumulative.

[*P69] HN3[] An expert witness is a person who, because of education, training, or experience, possesses specialized knowledge beyond the ordinary understanding of the jury. Hubbard v. Sherman Hospital, 292 Ill. App. 3d 148, 153, 685 N.E.2d 648, 226 Ill. Dec. 393 (1997). In medical malpractice cases, "[i]t must be established that the expert is a licensed member of the school of medicine about which he proposes to express an opinion [citation] and the expert witness must show that he is familiar with the methods, procedures, and treatments ordinarily [**37] observed by other physicians, in either the defendant physician's community or a similar community." Purtill v. Hess, 111 Ill. 2d 229, 243, 489 N.E.2d 867, 95 Ill. Dec. 305 (1986); see also Gill v. Foster, 157 Ill. 2d 304, 316, 626 N.E.2d 190, 193 Ill. Dec. 157 (1993). Whether the plaintiff's medical "expert is qualified to testify is not dependent on whether he is a member of the same specialty or subspecialty as the defendant, but, rather, whether the allegations of negligence concern matters within his knowledge and observation." Jones v. O'Young, 154 Ill. 2d 39, 43, 607 N.E.2d 224, 180 Ill. Dec. 330 (1992).

[*P70] HN4[] While our courts have stated that the foundational requirements of an expert's qualifications are reviewed as a matter of law *de novo* (see Roach v. Union Pacific R.R., 2014 IL App (1st) 132015, ¶ 51, 385 Ill. Dec. 503, 19 N.E.3d 61; McWilliams v. Dettore, 387 Ill. App. 3d 833, 844, 901 N.E.2d 1023, 327 Ill. Dec. 290 (2009)), it has also been said that a trial court's determination regarding whether someone is qualified to testify as a medical expert is ultimately reviewed for an abuse of discretion (see Gill, 157 Ill. 2d at 317; Ayala v. Murad, 367 Ill. App. 3d 591, 597, 855 N.E.2d 261, 305 Ill. Dec. 370 (2006)). An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view. Kunz v. Little Co. of Mary Hosp. & Health Care Ctrs., 373 Ill. App. 3d 615, 624, 869 N.E.2d 328, 311 Ill. Dec. 654 (2007). In determining whether there has been an abuse of discretion, the appellate court does not substitute its own judgment for that of the trial court, or even determine whether the trial court exercised its discretion wisely. Roach, 2014 IL App (1st) 132015, ¶¶ 19-20, 385 Ill. Dec. 503, 19 N.E.3d 61. This same deferential standard also applies to a trial court's decision on a motion *in limine*. [**38] Maggi v. RAS Dev., Inc., 2011 IL App (1st) 091955, ¶ 61, 949 N.E.2d 731, 350 Ill. Dec. 939.

[*P71] The outcome of this case, however, is the same regardless of the standard of review employed. Here, the trial court barred Dr. Hogarth from testifying regarding Dr. Thakadiyil's standard of care when ruling on a motion *in limine*. HN5[] Such a motion seeks a preliminary evidentiary ruling for purposes of the trial. See Cannon v. William Chevrolet/Geo, Inc., 341 Ill. App. 3d 674, 681, 794 N.E.2d 843, 276 Ill. Dec. 593 (2003) ("Motions in *limine* are not designed to obtain rulings on dispositive matters but, rather, are designed to obtain rulings on *evidentiary* matters outside the presence of the jury." (Emphasis in original.)). Erroneous evidentiary rulings are only a basis for reversal if the error was "substantially prejudicial and affected the outcome of trial." (Internal quotation marks omitted.) Holland v. Schwan's Home Service, Inc., 2013 IL App (5th) 110560, ¶ 192, 992 N.E.2d 43, 372 Ill. Dec. 504. We will not reverse if it is apparent that "no harm has been done." Jackson v. Pellerano, 210 Ill. App. 3d 464, 471, 569 N.E.2d 167, 155 Ill. Dec. 167 (1991). Importantly, "[w]hen erroneously admitted evidence is cumulative and does not otherwise prejudice the objecting party, error in its admission is harmless." Greaney v. Industrial Comm'n, 358 Ill. App. 3d 1002, 1013, 832 N.E.2d 331, 295 Ill. Dec. 180 (2005). "The burden rests with the party seeking reversal to establish prejudice." Watkins v. American Service Insurance Co., 260 Ill. App. 3d 1054, 1065, 631 N.E.2d 1349, 197 Ill. Dec. 890 (1994).

[*P72] In this case, any error in barring Dr. Hogarth's testimony on Dr. Thakadiyil's standard of care was harmless. See Hazelwood v. Illinois C. G. Railroad, 114 Ill. App. 3d 703, 708, 450 N.E.2d 1199, 71 Ill. Dec. 320 (1983) (finding that evidence that is merely cumulative was harmless error); People v. Patterson, 217 Ill. 2d 407, 428, 841 N.E.2d 889, 299 Ill. Dec. 157 (2005). Dr. Hogarth [**39] presented expert testimony regarding causation. Dr. Hogarth specifically opined that the incision and drainage performed by Dr. Thakadiyil worsened plaintiff's sepsis and caused plaintiff to go into septic shock that resulted in the loss of his legs. Dr. Hogarth further opined that when Dr. Thakadiyil treated plaintiff he had sepsis and that if plaintiff had received intravenous fluids before the incision and drainage procedure was performed plaintiff's injury would never have occurred. While Dr. Hogarth was barred from

opining as to Dr. Thakadiyil's standard of care for treating sepsis, Dr. Ewigman, a family medicine physician, testified extensively as to Dr. Thakadiyil's standard of care, including testimony regarding the proper timing and management of an incision and drainage in a patient who presented with plaintiff's signs and symptoms. The jury was thus presented with competent testimony supporting plaintiff's theory of negligence and that Dr. Thakadiyil's failure to diagnose sepsis, failure to properly treat plaintiff, and her failure to send plaintiff directly to the emergency room, caused his injury. See *Gulino v. Zurawski, 2015 IL App (1st) 131587, ¶ 84, 398 Ill. Dec. 192, 43 N.E.3d 1102*. Considering the testimony presented at trial, Dr. Hogarth's standard [**40] of care testimony was merely cumulative and, as such, it did not amount to reversible error. See *Jefferson v. Mercy Hosp. & Med. Ctr., 2018 IL App (1st) 162219, ¶ 39, 420 Ill. Dec. 599, 97 N.E.3d 173* (a physician's testimony, whether admitted erroneously or not, was cumulative of the evidence at trial and could not have affected its outcome); see also *Steele v. Provena Hosps., 2013 IL App (3d) 110374, ¶ 77, 996 N.E.2d 711, 374 Ill. Dec. 1016* (the trial court may exercise its discretion to limit the number of expert witnesses a party may present).

[*P73] Dr. Zar's Commentary

[*P74] Plaintiff next asserts that he was denied a fair trial where Dr. Zar supported his causation opinion by testifying to a specific incision and drainage he had performed on his own daughter. Plaintiff maintains that this testimony was unfairly prejudicial where it was not previously disclosed pursuant to *Rule 213* and testimony regarding an expert's personal practices had been barred by a motion *in limine*. In response, defendants maintain that Dr. Zar did not testify that this incident formed the basis of his opinion that the incision and drainage at issue did not cause toxic shock. Defendants further observe that plaintiff did not object to Dr. Zar's earlier reference in his trial testimony to performing an incision and drainage on his daughter.

[*P75] ***HN6***[↑] We review the trial court's admission of evidence for an abuse of discretion. [**41] *Jefferson, 2018 IL App (1st) 162219, ¶ 39, 420 Ill. Dec. 599, 97 N.E.3d 173*. An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view. *Kunz, 373 Ill. App. 3d at 624*.

[*P76] The record reflects that during cross-examination and numerous recross-examinations, plaintiff's counsel did not question Dr. Zar about the incision and drainage he performed on his daughter. On one redirect, which is pertinent to this appeal, in response to a question regarding whether he ever considers that toxic shock syndrome could develop from performing an incision and drainage procedure, Dr. Zar discussed the anecdote. Dr. Zar stated that the possibility of toxic shock syndrome was never on his mind and explained that he even performed an incision and drainage on his daughter's belly button after it had become infected without such a thought. Dr. Zar went on to briefly explain that the incision and drainage he performed on his daughter, who had a fast pulse and a fever, was routine and he did not send her to the emergency room or administer intravenous fluids or antibiotics prior to the procedure. Plaintiff's counsel objected to this testimony without stating a basis for his objection. The trial court sustained [**42] plaintiff's counsel's objection and Dr. Zar's testimony concluded immediately thereafter. Plaintiff's counsel did not move to strike Dr. Zar's response.

[*P77] We agree with the trial court's determination that plaintiff forfeited this issue by not objecting to the content of this testimony the first time it was raised on direct examination of Dr. Zar. ***HN7***[↑] A denial of a motion *in limine* does not preserve an objection to disputed evidence later introduced at trial. *Brown v. Baker, 284 Ill. App. 3d 401, 406, 672 N.E.2d 69, 219 Ill. Dec. 754 (1996)*. When a motion *in limine* is denied, a contemporaneous objection to the evidence at the time it is offered is required to preserve the issue for review. *Id.* Absent the requisite objection, the right to raise the issue on appeal is forfeited. *Roach, 2014 IL App (1st) 132015, ¶ 28, 385 Ill. Dec. 503, 19 N.E.3d 61*. The same principle rings true for a party's failure to raise an objection to a *Rule 213* violation. See *Stapleton ex rel. Clark v. Moore, 403 Ill. App. 3d 147, 156, 932 N.E.2d 487, 342 Ill. Dec. 360 (2010)*. In this instance, because plaintiff failed to object to Dr. Zar's initial testimony regarding the belly button anecdote, we find this issue to be forfeited.

[*P78] We further observe that Dr. Zar initially testified about the incision and drainage he performed on his daughter on direct examination, accordingly plaintiff's argument that he did not have an opportunity to cross-examine Dr. Zar is incorrect. [**43] In addition, we note that plaintiff's objection to Dr. Zar's testimony on redirect was sustained and that, when sustained, an objection cures any prejudicial impact from the testimony. *Clayton v. County of Cook, 346 Ill. App. 3d 367, 383, 805 N.E.2d*

222, 281 Ill. Dec. 854 (2003). Accordingly, even if we were to consider this issue, no prejudice resulted from Dr. Zar's testimony.

[*P79] Closing Argument

[*P80] Lastly, plaintiff maintains that there were two significant errors in defense counsel's closing argument which deprived him of a fair trial. First, plaintiff asserts that defense counsel violated the "golden rule" by asking the jurors to stand in the position of a party and to determine the standard of care from an improper perspective. Second, plaintiff contends that defense counsel misstated already prejudicial testimony regarding a post-occurrence change to the standards used to diagnose sepsis. Plaintiff argues as these two errors went to the critical issue of standard of care, the remarks are sufficiently prejudicial to have affected the outcome of the case and a new trial is required.

[*P81] In response, defendants argue that defense counsel did not ask the jurors to stand in the shoes of Dr. Thakadiyil nor did defense counsel appeal to the sympathy of the jury. Defendants further assert [**44] that defense counsel did not misstate the evidence and that plaintiff is taking counsel's remarks out of context. When viewed in context, defendants maintain it is apparent that defense counsel's comments were a fair comment on the evidence presented. Lastly, defendants maintain that any possible error was cured when the trial court, on numerous occasions, admonished the jury that arguments made by counsel that are not based on the evidence should be disregarded.

[*P82] HN8[↑] The standard of review in the examination of specific remarks made during closing argument is whether the comments were of such character as to have prevented the opposing party from receiving a fair trial. Klingelhoets v. Charlton-Perrin, 2013 IL App (1st) 112412, ¶ 29, 983 N.E.2d 1095, 368 Ill. Dec. 291. Ultimately, a trial court is given discretion in the scope of closing argument and its judgment as to the propriety of the comments therein will not be reversed unless the remarks are of a character that prevented a fair trial. Weisman v. Schiller, Ducanto and Fleck, Ltd., 368 Ill. App. 3d 41, 62, 856 N.E.2d 1124, 306 Ill. Dec. 29 (2006).

[*P83] We begin by addressing the comment plaintiff maintains instructed the jurors to disregard the evidence they heard from the medical experts and instead call upon their own personal experience to decide whether plaintiff had sepsis. HN9[↑] During closing argument, attorneys have wide latitude to comment [**45] and argue based on the evidence presented at trial as well as draw any reasonable inferences from that evidence. Clarke v. Medley Moving & Storage, Inc., 381 Ill. App. 3d 82, 95, 885 N.E.2d 396, 319 Ill. Dec. 125 (2008). However, when arguing to the jury, attorneys should not unfairly appeal to its emotions. Chakos v. Illinois State Toll Highway Authority, 169 Ill. App. 3d 1018, 1029, 524 N.E.2d 615, 120 Ill. Dec. 585 (1988). The jury must decide the case based on the evidence and issues presented at trial "unencumbered by appeals to [its] passion, prejudice or sympathy." Lorenz v. Siano, 248 Ill. App. 3d 946, 953, 618 N.E.2d 666, 188 Ill. Dec. 96 (1993). One line of argument that this court has repeatedly found to improperly elicit passion, prejudice, or sympathy from the jury is asking it to place itself in the position of either the plaintiff or the defendant. See Koonce ex rel. Koonce v. Pacilio, 307 Ill. App. 3d 449, 457, 718 N.E.2d 628, 241 Ill. Dec. 57 (1999); Chakos, 169 Ill. App. 3d at 1029. The alleged improper comments must be viewed not in isolation, but within the context of the entire closing argument. Drews v. Gobel Freight Lines, Inc., 144 Ill. 2d 84, 102-03, 578 N.E.2d 970, 161 Ill. Dec. 324 (1991). As a result, some golden rule arguments, while technically improper, may not elicit passion, prejudice, or sympathy from the jury. See Offutt v. Pennoyer Merchants Transfer Co., 36 Ill. App. 3d 194, 204, 343 N.E.2d 665 (1976).

[*P84] Plaintiff maintains that the comment made in this case is identical to one made in Sikora v. Parikh, 2018 IL App (1st) 172473, ¶ 60, 428 Ill. Dec. 318, 122 N.E.3d 327. We disagree. The comments in Sikora were markedly different from the comments in the case at bar. In *Sikora*, the defense counsel told the jury, "You need to evaluate this case for Dr. Parikh from a prospective analysis. Stand in her shoes on that morning ***." Id. ¶ 63. Here, defense [**46] counsel's argument did not encourage the jurors to literally "stand in the shoes" of Dr. Thakadiyil and is thus distinguishable.

[*P85] The comment, in context, was as follows:

> "People present to family medicine physicians, internal medicine physicians, outpatient clinics every single day with what? An infection, respiration elevated, fevers. You get a flu. Strep throat. Infection of any sort; urinary tract, lung. You can have any of those, any of them, and in combination. That's where clinical judgment is involved.
>
> This is the most common presentation in any family medicine or outpatient clinic, showing up with an

> infection and fever, pulse rate. This is common.
> And you are allowed to bring your common sense into this courtroom. That is permitted.
>
> Two SIRS, infection, is not the diagnosis of sepsis. Otherwise, respectfully, *every single one of us at some point in time, and more than one, has had sepsis. Because every single one of us has had an elevated pulse rate, a little respirations, a temperature of 101*.
> [Plaintiff's counsel]: Objection, Your Honor. Facts not in evidence. No basis.
> [Defense counsel]: Your Honor, this is argument.
> THE COURT: Sustained.
>
> Counsel should not ask jurors to put themselves [**47] in the position of the witnesses or the parties. So sustained." (Emphasis added.)

[*P86] We decline to accept plaintiff's argument that these remarks instructed the jurors to disregard the evidence they heard from the medical experts and instead call upon their own personal experience to decide whether plaintiff had sepsis. The comment that "every single one of us at some point in time *** has had sepsis" and the colloquy that followed directed the jurors' attention to the differences in the experts' iterations of the standard of care. While plaintiff's expert set forth that the standard of care was defined as two SIRS criteria plus infection, the defense experts, on the other hand, testified that the standard of care was not a "cookbook definition" but also involved clinical judgment. Defense counsel's argument is a direct reference to the evidence and the "battle of the experts" that it presented. As such, the commentary did not violate the "golden rule." Furthermore, defense counsel's remark was a commentary on the evidence that someone with an infection can have two of the SIRS criteria and not have sepsis.

[*P87] Moreover, any potential prejudice from this remark was cured when counsel's objection [**48] was sustained by the trial court. See *People v. Saxon, 226 Ill. App. 3d 610, 622, 588 N.E.2d 1235, 167 Ill. Dec. 1105 (1992)*; *Copeland v. Johnson, 63 Ill. App. 2d 361, 367, 211 N.E.2d 387 (1965)* (even if the comment was error, the error could have been cured by the court upon proper objection). More importantly, the trial court directly instructed the jury on this precise issue when it stated, "Counsel should not ask jurors to put themselves in the position of the witnesses or the parties." See *Sikora, 2018 IL App (1st) 172473, ¶ 64, 428 Ill. Dec. 318, 122 N.E.3d 327* ("what prejudice did result from the argument was mitigated by the trial court's sustained objection paired with its instruction to disregard the comment"). ***HN10***[⬆] In addition, the trial court admonished the jury on numerous occasions during the trial and closing arguments that the arguments of the lawyers are not evidence and that any argument not based on the evidence should be disregarded. See *Lecroy v. Miller, 272 Ill. App. 3d 925, 933, 651 N.E.2d 617, 209 Ill. Dec. 439 (1995)* (stating "when a trial court sustains an objection to improper remarks of counsel and admonishes the jury that counsel's remarks are not evidence, any error is cured"). It is well established that improper remarks generally do not constitute reversible error unless they result in substantial prejudice. See *Saxon, 226 Ill. App. 3d at 622*. Substantial prejudice means that absent the remarks, the outcome of the case would have been different. *People v. Simms, 192 Ill. 2d 348, 397, 736 N.E.2d 1092, 249 Ill. Dec. 654 (2000)*. Here, the exclusion of defense counsel's remarks [**49] would not have changed the outcome of the trial. As noted by defendants, the jury specially found that the sole proximate cause of plaintiff's injury was something other than the conduct of defendants. Accordingly, based on the record presented, we decline to find that plaintiff was prejudiced by these remarks.

[*P88] Plaintiff next argues that defense counsel misrepresented Dr. Zar's testimony about the change in the standards to diagnose sepsis and further violated a motion *in limine* prohibiting this testimony to establish the standard of care. The comment being challenged was as follows:

> "Diagnose sepsis, send them to an emergency room. Incision and drainage, send them to an emergency room. Perform an incision and drainage, send them to an emergency room. That's what this whole case from plaintiff has boiled down to.
> So it does not stop, as [plaintiff's counsel] said, at did you diagnose sepsis.
> But I want to take each of those allegations one at a time and tell you what I think the evidence showed on those very key issues on the standard of care.
>
> Well, sepsis. We have heard an awful lot about SIRS, two SIRS, known or suspected site of infection. That has been something we have heard a lot [**50] about during the course of this trial.
>
> And it was yesterday when we finally learned that *as of early 2000s, which stands unrefuted, this has not been used*.
> [Plaintiff's counsel]: Objection, Your Honor.

> [Defense counsel]: And it is not —
> [Plaintiff's counsel]: Motion in limine.
> [Indiscernible crosstalk.]
> [Plaintiff's counsel]: Mischaracterizes the evidence.
> THE COURT: Okay. Again, Counsel may argue, but arguments of the lawyers are not — that are not based on the evidence should be disregarded by you.
> But as this is the inference that Counsel sees in the evidence, overruled."
> (Emphasis added.)

According to plaintiff, Dr. Zar's testimony was that "we started to realize that the SIRS criteria in the early 2000s was probably too loose" not, as defense counsel argued, that in the early 2000s it was not used at all. Plaintiff asserts this argument was highly prejudicial where it attempted to backdate the change in the standards and was confusing in regards to what the standard of care was at the time of Dr. Thakadiyil's treatment. Plaintiff further contends that this error was compounded when defense counsel argued that the change of standards in the early 2000s was unrefuted. Plaintiff points out [**51] that Dr. Ewigman testified the SIRS definition was the standard of care to diagnose sepsis in 2010 and Dr. Hogarth used the same definition to define the standard of care as well. Plaintiff notes that even Dr. Thakadiyil acknowledged that the SIRS criteria were "general variables" for sepsis at the time she treated plaintiff and even Dr. Zar admitted on cross-examination that the SIRS criteria were used in 2010. In response, defendants note that Dr. Zar's testimony was actually that "in the early 2000s" it was learned that the SIRS criteria were of no benefit and societies began abandoning its use.

[*P89] We agree with defendants that counsel's commentary was not a pure misstatement of the evidence. A review of the record reflects that Dr. Zar did testify that in the early 2000s a study found that the SIRS criteria were of no benefit. But while there was no misstatement in this regard, defense counsel did misstate that this evidence was "unrefuted." We thus agree with plaintiff that the jury was presented with evidence regarding the use of the SIRS criteria in 2010. Consequently, because the jury was presented with the overwhelming evidence that the SIRS criteria was in use in 2010, along [**52] with the trial court's numerous instructions to disregard any comments by the attorneys that do not accurately reflect the evidence, we conclude that defense counsel's remark did not prejudice plaintiff. See *Cahill v. Boury, 144 Ill. App. 3d 413, 419, 494 N.E.2d 256, 98 Ill. Dec. 329 (1986)* (finding that, despite a misstatement of the evidence, any error would have been cured by the trial court's instruction that the jurors should rely on their own memory of the evidence).

[*P90] Furthermore, when taken in context, defense counsel's misstatement was a minor error. ***HN11***[↑] A misstatement by counsel will not deny the losing party a fair trial where the misstatement comprises only a small segment of the closing argument and the jury is instructed that closing arguments are not evidence. See, *e.g.*, *Lagoni v. Holiday Inn Midway, 262 Ill. App. 3d 1020, 1035, 635 N.E.2d 622, 200 Ill. Dec. 283 (1994)*; see also *Wilson v. Humana Hospital, 399 Ill. App. 3d 751, 759, 926 N.E.2d 821, 339 Ill. Dec. 346 (2010)* (and cases cited therein discussing harmless error). In this instance, after the jury was admonished that the attorney's argument was not evidence, defense counsel moved on from discussing the viability of the SIRS criteria in 2010 and instead focused on her theory that Dr. Thakadiyil was entitled to use her clinical judgment to diagnose plaintiff. Additionally, this misstatement was comprised of only a few words in a 46-page argument. See *Lagoni, 262 Ill. App. 3d at 1035*. These factors militate against finding [**53] that plaintiff was denied a fair trial. See *id.* Accordingly, when the trial is viewed in its entirety, plaintiff fails to establish defense counsel's misstatement resulted in substantial prejudice to him or prevented a fair trial. See *Davis v. City of Chicago, 2014 IL App (1st) 122427, ¶ 84, 380 Ill. Dec. 189, 8 N.E.3d 120*.

[*P91] In sum, finding no reversible error was committed by the trial court, we affirm its judgment.

[*P92] CONCLUSION

[*P93] For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

[*P94] Affirmed.

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FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

THOMAS ITTERSAGEN
Plaintiff/Petitioner

Reviewing Court No: 1-19-0778
Circuit Court No: 2016L003532
Trial Judge: RENA VANTINE

v.

ADVOCATE HEALTH AND HOSPITALS CORPORATION, ET AL.
Defendant/Respondent

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Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

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3/3/21	Records/Exhibits- Other Filed	Order Denying Plaintiff's Motion to Cite Additional Authority and Refusing to Take Judicial Notice, Entered by the First District of the Appellate Court on August 31, 2020 Order – Responding Order – Denied 19-0778	2
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3/3/21	Records/Exhibits- Other Filed	Plaintiff's Exhibit B to Plaintiff's Motion to Cite Additional Authority, Advocate's Form 990 Federal Return, filed August 14, 2020 2018 Form 990 Ex. B 19-0778	380
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3/3/21	Records/Exhibits- Other Filed	Order- Petition for Rehearing Denied- Entered by the First District Appellate Court on August 31, 2020 Petition for Rehearing – Petition for Rehearing Denied 19-0778	1
3/4/21	Records/Exhibits- Other Filed	Plaintiff's Motion to Cite Additional Authority and Request to the Appellate Court to Take Judicial Notice, filed on August 14, 2020 19-0778 Motion Cite Additional Authority.FINAL	6
3/25/21	Motion- Extension of Time Appellant Brief (2nd)	Plaintiff's Second Motion to Extend Time to File Appellant's Brief, Filed on MOTION.extend time.Second	8

4/29/21	Motion- Miscellaneous	Motion to Transmit Petition for Rehearing to the Supreme Court, filed on April 29, 2021	8
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*These Orders and Pleadings were transmitted by the Clerk of First Appellate Court to the Supreme Court on Order from this Court. These Orders and Pleadings are not in the Common Law Record and are not paginated. Accordingly, when cited to in Plaintiff-Appellant's Brief, Plaintiff referred to the date the document was uploaded to ReSearh:IL and the title of the pleading and/or order.

No. 1-19-0778

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THOMAS ITTERSAGEN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	No. 16 L 3532
ADVOCATE HEALTH AND HOSPITALS	)	
CORPORATION D/B/A ADVOCATE MEDICAL	)	
GROUP and ANITA THAKADIYIL, M.D.,	)	Honorable
	)	Rena Van Tine,
Defendants-Appellees.	)	Judge Presiding.

ORDER

This cause coming to be heard on Plaintiff-Appellant's Motion to Cite Additional Authority in Support of Plaintiff-Appellant's Petition for Rehearing (Motion) and this Court taking judicial notice thereof, due notice having been given, this Court having reviewed the response to the Motion, and the Court being advised in the premises,

IT IS HEREBY ORDERED that Plaintiff-Appellant's Motion is denied as the issue which this Court is being requested to consider has been forfeited;

IT IS FURTHER ORDERED that Plaintiff-Appellant's Motion is denied as being improper. It was Plaintiff-Appellant's burden to provide any and all evidence pertaining to Juror Glascott's bias to the trial court. Plaintiff-Appellant's counsel's affidavit (exhibit A) clearly sets forth and demonstrates that the document in question that this Court is now being asked to consider could have easily been acquired at the time of the hearing and considered by the trial court. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 ("Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal."); Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); and

IT IS FURTHER ORDERED that Plaintiff-Appellant's Motion is denied as Plaintiff-Appellant cites no authority allowing a party to supplement its argument by requesting a reviewing court to take judicial notice of evidentiary matters that were not presented to the trial court. *People v. James*, 2019 IL App (1st) 170594, ¶ 15 ("The State asks us to take judicial notice of Department of Corrections' records, but that does not change the fact that this information was not properly presented as evidence at trial. The issue here is not what the State could have proved at trial but what the State actually did prove at trial." (citing *People v. Jones*, 2017 IL App (1st) 143718, ¶ 21)).

No. 1-19-0778

For all the reasons set forth above the Plaintiff-Appellant's Motion is denied.

DATED: _____

JUSTICE

JUSTICE

JUSTICE

ORDER ENTERED

AUG 31 2020

APPELLATE COURT FIRST DISTRICT

State Statutes Governing Implied Juror Bias

Alabama - Code of Ala. § 12-16-150

> (11) That the juror, in any civil case, is plaintiff or defendant in a case which stands for trial during the week he is challenged or is related by consanguinity within the ninth degree or by affinity within the fifth degree, computed according to the rules of the civil law, to any attorney in the case to be tried or is a partner in business with any party to such case.
>
> (12) That the juror, in any civil case, is an officer, employee or stockholder of or, in case of a mutual company, is the holder of a policy of insurance with an insurance company indemnifying any party to the case against liability in whole or in part or holding a subrogation claim to any portion of the proceeds of the claim sued on or being otherwise financially interested in the result of the case.

Alaska - **Alaska R. Civ. P. 47(c)(10)**

> (10) That the person is the guardian, ward, landlord, tenant, employer, employee, partner, client, principal, agent, debtor, creditor, or member of the family of a party or attorney; provided, however, that challenge for cause may not be taken because of the employer-employee relationship when the State of Alaska or a municipal corporation is the employer and the person challenged is not employed by an agency, department, division, commission, or other unit of the State or municipal corporation which is directly involved in the case to be tried.
>
> * * * *
>
> (13) That the person has a financial interest, other than that of a taxpayer or a permanent fund dividend recipient in the outcome of the case.

Arizona - Ariz. R. Civ. P. 47

> (d) Challenges for cause.
> (1) Grounds. -- A party may challenge a prospective juror for cause on one or more of the following grounds:
> (A) The prospective juror lacks one or more of the required statutory qualifications specified in A.R.S. § 21-211;
> (B) The prospective juror is a party's:
> (i) Family member;
> (ii) Guardian or ward;
> (iii) Master or servant;
> (iv) Employer or employee;
> (v) Principal or agent;

(vi) Business partner or associate; or
(vii) Surety or obligee on a bond or obligation;

Arkansas - A.C.A. § 16-33-304

(B) A challenge for implied bias may be taken in the case of the juror:
(i) Being related by consanguinity, or affinity, or who stands in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or who is a member of the family of the defendant or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;

California – Cal Code Civ Proc § 229

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

Colorado – C.R.S. 16-10-103

(e) Challenges for Cause. Challenges for cause may be taken on one or more of the following grounds:
(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror;
(2) Consanguinity or affinity within the third degree to any party;
(3) Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of any party; or a partner in business with any party or being security on any bond or obligation for any party;

Florida – Fla. R. Civ. P. 1.431

(c) Challenge for Cause.
(1) On motion of any party, the court must examine any prospective juror on oath to determine whether that person is related, within the third degree, to

(i) any party, (ii) the attorney of any party, or (iii) any other person or entity against whom liability or blame is alleged in the pleadings, or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called, or has any interest in the action, or has formed or expressed any opinion, or is sensible of any bias or prejudice concerning it, or is an employee or has been an employee of any party or any other person or entity against whom liability or blame is alleged in the pleadings, within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action or any of the foregoing grounds of objection exists or that the juror is otherwise incompetent, another must be called in that juror's place.

Idaho – I.R.C.P. Rule 47

(h)Challenges for cause.
(1)When made.
Challenges for cause may be made at any time while questioning a prospective juror, or no later than the conclusion of all questions to an individual prospective juror, or the prospective jury if questioned as a whole, except that a challenge for cause may be permitted by the court at a later time upon a showing of good cause. Challenges for cause, as provided by law, must be tried by the court. The challenged juror, and any other person, may be examined as a witness on the trial of the challenge.
(2)Grounds for challenge for cause.
A challenge for cause may be made because a prospective juror:
(A) lacks any of the qualifications prescribed by the Idaho Code to render a person competent as a juror;
(B) is related by blood or marriage within the fourth degree to any party;
(C) is in the relation of debtor or creditor, guardian and ward, master and servant, employer and clerk, or principal and agent with any party, or is a member of the family of any party, or a partner, or united in business with any party, or surety on any bond or obligation for any party;
(D) has served as a juror or has been a witness or subpoenaed at a previous trial between the same parties for the same cause of action;
(E) has a monetary interest in the outcome of the action or in a main question involved in the action;
(F) has an unqualified opinion or belief as to the merits of the action, or a main question involved, based on knowledge or information of material facts;
(G) has a state of mind showing hostility or bias to or against any party.

Iowa - Iowa R. Civ. P. 1.915

(6) For cause
A juror may be challenged by a party for any of the following causes:

a. Conviction of a felony.
b. Want of any statutory qualification required to make that person a competent juror.
c. Physical or mental defects rendering the person incapable of performing the duties of a juror.
d. Consanguinity or affinity within the ninth degree to the adverse party.
e. Being a conservator, guardian, ward, employer, employee, agent, landlord, tenant, family member, or member of the household of the adverse party.
f. Being a client of the firm of any attorney engaged in the cause.
g. Being a party adverse to the challenging party in any civil action; or having complained of or been accused by the challenging party in a criminal prosecution.
h. Having already sat upon a trial of the same issues.
i. Having served as a grand or trial juror in a criminal case based on the same transaction.
j. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows a state of mind which will prevent the juror from rendering a just verdict.
k. Being interested in an issue like the one being tried.
l. Having requested, directly, or indirectly, that the person's name be returned as a juror. Exemption from jury service is not a ground of challenge, but the privilege of the person exempt.

Kansas – K.S.A. § 22-3410

(b) He is attorney, client, employer, employee, landlord, tenant, debtor, creditor or a member of the household of the defendant or a person alleged to have been injured by the crime charged or the person on whose complaint the prosecution was instituted.

* * * *

(h) He occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime or the person on whose complaint the prosecution was instituted.

Louisiana – La. C.C.P. Art. 1765

A juror may be challenged for cause based upon any of the following:
(1) When the juror lacks a qualification required by law;
(2) When the juror has formed an opinion in the case or is not otherwise impartial, the cause of his bias being immaterial;
(3) When the relations whether by blood, marriage, employment, friendship, or enmity between the juror and any party or his attorney are such that it must be reasonably believed that they would influence the juror in coming

to a verdict;
(4) When the juror served on a previous jury, which tried the same case or one arising out of the same facts;
(5) When the juror refuses to answer a question on the voir dire examination on the ground that his answer might tend to incriminate him.

Michigan – MCR 2.511(D)

(D) Challenges for Cause. The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:
(9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;

Minnesota - Minn. Stat. § 546.10 & Minn R. Crim. P. 26.02(5)(1)(6)

In any civil action or proceeding either party may challenge the panel, or individual jurors thereon, for the same causes and in the same manner as in criminal trials, except that the number of peremptory challenges to be allowed on either side shall be as provided in this section. Before challenging a juror, either party may examine the juror in reference to qualifications to sit as a juror in the cause.

Standing as a guardian, ward, attorney, client, employer, employee, landlord, tenant, family member of the defendant, or person alleged to have been injured by the offense, or whose complaint instituted the prosecution.

Montana – 25-7-223

Challenges for cause may be taken on one or more of the following grounds:
(1) a want of any of the qualifications prescribed by this code to render a person competent as a juror;
(2) being the spouse of or related to a party by consanguinity or affinity within the sixth degree;
(3) standing in the relation of guardian and ward, debtor and creditor, employer and employee, or principal and agent to either party or being a partner in business with either party or surety on any bond or obligation for either party.

Nevada - Nev. Rev. Stat. Ann. § 16.050

(1) (c) Standing in the relation of debtor and creditor, guardian and protected person, master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party or a partner, or united in business with either party; or being security on any bond or obligation for either party.

New Hampshire – RSA 500-A:12

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:
(a) Expects to gain or lose upon the disposition of the case;
(b) Is related to either party;
(c) Has advised or assisted either party;
(d) Has directly or indirectly given his opinion or has formed an opinion;
(e) Is employed by or employs any party in the case;
(f) Is prejudiced to any degree regarding the case; or
(g) Employs any of the counsel appearing in the case in any action then pending in the court.

New York - NY CLS CPLR § 4110. Challenges for cause

(a) Challenge to the Favor. The fact that a juror is in the employ of a party to the action; or if a party to the action is a corporation, that he is a shareholder or a stockholder therein; or, in an action for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property; shall constitute a ground for a challenge to the favor as to such juror. The fact that a juror is a resident of, or liable to pay taxes in, a city, village, town or county which is a party to the action shall not constitute a ground for challenge to the favor as to such juror.

North Dakota - N.D. Cent. Code, § 28-14-06

28-14-06. Challenges for cause Grounds.
Challenges for cause may be taken on one or more of the following grounds:
1. A want of any of the qualifications prescribed by law to render a person competent as a juror;
2. Consanguinity or affinity within the fourth degree to either party;
3. Standing in the relation of guardian and ward, master and servant, debtor and creditor, employer and employee, attorney and client, or principal and agent to either party, or being a member of the family of either party, or being a partner in business with either party, or surety on any bond or obligation for either party;

Ohio- ORC Ann. 2313.17

(B) The following are good causes for challenge to any person called as a juror:
(1) That the person has been convicted of a crime that by law renders the person disqualified to serve on a jury;
(2) That the person has an interest in the cause;
(3) That the person has an action pending between the person and either party;
(4) That the person formerly was a juror in the same cause;
(5) That the person is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;
(6) That the person is subpoenaed in good faith as a witness in the cause;
(7) That the person is akin by consanguinity or affinity within the fourth degree to either party or to the attorney of either party;
(8) That the person or the person's spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against any such party to another such action;
(9) That the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court.
(C) Each challenge listed in division (B) of this section shall be considered as a principal challenge, and its validity tried by the court.
(D) In addition to the causes listed in division (B) of this section, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render the juror at the time an unsuitable juror. The validity of the challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased.

Oklahoma- 22 Okl. St. § 660

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages.

Oregon- ORCP 57 (D)(1)(d)

D. CHALLENGES

(1) Challenges for cause; grounds. Challenges for cause may be taken on any one or more of the following grounds:
D.(1)(d) Standing in the relation of guardian and ward, physician and patient,

master and servant, landlord and tenant, or debtor and creditor to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

South Dakota- S.D. Codified Laws § 15-14-6.1

Challenges for cause may be taken on any of the following grounds:
(1) The prospective juror does not meet one of the qualifications required by § 16-13-10 or is disqualified under that section;
(2) The prospective juror is related by consanguinity or affinity within the fourth degree, as defined by § 23A-20-30, to a party in the case;
(3) The prospective juror is a member of the family of a party or one of the attorneys in the case;
(4) The prospective juror has a relationship of guardian and ward, master and servant, employer and employee, landlord and tenant, or principal and agent with an attorney or a party in the case;
(5) The prospective juror is a partner or associate in business with an attorney or a party in the case;

Texas - Tex. Gov't Code § 62.105

A person is disqualified to serve as a petit juror in a particular case if he:
(1) is a witness in the case;
(2) is interested, directly or indirectly, in the subject matter of the case;
(3) is related by consanguinity or affinity within the third degree, as determined under Chapter 573, to a party in the case;
(4) has a bias or prejudice in favor of or against a party in the case; or
(5) has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.

Utah- URCP Rule 47

(f) Challenges for cause. -- A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.
(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.
(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.
(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for

either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

Washington- Rev. Code Wash. (ARCW) § 4.44.180

Implied bias defined.
A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:
(1) Consanguinity or affinity within the fourth degree to either party.
(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

Wyoming- Wyo. Stat. § 1-11-203

Challenges for cause; grounds.
(a) Challenges for cause may be taken on one (1) or more of the following grounds:
(i) A lack of any of the qualifications prescribed by statute which render a person competent as a juror;
(ii) Relationship by consanguinity or affinity within the third degree to either party;
(iii) Standing in the relation of debtor or creditor, guardian or ward, master or servant, or principal or agent to either party, or being a partner united in business with either party, or being security on any bond or obligation for either party

State Judicial Decisions Governing Implied Juror Bias

Alaska

> Thus, as interpreted in *Malvo*, Rule 47(c)(12) requires trial courts to presume that prospective jurors with financial relationships with a party to the litigation cannot be impartial and that their interest in the outcome will influence their decision. "In these situations, the relationship between the prospective juror and a party to the lawsuit points so sharply to bias in the particular juror that even the juror's own assertions of impartiality must be discounted." When the prospective juror is a stockholder in a company which is a party to the litigation, the prospective juror's impartiality is even more suspect. "That a stockholder in a company which is party to an action is incompetent to sit as a juror is so well settled as to be black letter law." Most courts apply a per se rule barring a shareholder from sitting on a jury "in an action to which the corporation is a party or in which it has a direct pecuniary interest." *Reich v. Cominco Alaska, Inc*., 56 P.3d 18, 23 (Alaska 2002).

Connecticut

> We previously have indicated that, in Connecticut, the "[g]rounds for a principal challenge include, 'relationship to either party to the suit, a former service as arbitrator on either side, an interest in the outcome of the suit, either personal or as a member of a corporation, or the relation of master or servant, steward, attorney, landlord or tenant to either party, or that the prospective juror has conversed with either party upon the merits of the case, or has formed or expressed an opinion on the question at issue.' *McCarten v. Connecticut Co.,* [supra, 103 Conn. 542]." (Emphasis added.) *State v. Esposito*, *supra*, 223 Conn. 309-10 n.7. "These relationships are 'held to import absolute bias or favor and require the disqualification of the juror as a matter of law.' *State v. Benedict*, 323 Conn. 654, 664, 148 A.3d 1044, 1050 (2016).

Colorado

> The General Assembly has identified certain jurors whose bias is implied as a matter of law and has required trial courts to excuse such jurors when a party challenges them for cause. *People v. Bonvicini*, 2016 CO 11, ¶ 10, 366 P.3d 151, 154-55. Nothing in section 16-10-103(1) suggests that the presumption of bias for such jurors is rebuttable. . . . In other words, an impliedly biased juror "is not susceptible to rehabilitation through further questioning because implied bias, once established, cannot be ameliorated by the juror's assurances that she nonetheless can be fair." *Lefebre*, 5 P.3d at 300.

Delaware

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end . . . no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. *Hall v. State*, 12 A.3d 1123, 1127 (Del. 2010)

Georgia

> The broad general principle intended to be applied in every case is that each juror shall be so free from either prejudice or bias as to guarantee the inviolability of an impartial trial. . . . If error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors. *Kim v. Walls*, 275 Ga. 177, 178, 563 S.E.2d 847, 849 (2002).
>
> And for that reason, the Court of Appeals has said that, if a trial court were to err in assessing the impartiality of prospective jurors, it would be better that the trial court "err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors." *Foster v. State*, 258 Ga. App. 601, 608 (3) (574 SE2d 843) (2002). See also *Ashmid v. State*, 316 Ga. App. 550, 556 (2) (730 SE2d 37) (2012). Consistent with these notions, the appellate courts have routinely affirmed the decisions of trial courts to excuse jurors for cause when as here there was a relationship between a juror and a lawyer, party, or witness that led the juror to express some doubt about his impartiality, even if the expression of doubt was equivocal. See, e.g., *Smith v. State*, 298 Ga. 357, 360 (3) (782 SE2d 26) (2016) (trial court did not abuse its discretion when it removed a juror who had approached the courtroom deputy with concerns about his business relationship with the defendant and said that he would try to do his best to put the relationship out of his mind); *Pate v. State*, 315 Ga. App. 205, 208-209 (2) (726 SE2d 691) (2012) (trial court did not abuse its discretion when it excused a juror who claimed impartiality but expressed discomfort because of her acquaintance with a witness and the fact that her son and the defendant had attended the same school); *Haney v. State*, 261 Ga. App. 136, 141 (5) (581 SE2d 626) (2003) (trial court did not abuse its discretion when it excused a juror who said that he would be uncomfortable sitting on the jury because he knew the girlfriend of a defendant); *Mobley v. Wright*, 253 Ga. App. 335, 337 (3) (559 SE2d 78) (2002) ("Having been briefly represented by defense counsel is a legitimate ground for removal of a juror." (Citation omitted)). *Trim v. Shepard*, 300 Ga. 176, 179, 794 S.E.2d 114, 117 (2016).

Hawaii

> [W]e see no reason why we should not apply the appearance of impropriety standard in a case such as the one before us where a prosecutor, currently in the employ of the same office of the very prosecutor who is trying the defendant, is called for jury service. *State v. Kauhi*, 86 Haw. 195, 198-99, 948 P.2d 1036, 1039-40 (1997).

Indiana

> "Implied bias," which also allows removal of a juror for cause, is attributed to a juror upon a finding of a relationship between the juror and one of the parties, regardless of actual partiality. See, e.g., *Haak v. State*, 275 Ind. 415, 417 N.E.2d 321, 323 (1981) (bias implied where juror's spouse was hired as a deputy prosecutor on the first day of trial by the office that was prosecuting the case despite juror's statement that she did not think the relationship would make it difficult for her to render an impartial verdict). *Joyner v. State*, 736 N.E.2d 232, 238 (Ind. 2000)

Kentucky

> "[The prevailing rule 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." *Butts v. Commonwealth*, Ky., 953 S.W.2d 943, 945, 44 10 Ky. L. Summary 12 (1997). A trial court should presume the possibility of bias of a juror if said juror has "a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses," regardless of the answers said juror may give during voir dire. *Ward v. Commonwealth*, Ky., 695 S.W.2d 404, 407 (1985) (quoting *Commonwealth v. Stamm*, 286 Pa. Super. 409, 429 A.2d 4, 7 (Pa. Super. Ct. 1981)). "Once that close relationship is established, without regard to protestations of lack of bias, the court should sustain a challenge for cause and excuse the juror." *Id*. *Bowman v. Perkins*, 135 S.W.3d 399, 402 (Ky. 2004).

Maine

> Although we have not had occasion to address the issue, federal jurisprudence has made clear that bias can be implied or prejudice presumed only in extreme or extraordinary circumstances. For instance, bias was implied when jurors' hotel rooms were burglarized overnight while the jurors were sequestered for a trial involving a burglary and murder, and there was some indication that jurors who had been victimized changed their votes to guilty. *Id.* at 317, 320. In another case, bias was implied when jurors listened to sixty-five percent of the potential jurors indicate that they thought the defendant was guilty of murder and state that they could not be fair and impartial. *Seals v. State*,

208 Miss. 236, 44 So. 2d 61, 67-68 (Miss. 1950). *State v. Carey*, 2019 ME 131, ¶ 26, 214 A.3d 488 (2019).

Maryland

Defendant in criminal case denied mistrial after juror disclosed acquaintance with police officer during trial; the trial judge was satisfied that the failure of the juror to disclose her acquaintance during the original voir dire was inadvertent and unintentional; that the relationship between the juror and the officer was minimal and had existed in the remote past; and that the juror could still render a fair and impartial verdict. Appellate Court affirmed, "Under the circumstances, we do not believe that the facts in this case would require a disqualification for cause of the juror during the original voir dire; nor do we find any abuse of discretion by the trial judge in refusing to strike the juror after the case had begun or to grant a mistrial." *Williams v. State*, 394 Md. 98, 110-11, 904 A.2d 534, 541-42 (2006).

Massachusetts

For the defendant to prevail on a claim of implied bias, the courts have recognized certain extreme circumstances where implied bias could be found: (1) where "it is disclosed that 'the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction'"; (2) in "a case where the trials of codefendants are severed and an individual observes the first trial and sits as a juror in the second trial"; and (3) where "a juror who has been the victim of a similar crime and has consciously concealed that fact from the parties or the court. In addition ... other jurisdictions have recognized certain circumstances where a juror's personal stake or substantial interest in the outcome of the case can demonstrate implied bias. "[E]ven a tiny financial interest in the case" has required a juror to be excused for cause. *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000), cert. denied, 531 U.S. 1168, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001). Accordingly, courts have presumed bias in stockholders of for-profit corporations that are parties in a lawsuit. *Getter v. Wal-Mart Stores, Inc*., 66 F.3d 1119, 1122 (10th Cir. 1995). Conversely, courts have not found an implied bias in members of a for-profit retail club because the club "membership is still worth the same after a judgment adverse to [the club]." *Guerra v. Wal-Mart Stores, Inc*., 943 S.W.2d 56, 59 (Tex. Ct. App. 1997). *Commonwealth v. Gonsalves*, 96 Mass. App. Ct. 29, 32, 132 N.E.3d 137, 140-41 (2019).

Mississippi

> While we cannot guarantee a defendant a perfect trial, we must endeavor to ensure that every defendant receives a fair trial free of implied bias that arises from the presence of a juror who is related to an attorney employed by the district attorney's office that is prosecuting the defendant. *Taylor v. State*, 656 So. 2d 104, 110-11 (Miss. 1995).

Missouri

> To be sure, a juror who cannot be fair and impartial should be stricken for cause to ensure a fair and just trial. *State v. Clark-Ramsey*, 88 S.W.3d 484, 488-89 (Mo. App. 2002). However, Brandolese does not allege nor demonstrate that Juror No. 16 was unfair or partial causing a manifest injustice in his trial. Brandolese points to no statement by Juror No. 16 that she was biased or partisan due to her relationship with her brother, nor does he present any other evidence of unfairness, nor could he.. . . *State v. Brandolese*, 601 S.W.3d 519, 526-28 (Mo. 2020).

Nebraska

> The plaintiff then peremptorily challenged the venireperson, who was excused. The court in *Burtnett v. B. & M. R. R.* Co., 16 Neb. 332, 20 N.W. 280 (1884) held "At common law it is good cause for challenge that a juror is next of kin to either party . . .; that he has an interest in the cause; that there is an action depending between him and the party; . . . that he is the party's master, servant, counselor, or attorney. 3 Black. Comm., 363. And the common law in that regard is in force in this state. *Ensign v. Harney*, 15 Neb. 330, 18 N.W. 73. Jurors must be indifferent between the parties and have neither motive nor inducement to favor either. The fact that the defendant is a corporation does not change the rule nor render an employee eligible to sit on a jury in an action where the corporation is a party. 16 Neb. at 334, 20 N.W. at 281. . . . *Kusek v. Burlington Northern R.R.*, 4 Neb. App. 924, 929-30, 552 N.W.2d 778, 781-82 (1996).

New Jersey

> This Court has emphasized the right to trial by an impartial jury, secured by Article I, paragraph 10 of the New Jersey Constitution as well as the [S]ixth [A]mendment of the United States Constitution, requires that a jury panel must be as nearly impartial as the lot of humanity will admit. *State v. Papasavvas*, 163 N.J. 565, 597-98, 751 A.2d 40, 57 (2000).

New Mexico

> We hold that juror bias may be implied as a matter of law in New Mexico. *State v. Sanchez*, 120 N.M. 247, 252, 901 P.2d 178 (1995).

North Carolina

> In reviewing whether a juror's personal relationship with a witness deprives the defendant of a fair trial, we consider: (1) the degree of relationship between the juror and the witness, (2) the statements of the witness as to whether or not he could be impartial, and (3) the importance of the witness to the case. *State v. Lee*, 189 N.C. App. 474, 480, 658 S.E.2d 294, 299 (2008). There, the Court held that a juror who engaged in tax preparation services for a witness that offered testimony unrelated to any element of the crime charged was insufficient to overturn the verdict.

Pennsylvania

> A challenge of a prospective juror for cause may invoke bias that is either implied or actual. Implied bias is presumed as a matter of law based upon special circumstances, and "is attributable in law to the prospective juror regardless of actual partiality." *United States v. Wood*, 299 U.S. 123, 134, 57 S. Ct. 177, 81 L. Ed. 78 (1936). In such circumstances, we do not inquire into whether the juror is capable of being objective and rendering a fair and impartial decision. Rather, we require disqualification to avoid the mere appearance of partiality.
>
> Few cases in our Commonwealth have examined employment relationships between jurors (or their family members) and corporate parties. However, Pennsylvania law clearly holds that, where there is a direct employment relationship between a juror and a party or participant, the courts must presume prejudice and the juror must be stricken for cause. *Shinal v. Toms*, 640 Pa. 295, 314, 162 A.3d 429, 440 (2017).

Rhode Island

> In the matter under review, the trial justice properly heeded our admonition in *Valcourt* that "[t]o determine a juror's impartiality, an appropriate *in camera* inquiry of the juror is necessary." *Valcourt*, 792 A.2d at 735. *Thornley v. Community College of Rhode Island*, 107 A.3d 296, 303 (R.I. 2014).

South Carolina

> It is well-settled under South Carolina law that a stockholder in a corporation is incompetent to serve as a juror in a case in which the corporation is a party or has any pecuniary interest. *Southern Bell Tel. &*

Tel. Co. v. Shepard, 262 S.C. 217, 222, 204 S.E.2d 11, 12 (1974) ("'That a stockholder in a company which is a party to a lawsuit is incompetent to sit as a juror is so well settled as to be black letter law.'") (quoting *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971)). Alston argues that members of an electric cooperative are similar to corporate shareholders and therefore should be per se disqualified from serving on a jury when the cooperative is a party. We agree.

. . . We therefore hold that a member of a cooperative "is incompetent to serve as a juror in a case in which the [cooperative] is a party. To hold otherwise, in our opinion, would compromise the right to an impartial jury which is guaranteed to all litigants. See S.C. Code Ann. § 14-7-1050. *Alston v. Black River Electric Cooperative*, 345 S.C. 323, 328, 548 S.E.2d 858, 860-61 (2001).

Tennessee

With regard to a prospective juror who is not otherwise disqualified to serve, there are two situations where a challenge for cause should be sustained. The first is where the prospective juror indicates by his or her answer that they cannot or will not be a fair or impartial juror. The second is where, irrespective of the answers given on voir dire, the trial court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial, or situational, with any of the parties, counsel, victims, or witnesses. See generally, 47 AM JUR 2d, Jury § 266-94 (1995). *State v. Pamplin*, 138 S.W.3d 283, 286 (Tenn. Crim. App. 2003).

Vermont

The law infers bias when, irrespective of the answers given on voir dire, the prospective juror has such a close relationship with a participant in the trial a witness, a victim, counsel, or a party that the potential juror is presumed unable to be impartial. The United States Court of Appeals for the Second Circuit articulates the relevant inquiry as "whether an average person in the position of the juror in controversy would be prejudiced." *United States v. Torres*, 128 F.3d 38, 45 (2d Cir. 1997). Moreover, "in determining whether a prospective juror is impliedly biased, his statements upon voir dire [about his ability to be impartial] are totally irrelevant." *Id*. (quotation omitted). *State v. Sharrow*, 183 Vt. 306, 314- 15, 949 A.2d 428 (2008).

Virginia

Although we disfavor per se disqualification of a juror by reason of his status alone, we have effectively established per se disqualification by limited categories in *Cantrell v. Crews*, 259 Va. 47 at 49, 523 S.E.2d

502 at 503, and *City of Virginia Beach v. Giant Square Shopping Ctr. Co.*, 255 Va. 467, 470-71, 498 S.E.2d 917, 918-19 (1998), when the veniremen at issue were current clients of counsel for a party to the proceedings in each case. See also *Medici v. Commonwealth*, 260 Va. 223, 226-27, 532 S.E.2d 28, 30-31 (2000). We did the same in *Barrett v. Commonwealth*, 262 Va. 823, 826-27, 553 S.E.2d 731, 732, when a juror's brother would appear as a witness to a crime scene in his capacity as a police officer. In each of these cases, the seating of the juror in question was found to be erroneous because the status these jurors occupied in relation to counsel or the parties in each case, would so likely erode the citizenry's confidence in the fairness of the judicial system that a new trial was required. *Townsend v. Commonwealth*, 270 Va. 325, 330-31, 619 S.E.2d 71, 74-75 (2005).

Although this Court generally disfavors per se rules of juror disqualification "by reason of [the juror's] status alone," we have nevertheless established "limited categories" of per se disqualification. *Townsend*, 270 Va. at 331, 619 S.E.2d at 74 (citing examples of per se disqualification). One such category establishes "[t]hat a stockholder in a company which is party to a lawsuit is incompetent to sit as a juror" because such a person "could [not] be said to stand indifferent in the cause." *Salina*, 217 Va. at 93-94, 225 S.E.2d at 200-201; see *Breeden v Commonwealth*, 217 Va. 297, 298, 227 S.E.2d 734, 735 (1976) (explaining *Salina*); accord *Gladhill v. General Motors Corp*., 743 F.2d 1049, 1050 (4th Cir. 1984) ("'That a stockholder in a company which is party to a lawsuit is incompetent to sit as a juror is so well settled as to be black letter law.'") (quoting *Chestnut v. Ford Motor Co*., 445 F.2d 967, 971 (4th Cir. 1971)); *Getter v. Wal- Mart Stores, Inc.*, 66 F.3d 1119, 1122 (10th Cir. 1995) (a trial court must presume bias when a prospective juror is a stockholder in a corporation that is a party to the action). And, it is immaterial whether a juror, who directly owns stock in a company that is a party to the lawsuit, is called to sit in a civil or criminal case; the per se disqualification remains. *Roberts v. CSX Transportation, Inc*., 279 Va. 111, 116-17, 688 S.E.2d 178, 181 (2010).

West Virginia

When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror. *State v. Cowley*, 223 W. Va. 183, 189, 672 S.E.2d 319, 325 (2008).

In fact, the relationship of Juror W with the hospital was fairly close. Leaving aside the normal associational ties of a person with their

spouse's employer, Juror W's earning power, household income, and family welfare was directly and specifically dependent in part on one of the parties to the lawsuit. Moreover, the juror's spouse worked at the specific physical location where the alleged acts of negligence occurred, and in the same job classification as the individual hospital employee who is alleged to have been negligent. As the cases cited *supra* indicate, such a prospective juror has regularly been held by a wide variety of courts under settled principles of law to be disqualified from service -- precisely because of a close relationship to one of the parties. *Mikesinovich v. Reynolds Memorial Hospital, Inc.*, 220 W. Va. 210, 212-14, 640 S.E.2d 560, 562-64 (2006).

Federal Circuit Court Cases by Circuit Governing Implied Juror Bias

United States Circuit Court for the Federal Circuit

We conclude that the district court should have dismissed Juror No. 3 for implied bias. Juror No. 3 had a financial interest in this case because her husband worked for Caterpillar at the time of the trial. As noted in *Polichemi*, even a tiny financial interest is enough to warrant dismissal. And it is legally irrelevant whether this financial interest arose due to his employment in management or under a union contract. *Caterpillar Inc. v. Sturman Industries*, 387 F.3d 1358, 1372 (Fed. Cir. 2004).

United States Court of Appeals for the 2nd Circuit

Implied bias does not depend on "determinations of demeanor and credibility," but rather is bias presumed as a matter of law. *See United States v. Torres*, 128 F.3d 38, 45 (2d Cir. 1997) ("In contrast to the inquiry for actual bias, which focuses on whether the record at *voir dire* supports a finding that the juror was in fact partial, the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced.") *United States v. Greer*, 285 F.3d 158, 172 (2d Cir. 2000).

United States Court of Appeals for the 3rd Circuit

Because implied bias deals in categories prescribed by law, the question whether a juror's bias may be implied is a legal question, not a matter of discretion for the trial court. *Smith*, 455 U.S. at 222 n.* (O'Connor, J., concurring); *Burton v. Johnson*, 948 F.2d 1150, 1158-59 (10th Cir. 1991). The test focuses on "whether an average person in the position of the juror in controversy would be prejudiced." *Torres*, 128 F.3d at 45; *accord United States v. Mitchell, 568 F.3d 1147*, 1151 (9th Cir. 2009); *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1260- 61 (10th Cir. 1999), *abrogated on other grounds by United States v. Duncan*, 242 F.3d 940 (10th Cir. 2001). Courts look to the facts underlying the alleged bias to determine if they would create

in a juror an inherent risk of substantial emotional involvement. *United States v. Russell*, 595 F.3d 633, 641-42 (6th Cir. 2010); *Solis v. Cockrell*, 342 F.3d 392, 399 (5th Cir. 2003). A prospective juror's assessment of her own ability to remain impartial is irrelevant for the purposes of the test. *Torres*, 128 F.3d at 45. Because the right to an impartial jury is constitutive of the right to a fair trial, "[d]oubts regarding bias must be resolved against the juror." *United States v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000) [and cases quoted and cited internally]

United States Circuit Court for the 4th Circuit

Not surprisingly, each court of appeals to have addressed the issue agrees that the doctrine of implied bias remains, after *Smith*, a settled constitutional principle. As the Fifth Circuit observed, [w]hile the Supreme Court has oft-rejected application of the implied bias principle, . . . it has never rejected the principle itself." *Brooksv. Dretke*, 418 F.3d 430, 435 (5th Cir. 2005) (reversing death sentence due to presumption of bias where juror was charged during trial with weapons offense by district attorney's office which was prosecuting case). In these circumstances, we are constrained to agree with the observation of Judge Kozinski in *Dyer v. Calderon,*: Courts disagree (*e.g., Smith*) about when the doctrine applies, not whether it exists." 151 F.3d 970, 985 (9th Cir. 1998). Accordingly, the implied bias principle constitutes clearly established federal law as determined by the Supreme Court. *Conaway v. Polk*, 453 F.3d 567, 587-88 (4th Cir. 2006).

United States Court of Appeals for the 5th Circuit

Nothing in Smith rejects the doctrine of implied bias, as illustrated by Justice O'Connor's concurring opinion, and the full history of *Remmer* bears this out. *Brooks v. Dretke*, 444 F.3d 328, 330 (5th Cir. 2006) (citing *Remmer v. United States*, 347 U.S. 227 (5th Cir. 1954)).

United States Court of Appeals for the 6th Circuit

Although "there is no constitutional prohibition in jurors simply knowing the parties involved or having knowledge of the case," *McQueen v. Scroggy*, 99 F.3d 1302, 1320 (6th Cir. 1996), the relationships here were close and ongoing. The first juror admitted that he might not be a fair and impartial juror. We find the second juror's assessment that she could be fair and impartial untenable, in light of both the close relationship between the juror and the victim's family, and the fact that she knew the family's theory of the victim's death. A court's refusal to excuse a juror will not be upheld "simply because the court ultimately elicits from the prospective juror a promise that he will be fair and impartial . . . ." *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 156 (3rd Cir. 1995). *Wolfe v. Brigano*, 232 F.3d 499, 502 (6th Cir. 2000).

United States Circuit Court for the 7th Circuit

> We agree with the United States that government employment alone is not, and should not be, enough to trigger the rule under which an employee isdisqualified from serving as a juror in a case involving her employer. But one need not adopt such a broad rule to find a problem in this case. Here, Nape was a long-time employee of the very U.S. Attorney's Office that was conducting the prosecution. . . . . *United States v. Polichemi*, 219 F.3d 698, 704-05 (7th Cir. 2000).

United States Circuit Court for the 8th Circuit

> Implying bias, however, is limited to "extreme situations" in which "the relationship between a prospective juror and some aspect of the litigation . . . [makes it] highly unlikely that the average person could remain impartial in his deliberations." *Id*. (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988)). Examples of an "extreme situation" include when a "juror is a close relative of one of the participants in the trial or the criminal transaction." Id. at 792-93 (quoting *Smith v. Phillips*, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1981) (O'Connor, J., concurring)). We have relied on the examples from Justice O'Connor's concurrence when rejecting a claim of implied juror bias. See *id*. at 793; *United States v. Tucker*, 243 F.3d 499, 509 (8th Cir. 2001). *Manuel v. MDOW Insurance Co.*, 791 F.3d 838, 843-44 (8th Cir. 2015)

United States Court of Appeals for the 9th Circuit

> In sum, we have implied bias in those extreme situations "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances, or where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury, *Dyer,* 151 F.3d at 982. The standard is "essentially an objective one," *Gonzalez,* 214 F.3d at 1113, under which a juror may be presumed biased even though the juror himself believes or states that he can be impartial. *Dyer,* 151 F.3d at 982. Review is *de novo*, because implied bias is a mixed question of law and fact. *Gonzalez,* 214 F.3d at 1112. *Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007).

United States Court of Appeals for the 10th Circuit

> Courts have presumed bias in extraordinary situations where a prospective juror has had a *direct* financial interest in the trial's outcome. As examples of such extraordinary situations, we cited a case in which a prospective juror was a stockholder in or an employee of a corporation that was a party to the suit. *Id.* (citing *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1984); *Francone v. Southern Pac. Co.*, 145 F.2d 732 (5th Cir. 1944)). "In these situations, the relationship between the prospective juror and a

party to the lawsuit 'points so sharply to bias in [the] particular juror' that even the juror's own assertions of impartiality must be discounted in ruling on a challenge for cause." *Id.* (quoting *United States v. Nell*, 526 F.2d 1223, 1229 n.8 (5th Cir. 1976)).

The challenged prospective juror in this case, John Agin, disclosed during voir dire that he owned stock in defendant corporation and that his wife was then employed by defendant. The district court questioned Mr. Agin regarding his ability to be a fair and impartial juror in light of his connections to defendant. Mr. Agin responded that he had no doubt that he could be fair and impartial. When later questioned by plaintiff's counsel, Mr. Agin assured counsel that he could support a verdict against defendant if the evidence presented at trial warranted such a result. Nevertheless, when the district court refused to dismiss Mr. Agin for cause, plaintiff used a peremptory challenge to remove him from the jury.

Despite Mr. Agin's assurances of his impartiality, the district court abused its discretion by denying plaintiff's challenge for cause. Due to his stock ownership and his wife's employment, Mr. Agin's financial well-being was to some extent dependent upon defendant's. This is precisely the type of relationship that requires the district court to presume bias and dismiss the prospective juror for cause. . . . *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995).

United States Court of Appeals for the 11th Circuit

When a prospective juror reveals actual bias, or when bias is implied because the juror has some special relationship to a party (such as a familial or master- servant relationship), the court must dismiss the prospective juror for cause. *United States v. Rhodes*, 177 F.3d 963, 965, 12 Fla. L. Weekly Fed. C 923 (11th Cir. 1999)

No. 126507

IN THE SUPREME COURT OF ILLINOIS

THOMAS ITTERSAGEN,	)	On Petition for Leave to 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 – Respondents.	)	

NOTICE OF FILING OF THOMAS ITTERSAGEN'S PLAINTIFF-APPELLANT'S BRIEF

PLEASE TAKE NOTICE that on May 12, 2021, I electronically submitted Plaintiff-Appellant Thomas Ittersagen's PLAINTIFF- APPELLANT'S BRIEF to the Supreme Court Clerk through the Odyssey e-filing system. A copy of the PLAINTIFF- APPELLANT'S BRIEF and the documents annexed thereto is attached to this notice and served on you.

Respectfully submitted,

By: /s/ Carla Colaianni
One of Plaintiff's attorneys

Carla A. Colaianni
Law Office of Carla A. Colaianni 1841 N. Drake
Chicago, IL 60647
(312) 405-7027
carlacolaianni@yahoo.com

CERTIFICATE OF SERVICE

I, Carla A. Colaianni, an attorney, served the foregoing PLAINTIFF-APPELLANT'S BRIEF and the documents annexed thereto on the individuals listed below by emailing them on May 12, 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

/s/ Carla A. Colaianni Carla A. Colaianni

Carla A. Colaianni
Law Office of Carla A. Colaianni 1841 N. Drake
Chicago, IL 60647
(312) 405-7027
carlacolaianni@yahoo.com

SERVICE LIST

Attorneys for Defendants - Appellees
Robert L. Larsen
Cunningham, Meyer, Vedrine, PC 2400 Cantera Dr. Suite 112
Warrenville, IL 60555
rlarsen@cmvlaw.com