IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

GARY VEAL,	)	
	)	
Plaintiff/Respondent,	)	
	)	Appeal No. ED108179
vs.	)	
	)	
STACEY KELAM,	)	
	)	
Defendant/Appellant.	)	

Appeal from the Circuit Court of Jefferson County
Cause No. 17JE-CC00795
The Honorable Troy Cardona

BRIEF OF RESPONDENT GARY VEAL

Respectfully Submitted,

FINNEY INJURY LAW

/s/Christopher J. Finney
Christopher J. Finney, #62888
Alexander L. Ledbetter, #70194
1600 S. Brentwood Blvd, Suite 220
St. Louis, MO 63144
(314) 293-4222
F: (314) 754-9477
chris@finneyinjurylaw.com
alex@finneyinjurylaw.com

DONALD L. SCHLAPPRIZZI, P.C.

/s/ Craig Anthony Schlapprizzi
Craig Anthony Schlapprizzi, #62309
211 N. Broadway, Suite 2430
St. Louis, Missouri 63102
314-241-0763
314-241-0787 (fax)
craig@schlapprizzipc.com

Attorneys for Respondent Gary Veal

TABLE OF CONTENTS

TABLE OF AUTHORITIES……3

JURISDICTIONAL STATEMENT……..5

STATEMENT OF FACTS……5

POINTS RELIED ON……8

ARGUMENT……10

I. Defendant's Point Relied on I does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial. Defendant failed to preserve for appeal the claim of prejudice she now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections. The trial court's comments in voir dire did not demonstrate a bias in favor of Plaintiff's counsel. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not err in denying Defendant's motion for new trial.

II. Defendant's Point Relied on II does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial or motion for remittitur. The jury's award was not an honest mistake by the jury and represents fair and reasonable compensation for Veal. Defendant has failed to preserve for appeal the claim of error she now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections to the claim of error in Plaintiff's closing argument. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not error in denying Defendant's motion for new trial or motion for remittitur.

III. Defendant's Point Relied on III does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial or motion for remittitur. Defendant failed to preserve for appeal the claim of prejudice show now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections. Defendant failed to object during the jury instruction conference to Instruction No. 10 or suggest a modification to its language. The jury's award was not an honest mistake by the jury and represents fair and reasonable compensation for Veal. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not error in denying Defendant's motion for new trial or motion for remittitur.

CONCLUSION…….38

CERTIFICATE OF SERVICE…….39

CERTIFICATE OF COMPLIANCE……40

CERTIFICATION UNDER RULE 55.03(a)……41

TABLE OF AUTHORITIES

Cases

Badahman v. Catering St. Louis, 395 S.W.3d 29 (Mo. banc 2013)……19, 37

Belter v. Crouch Brothers, Inc., 554 S.W.2d 562 (Mo. Ct. App. 1977)……..…..34

Blanks v. Fluor Corp., 450 S.W.3d 308 (Mo. Ct. App. E.D. 2014)……18, 19, 32, 37

Chapman v. St. Louis County Bank, 649 S.W.2d 920 (Mo. Ct. App. E.D. 1983)…….11

Cohen v. Express Financial Services, Inc., 145 S.W.3d 857 (Mo. Ct. App. W.D. 2004)……..14

Connour v. Burlington Northern R. Co., 889 S.W.2d 138 (Mo. Ct. App. W.D. 1994)….12

Cundiff v. Cline, 752 S.W.2d 409 (Mo. Ct. App. S.D. 1988)……....15

Echard v. Barnes-Jewish Hosp., 98 S.W.3d 558 (Mo. Ct. App. E.D. 2002)…….11, 18, 32

Eickmann v. St. Louis Public Service Company, 323 S.W.2d 802 (Mo. 1959)……26-27

Glasscock v. Miller, 720 S.W.2d 771 (Mo. Ct. App. 1986)……..25

Houfburg v. Kansas City Stock Yards Co. of Maine, 283 S.W.2d 539 (Mo. 1955)……...29

In re Care and Treatment of Donaldson, 214 S.W.3d 331 (Mo. banc 2007)……11

In re Marriage of Farris, 485 S.W.3d 827 (Mo. Ct. App. S.D. 2016)……14, 15

Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752 (Mo. banc 2010)……...12, 25

Matter of Crist, 732 S.W.2d 587 (Mo. Ct. App. E.D. 1987)…….....15

MB Town Ctr., LP v. Clayton Forsyth Foods, Inc., 364 S.W.3d 595 (Mo. Ct. App. E.D. 2012)……13, 26

Payne v. Fiesta Corp., 543 S.W.3d 109 (Mo. Ct. App. E.D. 2018)……...…….19, 37

Payton v. Union Pacific R. Co., 405 S.W.3d 1 (Mo. Ct. App. E.D. 2013)……12, 25, 33

Peterson v. Progressive Contractors, Inc. 399 S.W.3d 850 (Mo. Ct. App. W.D. 2013)..30

Schieffer v. DeCleene, 539 S.W.3d 798 (Mo. Ct. App. E.D. 2017)…….35, 36

State ex rel. Missouri Highway and Transp. Com'n v. Jim Lynch Toyota, Inc., 830 S.W.2d 481 (Mo Ct. App. E.D. 1992)……...33

State v. White, 247 S.W.3d 557 (Mo. Ct. App. E.D. 2007)…….13, 26

Stephenson v. Countryside Townhomes, LLC., 437 S.W.3d 380 (Mo. Ct. App. E.D. 2014)……..11, 18, 32

Stewart v. Partamian, 465 S.W.3d 51 (Mo. banc 2015)……..19, 37

Taylor v. Cleveland, C.C. & St. L. Ry. Co., 63 S.W.2d 69, 75 (Mo. 1933)……...30

Williams v. Mercy Clinic Springfield Communities, 568 S.W.3d 396 (Mo. banc 2019)……..13, 14, 26

Missouri Rules of Civil Procedure

Rule 70.03……..33

Rule 84.13……13, 26

BRIEF OF PLAINTIFF-RESPONDENT GARY VEAL

JURISDICTIONAL STATEMENT

Plaintiff-Respondent Gary Veal ("Plaintiff" or "Veal" accepts Defendant-Appellant's ("Defendant" or "Kelam") Jurisdictional Statement.

STATEMENT OF FACTS

Kelam's Statement of Facts does not constitute a fair and concise statement of facts relevant to the issues presented for determination, as required by Rule 84.04(c). Accordingly, Veal sets forth additional facts below.[1]

Plaintiff-Respondent Gary Veal is self-employed auto mechanic and a business owner of nearly twenty-four (24) years. (T: 165) On October 25, 2016 at 6:20 in the evening, Veal was traveling home from work, northbound on Jeffco Boulevard. (LF #2) Traffic on Jeffco Boulevard was substantial according to an eyewitness, Dennis Warren, who was traveling behind Veal's vehicle headed in the same direction. (LF #34: 3) Dennis Warren testified that he saw a red car, out of nowhere, come out from the right side across the northbound lanes and be "t-boned" by Veal's vehicle. (LF #34: 3) Kelam, who was leaving a McDonald's, was driving that red car that pulled out in front of Veal's vehicle to go southbound. (T: 249) Veal struck the driver's side of Kelam's vehicle. (T:

[1] References to the Legal File will use the abbreviation "LF" with the symbol "#" to designate the document number followed by a colon and page number, if applicable. References to the transcript at trial will use the abbreviation "Tr.," followed by the page number.

249) As a direct result of the crash, Veal sustained an injury to his cervical spine, requiring future surgery, an injury to his shoulder, requiring future surgery, and an injury to his wrist, requiring future surgery. (LF #2) Veal's damages included inconvenience, the loss of enjoyment of life, restricted mobility, isolation, anxiety, emotional distress, pain, suffering, numerous doctor appointments, invasive tests and procedures. (LF #2) Veal did not plead nor seek damages from Kelam for his medical bills. (LF #2)

The crash caused significant disruption to Veal's daily life. (T: 166). After the crash, Veal's mechanic work became difficult, taking him more time to complete tasks related to his job due to his injuries. (T: 166) Veal's sleep and interactions with his grandchildren were effected. (T:166) Veal was struggling to keep his business open after the crash. (LF# 24: 7, L: 15-18) Friends and customers of Veal's mechanic shop testified. Will Jernigan told the jury that after the crash Veal was in constant pain with his arms and neck. (T: 212) Veal would have to call Dean Costephens and Lonnie Tilley to assist him with his mechanic work. (T: 215, T: 218) Lynn Mahn, a customer, testified that after the crash Veal would have to turn away work that he could have handled before the crash. (T: 221-22)

Veal proffered testimony of four treating physicians, Dr. Alan Sandidge, Dr. Richard Howard, Dr. Dennis Dusek, and Dr. Kevin Rutz. Dr. Alan Sandidge, the primary care physician for Veal, testified that the pain in Veal's wrist had become worse since the crash with more swelling and a more limited range of motion. (LF #30, 4) Dr. Richard Howard, a hand and upper extremity specialist, testified that even with pre-existing arthritis in Veal's wrist, the traumatic event of the car crash exacerbated Veal's injury.

(LF #24, 3) Dr. Howard recommended a partial fusion surgery of Veal's wrist. (LF #24, 3) Dr. Dennis Dusek, an orthopedic surgeon, testified regarding Veal's shoulder injury, specifically a rotator cuff tear, on his dominant right side. (LF #26) The injury to Veal's shoulder is permanent. (LF #26: 14) Veal tried two cortisone injections for his shoulder, each were ineffectual. (LF #26: 10) To alleviate pain, arthroscopic surgery was recommended. (LF #26: 11) Veal was apprehensive to get the surgery because the post-operation recovery period would effect his ability to work as a self-employed mechanic. (LF #26: 13) Then, Dr. Kevin Rutz, a spinal orthopedic surgeon, testified regarding Veal's neck injury. (LF #28) Dr. Rutz testified that Veal had degenerative disc disease present before the crash, but was not symptomatic (LF #28: 4) After the crash, Veal had pain symptoms in his neck and down his right extremity. (LF #28: 1) Dr. Rutz testified that the mechanism of injury to be the car crash. (LF #28: 2) Veal underwent a CT myelogram and thereafter Dr. Rutz recommended a discectomy and fusion surgery at three levels in Veal's cervical spine. (LF#28: 8) The surgery would require Veal to stay overnight in a hospital. (LF#28: 12)

Kelam offered the testimony of Dr. Rhoderic Mirkin who conducted an independent medical examination, conducting several tests on Veal. Dr. Mirkin was selected by Kelam's trial lawyer. (LF #60: 1) Dr. Mirkin has been deposed one hundred and ninety-seven times, was paid by Kelam's trial lawyer's office, and has worked with Kelam's trial lawyer in the past. (LF #60: 1) Dr. Mirkin has completed thousands of medical examinations. (LF #60: 3) Dr. Mirkin's medical-legal income total half million dollars in fees each year. (LF #60: 3) According to Dr. Mirkin's review of Veal's medical

records, Veal was immediately symptomatic post-crash. (LF# 60: 8) Dr. Mirkin was not critical of Dr. Rutz's recommendation nor anyone else's care recommendation for Veal. (LF #60: 9) Dr. Mirkin believed Veal's injuries were caused by pre-existing arthritis. (LF# 60: 8) Prior to trial Defendant's medical expert Mitchel B. Rotman, MD, was stricken as an expert.[2] (LF# 70)

At the conclusion of trial, the jury returned a verdict in favor of Veal. The jury assessed fault at one-hundred percent to Kelam and zero percent to Veal. The total amount of damages were assessed at two-million five-hundred thousand. (LF #75)

POINTS RELIED ON

I. Defendant's Point Relied on I does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial. Defendant failed to preserve for appeal the claim of prejudice she now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections. The trial court's comments in voir dire did not demonstrate a bias in favor of Plaintiff's counsel. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not err in denying Defendant's motion for new trial.

In re Marriage of Farris, 485 S.W.3d 827 (Mo. Ct. App. S.D. 2016)

[2] Defendant's medical expert Mitchell B. Rotman, MD was designated to testify about Veal's wrist and shoulder injury.

MB Town Ctr., LP v. Clayton Forsyth Foods, Inc., 364 S.W.3d 595 (Mo. Ct. App. E.D. 2012)

Payton v. Union Pacific R. Co., 405 S.W.3d 1 (Mo. Ct. App. E.D. 2013)

II. Defendant's Point Relied on II does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial or motion for remittitur. The jury's award was not an honest mistake by the jury and represents fair and reasonable compensation for Veal. Defendant has failed to preserve for appeal the claim of error she now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections to the claim of error in Plaintiff's closing argument. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not error in denying Defendant's motion for new trial or motion for remittitur.

Blanks v. Fluor Corp., 450 S.W.3d 308 (Mo. Ct. App. E.D. 2014)

Eickmann v. St. Louis Public Service Company, 323 S.W.2d 802 (Mo. 1959)

Payne v. Fiesta Corp., 543 S.W.3d 109 (Mo. Ct. App. E.D. 2018)

Peterson v. Progressive Contractors, Inc. 399 S.W.3d 850 (Mo. Ct. App. W.D. 2013)

III. Defendant's Point Relied on III does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial or motion for remittitur. Defendant failed to preserve for appeal the claim of prejudice show now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections. Defendant failed to object during the jury instruction conference to Instruction No. 10 or suggest a modification to its language. The

jury's award was not an honest mistake by the jury and represents fair and reasonable compensation for Veal. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not error in denying Defendant's motion for new trial or motion for remittitur.

Blanks v. Fluor Corp., 450 S.W.3d 308 (Mo. Ct. App. E.D. 2014)

Schieffer v. DeCleene, 539 S.W.3d 798 (Mo. Ct. App. E.D. 2017)

Stewart v. Partamian, 465 S.W.3d 51 (Mo. banc 2015)

ARGUMENT

I. Defendant's Point Relied on I does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial. Defendant failed to preserve for appeal the claim of prejudice she now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections. The trial court's comments in voir dire did not demonstrate a bias in favor of Plaintiff's counsel. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not err in denying Defendant's motion for new trial.

A. Introduction

Fundamental to the preservation of trial court error for appellate review is a timely and proper objection. Defendant's allegation of error in her Point Relied on I, with relation to the trial court's participation in voir dire is without merit. Defendant failed to make any objection at trial to the claimed references of bias or prejudice. Any claims of error as to these alleged prejudicial comments demonstrating a bias in favor of Plaintiff's

counsel have been waived and have not been preserved for appeal. Moreover, the trial court did not demonstrate a prejudicial bias in favor of Plaintiff's counsel and maintained an impartial attitude and neutrality for both Veal and Kelam.

Point Relied on I of the Defendant does not specify any action or inaction by the trial court other than the trial court's denial of her motion for new trial. Absent objection at trial, Defendant's claim of error has substantively not been preserved for appellate review.

B. Standard of Review

A denial of a motion for new trial is reviewable on appeal based on an abuse of discretion standard. *Echard v. Barnes-Jewish Hosp*., 98 S.W.3d 558, 567 (Mo. Ct. App. E.D. 2002). "An abuse of discretion occurs only when the trial court's ruling is clearly against the logic of the circumstances and so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful consideration." *Stephenson v. Countryside Townhomes, LLC*., 437 S.W.3d 380, 390 (Mo. Ct. App. E.D. 2014). Review of a trial court's discretion does not hinge on whether the appellate court would exercise discretion in the same way but whether the trial court abused its discretion. *Chapman v. St. Louis County Bank*, 649 S.W.2d 920, 922 (Mo. Ct. App. E.D. 1983). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *In re Care and Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. banc 2007).

C. Failure to preserve claimed error by failure to object at trial

The Defendant's failure to preserve the claimed error in her Point Relied on I in that the Defendant failed to object at trial. "If a party fails to raise an objection concerning an issue at trial, that issue is not preserved for appeal…An objection to evidence must be made at trial, and on appeal the party must base its claim of error on the same grounds raised in its trial objection." *Payton v. Union Pacific R. Co.*, 405 S.W.3d 1, 7 (Mo. Ct. App. E.D. 2013). Here, the Defendant failed to preserve her allegation of error regarding the complained-of trial issues in voir dire. Kelam's failure to do so is fatal to her claim of error. Kelam, in her argument, seeks to convince this Court that it was not fair, practical, or realistic to object to the complained of prejudice during voir dire. This argument is without basis or support in existing Missouri law. The law offers no consideration to the practicality or fairness of the timing of an objection. Instead, objections must be timely and specific. *Connour v. Burlington Northern R. Co.*, 889 S.W.2d 138, 141 (Mo. Ct. App. W.D. 1994). When evidence is "admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may be properly considered even if the evidence would have been excluded upon a proper objection." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010). As such, Defendant's Point Relied on I is not properly preserved for appellate review.

D. Defendant's claim of error regarding the trial court's comments, discussion, and an alleged bias with Plaintiff's counsel fails to qualify under a plain error standard of review should this Court grant plain error review of Defendant's Point Relied On I

It is undisputed that Defendant never objected to the trial court's comments and discussions with Plaintiff's counsel during voir dire. Defendant seeks to convince this Court to exercise its discretion under plain error review. Because the Defendant did not properly preserve her point, it is subject to, at most, plain error review under Missouri Rule of Civil Procedure 84.13(c). "Unpreserved points are subject to, at most, plain error review." *MB Town Ctr., LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 602 (Mo. Ct. App. E.D. 2012). "Plain error review should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review." *State v. White*, 247 S.W.3d 557, 561 (Mo. Ct. App. E.D. 2007). "Plain error review is rarely granted in civil cases." *MB Town Ctr., LP*, 364 S.W.3d at 602. And should be limited to cases where "the injustice must be so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case." *Williams v. Mercy Clinic Springfield Communities*, 568 S.W.3d 396, 412 (Mo. banc 2019).

Rule 84.13(c) provides, in relevant part, "plain errors may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom." Mo. R. Civ. P. 84.13(c). In considering whether to exercise its discretion in applying plain error review, an appellate court considers whether substantial grounds exist for believing that the trial court committed an error that is evident, obvious, and clear and where the error resulted in manifest injustice or a miscarriage of justice. *Williams v. Mercy Clinic Springfield*

Communities, 568 S.W.3d at 412. A two-step approach is taken as outlined in *Cohen v. Express Financial Services, Inc.*:

> "First, the court must determine whether the trial court actually committed evident, obvious and clear error that affected substantial rights. However, as in the case of regular appellate review, not every obvious, evident and clear error found in plain error review requires reversal. In the case of regular review, to be reversible, the error found must have prejudiced the appellant. Likewise, in the case of plain error review, the error must have prejudiced the appellant, except that such prejudice must constitute manifest injustice or miscarriage of justice. Thus, in the second step of reviewing for plain error, the court must determine whether evident, obvious, and clear error found resulted in manifest injustice or a miscarriage of justice. 145 S.W.3d 857, 864 (Mo. Ct. App. W.D. 2004).

Here, Defendant argues that the trial court's participation in voir dire and the court's denial of her motion for new trial are evident, obvious, and clear errors that resulted in manifest injustice to the Defendant. Defendant claims that the trial court gave the impression to the jury that it was working with the Plaintiff to choose the jury and favored Plaintiff's counsel. Defendant's argument and case law to support are misguided. First, *In re Marriage of Farris*, was a dissolution of marriage action, which is a matter tried before a judge only and without a jury. 485 S.W.3d 827 (Mo. Ct. App. S.D. 2016). There the court of appeals found prejudice because the record showed that the trial court made direct comments adverse to a party: "Husband was wasting everyone's time," "the trial court did not care about particular evidence," and "I have got all the evidence I need

and all you're doing is, as you have done all day, is beat a dead horse." *Id*. At 832. Second, Defendant directs this Court to *Matter of Crist*, a case involving the appointment of a guardian and conservator, which is a matter tried before a judge only and without a jury. 732 S.W.2d 587 (Mo. Ct. App. E.D. 1987). There, reversal was warranted because in the middle of the petitioner's direct examination testimony summarily stopped the hearing and made a ruling on the case, "I'm ready to rule on the case. I've heard enough." *Id.* At 589. Third, in *Cundiff v. Cline*, another court-tried case, involved a misrepresentation in a real-estate purchase, was reversed on grounds other than trial court participation or comments in the trial. 752 S.W.2d 409 (Mo. Ct. App. S.D. 1988)(where there was error in the declarations and conclusions in the court's judgment regarding a mutual mistake of fact in contract). The court of appeals in dicta mentioned the trial court's conduct in the record, without providing quotes from the transcript of the trial court's comments. *Id.* At 412. As such, there is no factual comparison to make to the case at bar from *Cundiff*. The court-tried cases cited by Defendant, *supra*, are inapposite to the jury-tried case here.

The transcript demonstrates the opposite of Defendant's argument, exhibiting a fair and impartial tribunal during the entire jury selection process. "The trial judge's comments must also be considered in the context of all the judge's statements and the circumstances surrounding such statements." *In re Marriage of Farris,* 485 S.W.3d at 831. When reviewing the voir dire transcript as a whole, the trial court extended endearment to Defendant's counsel before his jury selection started exhibiting a level of comfortability with Mr. Clark. The trial court referred to Defendant's counsel as "Clark

Kent."[3] (Tr. 88: 10-12). Then, during his own colloquy about objections in the trial procedure with the venire panel, Defendant's counsel, refers to himself as "Clark Kent." (Tr. 118: 19). Next, the trial court, too, assisted Defendant's counsel in asking questions of the venirepersons and could have also given the jury the impression that the trial court and the lawyers, at this point only Defendant's counsel, were working together. As example, when an unidentified venireperson anticipated Mr. Clark's follow-up questions regarding experience in the medical field, the Court chimed in stating: "I like this lady." (Tr. 114: 7). Mr. Clark followed with "I do too." (Tr. 114: 8). This gives the appearance to the jury panel that Mr. Clark and the court are picking the jury together. Later, Mr. Clark was examining venirepersons as to whether a potential juror would take issue with being on the jury with someone he or she knew prior:

> The Court: …Do you know anybody of the jurors?
>
> Mr. Clark: Right.
>
> The Court: So this is an important question.
>
> Mr. Clark: The reason why we ask it - - the reason why I ask if you know jurors is because so we're going to pick twelve people to be on a jury. If two of them already know each other, they're more likely to - - maybe they're not, but they're more likely to go and rule the same way because they have familiarity. So they may be more in control of the jury. That's why we ask the question not to get into your personal lives.

[3] "Clark Kent" – The secret alter-ego identity of the comic book character, Superman.

The Court: Or just the opposite. They may be diametrically opposed to each other and they know that. And so it might not be good to have them on the jury. (Tr. 125: 8-22)

Because Defendant has not and cannot demonstrate any evident, obvious, and clear error, or that any error resulted in prejudice amounting to a miscarriage of justice, this Court should decline to exercise its discretion to grant plain error review for Defendant's first point. Defendant's Point Relied on I should be denied.

II. Defendant's Point Relied on II does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial or motion for remittitur. The jury's award was not an honest mistake by the jury and represents fair and reasonable compensation for Veal. Defendant has failed to preserve for appeal the claim of error she now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections to the claim of error in Plaintiff's closing argument. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not error in denying Defendant's motion for new trial or motion for remittitur.

A. Introduction

Defendant's Point Relied on II does not specify any action or inaction by the trial court other than the trial court's denial of her motion for new trial and denial of her motion for remittitur. With respect to her denial of motion new trial claim of error for the alleged inflammatory statements by Plaintiff's counsel during closing argument, Defendant failed to make any objection at trial, and therefore, such claim or error has not

been preserved for appellate review. Moreover, Defendant's claim of error fails to justify manifest injustice under a plain error standard of review. The trial court properly denied Defendant's motion for new trial.

With respect to Defendant's claim of error for the trial court's denial of her motion for remittitur, such claim is without merit. Juries have unfettered discretion in reaching their decision and the primary responsibility of determining Plaintiff's damages. The jury's damage award represents fair, just compensation and is supported by substantial evidence. The trial court was in a far greater position than this Court to assess the jury's verdict and thus properly denied Defendant's motion for remittitur.

B. Standard of Review

A denial of a motion for new trial is reviewable on appeal based on an abuse of discretion standard. *Echard v. Barnes-Jewish Hosp*., 98 S.W.3d at 567. "An abuse of discretion occurs only when the trial court's ruling is clearly against the logic of the circumstances and so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful consideration." *Stephenson v. Countryside Townhomes, LLC*., 437 S.W.3d at 390.

A denial of a motion for remittitur is reviewable on appeal based on an abuse of discretion standard. *See e.g. Blanks v. Fluor Corp*., 450 S.W.3d 308, 407-8 (Mo. Ct. App. E.D. 2014). "The trial court enjoys broad discretion in deciding whether remittitur should be ordered." *Id*. at 408. An appellate court, "will interfere only when the verdict is so grossly excessive that it shocks the conscience of the court and convinces us that both the trial judge and the jury have abused their discretion." *Id*. Furthermore, the appellate court

"should exercise power to interfere with the judgment of the jury and the trial court with hesitation and only when the verdict is manifestly unjust." *Id*.

C. The trial court properly denied Defendant's Motion for Remittitur because the judgment is supported by substantial evidence

On review of a denial of a motion for remittitur, this Court is to "consider the evidence in the light most favorable to the trial court's order." *Blanks v. Fluor Corp*., 450 S.W.3d at 408 *citing Badahman v. Catering St. Louis,* 395 S.W.3d 29, 39 (Mo. banc 2013). For this case, the Court is to "consider the evidence in the light most favorable to the verdict…And disregard any contrary evidence." *Id*. Furthermore, review on appeal of a jury verdict starts with the "recognition that the jury retains virtually unfettered discretion in reaching its decision because there is a large range between the damage extremes of inadequacy and excessiveness." *Stewart v. Partamian*, 465 S.W.3d 51, 57 (Mo. banc 2015). Two general types of excessive verdicts: (1) verdict that is disproportionate to the evidence of injury and results from an honest mistake by the jury in assessing damages, and (2) an excessive verdict due to error at trial causing bias and prejudice by the jury. *Id.* at 56. The amount of the verdict does not by itself establish bias or passion and prejudice without a showing of some other error occurring during the trial. *Id*. The jury has the ability to also consider "intangible or non-economic damages, such as past and future pain, suffering, effect on life-style, embarrassment, humiliation, and economic loss." *Payne v. Fiesta Corp*., 543 S.W.3d 109, 131 (Mo. Ct. App. E.D. 2018).

The evidence adduced at trial, taken in the light most favorable to the verdict, establishes that there was substantial evidence to support the jury's assessment of

Plaintiff's damages. Veal sustained permanent and painful injury to multiple parts of the body. Veal's injuries all had surgical implications and recommendations from his treating physicians. The injuries are permanent. Veal's injuries as a direct result of the crash with Kelam caused significant disruption on his daily life. Veal's damages are unique to him. This case to Veal was about past and future pain, suffering, past and future surgery, effect on lifestyle, embarrassment, humiliation, loss of enjoyment of life, and loss of function. (LF #2). Substantial medical evidence supports it. The evidence showed that:

- He could no longer pick up his grandchildren. (Tr. 166) His work as a self-employed auto-mechanic became far more difficult since this crash. (Tr. 165) Sleeping became difficult after the crash. (Tr. 166) Veal had to employ the use of friends to lend a helping hand to make sure his business was still operational when a mechanic task proved too difficult or too painful from Veal's injuries. (Tr. 212-3, 215) Prior to the crash, Veal was always helping those in need with their car's mechanic needs. (Tr. 212)
- Will Jernigan, a friend and customer of Veal testified about Veal being in constant pain with his arms and neck. (Tr. 212)
- Dean Costephens, who has known Veal for thirty years, testified that he interacted with Veal before and after the crash. (Tr. 215) He would help Veal around the shop because there were certain mechanic tasks that Veal had a lot of problems doing since the crash. (Tr. 215)
- Lonnie Tilly, a friend of Veal, who Veal met through church, testified about how he had to help Veal out around the mechanic shop after the crash. Lonnie never

had to help Veal before the crash. (Tr. 218) Anything that was heavy, Veal would need help. (Tr. 218, L:18-21)

- Lynn Mahn, a customer of Veal's repair shop, testified that Veal had to turn away work since the crash. (Tr. 221-222)
- Veal was taken by EMS to the Emergency Department and administered fentanyl twice while in route to the hospital for his pain. (LF #90)
- Veal's primary care physician, Alan Sandidge, MD, testified that the crash exacerbated the pain in Veal's wrist. Prior to the crash, pain in Veal's wrist did not cause him to issues with work. (LF #30: 3)
- In December of 2016, Veal saw Dennis Dusek, MD, for his shoulder. Veal, normally would sleep on his right side. Pain in his right shoulder kept Veal from sleeping in a bed. He had to resort to sleeping in a recliner. Pain in his shoulder would worsen when he raised his arm. (LF #26: 3) Veal could not reach full normal flexion of one-hundred-ten degrees, but only ninety degrees. (LF #26: 4) As a result, Veal underwent an MRI.
- In January of 2017 Veal was diagnosed with a broad-based shallow partial thickness bursal surface tear in the distal supraspinatus, distal subscapularis tendinopathy with a partial thickness tear and a nondisplaced tear of the posterior glenoid labrum. (LF #91) These injuries are commonly known as a "rotator cuff" injury.

- An injection was recommended to attempt to alleviate pain, however, if the pain persisted arthroscopic surgery would be required. (LF #91)
- At a follow-up appointment with Dr. Dusek in 2018, Veal reported relief from the cortisone injection, but only for a few days. (LF #26: 9). Veal had not seen Dr. Dusek in an approximately one-year and a half because he sought the second opinion of his shoulder from Dr. Solman.[4] (LF #26: 9) Dr. Dusek, once again, performed an physical examination and testing of Veal's shoulder confirming the same injury and diagnoses from his visit in December of 2016. (LF #26: 10) Veal had another injection. The relief lasted for a few days. (LF #26: 10)
- Dr. Dusek recommended arthroscopic surgery, if Veal could find the means to take time from work. (LF #26: 11) This surgery would require general anesthesia. Once the arthroscopic surgery began, Dr. Dusek could assess the full severity of the ligament tear. A tear greater than fifty percent would require repair by tacking the ligament down, but a tear less than fifty percent would not require repair. Either way the bursa would be cleaned to improve Veal's symptoms. (LF #26: 11-12)
- Dr. Dusek testified that this surgery, should Veal elect it, would require many months of therapy. Veal was apprehensive as he is a self-employed auto-mechanic

[4] Dr. Solman's testimony was not offered at trial by either Plaintiff or Defendant and thus is not contained in the record on appeal.

and would be hard-pressed to put himself out of work. (LF #26: 13) Veal's injury in his shoulder is permanent. (LF #26: 14)

- In May of 2017 Veal saw Richard Howard, MD, for his wrist injury. Physical examination of Veal's wrist indicated a very limited range of motion of his thumb and swelling. (LF# 24: 3) Normal extension of the wrist is seventy degrees while Veal could only extend forty-five degrees (LF #24: 3) X-rays revealed a scapholunate collapse, an injury caused by violent extension of the wrist. (LF #24: 4)
- Dr. Howard testified that arthritis in Veal's wrist was asymptomatic, Veal was symptom-free, and trauma exacerbated Veal's wrist condition. (LF #24: 5)
- Veal underwent a partial fusion of his wrist where Dr. Howard utilized buried screws in the bone to fuse the bones together. (LF #24: 6) The surgery allowed Veal to get back to work but would not make him normal. (LF #24: 6, L:13-17)
- In April of 2017, Veal saw Kevin Rutz, MD, an orthopedic spine surgeon for his neck pain with radiation into his right extremity. (LF #28: 1) Veal had no issues with his neck or arms prior. Veal had degenerative changes in his neck, namely arthritis in the joints. (LF #28: 4) However, these changes were not symptomatic.
- Dr. Rutz recommended and Veal underwent C5 and C6 nerve blocks. This procedure involved use of a needle in Veal's back and the injection of local anesthetic and steroids in the nerve cavities. However, the nerve block was not successful as Veal remained symptomatic. (LF #28: 7)

- As a result, Dr. Rutz recommended a C4, C5, C6, C7 anterior cervical discectomy and fusion. (LF #28: 8) This surgery requires an incision on the front of the neck, use tools to stretch out the vertebrae for room, cut out the cervical discs, cut out any bone spur that is causing nerves to be pinched, install a fusion cage/metal plate, and install screws at each vertebrae. (LF# 28: 9-11) The surgery would require an overnight stay in the hospital. (LF# 28: 12)
- Dr. Rutz testified that the crash is what caused the need for the recommended surgery. (LF #28: 12)

Because substantial evidence supports the verdict in this case, when viewing the evidence in the light most favorable to the verdict, this Court should not disturb the jury's "virtually unfettered" discretion in rendering its verdict. Defendant's Point Relied on II should be denied.

D. Defendant's claim of error with reference to Plaintiff's closing argument is not preserved for appellate review and fails to qualify as plain error should this Court exercise its discretion under a plain error standard of review

In Defendant's Point Relied on II, she complains that Plaintiff's closing argument was designed to persuade the jury that Veal was the victim of a system and a highly paid expert, Dr. Rhoderic Mirkin. The aspects of Plaintiff's closing argument are not preserved in that the Defendant failed to object at trial. Defendant acknowledges she did

not object.[5] "If a party fails to raise an objection concerning an issue at trial, that issue is not preserved for appeal…An objection to evidence must be made at trial, and on appeal the party must base its claim of error on the same grounds raids in its trial objection." *Payton v. Union Pacific R. Co.*, 405 S.W.3d at 7. Here, the Defendant failed to preserve her allegation of error regarding the complained-of trial issues in Plaintiff's closing argument. Kelam's failure to do so is fatal to her claim of error. When evidence is "admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may be properly considered even if the evidence would have been excluded upon a proper objection." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d at 766. Failure to properly object to an argument at the time it is made to the jury results in waiver of any right to complain of the argument on in a waiver of any right to complain of the argument on appeal, even if the point is preserved in an after trial motion. *Glasscock v. Miller*, 720 S.W.2d 771, 777 (Mo. Ct. App. 1986). If the objection is not timely, the trial court has no opportunity to take corrective action at the time the remarks were made. *Id*. As such, Defendant's Point Relied on II, the argument regarding Plaintiff's closing argument is not properly preserved for appellate review.

[5] First, during the hearing for Defendant's motion for new trial: "There's no objection to the closing argument. And if we go to the Court of Appeals, quite honestly, they're going look at us and say, Well, where is the objection? What have you preserved for this court…" (Post Trial Tr. 20: 12-16). Second, in Appellant's Brief. (26)

Acknowledging that she did not object at trial to Plaintiff's closing argument, Defendant seeks to convince this Court to grant her plain error review. "Unpreserved points are subject to, at most, plain error review." *MB Town Ctr., LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d at 602. "Plain error review should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review." *State v. White*, 247 S.W.3d at 561. "Plain error review is rarely granted in civil cases." *MB Town Ctr., LP*, 364 S.W.3d at 602. And should be limited to cases where "the injustice must be so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case." *Williams v. Mercy Clinic Springfield Communities*, 568 S.W.3d at 412. Rule 84.13(c) provides, in relevant part, "plain errors may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom." Mo. R. Civ. P. 84.13(c). An appellate court considers whether substantial grounds exist for believing that the trial court committed an error that is evident, obvious, and clear and where the error resulted in manifest injustice or a miscarriage of justice. *Williams v. Mercy Clinic Springfield Communities*, 568 S.W.3d at 412

Here, the trial court did not commit an evident, obvious, or clear error in permitting Plaintiff's closing argument. It follows that manifest injustice or a miscarriage of justice did not result. Missouri law has consistently treated closing argument in a broad manner. Counsel is granted a wide latitude to suggest inferences from evidence and the trial court has broad discretion to determine if a line or argument by counsel is proper.

Eickmann v. St. Louis Public Service Company, 323 S.W.2d 802 (Mo. 1959). Counsel's wide latitude in discussing facts and arguing the inferences from the evidence is allowed even if the inferences drawn are illogical or erroneous. *Id*. The trial court is vested with wide discretion in ruling on proprietary of jury arguments and in making a determination whether prejudice results. *Id*. Defendant's argument that Plaintiff's closing argument was not a discussion of the evidence is misguided. The entire defense of this case was that Veal's injuries were pre-existing, that Veal did not follow doctor's orders for physical therapy, and that Veal was not significantly hurt. In fact, the Defendant even described Veal's crash with Kelam as "routine" in her brief. (Appellant's Brief: 5) There was nothing "routine" about this crash. Veal's life, as he knew it before the crash, has been permanently changed through no fault of his own. The Defendant's evidence at trial sought to undermine Veal's credibility consisting of the following:

- On cross-examination of Veal, the Defendant sought to elicit testimony that a medical record showed degenerative process in Veal's cervical spine and likely preexisted the trauma. (Tr. 176)(LF #92)
- That Veal chose not to follow up with Dr. Kumar's physical therapy order (Tr. 178)(LF #93)(LF #94)
- Veal's cervical spine had severe disc degeneration from C3-7. (Tr. 181)(LF# 95)
- When Dr. Howard reviewed Veal's MRI of his shoulder that arthritis was found and at a visit on May 23, 2017, Dr. Howard's plan for treatment stated he did not think Veal's shoulder needs any treatment at this point. (Tr. 182)(LF# 96)

- That Veal went back to Dr. Howard on August 14, 2017 to discuss or complain about Dr. Howard's report. (Tr. 184)(LF# 97)
- The Defendant sought to impeach the Plaintiff's statement about not having any prior neck pain with a prior lawsuit from a 1990 crash allegedly involving a cervical spine strain and neck pain. (Tr. 192-93)(LF# 98)
- Defendant elicited evidence that Dr. Dusek stated in a medical record note that he did not think any surgery (wrist surgery) would help him (Veal). (Tr. 203)(LF #100)
- Defendant introduced a medical record from March 26, 2015 stating that Veal complained of right wrist swelling and pain for the past six months. (Tr. 205)(LF #101)
- That Veal had severe arthritis. (Tr. 244: 9) The problems with his wrist pre-existed the crash. (Tr. 244: 13) The problems with his right shoulder—no doctor could definitively know what is wrong, and that the imaging showed age related conditions. (Tr. 244: 23) For his neck, that Veal had severe degenerative disc disease and the crash may have caused a minor aggravation to it and may have caused little problems afterwards. (Tr. 245: 7-14)
- Lastly, Kelam provided the testimony of her hired medical expert, Rhoderic Mirkin, MD, who conducted an independent medical examination of Veal. Dr. Mirkin was selected by Mr. Clark, Kelam's trial lawyer's office. (LF #60: 1, L: 8) He was paid by Mr. Clark's office. (LF #60: 1, L: 10). Dr. Mirkin has done one-

hundred ninety-seven depositions. (LF #60: 2, L: 21-23) Dr. Mirkin has worked with Mr. Clark's office before this case. (LF #60: 2, L: 24) He has worked with Mr. Clark's firm and other firms for twenty years. (LF #60: 2, L: 12) He has done thousands of exams. (LF #60: 3, L: 10) Dr. Mirkin makes approximately half-million or five-hundred thousand dollars in medical legal fees per year. (LF #60, 3, L: 2) Dr. Mirkin testified that Veal had severe arthritis in his neck that was pre-existing. (LF #60, 6: 11)

- Defendant's closing argument sought to infer that Veal's injuries to his neck, wrist, and shoulder pre-existed the crash. (Tr. 295-308)

Based on the defense asserted by Kelam at trial, Plaintiff's closing argument consisted of proper argument and inferences from the evidence. The *entire* defense was based around the notion that Veal's injuries were pre-existing, that Veal was not significantly hurt, and that Veal did not follow doctor's orders for physical therapy. The evidence did show that the Defendant's hired medical expert made approximately five-hundred thousand dollars per year in medical-legal work and had done so for twenty years. An inference from this evidence, based on simple math, is that Dr. Mirkin has amassed ten-million-dollars in medical-legal income. The pecuniary interest of a witness, or his bias or prejudice, can always be shown. *Houfburg v. Kansas City Stock Yards Co. of Maine*, 283 S.W.2d 539, 549 (Mo. 1955). Furthermore, if all of Veal's injuries truly pre-existed the crash, then a logical inference from that evidence is that Veal was a liar, a cheat, and a fraud for bringing his personal injury action for this crash involving Kelam.

Alternatively, Plaintiff asks this Court to apply the invited error rule as applied in *Peterson v. Progressive Contractors, Inc.* 399 S.W.3d 850 (Mo. Ct. App. W.D. 2013).[6] "A party will not be heard to complain of alleged error in which, by his own conduct at the trial, he joined or acquiesced." *Id*. The party is then estopped from complaining of the error. *Id*. Here, the Defendant's own conduct at trial, namely the basis of their defense, is what led to Plaintiff defending himself in closing argument. As outlined above, the main elements of the Defendant's defense were: Veal was not significantly hurt, his injuries were pre-existing, and Veal disobeyed a doctor's order for physical therapy. Defendant sought to impeach the Plaintiff about a 1990 lawsuit, about pre-existing complaints at medical providers, and provided testimony of its own expert witness to opine that Veal's injuries in his neck were pre-existing. Reading between the lines, the jury could reasonably infer that the Defendant's entire case was about calling out Veal for being a liar, a cheat, and a fraud. Because the Defendant's own conduct at trial lead Plaintiff to have to defend the allegations in his closing argument, Defendant should not be permitted to complain of error in Plaintiff's closing argument.

The crux of the verdict in this case is that the jury, the finder of fact, chose to believe Veal's evidence of permanent injury and a negative impact on his life more than Kelam's evidence at trial. The jury chose to believe that the crash caused permanent

[6] The invited error rule was originally promulgated by the Missouri Supreme Court in 1933 in *Taylor v. Cleveland, C.C. & St. L. Ry. Co.*, 63 S.W.2d 69, 75 (Mo. 1933).

injury to Veal. To put it frankly, the jury did its job. The jury assessed the witnesses of both the Plaintiff and the Defendant, weighed the evidence, and arrived at a damages assessment that they believed fairly and justly compensated Veal. Kelam now seeks to complain about the verdict alleging that Plaintiff's closing argument is prejudicial. The argument is without merit. The trial court did not abuse its discretion in permitting Plaintiff's counsel closing argument. Moreover, because Defendant's claim of error regarding Plaintiff's closing was not objected to at trial, it has not been preserved for appellate review. This Court should refuse to exercise its discretion to grant plain error review of the trial court's discretion in closing argument

III. Defendant's Point Relied on III does not specify any action or inaction by the trial court, other than a denial of Defendant's motion for new trial or motion for remittitur. Defendant failed to preserve for appeal the claim of prejudice show now seeks to rely upon based on occurrences at trial by failure to object and failure to make proper objections. Defendant failed to object during the jury instruction conference to Instruction No. 10 or suggest a modification to its language. The jury's award was not an honest mistake by the jury and represents fair and reasonable compensation for Veal. There was no prejudicial error in any of the respects complained of by Defendant, and the trial court did not error in denying Defendant's motion for new trial or motion for remittitur.

A. Introduction

Defendant's allegation of error in her Point Relied on III is devoid of any articulable argument for review by this Court because it has not been preserved for

appellate review. Any presumption of prejudice is rebutted because Defendant failed to object to the inclusion of Instruction No. 10 in the jury instructions or request a modification to its language. The trial court did not bar Defendant's counsel from arguing that the jury could not award the cost of past and future medical treatment. Defendant had the chance and failed to do so. Remittitur is not proper either, as substantial evidence supports this verdict, and no error occurred in which the Defendant suffered prejudice. The trial court properly denied Defendant's motion for new trial and her motion for remittitur.

B. Standard of Review

A denial of a motion for new trial is reviewable on appeal based on an abuse of discretion standard. *Echard v. Barnes-Jewish Hosp*., 98 S.W.3d at 567. "An abuse of discretion occurs only when the trial court's ruling is clearly against the logic of the circumstances and so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful consideration." *Stephenson v. Countryside Townhomes, LLC*., 437 S.W.3d at 390.

A denial of a motion for remittitur is reviewable on appeal based on an abuse of discretion standard as well. *See e.g. Blanks v. Fluor Corp*., at 407-8. "The trial court enjoys broad discretion in deciding whether remittitur should be ordered." *Id*. at 408. An appellate court, "will interfere only when the verdict is so grossly excessive that it shocks the conscience of the court and convinces us that both the trial judge and the jury have abused their discretion." *Id*. Furthermore, the appellate court "should exercise power to

interfere with the judgment of the jury and the trial court with hesitation and only when the verdict is manifestly unjust." *Id*.

C. Defendant failed to object to Instruction No. 10, thus, this claim of error is not preserved for appellate review, furthermore evidence of medical expenses is outside the scope of the pleadings and was properly excluded

Defendant failed to preserve the instructional claim of error in her Point Relied on III because the Defendant failed to lodge an objection during the jury instruction conference. "If a party fails to raise an objection concerning an issue at trial, that issue is not preserved for appeal…An objection to evidence must be made at trial, and on appeal the party must base its claim of error on the same grounds raids in its trial objection." *Payton v. Union Pacific R. Co.*, 405 S.W.3d at 7. Missouri law also provides, by rule, a mandate for counsel to object to instructions. "Counsel shall make specific objections to instructions considered erroneous…***No party may assign as error the giving or failure to give instructions unless that party objects thereto on the record during the instructions conference***, stating distinctly the matter objected to and the grounds of the objection." Mo. Ct. R. 70.03. (emphasis added) The requirement of Rule 70.03 is designed to afford the trial court a chance to correct its errors without the delay and expense of an appeal; "they are to be strictly enforced." *State ex rel. Missouri Highway and Transp. Com'n v. Jim Lynch Toyota, Inc.*, 830 S.W.2d 481, 488 (Mo Ct. App. E.D. 1992). Stating further, "if on appeal an alleged error relating to an instruction differs from or is not included in the specific objections made to and determined by the trial court, it may not be reviewed

by the appellate court." *Id*. *citing Belter v. Crouch Brothers, Inc*., 554 S.W.2d 562, 563 (Mo. Ct. App. 1977).

Here, the record on appeal demonstrates that Defendant failed to preserve this instructional claim of error. Instruction No. 10 was received by the trial court by consent of the parties. The record demonstrates the exchange:

> The Court: …And then Number 10 is - - help me here.
>
> Mr. Schlapprizzi: 37.03, the damage instruction.
>
> The Court: The damage instruction. I don't think there's any objection to that either. Right, Mr. Clark?
>
> Mr. Clark: Correct. (Tr. 275: 19-24)

Defendant's argument that the trial court denied her counsel the opportunity to discuss evidence in the case during closing argument is inaccurate. During the jury instruction conference, Defendant informed the trial court that Plaintiff's counsel stated earlier in the trial: "in his opening said we're not seeking medical bills, so I think that I should be able to reference that in my closing." (Tr. 270) Plaintiff renewed his objection that medical bills were a non-issue in the case. (Tr. 270: 15-16) The trial court then directed Defendant's counsel to coordinate with the court reporter to find out if the Plaintiff made the statement regarding medical bills. (Tr. 270-271) The trial court then stated "I will overrule their objection if you are able to show me - - because I seem to have the same recollection." (Tr. 271: 14-16) Yet, thereafter, there is no record that defense counsel ever followed-up about whether Plaintiff stated he was not seeking medical bills earlier in the trial. Defendant did not mention the medical bills in her closing statement.

The record, instead, demonstrates that during Plaintiff's portion of jury selection, a discussion was had with the venire panel about special damages, namely that the medical expenses were not being claimed in this lawsuit. The purpose of this discussion was to assist the venire panel in understanding that the case was about non-economic damages only. In order to evaluate the venire panel's ability to fairly and impartially decide the issue of awarding non-economic damages only, Plaintiff had to explain that he was not seeking reimbursement for his medical bills. Nothing about this discussion with the venire panel opened the door for defense counsel to then argue in closing about medicals bills, a non-issue in the case. Plaintiff never plead nor sought past medical damages. (LF #2) Then, prior to trial, Plaintiff dismissed his claim for future medical expenses. (LF #31). Therefore, even if Defendant had properly preserved her claim of error regarding the trial court barring her from arguing about the cost of past and future medical treatment, such was outside the scope of the pleadings and, therefore, irrelevant to any issue in the case.

Recently, this Court in *Schieffer v. DeCleene*, held that evidence of medical expenses, which were not included in the plaintiff's petition, is evidence outside the scope of the pleadings and is irrelevant. 539 S.W.3d 798, 807 (Mo. Ct. App. E.D. 2017). In *Schieffer*, the plaintiff filed an amended petition and did not include a claim for the recovery of medical expenses. *Id*. at 804. Medical bills are considered special damages and must be specifically plead. *Id*. The trial court admitted evidence of the plaintiff's medical bills, although not plead, and the jury was permitted to consider the bills as evidence. *Id*. This Court reasoned that "trial is limited to the scope of the issues raised by

the pleadings." *Id*. "Where objected-to evidence is outside the scope of the pleadings, the trial court has no discretion to admit such evidence." *Id*. (internal citations omitted) At trial in *Schieffer*, there was significant evidence of "mental and physical suffering," "anguish suffered from the increased pain he now experiences, the stress of determining whether to move forward with surgery despite potentially serious risk, the inability to maintain his prior hobbies and lifestyle, and the fear that his family members will be required to significantly alter their lives to provide him greater care." *Id.* at 806. The plaintiff in *Schieffer* also introduced evidence of his medical treatment, namely, physical therapy, pain management care, and primary care. *Id*. This evidence was presented "not to recover for the cost of his treatment, but rather, to show the nature and extent of his physical pain and mental anguish." *Id*. at 807. The Court of Appeals reasoned that this evidence was relevant to the issues raised in the pleadings where the plaintiff sought only general damages for his pain and suffering. *Id*.

Schieffer is directly applicable here. Veal dismissed his claims for medical bills. (LF #2, 31) Veal introduced evidence of his medical providers to discuss his medical treatment. (LF #24, 26, 28, 30) And, like *Schieffer*, Veal introduced evidence of the nature and extent of his injuries through the testimony of friends and customers. (Tr. 210, Tr. 213, Tr. 216, Tr. 220)[7] The trial court's admission of this evidence does not require the introduction of the cost of the medical treatment. Evidence of medicals is beyond the scope of the pleadings and the record on appeal. There was no evidence adduced by of

[7] Tr. 210: Will Jernigan, Tr. 213: Dean Costephens, Tr. 216: Lonnie Tilly, Tr. 220: Lynn Mahn

the cost of any of Plaintiff's medical treatment. Therefore, Defendant's argument that she was prejudiced from not being allowed to argue a subject that was not within the scope of the pleadings, or the record before this Court, is illogical.

E. Denial of Remittitur was proper

On review of a denial of a motion for remittitur, this Court is to "consider the evidence in the light most favorable to the trial court's order." *Blanks v. Fluor Corp*., 450 S.W.3d at 408 *citing Badahman v. Catering St. Louis,* 395 S.W.3d at 39. For this case, the Court is to "consider the evidence in the light most favorable to the verdict…And disregard any contrary evidence." *Id*. Furthermore, review on appeal of a jury verdict starts with the "recognition that the jury retains virtually unfettered discretion in reaching its decision because there is a large range between the damage extremes of inadequacy and excessiveness." *Stewart v. Partamian*, 465 S.W.3d at 57. Two general types of excessive verdicts: (1) verdict that is disproportionate to the evidence of injury and results from an honest mistake by the jury in assessing damages, and (2) an excessive verdict due to error at trial causing bias and prejudice by the jury. *Id.* at 56. The amount of the verdict does not by itself establish bias or passion and prejudice without a showing of some other error occurring during the trial. *Id*. The jury has the ability to also consider "intangible or non-economic damages, such as past and future pain, suffering, effect on life-style, embarrassment, humiliation, and economic loss." *Payne v. Fiesta Corp*., 543 S.W.3d at 131.

Here, substantial evidence supports the verdict and remittitur is not appropriate. The evidence at trial, taken in the light most favorable to the verdict was:

- Multi-level cervical spine surgery with overnight hospital stay was recommended (LF#28)
- Surgery was performed on his wrist (LF #24)
- Surgery was recommended for his shoulder (LF #26)
- Veal was in tremendous pain (Tr. 166)
- Veal needed help of friends to do tasks at his auto-repair shop (Tr. 213, 218)
- Veal had to turn away work since the crash. (Tr. 221-222)
- Veal could not function at home like he did before the crash. He could no longer pick up his grandkids (Tr. 166)
- Veal had trouble sleeping (Tr. 166)

The Defendant offered no testimony that contradicted the traumatic event of the crash as the cause of Veal's need for surgeries. Because substantial evidence supports the jury's verdict, this Court should not interfere with jury's "virtually unfettered" discretion in assessing Veal's damages.

As such, Defendant's Point Relied on III should be denied in its entirety.

CONCLUSION

For the foregoing reasons, Plaintiff prays that all of Defendant's Points Relied on be denied in their entirety, and that the judgment of the trial court be affirmed in all respects.

Respectfully Submitted,

FINNEY INJURY LAW

/s/Christopher J. Finney
Christopher J. Finney, #62888
Alexander L. Ledbetter, #70194
1600 S. Brentwood Blvd, Suite 220
St. Louis, MO 63144
(314) 293-4222
F: (314) 754-9477
chris@finneyinjurylaw.com
alex@finneyinjurylaw.com

DONALD L. SCHLAPPRIZZI, P.C.

/s/ Craig Anthony Schlapprizzi
Craig Anthony Schlapprizzi, #62309
211 N. Broadway, Suite 2430
St. Louis, Missouri 63102
314-241-0763
314-241-0787 (fax)
craig@schlapprizzipc.com

Attorneys for Respondent Gary Veal

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2019, I electronically filed the above document through the Missouri Court's electronic filing system, to be served by operation of the Court's electronic filing system on all counsel of record.

/s/Christopher J. Finney
Christopher J. Finney, #62888
Alexander L. Ledbetter, #70194
1600 S. Brentwood Blvd, Suite 220
St. Louis, MO 63144
P: (314) 293-4222
F: (314) 754-9477
chris@finneyinjurylaw.com
alex@finneyinjurylaw.com

CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Respondent's Brief includes the information required by Rule 55.03.

2. The Respondent's Brief complies with the limitations contained in Rule 84.06;

3. The Respondent's Brief, excluding cover page, table of contents, table of authorities, signature blocks, certificate of compliance, and affidavit of service, contains 9,299 words, as determined by the word-count tool contained in the Microsoft Word software with which this Respondent's Brief was prepared; and

4. Respondent's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

/s/Christopher J. Finney
Christopher J. Finney, #62888
Alexander L. Ledbetter, #70194
1600 S. Brentwood Blvd, Suite 220
St. Louis, MO 63144
(314) 293-4222
F: (314) 754-9477
chris@finneyinjurylaw.com
alex@finneyinjurylaw.com

CERTIFICATION UNDER RULE 55.03(a)

Pursuant to Rule 55.03(a) of the Missouri Rules of Civil Procedure, the undersigned hereby certifies that he has signed an original of this pleading and that an original of this pleading shall be maintained for a period of not less than the maximum time allowable to complete the appellate process.

/s/Christopher J. Finney
Christopher J. Finney, #62888
Alexander L. Ledbetter, #70194
1600 S. Brentwood Blvd, Suite 220
St. Louis, MO 63144
(314) 293-4222
F: (314) 754-9477
chris@finneyinjurylaw.com
alex@finneyinjurylaw.com

Dated: April 6, 2020