

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

FILED
MAR 13 2025
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

K. W., a minor, by and through)
Next Friend, ELIZABETH WHITFIELD,)
Plaintiff,)
v.)
MEAD JOHNSON & COMPANY, LLC,)
et al.,)
Defendants.)

Cause No. 2222-CC06214
Division No.: 22

ENTERED
MAR 13 2025
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ORDER & JUDGMENT

Before this Court is Plaintiff K.W., a minor, by and through Next Friend, Elizabeth Whitfield's ("Plaintiff") Motion for New Trial. The motion was called, heard, and submitted on February 19, 2025. Having been fully briefed, the Court now finds as follows:

On November 18, 2024, the Court entered a final judgment in favor of Defendant St. Louis Children's Hospital ("SLCH"), Defendants Abbott Laboratories and Abbott Laboratories, Inc. (collectively "Abbott"), and Defendants Mead Johnson & Company, L.L.C. and Mead Johnson Nutrition Company (collectively "Mead").

On December 18, 2024, Plaintiff filed his Motion for New Trial on all claims, against all defendants.

On February 19, 2025, the Court entered an Order Approving Minor Settlement against SLCH.

Plaintiff's Motion for New Trial now proceeds against Abbott and Mead (collectively "Defendants") on all remaining claims, pursuant to Rule 78.

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Court Rule 78.01, in relevant portion, states that “The court may grant a new trial of any issue upon good cause shown. A new trial may be granted to all or any of the parties and on all or part of the issues after trial by jury, court or master.” Rule 78.01. “Every order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted.” Rule 78.03.

A motion for new trial serves a dual function. It seeks to obtain relief in the trial court by having that court grant a new trial to correct alleged errors occurring during the trial and, if overruled, to obtain relief on appeal by preserving for appellate review the alleged errors stated in the motion. *Johnson v. Kan. City Pub. Serv. Co.*, 358 Mo. 253, 257, 214 S.W.2d 5, 8 (1948). “To properly grant such a motion, it is crucial that the movant suffered actual prejudice[.]” *Collier v. Steinbach*, 669 S.W.3d 356, 359 (Mo. App. E.D. 2023). “A determination of prejudice by the erroneous admission of evidence depends largely upon the facts and circumstances of the particular case.” *Khan v. Gutschell*, 55 S.W.3d 440, 443 (Mo. App. E.D. 2001), citing *Chester v. Shockely*, 304 S.W.2d 831 (Mo. 1957). “The movant has the burden of proving allegations it makes in a motion for new trial.” *Frontenac Bank v. GB Invs., LLC*, 528 S.W.3d 381, 392 (Mo. App. E.D. 2017). “To succeed on a motion for new trial, the moving party must establish that trial error or misconduct of the prevailing party incited prejudice in the jury.” *Beverly v. Hudak*, 545 S.W.3d 864, 869 (Mo. App. W.D. 2018), quotation omitted. “Plain errors affecting substantial rights may be considered at a hearing on motion for a new trial, in the discretion of the court, though not raised in the motion or defectively raised, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.” Rule 78.08. “It is the inherent privilege of the trial court, upon subsequent deliberate, unhurried consideration, to reverse the ruling it had made under the stress and pressure of trial urgency,” *Raley v. Hy-Vee, Inc.*, 685 S.W.3d 554, 559 (Mo. App. W.D. 2023),

citing *Aulgur v. Zylich*, 390 S.W.2d 553, 557 (Mo. App. W.D. 1965). However, such relief is “limited to errors so prejudicial that a party did not receive a fair trial.” *Id.*

Plaintiff moves the Court for a new trial for its erroneous rulings which led to the Plaintiff being prejudiced and denied a fair trial.

I. Flooding the Zone

Plaintiff also argues Defendants implemented a common football strategy known as “flooding the zone” in the course of the trial to overwhelm and barrage the Court in a veiled attempt to cause a mistrial and/or improperly prejudice Plaintiff from receiving a fair trial. In response, Defendants argue that Plaintiff failed to properly preserve nearly two-thirds of his misconduct objections or waived any claims of error stemming from Defendants’ misconduct. See Appendix A and B to Defendant Mead’s Opposition. However, the Court finds these arguments are without merit because either Plaintiff preserved his objections or the Court has the authority to review its discretionary rulings upon a motion for new trial. See *Raley v. Hy-Vee, Inc.*, 685 S.W.3d at 558.

The Court finds Plaintiff specifically objected to the introduction of prejudicial evidence during the course of the trial to ensure Defendants and the Court were apprised of the rationale for the objections, which allowed the Court to make its rulings. Those same arguments are reflected in his Motion for New Trial. Missouri courts do not require the parties use a ‘magic word’ in order find an objection was preserved or was not waived. *Khan v. Gutschell*, 55 S.W.3d at 442. (Missouri courts have broadly accepted several variations for the articulation of an objection and requires no mathematical precision so long as it gives opposing counsel and the court reasonable notice of the basis of the objection to either correct the error or rule on the objection.). When specificity is understood by all parties the objection will be deemed preserved. *State ex rel. Phillips v. Hackett*, 469 S.W.3d 506, 510 (Mo. App. S.D. 2015).

Court Given the length of arguments heard outside the presence of the jury and the unusually long trial, the Court granted wide latitude to the parties for standing objections in an attempt to not disturb the flow of trial or counsel's questions, which the parties conceded was appropriate. Additionally, many of the legal arguments overlapped during the over ninety sidebar conferences and daily oral arguments heard before trial testimony started, and during breaks in testimony. The tremendous number of objections, arguments, and discussions sufficiently presented the pertinent issues of error and misconduct for the purposes notifying the parties and Court to make an informed ruling outside the presence of the jury, as well as for preservation for consideration of the instant motion. See *Rhoden v. Mo. Delta Med. Ctr.*, 621 S.W.3d 469, 484 (Mo. 2021).

It is well settled that "a trial court has the right, in the proper exercise of its discretionary power, to grant a new trial on account of any erroneous [trial] ruling, whether an objection has been made or not." *Wagner v. Mortg. Info. Servs.*, 261 S.W.3d 625, 636 (Mo. App. W.D. 2008); see also *State v. Ginn*, 31 S.W.3d 454, 459 (Mo. App. W.D. 2000). "On a motion for new trial, the trial court may reconsider its rulings on discretionary matters, such as the admissibility of evidence, and may order a new trial if it believes that its discretion was not wisely exercised and that the losing party was thereby prejudiced." *Anderson v. Kohler Co.*, 170 S.W.3d 19, 23 (Mo. App. E.D. 2005); see also *Hyde v. Butsch*, 861 S.W.2d 819, 821 (Mo. App. E.D. 1993). Additionally, when the record indicates a party knowingly disregarded or violated the orders in limine or the court's trial rulings, the issue is preserved for purposes of a motion for new trial and appellate review. See *Wilkinson v. Stanley Fastening Sys., L.P.*, 693 S.W.3d at 173 n.4.

Having considered all the arguments and evidences related to Defendants' violations of the Court's numerous interlocutory rulings and trial rulings, the Court finds two of Plaintiff's many

contentions for error require distinct and separate consideration: evidence related to Plaintiff's mother's marijuana usage during pregnancy; and attorney misconduct.

a. Maternal Marijuana Usage

First, Plaintiff argues that he was prejudiced by a pre-trial ruling which allowed Defendants to proffer expert opinions related to alternative causation of Plaintiff's injuries based upon Plaintiff's mother having smoked tobacco and marijuana during the pregnancy. Plaintiff objected to the introduction of this evidence arguing its highly prejudicial effect outweighs any probative value and that no medical expert could testify to a degree of certainty that it caused or contributed to cause Plaintiff developing NEC. See Plaintiff's Omnibus Motions in Limine Nos. 4, 5, and 28. The Court entered interlocutory orders that Defendants may introduce an expert opinion to support its alternative causation theory, so long as the expert's opinion is offered within a reasonable degree of medical certainty and satisfies the requirements set forth under §490.065 and the guidance found in *Linton v. Carter*, 634 S.W.3d 623 (Mo. 2021) and *Moore v. Monsanto Co.*, 699 S.W.3d 516 (Mo. App. E.D. 2024). Although Plaintiff tendered a continued objection to the introduction of said evidence, Plaintiff voluntarily opened the door during the opening statements. See Trial Transcript at pg. 695, lns. 4-25. The Court cannot now find Plaintiff was prejudiced by his own introduction of said evidence during his opening statements. See *Sherrer v. Bos. Sci. Corp.*, 609 S.W.3d 697, 708 (Mo. 2020) (The trial court has the discretion to determine if an opening statement opens the door to the admission of evidence); and *Collier v. Steinbach*, 669 S.W.3d at 360. (A party is essentially hoisted by the petard of its own choice and, after a subsequent unfavorable result, cannot then claim prejudice sufficient to warrant a new trial.); and *State v. Strickland*, 676 S.W.3d 478, 483 (Mo. App. S.D. 2023) (Otherwise inadmissible evidence may be admitted based on a theory presented during opening statements). Therefore, there was no

error resulting from the initial introduction of evidence related to Plaintiff's mother's marijuana usage.

However, given the benefit of hindsight, the Court also finds that its interlocutory ruling and decision to allow Defendants to include any reference to Ms. Whitfield's marijuana usage in its opening statements were erroneous. The probative value of the evidence was far outweighed by the inherently prejudicial effect of the extremely prejudicial evidence of smoking while pregnant. The Court relied on Defendants good faith assertions that their experts would satisfy the requirements of §490.065 when offering a medical expert opinion as to an alternative causation.

Plaintiff's Omnibus Motion in Limine No. 4 sought to exclude any reference of Ms. Whitfield's smoking or marijuana usage as wholly irrelevant and inadmissible character evidence of a non-party. In response, Defendants argued the evidence supports their alternative causation theory that cigarette and marijuana usage during pregnancy, and not formula, caused or contributed to case Plaintiff's NEC and his developmental delays. Defendants argued that its experts, Dr. Inder and Dr. Mbwana, would testify, to a reasonable degree of medical and scientific certainty, that cigarettes and marijuana are independent risk factors for Plaintiff's NEC and his developmental delays and are entirely separate from any risk associated with prematurity. Relying on this good faith argument, the Court denied Plaintiffs motion to exclude the evidence of alternative cause so long as expert opinions satisfies the requirements of section 490.065, the guidance of *Linton v. Carter*, 634 S.W.3d 623, 6628 (Mo. 2021), and the medical expert opinion is offered within the witness' area of expertise per the requirements of *Moore v. Monsanto Co.*, 699 S.W.3d 516 (Mo. App. E.D. 2024). Defendants informally withdrew Dr. Inder as a trial witness following Plaintiff and SLCH's challenges to her §490.065 qualifications. The Court also found since Defendants' expert Dr. Hamersley admitted she is not an expert in NEC and does not treat or diagnose infants,

her testimony would be limited to her qualifications and expertise as an OB-GYN who specializes in high risk pregnancies and maternal-fetal health.

Regardless of Plaintiff's opening the door during his opening statements, the evidence was not admissible until the probative value of Ms. Whitfield's medical records was weighed against the risk of prejudicial effect against Plaintiff. The Court's clear ruling was that it "may allow limited inquiry and testimony related to tobacco and marijuana usage during gestation, including the potential risk of NEC and neuro-developmental delays, any medical expert opinion related to the same must be offered within a reasonable degree of medical certainty by a qualified expert opinion pursuant to §490.065." See Order entered on October 1, 2024. Defendants' experts failed to meet that threshold, despite repeatedly reassuring the Court that any expert testimony elicited to support the alternative causation defense would conform with §490.065, and the guidance set forth in the *Linton* and *Moore* decisions. The testimony elicited from experts including Drs. Mandelbaum, Mbwana, and Hamersly, did not make a causal link between Plaintiff's injuries from NEC or neuro-developmental delays and his mother's marijuana usage to overcome the highly prejudicial nature of any reference. See Meads's Ex. F & G. Therefore the probative value of the evidence did not outweigh any the unfair prejudice. The defense experts merely offered speculative and conjecture that smoking marijuana could lead to prematurity as a predisposing factor to NEC or that marijuana is a neurotoxin. The profuse and rampant references to marijuana far exceeded the limited scope permitted by the Court based on a good faith assertion by the defense. During the course of the trial, Plaintiff moved the Court on several occasions to ban further references to marijuana due to its extremely prejudicial effect against Plaintiff. It was error for the Court to not stop the deluging prejudice which was intentionally elicited time and time again, when the marijuana evidence had little probative value and was exceedingly outweighed by this extremely

prejudicial effect on the trial and verdict. In fact, prior to Dr. Mandelbaum's testimony Abbott acknowledged that excessive references to marijuana alone would be prejudicial and would "backfire" on Abbott. See Mead's Ex. A. Nevertheless, Plaintiff has not met his burden to show the prejudice from this error alone, and this Court is unable to distinguish the latter prejudice from the initial prejudice to rely on it for the basis of granting a new trial.

b. Attorney Misconduct

Second, Plaintiff argues Defendants' counsel's professional misconduct amounted to copious numbers of errors which severely prejudiced Plaintiff and denied him a fair trial.¹ This Court's limited jurisdiction does not extend to whether the alleged misconduct rises to the level of review of licensure or any violations of the Rules of Professional Conduct. The Court also recognizes the onslaught of Defendants' daily written and oral motions to reconsider nearly every interlocutory or trial ruling was a litigation strategy employed throughout the five-week trial that skirts the borders of the honorable boundaries of Missouri's Rules of Civil Procedure. However, in its rulings at trial and in consideration of this motion, the Court looks beyond whether there was an honest and truthful presentation of admissible evidence by counsel to determine whether any misconduct by parties in the presentation of their arguments or the evidence resulted in any error warranting a new trial.

¹ While only one of Abbott's counsel was sanctioned for his misconduct, the Court recognizes Mead's defense was so closely intertwined with and reliant on Abbott's defense that Mead conceded their defense was indivisible with Abbott's defense as the Manufacturing Defendants. Moreover, Mead exacerbated Abbott's errors and misconduct by mirroring the same language through out their presentation of evidence and arguments.

II. Prejudicial Errors

A trial court may grant a motion for new trial based on the improper admission of evidence even if the movant does not object to the evidence during trial. See *Z.R. v. Kan. City Pediatrics*, 682 S.W.3d 55, 62 (Mo. App. W.D. 2023). The primary focus is “with the correctness of the result, rather than the course taken in order to reach it[.]” *Id.*, citing *Vescovo v. Kingsland*, 628 S.W.3d 645, 654 (Mo. App. W.D. 2020). “In order for the trial court to grant a motion for a new trial, the error complained of as a basis for the motion must be prejudicial to the party seeking the new trial.” *Baldridge v. Kan. City Pub. Schs.*, 552 S.W.3d 699, 709 (Mo. App. W.D. 2018). “A new trial is available only upon a showing that trial error or misconduct of the prevailing party incited prejudice in the jury.” *Id.*

Having reviewed Plaintiff’s motion, Defendants’ responses, and arguments related to the same, the Court now finds prejudicial error for arguments, questions, and evidence related to genetic testing, defenses outside the scope of Plaintiff’s claims for injuries (straw man doctrine), de facto approval by the FDA, and the consensus statement. The Court further finds those said errors caused prejudice and denied Plaintiff a fair trial.

Genetic Testing

Defendants conceded that it intentionally elicited highly prejudicial testimony for its expert Dr. Stevenson about the timing of genetic testing and the filing of Plaintiff’s lawsuit despite the Court’s direct orders excluding any evidence. See Trial Trans 4853-57. The Court finds Defendants’ intentionally elicited highly prejudicial testimony from Dr. Stevens and admitted the purpose was to prejudice Plaintiff. Furthermore, the probative value of any evidence related to genetic testing did not outweigh the prejudicial effect.

Straw Man Doctrine

Plaintiff argues Defendants injected an inflammatory defense against Plaintiff's nonexistent claims. This matter centers on Plaintiff's claims that Defendants failed to warn of the dangers of its pre-term infant formula, that it can cause or contribute to cause NEC when given to infants under 1500 grams. As a result of his damages, Plaintiff requested compensatory and punitive damages in a non-bifurcated trial. It was erroneous for Defendants introduce prejudicial defenses beyond the confines of Plaintiff's claims and requested damages in an attempt to poison the jury. Defendants injected the erroneous defense asking the jury to consider that Plaintiff and/or his counsel are asking for all formula or all pre-term infant formula to be banned from the market, and the results of that request is that infants would starve to death. This Court finds it was error to allow such arguments, questions, or evidence as it confused and mislead the jury to the point of nullification of Plaintiff's claims for his damages. Additionally, said defense was in direct conflict of evidence that SLCH had changed its feeding protocol was proof that no pre-term infant under 1500 grams would starve in the absence of pre-term infant formula or that the pre-term infant formula had to be removed from the market.

De Facto Approval of Formula

Despite the Court's interlocutory ruling prohibiting defense expert from offering any subjective opinion related to the FDA's state of mind, the FDA's procedures as "de facto approval", or otherwise interpret the regulatory provisions as a matter of law, Defendants erroneously introduced evidence that the FDA approved each ingredient of the pre-term infant formula at issue. Said expert testimony and opinions extended beyond the parameters of §490.065 and confused or misled the jury to believe that the FDA gave its de facto approval of the pre-term infant formula and that the FDA did not require a NEC warning which is improper. See *J.J.'s Bar*

& Grill, Inc. v. Time Warner Cable Midwest, LLC, 539 S.W.3d 849, 874-875 (Mo. App. W.D. 2017). This Court finds Plaintiff met his burden showing that error lead to prejudice and denied him a fair trial.

Consensus Statement

The Court entered several rulings excluding the consensus statements from the trial. Those rulings fully considered the timing of disclosure, authenticity, authoritativeness, and the relevancy to the claims. Ultimately, the Court found the consensus statement purportedly created on October 3, 2024, could not be introduced as evidence at the trial in any form or reference. However, Defendants intentionally and flagrantly disregarded the Court's repeated orders by referencing the document several times during trial and reading it directly into evidence which prejudiced Plaintiff and denied him a fair and impartial trial.

III. Cumulative Effective of Errors

Turning to Plaintiff's remaining arguments that the cumulative effect of errors severely prejudiced Plaintiff and denied him a fair trial, the Court agrees and finds that inadmissible evidence, related to: (1) attack on the trial attorneys and the legal system; (2) genetic testing; (3) straw man arguments; (4) AAP & NEC Statements; (5) other lawsuits against the Defendants; (6) learned intermediary; (7) improper expert opinions, including eliciting new medical expert opinions related to causation at trial and/or in violation of interlocutory or trial rulings; (8) character evidence of other products unrelated to the products at issue; (9) de facto FDA approval of pre-term infant formula; and (10) the Working Group Report and Consensus Statement, were in direct violation of the Court's interlocutory orders, partial summary judgments, and evidentiary rulings during the trial that prejudiced Plaintiff and denied him a fair trial. Despite the Court's

warnings and clear instructions, Defendants intentionally violated the Courts orders and rulings by improperly introducing the inadmissible evidence to the jury, time after time.

“[T]he trial court had and has the right, based on the conduct specified, and in the exercise of a duty to see that justice is done, to find that plaintiff was deprived of a fair trial.” *Maloney v. Benchmark Ins. Co.*, 628 S.W.3d 667, 682 (Mo. App. W.D. 2021), citing *Ryan v. Campbell* “66” *Express, Inc.*, 304 S.W.2d 825, 831 (Mo. 1957). When cumulative prejudicial effects of errors, including the conduct of a party’s presentation of evidence and arguments to the jury, combine to affect “the trial the case in such a way as to have a substantial prejudicial influence on the verdict rendered by the jury in this case.” *Myers v. Moffett*, 312 S.W.2d 59, 65 (Mo. 1958). This Court does not base any ruling solely on the alleged attorney misconduct. Instead, the Court examines the widespread misconduct of the parties, including repeated and flagrant violations of the Court’s orders by inappropriately introducing impermissible arguments and inadmissible evidence to influence the jury by undermining the Rules of Civil Procedure and the fairness of the trial process to distract the jury from the presentation of admissible evidence. *Kline v. City of Kan. City*, 334 S.W.3d 632, 649 (Mo. App. W.D. 2011), see also *Hurley v. Burton*, 626 S.W.3d at 827 (The movant must show the alleged errors resulted in manifest injustice, even if the court does not make a specific finding of any error). Relief for cumulative error can only be granted upon a “showing that prejudice resulted from any rulings of the trial court.” *Frazier v. City of Kan. City*, 467 S.W.3d 327, 347 (Mo. App. W.D. 2015).

The Court finds the cumulative effect of the errors resulted in not only prejudice and denied Plaintiff a fair trial, but also resulted in a manifest injustice which is so egregious that those errors weakened the foundation of the judicial process and seriously undermined the confidence in the outcome of this trial. See *Williams v. Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo.

2019). Given the weight and the effect of those cumulative errors, the Court finds good cause has been shown for a new trial pursuant to Rule 78.01.

IV. Against the Weight of the Evidence

“Only one new trial shall be allowed on the ground that the verdict is against the weight of the evidence.” Rule 78.02. “The trial court has nearly unfettered discretion in deciding whether or not to grant a new trial on the ground that the verdict was against the weight of the evidence, 'and its ruling upon that ground will not be disturbed, except in case of manifest abuse.’” *Smith v. City of Hannibal*, 297 S.W.3d 926, 929 (Mo. App. E.D. 2009), quoting *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247 (Mo. 2006).

“A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence.” *Dodson v. Ferrara*, 491 S.W.3d 542, 551 (Mo. banc 2016).

“When conducting its review, this Court views the evidence in the light most favorable to the plaintiff, and the plaintiff is given the benefit of all reasonable inferences.” *Id.* at 551-52. Having reviewed Plaintiffs claims against Defendants, and all the evidence presented, this Court again finds Plaintiff made a submissible case on all claims. The Court also finds, *supra*, Plaintiff met his burden to show that prejudicial errors precluded him from receiving a fair and impartial trial, and that the jury’s verdict was the result of passion, bias, and prejudice which vitiates the entire verdict.

Koehler v. Burlington N., Inc., 573 S.W.2d 938, 945 (Mo. App. E.D. 1978). When the prejudicial effect is so interwoven with the erroneously excluded or admitted evidence, the only cure is to set aside the verdict and award a new trial on all issues. See *Oventrop v. Bi--State Dev. Agency*, 521 S.W.2d 488, 493 (Mo. App. E.D. 1975); see also *Host v. BNSF Ry. Co.*, 460 S.W.3d 87, 111-112 (Mo. App. W.D. 2015) (The erroneously admitted evidence must be outcome determinative or highly prejudicial).

Furthermore, following the Court's sanction of Abbott's counsel, Mead renewed its motion for mistrial and conceded that "Too much has happened here for a reliable jury verdict...the consequences of that conduct, affect the whole trial, affect other parties than Abbott and the plaintiff." Trial Transcript pg. 5484.

The Court finds the errors and misconduct were so prejudicial that affected the credibility of evidence with an extreme passion and bias that denied Plaintiff a fair trial and undermined the entire judicial process. For all those prejudicial reasons, the jury did not follow the greater weight of the evidence in reaching its verdict. Therefore, the Court finds the verdict was against the weight of the evidence and in accordance with Rule 78.02, a new trial is appropriate.

WHEREFORE, it is Ordered and Decreed, for the reasons stated herein, Plaintiff K.W., a minor, by and through Next Friend, Elizabeth Whitfield's Motion for New Trial is GRANTED.

SO ORDERED:



Michael W. Noble, Judge

Dated: March 13, 2025.