IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

JANE DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 4:08-cv-00197-TIA
	)	
V. LEROY YOUNG, et al.	)	
	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR NEW TRIAL

COMES NOW Plaintiff, pursuant to Fed. R. Civ. Pro. 59, and moves the Court to set aside the verdict of the jury returned herein on November 16, 2009 and the judgment entered thereon on November 16, 2009, and to grant a new trial on the following grounds:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The Court erred in refusing to allow Plaintiff to present testimony of Kristen Hinman regarding the circumstances surrounding the receipt and use of the computer disc containing a Power Point presentation ("Power Point disc") furnished to her by the Defendants.

4. The Court erred in refusing to allow Plaintiff to present the testimony of Kristen Hinman that she had never agreed to pre-printing review by Defendants of the article she was writing about Defendants.

5. The Court erred in refusing to allow Plaintiff to present the testimony of Kristen Hinman that Defendants made no demand or request that they be permitted to review the article prior to publication.

6. The Court erred in refusing to allow Plaintiff to present the testimony of Kristen Hinman that Defendants placed no restrictions on the use of the photographs of Defendants' patients depicted on the Power Point Defendants furnished to her.

7. The Court erred in refusing to allow Plaintiff to present the testimony of Kristen Hinman that she never agreed to restrict the use of any of the photographs of Defendants' patients depicted on the Power Point disc Defendants furnished to her.

8. The Court erred in refusing on redirect examination of Defendant Young to allow Plaintiff's counsel to examine Defendant Young concerning Young's admission under oath in the medical malpractice suit filed by Plaintiff against Young and Defendant Body Aesthetics, that in treating and administering to Plaintiff, Defendant Young failed to exercise the degree of care ordinarily exercised by medical practitioners under the same or similar circumstances.

9. The Court erred in refusing on redirect examination of Defendant Young to allow Plaintiff's counsel to examine Defendant Young concerning Young's admission under oath in the medical malpractice suit filed by Plaintiff against Young and Defendant Body Aesthetics, that in treating staph infections which developed in Plaintiff, Defendant Young prescribed antibiotics for treating the infection which laboratory tests repeatedly identified as antibiotics to which the staph infection was resistant.

10. The Court erred in refusing on redirect examination of Defendant Young to allow Plaintiff's counsel to examine Defendant Young concerning Young's admission under oath in the medical malpractice suit filed by Plaintiff against Young and Defendant Body Aesthetics, that Defendant Young's treatment of Plaintiff's staph infection with antibiotics identified as ones to which the staph infection was resistant resulted in a delay in healing for Plaintiff's surgeries.

11. The Court erred in refusing on redirect examination of Defendant Young to allow Plaintiff's counsel to examine Defendant Young concerning Young's admission under oath in the medical malpractice suit filed by Plaintiff against Young and Defendant Body Aesthetics, that Defendant Young's treatment of Plaintiff's staph infection with antibiotics identified as ones to which the staph infection was resistant resulted in Plaintiff being rehospitialized.

12. Counsel for Defendants conducted himself improperly in eliciting testimony from Dr. Young that Dr. Young had performed eight thousand surgeries and only one patient – the Plaintiff – had filed a medical malpractice suit against him, and that suit involved some complaints about developing a staph infection, and the prejudicial effect of such testimony could not be overcome by the Court's instruction to the jury to disregard such question and answer.

13. The verdicts rendered by the jury are inconsistent.

14. The testimony by Defendant Young that Plaintiff is the only patient of his that has filed a malpractice case against him is false and misled the jury.

15. This motion is based upon the records and proceedings in this action.

16. Plaintiff incorporates herein by this reference her contemporaneously filed Memorandum of Law in Support of Her Motion for New Trial.

WHEREFORE, Plaintiff requests that this Court grant her Motion for New Trial, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

WITZEL, KANZLER, DIMMITT,
KENNEY & KANZLER, L.L.C.

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was filed electronically with the Clerk of the Court to be served by the Court's electronic filing system on this 30th day of November, 2009 to:

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Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR NEW TRIAL

Comes Now, Plaintiff Jane Doe, and files her Memorandum of Law in Support of her Motion for New Trial Pursuant to Fed. R. Civ. Pro. 59.

STANDARD

A new trial is warranted when the initial trial results in a "miscarriage of justice." Harris v. Secretary, U.S. Dep't of Army, 119 F.3d 1313, 1318 (8th Cir. 1997). Such a miscarriage of justice may be the result of "a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial." Gray v. Bicknell, 86 F.3d 1472, 1480 (8th Cir. 1996). To determine if the new trial should be granted, "the trial court can rely on its own reading of the evidence—it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." Harris, 119 F.3d at 1318. In order to grant a new trial based on trial court error, the court must determine that the evidentiary ruling was so prejudicial that retrial would likely produce a different result. O'Dell v. Hercules, Inc., 904 F.2d 1194, 1200 (8th Cir. 1990). "The authority to grant a new trial... is confided almost entirely to the exercise of discretion on the part of the trial court." Allied Chem. Corp. v Daiflon, Inc., 449 U.S. 33, 36 (1980).

ARGUMENT

I. Testimony of Kristen Hinman was Improperly Excluded.

The exclusion of Kristen Hinman's live testimony in response to Defendants' repeated use of her hearsay testimony made it impossible for Plaintiff to receive a fair trial. The prejudice was exacerbated here because the Court's final decision was not made until after the horses were out of the barn – Defendants had already made liberal use of hearsay versions of Ms. Hinman's purported statements. Plaintiffs, therefore, were left with no ability to attack the credibility or veracity of Defendants' testimony. Defendants were able to create an unassailable alibi – Hinman did it, not us. The result was clear prejudice to Plaintiff, requiring a new trial.

A. Procedural Background.

Plaintiff sought to elicit live testimony of Kristen Hinman, the *Riverfront Times* reporter who wrote the article about Defendants that contained Plaintiff's nude photographs. There is no dispute that the article was written with Defendants' knowledge, consent and avid participation. The article was not a traditional piece of "investigative" journalism with "sources". Rather, this was almost a promotional piece where Defendants voluntarily gave Ms. Hinman unlimited access to their offices, surgical suite, and Dr. Young's home. Ms. Hinman was also provided at least one disc containing the nude photographs of numerous patients of defendants, including Plaintiff's nude photographs.

Defendants filed a motion in limine before trial seeking to limit Ms. Hinman's testimony to her knowledge of a second set of high-definition photographs that were provided by Defendants to the *Riverfront Times*. At the pretrial conference, the Court did not rule on this motion, but suggested to counsel that it was leaning towards granting Defendants' motion.

During opening statement, Defendants' counsel avowed, and in the questioning of each and every individual Defendant, counsel sought to elicit testimony directed toward establishing an "agreement," an "understanding," and a "conversation" between Hinman and one or more Defendants about alleged restrictions on the use of the photographs and pre-publication review rights of the article. Indeed, this was the ***cornerstone*** of Defendants' presentation for mitigating the damages of their admitted "mistake" of turning over a disc containing nude patient photographs to a reporter whom they had just recently met. Defendants claimed ***they were the victims***, that ***they*** had been "duped."

Following Defendants' testimony, Plaintiff sought to call Ms. Hinman as a witness in order to impeach Defendants and to set the record straight regarding the absence of any such agreements or understandings between The *Riverfront Times* and the Defendants. The Court requested additional briefing and oral argument on the permitted scope of Ms. Hinman's testimony. Thereafter, this Court granted Defendants' motion in limine, restricting examination of Ms. Hinman to the "second disc" only.

In her offer of proof, Plaintiff asked Ms. Hinman the following questions, and Ms. Hinman gave the following answers:

1. Did she ever tell Defendants they would have the right of pre-publication review?

   Hinman's Answer: No.

2. Did the Defendants tell her that she could not use the photographs on the disc?

   Hinman's Answer: Absolutely not.

3. Who gave her the first disc containing Plaintiff's nude photographs?

Hinman's Answer: During a private meeting with Defendant Centeno – where they were reviewing the contents of the disc -- Defendant Centeno asked an assistant to make a copy of the disc for Ms. Hinman's.

The relevance and probative value of this testimony cannot be seriously disputed. The Court's exclusion of this testimony severely prejudiced Plaintiff from offering obviously relevant testimony that directly contradicted Defendants' self-serving statements ***and*** the alleged hearsay statements attributed to Ms. Hinman by the Defendants. In short, Defendants had an unfettered opportunity to set up an unassailable defense based upon ***one side*** of a story that clearly involved two opposing sides — ***Defendants and Ms. Hinman.***

Because Plaintiff had absolutely no independent knowledge of the circumstances under which Defendants voluntarily gave a disc of patients' nude photographs to a reporter for the *Riverfront Times,* Ms. Hinman's testimony was the only opportunity to respond to Defendants. Ms. Hinman was Plaintiff's ***only*** opportunity at a meaningful opportunity to test the credibility of the Defendants' testimony. Ms. Hinman was Plaintiff's only opportunity to challenge Defendants' ***sole*** defense at trial. Stripped of that opportunity, Plaintiff had no opportunity to challenge Defendants' repeated hearsay statements attributed to Ms. Hinman, which became more brazen and more absolute as the trial proceeded, culminating in a closing argument for Defendants that declared Ms. Hinman had broken her "promise" to the Defendants. The jury was told that Ms. Hinman promised Defendants the right to preview the article, and that they had, in no uncertain terms, admonished her not to use the photographs. How could Plaintiff respond to Defendants' declarations without the opportunity to present the rest of the story? Plaintiff was deprived of the opportunity to present relevant testimonial evidence in support of her case.

The excluded testimony was highly relevant and probative on the issues of both actual **and** punitive damages, particularly with regard to the Defendants' culpability and intentions in releasing Plaintiff's photographs. As set forth above, without Hinman's testimony, the jury is presented with the scenario of "duped doctors-victims of the unscrupulous reporter and her newspaper." This is in sharp contrast to the images that develop with Hinman's testimony, including:

- doctors so anxious to hawk their variety of wares that they give ***unrestricted*** access to their patients' most private information;
- doctors lying about and/or attempting to "cover up" the actual circumstances and motivations behind the release of Plaintiff's photographs to Hinman; and
- two distinct, separately corroborated instances of Hinman receiving discs from the Defendants: the Power Point disc from Centeno (according to Hinman's excluded testimony) and a "second" disc from Young (according to the uncontested testimony of Kelly Williams).

Hinman's testimony not only directly contradicts the "mistake" scenario, it permits a reasonable juror to readily conclude that the actions of one or more of the Defendants was at a minimum reckless and, quite possibly, intentional. Morevoer, with the Hinman testimony, the doctors' "remorse" is questionable and the need to "deter" with an award of punitive damages becomes much more compelling.

B. Ms. Hinman's Testimony Was Not Covered By Any Privilege.

The topics upon which Plaintiff sought to elicit testimony from Ms. Hinman ***were not covered by the privilege.*** In Continental Cablevision, Inc. v. Storer Broadcasting Co., 583 F.

Supp. 427 (E.D. Mo. 1984), a case cited by this Court in its May 14, 2009 Order, the Court held that questions posed to a reporter by her sources, about conversations she had with those sources, where the sources have already testified as to those conversations, are not privileged. Id. at 437. The Court reasoned as follows:

> Each of these individuals has testified as to the fact and substance of their conversations with Movant and have further stated that they did not have an agreement of confidentiality with Movant. ***Each of the questions merely seeks to confirm whether in fact Movant told these individuals what they said she said.*** As to Movant's conversations with these individuals, there would seem to be little basis for asserting that answering questions 6 through 14 would infringe on the newsgathering process.

Id. (emphasis added).

Similarly, Plaintiff sought only to elicit testimony from Ms. Hinman related to the very statements or agreements that Defendants testified that Ms. Hinman made to or with them. There is no journalistic privilege at issue regarding these topics. What's more, even if such a privilege did attach (which it does not), Ms. Hinman did not assert any such privilege. She gave her testimony as part of Plaintiff's proffer.

C. Defendants Were Not Prohibited From Asking The Questions in Deposition.

Further, as set forth at length in oral argument on the record, and in Plaintiff's memoranda filed with the court, even if these questions might possibly be covered by the privilege, they were questions that were permitted to be asked pursuant to this Court's Orders concerning the depositions of the *Riverfront Times* personnel. Despite being permitted by the Court to depose Ms. Hinman, Defendants asserted that to permit her to testify at trial would present unfair "surprise," because neither party asked these questions of Ms. Hinman at her deposition. This basis for objecting is entirely without merit. Nothing prohibited Defendants'

counsel from asking Ms. Hinman these questions at her deposition (except maybe her answers), and Plaintiff's counsel was under absolutely no obligation to ask the questions before trial.

In Johnson v. H. K. Webster, Inc., 775 F.2d 1 (1st Cir. 1985), the court, including now Supreme Court Justice Stephen Breyer, addressed this very issue. The court stated as follows:

> Chief Judge Campbell and Judge Breyer believe that, to the extent that the district judge's rulings were meant to limit Webster's cross-examination to the same questions Webster posed during the deposition, this was error. ... ***Webster's failure to ask certain questions of Flynn during the deposition did not effect a waiver of its right to ask those questions at trial; indeed, tactical decisions of this nature are often the very essence of a party's trial strategy***.

Id. at 5, n.6 (emphasis added).

Defendants' counsel had the exact same opportunity to ask these questions of Ms. Hinman, but chose not to do so. Maybe for strategic reasons – Defendants, frankly, may not have wanted to hear the answers – or maybe for other reasons entirely. In either case, however, Defendants' equal ability to seek this information from Ms. Hinman is sufficient reason for this Court to reject their "surprise" objection. *See* McEwen v. Norman, 926 F.2d 1539, 1549 (10th Cir. 1991)(rejecting the objection of surprise where the witness had been deposed, but the plaintiff had failed to ask the witness questions regarding a key issue in the case). The questions could have been asked of Hinman at her deposition, but were not. That does not constitute unfair "surprise" if these questions are asked at trial.

Finally, defendants essentially used the Court's Orders as both a sword and a shield — Defendants were permitted to testify about what they allegedly told the reporter, and the "agreement", "understanding" and "promises" made by the reporter, but objected to Plaintiff's proposed questions to the reporter on these very issues. This was patently unfair. At a minimum, Ms. Hinman's testimony was relevant for impeachment purposes.

If evidence regarding Ms. Hinman's discussions with Defendants or her conduct thereafter was to be restricted by this Court, then it should have been equally restricted for each party, and ***neither*** party should have been able to testify about, or allude to, alleged conversations with Ms. Hinman. Thus, even if the Court did not error in excluding the testimony of Ms. Hinman, a new trial is appropriate so that the Court's ruling may be clearly implemented for both sides from the outset: all alleged statements, agreements or promises made by Ms. Hinman shall be excluded. Otherwise, the jury is improperly permitted to hear only one side of the story – the one side presented by defendants as their only defense to publishing Plaintiff's nude photographs.

II. Improper Questions and Comments by Defendants' Counsel.

"[I]mproper questioning by counsel generally entitles the aggrieved party to a new trial if it conveys improper information to the jury, and prejudices the opposing litigant. When counsel repeatedly attempts to use irrelevant and prejudicial evidence, the possibility of improper influence is increased. Counsel's misconduct may be such that a district court cannot overcome its prejudicial effect by admonishing the jury or rebuking counsel; in such case a court should grant a new trial. Carraway v. Christian Hospital Northeast/Northwest, 2006 U.S. Dist. LEXIS 61832, *17-18 (E.D. Mo. 2006), quoting, Blair v. Wills, 420 F.3d 823, 829-30 (8th Cir. 2005)(internal quotes omitted).

At trial, Defendants' counsel improperly commented on or alluded to the merits of the underlying medical malpractice suit on at least three occasions.

First, in opening statements, Defendants' counsel inaccurately described Plaintiff's medical malpractice suit as one involving "staph" she developed following surgery. The false impression conveyed to the jury was that Plaintiff's medical malpractice lawsuit involved only a

single claim: that Plaintiff ***developed*** a staph infection following her operation. This was a patently false impression, and moreover, was extremely misleading. Plaintiff's medical malpractice suit involved multiple claims of negligence against Dr. Young and Body Aesthetics, ***one*** of which involved Dr. Young's negligence in failing to properly diagnose and treat Plaintiff's staph infection. Indeed, Dr. Young ***admitted*** that he treated Plaintiff with antibiotics that were ***counter-indicated*** by numerous lab reports which Dr. Young ***admitted*** he had misread. Further, Dr. Young ***admitted*** in the medical malpractice lawsuit that his treatment of Plaintiff fell below the standard of care, and that his actions directly caused Plaintiff's subsequent hospitalization and her delay in healing.

In order to counter Defendants' counsel's inaccurate, prejudicial comment, Plaintiff's counsel requested that the Court allow counsel to examine Dr. Young, on a limited basis, about his admitted failure to treat Plaintiff's staph infection. As an offer of proof, plaintiff's counsel offered the following deposition testimony of Dr. Young from the medical malpractice suit:

> Q: Do you regard your failure to give Judy *** antibiotics, which the cultures showed to be ones that the infection in Judy were susceptible to, to have had an effect on her infections?
>
> ***
>
> A: If I understand your question correctly is if she had been on antibiotics that the bacteria were susceptible to, would it have prevented her need to be hospitalized and shortened the duration of her recovery. I suspect that that's true. ***And I think my failure to do that was a mistake and it's below the standard of care. I made a mistake.***" (emphasis added).

The Court denied Plaintiff's counsel's request to examine Dr. Young on this limited issue in response to the comments of Defendants' counsel.

During trial, on re-cross, Defendants' counsel asked Dr. Young how many of his alleged 8000 patients had sued for medical malpractice. Dr. Young answered, only one -- Plaintiff. Again, the question and answer were clearly inappropriate and prejudicial. First, the answer appears to be false. According to records available online at Missouri CaseNet, Dr. Young is listed as a defendant in the following "personal injury-malpractice" actions filed in the City of St. Louis Circuit Court alone:

- Stevenson v. Dr. Leroy Young, et. al, Cause No. 0622-CC05857;
- Huether, et. al. v. Barnes Hospital, et. al., Cause No. 22902-09988; and
- Isler v. Washington University, et. al., Cause no 22952-00318.

Second, as the Court clearly noted, the question and answer were highly improper and prejudicial, intended solely to suggest to the jury that Plaintiff's medical malpractice claims lacked merit, and similarly, that Plaintiff's present suit lacked merit as well. Again, the false impression left with the jury was that Plaintiff is litigious and her claims lack merit.

Once again, Plaintiff's counsel requested that the Court permit examination of Dr. Young, on a limited basis, about his admitted failure to treat Plaintiff's staph infection in an attempt to remedy the obvious prejudicial effect of the improper question and answer. And again, the Court denied this request. The Court's admonition to the jury to disregard the question and answer was, unfortunately, wholly inadequate.

Finally, in closing argument, Defendants' counsel suggested that John Carlson, the *Riverfront Times*' art director, was lying about the existence of higher definition photographs because he was afraid he'd be the target of the "third lawsuit by Mr. Witzel". The jury was well

aware that counsel represented Plaintiff in her underlying medical malpractice lawsuit. The obvious implication of the comment was to imply an improper motivation for the medical malpractice lawsuit, the present lawsuit, and the theoretical "third lawsuit", and to suggest that all three are without merit. These comments were highly prejudicial, and Defendants' counsel's misconduct conveyed improper information to the jury for which the admonition was simply inadequate.

III. The Jury's Verdict on the Invasion of Privacy Count Was Against the Greater Weight of the Evidence.

Jury instruction No. 5 (invasion of privacy) read:

> On the claim of plaintiff for compensatory damages for invasion of privacy, your verdict must be for the plaintiff and against defendants if you believe that the defendants' giving of plaintiff's photographs to the Riverfront Times Newspaper brought her shame and humiliation and as a direct result thereof she was damaged.

Jury Instruction No. 6 (breach of fiduciary duty) read:

> On the claim of plaintiff for compensatory damages for breach of fiduciary duty of confidentiality, your verdict must be for the plaintiff and against defendants if you believe that as a direct result of defendants' disclosure of plaintiff's medical photographs to the Riverfront Times Newspaper, plaintiff sustained damage.

Each verdict director required a finding that Defendants gave Plaintiff's photographs to the *Riverfront Times* (a fact admitted by Defendants), and that Plaintiff was thereby damaged. The jury found that plaintiff suffered damages in the amount of $100,000 on the breach of fiduciary duty claim and, therefore, it is wholly inconsistent that they would find that she suffered no damages on her invasion of privacy claim. The only difference in the verdict directors is the "shame and humiliation" element. The testimony at trial from Plaintiff ***and several of the individual Defendants,*** was undisputed: Plaintiff suffered humiliation, shame and embarrassment as a result of Defendants' conduct. There is no alternative, ***permissible***

conclusion the jury could have reached on the evidence presented, if they followed the jury instruction.

It is possible that the jury concluded that the *Riverfront Times* published the photographs in breach of an "agreement" with the Defendants, and based upon this "agreement", the jury may have felt (albeit improperly) that the *Riverfront Times*, and not Defendants, caused Plaintiff's damage. However, publication was not an element of the jury instruction and the jury's verdict based upon these grounds is not permissible. Instead, the only reasonable verdict, given the language of the verdict director and the undisputed, overwhelming evidence of Plaintiff's shame and humiliation, was that Defendants were liable on Plaintiff's invasion of privacy claim as a result of giving (admittedly) Plaintiff's pictures to the *Riverfront Times*. Thus, the jury's verdict in favor of Defendants was against the greater weight of the evidence.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiff's Motion for New Trial, Plaintiff is entitled to a new trial.

Respectfully submitted,

WITZEL, KANZLER, DIMMITT,
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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was filed electronically with the Clerk of the Court to be served by the Court's electronic filing system on this 30th day of November, 2009 to:

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