

"They poisoned the well" without objection | Elizabeth C. McNulty

In the matter of *Pepper v. Vladimir Gelfand, M.D.*, Case No. 19SL-CC04680 (21st Judicial Circuit, St. Louis County, Missouri), plaintiff counsel Elizabeth C. McNulty Mo. Bar # 72026 (The Simon Law Firm, P.C.) conducted the trial in a manner that deviated significantly from standard Missouri civil procedure and evidentiary practice. The result was a jury verdict finding a departure from the standard of care in the over-prescribing of opioid narcotics, but awarding net zero damages \$0.00 to the plaintiff after approximately five years of litigation.

The trial proceeded under Hon. Stanley J. Wallach in Division 12. Following opening statements, the defendant presented evidence first, including his own testimony. This testimony included a narrative concerning his father's escape from a Russian Gulag and the family's subsequent immigration to the United States. This account bore no relevance to the elements of medical malpractice—duty, breach, causation, or damages—and carried a substantial risk of undue prejudice through sympathy (pathos) under Missouri's equivalents of Federal Rules of Evidence 401–403.

During this testimony, the plaintiff was seated in the back of the gallery, removed from the counsel table. Following the defendant's testimony, counsel relocated the plaintiff to the second bench in the gallery, still behind the counsel table and separated from direct participation.

The defense then called Alexander Rose, MD, MPHS, a board-certified forensic psychiatrist practicing at Veritas Forensic Psychiatry, LLC in St. Louis (1034 S. Brentwood Blvd., Suite 555, Richmond Heights, MO 63117), as an expert witness. Dr. Rose, ABPN-certified in psychiatry and forensic psychiatry with a fellowship from McGaw Medical Center of Northwestern University (2019–2020), provided testimony that introduced elements prejudicial and lacking probative value in the context of the claimed breach involving opioid over-prescribing.

Specifically, the testimony referenced that the plaintiff was discharged from a drug and alcohol

rehabilitation facility prior to completion, citing sexual harassment of a staff member. This allegation, unrelated to the defendant's prescribing practices or medical causation, implicated improper character evidence (akin to FRE 404) and carried a high risk of undue prejudice by stigmatizing the plaintiff with a collateral moral failing, potentially influencing jury perceptions of credibility or deservedness of damages.

No objection was raised to the admissibility of this testimony under RSMo § 490.065 (Missouri's Daubert standard) or on grounds of relevance or undue prejudice.

Furthermore, during cross-examination of the plaintiff by defense counsel, the statement was made in the jury's hearing that the plaintiff requested "a Caucasian only doctor" when seeking a referral from a neurosurgeon for a pain management doctor. This assertion—implying racial bias—bore no relevance to the malpractice elements and posed significant prejudicial risk by portraying the plaintiff as discriminatory. No objection was interposed to this statement on grounds of irrelevance, undue prejudice, or improper impeachment. Additionally, on redirect examination, counsel did not seek to clarify or contextualize the comment to mitigate its impact, leaving the remark unchallenged and unrehabilitated.

No objections were interposed to:

- The defendant's presentation of evidence first, contrary to the standard allocation of the burden of proof in civil trials (Missouri Supreme Court Rule 69.01 and established practice requiring the plaintiff to present the case-in-chief first);
- The irrelevant personal narrative of the defendant;
- The plaintiff's restricted seating and limited ability to consult with counsel or observe proceedings in close proximity;
- The forensic psychiatrist's testimony regarding the rehabilitation discharge and sexual harassment allegation;

- The defense counsel's statement during cross-examination about the "Caucasian only doctor" request.

These failures preserved none of the issues for appellate review, as timely and specific objections are required to avoid waiver (see, e.g., *Gage v. Morse*, Mo. App. 1996, holding that unobjected-to evidence becomes part of the record and errors are not preserved absent timely objection; Missouri Rule 84.13(c) plain error standard is a narrow exception rarely applied in civil evidentiary matters).

To exacerbate the poor representation McNulty refused to discuss with her plaintiff client any post trial remedies and therefore as a consequence after counsel's withdrawal of representation plaintiff Albert B. Pepper Jr. proceeded pro se filing a post trial motion for additur or in the alternative a new trial. However, Hon. Stanley J. Wallach never made a ruling on the motion and allowed it to be administratively denied under Missouri Rule 78.06

This sequence of events may warrant scrutiny by the Missouri Bar's Office of Chief Disciplinary Counsel under Missouri Rules of Professional Conduct 4-1.1 (competence), 4-1.3 (diligence), and related provisions concerning thoroughness in trial advocacy and post-judgment obligations.

In conclusion, I will ask this one rhetorical question for your consideration. What competent attorney would invert the entire presentation of a case at trial by allowing defense counsel to proceed first knowing that it will set the tone and mood for the rest of the proceeding that is prejudicial to the plaintiff client?

Albert B. Pepper Jr.

Plaintiff, *Pepper v. Gelfand, M.D.*

January 21, 2026

Following is an assessment by Google Gemini A.I. a LLM for further consideration.

Note: Artificial Intelligence, A.I. can make mistakes. However, after reviewing the output I concur and certify to my satisfaction the output. Albert B. Pepper Jr.

1. Procedural Irregularity: Order of Proof

The most striking procedural claim is that the **defendant presented evidence first**. In Missouri civil procedure, as in most jurisdictions, the party with the burden of proof (the plaintiff) has the right and obligation to open the case and present their evidence first (Mo. Sup. Ct. Rule 69.01).

- **Tactical Impact:** Allowing the defense to go first cedes "primacy"—the psychological advantage of the first impression. It allows the defendant to frame the narrative before the plaintiff has even established the elements of the claim.
- **Legal Consequences:** If no objection was made to this inversion, the plaintiff effectively waived the right to the standard order of trial.

2. Evidentiary "Poisoning" and the Failure to Object

The "poisoned well" metaphor refers to the introduction of highly prejudicial information that biases the jury against a party's character, regardless of the legal merits of the case. The text identifies three specific instances:

Key Prejudicial Elements

Evidence Item	Legal Concern	Potential Impact
Defendant's Family History	Relevance (Mo. RE 401-403)	Invokes "pathos" (sympathy) for the doctor, humanizing him before the malpractice is discussed.
Rehab Discharge/Harassment	Character Evidence / Prejudice	Stigmatizes the plaintiff as a "bad actor," potentially diminishing the jury's desire to award damages.

"Caucasian Only" Request	Irrelevant Prejudice	Portrays the plaintiff as racially biased, which is inflammatory and unrelated to medical standard of care.
--------------------------	-------------------------	---

The Role of the Objection: Under Missouri law (e.g., *Gage v. Morse*), if a lawyer does not object to evidence at the moment it is offered, the right to challenge that evidence on appeal is generally lost. This is known as **waiver**.

3. The "Net Zero" Verdict

The jury's verdict—finding a "departure from the standard of care" (liability) but awarding **\$0.00 in damages**—is a rare and legally complex outcome. It suggests that while the jury believed the doctor did something wrong, they:

1. Did not believe the plaintiff was harmed by that specific wrong; or
2. Were so prejudiced against the plaintiff's character (due to the "poisoned well") that they refused to grant a financial recovery.

4. Post-Trial and Ethical Implications

The text notes that the motion for **additur** (a request for the judge to increase the jury's award) or a new trial was administratively denied under **Missouri Rule 78.06**. This rule dictates that if a motion for a new trial is not passed upon within 90 days, it is deemed denied.

Potential Avenues for Scrutiny

- **Rule 4-1.1 (Competence):** Did the failure to object to clearly prejudicial and irrelevant material fall below the standard of a "competent" attorney?
- **Rule 4-1.3 (Diligence):** Did the alleged refusal to discuss post-trial remedies constitute a failure of the duty of diligence and communication?

Commentary

The account depicts a trial where the "theatre" of the courtroom overshadowed the "elements" of the law. In medical malpractice, jurors often struggle with complex clinical data; consequently, they lean heavily on the **likability and credibility** of the parties.

By failing to object to the defendant's sympathetic immigrant narrative and the plaintiff's alleged behavioral lapses, the counsel allowed a "character trial" to take place. When a jury finds a breach of duty but awards zero dollars, it is often a sign that they were "convinced of the fault, but unsympathetic to the victim."

