

SC89762

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IN THE MISSOURI SUPREME COURT

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EDGAR T. EDGERTON,  
Plaintiff-Respondent,

vs.

FERRELL-DUNCAN CLINIC, INC.  
AND  
STEPHEN K. MORRISON, M.D.

Defendants-Appellants.

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APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY,  
MISSOURI  
HONORABLE THOMAS E. MOUNTJOY, JUDGE

GREENE COUNTY CASE NO. 191CC2009

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RESPONDENT'S SUBSTITUTE BRIEF

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## REPLY TO JURISDICTIONAL STATEMENT

For simplicity and clarity of identification, the parties and witnesses will be referred to by surname. Since appellant Ferrell-Duncan Clinic, Inc. bears liability solely in the capacity as the employer of Dr. Morrison under the principle of respondeat superior, appellants will be referred to collectively in the singular perspective as "Dr. Morrison" just as appellants have treated themselves in their brief.

It is must also be noted that the transcript for this appeal has been prepared in three separate sessions, thus requiring a modified method of citation for clear reference. Thus, the following notations will be used: "A.B." refers to the appellants' brief; "AA" refers to appellants appendix; "T." refers to transcript volumes 1 through 9 prepared by the official court reporter present at trial which pages are numbered consecutively from 1 to 1337; "10 T." refers to the tenth volume of the transcript which was prepared by a substitute court reporter and begins its pagination anew with page 1 and runs through page 127; "S.T." refers to the supplemental transcript filed by stipulation of the parties, beginning with page 1 and running through page 134, divided by two tabs. Furthermore, because the caption prepared for transcript volumes 1 through 9 transposed the parties contrary to Rule 81.03, for consistency, the supplemental transcript caption was intentionally duplicated in the same transposed format.)

This is a tort action based upon improper health care as denominated by and

subject to the provisions of Chapter 538 R.S.Mo. alleging damages from Dr. Morrison's failure to diagnose and treat Mr. Edgerton's unhealed sternum with either one of two types of rigid fixation instead of the more flexible muscle flap repair method. Or, as conceded by Dr. Morrison in his brief, "Respondent claimed at trial that Dr. Morrison failed to diagnose the sternal dehiscence on or after September 5, 1989, causing respondent to undergo the muscle flap repair procedure instead of receiving, or having the option of receiving, one of two specific repair procedures (rib-transfer or methyl-methacrylate) that respondent claimed were preferable. (2 T 306-12, 3 T 384)." A.B. 9.

No issues of comparative fault of Mr. Edgerton or apportionment of fault of any co-defendants were raised by any party. L.F. 79. Otherwise, Mr. Edgerton does not contest the jurisdictional statement as presented by Dr. Morrison.

## **REPLY TO STATEMENT OF FACTS**

### **Mr. Edgerton's Motion to Strike Dr. Morrison's Statement of Facts**

Mr. Edgerton objects to the statement of facts offered by Dr. Morrison and moves that the same and their brief be stricken, thus dismissing this appeal, as such violates Rule 84.04(c). It is well known that the statement of facts must be a fair, complete and impartial recitation of the facts without argument.

First, Dr. Morrison's statement of facts is inherently deficient in that it omits and fails to advise this Court of many important parts of the record presented by Mr. Edgerton at trial which support the causation element of his case which Dr. Morrison now attacks here on appeal. Additionally, his statement of facts is slanted to focus on the evidence offered by the defense at trial supporting his contentions contrary to the jury's verdict, much of which has absolutely no bearing on the appellate issues, instead of reciting the evidence which supports the verdict in Mr. Edgerton's favor. This is contrary to the appropriate standard of review on appeal. Finally, Dr. Morrison's statement of facts improperly attempts to reargue his case as if it was still on trial rather than the issues presented on appeal.

Dr. Morrison's failure to comply with the requirements for a proper statement of facts, alone, constitutes grounds for dismissal of this appeal. Devoy v. Devoy, 502 S.W.2d 428, 430 (Mo. App. 1973).

**Omissions:** The proper standard of review cited for Dr. Morrison's first three points requires a review of all of Mr. Edgerton's evidence, and the drawing of all reasonable inferences in Mr. Edgerton's favor. A.B. 14-15, 32-33, 36-37.

Dr. Morrison did not file a complete transcript of all of Mr. Edgerton's evidence as is required by the applicable standard of review. Mr. Edgerton was not obligated to, but volunteered to supplement the transcript which had been previously selected by Dr. Morrison in order to add the important testimony of two treating surgeons (Dr. Huang and Dr. Lundman), pertinent portions of which concerning the casual relationship between the muscle flap and Mr. Edgerton's damages are included in Mr. Edgerton's reply to Dr. Morrison's statement of facts, below. S.T. tabs 1 and 2. Failing to provide the Court with facts supporting the jury's verdict in favor of Mr. Edgerton, either in his statement of facts or in the transcript he selected, thus presenting an unfair perspective of the entire record, is as inexcusable as it is argumentative and improper.

"Instead of constituting 'a fair and concise statement of the facts', it gives a distorted and unbalanced view of the evidence presented below by excluding relevant facts favorable to the opposing party. Statements of fact which favorably slant the evidence by similar processes of exclusion have been held not to comply with subsection (c) of Rule 84.04, supra. State ex rel. State Highway Comm. v. Nickerson, 539 S.W.2d 771, 773 (Mo. App. 1976); Cady v. Kansas City Southern Railway Co., 512 S.W.2d 882, 885 (Mo. App. 1974); Doehler v. Village of Cool Valley, 498

S.W.2d 621, 622 (Mo. App. 1973); and Geiler v. Boyer, 483 S.W.2d 773, 774 (Mo. App. 1972)." Estate of Degraff, 560 S.W.2d 342, 345 (Mo. App. 1977).

Mr. Edgerton should not be burdened to supplement the transcript to ensure it is fairly presented, nor to dig out and add the important facts omitted by Dr. Morrison. If left completely to rely on the statement of facts presented in Dr. Morrison's brief, this Court would have had to read the entire nearly 1800 page transcript in order to discern the nature and extent of the omissions. "To provide a statement of facts which requires an examination of the transcript in order to determine the facts of the case is a travesty upon the rules." Spradley v. St. Mary's Hospital, 469 S.W.2d 855, 858 (Mo. App. 1971). Neither this Court, nor Mr. Edgerton, should be burdened with doing the work of an advocate on appeal. Cole v. Cole, 516 S.W.2d 518, 521 (Mo. App. 1974).

**Improper focus on evidence supporting the defense:** Given that Dr. Morrison's first two points attack the submissibility of Mr. Edgerton's case at trial limited to the issue of causation, and because the proper standard of review requires a consideration of all the evidence which tends to support Mr. Edgerton's case while ignoring all of Dr. Morrison's evidence to the contrary, a defense-slanted statement of facts is a direct violation of Rule 84.04(c).

By Mr. Edgerton's count, nearly half of the factual citations in Dr. Morrison's statement of facts tend to support his defense rather than the jury's verdict. Therefore, the statement of facts presented by Dr. Morrison is heavily and improperly slanted to

focus on the evidence he presented at trial, and all of the same should be ignored here.

**Rearguing the trial issues:** Throughout Dr. Morrison's statement of facts, and in his brief itself, Dr. Morrison seems to argue by implication, and sometimes directly, that his evidence and the testimony of his expert witness were more credible, and therefore, that he should have won the liability issues at trial. Such is purely a trial argument and has absolutely no bearing on any appellate issue here.

For example, on the first two pages of his statement of facts, Dr. Morrison in footnote 3 refers to 9 different parts of the transcript addressing various other health conditions of Mr. Edgerton which are mostly unrelated to any issue in this appeal, and the majority of which did not develop until well after Dr. Morrison's improper health care. A.B. 2-3. This is an apparent attempt to unfairly paint Mr. Edgerton as someone not "deserving" a verdict for his injuries and damages which were limited to one particular physical problem. These references to the transcript appear to be injected by Dr. Morrison for unfair purposes unrelated and irrelevant to any actual issues on appeal.

Likewise, Dr. Morrison eagerly points out that Mr. Edgerton's grafts and his muscle flap are still "working" today, as if to suggest that benefit should inherently offset other injuries from improper health care as part of the heart surgery process. A.B. 2, 9. Nothing about those facts has any legal bearing on the issues presented here.

At page 4, Dr. Morrison makes a critical statement which is neither true, nor

is it supported by the evidence: "If the dehiscence is sterile, as in respondent's case, a patient may choose to leave it alone or may choose attempted rewiring of the sternum. (3 T 354-356, 5 T 648, 8 T 1157)." First, none of the cited testimony says this was true "in respondent's case." Next, the first citation is to Dr. Flye's testimony about other patients unlike Mr. Edgerton; the second citation is to testimony by Dr. Morrison's retained expert witness, Dr. Barner, also referring to other patients in general with conditions unlike Mr. Edgerton; and the third citation is to Dr. Morrison's own testimony which fails to state what his brief asserts. Finally, even Dr. Morrison himself admitted that "rewiring" was never an option for Mr. Edgerton: "Attempted rewiring was not available to respondent due to his sternal bone necrosis (death from lack of blood supply), coughing from smoking and his barrel-shaped chest. (2 T 300-302, 2 T 336, 6 T 902)." A.B. 4. (See, also, Dr. Morrison's expert witness testimony by Dr. Geter: "Putting the sternum back together with wires or with plates or any other method would not have been reasonable for [Mr. Edgerton] for a number of reasons." T. 891).

At page 8, Dr. Morrison makes another critical misstatement of the record when he claims that Dr. Geter (Dr. Morrison's expert witness testifying in his defense) was called in to "repair the sternal non-union." The muscle flap repair was for "sternal wound coverage," that is, to fill the gap left by the now absent sternum bone with muscle, not to restore the bony structure of the rib cage. T. 890.

Another example of argument is seen at pages 8 and 9. As he did at trial, Dr.

Morrison continues to rely on the evidence supporting his defense he presented at trial and argues that a muscle flap repair was the best and only available option for Mr. Edgerton. Dr. Morrison refers to Dr. Geter as the "go-to-guy" for sternal repair procedures in Springfield just as he argued in his defense at trial. A.B. 8. In the same style of presenting his trial arguments, Dr. Morrison then goes on to extol what he claims to be the superior benefits of the muscle flap repair option. Id. Finally, Dr. Morrison ends that portion of his "statement" of facts by bragging that the muscle flap used by his treating expert witness is still in place today, "16 years later," none of which has any relevance to any issue on this appeal. A.B. 9.

Albeit in his argument, another example of how Dr. Morrison focuses on irrelevant and argumentative facts is seen at the bottom of page 17 of his brief. There he claims that the muscle flap repair was the "state of the art" procedure in 1990, citing his own evidence as the sole source of such, in direct contravention of Mr. Edgerton's evidence presented through Dr. Flye who clearly testified to the exact opposite. The issue at trial was which repair options were required by the proper standard of medical care, and the jury decided to believe Dr. Flye's testimony over that offered by Dr. Morrison and his expert witnesses, thus the issue is resolved and should not be reargued here.

For these reasons, Mr. Edgerton moves this Court to strike Dr. Morrison's statement of facts, and to dismiss this appeal.

**Mr. Edgerton's Reply to Dr. Morrison's Statement of Facts**

Because Dr. Morrison never raised or preserved any issue contesting the trial court's submission of Mr. Edgerton's case on liability matters, nor any issue concerning the jury's finding of fault, or any complaint regarding the amount or nature of damages assessed by the jury, the trial court's judgment is now final in those aspects, and such are not at issue here, thus, Mr. Edgerton will not recite any facts pertaining to the fault of Dr. Morrison for failing to diagnose and treat Mr. Edgerton's unhealed sternum. For purposes of the issues raised on this appeal, the facts concerning whether Dr. Morrison could have and should have made the diagnosis and treated Mr. Edgerton's unhealed sternum are no longer pertinent. In fact, the record is without dispute that Dr. Morrison never made such a diagnosis at any time, nor did he ever recommend any repair treatment of any kind to Mr. Edgerton. For the statement of facts purposes on this appeal, the only issues raised by Dr. Morrison concern first, the evidence of the causal relationship between such failures and the ensuing damages (Points I and II), and second, the evidence from the entire record supporting the use of the term "rigid fixation" as it relates to the two options available in his particular situation to repair his unhealed sternum (Point III).

As noted in the motion above, and which additional facts are incorporated herein, Dr. Morrison has failed to meet even a prima facie burden on appeal in his claim that Mr. Edgerton did not make a submissible case on the causation issue since he submitted his brief despite his failure to present a complete transcript of all of Mr. Edgerton's evidence, thus his statement of facts is inherently deficient and fails to

support his first three points. Although it is true that Mr. Edgerton stipulated to the record on appeal to the extent it was requested by Dr. Morrison, that only establishes that what Dr. Morrison tendered represented the limited portions Dr. Morrison requested to be prepared. Since the record on appeal was prepared before Mr. Edgerton knew what points Dr. Morrison would raise, such a stipulation does not mean that Mr. Edgerton also stipulated that the record was sufficient to meet the needs of Dr. Morrison's points he has now presented on appeal.

As also noted in the motion above, since nearly half of the transcript cited by Dr. Morrison cites evidence and testimony tending to support his claims at trial, the same should be ignored as is required by the appropriate standard of review.

Furthermore, to the extent that Dr. Morrison's statement of facts dwell on evidence concerning liability (that is, implying that Dr. Morrison should not have been found liable for failing to diagnose and treat Mr. Edgerton properly), such should also be ignored.

The following facts are offered to supplement important facts missing from those presented by Dr. Morrison.

A summary review of this case can be stated as: For any combination of several reasons over the several ensuing months following heart bypass surgery, Mr. Edgerton's sternum died (became necrotic) but was never infected, (Dr. Morrison: T. 176, 1143, 1167-68), and essentially liquified, whereby his sternum was reduced to narrow strips on either side, thus making his rib cage unstable and connected only at

the very top by a small portion of remaining sternum. On August 25, 2006, after two weeks of trial, a Greene County jury found that Dr. Morrison was negligent in failing to diagnose and treat Mr. Edgerton's unhealed sternum with "rigid fixation" despite several months of symptoms. This failure and the subsequent discharge from Dr. Morrison's care resulted in Mr. Edgerton being directed to other doctors in a different health care system unfamiliar with his history who, upon re-operation, were then compelled to presume that his sternum was infected, and thus provided Mr. Edgerton with a muscle flap repair instead of either a rib transfer or a prosthetic plastic mesh repair. The critical difference was whether Mr. Edgerton's sternum remained flexible (muscle flap) or became rigid (rib or plastic).

Dr. Lundman, another surgeon Mr. Edgerton was referred to by other physicians concerned about his chest condition, saw Mr. Edgerton on Monday, January 15, 1990, and noted complaints of sternal pain, and that Mr. Edgerton's sternum was probably loose. S.T. 126. His diagnosis that Mr. Edgerton's sternum was unstable came just three days after Dr. Morrison saw Mr. Edgerton on the preceding Friday, and not knowing the full medical history, Dr. Lundman suspected a possible infection which contributed to the decision of a muscle flap instead of a solid type of repair. S.T. 128.

On that same Monday, three days after Dr. Morrison diagnosed and charted that Mr. Edgerton's sternum was "well healed," Dr. Lundman called in a fellow surgeon, Dr. Rogers, to examine Mr. Edgerton, and in Dr. Rogers' notes he charted

that he found Mr. Edgerton's sternum to be "markedly unstable," and "flail." T. 856. Dr. Morrison's own retained surgeon expert witness, Dr. Barner, described the terms used by Dr. Rogers to mean "severe or profound or very obvious," and that with normal breathing in and out, Dr. Rogers could see Mr. Edgerton's chest wall moving abnormally without even touching it. T. 810.

Treating cardiologist Dr. VanOsdol was called as an expert witness by Mr. Edgerton and testified that because of the nature of the muscle flap repair instead of getting either of the two forms of rigid fixation, Mr. Edgerton was then placed at greater risk if he needed a later heart surgery. T. 74-75. When it became apparent that Mr. Edgerton indeed needed another heart surgery, Dr. VanOsdol and the other treating doctors researched and found no other reoperation described in the medical literature after a muscle flap repair. T. 78. Dr. VanOsdol testified that the gap which would normally exist between where the sternum should be and the surface of Mr. Edgerton's heart was totally obliterated by the remnants of the muscle flap in the form of scar tissue. T. 79. Dr. VanOsdol testified that the other heart surgeon, Dr. Ruff, called a reoperation "prohibitive" due to the muscle flap repair. T. 80. The muscle flap repair created more than normal scarring and required that a different approach be used for Mr. Edgerton's second bypass surgery. T. 119.

Dr. Huang performed a second bypass operation on Mr. Edgerton in March 2005. S.T. 3-4. As a result of the prior muscle flap repair procedure, he and the other surgeons consulted each other and medical literature concerning the advisability of

opening Mr. Edgerton's chest from the front, but found very little information to help them for this situation, so the decision was made to enter his chest from the side. S.T. 10-11. In describing the risks he had to deal with in the anticipated surgery, compared to the other conditions, he called the muscle flap "the greatest problem," "number one," a "nightmare," and "extremely high risk through a standard anterior approach." S.T. 21-22, 103-106, 122. Primarily because of the use of the muscle flap repair but combined with other reasons, he decided on a lateral approach since if he used the anterior approach and injured a graft or his heart, the odds were that Mr. Edgerton would have a heart attack during surgery and die. S.T. 25-26, 80-83. This was all because Mr. Edgerton did not have a bony skeleton to separate the underlying tissues, and the muscle flap caused too much scarring. S.T. 26, 61-64. Dr. Huang also described how Mr. Edgerton did not lose his entire sternum; he still had a very small portion connected at the top, but the rest was nearly gone and there was only soft tissue, scarring, and fat left in the gap now. S.T. 93-99.

Given the points he chose to raise on appeal, Dr. Morrison's statement of facts omits a substantial amount of the critical testimony presented by Mr. Edgerton and is terribly deficient regarding one of the most important witnesses at trial. Dr. Wayne Flye was Mr. Edgerton's only retained medical expert witness. In addition, Mr. Edgerton called many other medical witnesses who were treating, non-retained expert witnesses from which reasonable supporting inferences may be drawn. Dr. Flye is board certified in the specialties of general surgery, cardiothoracic surgery, and

vascular surgery, and actively practices at Barnes Hospital in St. Louis, Missouri. T. 228-229. His practice involves hands-on diagnosis and treatment of post sternotomy necrotic sternums. T. 229. Despite this being a rare condition few surgeons ever encounter, he has had actual experience in reconstructing a sternum in a rigid fashion as well as performing a muscle flap surgery like the one Dr. Geter did on Mr. Edgerton. T. 230, 368.

At pages 231 to 241 of the transcript Dr. Flye described for the jury his extensive and honorable medical training and experience, and refers to parts of his 65 page curriculum vitae, which included more than 200 articles he has authored or assisted in writing and presenting. T. 350.

When providing his opinions that Dr. Morrison's care was negligent and the damages that were thereby caused to Mr. Edgerton, Dr. Flye expressed the same to a reasonable degree of medical certainty, and applied the correct definition of negligence. T. 243-247.

Dr. Flye testified that if Mr. Edgerton's aseptic necrotic dehiscence had been diagnosed by Dr. Morrison, a more rigid reconstruction could have and, as was required by the proper standard of medical care, should have been performed at any time during the spectrum from September to January. T. 302. The longer the wait, the more inflammation and scar tissue would be expected to form. T. 304. If it had been timely and properly diagnosed by the original surgeon, Dr. Morrison, the muscle flap repair was not the only nor the best option available for Mr. Edgerton. T. 306.

When Dr. Rogers explored Mr. Edgerton's chest in surgery without first hand knowledge of his prior five months of treatment and conditions, what Dr. Rogers unexpectedly found forced him to leave the wound open which must then be presumed infected, thus permanently limiting the repair option to that of a muscle flap. T. 308-309, 390. In addition, Dr. Rogers scraped (debrided) the dead sternum on Wednesday, January 17, which was followed by another scraping during Dr. Geter's surgery three days later on Saturday, January 20. T. 926-927. If properly and timely diagnosed, the ideal option was to use bone, which he has done before, to create "struts" and recreate "structural integrity" where the sternum used to be, and if not bone taken from one of Mr. Edgerton's own ribs, then mesh and a plastic glue-like material can be used to create a similar "solid structure" to replace the missing sternum. T. 306-307, 371. Dr. Morrison conceded, and was there never any contrary contention by any witness throughout the trial, that once Dr. Rogers opened Mr. Edgerton's chest and left it packed with gauze and "open," rewiring Mr. Edgerton's sternum was never again an available option. A.B. 4.

When Dr. Rogers opened Mr. Edgerton's chest, he was surprised and described what he saw as appearing to be "larvae-like forms," decayed remnants of the dead sternum, which forced him to assume there was an infection and the only option then was to pack the wound with gauze in an "open" fashion and to later call in a plastic surgeon to proceed with a muscle flap repair. T. 308-309, 390, 356-357. Dr. Rogers was completely new to Mr. Edgerton's medical care, was not a part of the group of

doctors who had been seeing Mr. Edgerton as Dr. Morrison was, and did not have the benefit of knowing the historic details about Mr. Edgerton's original surgery and had not followed him afterwards; whereas Dr. Morrison had the advantage of this special experience and knowledge, greater access to the other physicians, and could have and should have been able to take the time and determine there was no infection before surgery, thus avoiding any need for a muscle flap repair, and the other, better options should have been offered to Mr. Edgerton. T. 310-311, 356-357. Although a solid repair could still be attempted; it would have been much better much earlier; but now, due to all his other health factors and possible serious complications, at this time Dr. Flye would not consider undertaking such a surgery for Mr. Edgerton. T. 318-319.

Insofar as the absence of the sternum was concerned and what repair options were available when, the "outcome" did not change "in that few days" between when Dr. Morrison last saw Mr. Edgerton on Friday, January 12 and when Dr. Rogers saw Mr. Edgerton on Monday, January 15, other than the fact that Dr. Morrison had discharged Mr. Edgerton from his care, causing him to go from the Cox system to the St. John's system, and to be seen by physicians who were strangers to his condition and history. T. 358.

Further, on cross examination by Dr. Morrison's counsel, Dr. Flye testified that if Mr. Edgerton's sternum necrosis had been diagnosed even at six weeks after his bypass surgery Dr. Flye knew he could have been able to reconstruct the sternum and reestablish structural skeleton integrity since it was not infected. T. 366.

On the same cross examination, Dr. Flye was asked if Dr. Rogers had no reason to suspect the possibility of infection, whether the options of a rigid repair would have been available to Mr. Edgerton in January of 1990, and he answered "Absolutely." T 368. Further answering, Dr. Flye testified that in his opinion "In fact, if Dr. Morrison had been there [when the dehiscence was diagnosed] he probably would have known it wasn't infected and could then have treated it as a non-infected wound." T. 368.

Dr. Flye has used the mesh impregnated with methyl methacrylate to repair a lateral chest wall and to reconstruct a sternum. T. 369. He also testified that he was aware of medical literature advocating the use of this synthetic material in a post bypass sternotomy patient, and albeit rare to need such a technique, this is not an unknown, unheard of procedure. T. 383. Dr. Geter, Dr. Morrison's expert witness, stated that he had seen the rib transfer surgery described in the literature. T. 895.

On redirect examination, Dr. Flye summarized his opinions about Dr. Morrison's failures which caused damage to Mr. Edgerton: "warning signs were missed and ignored, and proper studies were not performed in a timely fashion to pick this up in an early fashion so that you could diagnose a necrotic sternum that was not infected and therefore could be repaired to restore structural integrity of the skeleton." T. 384. In his opinion, there were some red flags which should have indicated to Dr. Morrison that something more than the routine postoperative follow-up was going on, and Dr. Morrison should have continued to be involved at that point, and if he had

done that and paid more attention and ordered a few more studies, he would have made the diagnosis much sooner, even as early as sometime in September. T. 385. And, at that time, "the chances would have been overwhelming that you would have the opportunity to reconstruct." T. 385-386.

"Rigid fixation" was the summary term used in Mr. Edgerton's verdict director as the ultimate fact based on all the testimony of supporting his claim of what the proper standard of care required Dr. Morrison to do for Mr. Edgerton ("the act or omission complained of" in MAI). AA23.

It is very critical to note that all doctors for both parties, including Dr. Morrison himself, unanimously testified without dispute that given Mr. Edgerton's unusual situation, because not enough sternum remained due to the necrosis, in addition to several other physical conditions, it was not possible to wire his rib cage back together, and the use of wire was never a feasible repair option for Mr. Edgerton as it would almost definitely fail. T. 902, 1153, 1164-65. All the doctors further agreed that if the sternum was both necrotic and infected, then a muscle flap repair was the only option, and, no witness nor any evidence ever affirmatively supported any belief that the use of wire was a possible repair option for Mr. Edgerton.

The following table simplifies and demonstrates the possible permutations of the necrotic and/or infected, or not, conditions, and what the pertinent testimony was regarding the repair options.

<p><u>Condition:</u> Necrotic : Infected</p> <p><u>Testimony:</u> All agreed : Muscle flap</p>	<p align="center"><b>(Mr. Edgerton)</b></p> <p><u>Condition:</u> Necrotic : Not infected</p> <p><u>Testimony:</u> Dr. Flye: rib or plastic : Defense: muscle flap (All agreed, rewiring not possible)</p>
<p><u>Condition:</u> Not necrotic : Infected</p> <p><u>Testimony:</u> All agreed : Rewire</p>	<p><u>Condition:</u> Not necrotic : Not infected</p> <p><u>Testimony:</u> All agreed : Rewire</p>

When testifying during the two-week trial, various synonyms were used by counsel and the witnesses to collectively refer to the two options Dr. Flye described that the standard of care required, and the term "rigid fixation" and what it meant thus evolved as the testimony progressed, for example:

-Dr. Flye: "structural integrity," "solid surface," "solid structure," "stability," "structural stability," "solid repair," and "stabilizing [effect]," T. 282, 307, 311, 318, 357;

-Dr. Morrison: "a stable repair either artificial or a donated rib" T. 1188;

-Dr. Barner: "the flap versus an attempt to make a rigid repair"; "Dr. Flye's

own testimony contrasting his opinions of a flap procedure versus an attempt of some form of rigid fix"; "whether it's a rib or whether it's artificial material," "Dr. Flye was recommending...the best option would be attempt a rigid fix," "that's a fair summary of what you understand Dr. Flye's testimony is. Yes, sir." T. 702-03.

Despite the lack of a "specific definition" from Dr. Flye, Dr. Morrison's own defense counsel acknowledged a very clear understanding that based on all the evidence and testimony, "rigid fixation" referred to Dr. Flye's testimony which was limited to only two possible repair options, by rib or plastic, and did not include any use of wire:

-The term "rigid fixation" was used twice during Mr. Edgerton's cross-examination of Drs. Barner and Geter, who were called as witnesses by Dr. Morrison, each time specifically defining the term as limited to the rib and plastic mesh options, and without ever making any suggestion whatsoever that the term included the use of wire. Dr. Barner at T. 734; and Dr. Geter at T. 925. Neither witness nor any defense counsel sought any clarification of the term "rigid fixation," nor was there raised any objection to the form of the questions as being confusing, ambiguous or amorphous.

Defense counsel for Dr. Morrison also demonstrated the unambiguous and universal understanding of Dr. Flye's testimony and the proper meaning of the term, which excluded any use of wire, in his closing arguments to the jury:

- "If you look at the Instructions, . . . The damage here is not having a rigid repair. . . . there was [sic] only two options presented in the evidence at all. One is

a methylmethacrylate prosthesis. I'll call it plastic . . . And the other is an autologous rib transfer, or putting a rib in the space." S.T. 82;

-Dr. Flye is the only one who came to court and said the plastic, the methylmethacrylate, or the rib transfer is even a possibility." S.T. 82-83;

-. . . methylmethacrylate . . . a rib . . . Those are the only two suggestions ever made by Dr. Flye." S.T. 83;

-"Dr. Morrison said . . . I have found no literature where a methylmethacrylate or a rib is an issue. Dr. Flye is the only one to say that this could be done. He told you because they thought it might be infected, they did not do a rigid repair." S.T. 84-85;

-"You look at these instructions and you'll see that unless you believe Mr. Edgerton would have, should have gotten a rigid repair . . ." S.T. 85;

-"Do we really think Ed should have gotten a piece of plastic or a dead bone in his chest? . . . I think now you know the difference." S.T. 86.

During his testimony and at its conclusion, there were no objections raised by Dr. Morrison to the admissibility of Dr. Flye's opinions regarding the causation of damages to Mr. Edgerton from Dr. Morrison's negligence. Dr. Morrison never moved to strike any of Dr. Flye's testimony regarding causation issues on any basis.

At pages 613 and 1311 of the transcript, counsel for Dr. Morrison conceded that the jury is "free to disbelieve" an expert witness for either side, and therefore it would be inappropriate to grant a directed verdict simply on the basis that expert

witness testimony presented by opposing sides is conflicting against each other.

In overruling Dr. Morrison's motion for directed verdict, the trial court announced the basis of its ruling by stating that it felt there was sufficient testimony in evidence for the jury to believe or disbelieve concerning the issues of standard of care and also causation, much of which came from Dr. Flye. T. 1317-1318.

At page 8 of the 10<sup>th</sup> volume of the transcript, during the instruction conference after the close of all the evidence, counsel for Dr. Morrison conceded that "The evidence was only that there are two possible rigid fixations that Dr. Morrison should have provided to Ed Edgerton, that being methylmethacrylate, or a rib transfer." Volume 10, T. 8-9.

In his brief at page 41, Dr. Morrison candidly concedes that Mr. Edgerton's evidence was clear and precise: ". . . Dr. Flye, respondent's only expert to testify against Dr. Morrison, was precisely explicit that, in his opinion, there were only two advisable treatment options available to respondent: 1) rib transfer, or 2) methyl-methacrylate. (2 T 306-307, 3 T 368)." At no time did counsel for Dr. Morrison suggest or argue that any of Mr. Edgerton's evidence or testimony supported a conclusion that Mr. Edgerton contended that he should have received a repair by rewiring his sternum, or that such was ever remotely possible for him. Additionally, Dr. Morrison concedes that Dr. Flye specifically "...testified that re-wiring was not an option for respondent. (2 T 300-302)." Id.

After two full weeks of trial, the jury retired to deliberate, during which two

questions were raised by the jury. 10T. 117-123. No questions were raised by the jury concerning any terms or provisions contained in the instructions or the verdict form.

Following seven and a half hours of deliberations the jury returned its verdict in favor of three defendants, and against Dr. Morrison. 10T. 123-127, L.F. 24. The court verified that the verdict was in proper form, accepted the same, and no party requested any further inquiry or relief before the jury was discharged. 10T. 125.

On September 1, 2006, the trial court entered and filed its judgment on the jury's verdict. L.F. 24, 115.

## ARGUMENT

### REPLY TO POINTS I AND II

**The trial court properly denied Dr. Morrison's motion for directed verdict at the close of all the evidence and his motion for JNOV**

**because Mr. Edgerton's evidence made a submissible case on the causation-in-fact element of tort action based on improper health care in that his evidence showed that "but for" Dr. Morrison's failure to diagnose Mr. Edgerton's sternal dehiscence from September 1989 through January 12, 1990, Mr. Edgerton would have probably undergone or had the option of a surgical repair to restore the structural integrity of his chest by the use of either mesh and glue or a rib transfer.**

Points I and II asserted by Dr. Morrison are virtually identical except that Point II includes the date of January 12, 1990. In fact, the standard of review is exactly identical, down to the position of the words on the page. To avoid needless duplication, Mr. Edgerton will address these points jointly.

Dr. Morrison's argument begins with a recitation of the correct standard of review, and then proceeds to ignore it completely by focusing on evidence supporting his defense rather than the evidence supporting the jury's verdict. Dr. Morrison

essentially argues that his evidence was better and more believable than that offered by Mr. Edgerton. A.B. 14-18, 32-34. These two points can be fully and properly analyzed and decided together based upon application of the proper standard of review to a clear and complete understanding of all the evidence presented at trial which supports the jury's verdict.

The jury is free to believe or disbelieve the expert witness testimony offered by either side. T. 613, 1311. Under the proper standard of review, the testimony of any expert witness tending to either contradict Mr. Edgerton's case or to support Dr. Morrison's case is completely irrelevant and must be ignored by Dr. Morrison and this Court. The issue here is not whether the jury believed the testimony of Dr. Flye, but whether his testimony combined with that of other non-retained expert witnesses and the defense expert witnesses established the required legal elements of Mr. Edgerton's case. This Court gives deference to the jury's role and relies on the facts most favorable to its verdict, not evidence, testimony or inferences contrary to the verdict. Overcast v. Billings Mutual Ins. Co., 11 S.W.3d 62, 64, n.2 (Mo. banc 2000). After all the additional facts are reviewed as stated above, it is abundantly clear that those elements were firmly established by Dr. Flye's testimony and supporting reasonable inferences from the other evidence and testimony.

"It is improper to withdraw a case from the jury unless there is no room for reasonable minds to differ. Id. at 89. There must be a 'complete absence of probative fact' supporting the jury's conclusion before [this Court] can reverse the jury's verdict

for insufficient evidence. Id.; Seitz v. Lemay Bank and Trust Company, 959 S.W.2d 458, 461 (Mo. banc 1998). On the other hand, if any one of [Mr. Edgerton's] experts was qualified to testify to the standard of care and that the breach caused injury to [Mr. Edgerton], then [Mr. Edgerton] has made a submissible case and it [will be] error to set aside the judgment." Brooks v. SSM Health Care, 73 S.W.3d 686, 693 (Mo. App. 2002).

Dr. Morrison essentially makes a three-part argument which fails to carry his burden on appeal.

1. **Dr. Flye's testimony was not contradictory**

Dr. Morrison at trial and here on appeal completely confuses, misunderstands and misconstrues Mr. Edgerton's case and Dr. Flye's testimony on the causation issue. Neither the trial court nor the jury were so confused.

Since Mr. Edgerton's dead sternum was never infected, the timing of "when" the repair by rib or plastic could be done was at any time along the spectrum from early September 1989 to January 1990, but the sooner the better. T. 302, 303; See, also A.B. 20. However, the choice of the "type" of repair which was best to perform for Mr. Edgerton depended on whether the treating doctor was in a position to determine if the sternal area was infected or not; and, according to Dr. Flye, Dr. Morrison was, and Dr. Rogers was not. T. 305-311. In Dr. Flye's opinion, this is what the standard of proper medical care required, and we must ignore what Dr. Morrison or Dr. Geter now say they would not have done. Counsel for Dr. Morrison

in closing argument demonstrated his clear understanding at trial that the key issue was what the evidence showed what "should" be done. S.T. 85, 86. By contrast, Dr. Morrison now totally confuses the issue by claiming Mr. Edgerton's case is deficient because Mr. Edgerton was required to show what type of surgery "would" have been performed. A.B. 26. Such is a gross misstatement of the legal standard. Therefore, Dr. Morrison's entire argument based on that false premise fails, and his first two points should be denied.

Dr. Morrison seems to argue that because he and Dr. Geter testified that they would have only considered a muscle flap and no other option, that this destroys "causation." Such is not true. It would only mean that they would not be following the proper standard of medical care. One cannot escape the proper standard of conduct by denying that it exists. Otherwise, proving "causation" would always be impossible if a negligent provider could later come in and preclude such a finding by merely disputing the standard of care.

Mr. Edgerton is entitled to the reasonable inference that since the diagnosis of unhealed sternum was strongly suggested by other treating doctors even before Dr. Morrison last examined Mr. Edgerton, and others easily made the correct diagnosis a mere three days later, that Dr. Morrison would have adhered to the proper standard of care as described by Dr. Flye, which required ruling out infection and then proceeding with the better option of rigid fixation, rather than defaulting to the less desirable muscle flap repair. T. 1320. Or, more simply put, the issue is not what Dr.

Morrison or Dr. Geter "would" have done (as Dr. Morrison argues), but rather what they "should" have done in accordance with the proper standard of medical care. Dr. Flye would have been just as critical of Dr. Morrison's treatment of Mr. Edgerton if he had actually made the correct and timely diagnosis, but then failed to provide the proper remedy by only considering a muscle flap repair.

If the area of Mr. Edgerton's chest was determined to be infected, regardless of "when" the diagnosis of the unhealed sternum is made, all the expert witnesses agreed that a muscle flap repair was the only reasonable "type" of surgery to perform. T. 305, 306. Mr. Edgerton's sternum was not infected, so this option was not the only option available, and was not the best choice for Mr. Edgerton.

Dr. Flye testified very clearly on causation: "Q: And you believe that's [rigid fixation] what could have and should have been done had Dr. Morrison followed more closely and made the diagnosis? A: He is in the ideal seat. I mean, we've talked about all the medical opinions comes back to him as the surgeon who's invaded Mr. Edgerton's chest, created the incision, and now that's a problem, so he's the one that can best assess that. And with that background, he's the one that can best assess what's going on at the second operation of January. So yes." T. 310, and see 308-310, generally.

If the area was determined to be not infected, then Dr. Flye clearly testified that the appropriate "type" of surgery, the best choice for Mr. Edgerton, was either a rib transfer, or use of mesh and glue to reconstruct the missing sternum and restore

structural integrity or rigid fixation to his chest. T. 306, 307.

Dr. Morrison's argument of contradictory testimony is a fiction arising from his continued confusion of these principles which were clearly established in the evidence, thereby, there was no contradictory causation testimony by Dr. Flye and Dr. Morrison's first and second points fail accordingly. The only "contradiction" arises from the opposing points of views and opinions of the parties, which is nothing more than arguing the evidence all over again, and is improper. If one properly disregards all the evidence tending to support Dr. Morrison's position at trial, the "contradiction" of which he complains here on appeal disappears completely.

Insofar as how the "when" or timing of the repair surgery should be determined according to Dr. Flye's testimony depends upon who and under what circumstances the medical issues and diagnosis are approached. That is, in Dr. Flye's opinion, if Dr. Morrison had not abandoned Mr. Edgerton but rather continued to keep a high index of suspicion and continued to follow Mr. Edgerton, then more likely than not Dr. Morrison would have been the one to make the diagnosis as was required by the standard of care proposed by Dr. Flye, and the ensuing standard of care would have required proceeding with the better option of using either type of rigid fixation surgery. T. 310, 311. And, Dr. Flye's testimony that the "outcome" was not changed from Friday to Monday simply means that Dr. Morrison still had the same options to perform a rigid fixation surgical repair on Monday had he continued to treat Mr. Edgerton and made the diagnosis. Thus, Dr. Flye's testimony was not

self-contradictory, and was more than sufficient to submit this case to the jury, and the trial court thereby did not err.

2. **No speculation as to other repair procedures**

Here, again, Dr. Morrison argues a matter that only goes to the weight of the evidence offered by Mr. Edgerton as compared to that he offered in his own defense. This completely misses the mark. Mr. Edgerton was not required to show that the alternatives Dr. Flye proposed were "widely used," that any "specific professional literature" supported the use of these alternatives, or that other surgeons agree with him. A.B. 23-24. (Although, Dr. Morrison completely ignores the fact that his own expert witness, Dr. Geter, testified that he had seen the rib transfer option described in medical literature. T. 895.) And, again, Dr. Morrison improperly lapses into arguing his own evidence that the "testimony of other doctors [called as defense witnesses] did not support the availability of alternative repair procedures; the other surgeons [called as defense witnesses] testified that the muscle flap procedure is the state of the art repair procedure. (5 T 663, 6 T 905)." A.B. 24. He complains to no avail that "no doctor, other than Dr. Flye, acknowledged any awareness of using" the two options of rigid fixation. Id. At the bottom of page 24 of his brief, Dr. Morrison misconstrues the proper standard and demonstrates his lack of understanding of the issues by claiming that Mr. Edgerton's evidence of causation was dependent on what Dr. Morrison "might" have done. What is critically important is not which procedure Dr. Morrison himself might have chosen, but what repair options the evidence

supporting the jury's verdict showed that Dr. Morrison was required to consider under the proper standard of medical care. Dr. Morrison's refusal to accept Dr. Flye's testimony does not affect its sufficiency.

Contrary to Dr. Morrison's subsequent arguments on later points, he demonstrates a very clear understanding at page 23 of his brief of Dr. Flye's testimony as to the "two specific alternative repair procedures" he opined were the best options for Mr. Edgerton's unhealed and non-infected sternum reconstruction surgery.

At trial, the same was true.

Reading page 8 of the 10th volume of the transcript, during the instruction conference after the close of all the evidence, it is seen that counsel for Dr. Morrison conceded that "The evidence was only that there are two possible rigid fixations that Dr. Morrison should have provided to Ed Edgerton, that being methylmethacrylate, or a rib transfer." Volume 10, T. 8-9.

Later, in his brief at page 41, Dr. Morrison concedes that Mr. Edgerton's evidence was clear and precise: ". . . Dr. Flye, plaintiff's only expert witness to testify against Dr. Morrison, was precisely explicit that, in his opinion, there were only two advisable treatment options available to plaintiff: 1) rib transfer, or 2) methyl-methacrylate."

On page 23 of his brief, Dr. Morrison raises a false issue claiming that Mr. Edgerton had a burden to show that the rigid fixation options were "widely used," or that "specific professional literature" approved such techniques. Not only did Dr.

Morrison fail to object at trial on this basis (a matter of admissibility of testimony never raised or preserved, thus waived), even if such contentions were material, they only go to the weight of the evidence for the jury to consider at trial, and have absolutely no relevance to the legal issues here on this appeal and must be ignored as meaningless.

On the following two pages, Dr. Morrison slips again into argument which relies entirely upon believing Dr. Morrison's expert witnesses to the exclusion of Mr. Edgerton's expert witness, Dr. Flye, which flies in the face and violates the applicable standard of review for this appeal. Such false and improper argument must be ignored here.

3. **Dr. Geter's testimony about the muscle flap procedure**

Once again, Dr. Morrison spends five pages advancing an argument which violates the applicable standard of review as he wants to require this Court to believe the testimony offered by his own expert witnesses to the exclusion of Mr. Edgerton's expert witness, Dr. Flye. This amounts to nothing more than rearguing Dr. Morrison's case upon the facts as if he were back at the trial level in front of the jury and is improper here.

Furthermore, for example, at the bottom of page 31 and continuing to page 32 of his brief, Dr. Morrison makes a bald assertion of legal fact without any supporting citation to the record or law. In addition, Dr. Morrison cites the Gulley v. Werth, 61 S.W.3d 293 (Mo. App. 2001) case and advances false arguments. A.B. 29-30. And,

again, to support his argument, Dr. Morrison lapses back into arguing that his evidence was more believable and disproved Dr. Flye's testimony, thus making it speculative. Such is simply not in compliance with the applicable standard of review.

Counsel for Dr. Morrison failed to get a clear understanding of the facts and issues at trial, and such was explained by Mr. Edgerton's counsel in argument on the pertinent motions. T. 1315-1316. Thereafter, the trial court carefully demonstrated his understanding of those facts and issues and how the testimony clearly established a submissible case for the jury to consider and either believe or disbelieve. T. 1317-1318. The jury also clearly understood the same matters, and reached a split verdict, deciding to grant defense verdicts to 3 out of the 4 defendants, and to hold Dr. Morrison liable for the damages he caused. LF 113, 114, 115.

In conclusion, a full, clear, and complete understanding of the factual testimony shows it is sufficient to dispose of these points as being without merit when the proper standard of review is applied, and a detailed analysis of the cases cited by Dr. Morrison would only lengthen this brief and would yield nothing to support Dr. Morrison's argument. Points I and II should be denied.

### **REPLY TO POINT III**

**The trial court properly submitted Mr. Edgerton's verdict director against Dr. Morrison (Instruction No. 11)**

**because it tracked Mr. Edgerton's theory of his case as established at trial and did not constitute a prejudicial roving commission**

**in that the term "rigid fixation" is not amorphous as it was supported by the evidence offered at trial, was clearly understood as being limited to only the two procedures recommended by Mr. Edgerton's expert witness (mesh and glue, or rib transfer), and specifically did not include a procedure that Mr. Edgerton's expert witness expressly testified, and all defense expert witnesses agreed, would not have been an appropriate option for Mr. Edgerton (rewiring).**

As a preliminary matter, it must be noted that due to the procedural history of this appeal being subject to a prior opinion issued by the Court of Appeals, Southern District, and then coming before this Court on application for transfer, the basis and case law asserted by Mr. Edgerton in his application for transfer is not a secret. (Note, Dr. Morrison makes three references to the Court of Appeals decision in his brief, and attaches a copy of it as the very first item in his Appendix, but completely

ignores the Application for Transfer. A.B. 25, 41, 44; AA1). However, despite obtaining additional time to prepare his substitute brief, Dr. Morrison has completely failed to address any of the cases and issues relative to this point which were raised in Mr. Edgerton's Application for Transfer. This puts Mr. Edgerton at a significant disadvantage leaving him with no opportunity to analyze Dr. Morrison's position on those cases and issues for this Court until the presentation of oral argument which is limited to all of 15 minutes. Mr. Edgerton finds this rather unfortunate since it seems a more fitting endeavor for the parties to raise and contrast all issues and known pertinent law, favorable and unfavorable, at the earliest opportunity so that the same can be "hashed out" in the crucible of appellate litigation as fully as possible to facilitate the best analysis by this Court.

The legal facts and issues presented here are very similar to this Court's recent decision in Hickman v. Branson Ear, Nose & Throat, Inc., 256 S.W.3d 120 (Mo. banc 2008) which was not yet decided at the time of trial. The history of that case is very instructive and is virtually identical to that presented here. In Hickman, the Court of Appeals reversed the trial court's judgment in favor of the plaintiffs in a tort action based on improper health care because of a perceived insufficient definition of the standard of care by the plaintiffs' expert witness according to more traditional methods. Hickman v. Branson Ear, Nose & Throat, Inc., No. 27648 (Mo. App. S.D. 8-29-2007) p. 7. The plaintiffs' motions for rehearing or for transfer raised the same issues but were denied. Hickman v. Branson Ear, Nose & Throat, Inc., No. 27648

(Mo. App. S.D.) October 9, 2007, p. 5. Application for transfer to this Court was granted.

This Court noted that expert witness testimony has been the subject of formulaic requirements "in the past" but the law now takes a simpler approach. Hickman, 256 S.W.3d at 122. After reviewing only six of the twenty-three questions and answers cited by the Court of Appeals, this Court concluded that the plaintiffs' expert witness had testified "enough" to sufficiently set forth the proper standard of care. Id., 124. This Court reviewed the full record and found that the expert witness' testimony as a whole was "not a vague reference" to the technically required legal phrase, and the substantive content, regardless of the less than "specifically defined" or precisely refined phrases used to express the opinion was sufficient to support the verdict. Id. This Court determined that it was the substance of the whole record and should not be limited to only the form of two isolated questions as the basis on which the jury could properly conclude that the defendant was negligent, and affirmed the judgment of the trial court, as should be done here. Id.

The lesson of Hickman is clear: hyper-technicalities of legalistic and "specifically defined" words are not required by an expert witness in a trial of a tort action based on improper health care as they once were as long as the overall record reflects the proper factual substance and legal merit supporting the opinions in understandable terms regardless of the exact words or phrases used. If such is true for the critical issue/definition/finding of "standard of care," such should be equally, if

not just all the more, true for the issue/definition/finding of the ultimate fact presented in the verdict director below using the term "rigid fixation." Expert witness testimony is not required to be recited in ritualistic fashion; the substance is far more important and controlling than the technical form. If an expert witness' failure to "specifically define" the MAI legal standard of medical conduct in the evidence for determination by lay jurors is not valid grounds for reversal and remand, then certainly it cannot be sufficient grounds here involving simpler lay phrases commonly understood where the record is much more replete with proper substance and merit in comprehensible terms. That is, that Dr. Morrison was negligent in failing to diagnose and treat Mr. Edgerton's unhealed sternum with rigid fixation, i.e., plastic or rib repair, and not with wire. Hickman is squarely on all fours procedurally, factually and legally, and compels the judgment be affirmed and final in all respects as originally entered.

Dr. Morrison's argument under his third point is self-contradictory and is refuted by his own counsel's admissions in court at trial, thus it has no merit and should be denied. And, again, since reference to the record is sufficient to resolve this Point, a review and analysis of the cases cited by Dr. Morrison would be of no benefit here. Dr. Morrison recites the proper legal principles and authorities, but fails in his analysis and application of the law to our particular facts in the record.

In very simple and plain terms, this dispute came down to a choice of whether the proper standard of medical care required a flexible or a rigid repair of Mr. Edgerton's sternum.

A number of synonymous terms were used at trial by various witnesses and by counsel, including counsel for Dr. Morrison, to distinguish these alternatives between flexible and rigid. At no time during any testimony did any witness or counsel express any difficulty in understanding the distinction, any confusion, nor any ambiguity in the testimony. The first time this issue was raised was in the instruction conference after the close of all the evidence.

As noted many times above, during the presentation of evidence at trial neither Dr. Morrison, his expert witnesses, nor his counsel, ever expressed any suggestion that the term "rigid fixation" was confusing, ambiguous, or "amorphous." See page 27 of Respondent's Substitute Brief.

It was only for a passing moment that a very generalized claim to this effect was raised during bench argument concerning the instructions. 10T. 8-10. Even then, the complaint was different than that now raised on appeal. There, the argument was that the term was a "roving commission"; a common, term itself often used to summarize a general objection to verdict directors. 10T. 8. Nonetheless, in the very next sentence, Dr. Morrison's counsel completely refutes the "roving commission" objection by stating: "The evidence was only that there are two possible rigid fixations that Dr. Morrison should have provided to Ed Edgerton, that being methylemethacrylate, or a rib transfer." *Id.* Similarly, Dr. Morrison never raised this issue in his motion for JNOV. L.F. 116-118. Nor did he mention any complaint specifically about the term "rigid fixation" in his motion for new trial. L.F. 120-122.

At best, his motion at paragraphs 5 and 6 generically alleged “improperly constituted a roving commission,” and “wrongly instructed the jury that defendants could be found negligent on a basis other than that found in the evidence.” L.F. 121. These bare statements could easily apply to any case, and may well be a standard form used after trial given that nearly every conceivable complaint is asserted in conclusory language. Thus, this preserves nothing for appeal here. Rule 70.03.

Nonetheless, Dr. Morrison cannot have it both ways. When viewing the entire record, the phrase "rigid fixation" was defined and understood. There is no need to resort to any dictionary definitions; the jury certainly did not. The meaning of the phrase is easily gathered from the same source the jury used: the record. Also defense counsel never suggested or proposed an alternate instruction or wording to resolve their complaints.

To preserve an asserted instructional error for review on appeal, a party must make specific objections to the giving of the instruction before the jury retires to consider its verdict; the objections and grounds therefore must be stated distinctly on the record. Doe v. McFarlane, 207 S.W.3d 52, 74 (Mo. App. 2006); Rule 70.03. A vague, general objection does not permit the trial court to make an informed ruling as to the validity of the objection, as such, a general objection preserves nothing for appellate review. Gurley v. Montgomery First Nat. Bank, N.A., 160 S.W.3d 863, 868-69 (Mo. App. 2005). The trial court has no obligation to dig out the basis for which a party chooses not to distinctly articulate in its objection. Gill Constr., Inc. v.

18th & Vine Authority, 157 S.W.3d 699, 719 (Mo. App. 2004).

Following Dr. Morrison's counsel's single sentence objection to the phrase, Mr. Edgerton's counsel satisfied the trial court with rebuttal that the verdict director avoided unnecessary detail, was readily understood to be limited to only two options, rib or plastic, was solidly supported in the record, was not argumentative, and squarely placed the factual issue to the jury in appropriate fashion. 10T. 9-10.

Finally, as noted in the first two points above, Dr. Morrison abandoned this claim and argued in closing that only two options, rib or plastic, were included in this phrase, thus this argument was waived. Rule 70.03.

Dr. Flye repeatedly used the term "structural integrity" in explaining his opinions in this regard. T. 282, 300, 306, 307, 313, 316, and 384. He described the goal with a non-infected unhealed sternum like Mr. Edgerton had here as: "once you make the diagnosis, you want to cut away all the dead tissue and then reconstruct the integrity of the skeleton." T. 303. Dr. Flye also used the phrase "solid repair." T. 318. In cross examination by Dr. Morrison's counsel, the question defense counsel posed referred to a "fixed, rigid chest, solid." T. 301.

Two of Dr. Morrison's own witnesses acknowledged that they each understood what the fixed versus flexible options were limited to under the facts of this case. Retained defense expert witness, Dr. Barner, was called in person by Dr. Morrison and he acknowledged that he knew for years, practiced with, and respected Dr. Flye as a good surgeon. T. 700-701. Dr. Barner said he read Dr. Flye's deposition

testimony and that he readily understood what Dr. Flye meant by using the words "rigid repair" or "rigid fix." T. 701. He also admitted that he clearly understood that in Dr. Flye's opinion that "the best option [for Mr. Edgerton] would be [to] attempt a rigid fix." T. 702. Albeit during an offer of proof out of the hearing of the jury, Dr. Barner had no difficulty or confusion when he answered questions regarding the use of prosthetic material or a person's own rib to close the sternal gap and "obtain a rigid fix." T. 726-727. Finally, Dr. Barner clearly understood the term "rigid fixation" when asked about his knowledge of his colleagues using artificial or autogenous rib grafts sternum defects as long ago as the late '70's and early 80's. T. 733-735.

Likewise, a treating expert witness called by and extensively relied upon by Dr. Morrison, Dr. Geter, was asked a similar line of questions about the medical literature in the late '70's and early 80's as an alternative to a muscle flap repair, and he admitted he was aware of the same. T. 924-925. However, he testified that he would not use either of those methods. T. 925. The question posed by Mr. Edgerton's counsel used the term "rigid fixation," and drew no objection from Dr. Morrison's counsel as being "amorphous" or ambiguous in any fashion. In giving his answer, Dr. Geter demonstrated no confusion, but instead clearly understood the use and application of that term to include the prosthetic and autogenous options. T. 925.

Finally, at the bench hearing on the motions filed after the close of all the evidence, Mr. Edgerton's counsel used the term "rigid fixation" several times and at no time did any defense counsel or the court express any confusion or uncertainty as

to what was meant and specifically included in that term. T. 1312-1321.

Dr. Morrison argues that somehow, despite the fact that all the evidence supporting a submission of rigid fixation was limited to only two options, the jury was allowed to conjure up their own method to fix Mr. Edgerton's sternum. He does not suggest any such imaginary alternatives, nor does he point out any parts of the record from where a third or other possibility could spring.

Furthermore, counsel in their brief have refuted their own argument. A.B. 9, 41-42.

Thus, a detailed review of cases cited by Dr. Morrison would be of no benefit to this matter. For example, Dr. Morrison cites the case of Mast v. Surgical Serv. Of Sedalia, L.L.C., 107 S.W.3d 360 (Mo. App. 2003) where the expert witness testified "about various other means" of a medical solution. A.B. 40. However, that case is completely distinguishable since the facts here are completely different. Dr. Flye did not testify about any "other means" of rigid fixation except for the prosthetic and autogenous methods, so there can be no application of that holding here, nor any confusion by the jury.

Additionally, Mast actually supports Mr. Edgerton's position that Instruction No. 11 was perfectly drafted here, and that the term "rigid fixation" was supported by the evidence when it is viewed as a whole with all reasonable inferences applied in his favor. The lesson of Mast very simply was that when there are several alternative forms of treatment, some negligent and some not, the proper practice is to have the

expert witnesses make those distinctions clear in the evidence so that the "ultimate fact" does not include both negligent and non-negligent options. Interpreting and applying Mast properly under the facts of this case leads to the only conclusion that the submitted ultimate fact of "rigid fixation" was perfectly correct as such was supported by evidence that the mechanism was limited to repair using either plastic or a rib, and did not include the muscle flap or wire repair options given Mr. Edgerton's particular circumstances.

Finally, the court in Mast properly held the error was harmless, and cited the correct legal standard that to order reversal and remand of a jury verdict on grounds of instructional error, it is mandatory that the appellant demonstrate "overwhelming" prejudice from the alleged error to a degree of confusing or misleading the jury. Mast, 374.

Also, Dr. Morrison cites the Grindstaff v. Tygett, 655 S.W.2d 70 (Mo. App. 1983) case for the holding that a term should not be submitted if it is "susceptible to many interpretations." A.B. 40-41. Mr. Edgerton has no quarrel with that statement of law, but rather with the fact that Dr. Morrison has failed to demonstrate how the holding would apply as there is no evidence of "rigid fixation" in this case of being susceptible to many interpretations other than the two that Dr. Morrison admits were "precisely explicit" and were repeatedly delimited in the evidence. A.B. 41-42.

Therefore, this Point must be denied.

## REPLY TO POINT IV

**The trial court properly submitted Instruction No. 15 on damages**

**because it followed the requirements of MAI 21.03, 19.01, and 4.01**

**in that Dr. Morrison elected to not allege any comparative fault of Mr. Edgerton, nor any apportionment of fault among any of his co-defendants.**

Under this Point, Dr. Morrison properly states the standard of review this Court is bound to apply, but then once again, Dr. Morrison promptly ignores the standard and fails to apply it.

In particular, Dr. Morrison correctly states the rule that "the party challenging the instruction must show that it misdirected, misled or confused the jury, and that prejudice resulted," and that the prejudice must be "overwhelming." A.B. 46. Interestingly, Dr. Morrison recites the rule that a verdict director must follow the substantive law, a principle Mr. Edgerton agrees with, but Dr. Morrison wholly fails to direct this Court to any way in which Instruction No. 15 violated this principle, much less caused actual and overwhelming prejudice.

Dr. Morrison cites to only a single case as legal support for his fourth point. Wicklund v. Handoyo, 181 S.W.3d 143 (Mo. App. 2005). However, despite making bold claims that Instruction No. 15 "removed causation" from the juries consideration, and allowed Dr. Morrison to be held "liable for his mere association" with Mr.

Edgerton, no cogent reason or factual explanation is given. A.B. 48-49.

A careful reading of the two pages from Wicklund cited by Dr. Morrison reveals no support for this point, and thus the point should be deemed abandoned. Muilenburg, Inc. v. Cherokee Rose Design & Build, L.L.C., 250 S.W.3d 848, 853 (Mo. App. 2008).

The discussion on those two pages concern first, an issue identical to that raised and resolved in Hickman regarding the sufficiency of an expert witnesses' testimony defining standards of care, and is thus moot per the holding in Hickman. Second, the "but for" test in analyzing causation and the sufficiency of the evidence was discussed, which is not pertinent to the substance Dr. Morrison apparently intended to raise in this point.

Finally, as was recognized and share aloud by the trial court on the record, MAI 2.03 absolves Dr. Morrison's complaint entirely. 10 T. 14. All the instructions must be read together and harmonized as a whole, but Dr. Morrison wants to treat them singularly in isolation, which is not proper, thus perhaps explaining why he offers no legal authority for his argument.

Absent the same, laboring under the unfair burden of having to decipher the legal basis of Dr. Morrison's argument, the best Mr. Edgerton can propose is that Dr. Morrison believes it was unfair that the jury found him liable for all of Mr. Edgerton's damages for his failure to diagnose and treat Mr. Edgerton for his unhealed sternum from September to January, and that none of the other defendants were found to

"share" that liability with him. Such is not surprising if all nearly 1800 pages of the transcript is read as carefully as the jury paid attention to the evidence during two weeks of trial.

This case was governed by the principles of full joint and several liability, yet Dr. Morrison elected to not request apportionment of fault amongst himself and his co-defendants. LF 86, 99-112. Therefore, such unique benefit permitted only to health care providers was waived, and Dr. Morrison raised no contention after trial or on appeal that his co-defendants should have shared some portion of liability for Mr. Edgerton's damages.

At page 48 of his brief, Dr. Morrison asserts, yet with no supporting citation to the record or any legal authority, that this instruction left the jury free to shift damages caused by another defendant to him. However, the jury found no other defendant liable for causing damages which could be "shifted" to Dr. Morrison, thus his argument is mere fiction in a vacuum absent of support, factually as well as legally.

Instead, Dr. Morrison refers us to the verdict form on page 114 of the Legal File, claiming that it improperly permitted the jury accumulate damages against him by calling for a specification of damages by category instead of by defendant. That is an interesting and novel argument, but it is no more supported by the record as it was never preserved, nor is it supported by any proper and authorized use of MAI, thus it must fall on deaf ears.

Finally, the bottom line is that Instruction No. 15 followed the precepts of MAI 21.03, 19.01, and 4.01 to the letter, and Dr. Morrison does not complain otherwise. Therefore, Point IV must be denied.

## REPLY TO POINT V

**The trial court properly submitted the verdict form**

**because the verdict form complied directly with the applicable MAI**

**36.21**

**in that note 2 of the Notes on Use requires a "descriptive phrase describing and identifying the claim submitted," and such descriptive phrase did not thereby prejudice Dr. Morrison as the jury was not confused and was obviously capable of understanding the verdict form as evidenced by its decision to grant verdicts in favor of the three co-defendants where an identical descriptive phrase was used.**

Dr. Morrison's argument begins on a false premise. The verdict form was not "modified" as that term is used in analyzing MAI issues. Rather, the dictates of MAI 36.21, Notes on Use, note 2, were followed to avoid confusion as to which claim the jury was using to record its verdict on the write-in blank.

Note 2 requires a "descriptive phrase describing and identifying the claim submitted." MAI 36.21, Notes on Use, note 2. The guiding principle of MAI is to avoid the inclusion of evidentiary detail. The second sentence of note 2 requires: "The indentifying phrase should be non-inflammatory and as neutral as possible and

should avoid the assumption of disputed facts." Mr. Edgerton satisfied that requirement by proposing a description which included no facts at all and which was as "neutral as possible." MAI does not require a descriptive phrase that is "perfectly neutral" as none probably exists given the adversarial nature of trial and the practical circumstances of instructing a jury.

Dr. Morrison claims this descriptive phrase drew unfair attention to the verdict director concerning his fault to the exclusion of the other instructions. Dr. Morrison fails to give any credence to the collective intelligence of the 12 jurors, and their presumed attention and obedience to Instruction No. 2 patterned after MAI 2.03. (Mr. Edgerton is compelled to safely assume that MAI 2.03 was given as Instruction No. 2 as MAI mandates such and the legal file he prepared did not include that particular instruction, and begins with Instruction No. 3; See, also 10 T. 14, where the trial court appears to confirm this assumption). That instruction in very plain language tells the jury that each instruction is equally binding on them, that they must consider each instruction in light of and in harmony with the other instructions, and that they must apply the instructions as a whole to the evidence in reaching their verdict. Nothing exists in the record nor in Dr. Morrison's brief, other than pure fiction, to suggest the jury did any thing but follow the requirements of Instruction No. 2 in reaching its verdict against Dr. Morrison.

At page 52 of his brief, Dr. Morrison refers to MAI 36.21 (AA27) and now

suggests this was the proper verdict form to have been used. This suggestion comes too late. Dr. Morrison never raised this issue at any time until now, well after trial, after appeal, and after transfer. For the same reasons stated in point four, above, Dr. Morrison has waived the basis of this argument. Rules 70.03, 83.08(b).

Furthermore, in fact, if the jury followed the trial court's instruction under MAI 2.03 and viewed all the instructions as an operative whole, as we must presume it did, any "prejudice" now claimed by Dr. Morrison would have been avoided entirely as the jury would find his fault under the verdict director, would have assessed the damages Dr. Morrison caused to Mr. Edgerton under Instruction No. 15, then recorded their decision on the verdict form. This is exactly the way it is supposed to work, thus there is neither any error nor prejudice. Finally, no reversal is permitted unless the Court finds error which materially affected the merits of the action, and none exists here. Rule 84.13(b); Sec. 512.160.2 R.S.Mo.

As a side note, Dr. Morrison makes vague complaints about Instruction No. 6 and No. 12, but neither complaint was preserved for review, nor did Dr. Morrison tender alternate instructions to avoid any possible error and prejudice of which he now complains. Rule 83.08(b).

On page 54 of his argument, Dr. Morrison contorts the standard of review under this Point by claiming Mr. Edgerton has a "burden to prove nonprejudice." This demonstrates a clear misunderstanding of proper application of the controlling law to this situation.

Finally, on page 55, Dr. Morrison cites the cases of Brown v. St. Louis Public Serv. Co., 421 S.W.2d 255 (Mo. banc 1967), Tillman v. Supreme Exp. & Transfer, Inc., 920 S.W.2d 552 (Mo. App. 1996), and Epps v. Ragsdale, 429 S.W.2d 798 (Mo. App. 1968). However, a reading of these cases quickly reveals they are distinguishable legally and factually and thus fail to support Dr. Morrison's contention under this Point.

In conclusion, the correct verdict form was used, it was not modified but only a descriptive phrase was added as required by note 2, and no actual overwhelming prejudice, no misdirection, no misleading, and no confusion has been shown. The fact that the jury was able to not be misguided on 3 out of the 4 identical submissions conclusively demonstrates they clearly understood their charge, applied the instructions as a whole and carried out their duties with precision, the exact goal of good MAI instructions. As such, Point V must be denied.

## CONCLUSION

This matter was fairly and justly tried to an attentive and intelligent jury, over two full weeks, by experienced and skilled counsel, before a fine circuit court judge. The issues were soundly presented and subject to thorough cross examination. The jury deliberated for more than seven hours and decided that Dr. Morrison was liable to Mr. Edgerton for negligently failing to diagnose and treat Mr. Edgerton's unhealed sternum with either one of two available types of rigid fixation which contributed to cause Mr. Edgerton to suffer damages which the jury fairly assessed and allocated in their verdict as is required by law. The jury decided that based upon the evidence, the three other defendants were not liable for causing any of Mr. Edgerton's damages, and returned verdicts in their favor. Those verdicts were not contested and are final.

This case has been through quite a course, and it is time to put it to an end, just as the jury decided. The points raised by Dr. Morrison in his appeal bear no merit and should be denied. The rulings and judgment entered by the trial court should be hereby affirmed in all respects as originally entered, effective as of its date of entry, September 1, 2006.

Respectfully submitted:

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**RULE 84.06(c) CERTIFICATION AND**  
**CERTIFICATE OF SERVICE**

The undersigned certifies that Respondent's Brief contains the information required by Rule 55.03 and in compliance with the limitations contained in Rule 84.06(b) contains 13846 words using Corel Word Perfect 12. This Brief complies with Rule 84.06(g) in that the computer disk provided to the Court has been scanned for viruses using AVG, and the disk is virus free. Two copies of Respondent's Brief and one disk were served upon all attorneys of record in the above action by hand delivering the same to the business office of said attorney the 6th day of February, 2009.

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On the 6th day of February, 2009.

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