

SC89762

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**IN THE MISSOURI SUPREME COURT**

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**EDGAR T. EDGERTON,**

**Respondent,**

**vs.**

**FERRELL-DUNCAN CLINIC, INC.**

**AND**

**STEPHEN K. MORRISON, M.D.,**

**Appellants.**

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**Appeal from the Circuit Court of Greene County, Missouri**

**The Honorable Thomas E. Mountjoy**

**Case No. 191CC2009**

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**APPELLANTS' SUBSTITUTE REPLY BRIEF**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Reply to Respondent’s “Motion to Strike” Statement of Facts .....	1
Reply to Respondent’s “Reply” to Statement of Facts .....	6
A. Irrelevant Additional Testimony.....	6
B. Repetitive Testimony .....	7
C. Mischaracterized Testimony.....	8
D. Created Testimony .....	10
E. “Rigid Fixation” does not equate to rib transfer or methyl-methacrylate .....	10
ARGUMENT .....	13
I. Respondent failed to prove causation-in-fact .....	13
A. Self-contradictory testimony on the importance of timing .....	13
B. Speculative testimony regarding the repair procedures.....	15
C. Dr. Geter would have performed the muscle flap regardless. ....	16
II. Respondent failed to prove causation-in-fact as to January 12, 1990 .....	17
III. Respondent cites to his own expert’s testimony that conclusively established that “rigid fixation” is a roving commission .....	18
IV. Damage Instruction error .....	25
V. Verdict form error .....	30
CONCLUSION.....	35
CERTIFICATE OF COMPLIANCE.....	36
CERTIFICATE OF SERVICE .....	36

## TABLE OF AUTHORITIES

### Cases

<i>Brown v. St. Louis Pub. Serv. Co.</i> , 421 S.W.2d 255 (Mo. en banc 1967).....	28
<i>Carlson v. K-Mart Corp.</i> , 979 S.W.2d 145 (Mo. en banc 1998).....	30
<i>Gulley v. Werth</i> , 61 S.W.3d 293 (Mo. App. 2001).....	17
<i>Hickman v. Branson Ear, Nose &amp; Throat, Inc.</i> , 256 S.W. 3d 120 (Mo. en banc 2008).....	18, 19
<i>Homm v. Oakes</i> , 453 S.W.2d 679 (Mo. App. 1970).....	26
<i>Klugesherz v. American Honda Motor Co.</i> , 929 S.W.2d 811 (Mo. App. 1996).....	15
<i>Russell v. Terminal Railroad Ass’n of St. Louis</i> , 501 S.W.2d 843 (Mo. en banc 1973).....	29
<i>State Highway Comm’n v. Beaty</i> , 505 S.W.2d 147 (Mo. App. 1974).....	34
<i>Vest v. City Nat. Bank &amp; Trust Co.</i> , 470 S.W.2d 518, (Mo. 1971).....	29
<i>Wicklund v. Handoyo</i> , 181 S.W.3d 143 (Mo. App. 2005).....	6
<i>Winkler v. Robinett</i> , 913 S.W.2d 817 (Mo. App. 1995).....	14

**Rules**

Mo. R. Civ. P. 81.12(a)..... 1

Rule 70.02(b) ..... 32

Rule 81.12(b) ..... 1

Rule 81.12(e)..... 1

Rule 84.04(c)..... 1

**REPLY TO RESPONDENT’S “MOTION TO STRIKE”**  
**STATEMENT OF FACTS**

Respondent, as he did in the Court of Appeals, offers an objection to Dr. Morrison’s Statement of Facts, arguing that it omits important parts of the record, is slanted to the defense, and is presented in an “argumentative fashion.” Respondent’s protestations are unfounded.

Contrary to respondent’s assertion that parts of the record were omitted (RB<sup>1</sup>, p. 9-10), Dr. Morrison supplied the Court with the complete transcript pursuant to Mo.R.Civ.P. 81.12(a). Respondent took it upon himself to “supplement” the official transcript with transcriptions of video deposition testimony, (the evidence that respondent complains Dr. Morrison omitted) played at trial, although depositions are not required as part of the transcript on appeal. Rule 81.12(b). That testimony was already part of the evidentiary record, and was available, by rule, as an evidentiary exhibit. Rule 81.12(e).

Perhaps respondent’s complaint stems from his misunderstanding of the proper standard of review. At page 10 of his brief, respondent incorrectly states that the standard of review “requires a review of all of Mr. Edgerton’s evidence....” Rather, Rule 84.04(c) mandates that the statement of facts should

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<sup>1</sup> “RB” refers to Respondent’s Brief. “AB” refers to Appellants’ Brief.

only include those facts “relevant to the questions presented for determination....” The deposition testimony respondent suggests was omitted is not relevant to any issue on appeal because the witnesses offered no testimony on the causation element of respondent’s case, nor did they have any bearing on the instructional errors. Respondent’s Brief has not identified, designated, nor quoted any allegedly “omitted” evidence relevant to a question presented to this Court for determination. The reason is simple – there was none.

Respondent’s claim that Dr. Morrison’s Statement of Facts is slanted to the defense is likewise without merit. Appellants’ Statement of Facts contains 134 actual citations to the transcript. (See AB, p. 2-10). Of those, 18 citations are to the Legal File and Appendix establishing and referencing matters such as the claims made against defendants, a docket entry evidencing trial, the trial court’s rulings on motions, evidence that a verdict was returned and accepted by the trial court, evidence that an appeal was filed, and reference to the Court of Appeals’ opinion. Of the remaining 116 citations, 88 (75%) are exclusively to testimony from respondent’s witnesses. Of the remaining 28 citations to “Dr. Morrison’s evidence,” 10 involve mixed citations to both respondent’s witnesses and to supporting citations thereto from Dr. Morrison’s witnesses. Thus, only 18 out of 134 citations are to “Dr. Morrison’s evidence” alone, and 13 of those are to the testimony of respondent’s treating doctors included to complete the narrative

account of respondent's treatment from the time of his heart bypass operation to the time of his muscle-flap repair procedure. Therefore, respondent's assertion that nearly half of the citations in the Statement of Facts come from Dr. Morrison's evidence is a confusing, gross exaggeration, and respondent's argument that Dr. Morrison has "slanted" the facts to the defense wilts under minimum scrutiny.

Respondent next claims that Dr. Morrison's Statement of Facts is presented in an "argumentative fashion" but respondent's own examples reveal the claim is without merit and naked but for the assertion.

First citing footnote 3 of Dr. Morrison's brief (AB, p. 2-3), respondent complains that Dr. Morrison identified respondent's numerous, serious, and potentially life threatening health problems "to unfairly paint Mr. Edgerton as someone not 'deserving' a verdict...." (RB, p. 12). Dr. Morrison made no such implication. In context, listing these health problems was merely to reinforce the textual statement that there was no criticism of the bypass operation Dr. Morrison performed and to illustrate why his second heart surgery in 2005 was complicated.

Respondent then attempts to persuade this Court that Dr. Morrison made false, "critical misstatements" of the record in two instances. (RB, p. 13-14). A review of each statement and the transcript cited by Dr. Morrison reveals the desperate and unfounded nature of respondent's attempt. Applying the rules of

grammar to the first criticized statement demonstrates the truth of Dr. Morrison's statement, fully supported by the record. Respondent complains that the statement: "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" is neither true nor supported by the record. (RB, p. 13). This is undeniably a true statement. Respondent's dehiscence was sterile, i.e., not infected, and that is the language in the proposition that "as in respondent's case" modifies. No misstatement exists.

The second charged "critical misstatement" is that Dr. Geter was called in to "repair the sternal non-union." Respondent claims Dr. Morrison's statement was untrue because the "muscle flap repair was for 'sternal wound coverage....'" (RB, p. 14). A review of the transcript supports Dr. Morrison's statement that Dr. Geter was called upon to "repair the sternal non-union." (6 T 888, 890). The manner in which he repaired it provided sternal wound coverage, but it does not change why he was called to provide care. Simply put, Dr. Morrison did not misstate the record, and there is no support for such an argument.

Respondent then complains that Dr. Morrison's statement of facts is argumentative citing Dr. Morrison's allegedly "improper" description of the muscle-flap procedure. (RB, p. 14). However, there Dr. Morrison clearly cites to respondent's own witness, Dr. Flye, for both the description and benefits of the

muscle flap procedure. (See AB, p. 8-9). Dr. Geter's testimony, as the treating physician who performed the procedure, supplements and supports Dr. Flye's testimony on the muscle-flap repair, and advances the narrative explaining what actually happened in the treatment of respondent.

In a final attempt to find an "argumentative" statement about which to complain, respondent cites to page 17 of Dr. Morrison's Brief. (*See* RB, p. 14). Page 17 of Appellants' Brief is not part of the Statement of Facts section. Here, respondent is citing to the official and clearly denominated argument section of Appellants' Brief. "Argument" within the Argument Section of a brief is accepted (if not required) in most legal circles.

## **REPLY TO RESPONDENT’S “REPLY” TO STATEMENT OF FACTS**

Respondent offers a 16-page “Reply” to Dr. Morrison’s Statement of Facts that does not advance the Court’s understanding of the issues on appeal. He adds testimony irrelevant to the issues on appeal, recasts testimony contained in Dr. Morrison’s statement of facts, misrepresents and mischaracterizes testimony, and, at times, appears to make up facts. Respondent also asserts the untenable argument that “rigid fixation” includes only the rib transfer and methyl-methacrylate procedures.

### **A. Irrelevant Additional Testimony**

Missouri law requires expert testimony to prove causation in a failure to diagnose case. *Wicklund v. Handoyo*, 181 S.W.3d 143, 149 (Mo. App. 2005). Respondent admits that Dr. Flye was his only retained medical expert. (RB, p. 20). Because respondent offered no other evidence regarding causation, it is Dr. Flye’s testimony alone that is relevant to this Court’s determination of whether respondent made a submissible case on causation. Dr. Morrison’s statement of facts appropriately focuses on Dr. Flye’s testimony in examining the sufficiency of respondent’s proof of causation.

Respondent attempts to fill the void in Dr. Flye’s testimony on this point by seeking refuge in testimony of “other witnesses,” who likewise failed to supply causation testimony. None of the other witnesses referenced by respondent

provided testimony on the issue of causation. Dr. Huang performed a second bypass operation on respondent in 2005, more than 15 years later and for a blockage of different vessels than the vessels that Dr. Morrison treated. This testimony has no relevance to proving whether Dr. Morrison's conduct between September of 1989 and January of 1990 was the cause of respondent receiving the muscle-flap repair. The same observations apply equally to testimony from Dr. Van Osdol, respondent's treating cardiologist at the time of respondent's second bypass operation in 2005.

Respondent also complains that Dr. Morrison omitted "critical testimony" from Dr. Flye. (RB, p. 20) Respondent then recites Dr. Flye's qualifications to testify as an expert, ignoring that his qualifications are not at issue, at least in this appeal. Dr. Flye's qualifications are irrelevant for purposes of determining any issue in this appeal.

#### B. Repetitive Testimony

The testimony of Dr. Flye that respondent claims was omitted from the Statement of Facts was included. Respondent's effort to reiterate redundant testimony adds nothing new and confirms how the record undermines respondent's prima facie case of causation. (RB, p. 21-24). For example, respondent claims that Dr. Morrison omits Dr. Flye's testimony that a sternal repair could have been performed at any time from September to January, but this

testimony is explicitly referenced in Appellants' Brief. (AB, p. 19-20). In re-directing the Court to this testimony, respondent confirms that the timing of the diagnosis and repair did not ultimately matter.

Respondent next claims that Dr. Morrison omitted testimony regarding the diagnosis and treatment provided by Dr. Lundman and Dr. Rogers. (RB, p. 17-18, 22). However, Dr. Morrison clearly referenced this testimony in his Statement of Facts. (AB, p. 6-8).

Respondent next reminds the Court (RB, p. 23, first full paragraph) that the outcome for respondent was *not* changed in the days between January 12, 1990 (when Dr. Morrison allegedly failed to diagnose the sternal dehiscence) and January 15, 1990 (when Dr. Rogers diagnosed the sternal dehiscence), although this evidence appears in the Statement of Facts. (AB, p. 7). Respondent there also appears to have created testimony that is the subject of discussion below. Ignoring that testimony, respondent concedes and confirms that he failed to make a submissible case with regard to causation on January 12, 1990.

### C. Mischaracterized Testimony

Respondent misrepresents Dr. Van Osdol's testimony, stating that the muscle flap repair "required" a different approach than the front of the chest. (RB, p. 19, citing 1 T 119). A review of the actual transcript reveals otherwise. The muscle flap repair did not "require" the different approach the surgeon took for the

second bypass 16 years later. In fact, an approach through the front of the chest was not recommended because the bypass was needed on the left side and on the back of respondent's heart - not the front. (1 T 81, 119).

Respondent claims that Dr. Huang testified that the decision was made to enter respondent's chest from the side for his second bypass operation in 2005 as a result of the muscle flap repair. (RB, p. 19, citing ST p. 10-11). The cited pages have nothing to do with this assertion, and it is untrue. Dr. Huang testified that he chose to operate on respondent in 2005 from the back instead of the front because that provided the most direct access to the problem arteries, and he would have chosen that method even if respondent had an intact sternum. (ST 26, 30).

Respondent also represents to this Court that Dr. Huang called the muscle flap "the greatest problem," "number one," a "nightmare" and that there was an "extremely high risk through a standard anterior approach." (RB, p. 19, citing ST p. 21-22, 103-106, 122). A review of the transcript exposes this as a mischaracterization. Dr. Huang's testimony is accurately characterized as discussing the general problems and risks associated with a second operation on respondent due to his overall medical history and condition. Respondent may not like the reality exposed by "footnote 3" (AB, p. 2), but the surgeon must deal with the reality presented.

D. Created Testimony

Respondent, desperately trying to avoid reversal of the judgment on the issue of January 12, 1990, has created testimony in an attempt to support causation. On page 23 of Respondent's Brief, first full paragraph, respondent agrees that the outcome did not change from January 12 to January 15, but then *adds* evidence that does not exist in the record or in fact: "[o]ther 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." He cites to 3 T 358, but a review of the transcript does not support the conveniently created qualification he desperately attempts to add to the record to attempt to address causation. There is no support for this statement in the record; it is simply respondent's attempt to avoid a finding that he failed to establish a submissible case on the issue of January 12, 1990.

E. "Rigid Fixation" does not equate to rib transfer or  
methyl-methacrylate

Respondent promotes the argument that the term "rigid fixation" results from only rib transfer or methyl-methacrylate, and specifically not from "rewiring," or any other repair. (RB, p. 26-30, 31). This is an untenable position. On page 26, respondent asserts that counsel and witnesses used various synonyms

to refer to only rib transfer or methyl-methacrylate. This is simply untrue; his first citation to the transcript proves it. Respondent refers the Court to 2 T 282, Dr. Flye's testimony on direct examination, for support that all terms "structural integrity," "solid surface," "solid structure," "stability," "structural stability," "solid repair," "stabilizing [effect]," and "rigid fixation" equate with "rib transfer" and "methyl-methacrylate." (RB, p. 26-30, 31). That testimony actually established that wiring the sternum provides structural integrity. Dr. Flye also included the muscle flap in those repairs that are "stabilizing procedures." (3 T 357).

Respondent next attempts to convince this Court that "rigid fixation" was defined as rib transfer or methyl-methacrylate by pointing to questions asked of Dr. Barner and Dr. Geter. (RB, p. 27). A review of the testimony reveals otherwise. The question posed to Dr. Barner was whether he needed to know the color of a patient's hair, and other issues to know whether autogenous ribs or artificial materials were being used by his colleagues in the 70s and 80s to secure rigid fixation of skeletal defects in the "region of the sternum." The question did not offer the definition respondent asserts. The question asked to Dr. Geter included metal, the composition of the wire used in rewiring a sternum. (6 T 925) Respondent's lawyer's question included this option; it was not limited to rib transfer or methyl-methacrylate as respondent asserts.

Finally, respondent argues that Dr. Morrison's counsel understood that "rigid fixation" only occurred as a result of rib transfer or methyl-methacrylate, citing counsel's argument made at the jury instruction conference and in closing argument. (RB, p. 27, 29). This argument is preposterous. When making a proper record at the instruction conference, arguing that "rigid fixation" was a roving commission and should not be used in the verdict director, Dr. Morrison's counsel stated that "the evidence was only that there are two possible rigid fixations that Dr. Morrison *'should have provided to Ed Edgerton,'* that being methyl-methacrylate or rib transfer." (10 T 8, emphasis added). Dr. Morrison's point there is the same that he makes on appeal here, that the verdict director should have been limited to the only two repairs that Dr. Flye states were required by the standard of care.

Likewise, Dr. Morrison's counsel did not define "rigid fixation" as rib transfer or methyl-methacrylate in closing argument, but was diligent in arguing that there were only two specific repairs that Dr. Flye opined were required by the standard of care. The verdict director should have been so limited.

## **ARGUMENT**

### **I. RESPONDENT FAILED TO PROVE CAUSATION-IN-FACT**

Dr. Morrison has demonstrated that the trial court erred in denying his motion for directed verdict and JNOV because respondent failed to make a submissible case on the causation-in-fact element of his medical malpractice claim. (AB, p. 14-32).

#### **A. Self-contradictory testimony on the importance of timing.**

Respondent's attempt to reconcile Dr. Flye's self-contradictory testimony fails and he in fact misrepresents Dr. Flye's testimony. Respondent claims that Dr. Flye testified that repair by rib transfer or methyl-methacrylate could be done at anytime between September 1989 and January 1990. (RB, p. 33). Dr. Flye actually testified that it was possible that respondent could have received the rib transfer or methyl methacrylate procedures even at the time of trial *more than 16 years later*. (2 T 318-219). Thus, Dr. Morrison's "position" cannot, as a matter of law or fact, be said to have made any difference in respondent's outcome when respondent's sternum could have been so repaired "any time" during the relevant time period from September 1989 to January 1990, and even at the time of trial.

Respondent then attempts to resolve the contradiction in Dr. Flye's testimony by asserting that it arises from "opposing points of views and opinions of the parties...." (RB, p. 36). This attempt is futile as it is clear that each citation

in this section of Dr. Morrison's argument is to Dr. Flye's testimony. Respondent's assertion that the contradiction "disappears completely" when evidence tending to support Dr. Morrison's position at trial is ignored is nonsensical, because none other than Dr. Flye's testimony is addressed. It is Dr. Flye's own testimony that was contradictory.

Respondent also attempts to fill the gaps and self-contradiction in Dr. Flye's testimony on causation with testimony that merely addresses other elements of his medical malpractice case, namely standard of care and breach. (RB, p. 35-36). Respondent is not entitled to an inference that he made a submissible case on causation simply because he had evidence regarding standard of care. *See Winkler v. Robinett*, 913 S.W.2d 817, 821 (Mo. App. 1995) (respondent must prove duty, breach of that duty, *and* causation to make a submissible case).

Even when respondent attempts to articulate his evidence of causation, he fails. (RB, p. 35-36). Respondent states that "Dr. Flye testified very clearly on causation:..." and then he quotes a question and answer by his lawyer and Dr. Flye. Reading the question and answer quoted reveals why respondent's attempt to articulate causation fails; it is a standard of care question and answer. It does not involve causation. Additionally, respondent misquotes the transcript by adding the phrase "rigid fixation" to the question that he says was "clear," which

was not present in the testimony, and likewise does not accurately represent the discussion leading up to the question.

**B. Speculative testimony regarding the repair procedures.**

In an effort to salvage Dr. Flye’s speculative testimony, respondent asserts that Dr. Flye’s testimony must have been “understandable” in that counsel for appellants is able to articulate his opinion. (RB, p. 38-39). The rule prohibiting speculative testimony by experts is not limited to “speaking gibberish.” The issue is not whether Dr. Flye recommended only the rib transfer or methyl methacrylate procedures – he spoke plainly when he did. Rather, the issue is that Dr. Flye’s testimony, as to these alternative repair procedures, was too speculative to constitutemissible evidence because there was no evidence showing either one to be recognized in professional literature for treatment of sternal dehiscence, regularly employed by physicians in comparable circumstances, or even available in Springfield.

Respondent also tries to improperly frame the issue as one of admissibility. Missouri cases recognize this as an issue of the submissibility of the case, properly raised and preserved by motions for directed verdict or JNOV. *See Klugesherz v. American Honda Motor Co.*, 929 S.W.2d 811, 813 (Mo. App. 1996).

**C. Dr. Geter would have performed the muscle flap regardless.**

Respondent's case ultimately fails on the element of causation because the trial testimony disproved causation-in-fact. The use of the muscle flap to repair respondent's sternum was the result of Dr. Geter's own independent, professional judgment as to the proper surgical repair procedure – *a judgment that respondent did not allege to be negligent*. Respondent does not – and cannot – refute this point on its merits. Respondent's sternum non-healing was *not* caused by nor alleged to be caused by Dr. Morrison. The method of repair of the non-healed sternum likewise was not affected by any action or inaction of Dr. Morrison.

Respondent attempts to evade the problem by claiming that Dr. Morrison's causation argument inappropriately requires one to “believe the testimony offered by his own expert witnesses to the exclusion of [respondent's] expert witness, Dr. Flye.” (RB, p. 40). Dr. Geter was not a retained “expert witness” for either party. Rather, Dr. Geter was an independent, professional judgment exercising surgeon who independently selected and performed the non-union sternal repair procedure *he* felt to be the most appropriate for respondent. His testimony establishes the lack of causation from respondent's case because it confirms that Dr. Geter would have performed the muscle flap independent of timing of the diagnosis or by whom the diagnosis was made.

Respondent also claims that Dr. Morrison's citation to *Gulley v. Werth*, 61 S.W.3d 293 (Mo. App. 2001) "advances false arguments," although he doesn't say how. (RB, p. 40). *Gulley* is a case involving a lack of causation similar to this case as discussed in AB, p. 29-32. There is nothing "false" about the holding in *Gulley* or in the description of it by Dr. Morrison.

## **II. RESPONDENT FAILED TO PROVE CAUSATION-IN-FACT AS TO JANUARY 12, 1990**

Dr. Morrison has demonstrated that the trial court erred in denying his motion for directed verdict and JNOV because respondent failed to make a submissible case on the causation-in-fact element with regard to Dr. Morrison's conduct on January 12, 1990. (AB, p. 32-36). The fatal flaw in this aspect of respondent's case comes directly from respondent's expert, Dr. Flye, who testified that the delay in diagnosis from January 12, 1990 (when Dr. Morrison last saw respondent) to January 15, 1990 (when Dr. Rogers diagnosed respondent's sternal dehiscence) did not affect respondent's outcome. (3 T 358). Because, according to respondent's own expert, Dr. Morrison's conduct on January 12, 1990 did not affect the outcome, there is no "but for" causation as to that date.

Respondent did not respond separately to Point II, claiming just that Points I and II are "virtually identical." (RB, p. 31). Point II presents an issue in and of itself, and Dr. Morrison specifically and separately sought a directed verdict as to

the January 12, 1990 date. (5 T 614; 9 T 1312). Even if the Court should determine that respondent made a submissible case on causation for some portion of his claim, the trial court's error in failing to grant a directed verdict as to the January 12 date is an independent basis that requires reversal and remand for a new trial, a trial free from the prejudicial effect of allegations of negligence on a date that had no causal connection to respondent's outcome.

**III. RESPONDENT CITES TO HIS OWN EXPERT'S TESTIMONY  
THAT CONCLUSIVELY ESTABLISHED THAT "RIGID  
FIXATION" IS A ROVING COMMISSION**

Respondent argues *Hickman v. Branson Ear, Nose & Throat, Inc.*, 256 S.W. 3d 120 (Mo. en banc 2008) is "on all fours procedurally, factually and legally" with the instant case and thus dictates that the judgment rendered should be affirmed. (RB, p. 45). This argument is a perversion.

*Hickman* addressed whether the testimony of a plaintiff's expert properly explained the standard of care, a phrase defined in MAI 11.06. This was not an issue in the instant case. *Hickman* did not involve crafting of a verdict director. *Id.* *Hickman* did not change the sound requirement in Missouri law that the verdict director must track plaintiff's expert testimony developed at trial. *Id.* It still must. *Hickman* did not change the sound requirement in Missouri law not to allow individuals to be held liable for non-negligent conduct. *Id.* They still must

not. The *Hickman* case cannot be stretched to excuse the Court's error in improperly instructing the jury in this case.

Although respondent now desperately tries to argue that "rigid fixation" was a term used to describe rib transfer or methyl-methacrylate, a review of the transcript conclusively establishes otherwise. "Rigid fixation" was never spoken by plaintiff's expert, it was never defined in the evidence, and it was never uttered during respondent's case-in-chief. "Rigid fixation" is a result that occurs from some methods used to treat sternal non-unions, among those being re-wiring the sternum, rib transfer, methyl-methacrylate, or any other imaginable treatment that will result in rigidity.

In an effort to excuse the error in submitting the verdict director, respondent argues that his expert, Dr. Flye, did not testify about other means that would constitute "rigid fixation" aside from the two he ultimately recommended respondent receive. (RB, p. 51). He contends that "all the evidence supporting a submission of rigid fixation was limited to only two options." (RB, p. 50). He declares that "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'...." (RB, p. 51). These assertions are wholly exposed as fiction when the actual transcript is reviewed.

The evidence is clear that rewiring the sternum results in a “rigid fixation.” Dr. Morrison’s Substitute Brief contains numerous citations to the transcript establishing that. In fact, respondent’s counsel, himself, cites this Court to *his own discussion* with Dr. Flye establishing that rewiring the sternum constitutes a “fixed, rigid chest, solid.”<sup>2</sup> (RB, p. 48-49). It is incredulous that respondent avers that there was no testimony at trial that repairs other than rib transfer or methel-methacrylate result in rigid fixation while at the same time citing this Court to testimony, specifically to his own counsel’s very conversation, establishing that there was.

In support of his argument that all testimony regarding repairs that result in “rigid fixation” was limited to the two procedures his expert recommended, respondent argues that the terms “structural integrity,” “fixed, rigid chest, solid,” “solid repair,” and “rib transfer and methel-methacrylate” are all synonymous. (RB, p. 46, 48, 49). He then proceeds to cite Dr. Flye’s repeated use of the term “structural integrity,” implying that each time Dr. Flye used that term it was synonymous with “rigid fixation” which equated with “rib transfer” or “methel-methacrylate.” (RB, p. 48, 49).

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<sup>2</sup> As more fully discussed *infra*, respondent incorrectly states to this Court that this conversation occurred in cross-examination by Dr. Morrison’s counsel, when it was his own counsel’s discussion with Dr. Flye during direct examination.

Reviewing the testimony, it is evident that the understood definitions of “structural integrity” and “rigid fixation” were *not* “rib transfer” or “methel-methacrylate.” Those terms were not and are not synonymous and did not have specific definitions. Rather, the terms “structural integrity” and “rigid fixation” were simply words used to discuss the result of a variety of repairs of sternal non-unions. Respondent’s first citation to Dr. Flye’s use of the term “structural integrity” proves this point.

Respondent cites to p. 282 of the transcript, Volume 2, in support of his contention that “structural integrity” was synonymous with rib transfer and methyl-methacrylate. In reality, Dr. Flye there testified that structural integrity results from the wires holding the sternum together. A review of his next citation at p. 300, Volume 2, reveals that Dr. Flye testified that rewiring the sternum results in structural integrity. (2 T. 300). Dr. Flye states that a “... sternum may still have a structural integrity and you can wire it back together and you can reestablish what’s remaining with the structural integrity of the skeleton in that part of the body.” (2 T. 300). Respondent’s next two citations refer to Dr. Flye’s testimony that structural integrity can result from a rib transfer or methel-methacrylate. (2 T. 306-307). Respondent then cites to Dr. Flye’s testimony describing how the muscle flap procedure provides some structural integrity. (2 T. 306-313). When the testimony is reviewed, it is obvious that the term “structural

integrity” was neither defined nor intended to be understood as a rib transfer or methel-methacrylate as respondent now desperately argues.

Likewise, “rigid fixation” was not defined as or synonymous with a rib transfer or methel-methacrylate, contrary to respondent’s argument. Although respondent now avows that there was no testimony that rigid fixation can result from anything other than rib transfer or methel-methacrylate, he cites a discussion between his own counsel and his expert establishing just the opposite. On p. 49 of Respondent’s Brief, he states that “in cross-examination by Dr. Morrison’s counsel, the question defense counsel posed referred to a ‘fixed, rigid chest, solid.’” That question was not asked by Dr. Morrison’s counsel, but by respondent’s counsel who had Dr. Flye agree that *rewiring the sternum* provides “structural integrity” and a “fixed, rigid chest, solid.” (2 T. 300-301). Thus, by respondent’s own evidence, “rigid fixation” results from more than the two repairs Dr. Flye advocated would support a finding of liability against Dr. Morrison. Including the term “rigid fixation” in the verdict director instructed the jury to find Dr. Morrison liable for non-negligent conduct.

Respondent also asserts that Dr. Morrison’s argument is self-contradictory and refuted by his counsel’s own admissions in court at trial. (RB, p. 45). Respondent claims that Dr. Morrison’s counsel argued that all the evidence of rigid fixation was strictly limited to two options. (RB, p. 48). This is manifestly

untrue. Looking at the transcript, when making a proper record in the jury instruction conference, arguing that “rigid fixation” was a roving commission that should not be used in the verdict director, Dr. Morrison’s counsel stated that “the evidence was only that there are two possible rigid fixations that Dr. Morrison ‘*should have provided to Ed Edgerton,*’ that being methel-methacrylate or rib transfer.” (10 T. 8, emphasis added). Dr. Morrison’s point there is the same that he makes on appeal here, that the verdict director should have specifically identified and been limited to the two repairs that Dr. Flye testified “*should have been provided*” (i.e., would support a finding of liability) instead of utilizing the imprecise nebulous term “rigid fixation” that includes a repair specifically testified to be neither possible nor advisable by respondent’s expert witness, as well as any other repair the jury could divine to provide rigidity.

Respondent disputes that the jury was allowed to “conjure up their own method to fix Mr. Edgerton’s sternum” and complains that Dr. Morrison did not point out any parts of the record from where such a possibility “could spring.” (RB, p. 50). Dr. Morrison did precisely that on page 43 of his Substitute Brief. As explained there, the ground from which other possibilities “could spring” was laid by Dr. Flye’s own testimony, elicited by respondent’s counsel in direct examination, in his case-in-chief.

Respondent states that the case law upon which Dr. Morrison relies is inapplicable. (RB, p. 50-52). He bases that assertion on the declaration that Dr. Flye did not testify that rigid fixation results from any procedure aside from rib transfer or methel-methacrylate. Dr. Morrison has demonstrated clearly how Dr. Flye did so testify. To adopt respondent's assertion, the transcript must be ignored.

Respondent also asserts that the court in *Mast* "properly held the error was harmless...." Respondent is presumably referring to the error in giving the jury a roving commission. However, the error that *Mast* held was harmless had nothing to do with the roving commission instruction. There were a number of instructional errors raised in *Mast* and the harmless error the court found dealt with an instruction not discussed in this appeal.

Finally, respondent argues, at pages 46-48, that Dr. Morrison did not preserve this claim of error, or perhaps is making a different argument on appeal than he did at trial. This is patently untrue. Dr. Morrison made a specific and identical objection to the verdict director at the instruction conference at trial (10 T 7-8), in his motion for new trial (LF 121, 144-146) and in his appellate brief (p. 36-45). Respondent supports this argument in part by complaining that Dr. Morrison never raised this issue in his motion for JNOV. With this,

Dr. Morrison agrees, as it is his understanding that the remedy for instructional error is not a judgment notwithstanding the verdict, but a new trial.

The law Dr. Morrison cites is directly on point, is controlling, and mandates reversal of the Judgment and remand for new trial.

#### **IV. DAMAGE INSTRUCTION ERROR**

The damages instruction (Instruction No. 15) awarded damages to respondent regardless of whether Dr. Morrison directly caused or directly contributed to cause damage in direct violation of *Wicklund's* causation requirement. Respondent, by bootstrapping to the verdict against Dr. Morrison, dismisses *Wicklund* and claims “Dr. Morrison believes it was unfair that the jury found him liable for all of [respondent’s] damages” based on respondent’s presumption that “the jury found no other defendant liable for causing damages.” (RB, p. 54-55). This presumption is the fallacy behind respondent’s argument. A finding that the other defendants were not liable does not mean that they did not cause or contribute to cause damage.

Respondent’s faulty presumption is highlighted by respondent’s claim “that Instruction No. 15 followed the prescripts of MAI 21.03, 19.01, and 4.01 to the letter.” (RB, p. 56). Had Instruction No. 15 followed MAI 21.03 and its Notes on Use (hereinafter “NOU”), it would have limited respondent’s damages to those sustained as a direct result of Dr. Morrison’s acts; instead, the impermissible

modification of the term “occurrence” instructed the jury to award damages alleged against any defendant regardless of whether Dr. Morrison was liable for such damages.

MAI 21.03 is the applicable damages instruction against health care providers when comparative fault is not alleged. It provides for damages sustained “as a direct result of the occurrence<sup>2</sup> mentioned in the evidence.” (footnote in original). The term “occurrence” must be modified when, as in the present case, there are multiple occurrences which may cause damage.

When modifying “occurrence”, MAI 21.03 provides two authorized modifications under NOU 2.<sup>3</sup> Under modification one, the “term ‘occurrence’ must be modified in any case where the evidence discloses more than one event or health care provider that is claimed to have caused injury or damage.” NOU 2 refers the drafter to NOU 3 of MAI 4.01 for such modification, which addresses when “the evidence discloses a compensable event and a non-compensable event.” NOU 3 of MAI 4.01 provides in pertinent part:

[I]f the plaintiff claims plaintiff sustained damages as a direct result of negligent medical care while being treated for a non-compensable fall or

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<sup>3</sup> “[T]he notes on use following each instruction dictate the circumstances under which the instruction may be used. These must be followed.” *Homm v. Oakes*, 453 S.W.2d 679, 681 (Mo. App. 1970) (citations omitted).

illness, the instruction may be modified to read, ‘... as a direct result of the conduct of defendant as submitted in Instruction Number \_\_\_\_\_ (*here insert number of verdict directing instruction*).’

MAI 4.01, NOU 3 (emphasis in original).

Modification two is to be used when MAI 19.01 is the verdict director. NOU 2 states that “where MAI 19.01 is used in the verdict director, delete the entire phrase ‘as a direct result of the occurrence mentioned in the evidence’ from this instruction and substitute the phrase “that (*describe the compensable event or conduct*) directly caused or directly contributed to cause.”” MAI 21.03, NOU 2 (emphasis in original).

Respondent’s version of MAI 21.03, as modified by MAI 4.01, awarded damages “that the conduct of one or more of the defendants as submitted in Instruction Numbers 7, 9, 11 and 13 directly caused or contributed to cause.” Given that MAI 19.01 was included in the verdict director, it should have followed the language from modification two; it did not. Respondent’s version used modification one (which was not applicable given that non-compensable events were not in issue)<sup>4</sup> in conjunction with modification two. His version removed the

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<sup>4</sup> In addition to using an inapplicable modification, Respondent’s version used the word “and” to impermissibly lump all four verdict directors together.

words “as a direct<sup>5</sup> result of” from the beginning of modification one and inserted the remaining portion of modification one into the portion of modification two which should have described the compensable event. This modification negated the instructions’ mandated requirement, i.e., that a defendant only be responsible for damages he caused or contributed to. Instruction No. 15 did not describe or limit the occurrence(s) of alleged negligence for which Dr. Morrison may have been liable, thereby damages attributable to any defendant’s occurrence was attributed to Dr. Morrison. The jury only had to find damage without any determination as to cause.

Respondent argues that because “the jury found no other defendant liable for causing damages which could be ‘shifted’ to Dr. Morrison...,” that Dr. Morrison’s argument that the instruction allowed him to be found liable for damages caused by another defendant is “mere fiction.” (RB, p. 55). Respondent misses the point. Rather than obviating the modification error, the fact that other defendants were not found liable makes manifest the prejudice caused by the modified instruction. A finding that the other defendants were not negligent *does not* equate to a finding that they did not cause or contribute to cause damage.

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<sup>5</sup> The word “direct” adds a limiting factor not otherwise included; therefore, deleting “direct” as a modifier of the conduct changes the instruction’s meaning. *See, e.g., Brown v. St. Louis Pub. Serv. Co.*, 421 S.W.2d 255 (Mo. en banc 1967).

By way of example, respondent argued for damages for “the frustration, the merry-go-round” suffered during a four month period when he was not treated by Dr. Morrison, but by co-defendant Dr. Christensen and other physicians. (10 T. 47). Respondent argued these damages were attributable to Dr. Christensen. (10 T. 39-40, 47, 53-54). The evidence revealed several occurrences for which Dr. Morrison could not be liable under respondent’s theory of the case. The jury could have found respondent entitled to recover only against Dr. Morrison and yet have awarded damages for any injuries respondent claimed he received at the hands of others. *See, e.g., Vest v. City Nat. Bank & Trust Co.*, 470 S.W.2d 518, (Mo. 1971) (holding instruction allowing malpractice damages without excluding occurrences for which defendants could not be liable under plaintiff’s theory was error).

Instruction No. 15 did not, as respondent claims, follow MAI 21.03, 19.01, and 4.01 “to the letter.” It mixed the letters into a contorted, impermissible modification. “[I]t was mandatory that MAI 4.01 be modified in accordance with its Notes on Use so as to limit the jury to a consideration of the results of the specific occurrence for which [Dr. Morrison] was liable in determining the amount of compensation to award [respondent].” *Russell v. Terminal Railroad Ass’n of St. Louis*, 501 S.W.2d 843, 847 (Mo. en banc 1973). “Failure so to modify was error.” *Id.* (citations omitted) (holding where three potential injury-producing

occurrences were mentioned, failure to modify damage instruction to limit consideration to specific occurrence for which defendant was liable was error).

Respondent also claims that Dr. Morrison treats Instruction No. 15 in isolation. (RB, p. 54). If Dr. Morrison believed Instruction No. 15 stood alone, why would Dr. Morrison highlight the fact that Instruction No. 15 cross-referenced all four verdict directors and permitted accumulation of damages in the verdict form? (AB, p. 47-48). Respondent argued multiple possible causes of injury and damages attributable to those different causes. Instruction 15 should have referred specifically to the negligent conduct specific to each defendant as mentioned in the verdict directors. “[I]t is reversible error not to modify the instruction in this way.” *Carlson v. K-Mart Corp.*, 979 S.W.2d 145, 147 n. 3 (Mo. en banc 1998) (citations omitted).

Respondent improperly modified Instruction No. 15 permitting the jury to assess damages against one defendant for the conduct of another. Respondent’s impermissible modification resulted in an instruction in direct violation of the substantive law of *Wicklund* and prejudicial to Dr. Morrison. The judgment must be reversed and the case against Dr. Morrison must be remanded for new trial.

## **V. VERDICT FORM ERROR**

Dr. Morrison has demonstrated reversible error based on the trial court’s submission of the verdict form with an impermissible and argumentative

modification. In an effort to justify the error, respondent claims the verdict form was not “modified” within the meaning of MAI, rather a “descriptive phrase” was added in compliance with MAI 36.21 NOU 2. However, NOU 2 to MAI 36.21 is inapplicable to the case at bar as it only applies to “complex” cases (as defined by MAI 2.00) that are packaged. This case was a “simple” case (as defined by MAI 2.00) to which packaging is inapplicable.

MAI 36.21 [1988 New] was directly applicable to the claim submitted by respondent at trial. The Notes on Use (2002 Revision) contain NOU 2 wherein the Supreme Court advises that “[t]he verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable.” The note is clear, as written, that it refers directly to packaging. For further explanation, the note refers to MAI 2.00 to clarify the circumstance when a modification to add descriptive language is appropriate.

MAI 2.00 [1996 revision] provides, consistent with MAI 36.21 NOU 2, that when more than one claim is being submitted, packaging is appropriate. In that situation, each claim is submitted in a separate package, beginning with MAI 2.05 and ending with a verdict form (lettered A, B, etc.) on which the jury may render a verdict on the claim submitted in that package. In that event, the verdict form may include a descriptive phrase to identify the claim to be decided on that verdict

form (the end of that specific package starting with a similar descriptive phrase on MAI 2.05 to start the package.)

However, if there is only one claim, i.e. medical negligence as in the case at bar, and there is only one verdict form, packaging is not appropriate. MAI refers to that type of case as “simple,” [MAI 2.00] and there is no basis for packaging. Therefore, the NOU 2 under MAI 36.21 would not have application.

Moreover, even assuming that modification was authorized by NOU 2, as respondent suggests, the modification was improper because it was not a “descriptive phrase describing and identifying the claim submitted by this particular package.” MAI 36.21 NOU 2. The modification directed the jury back to another specific instruction, namely respondent’s verdict director, and thus transformed the otherwise neutral verdict form into an argument. In essence, at perhaps the precise moment of decision, the jury was directed by the court to the single instruction on which they could find in favor of respondent and against Dr. Morrison. The jury was not at that same time reminded of the burden of proof instruction, the definition of negligence, or directed to the converse instruction, each of which may have favored Dr. Morrison, but would have been as improper as directing the jury back to the respondent’s verdict director.

Simply put, there is no authority in MAI to modify the directly applicable verdict form in this case. To do so violates Rule 70.02(b). It also violates the

MAI committee admonition, long understood by trial lawyers, that “[i]f you think the change of a word or phrase will make it a better instruction, do not do it. You are falling into error if you do.” MAI Committee comment (1996 Revision, at XLIX (6<sup>th</sup> Ed. 2002).

At page 59 of his brief, respondent alleges that Dr. Morrison has made the suggestion that MAI 36.21 was the proper verdict form to be used for the first time in his Substitute Brief before this Court, and as such, has waived his argument. This is clearly erroneous. Dr. Morrison’s argument existed *verbatim* in Dr. Morrison’s brief filed in the Court of Appeals on page 51. It also exists in bold in his Point Relied on, in precisely the language that was used in the Court of Appeals. Respondent’s argument is directly contrary to the record and is disingenuous.

Respondent further complains that Dr. Morrison has contorted the standard of review and misunderstands the proper application of controlling law by claiming that respondent has the burden of proving nonprejudice of this instruction. Respondent does not offer the Court any law holding otherwise. The law is exactly as Dr. Morrison stated it was: As the proponent of the erroneous verdict form, respondent has the burden of proving there was no prejudice from the error, there being a presumption of prejudice when the court fails to use the

directly applicable MAI. *State ex rel. State Highway Comm'n v. Beaty*, 505 S.W.2d 147, 154 (Mo. App. 1974).

The unauthorized and “unnecessary modification” to MAI of the tendered verdict form is both presumptively prejudicial and demonstrated to be prejudicial. Respondent did not establish its nonprejudice. This error of law mandates a reversal of the judgment and remand for new trial.

**CONCLUSION**

For the foregoing reasons, and for the reasons stated in Appellants' Substitute Brief, this Court should reverse the judgment of the trial court and enter judgment on behalf of Appellants' with respect to Points I and II, or reverse the judgment and remand the case for new trial with respect to Points III, IV and V.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that:

The brief includes the information required by Rule 55.03;

The brief complies with the limitations contained in Rule 84.06(b);

According to the word count function of counsel's word processing software (Microsoft® Word 2002), the brief contains 7629 words; and

The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

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Darynne L. O'Neal

**CERTIFICATE OF SERVICE**

On this 19<sup>th</sup> day of February, 2009, I hereby certify that two copies of the above and foregoing together with a copy of this brief on disk were served by hand-delivery, addressed to:

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