IN THE SUPREME COURT OF MISSOURI

KENNETH SUNDERMEYER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE FOR ELVA ELIZABETH SUNDERMEYER, DECEASED,	)	
Plaintiff/Appellant,	)	**No: SC89318**
vs.	)	
SSM REGIONAL HEALTH SERVICES D/B/A VILLA MARIE SKILLED NURSING FACILITY,	)	
Defendant/Respondent.	)	

Appeal from the Circuit Court of Cole County, Division 1
The Honorable Thomas J. Brown, Judge

SUBSTITUTE BRIEF OF RESPONDENT SSM REGIONAL HEALTH SERVICES, D/B/A VILLA MARIE SKILLED NURSING FACILITY

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STATEMENT OF FACTS

Plaintiff Kenneth Sundermeyer brought a wrongful death claim against Villa Marie Skilled Nursing Center ("Villa Marie"), claiming that Villa Marie neglected his mother, Elva Sundermeyer, during her residence there, causing Mrs. Sundermeyer "to lose the will to live, and wish to die." L.F. 14. The plaintiff alleged that his mother's lost will to live caused her to stop eating, resulting in her death in another nursing home, Green Meadows, approximately a month after she left Villa Marie. L.F. 14.

The trial court entered summary judgment in Villa Marie's favor, finding that the causation testimony of plaintiff's expert was, as the expert admitted, speculative, and that the plaintiff failed to produce "any expert medical testimony to establish that any acts or omissions of Villa Marie's agents, servants or employees caused or contributed to cause decedent's death." L.F. 352. After reversal by the Missouri Court of Appeals, Western District, this Court ordered transfer.

Mrs. Sundermeyer's residence at Villa Marie.

Mrs. Sundermeyer was admitted to Villa Marie on June 27, 2001. L.F. 11, 178. She was elderly and infirm, and suffered from longstanding clinical depression. L.F. 210, 214. She had reached the point where she no longer could take care of herself. L.F. 210.

Mrs. Sundermeyer's daughter, Barbara Lowry, was Villa Marie's Director of Nursing when Mrs. Sundermeyer was admitted. L.F. 216, 224. Shortly thereafter, Ms. Lowry left her position as Director to work at St. Mary's Health Center, which was affiliated with Villa Marie. L.F. 216. On visits to her mother after she left Villa Marie, Ms. Lowry noticed that her mother had bruises and sores, was not eating, and lost a lot of

weight. L.F. 222-23, 225. According to the plaintiff's petition, Mrs. Sundermeyer fell a number of times and did not receive proper nutrition and hydration. L.F. 12-13. On July 18, 2002, Mrs. Sundermeyer was taken out of Villa Marie and admitted to St. Mary's for treatment of electrolyte disorder, dehydration, and oral thrush. L.F. 203.

While at St. Mary's, Mrs. Sundermeyer stated that her expectation from her care at the hospital was to feel better. L.F. 209. She stated that she wanted to get stronger so she could walk again, and she "would do anything to get out of this bed." L.F. 205. On July 24, 2002, six days after she arrived at St. Mary's, Mrs. Sundermeyer's physician, Dr. Ennis, noted in her chart that Mrs. Sundermyer's vital signs were stable, and she appeared "at or near baseline." L.F. 204. Plaintiff's expert, Dr. Thomas Manger, testified that the term "baseline" meant that Mrs. Sundermeyer "was close to where she was at before she took ill." L.F. 205. Dr. Manger agreed that Mrs. Sundermeyer's condition became stable for return to a nursing home. L.F. 207.

After Mrs. Sundermeyer was released from St. Mary's she was placed in a different nursing home, Green Meadows. While at Green Meadows, Mrs. Sundermeyer developed ulcers and problems swallowing, and stated that she wanted to die. L.F. 213. Mrs. Sundermeyer died on August 12, several weeks after being discharged from St. Mary's in stable condition. L.F. 14. The plaintiff alleged in his petition that, at Green Meadows, "despite every effort to get her to eat, Sundermeyer, who had lost her will to live, simply stopped eating and died on August 12, 2002." L.F. 14.

Dr. Manger's Expert Opinions.

Dr. Manger was plaintiff's sole causation expert. He had no opinion on the standard of care applicable to plaintiff's claim. L.F. 201.

Because the plaintiff's petition was framed in terms of Mrs. Sundermeyer "losing her will to live," Dr. Manger was asked in his deposition whether he would "use those terms" in expressing his opinion. L.F. 202. Dr. Manger replied that "from my perspective – I don't know that there is a lot of evidence that I have that says she lost the will to live though certainly patients that get abused withdraw and become more depressed. I think that could be interpreted as a – as losing the will to live." L.F. 202. When asked for a summation of his opinions, Dr. Manger testified that, in his opinion, Mrs. Sundermeyer was "neglected at the least"; that her falls at Villa Marie and the removal of her telephone indicated that she was "possibly" physically and emotionally abused; that she suffered "tremendous weight loss"; and that these events "contributed to her demise." L.F. 243. Dr. Manger was asked whether "all these conditions that you mentioned caused her death?" L.F. 243. He responded, "I think they contributed to her death, yes." L.F. 243.

Dr. Manger was asked whether, despite Mrs. Sundermeyer's statements at St. Mary's that she wanted to get out of bed, get stronger, and walk again, he believed Mrs. Sundermeyer wanted to die. L.F. 206. Dr. Manger was unable to form an opinion on this key issue:

> Q. Now, these statements, these comments do not indicate a person that wants to die, does it?

A. I don't know that I can make that assessment from the statements that you pointed out to me.

***

Q. You think that in spite of those statements she wants to die?

A. That's not what I said.

Q. All right. Tell me where I'm wrong.

A. I just said I can't decide from those statements that you pointed out that that's the inclination of the patient.

L.F. 206. Dr. Manger was then asked whether Mrs. Sundermeyer's statement that she wanted to feel better was inconsistent with wanting to die. L.F. 208-09. He responded, "yes, it could be." L.F. 209.

Dr. Manger acknowledged that it is not unusual for people who are elderly and sick to simply become tired of living and want to die (L.F. 210), but admitted that he did not know whether that occurred in Mrs. Sundermeyer's case:

Q: But you don't think that's the case here?

A: I can't tell whether that's just the case here.

Q: It could be the case here?

A: I suppose it could be.

Q: Maybe she just got tired of living, correct?

PLAINTIFF'S COUNSEL: Objection. Calls for him to speculate on her state of mind.

A: I can't tell.

Q. The only way we would really know is if she told us, would you agree with that?

***

A. I suppose specifically if she told us, yes.

Q. And she didn't did she?

A. Not to my knowledge. Not except for that occasion while she was at Villa Marie.[1]

Q. So the cause of her death, because we don't know what she was thinking, as you just said, it involves some speculation, does it not?

A. Yes.

L.F. 210-11. Dr. Manger agreed that giving up the will to live is an intellectual decision. L.F. 212. He agreed that "we can't really know what that person is thinking on that issue unless that person tells us," and agreed that Mrs. Sundermeyer "didn't tell us." L.F. 212. He agreed that, if Mrs. Sundermeyer made the decision to die, there was nothing in the record indicating why:

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[1] Mrs. Sundermeyer commented that she wanted to die after her roommate at Villa Marie died. Dr. Manger stated that he "wouldn't know" whether such statements are common after a nursing home patient's longtime roommate dies, because he is not a nursing home doctor. L.F. 208.

> Q. All right. And there is nothing in the record to indicate that if she wanted to die, if she made that decision to die, there is nothing in there to indicate why, would you agree with that? That she told us?
>
> A. Yes, I'd agree with that.

L.F. 212. Dr. Manger agreed that a nursing home resident can lose the will to live even when everything is being done for that resident. L.F. 213. He admitted that Mrs. Sundermeyer suffered from clinical depression long before she entered Villa Marie, and that "Villa Marie did not cause her depression." L.F. 214.

After Dr. Manger gave this testimony, plaintiff's counsel asked the following question: "Although you might have to speculate about what Mrs. Sundermeyer's state of mind was, is it a fair statement to say that you're basing your opinion on what's in the medical records and that your opinion as to cause of death is not speculation?" L.F. 245. Dr. Manger replied, "Yes." L.F. 245.

Proceedings in the trial court and the court of appeals.

In response to the plaintiff's petition, Villa Marie filed a motion to dismiss the petition for failure to state a claim, and a motion to dismiss the petition as time-barred under the medical malpractice statute of limitations. L.F. 29, 32. In the motion to dismiss for failure to state a claim, Villa Marie argued that the petition merely alleged that plaintiff lost her will to live and made a voluntary decision to stop eating while at Green Meadows. L.F. 33. Villa Marie argued that the plaintiff's allegations did not allege facts showing a causal connection between Mrs. Sundermeyer's death and Villa

Marie's conduct. L.F. 33. In its motion to dismiss the petition as time-barred, Villa Marie argued that because plaintiff had failed to state a wrongful death claim, his cause of action actually was for damages allegedly arising from medical malpractice. L.F. 29. The last date that Villa Marie could have committed any act of alleged negligence was July 18, 2002, making plaintiff's petition filed on August 6, 2004, barred by the two-year limitations period for medical malpractice actions. L.F. 29-30. The trial court denied the motions to dismiss. L.F. 2.

After the parties conducted discovery, Villa Marie filed a motion for summary judgment. Villa Marie argued that plaintiff's wrongful death case was not supported by any evidence because Dr. Manger's testimony was speculative, and there was no evidence establishing that Mrs. Sundermeyer lost the will to live. L.F. 188-92. Villa Marie argued that there was no evidence that "but for" its alleged conduct, Mrs. Sundermeyer would not have died. L.F. 195-96. Villa Marie argued that proof of "but for" causation was also lacking because the undisputed evidence showed that Mrs. Sundermeyer was in stable condition when she was discharged from St. Mary's and transferred to Green Meadows. L.F. 194-95.

In responding to Villa Marie's motion, plaintiff stated that "the case is a close call" as to whether the evidence proved causation. L.F. 275-76. Plaintiff acknowledged that courts normally are "attuned to experts in wrongful death cases being able to point with specificity to a particular act or omission that directly caused death," which was not the case here. L.F. 287. The plaintiff admitted that Villa Marie's argument merited "serious consideration" because causation was a "close call," and admitted that "the facts

of this case, at first glance appear to indicate attenuated causation." L.F. 287-88. The plaintiff argued that Dr. Manger had to "speculate about [Mrs. Sundermeyer's] state of mind and what she was thinking at the time she was at Green Meadows," but he did "not have to speculate about his cause of death opinion." L.F. 290. Plaintiff then argued that, despite the apparently "attenuated" evidence of causation, Barbara Lowry's[2] belief that Villa Marie "broke her mother's spirit and took away her will to live," coupled with Dr. Manger's testimony that Villa Marie "contributed to" Mrs. Sundermeyer's death, "nails down the issue of causation." L.F. 290-91. He argued that "but for the abuse, the decline in her nutritional status, and the neglect of Mrs. Sundermeyer, her spirit and will to live would not have been extinguished." L.F. 290.

The trial court found for Villa Marie. The court reasoned that, "by Plaintiff's expert's own admission, Plaintiff's expert's opinions included speculation that it was possible that decedent was old, sick, tired of living, and wanted to die." L.F. 352. The court found that plaintiff failed to produce any expert medical testimony establishing that

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[2] Plaintiff states that because of Barbara Lowry's former status as the Director of Nursing and her "unusual status of being both an employee of the SSM Healthcare and a plaintiff," her statements could be viewed as an admission by Villa Marie. App. Br. at 15, n.1. This is incorrect. "In order to be binding upon a corporation, statements made in depositions must be made by a corporate officer who is so employed at the time he is deposed." *Penberthy v. Nancy Transp., Inc.*, 804 S.W.2d 404, 408 (Mo. App. 1991).

any conduct by Villa Marie caused or contributed to cause Mrs. Sundermeyer's death. L.F. 352. The plaintiff appealed from that judgment.

In a divided opinion with Judge Lowenstein dissenting, the Missouri Court of Appeals reversed the trial court's judgment. The majority held that plaintiff had filed a "garden variety" medical malpractice action in which Dr. Manger's opinion that Villa Marie's conduct "contributed to" Mrs. Sundermeyer's death was sufficient to establish causation. *Sundermeyer v. SSM Regional Health Services*, _____, S.W.3d ____, 2008 WL 731241 (Mo. App. W.D., March 18, 2008). This Court ordered transfer.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN VILLA MARIE'S FAVOR, BECAUSE THE PLAINTIFF FAILED TO PRODUCE ANY EVIDENCE TO SUPPORT HIS ALLEGED THEORY THAT MRS. SUNDERMEYER DIED BECAUSE VILLA MARIE CAUSED HER TO LOSE THE WILL TO LIVE.

Plaintiff attempts to skirt the issue raised in his petition by stating that this is not "a case about whether Missouri recognizes a cause of action for the loss of a patient's will to live," but instead a "simple case about the standard of review for summary judgment." App. Br. at 32. He states that "loss of will to live is not an issue in this case" (App. Br. at 34), a statement directly contrary to his claim in the court of appeals that this case of "first impression" questions whether a plaintiff can "present a claim for wrongful death where the cause of that death is the destruction of her will to live." App. Br., No. WD67235, at 32. Rule 83.08(b) provides that a substitute brief filed on transfer to this Court "shall not alter the basis of any claim that was raised in the court of appeals brief." The plaintiff's argument should be rejected because it was not advanced in the court of appeals. *Lane v. Lensmeyer,* 158 S.W.3d 218, 230 (Mo. banc 2005); *Blackstock v. Kohn,* 994 S.W.2d 947, 953 (Mo. banc 1999); *Linzenni v. Hoffman,* 937 S.W.2d 723, 727 (Mo. banc 1997).

Furthermore, other statements in the plaintiff's brief show that this case is, in fact, about whether Missouri recognizes an action based on the lost will to live. The plaintiff acknowledges his alleged theory that Mrs. Sundermeyer was neglected and abused to the

point that it "caused Sundermeyer to lose the will to live, and wish to die." App. Br. at 20. He asserts that both parties have searched for "a case where the cause of death is based on the destruction of the will to live," but that "no similar case to this one has been found." App. Br. at 34. He asserts that his theory of this case is "that Villa Marie broke the plaintiff's decedent's spirit and directly contributed to cause her death." App. Br. at 49. He argues that this case pleads a claim for wrongful death, and that there is "no cause of action, *separate from wrongful death*, for loss of the will to live." App. Br. at 34 (emphasis added). Unquestionably, this is a case for wrongful death based on the lost will to live.

An action for causing one to lose the will to live is "not a recognized cause of action in this state." *Sundermeyer*, 2008 WL 731241 at *5 (Lowenstein, J. dissenting). Even if Missouri were to recognize this proposed cause of action, plaintiff bore the burden of proving that Mrs. Sundermeyer lost her will to live, that Villa Marie caused this lost will to live, and that Mrs. Sundermeyer died as a result. Plaintiff failed to satisfy his burden. There is no evidence that Mrs. Sundermeyer lost her will to live, much less that she lost this will because of Villa Marie's conduct. Instead, plaintiff's sole causation expert, Dr. Manger, admitted there was no way of knowing whether Mrs. Sundermeyer lost the will to live.

The trial court properly granted Villa Marie's motion for summary judgment. The court's judgment should be affirmed.

A. Standard of Review.

Review of the trial court's judgment is *de novo. Foster v. St. Louis County*, 239 S.W.3d 599, 601 (Mo. banc 2007). This Court will affirm the summary judgment if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Id.* "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

B. There is no evidence that Mrs. Sundermeyer died of the lost will to live.

In a wrongful death action based on medical malpractice, the plaintiff must allege and prove a causal connection between the defendant's actions and the patient's death. *Mueller v. Bauer*, 54 S.W.3d 652, 656 (Mo. App. 2001). The defendant's conduct is a cause of an event if the event would not have occurred "but for" that conduct. *Id.*; *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 860-61 (Mo. banc 1993). This burden of proof required the plaintiff to establish that his mother would not have died "but for" Villa Marie's actions or inactions. *See Mueller*, 54 S.W.3d at 656, *Callahan*, 863 S.W.3d at 860-61.

Plaintiff states that the issue before the Court is "whether plaintiff's expert testimony was sufficient on the subject of causation so as to avoid summary judgment." App. Br. at 32. This is indeed the issue, but it should be stated in terms of plaintiff's theory of recovery. As Judge Lowenstein stated in his dissenting opinion, the issue before the court "is whether the plaintiff presented sufficient medical evidence of a causal

connection between the actions or inaction of the defendants, Sundermeyer's state of mind, and her subsequent death." *Sundermeyer*, 2008 WL 731241 at *5. Villa Marie was entitled to summary judgment unless plaintiff could prove, through Dr. Manger's testimony, that (1) Mrs. Sundermeyer died because she lost the will to live, and (2) "but for" Villa Marie's conduct, Mrs. Sundermeyer would not have lost the will to live. Plaintiff never proved that Mrs. Sundermeyer lost the will to live. He could not prove causation.

Without any citation to the record, plaintiff states that Dr. Manger testified "that Villa Marie broke the plaintiff's decedent's spirit." App. Br. 49. Dr. Manger gave no such testimony. To the contrary, Dr. Manger had no idea whether Mrs. Sundermeyer had the "inclination" to die. L.F. 206. He admitted that Mrs. Sundermeyer's statements about wanting to get better and walk again were consistent with a desire to recover, and "could be" inconsistent with a lost will to live. L.F. 206, 209. Dr. Manger admitted that, if Mrs. Sundermeyer made a decision to die, nothing in the record indicated why. L.F. 212. He admitted that the only way to know if she lost her will to live was "if she told us," and he acknowledged that "she didn't." L.F. 211. He admitted that he "can't tell" whether Mrs. Sundermeyer simply got tired of living. L.F. 211. Dr. Manger admitted that his opinion as to the cause of Mrs. Sundermeyer's death involved speculation because no one knew what she was thinking. L.F. 210-211.

Plaintiff's objections during Dr. Manger's deposition and his arguments in the trial court and court of appeals also effectively conceded that the issue of whether Mrs. Sundermeyer lost her will to live was wholly speculative. When Villa Marie's counsel

asked Dr. Manger whether it was possible that Mrs. Sundermeyer simply got tired of living, plaintiff's counsel objected on the ground that it called for Dr. Manger *to speculate on Mrs. Sundermeyer's state of mind*. L.F. 211. When plaintiff's counsel later attempted to rehabilitate Dr. Manger, he prefaced his question with an acknowledgement that testimony as to Mrs. Sundermeyer's state of mind involved speculation: "And although you might be speculating about certain elements of her state of mind, is it a fair statement to say that you're not speculating about the causation in this issue?" L.F. 245. In his response to Villa Marie's motion for summary judgment, the plaintiff acknowledged that Dr. Manger "might have to speculate about her state of mind and what she was thinking at the time she was at Green Meadows." L.F. 290. He acknowledged that Dr. Manger "may have had to speculate about the frame of mind of the decedent." L.F. 342.

Dr. Manger's and the plaintiff's admissions defeat the plaintiff's claim. Because no evidence supports the threshold issue – whether Mrs. Sundermeyer died from a lost will to live – Dr. Manger's opinion that Villa Marie "contributed to" the death is factually baseless, and therefore not probative. *Mueller v. Bauer*, *supra*, is on point. *Mueller* was a wrongful death action based on alleged medical malpractice. The Missouri Court of Appeals, Eastern District, affirmed summary judgment because the plaintiff failed to refute the defendant's "prima facie case that plaintiffs could not establish the element of causation." *Mueller*, 54 S.W.3d at 657 (Mo. App. 2001). Defendants established a prima facie case because "plaintiff's only identified expert, who testified on the issues of standard of care and causation, testified that he was unable to determine the cause of

patient's death with reasonable probability and that it was a matter of speculation whether patient's death was caused by the antiarrhythmic drug or by a preexisting condition." *Id.* at 657. The expert's testimony was mere conjecture and speculation, which did not "constitute substantive, probative evidence on which a jury could find ultimate facts and liability." *Id.*; *see also Super v. White*, 18 S.W.3d 511, 516 (Mo. App. 2000) ("When an expert merely testifies that a given action or failure to act 'might' or 'could have' yielded a given result, though other causes are possible, such testimony is devoid of evidentiary value.").

The same reasoning applies here. Dr. Manger admitted that the cause of death was speculative because he did not know whether Mrs. Sundermeyer lost the will to live. As in *Mueller*, the plaintiff's own evidence established Villa Marie's unrefuted, prima facie case that plaintiff could not prove causation.

C. <u>Dr. Manger's testimony does not prove causation.</u>

As Judge Lowenstein properly found, Dr. Manger never testified "whether, within a reasonable degree of medical certainty, the care rendered by the defendant failed to meet the degree of skill ordinarily required under the same or similar circumstances." *Sundermeyer*, 2008 WL 731241 at 6 (Lowenstein, J., dissenting). Dr. Manger never stated an opinion "within a reasonable degree of medical certainty, that *but for* the defendant's negligent care and conduct, the death would not have occurred." *Id.* (emphasis in original). Consequently, plaintiff never satisfied his burden of proving a direct causal link between Villa Marie's actions and the alleged injury. *Id.* This requirement was "of special note where, as here, the link between the defendant's actions

and the injury is attenuated. Even where Dr. Manger attempted to link Villa Marie's actions to Sundermeyer's state of mind, his testimony was equivocal." *Id.* at *7.

The plaintiff claims that Dr. Manger's affirmative response to the following question constituted "rock solid" evidence of causation: "Although you might have to speculate about what Mrs. Sundermeyer's state of mind was, is it a fair statement to say that you're basing your opinion on what's in the medical records and that your opinion as to cause of death is not speculation?" App. Br. 39. This testimony did not add any substance to Dr. Manger's opinion, did not "change the substance of his testimony," and did not "supply the missing element to his testimony." *Sundermeyer*, 2008 WL 731241 at *7 (Lowenstein, J., dissenting). It was merely an inherently contradictory statement that Dr. Manger was speculating as to the cause of death, yet not speculating as to the cause of death. "Where the only evidence of a necessary element of a claim is self-contradictory, it does not constitute sufficient evidence." *Tomkins v. Cervantes*, 917 S.W.2d 186, 190 (Mo. App. 1996).

Plaintiff argues that Dr. Manger's opinion "was somewhat broader than that proffered to the trial court" because Dr. Manger referenced Mrs. Sundermeyer's weight loss, nutritional status, and falls at Villa Marie in testifying that these conditions "contributed to" her death. App. Br. at 37-38. Dr. Manger's testimony, however, does not cure the glaring deficiency in plaintiff's proof: the lack of any evidence that Mrs. Sundermeyer lost the will to live. Even if Dr. Manger had testified that Villa Marie's alleged conduct was a "but for" cause of death (he never did), his admission that there was no way to know if Mrs. Sundermeyer died of a lost will to live mooted the causation

issue. Dr. Manger's testimony clearly does not show that Mrs. Sundermeyer died "but for" Villa Marie's alleged conduct. His testimony that Villa Marie's conduct "'contributed' to the death does not stave off summary judgment." *Sundermeyer*, 2008 WL 731241 at *7 (Lowenstein, J., dissenting).

Plaintiff argues that the trial court "clearly erred" in finding that Dr. Manger's opinions were not given with the requisite degree of medical certainty because, after admitting that he had to speculate, Dr. Manger summarily stated that his opinion was to a reasonable degree of medical certainty. App. Br. at 46. Plaintiff asserts that it is "important" that "defendant did not file a motion to strike the expert's opinion, but simply stated that the opinion was not sufficient to create a material issue of fact." *Id.* He argues that Villa Marie thereby requested the trial court "to weigh the opinion of the expert" and "induced the trial court's error." App. Br. at 46. This argument is groundless.

Villa Marie was not required to file a motion to strike in order to challenge the sufficiency of Dr. Manger's opinion; it had every right to seek summary judgment on the ground that Dr. Manger's opinion was wholly speculative. Furthermore, the trial court did not impermissibly weigh Dr. Manger's testimony or assess his credibility. As plaintiff states in his brief, the trial court was responsible for determining whether the facts underlying Dr. Manger's opinion met the minimum standards of reliability. App. Br. at 46-47. Based on Dr. Manger's own *admissions*, and not on an assessment of credibility, the trial court properly found that Dr. Manger's testimony was insufficient to establish a causal connection between Villa Marie's conduct and Mrs. Sundermeyer's

death. L.F. 352. The trial court noted that "by Plaintiff's expert's own admission, Plaintiff's expert's opinion included speculation that decedent was old, sick, tired of living, and wanted to die. Further, Plaintiff's expert witness did not offer testimony that Villa Marie caused or contributed to cause decedent to lose her will to live." L.F. 352. Plaintiff does not cite any case convicting a trial court of error for holding that admittedly speculative expert testimony lacks probative value.

As plaintiff notes in his brief, there are no cases in any jurisdiction discussing a defendant's liability for allegedly causing someone to lose the will to live. App. Br. at 34. However, there are Missouri cases involving allegations of negligence resulting in suicide, which also involves the decision to die. The burden of proving proximate cause in such cases is instructive here.

In *Eidson v. Reproductive Health Services,* 863 S.W.2d 621 (Mo. App. 1994), the plaintiff alleged that the defendant abortion provider's failure to provide her daughter with post-abortion counseling caused her daughter's suicide. *Id.* at 624. The trial court entered judgment for the defendant. On review, the court of appeals noted that the submissibility of plaintiff's case depended on proof that the defendant's conduct caused the decedent to become insane in the sense that "1) the insanity prevents the injured party from understanding what he or she is doing or from understanding its inevitable or probable consequence, or 2) the injured party's act is done under an insane impulse which is irresistible because the insanity has prevented his or her reason from controlling his or her actions." *Id.* at 627. Courts impose this requirement because "suicide, due to a mind disordered by an accident or injury or even an assault accompanied by mental

torture, has been held not so related to the wrongful acts as to furnish a ground for the action, where the act of suicide of the insane person is voluntary and done with the knowledge of its purpose and physical effect." *Id.* Conversely, where a negligent act causes a person to become "insane and bereft of reason," resulting in an "involuntary" suicide, the act causing the injury can be the proximate cause of death. *Id.*

In *Eidson*, the plaintiff's causation expert, a psychiatrist, testified that the decedent suffered from a major depression in the weeks before her suicide, that the suicide was a consequence of this depression, and that the abortion was the "straw that broke the camel's back." *Id.* at 628. The expert testified, however, that the decedent had not lost control and was fully aware of the purpose and effect of her actions. *Id.* The expert's testimony was held insufficient to satisfy the plaintiff's burden of proof because there was no testimony that the decedent was suffering from an uncontrollable impulse when she died, or that she did not understand the consequences and risks of her acts. *Id.*

Tomkins v. Kusama, 822 S.W.2d 46 (Mo. App. 1991), involved a similar failure to prove causation. The plaintiffs in *Tomkins* were the parents of a youth killed in a car crash while fleeing from police. *Id.* at 465. The parents sued their son's psychiatrist, alleging negligent treatment and negligent failure to document the psychiatrist's withdrawal from their son's case. *Id.* The court of appeals held that the parents failed to make a submissible case of medical malpractice resulting in death. *Id.* The court noted that for liability to attach, the parents had to prove that their son's death was a suicide rather than an accident. *Id.* However, the parent's expert was unable to testify to a reasonable degree of medical certainty that the decedent was suicidal or that his death

was a suicide. *Id.* The parents argued that the jury could infer suicide based on evidence of their son's prior suicidal conduct, his state of mind, his prior threats of suicide, and the circumstances of his death, but the court rejected this argument. The court reasoned that the evidence supported a finding that the death was accidental, and there was no substantial evidence that the decedent committed suicide. It was improper to permit the jury, without the aid of expert testimony, to infer that the death was a suicide "because no layperson could know or have any reasonable basis for such inference." *Id.*

The reasoning in *Tomkins* and *Eidson* applies here. Like the plaintiffs in *Tomkins*, the plaintiff here argues the jury should be permitted to infer that Mrs. Sundermeyer lost her will to live. He argues that Dr. Manger's opinion testimony creates a fact issue, and that his speculation about her state of mind "goes only to the weight to be accorded the opinion by the jury." App. Br. at 50. Plaintiff is wrong. Dr. Manger did not testify to a reasonable degree of medical certainty that Mrs. Sundermeyer lost her will to live; rather, he admitted that there was no way to know whether or why Mrs. Sundermeyer might have lost her will to live. In these circumstances, it would be improper to allow a jury to infer a lost will to live, "because no layperson could know or have any reasonable basis for such inference." *See Tomkins,* 822 S.W.2d at 466.

If Mrs. Sundermeyer made the intellectual decision to die, there is no evidence that this decision was involuntary, or that any conduct in furtherance of it – such as the alleged failure to eat (L.F. 14) – was done without knowledge of that conduct's purpose and physical effect. Furthermore, there is no evidence that such a decision resulted from any conduct by Villa Marie. Mrs. Sundermeyer's death cannot possibly be deemed "so

related to the wrongful acts as to furnish a ground for the action." *See Eidson*, 863 S.W.2d at 627. The plaintiff did not satisfy his burden of proof.

D. No other evidence supports the plaintiff's claim.

The plaintiff argues that the court of appeals was correct in holding that this is a "garden-variety medical malpractice action." App. Br. at 35. He does not substantiate this new argument. The plaintiff has never pointed to any evidence showing that Mrs. Sundermeyer's death was medically caused by a physical injury allegedly suffered at Villa Marie. The plaintiff acknowledged in the trial court that this case is unlike the typical wrongful death/medical malpractice case in which an expert can actually point to conduct that directly caused a decedent's death. L.F. 287. He argued in the court of appeals that this is a case of "first impression" because it involves "the destruction of [the decedent's] will to live." App. Br., No. WD67235, at 32. This clearly is not a "garden variety" medical malpractice case or a "garden variety" wrongful death case.

Plaintiff again ignores his burden of proof in arguing that the "competing theories" of this case are (1) defendant's theory that Mrs. Sundermeyer died of unrelated causes at another nursing facility, and (2) plaintiff's theory "that Villa Marie broke the plaintiff's decedent's spirit and directly contributed to cause her death." App. Br. at 49. He argues that these are two "valid" theories that should be submitted to the jury. *Id.* If Mrs. Sundermeyer's death may have resulted from either of two causes, for one of which Villa Marie would be liable and for the other it would not be liable, the plaintiff must show with reasonable certainty that the cause for which Villa Marie allegedly is liable produced the death. *See Silberstein v. Berwald*, 460 S.W.2d 707, 709 (Mo. 1970),

Mueller, 54 S.W.3d at 656-57. There is no evidence showing with "reasonable certainty" that Mrs. Sundermeyer died from a lost will to live, and therefore no evidence that Villa Marie caused her to die from a lost will to live.

Plaintiff attempts to go beyond the record to argue that science supports Dr. Manger's opinion because "current medical thinking" and a "large longitudinal study of old people" showed that "mistreated" elderly were more likely to die over a three-year period than those who did not experience abuse, "even after adjustment for comorbidity and other factors associated with mortality." App. Br. at 48. There are several obvious flaws in this argument.

First, a "longitudinal study" purportedly showing that some people are "more likely" to die over a three-year period in circumstances that plaintiff has left undescribed is not evidence that Mrs. Sundermeyer would not have died but for Villa Marie's alleged conduct.

Second, the cited journal article reflecting this study is not contained in the record, is hearsay, and is not admissible as independent, substantive evidence. *Wilson v. ANR Freight Sys., Inc.*, 892 S.W.2d 658, 664 (Mo. App. 1995), *overruled on other grounds by Hampton v. Big Boy Steel Erectors*, 121 S.W.3d 220 (Mo. banc 2003). Also, there is nothing in the record suggesting that Dr. Manger ever saw this study, much less relied on it. Plaintiff may not rely on hearsay to avoid summary judgment. "Only evidentiary materials that are admissible or usable at trial can sustain or avoid a summary judgment." *Blunt v. Gillette*, 124 S.W.3d 502, 503 (Mo. App. 2004).

Third, there is no "opinion" for an article or study to support. Rather than give an opinion on causation, Dr. Manger admitted that he did not know whether Mrs. Sundermeyer lost the will to live.

E. <u>The court of appeals' opinion should not stand.</u>

The majority of the court of appeals issued an inherently contradictory opinion that conflicts with prior appellate opinions. Its opinion should not be affirmed.

The majority stated that it "failed to see the relevance" of whether an action exists for "loss of the will to live," because "in essence, this is a garden-variety medical malpractice case brought as a wrongful death action." *Sundermeyer*, 2008 WL 731241 at *3. In the same paragraph of its opinion, the majority stated that it did "not deny the question's relevance, however," because the "essential gist of the underlying action" was that Mrs. Sundermeyer suffered abuse, neglect, and emotional anguish "to the point where she said she simply wanted to die." *Id.* The majority therefore acknowledged that this is a case of wrongful death based on the lost will to live and, by allowing the plaintiff to proceed, adopted this theory as a viable cause of action in Missouri. Notably, the majority misstated the record in adopting this theory of recovery. As Dr. Manger admitted, Mrs. Sundermeyer never told anyone whether or why she wanted to die.

After holding that plaintiff could proceed on his "lost will to live" theory, the majority held that this cause of action could be proven without expert testimony, without any evidence that the decedent expressed a desire to die, and without any evidence that the defendant nursing home might have induced a lost will to live. The court held that,

instead, a jury could infer a lost will to live resulting from the defendant's alleged negligence as the cause of death:

> Assuming, as we must for our present purposes, that Villa's negligence caused or contributed to cause Elva Sundermeyer's diagnosed conditions, we think a jury is as well qualified as an expert to decide whether the emotional conditions and abuse associated therewith affected Elva Sundermeyer to the extent that she didn't want to live or whether she was simply old and sick and wanted to die regardless of any negligence as Villa claims. This is an issue for the finder of fact, not for summary judgment.

Sundermeyer, 2008 WL 731241 at *4. This holding directly conflicts with settled law, cited by the majority, that expert testimony is required to prove causation in medical malpractice/wrongful death cases "except in those cases where the negligence and its connection with the injury are so apparent as to be within common understanding." *Id.* at *2, *citing Tillman v. Elrod*, 987 S.W.2d 116, 118 (Mo. App. 1995). As Judge Lowenstein stated in his dissent, the decision to stop eating and die "seems to be a form of extended and subtle suicide." *Sundermeyer*, 2008 WL 731241 at *5. Villa Marie has not found a single Missouri case holding that a suicidal state of mind is within the common understanding of laypersons. Instead, the Missouri Court of Appeals has held that the decision to commit suicide *cannot* be inferred by a layperson, even where there is evidence of the decedent's prior suicidal conduct and prior threats of suicide. *Tomkins*, 822 S.W.2d at 466. In this case, there is no evidence that Mrs. Sundermeyer ever was

suicidal, and there is expert testimony admitting that there is no way of knowing what her state of mind was. In these circumstances, allowing a jury to infer that Villa Marie caused Mrs. Sundermeyer to choose to die would be contrary to every Missouri case requiring proof of a direct causal link between alleged negligence and death.

Plaintiff's "sole medical expert could not testify, to a reasonable medical certainty, of a direct causal link between Villa Marie's actions and Sundermeyer's subsequent death." *Sundermeyer*, 2008 WL 731241 at *7 (Lowenstein, J., dissenting). There is no evidence that Mrs. Sundermeyer would not have died "but for" Villa Marie's alleged conduct. The trial court properly concluded that plaintiff's case failed for lack of proof. Its judgment should be affirmed.

CONCLUSION

For the reasons discussed in this brief, the trial court properly entered summary judgment in Villa Marie's favor. The court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Substitute Brief of Respondent, and a disk containing the brief, were mailed on August 18, 2008, to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Substitute Brief of Respondent includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,873, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disks filed with the Substitute Brief of Respondent and served on appellant were scanned for viruses and found virus-free through the Symantec anti-virus program.

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