No. 89318

IN THE SUPREME COURT OF MISSOURI

Kenneth Sundermeyer, individually and as personal Representative for Elva Elizabeth Sundermeyer, deceased,

Appellant,

v.

SSM Regional Health Services d/b/a Villa Marie Skilled Nursing Facility,

Respondent.

Appeal From Circuit Court of Cole County
Case No. 04-CV-325466
The Honorable Thomas J. Brown

SUBSTITUTE BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

This is an appeal from summary judgment in favor of a defendant in a nursing home negligence case. The judgment and order granting summary judgment was issued by the Circuit Court of Cole County. The Western District Court of Appeals had jurisdiction and pursuant to that jurisdiction rendered an opinion reversing and remanding. On June 24, 2008 this Court issued a transfer order and claimed jurisdiction under Article V, Mo. Const.

STATEMENT OF FACTS

Introduction

This is a sad and tragic case of misplaced trust. (LF.0275) When Elizabeth Sundermeyer asked her daughter, Barbara Lowry, if the nursing home where Barb was the Director Of Nursing (Villa Marie) had a place for her, Barb said yes. (LF.0275, citing Deposition of Lowry at LF.0217). Elizabeth Sundermeyer and Barbara Lowry placed their trust in Villa Marie, and that trust turned out to have been misplaced. (LF.0275) Mrs. Lowry remained on as the DON for only a few months longer before transferring back to her original employer, St. Mary's Hospital. (LF.0275) After she left Villa Marie as the DON, she noticed that the care given to her mother began to change. Mrs. Sundermeyer suffered abuse, neglect, weight loss, dehydration, and eventually death. (LF.0275)

Complicating this case is the undisputed fact that Mrs. Sundermeyer did not die at Villa Marie, and in fact, died twenty-five days after the abuse occurred at another facility. (LF.0275)

The Lawsuit

Plaintiff sued Villa Marie, a subsidiary of SSM Health Care, a skilled nursing facility that cared for Plaintiff's mother, Elva Elizabeth Sundermeyer or "decedent", shortly her death. (Legal File at 178 hereafter "LF.__") Sundermeyer was admitted to Villa Marie on June 27, 2001 and remained a resident there through July 18, 2002. At the time of her admission, plaintiff Barbara Lowry, RN, was the Director of Nursing at Villa Marie. (LF.0216). At the time when Mrs. Lowry was in charge of nursing, she ensured that Elizabeth received adequate care. (LF.0224). When Mrs. Lowry left in October, 2001, to resume working at St. Mary's Hospital, Elizabeth's care began to worsen. (LF.0219-224) Mrs. Lowry talked to the administrator in attempting to address the care her mother received (LF.0222-223).

During her residency at Villa Marie, defendant's medical records document various significant problems with her care. (LF.0011-0014) Elva Elizabeth Sundermeyer was allowed to fall on multiple occasions. (LF.0011-0014). She fell on 7/11/01, 8/16/01, and was found kneeling on the floor after crawling out of bed on 9/5/01. She was again found on the floor on 9/14/01. (LF.0011-0014)

She fell while ambulating with her walker on 1/19/02. (LF.0011-0014) She was found on the floor, having slid off the bed on 1/24/02. (LF.0011-0014) She crawled out of

bed and was noted to be bruised on 4/24/02. She fell in the shower room on 5/3/02. (LF.0011-0014) In addition to her numerous falls, she was found to have numerous skin tears and excoriations. (LF.0011-0014). A sore was found in the abdominal folds, by Sundermeyer's daughter, on 10/13/01. (LF.0011-0014) The same area was red and open on 2/7/02 and 2/8/02. (LF.0011-0014) She suffered a skin tear to her left forearm on 2/26/02. (LF.0011-0014) She had red abdominal folds on 3/18/02. (LF.0011-0014) She again had excoriated skin folds in her right pannus on 7/1/02 She suffered a skin tear on 7/8/02. (LF.0011-0014)

The Abuse

The most serious issue, however, and the one that concerned family members the most, was the issue of bruising. Richard Sundermeyer testified that "just about every time I went in to see her there was more bruises." (LF.0253) This concern was magnified significantly by the discovery on 7/14/02 that Mrs. Sundermeyer had twenty-six separate bruises on her body that had not been present earlier. (LF.0017) Those bruises were located on her arms and legs. The bruises were recorded by family members in photographs provided to the trial court and shown below:

Figure 1 – Evidentiary photos showing the bruising on Elva Elizabeth Sundermeyer in July, 2002. (See LF.0068)

On 7/18/02, following the discovery of the abuse, Ms. Sundermeyer was transferred to St. Mary's Hospital where she was seen by nursing staff and social services; (LF.0014) They referred her to the Division of Aging for bruises on her arms and legs. (LF.0014). She later asked family members never to send her back to Villa Marie. (LF.0225)

The Neglect

Plaintiff alleged that Elva Elizabeth Sundermeyer did not receive proper nutrition and hydration at Villa Marie. (LF.0013). This was evidenced by:

- On 2/5/02 Sundermeyer was found to be impacted requiring manual disimpaction; thereafter family requested she be given additional fluid. (LF.0013)
- Following 2/5/02 the facility did not comply with the request as no increase in fluids is noted in the medical record. (LF.0013)
- On 4/17/02 Sundermeyer developed a Urinary Tract Infection that as the result of improper fluid intake. (LF.0013)
- Sundermeyer's weight was measured at 162.3 pounds on 6/4/02. (LF.0013)
- On 6/8/02 Sundermeyer suffered diarrhea. Ten days later, 6/18/02 during a Dehydration risk assessment the facility concluded she was not at risk, her

nutrition was good, and her fluid intake was 1000 to 2000 cc per day. (LF.0013)

- On the same day, 6/18/02, a social service note indicated she "currently has diarrhea… has been eating meals in her room… she has not been feeling well." (LF.0013)
- A monthly review on 6/19/02 concluded she had regular bowels, good appetite, and ate in the dining room. Her weight remained 162.3 pounds. (LF.0013)
- By 7/1/02 she continued to have diarrhea. (LF.0013)
- On 7/7/02 although nurses concluded her voiding was sufficient, nursing notes indicate that she "dribbles urine," indicating low urine output consistent with dehydration. (LF.0013)
- On 7/8/02 Sundermeyer's weight had fallen to 145.8, a drop of more than 17 pounds in a month. (LF.0013)
- Dietary notes on 7/10/02 indicate poor oral intake and suggest she was eating in her room because of continuing diarrhea. Staff were directed to encourage her to drink fluids. (LF.0013)
- On 7/18/02 she was admitted to St. Mary's Hospital E.R. with a diagnosis of electrolyte disorder, dehydration, and oral thrush. Her weight was 137.2 pounds. Sundermeyer had lost 12 pounds in ten days and 29 pounds in less

than two months without any modification in her care plan to address the loss of weight. (LF.0013)

Mrs. Lowry, a plaintiff in this action, a current employee of SSM Healthcare, and the former Director of Nursing for Villa Marie, testified that there were numerous deviations from the standard of care by Villa Marie staff and that those deviations destroyed her mother's will to live:

9 And I don't want to recreate the wheel here.
10 Can you, without going into too many specifics unless you
11 feel you have to, tell us what basically your criticisms
12 are?
13 A. My criticisms are not being kept informed of
14 changes in my mother's skin, coming in and finding
15 bruising, open skin, her significant weight loss in one
16 month's time, and I found that. I wasn't told about her
17 weight loss.
18 When I reviewed my mother's record on July
19 the 14th, the last dietary note was entered as 6-18.
20 There was nowhere in the chart where the nutritionist had
21 addressed my mother's 17-pound weight loss. But in
22 reviewing the chart last month, there were two notes there
23 in July under the nutritionist's assessments that were not

there in July of '02.

Her restorative care was not given to her as ordered. So that decreased her ability to have use of her upper extremities.

Q. What specifically are we talking about here?

A. She was to have range of motion daily to her upper extremities and to be walked to maintain her level of function that she came in at, and that was not provided.

Q. Okay.

A. She was treated roughly and abusively, and she went from being a joyful person to not being treated right and wanting never to go back there again to Villa Marie.

Q. Okay.

A. I feel that her spirit was broken, and that is not the mission of St. Marys Health Care.

(LF.0225) Mrs. Lowry also testified that the abuse and neglect by Villa Marie caused her mother's death[1].

[1] In the context of her former status as the Director of Nursing, and in the further more unusual status of being both an employee of the SSM Healthcare and a plaintiff, Mrs.

Q. Do you have any other criticisms?

A. Okay. I would like to add that I do not feel that the staffing ratios were as -- adequately staffed to establish standards of care during the survey or law after I left while my mother was there, and those were determined by the Administrator or the administration of St. Marys.

Q. Let me stop you there.

A. Yes.

Q. I'm going to ask while I am thinking about it. Did you say there was a survey on staffing ratios?

A. No.

Q. Okay.

A. I said I don't believe that the staffing ratios were appropriate during the survey process.

Q. During the survey process?

A. Survey in July.

Q. Okay.

A. Nor were they appropriate --

Lowry's statements could be viewed as an admission. However, Plaintiff never intended to rely on Ms. Lowry to establish cause of death and does not do so now.

Q. This survey that we're talking about (indicating)?

A. Yes.

Q. All right. How do you know about that?

A. Because they were not the appropriate numbers to provide the care that was needed for the residents. That was managed and determined by higher-ups than myself.

Q. I don't see any mention of that in the survey. Do you know if it was in the survey?

A. I do not see a tag number for staff.

Q. So they didn't find any criticism?

A. There is not a law for the amount of staff that you have to have. You have to maintain enough staff to meet the standard.

Q. So is that an individual -- did that issue even come up in the survey, do you know?

A. Staffing was not an F tag number. Staffing was not a citation, because there is not one directly related to numbers.

Q. All right. And what leads you to the conclusion that was improper staffing?

A. By the staffing ratios that we had, you were not

allowed to provide the care that was needed for the people.

Q. What was the staffing ratio? What were the practices at that time that you feel were deficient?

A. On the evening shift, I was told to decrease staffing by one person. The staffing was also decreased by one person on days on each side. That's three staff. That makes a significant difference when you are talking about three, six, nine people a day in a 24-hour period.

Q. For each shift, you are talking about?

A. (Witness nodded head.)

Q. Okay. That was on nurse aides and CMTs?

A. That was on nurse aides and CMTs.

Q. That was what?

A. That was for nurse aides and CMTs. We also -- I was also given the directive to change my mix on licensed staff, RNs, LPNs.

Q. In what way?

A. To decrease that, that number.

Q. Decrease the RNs and LPNs?

A. LPN numbers on the evening shift.

Q. Okay. Anything else?

A. I also feel that after I left, the care that was delivered to my mother also reflects the decrease in staffing that continued and ultimately what led to her demise.

Q. Say that again.

A. And ultimately led to her demise.

Q. What specifically occurred to your mother that was a result of improper staffing?

A. When they don't have the time to give her the care that's ordered, like her restorative care to feed her, make for sure that she has water and fluids. Those are staffing issues.

Q. Well, how do you know it's a situation that there's either nobody there to do it or they're there but they just don't do it?

A. By what I observed, what staff said to me, by the e-mail that Candy sent to me.

Q. Okay. That was one extra criticism. Do you have any others?

A. No.

Q. All right. Let me ask --

BY MR. FOLEY:

17 Q. And how did it cause her death?

18 A. By being treated roughly, not getting hydration

19 and fluids that she needed, the weight loss. It broke her

20 spirit. If you were slung around and your head was hit on

21 a table, you wouldn't feel very much like going on either.

(LF.0227-0230).

The Causation Issue

Plaintiff alleged that Elva Elizabeth Sundermeyer suffered abuse and neglect as noted and the abuse and neglect were so significant, so pervasive, and so severe, that they caused Sundermeyer to lose the will to live, and wish to die. (LF.0014).

On July 18, 2002, as noted *supra*, Sundermeyer was transferred to St. Mary's Hospital. (LF.0179). During her stay at St. Mary's Hospital, decedent's medical condition improved with respect to her electrolytes and fluid status and her pain was better controlled. (LF.0179)(LF.0207) Although clinical improvement was noted the family testified that Elizabeth continued to have difficulties even at St. Mary's:

19 Q. Okay. Do you remember how she was

20 feeling whenever you were staying with her at the

21 hospital?

22 A. Tired and weak and just complaining of

23 not being able to breathe very good.

24 Q. Do you think at that time she was having
25 more of a breathing -- breathing difficulties were
1 giving her some problems?
2 A. Yeah.
3 Q. Okay. There's nothing else you can
4 remember about that admission that would tell you
5 maybe what else is going on medically with her?
6 A. No.

(LF.0236-237)

Furthermore, Richard Sundermeyer also testified that his mother did not appear, to him, to be getting any better at St. Mary's Hospital. (LF.0254).

During that time she also expressed to her caretakers at St. Mary's Hospital that she would do anything to get out of her bed and wanted to get stronger so she could walk again. (LF.179) On July 24, 2002, decedent was transferred from St. Mary's Hospital to Green Meadows Nursing Facility. (LF.0014) Over the course of her stay at Green Meadows Nursing Facility, decedent's condition worsened; she developed decubitus ulcers and swallowing problems and told caretakers she wanted to die. (LF.0179)

Decedent Elva Sundermeyer passed away on August 12, 2002, 25 days after leaving Villa Marie. (LF.0014). Plaintiff alleges that Villa Marie negligently failed to prevent decedent from falling, provide adequate nutrition and hydration, adequately supervise its employees, and adequately monitor decedent. (LF.0015) Plaintiff alleged that decedent

suffered abuse and neglect that caused decedent to lose the will to live. (LF.0017). Plaintiff also alleged that Sundermeyer, died as a result of her lost will to live, dehydration and malnutrition. (LF.0020).

The Summary Judgment Motion

In defendant's motion for summary judgment, defendant suggested that Plaintiff's only causation expert, Dr. Thomas Manger, "testified that the cause of decedent's death is speculative." Defendant illustrated that analysis with a very small segment from Manger's deposition:

> 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.

(LF.0211)

Dr. Manger did make the statement during his deposition, but his opinions and statements were far more broad than has been suggested above. He also testified as follows:

> 14 Q. Mr. Foley asked you about speculating about
> 15 causation at one point. I just want to clear this
> 16 issue up.
> 17 Although you might have to speculate
> 18 about what Mrs. Sundermeyer's state of mind was, is it
> 19 a fair statement to say that you're basing your

20 opinion on what's in the medical records and that your
21 opinion as to cause of death is not speculation?
22 A. Yes.

(LF.0245)

Defendant then pointed out that Dr. Manger testified that normally people, when they get old and are sick, are tired of living and want to die.

Q. Just normally people when they get old and are sick, are tired of living and they just want to die?

A. Yes, I would agree.

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.

(LF.210-211).

Defendant likewise pointed out Dr. Manger's admission that a patient can lose the will to live even when everything is being done properly for that patient.

Q. Would you agree, doctor, that a patient who is in a nursing home can lose the will to live even though everything that is being done for the patient or I guess the resident would be a better term, is appropriate?

A. Yes.

(LF.0213)

Stretching the argument just a bit, Defendant then suggested that Dr. Manger testified that losing the will to live is an intellectual decision made by the individual that cannot be known by others unless it is communicated by the individual.

> Q. Giving up the will to live, whatever the cause might be, is an intellectual decision, is it not, by that person?
>
> A. Yes.
>
> Q. All right. And so, therefore, we can't really know what that person is thinking on the issue unless that person tells us?
>
> A. Yes.
>
> Q. All right. And here she didn't tell us?
>
> A. Not that I saw.

(LF.0212).

Defendant then averred that Decedent told her caretakers that she wanted to die while she was at Green Meadows. (LF.0213), and nothing indicated why she wanted to die. (LF.0212).

Defendant then pointed out that Dr. Manger, instead of testifying that Villa Marie caused or contributed to cause decedent's death, testified that decedent's nutritional decline and psychological status contributed to her death.

> Q. Okay. What factors caused her death?

A I think that her nutritional decline and her emotional and psychological status all contributed to her death.

(LF.0203) Dr. Manger did testify as stated, however, Dr. Manger's opinion was broader than that quoted. Dr. Manger testified:

Q. (By Mr. Foley) Okay. Let me just get a ballpark handle on what your opinions are in this case, that will tell me how long we're going to be here.

A. I think after reviewing the depositions as well as some of the records of Villa Marie Nursing Home with Mrs. Sundermeyer, I think that it's clear to me that she had been neglected at the least.

Certainly from the standpoint of the photographs and the descriptions of the falls she had perhaps been abused from that perspective not just physically but also emotionally from the standpoint of having the telephone withdrawn.

From the span of I believe it was late February early March of 2002 it appeared those instances became more numerous.

She had a tremendous weight loss the last month between June and July none of which was really

addressed. I think overall her nutritional status suffered and eventually that neglect contributed to her demise.

Q. And that caused -- all of those conditions that you mentioned caused her death?

A. I think they contributed to her death, yes.

(LF.0242-43)

Although defendant did not ask if the opinions held by Dr. Manger were to a reasonable degree of medical certainty, plaintiff did. (LF.0245). Dr. Manger stated his opinion was to a reasonable degree of medical certainty. (LF.0245)

The Trial Court's Ruling

Defendants moved for summary judgment solely on the issue of causation. (LF.0178). Following the motion, plaintiff's response, defendant's reply, and plaintiff's surreply, the parties argued the motion. Thereafter on June 8, 2006, the trial Court, the Honorable Thomas Brown, issued an order granting summary judgment to the defendant. His order specifically found that "Plaintiff's expert's testimony was not given to a reasonable degree of medical certainty." (LF.0368). Finding that the opinions "included speculation that it was possible that the decedent was old, sick, tired of living, and wanted to die," the court concluded that there was no competent medical testimony to establish that "any acts or omissions of Villa Marie's agents, servants or employees caused or contributed to cause the decedent's death." (LF.0368)

This appeal followed.

The Missouri Court of Appeals reversed and remanded by opinion on March 18, 2008. This court took transfer on June 24, 2008.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE CAUSE OF DEATH WAS A MATERIAL FACT IN DISPUTE AND PLAINTIFF'S EXPERT THOMAS MANGER, MD, TESTIFIED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT THE CAUSE OF MRS. SUNDERMEYER'S DEATH WAS ABUSE AND NEGLECT SUFFERED AT VILLA MARIE IN THAT (1) THE TRIAL COURT'S FINDING THAT THE OPINION WAS NOT TO A REASONABLE DEGREE OF MEDICAL CERTAINTY IS REFUTED BY THE RECORD; AND (2) THE TRIAL COURT'S FINDING THAT SPECULATION RENDERED THE OPINION INCOMPETENT DID NOT PROPERLY APPLY THE LAW WITH RESPECT TO EXPERT OPINIONS BECAUSE THE MEDICAL RECORDS AND LITERATURE PROVIDED A SUFFICIENT FOUNDATION FOR DR. MANGER'S OPINION.

ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

RULE 74.04(c)(6)

§ 490.065, RSMo. (2005)

Glidewell v. S.C. Management, Inc., 923 S.W.2d 940, 951 (Mo.App.1996)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE CAUSE OF DEATH WAS A MATERIAL FACT IN DISPUTE AND PLAINTIFF'S EXPERT THOMAS MANGER, MD, TESTIFIED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT THE CAUSE OF MRS. SUNDERMEYER'S DEATH WAS ABUSE AND NEGLECT SUFFERED AT VILLA MARIE IN THAT (1) THE TRIAL COURT'S FINDING THAT THE OPINION WAS NOT TO A REASONABLE DEGREE OF MEDICAL CERTAINTY IS REFUTED BY THE RECORD; AND (2) THE TRIAL COURT'S FINDING THAT SPECULATION RENDERED THE OPINION INCOMPETENT DID NOT PROPERLY APPLY THE LAW WITH RESPECT TO EXPERT OPINIONS BECAUSE THE MEDICAL RECORDS AND LITERATURE PROVIDED A SUFFICIENT FOUNDATION FOR DR. MANGER'S OPINION.

A. Standard Of Review

When considering appeals from summary judgments, appellate courts review the record in the light most favorable to the party against whom judgment was entered. ***ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp***., 854 S.W.2d 371, 376 (Mo. banc 1993). ***Zafft v. Eli Lilly***, 676 S.W.2d 241, 244 (Mo. banc 1984); ***Cooper v. Finke***, 376

S.W.2d 225, 228 (Mo.1964). 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***, 854 S.W.2d at 376. ***Cherry v. City of Hayti Heights,*** 563 S.W.2d 72, 75 (Mo. banc 1978); ***Dietrich v. Pulitzer Publishing Company***, 422 S.W.2d 330, 333 (Mo.1986). Courts accord the non-movant the benefit of all reasonable inferences from the record. ***ITT***, 854 S.W.2d at 376. ***Martin v. City of Washington***, 848 S.W.2d 487, 489 (Mo. banc 1993); ***Madden v. C & K Barbecue Carryout, Inc***., 758 S.W.2d 59, 61 (Mo. banc 1988).

This Court's review is essentially *de novo*. ***ITT***, 854 S.W.2d at 376. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. ***ITT***, 854 S.W.2d at 376. ***E.O. Dorsch Electric Co. v. Plaza Const. Co***., 413 S.W.2d 167, 169 (Mo.1967). The propriety of summary judgment is purely an issue of law. ***ITT***, 854 S.W.2d at 376. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment. ***ITT***, 854 S.W.2d at 376. ***Elliott v. Harris***, 423 S.W.2d 831, 834 (Mo. banc 1968); ***Swink v. Swink***, 367 S.W.2d 575, 578 (Mo.1963).

RULE 74.04 provides:

> If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law, the court shall enter summary judgment forthwith.

RULE 74.04(c)(6). ***ITT***, 854 S.W.2d at 376.

The moving party's entitlement to judgment as a matter of law revolves to a great extent around whether that party is the claimant or the defending party. ***Id***. at 381. Defendant is not required to controvert each element of plaintiff's claims in order to establish its right to summary judgment. ***ITT***, 854 S.W.2d at 381. Instead, defendant can establish its right to judgment by showing (1) facts that negate any one of plaintiff's elements; (2) that plaintiff, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of his elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the defendant's properly-pleaded affirmative defense. ***Id.***

To prevent summary judgment, plaintiff needs to show only that there is a genuine dispute as to the facts underlying the defendant's right to judgment on the grounds of causation. ***Id.*** at 382. A genuine dispute exists if the record shows the evidence suggests two plausible, but contradictory, accounts of the essential facts. ***Id***. This dispute must be real, not merely argumentative, imaginary, or frivolous. ***Id.***

B. Introduction to the Argument

Every day, in nursing homes across this state, residents are neglected. In most cases the facilities employ too few nurses and patients suffer the result of management's drive to increase profits. See, e.g., ***State v. Kaiser***, 139 S.W.3d 545, 559 (Mo. App. E.D. 2004). ("What was permitted to take place at Claywest is a disgrace. 'All hope abandon, ye who enter here' would be a fitting inscription for Claywest's portals, just as over the gates of Dante's Hell." Crandall, J. dissenting) One of the few deterrents that keep nursing homes honest is the wrongful death lawsuits that are filed challenging these conditions. This is one such lawsuit.

This is not, however, a case about whether Missouri recognizes a cause of action for the loss of a patient's will to live. It is a simple case about the standard of review for summary judgment, an issue this Court has reached numerous times before. See, e.g., ***Daugherty v. City of Maryland Heights***, 231 S.W.3d 814 (Mo. Banc 2007)(" A "genuine issue" that will prevent summary judgment exists where the record shows two plausible, but contradictory, accounts of the essential facts and the "genuine issue" is real…"); ***White v. Zubres***, 222 S.W.3d 272, (Mo. Banc 2007); ***ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp***., 854 S.W.2d 371, (Mo. Banc 1993)("Summary judgment tests simply for the existence, not the extent, of these genuine disputes.")

The issue before the Western District, as before this Court now, is whether plaintiff's expert testimony was sufficient on the subject of causation so as to avoid summary judgment. This case will not make new law; it can only affirm the summary judgment

standards set out in Rule 74 and affirmed as recently as this past year. Simply put, once briefing is complete this Court should retransfer this case to the Western District.

In this case the plaintiff's expert unequivocally stated that the conditions at Villa Marie contributed to cause Elva Sundermeyer's death. He admitted that other factors played a role. His opinion was given to a reasonable degree of medical certainty, and did not hinge on an analysis of what Ms. Sundermeyer was thinking, as the Court of Appeals found. The trial court's ruling was clearly erroneous and must be reversed.

C. A Genuine Dispute Exists Regarding Causation In That Plaintiff's Expert Holds The Opinion, To A Reasonable Degree of Medical Certainty, that the Actions of Villa Marie Contributed To Cause Decedent's Death

1. Procedural Posture

This case comes before the appellate courts following summary judgment. Early on, Defendant moved for dismissal citing a lack of case law permitting a wrongful death case to move forward on the basis of a loss of a will to live. (LF.0063) The trial court overruled that motion because the cause of action pleaded was for wrongful death, (LF.0002) and the case progressed to discovery. Family members and a few fact witnesses from the nursing home were deposed. (LF.0001-0007). Plaintiffs Liability and Causation experts were produced for deposition. Shortly thereafter, Defendant filed its motion for summary judgment solely on the issue of causation. (LF.0178)

2. Loss of Will To Live Is Not An Issue In This Case

At the outset, this is not a particularly difficult case from a precedential point of view because it does not turn on whether the State of Missouri recognizes a cause of action for the loss of will to live[2]. Rather, it turns on the question of whether the standard of review that requires courts to test for the existence of a set of disputed facts permits the court to weigh those facts and then substitute its judgment on a disputed issue of fact for that of the jury. Plaintiff asserts that Rule 74 and the long line of case law interpreting that rule does not permit what the trial court did here.

To be sure, there is no cause of action, separate from wrongful death, for loss of the will to live. Had some unique cause of action for the "loss of the will to live" been pleaded in the abstract as the only basis for Ms. Sundermeyer's death, it is doubtless that the trial court would have granted the defendant's early motions to dismiss. But the cause of action pleaded was that of wrongful death, and the trial court did not dismiss. While both Plaintiff and Defendant searched through the case law trying to find a case where the cause of death is based on the destruction of the will to live, they could not find such a case. Despite diligent research on Westlaw and through the internet, no similar case to this one has been found. Yet, the absence of such case law is immaterial, because the issue before this court,

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[2] Before the Court of Appeals both parties recognized that there was no case that determined whether there was a separate cause of action for lost will to live. Plaintiff/Appellate concedes that here. However, the cause of action pleaded in this case is Wrongful Death.

as before the trial court, is one of causation as to the cause of death, not some abstract issue related to the loss of the will to live.

So, to the extent this Court took transfer on the basis of the "loss of the will to live" argument proffered by the Respondent in its application for transfer, the transfer may have been improvidently granted, and this Court can simply retransfer the case to the Western District. The issue of lost will to live is not where this case will be decided[3].

Rather, the question to be decided, as properly set forth in the Court of Appeals opinion, is whether plaintiff's expert testimony established a case of causation sufficient to avoid summary judgment. The Western District so held, and that was the correct ruling. As the Court of Appeals noted in reviewing this matter:

> Villa also contended that it was entitled to summary judgment because Dr. Manger did not opine that the alleged negligence caused Elva Sundermeyer to lose her "will to live." Both parties allot some portions of their brief to discussing the open question of whether a cause of action exists for "loss of the will to live." Although intellectually interesting, we fail to see its relevance in the present procedural posture of this case. **In essence, this is a garden--variety medical malpractice case brought as a wrongful death action.** This fact is asserted by the plaintiff and acknowledged by the trial court. We do not understand Villa's argument to the extent it appears to

[3] The Court of Appeals viewed this issue as an "interesting" but ultimately irrelevant point. That analysis is correct.

> claim that the "loss of the will to live" is an independent element of Sundermeyer's cause of action. We do not deny the question's relevance, however. The essential gist of the underlying action is that, as a result of the abuse and neglect of Villa, Elva Sundermeyer became severely malnourished and dehydrated; it further contends that, as a result of neglect or direct abuse, she suffered multiple falls, horrendous bruising, and emotional anguish to the point where she said she simply wanted to die. Villa does not dispute, at this summary judgment stage, that these conditions (other than "wanting to die") were a result of its acts or omissions that another witness has apparently described as negligence or resulting from negligence. It only contends, as we understand its argument, that to recover, Sundermeyer had to present expert testimony that, in fact, Elva Sundermeyer had lost her will to live and that loss was caused by the negligence described above. We disagree. We initially have some reservation that current medical knowledge, at least as demonstrated to us, would authorize any witness to testify what the decedent was "thinking," which Villa complains Dr. Manger failed to do. Nor are we convinced that expert testimony is even necessary on this issue.

Slip op at 8. (emphasis added)

3. The Causation Issue

Defendant sought to test plaintiff's evidence in this case by challenging only the causation piece in its motion for summary judgment. It did not suggest that there was insufficient evidence of negligence, abuse, neglect, weight loss, or the clinical manifestations of those episodes of abuse and neglect. (See generally, LF.0178-0180). Rather, the basis for the motion for summary judgment was one colloquy between Defendant's attorney and Plaintiff's expert Thomas Manger, MD:

> 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.

(LF.0211) Manger testified in that manner, but context is important. Taken alone, Dr. Manger's statement about speculation might seem to imply that his opinion on cause of death is wholly based on speculation. It was not. It was based on the medical records, the depositions, and the photographs taken by family members showing the horrific bruising on Elva Elizabeth Sundermeyer. Dr. Manger's opinion was somewhat broader than that proffered to the trial court. What he actually said about cause of death is as follows:

> 15 Q. (By Mr. Foley) Okay. Let me just get a
> 16 ballpark handle on what your opinions are in this
> 17 case, that will tell me how long we're going to be
> 18 here.

A. I think after reviewing the depositions as well as some of the records of Villa Marie Nursing Home with Mrs. Sundermeyer, I think that it's clear to me that she had been neglected at the least.

Certainly from the standpoint of the photographs and the descriptions of the falls she had perhaps been abused from that perspective not just physically but also emotionally from the standpoint of having the telephone withdrawn.

From the span of I believe it was late February early March of 2002 it appeared those instances became more numerous.

She had a tremendous weight loss the last month between June and July none of which was really addressed. I think overall her nutritional status suffered and eventually that neglect contributed to her demise.

Q. And that caused -- all of those conditions that you mentioned caused her death?

A. I think they contributed to her death, yes.

(LF.0242-43)

When asked by Plaintiff's counsel about the issue of speculation, and how it applied to his opinion on cause of death, Manger said:

> Q. Mr. Foley asked you about speculating about causation at one point. I just want to clear this issue up.
>
> 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?
>
> A. Yes.

(LF.0245)

Dr. Manger made clear, on re-direct examination, that while he might have to speculate to some extent about what Mrs. Sundermeyer's state of mind was in the days before her death, his opinion on central issue, that Villa Marie contributed to the death of Elva Elizabeth Sundermeyer, was rock solid, and was not based on speculation. It was based on the content of the medical records, depositions and photographs that he reviewed. (LF.0242) As the Court of Appeals noted:

> Sundermeyer next contends that his expert provided sufficient testimony about the causal relationship to create a genuine issue of material fact. Villa points to deposition testimony that it contends entitles it to judgment as a

matter of law because it shows that all of Dr. Manger's testimony is speculative. The essential test is whether Dr. Manger's testimony would be sufficient to present the issue of causation to a jury. *Super*, 18 S.W.3d at 516. If it is, then summary judgment is improper.

Villa argues that Dr. Manger's testimony is not sufficient because it does not satisfy the "but for" test laid out in *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 862 (Mo. banc 1993). In its motion for summary judgment, Villa candidly stated the legal rule correctly, but avoids doing so in its appellate brief. As acknowledged in its summary judgment motion, the "but for" test is equivalently phrased as "caused or contributed to cause." Missouri approved jury instruction 19.01 was approvingly spoken of in *Callahan*. It expresses causation as "'directly cause' or 'directly contribute to cause.'" *Id.* at 863 (quoting MAI 19.01).

Dr. Manger testified:

A. What factors caused her death?

B. I think her nutritional decline and her emotional and psychological status all contributed to her death.

C. Let me just get a ballpark handle on what your opinions are in this case, that will tell me how long we are going to be here.

D. I think after reviewing the depositions as well as some of the records of Villa Marie Nuring Home with Mrs. Sundermeyer, I think it's clear to me that she had been neglected at the least. Certainly from the standpoint of the falls she had perhaps been abused from that perspective not just physically but emotionally from the standpoint of having the telephone withdrawn. From the span I believe it was late February early March of 2002 it appeared those instances became more numerous. She had a tremendous weight loss the last month between June and July none of which was really addressed. I think overall her nutritional status suffered and eventually that neglect contributed to her demise.

E. And that caused--all of those conditions that you mentioned caused her death?

F. *I think they contributed to her death, yes.* [Emphasis added.]

Nevertheless, Villa contends that Dr. Manger's testimony was speculative because he conceded both that other factors *could* also have contributed to her death, that she *could* simply have gotten old and wanted to die, and that Dr. Manger admitted that he would be speculating as to what she was actually thinking (as, we observe, would any witness). The sufficiency of an expert's testimony is not destroyed simply by concessions that other factors for which the defendant is not responsible could explain the course of events. *Schiles v. Schaefer,* 710 S.W.2d 254, 261 (Mo. App. E.D. 1986).

> It is the rare case and rare expert who will not concede (or must necessarily concede) that other things, factors or causes contrary to or inconsistent with that expert's opinion, are "possible." To the extent that Dr. Manger conceded that causes other than Villa's negligence were possible, his testimony did not lose its probative value.

Slip op at 7.

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. Banc 2007) is instructive here. Daughtery was a police captain who was told by the chief of police that the city was trying to eliminate officers older than 55. The City brought a motion for summary judgment claiming Daughtery was terminated for failure of fitness for duty evaluations. Daughtery asserted that the chief's statements made out a bona fide cause of action under the MHRA which required only that the improper purpose be a contributing factor in his discharge. Id. at 820. This Court, properly applying the summary judgment standard regarding two plausible but competing theories of the case, held that the claim survived summary judgment on the basis of this evidence. Id. at 821.

The plaintiff here was only required to show that Villa Marie's conduct caused or contributed to cause the death of Mrs. Sundermeyer. ***Callahan v. Cardinal Glennon Hospital***, 863 S.W.2d 852, 862 (Mo. banc 1993). The plaintiff made that showing. The trial court's summary judgment order must be reversed.

4. Standards For Admission of Expert Testimony

Section 490.065, RSMo. (2005), provides that in civil cases:

> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable[4].

Section 490.065 has been said to be "substantially the same as FED.R.EVID. 703," ***Edgell v. Leighty***, 825 S.W.2d 325, 328 (Mo.App.1992); see also ***Peterson v. National Carriers, Inc***., 972 S.W.2d 349, 354 (Mo.App.1998) ("This approach is fully consistent with the approach in FEDERAL RULES OF EVIDENCE 703.") and the case law suggests that the two are very similar in application. ***Peterson v. National Carriers, Inc***., 972 S.W.2d 349, 355 (Mo.App.1998)

Section 490.065 expands the historical bases of expert opinion, making it clear that experts testifying in civil cases may base their opinions on facts made known to them at or before the hearing. *See, e.g.*, ***Casey v. Florence Construction Co***., 939 S.W.2d 36, 39–40

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[4] Prior case law regarding expert opinion testimony is discussed in BRANDENBERG, *Expert Witnesses and Hypothetical Questions*, 44 J.MO.BAR 25 (1988) (recommending that Missouri adopt the Federal Rules for use in Missouri); see also MCMICHAEL AND MCCARTER, *Expert Testimony*, 45 J.MO.BAR 281 (1989).

(Mo.App.1997).[5] However, the facts "must be of a type reasonably relied upon by experts in the field … and … [they] must be … reasonably reliable." *See, e.g.*, ***Massachusetts Gen'l***, 835 S.W.2d at 480[6].

As Judge Wolff noted in his concurrence in ***State Bd. Of Registration for Healing Arts v. McDonagh***, 123 S.W.3d 146, 160 (Mo. Banc 2003), the statute is 204 words long and conveniently written in English. It sets up the only test for expert testimony. Here a careful review of the testimony of Dr. Manger shows that his testimony was based on a review of the medical records, the deposition testimony of the decedent's daughter (herself a registered nurse), and the photographs that would be introduced into evidence at trial. (LF.0242-243) His testimony met the test set out in the statute. Dr. Manger stated:

> 19 A. I think after reviewing the depositions as
> 20 well as some of the records of Villa Marie Nursing

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[5] ***Casey*** holds that given the language of § 490.065.3, an expert testifying to the cause of a highway accident at a construction site "was not required to make personal observations of the accident or construction sites."); See also, ***Massachusetts Gen. Life Ins. Co. v. Sellers***, 835 S.W.2d 475, 479 (Mo.App.1992) (referring to "the new and liberalized rule governing the admission of expert opinion").

[6] ***Mass. Gen.*** holds that a surveyor's expert opinion was properly received under § 490.065.3 because "(a) he was aware of the [land] records before the hearing; (b) the records are of a type reasonably relied upon by surveyors in forming their opinions or inferences; and (c) the records are otherwise reasonably reliable")

21 Home with Mrs. Sundermeyer, I think that it's clear to
22 me that she had been neglected at the least.
23 Certainly from the standpoint of the
24 photographs and the descriptions of the falls she had
25 perhaps been abused from that perspective not just
1 physically but also emotionally from the standpoint of
2 having the telephone withdrawn.

(LF.0242-243).

The trial judge is responsible for deciding if proffered foundational facts meet the minimum standards of reliability. ***Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940, 951 (Mo.App.1996) (stating that "[i]t is only in those cases '[w]here the source upon which the expert relies for opinion is so slight as to be fundamentally unsupported, [that] the jury may not receive the opinion,' " and holding that "the source of the experts' opinions, the medical records, was [not] so factually deficient that the trial court should have determined that they did not meet minimum standards of reliability.") *See also*, ***Wulfing v. Kansas City Southern Industries,*** 842 S.W.2d 133, 152 (Mo.App.1992). Ordinarily a "trial judge is expected to defer to the expert's assessment of what data is reasonably reliable." ***Glidewell*** 923 S.W.2d at 951 ("Medical records are the quintessential example of the type of facts or data reasonably relied on by experts in the field of medicine."); ***Schreibman v. Zanetti***, 909 S.W.2d 692, 699 (Mo.App.1995) (witness' inability to vouch for the reliability of the data "was inconsequential."). As set forth in ***Glidewell*** and ***Wulfing***, the medical records here met the test and provided a sufficient basis for the opinion.

The testimony of Dr. Manger was given to a reasonable degree of medical certainty. (LF.0245) The trial court clearly erred when it stated, in its order and judgment, that the opinions were not given to this standard. (LF.0368). The Western District was clear in so noting in its opinion. Slip op. at 5.

Importantly, 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. In effect, by so requesting the trial court to weigh the opinion of the expert, the defendant induced the trial court's error.

Whether an opinion of an expert is based on and supported by sufficient facts and evidence is a question of law, See e.g., ***Washington by Washington v. Barnes Hospital***, 897 S.W.2d 611, 616 (Mo.1995) (en banc) (discussing the difference between the admissibility of expert opinion testimony and the submissibility of a case based thereon)[7];

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[7] See also, ***Harp v. Illinois Central R. Co***., 370 S.W.2d 387, 393 (Mo.1963) (*quoting* ***Gaddy v. Skelly Oil Co***., 364 Mo. 143, 259 S.W.2d 844, 849 (1953)); ***Vittengl v. Fox,*** 967 S.W.2d 269, 280–82 (Mo.App.1998); ***Koontz v. Ferber***, 870 S.W.2d 885, 893 (Mo.App.1993); ***Heisler v. Jetco Service***, 849 S.W.2d 91, 95 (Mo.App.1993); ***Stan Cushing Construction Co. v. Cablephone, Inc.***, 816 S.W.2d 293, 296 (Mo.App.1991); ***Baker v. Gordon***, 759 S.W.2d 87, 93 (Mo.App.1988); ***Kummer v. Cruz***, 752 S.W.2d 801, 807 (Mo.App.1988); ***Wiley v. Pittsburg and Midway Coal Mining Co***., 729 S.W.2d 228, 233 (Mo.App.1987); ***Kozeny-Wagner, Inc. v. Shark***, 709 S.W.2d 149, 152 (Mo.App.1986), appeal after remand, 752 S.W.2d 889 (Mo.App.1988).

and must be raised by a timely objection or motion to strike, ***Lee v. Hiler***, 141 S.W.3d 517, 524 (Mo.App.2004)[8]; but if there is a sufficient factual basis for an expert's opinion, any challenge to the facts on which an expert bases his opinion, or any weaknesses in the factual underpinnings of that opinion, or in the expert's knowledge, go to the weight the "testimony should be given, not its admissibility." See ***Mitchell v. K.C. Stadium Concessions, Inc***., 865 S.W.2d 779, 788 (Mo.App.1993) (any weakness in expert's testimony was for the jury to evaluate; it went to the weight and credibility of the testimony)[9].

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[8] *See also* ***Gillham v. LaRue***, 136 S.W.3d 852, 857 (Mo.App.2004) (an objection or motion to strike comes too late if it is made after the opportunity to correct any deficiencies has passed); ***Kauffman v. Kauffman***, 101 S.W.3d 35, 50 (Mo.App.2003).

[9] See also, ***Wulfing v. Kansas City Southern Industries, Inc.***, 842 S.W.2d 133, 152 (Mo.App.1992); ***Young v. St. Louis University,*** 773 S.W.2d 143, 146 (Mo.App.1989) ("Any defects in … [expert's] diagnosis because of his relatively short investigation of appellant's mental health relate to the weight his testimony should be given, not its admissibility."), cert. denied, 493 U.S. 1028, 110 S.Ct. 738, 107 L.Ed.2d 756 (1990); ***Wadlow by Wadlow v. Lindner Homes, Inc.***, 722 S.W.2d 621, 627 (Mo.App.1986) ("The factual underpinning of an expert witness' opinion goes to weight and credibility rather than admissibility."); ***Wiley v. Pittsburg and Midway Coal Mining Co***., 729 S.W.2d 228, 233–34 (Mo.App.1987); ***Mississippi River Fuel Corp. v. Whitener,*** 237 S.W.2d 239, 244 (Mo.App.1951).

However, ordinarily, the opinion itself is still admissible, See, e.g., ***Menschik v. Mid-America Pipeline Co.***, 812 S.W.2d 861, 865 (Mo.App.1991) ("Opinion testimony is not to be rejected upon an objection that it fails to take certain facts into account"); ***Wiley v. Pittsburg and Midway Coal Mining Co.***, 729 S.W.2d 228, 233–34 (Mo.App.1987); ***Mississippi River Fuel Corp. v. Whitener***, 237 S.W.2d 239, 244 (Mo.App.1951), unless the basis for the opinion is "so slight as to be fundamentally unsupported." ***Glidewell*** 923 S.W.2d at 951.

In addition to being supported in the medical records, current medical thinking draws significant correlations between abuse and neglect of elders and survivability of elder patients. In a large longitudinal study of old people[10], those who were mistreated were 3.1 times more likely to die during a 3-year period than those who did not experience abuse, even after adjustment for co-morbidity and other factors associated with mortality. At the end of 13 years of follow-up, 9% of those who were mistreated were alive, compared with 41% who had not experienced abuse. See, e.g., MARK S. LACHS, *Elder Abuse*, 364 LANCET 1263 (2004). Thus Dr. Manger's opinion about the effects of the abuse and neglect on the mortality of Elva Elizabeth Sundermeyer is supported by science as well as by the medical records and Dr. Manger's extensive experience.

[10] Lachs MS, et al,. *The Mortality Of Elder Abuse*. 280 JAMA 428-43 (1998);

5. Dr. Manger's Opinion Created A Disputed Issue of Material Fact

In order for a material disputed fact to exist, there must be two contradictory but plausible theories of how things happened. ***ITT***, 854 S.W.2d at 381. The dispute can't be merely frivolous or argumentative. ***Id.*** The testimony of Dr. Manger, viewed in its entirety, meets the test for expert testimony and lays out such a contradictory and plausible theory. Defendant's theory of the case is apparently that the Decedent died of unrelated causes at the subsequent nursing facility. The plausible, and contradictory theory offered by plaintiffs arises from the evidence of abuse and neglect. It is buoyed by the presence of skin tears, falls, and unaddressed weight loss at Villa Marie. Finally, it is supported by Plaintiff's expert Dr. Thomas Manger's opinion that Mrs. Sundermeyer died at the other facility but the abuse, neglect and traumas that she suffered at Villa Marie Nursing Center contributed to that death.

Plaintiff's expert testified, as did the family, that Villa Marie broke the plaintiff's decedent's spirit and directly contributed to cause her death. These are two valid competing theories. ***ITT***, 854 S.W.2d at 381. They are not merely frivolous or argumentative. ***ITT***, 854 S.W.2d at 381 This case is properly decided by a jury.

Because plaintiff's expert witness testimony meets the threshold standard for expert witness testimony, in that it is based on facts taken from the medical record, ***Glidewell*** 923 S.W.2d at 951, is supported by the scientific literature, and because the expert holds the opinion to a reasonable degree of medical certainty, (LF.0245) it creates a factual issue that

can only be resolved by a jury. To the extent that Dr. Manger might be impeached at trial on where he might need to speculate about the state of mind of the decedent in the days antecedent to death, that issue goes only to the weight to be accorded the opinion by the jury. ***Wadlow***, 722 S.W.2d at 627; ***Wiley***, 729 S.W.2d at 233–34.

6. Summary

Although the application for transfer was phrased in terms of whether Missouri would recognize a cause of action for lost will to live, the summary judgment motion was decided not on whether such a theory was viable as some separate tort claim, but rather, on whether the plaintiff had made a case of causation sufficient to withstand summary judgment. The Court of Appeals properly examined whether this was a case where the summary judgment record, taken as a whole, supported the judgment. It found that it did not support summary judgment, and the judgment had to be reversed.

In the Court of Appeals oral argument for the plaintiff/appellate lasted about five minutes. Appellant merely asked the Court of Appeals to examine the standard of review and apply that standard correctly to the facts of the case. This Court need not go that far. This Court can examine the briefs and the issues presented and make a determination that this matter should be retransferred for reinstatement of the Court of Appeals opinion.

Should this Court decide to re-examine the work of the Court of Appeals (because there is no error of law and no issue of general importance in this case), then the Supreme Court is likely to find:

- That the expert opinion of Thomas Manger was given to a reasonable degree of medical certainty, and the trial court clearly erred when it held otherwise. (compare LF.0245 and LF.0368);
- That Dr. Manger's opinion did create a material factual issue regarding whether the acts or omissions of Villa Marie's agents, servants or employees caused or contributed to cause the decedent's death;
- That the trial court overlooked direct and material evidence in the record supporting, the expert's opinion that the acts or omissions of Villa Marie directly contributed to cause the death of Elva Elizabeth Sundermeyer. (LF. 0242-243);
- That while defendant's motion focused on the barest mention of speculation in the expert's opinion, the trial court erred when it attempted to weigh the credibility of the expert's testimony because summary judgment tests for the existence of material factual issues only; ***ITT***, 854 S.W.2d at 376.
- That the trial court erred when it failed to consider Dr. Manger's testimony as a whole[11].

A trial court has no authority to weigh credibility on conflicting affidavits in adjudicating a motion for summary judgment. ***North Central County Fire Alarm System, Inc. v. Maryland Heights Fire Protection District***, 945 S.W.2d 17, 21[5] (Mo.App.

[11] As is quite common in the Circuit Court, a large portion of the summary judgment order was drafted by Defendants.

E.D.1997), and likewise, should have no authority to weigh the credibility or worth of an expert's testimony if that testimony is given to the proper evidentiary standard, as was done here. The weight accorded to an expert's testimony is properly for the jury. ***Johnson v. Kahn***, 71 S.W.725 (Mo. App. 1903); ***State v, Thomas***, 542 S.W.2d 612 (Mo. App. W.D. 1976); *c.f.*,***Sanders v. Hartville Mill. Co***., 14 S.W.3d 188 (Mo. App. S.D. 2000)("The extent of an expert's experience or training goes to the weight of his testimony and does not render the testimony incompetent." *citing* ***Donjon v. Back and Decker***, 825 S.W.2d 31 (Mo. App. 1992)).

As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment. ***ITT***, 854 S.W.2d at 376. ***Elliott v. Harris,*** 423 S.W.2d 831, 834 (Mo. banc 1968); ***Swink v. Swink,*** 367 S.W.2d 575, 578 (Mo.1963). This Court should simply retransfer the case, or if it chooses to write an opinion, should reverse and remand for trial.

CONCLUSION

The trial court erred in concluding that the plaintiff's expert opinion was not given to a reasonable degree of medical certainty. The trial court erred in weighing the credibility of the expert and in concluding that a material issue of fact did not exist. Because there are two plausible but contradictory theories of causation, and because the expert's opinion was based on the kind of information reasonably relied upon by experts (specifically, the medical record), this Court should reverse and remand for trial.

Respectfully Submitted,

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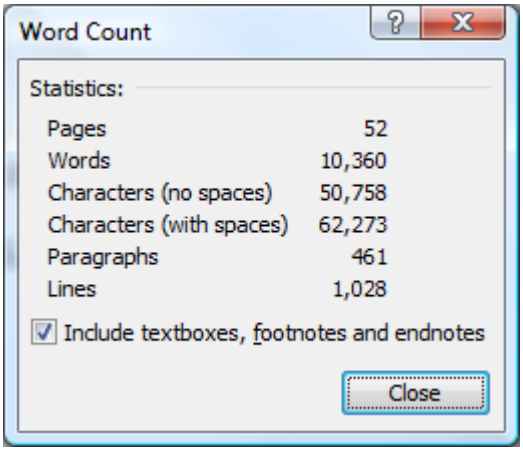
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 10,360 words. The word count was derived from Microsoft Word as shown below.



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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that true and accurate copies in the amount specified by Rule 84 of the foregoing documents were served via United States Mail; postage prepaid this 14th day of July, 2008, to the following:

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