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 REPLY BRIEF OF APPELLANT

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ARGUMENT

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE WERE TWO PLAUSIBLE AND COMPETING THEORIES OF LIABILITY AND PLAINTIFF'S EXPERT TESTIMONY WAS GIVEN TO THE PROPER STANDARD AND ESTABLISHED A SUBMISSIBLE CASE UNDER MAI 19.01

(Responds to Respondent's only point on appeal)

A. The Record Is Replete With References To Physical Injury, Neglect, and Abuse and There was Ample Evidence Supporting Dr. Manger's Medical Causation Opinion.

In its response brief, Respondent claims that there is no evidence that Mrs. Sundermeyer died from a lost will to live. (Resp. Br. at 14). That is because that was the Defendant's characterization of the Plaintiff's theory. Plaintiff's case has always been about Wrongful Death arising from Medical Negligence. As the Court of Appeals found, there was more than ample evidence of abuse and neglect in the record. Mrs. Sundermeyer was denied food and lost an enormous amount of body weight. As previously noted Plaintiff alleged that Elva Elizabeth Sundermeyer did not receive proper nutrition and hydration at Villa Marie. (LF.0013). This was evidenced by instances of

impaction, failures to increase fluids, urinary tract infections, diarrhea, and a seventeen pound loss of body weight in one month. (LF.0013). Her plan of care was never modified to address these concerns. (LF.0013).

Mrs. Lowry, a plaintiff in this action (the daughter of the decedent), 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 and caused her death[1]. (LF.0225) Thus, contrary to the claim advanced by the Respondent that there was "no evidence" supporting a claimed lost will to live, the evidence was there in the record. The suggestion to the contrary overlooks this evidence.

Respondent also suggests that Dr. Manger never said that "but for" the conduct of Villa Marie, that Mrs. Sundermeyer would have died. (Resp. Br. at 14). However, just as the Respondent never asked Dr. Manger if he held his opinions to a reasonable degree of medical certainty (see *Sundermeyer v. SSM Healthcare*, 2008 WL 731241 (W.D. Mo. 2008), slip op. at 2), Respondent never phrased a question on causation in "but for" terms. Here is what Dr. Manger said:

> Q. Okay. What factors caused her death?

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[1] Plaintiff never intended to rely solely on Ms. Lowry to establish cause of death and does not do so now.

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

(LF.0203)

Dr. Manger testified:

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.
19 A. I think after reviewing the depositions as
20 well as some of the records of Villa Marie Nursing
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.
3 From the span of I believe it was late
4 February early March of 2002 it appeared those
5 instances became more numerous.
6 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)

Dr. Manger's opinion does not appear to be rooted in the concept of a lost will to live, but rather, in the more scientific area of falls, emotional abuse, neglect, and weight loss. All those factors clearly contributed to cause Sundermeyer's death, which as the Court of Appeals noted, was all that was required. It made a submissible case. Respondent's argument to the contrary is misdirected.

B. Dr. Manger's Testimony That Villa Marie Contributed to Cause Sundermeyer's Death Is All That Is Required Under MAI 19.01 and *Callahan v. Cardinal Glennon Hospital,* 863 S.W.2d 852, 862 (Mo. banc 1993)

Respondent further suggests that 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." Resp. Br. at 17. (citing Judge Lowestein's dissent). However, Manger was not a liability

expert. That role was filled by nurse Patricia Carroll, RN. Dr. Manger was not asked to express an opinion on liability and was solely named for causation. Judge Lowenstein's criticism, echoed by the Respondent in their substitute brief, misses the mark. More importantly, however, Respondent's motion for summary judgment did not address liability – only causation. And, as noted *supra*, Respondent never asked the "but for" question during the deposition. Had it asked, Dr. Manger would have answered it appropriately. The Respondent failed to ask the question, and as a result, the suggestion that Manger does not establish "but for" causation simply lacks any merit. What Dr. Manger did say was that the care directly contributed to cause Sundermeyer's death, which under *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 862 (Mo. banc 1993), and the appropriate MAI is all that is required[2].

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[2] 19.01 [1986 Revision]Verdict Directing Modification—Multiple Causes of Damage

> In a case involving two or more causes of damage, the "direct result" language of paragraph Third of verdict directing instructions such as 17.01 and 17.02 might be misleading. In such cases plaintiff, at his option, may substitute one of the following:
>
> Third, such negligence directly caused or directly contributed to cause damage to plaintiff.[1]

Respondent also suggests that the trial court did not actually weigh Dr. Manger's opinion so much as determine from it that the expert's opinion was not reliable evidence of causation. (Resp. Br. at 19). This is a distinction without a difference because the order makes plain that the trial court did weigh the evidence instead of merely testing for the existence of a factual issue. The facts are:

- Dr. Manger said multiple factors for which Villa Marie was directly responsible (hydration, weight loss, falls, etc.) were causative factors in Sundermeyer's death. (LF.0203)
- Dr. Manger testified that those factors contributed to cause Sundermeyer's death. (LF.0242-43)
- He gave his opinion to a reasonable degree of medical certainty. (LF.0245)
- He testified that while he might have to speculate about what Mrs. Sundermeyer was thinking, he was not speculating about his causation opinion. (LF.0245)
- His causation opinion was buttressed by science[3].

None of the cases cited by the Respondent stand for the proposition advanced by the Respondent that causation standards were not met in this case. Dr. Manger offered his opinion on causation and contrary to the Respondent's claim, the proper method to challenge an expert's opinion, or the basis for that opinion, is by a motion to strike as the

[3] See, e.g., MARK S. LACHS, *Elder Abuse*, 364 LANCET 1263 (2004).

Court of Appeals properly held. *Lee v. Hiler*, 141 S.W.3d 517, 524 (Mo.App.2004)[4] Respondent failed to do so. Had Respondent properly challenged the expert opinion by a motion to strike, it is likely that the trial court could have resolved any issue about the basis for his opinion by reference to affidavits from the expert. Had the trial court stricken the expert, doubtless the plaintiff would have been given additional time to produce another expert to offer a similar opinion. But no motion to strike was made and the Respondent's failure to address the basis for the opinion in the proper manner is fatal to its claim here on appeal. *Id.*

Neither *Tomkins v. Kusama*, 822 S.W.2d 46 (Mo. App. 1991) nor *Eidson v. Reproductive Health Services*, 863 S.W.2d 621 (Mo. App. 1994) are precisely on point in this case. *Eidson*, however, is perhaps somewhat instructive. There plaintiff sought recovery for a voluntary suicide[5] relating to an abortion. Plaintiff could not show that the wrongful acts caused the change in mentation that induced the suicide. *Id.* As noted in that case, however, where a negligent act or acts (in this case, the denial of food and

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[4] *See also Gillham v. LaRue*, 136 S.W.3d 852, 857 (Mo.App.2004); *Kauffman v. Kauffman*, 101 S.W.3d 35, 50 (Mo.App.2003).

[5] At various times and in various ways the Respondent makes the comparison to this case of a suicide. Appellant does not believe that is a proper comparison. Suicide victims rarely endure emotional and physical abuse leading up to their suicide. Elderly people who experience abuse and neglect, however, are substantially more likely to die than those who do not. See footnote 3, *supra*.

water, manifesting itself as a seventeen pound weight loss unaddressed by proper intervention, the isolation from family by repeatedly moving the telephone away from where the disabled Mrs. Sundermeyer could reach it, the physical abuse manifesting itself as bruising on Mrs. Sundermeyer) induces the mental state causing the suicide, the injury is the proximate cause of death. *Id.* Respondent recognizes this in its brief but apparently fails to apprehend its significance here. (Resp. Br. at 21).

Eidson is Respondent's attempt to cloak Mrs. Sundermeyer's death in terms of suicide in order to characterize this as a question of whether Missouri recognizes a cause of action for lost will to live (suicide) as opposed to whether Dr. Manger's opinion establishes causation under Wrongful Death. It is clever misdirection, but it is misdirection just the same.

A cause of action for suicide naturally falls under Wrongful Death. If Respondent is correct that suicide and the loss of a person's will to live are even equivalent (which Appellant does not accept other than for purposes of this argument), then what is being asserted is not a new cause of action for "lost will to live," but as the Court of Appeals properly found, but a well-recognized cause of action for wrongful death premised on medical neglect and wrongful conduct. Here the evidence for causation, as set out above, is clear and ample.

Similarly *Tomkins* is not on point because the cause of action asserted there was, as here, wrongful death. The plaintiff's decedent was killed in a police chase. The parents asserted a cause of action against the psychiatrist who had been treating the boy, but could not establish that the boy's death was in fact a suicide and not an accident.

Respondent asserts that if Mrs. Sundermeyer made the "intellectual decision to die" (Resp Br. at 22), then, like *Tomkins*, the failure to be able to know Mrs. Sundermeyer's mental state defeats causation. This of course, neglects to consider the evidence of abuse, neglect, weight loss and dehydration that populate the record and that form the medical basis for Dr. Manger's opinion. At no time did Dr. Manger say that Villa Marie's conduct caused Sundermeyer to lose her will to live. Rather, what he said was:

> 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)

There is no issue of "accident" in this case. The conduct of Villa Marie directly contributed to cause the injury as set out above. *Tomkins* is not on point and does not apply.

C. Twenty-six Bruises Amply Document Physical Injury, and Testimony By Family Documents Emotional Abuse Sufficient To Support Dr. Manger's Opinions.

Respondent next resorts to reading the record with blinders on and asserting that the plaintiff "has never pointed to any evidence showing that Mrs. Sundermeyer's death was medically caused by a physical injury." (Resp. Br. at 23) This is simply inaccurate

as pointed out above. For a graphic look at the quality of Mrs. Sundermeyer's abuse, color photographs were included in the Appellant's Substitute Brief on Appeal. The entire basis for Dr. Manger's opinion was medical and related to the exceptionally bad care Mrs. Sundermeyer received:

> 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.

(LF.0242-43)(emphasis added)

Dr. Manger's opinion fully establishes causation.

D. The Court of Appeals Opinion Accurately States the Law of Missouri, Properly Decides the Legal Issues, And Does Not Create Any New Cause of Action

Finally, the Respondent argues that the Court of Appeals was simply wrong and that its opinion was inconsistent and internally contradictory. An analysis of Judge Holliger's well-written and well-reasoned opinion[6] shows that it is neither internally inconsistent nor contradictory. It holds that Plaintiff made a submissible case of causation with Dr. Manger's testimony.

At oral argument in the Court of Appeals, Appellant made it clear that this case was about the standard of review for summary judgment, and not about a lost will to live. The standard of review requires a court to test for the existence, and not the extent of a factual dispute. *Meckfessel v. Fred Weber, Inc.*, 901 S.W.2d 335 (Mo. App. E.D. 1995); *ITT Commercial Finance v. Mid-Am Marine,* 854 S.W.2d 371, 378 (Mo. Banc 1993); Where the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant's right to

[6] The opinion was joined by a sitting member of this Court, however, Judge Breckenridge did not participate in the decision regarding transfer, and counsel has not been informed as to whether she will participate in the argument.

judgment – which is precisely what the trial court did here – then summary judgment is not proper. *Id.* at 378.

This was the issue argued before the Court of Appeals, and the opinion nicely compartments the legal questions raised. The opinion first addresses whether the expert gave an opinion to a reasonable degree of medical certainty, and then whether the experts opinion was that negligence on the part of Villa Marie caused Mrs. Sundermeyer's death.

It is worth noting at the outset that Respondent does not and cannot complain that the Court of Appeals was wrong when it held that the trial court erred in basing its summary judgment on the contention that testimony was not given to a reasonable degree of medical certainty[7]. This was clear error and the Court of Appeals was correct in so holding.

What Respondent really takes issue with is Dr. Manger's opinion on causation. Reaching back to the theme of "lost will to live" and ignoring the evidence of abuse and neglect that the Western District found important, the Respondent argues that expert testimony is necessary in cases not of a "lost will to live" but rather, suicide. (Resp. Br. at 26). Clipping the important prefatory language from the opinion, and quoting the

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[7] "But as any seasoned lawyer would expect, Villa's attorney never asked him that question. Rather, at the conclusion of direct exam, Sundermeyer's attorney asked: "In giving your opinion are you giving your opinion to a reasonable degree of medical certainty? Answer: Yes." To the extent that the court granted summary judgment on this issue, it erred." *Sundemeyer*, 2008 WL 731241 at *2.

remainder out of context, the Respondent argues that the Western District opinion conflicts with *Tomkins* holding on the necessity of expert testimony. (Resp. Br. at 26). This is simply not so. Rather, it artfully lays out that no expert could reasonably testify about what a person is thinking, and that this evidence was not necessary to meet the test for causation for wrongful death.

The relevant text of the Western District's opinion on the causation issue is as follows:

> We do not understand Villa's argument to the extent it appears to 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.

Evidence in a non--expert form about general mental condition, attitude, depression, anxiety, emotional pain, and the like is frequently presented in all varieties of tort cases without the necessity of expert testimony. Expert testimony is required only when an issue is so beyond the ken and understanding of a layperson that the jury will not be permitted to draw a conclusion about the issue without some expert guidance. *Vittengl v. Fox,* 967 S.W.2d 269, 279 (Mo. App. W.D. 1998) (expert testimony is not necessary unless it is clear that jurors are not capable, for want of knowledge or experience, of drawing correct conclusions from the facts.) 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. That is an issue for a finder of fact, not for summary judgment.

Sundermeyer, at *3,4.(footnote omitted)

It is clear from the Court of Appeals opinion that the Court separated for purposes of analysis the issue of "loss of the will to live" – something it determined was not relevant in the case because it appeared to deal with what the decedent was thinking – from evidence of medical neglect and abuse that an expert determined to be causative of death. In essence, Respondent is urging error because the Court of Appeals kept its eye on the ball. It recognized that the Respondent only challenged causation, and that the trial court's order – adopted verbatim from the Respondent's proposed findings – was simply erroneous when it held that the opinion of Dr. Manger was not given to a reasonable degree of medical certainty[8]. It then properly analyzed whether there was evidence in the record that support Dr. Manger's testimony, and whether Dr. Manger sufficiently stated causation. As the Court of Appeals stated in its opinion:

> 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[9]. If it is, then summary judgment is improper.

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[8] In this case the trial judge adopted the Respondent's findings of fact and conclusions of law verbatim. Missouri courts have counseled against this. See, e.g *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501 (Mo. App. E.D. 2006); *Nolte v. Wittmaier,* 977 S.W.3d 52, 58 (Mo. App. E.D. 1998).

[9] The full citation referenced is *Super v. White,* 18 S.W.3d 511, 516 (Mo. App. 2000)

Id. at *2

The Court of Appeals went on to consider the argument by Villa Marie that Manger's opinion was speculative because Dr. Manger admitted that he would have to speculate about what Mrs. Sundermeyer was thinking. Importantly, the Court of Appeals was right when it stated:

> 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.

Id. at *3.

In the case before this Court the key issue is whether Dr. Manger's opinion on causation is sufficient to withstand summary judgment. There is no issue with regard to a lost will to live. The argument related to the "lost will to live" is merely an attempt to draw the Courts attention away from the two relevant issues in this case. Did the trial court (1) weigh the evidence instead of testing for the existence of a factual issue, and thereby violate the standard of review; and (2) err in concluding that the plaintiff failed to establish causation to a reasonable degree of medical certainty.

It is worth noting that the Respondent never offered any expert to opine on causation. Rather, Respondent claims that Dr. Manger's opinions are just insufficient. This is not a case like *Powel v. Chaminade College Preparatory, Inc*., 197 S.W.3d 576 (Mo. Banc 2006) where the plaintiff used his own affidavit to contradict prior testimony and thereby construct a genuine issue of material fact. *Id.* But this Court, holding true to the requirement that a court tests for the existence – and not the sufficiency – of a material factual issue, reversed and remanded the summary judgment granted in the case, even though Judge Wolff's concurrence makes plain that the Court had doubts about the sufficiency of the evidence. *Id.* In this case, the testimony of Dr. Manger creates a factual issue for resolution by the jury, and this Court's jurisprudence as set out in *Powel* certainly suggests that the Sundermeyer family should have its day in court before a Cole County jury.

The record discloses that Dr. Manger created a genuine factual issue by testifying that the negligent conduct of Villa Marie in the words of MAI 19.01, caused or contributed to cause the death of Mrs. Sundermeyer[10]. The testimony would be sufficient to submit the case to a jury, especially where there is no competing testimony, and where the opinion was bolstered by the scientific literature called to the Court's attention in response to summary judgment.

[10] To be clear, he testified that it contributed to cause the death. (LF.0203)

CONCLUSION

Respondent has not demonstrated in its response to this appeal that it has an absolute right to judgment as a matter of law flowing from undisputed facts. Rather, it merely attacks the opinion of the Court of Appeals in numerous respects because it disagrees with the outcome.

The Sundermeyer family lost a mother and grandmother to abuse and neglect that, when examined in context is frankly shocking. The plaintiff's expert, Dr. Manger, stated his opinion that the actions of Villa Marie contributed to cause Mrs. Sundermeyer's death. That is all that is required under *Callahan v. Cardinal Glennon Hospital,* 863 S.W.2d 852, 862 (Mo. banc 1993).

This Court should retransfer this case to the Western District for reinstatement of Judge Holliger's well-written and well-reasoned opinion, or reverse and remand in an opinion of its own.

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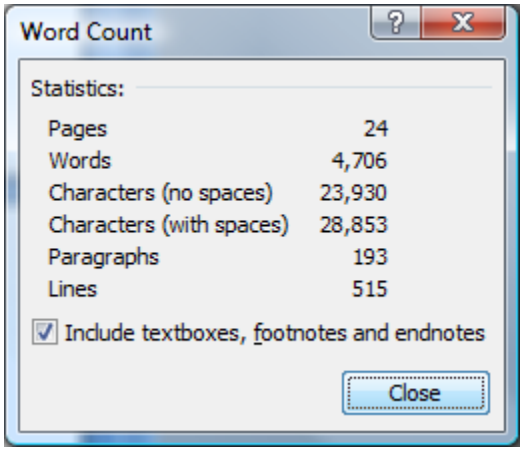
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 55.03 and 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 4,701 words. The word count was derived from Microsoft Word.



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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 27th day of August, 2008, to the following:

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