IN THE SUPREME COURT OF MISSOURI

WILLIE HARVEY,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	SUPREME COURT NO. SC84449
	)	
WENDELL WILLIAMS, M.D.,	)	
ERIC WASHINGTON, M.D., and	)	
DENISE TAYLOR, M.D.,	)	
	)	
Defendants/Appellants.	)	

TRANSFER FROM THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT, APPEAL NO. ED79699

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
HONORABLE JOAN M. BURGER, DIVISION ELEVEN

SUBSTITUTE BRIEF OF PLAINTIFF/RESPONDENT WILLIE HARVEY

FRANK, DOLAN & MUELLER LLC

JOSEPH A. FRANK #38241
DAVID T. DOLAN # 45390
308 NORTH 21ST STREET, SUITE 401
ST. LOUIS, MO 63103-1600
PHONE: (314) 421-2430
FAX: (314) 421-4404

ATTORNEYS FOR PLAINTIFF/RESPONDENT
WILLIE HARVEY

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JURISDICTIONAL STATEMENT

Respondent challenges the jurisdiction of this Court as this case does not involve matters of general interest or importance. Further, Appellants are not asking this court to reexamine any existing law. Finally, since there was no opinion issued by the Court of Appeals, there is no opinion which is contrary to a previous decision of an appellate court of this state. This case was transferred to this Court pursuant to Appellants' Motion to Transfer pursuant to Rule 83.04. Rule 83.04 provides that a case may be transferred for any of the reasons specified in Rule 83.02 or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state. None of the requirements of Rule 83.02 or 83.04 have been satisfied.

Respondent does not dispute any of the facts set forth in the Jurisdictional Statement of Appellant Wendell Williams, M.D.

STATEMENT OF FACTS

Decedent Mary Harvey was admitted to Deaconess Hospital on September 14, 1995, for elective right knee replacement surgery. Tr. 256. She was admitted under the care of Defendant Eric Washington, M.D., her orthopaedic surgeon. Mary Harvey died on October 21, 1995, as a result of complications from a neurological injury she sustained on October 1, 1995, from which she never recovered. Tr. 258. Plaintiff Willie Harvey thereafter filed this claim for wrongful death against appellants. L.F.12, 30.

Initially, Mary Harvey was referred to Defendant Washington by her Internist, Cynthia Dugas-Elliott. Tr. 474. Mary Harvey had been treated by her internist for rheumatoid arthritis for a period of years. Tr. 256. In 1992, that condition had caused her to have her left knee replaced. Tr. 475. Then, in 1995, Mary Harvey was evaluated by Defendant Washington, and he recommended that she have her right knee replaced as well. Tr. 481. Mary Harvey agreed, and the surgery was scheduled for September 14, 1995, at Deaconess Hospital. Tr. 256.

In addition to her history of rheumatoid arthritis, Mary Harvey also had a history of recurrent urinary tract infections, as well as chronic renal failure. Tr. 256, 521. A pre-surgical urinalysis was done on September 12, 1995, which showed the presence of bacteria in Mary Harvey's urine. Tr. 524. However, the specific type of bacteria infecting Mary Harvey's urine was only identified by another urine test (a culture) which was not performed until the day of surgery. Tr. 524. Defendant Washington knew that he did not know the results of that urine culture prior to proceeding with surgery. Tr. 526. Despite this fact, Dr. Washington proceeded with the surgery on September 14, 1995, anyway.

Before surgery, Dr. Washington prescribed the antibiotic Ancef as a prophylaxis against infection during surgery. Tr. 484. After the surgery, Mary Harvey's pre-surgical urinary tract infection was

discovered to be an e-coli infection. Tr. 484-5. Ancef is an effective antibiotic against an e-coli urinary tract infection. But, when Ancef is normally given as a prophylaxis, it is given for twenty-four to forty-eight hours. Tr. 526. Dr. Washington extended Mary Harvey's Ancef prescription to six days in order to treat the e- coli urinary tract infection. Tr. 526. What Dr. Washington did not do, was order a follow-up post-surgical urine culture to ensure that all types of every bacteria had been eradicated from Mary Harvey's urine. Tr. 527. And, the next urine culture was not performed until September 24, 1995. Tr. 527. That urine culture yielded results which showed that Mary Harvey had a pseudomonas urinary tract infection. Tr. 270-1.

Additionally, in the days following her surgery, Mary Harvey's kidney function began to deteriorate dramatically. Tr. 300. Kidney function is measured by the levels of the chemical serum creatinine in the blood. Tr. 259. On admission, Mary Harvey's serum creatinine level was 3.7. Tr. 300. Only two days later, her serum creatinine level had dramatically risen to 4.4. Tr. 300. On September 16, 1995, Mary Harvey began to experience seizures, a known side effect of worsening kidney function. Tr. 636. Dr. Washington properly requested a consult from Defendant Taylor, a neurologist, to evaluate Mary Harvey's seizures. Tr. 633-4. Defendant Taylor believed that her seizures were of a metabolic origin. Tr. 635. Defendant Taylor, however, did not prescribe any treatment for her kidneys, nor did she request consultation from a kidney specialist. Defendant Taylor decided to treated Mary Harvey's seizures herself, by prescribing Dilantin. Tr. 606. Mary Harvey's serum creatinine level was not checked again until September 24, 1995. At that time her serum creatinine had risen even further to 6.8. Tr. 637. At that time, Mary Harvey was in acute and total kidney failure.

On September 24, 1995, Mary Harvey was discovered to have suffered a fractured hip while in

the hospital. Tr. 501. No explanation as to how Mary Harvey fractured her hip was ever identified. Tr. 501. Defendant Washington was of the opinion that Mary Harvey needed to undergo a total hip replacement for repair of her hip fracture. Tr. 504. Dr. Washington then requested a consult from Defendant Williams, an internist and cardiologist, in order to obtain medical clearance for the hip replacement surgery. Tr. 505. Dr. Washington also requested a consult from a nephrologist to make sure that Mary Harvey's kidney function was sufficient to undergo hip surgery. Tr. 505.

Upon examining Mary Harvey, Defendant Williams asked Defendant Washington to postpone the hip replacement surgery based on his diagnosis of congestive heart failure due to fluid overload. Tr. 657. Defendant Williams prescribed the diuretic to flush the fluids out and treat what he believed to be a fluid overload. Tr. 669-670. At the same time, the nephrologist diagnosed Mary Harvey as being in a state of metabolic acidosis due to kidney failure, and the also found that she did not have sufficient fluids to maintain adequate kidney function and prescribed IV fluids. Tr. 422-24.

Eventually, Mary Harvey was given clearance for her hip replacement surgery which was performed on September 26, 1995. Tr. 508. On September 27, 1995, Mary Harvey began to experience seizures again. Tr. 258. Prior to this surgery, a repeat urine culture had been performed. That urine culture yielded results which showed that Mary Harvey had a pseudomonas urinary tract infection. Tr. 270-1. Mary Harvey had again been given Ancef as a prophylaxis for her hip replacement surgery on September 24, 1995. Tr. 508. However, Ancef will not treat a pseudomonas urinary tract infection. Tr. 528.

On September 28, 1995, the nephrologist notes the results of the September 24, 1995 urine culture and recommends a change in the antibiotic to Fortaz. Tr. 432. Fortaz is an antibiotic which would have treated Mary Harvey's pseudomonas urinary tract infection. However, the nephrologist's advice is not

followed until October 3, 1995, at which time Mary Harvey had suffered a catastrophic brain injury and was now in a coma. Tr. 277.

After October 1, 1995, it was too late to do anything to reverse the catastrophic effects of the neurological injury suffered by the uncontrolled seizures. Tr. 303-4. Mary Harvey eventually died from that condition. Tr. 257.

At trial, plaintiff alleged and the jury found that Defendants Washington and Williams were negligent for failing to timely prescribe an antibiotic which would treat a pseudomonas urinary tract infection. Plaintiff also alleged and the jury found that Defendant Taylor was negligent for failing to advocate for dialysis to address Mary Harvey's worsening kidney function. As stated before, Defendant Taylor was of the opinion that Mary Harvey's seizures were the result of a metabolic process. Despite this knowledge, Defendant Taylor did not address this issue with the nephrologist, nor did she communicate to him the urgent need to begin dialysis to stop the seizures.

Additionally, Plaintiff alleged and the jury found that Defendant Taylor was negligent for failing to prescribe an antibiotic which would treat a pseudomonas urinary tract infection. It was undisputed that Mary Harvey was not given an antibiotic which would treat a pseudomonas urinary tract until October 3, 1995. Tr. 277.

Defendants, at trial, denied that Mary Harvey was suffering from a urinary tract infection between September 24, 1995, and October 3, 1995. Their experts testified that the urine culture results of September 24, 1995, indicated a mere colonization of the pseudomonas bacteria, not an actual infection. At the time he was caring for Mary Harvey, Defendant Williams had diagnosed Mary Harvey's condition as a pseudomonas urinary tract infection, not a colonization. Tr. 697. This diagnosis was also made by the

nephrologist. Tr. 432.

Plaintiff's experts testified that the defendants' negligent failure to treat the pseudomonas urinary tract infection, coupled with Mary Harvey's worsening kidney failure, combined to cause the neurological event of October 1, 1995. It was that neurological event of October 1, 1995, which ultimately caused Mary Harvey's death on October 24, 1995. Tr. 303-4.

Plaintiff's orthopaedic surgery expert, Dr. Iannacone, testified that Defendant Washington breached the standard of care by proceeding with the total knee replacement on September 14, 1995, when a urine culture had indicated that Mary Harvey was suffering from an active urinary tract infection. Tr. 403-4. Dr. Iannacone testified that the infection needed to be eradicated prior to proceeding with the knee replacement surgery. Tr. 404. Dr. Iannacone testified that Dr. Washington breached the standard of care by not ordering a post-surgical urine culture until September 24, 1995. Tr. 407. A follow-up urine culture was necessary to determine whether the pre-surgical urinary tract infection had been resolved. Dr. Iannacone further testified that Dr. Washington breached the standard of care by failing to prescribe an antibiotic which would treat a pseudomonas urinary tract infection. Tr. 405.

Plaintiff also presented expert testimony from Dr. David Coleman, an infectious disease specialist. Dr. Coleman testified that each of the defendants were negligent for failing to recognize the results of the September 24, 1995 urine culture and prescribe an antibiotic which would treat a pseudomonas urinary tract infection. Tr. 295, 296, 299-300. Dr. Coleman also testified that the urinary tract infection, in the presence of Mary Harvey's total renal failure, increased Mary Harvey's metabolic load to such a point where she was experiencing seizures, which led to brain damage, which ultimately led to her death. Tr. 303-4.

Dr. Coleman also testified that Defendant Taylor, individually, was negligent for failing to advocate for the initiation of dialysis in light of the fact that she had recognized that Mary Harvey's seizures were the result of a metabolic process. Tr. 321. Dr. Coleman's ultimate opinion was that had Mary Harvey's urinary tract infection been treated, and had her total renal failure been treated, Mary Harvey would have recovered, been discharged, and resumed her normal life. Tr. 323-4.

The case was submitted to the jury on January 30, 2001. On January 31, 2001, the jury returned a verdict in favor of plaintiff and against Defendants Washington, Taylor, and Williams. The jury awarded plaintiff $600,000 for past non-economic damages and $600,000 for future non-economic damages, for a total of $1,200,000. L.F. 196. In a separate verdict form, the jury assessed each of the doctors to be 33_% at fault. L.F. 198. The Trial Court entered judgment on January 31, 2001. L.F. 199.

Each of the defendants filed motions for a new trial. In his motion for new trial, Defendant Williams alleged juror non-disclosure on the part of Juror Lolita Jones. The Trial Court conducted a hearing on May 21, 2001. At that hearing, Juror Jones testified about three automobile accidents which gave rise to claims. An automobile accident in 1998 in which her daughter was injured. (P. Tr. 8-14). An automobile accident in 1999 as a result of which she filed a claim for property damage against her insurance company. (P. Tr. 17-19). The third was an automobile accident in 1991 which, as a result, Juror Jones was sued. (P. Tr. 19-20).

The Court found that there was no non-disclosure of the 1998 or 1999 automobile accidents, and that the failure to disclose the 1991 automobile accident was unintentional and non-prejudicial. L.F. 393. Each of the defendants' motions for judgment notwithstanding the verdict and motions for new trial were denied on May 29, 2001. L.F. 393-4.

POINTS RELIED ON

I THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF ESTABLISHED THROUGH EXPERT TESTIMONY THAT THE NEGLIGENCE OF DEFENDANTS DIRECTLY CAUSED OR DIRECTLY CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH.

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993).

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Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. 1998)

Coggins v. Laclede Gas Co., 37 S.W.3d 335, 339 (Mo.App.E.D. 2000).

Wright v. Barr, 62 S.W.3d 509, 527 (Mo.App.E.D. 2001)

Barr v. Plastic Surgery Consultants, Ltd., 760 S.W.2d 585, 590. (Mo.App.E.D. 1988)

Gaines v. Property Servicing Co., 276 S.W.2d 169 (Mo. 1955)

II THE TRIAL COURT DID NOT ERR IN SUBMITTING THE RESPECTIVE VERDICT DIRECTORS AGAINST EACH DEFENDANT, BECAUSE: (1) THE INSTRUCTION DID NOT ASSUME A DISPUTED FACT AS THE INSTRUCTION CONTAINED ONLY ONE DISPUTED FACT FOR THE JURY TO DECIDE, THE INSTRUCTION CONTAINED NO LANGUAGE THAT NECESSITATED A FINDING OF A DISPUTED FACT, AND THE INSTRUCTION WAS MODIFIED AT THE REQUEST OF DEFENDANTS, NEGATING ANY ARGUMENT OF

ROVING COMMISSION, (2) THE "DIRECTLY CONTRIBUTED TO CAUSE" MODIFICATION OF THE THIRD PARAGRAPH OF THE INSTRUCTION CONFORMED TO THE EVIDENCE, AND (3) THE TERM "ADVOCATE" IN DEFENDANT TAYLOR'S VERDICT DIRECTOR WAS DEFINED BY DR. COLEMAN, WAS NOT AN UNUSUAL OR VAGUE TERM IN CONTEXT OF THE EVIDENCE IN THE CASE AND WAS NOT CONFUSING TO THE JURY.

Bledsoe v. Northside Supply & Development Co., 429 S.W.2d 727 (Mo. App. 1968).

Brown v. Van Noy, 879 S.W.2d 667, 673 (Mo. App. 1994).

Chrisler v. Holiday Valley, Inc., 580 S.W.2d 309, 315 (Mo. App. 1979).

Gallaher-Smith-Feutz Realty, Inc. v. Circle Z Farm, Inc., 545 S.W.2d 395 (Mo. App. 1976).

Kewanee Oil Company v. Remmert-Werner, Inc., 508 S.W.2d 23, 26 (Mo. App. 1974).

Lashmet v. McQueary, 954 S.W.2d (Mo. App. S. D. 1997)

Lasky v. Union Elec. Co., 936 S.W.2d 797 (Mo. 1997).

Smith v. Kovac, 927 S.W.2d 493, 498 (Mo .App. 1996)

Smith v. Wells, 31 S.W.2d 1014, 1022 (Mo. 1930).

Spring v. Kansas City Area Transportation Authority, 873 S.W.2d 224 (Mo. 1994).

Welch v. Hyatt, 578 S.W.2d 905, 914 (Mo. banc 1979).

M.A.I. 19.01.

III THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING DEFENDANTS' OBJECTION TO DR. COLEMAN'S TRIAL TESTIMONY THAT

THE FAILURE TO TREAT THE URINARY TRACT INFECTION AND RENAL FAILURE CAUSED OR CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH BECAUSE DR. COLEMAN'S TRIAL TESTIMONY WAS CONSISTENT WITH HIS DEPOSITION TESTIMONY.

Blake v. Irwin, 913 S.W.2d 923, 931-2 (Mo. App. W. D. 1996).

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993).

Goodwin v. Farmers Elevator and Exchange, 933 S.W.2d 926, 929 (Mo. App. E. D. 1996).

King v. Copp Trucking, Inc., 853 S.W.2d 304, 307 (Mo. App. 1993).

Oldaker v. Peters, 817 S.W.2d 245, 250 (Mo. banc 1991).

IV THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT TAYLOR'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF PRESENTED SUBSTANTIAL EVIDENCE THAT DEFENDANT TAYLOR'S FAILURE TO ADVOCATE DIALYSIS AND HER FAILURE TO TREAT THE URINARY TRACT INFECTION BREACHED THE APPROPRIATE STANDARD OF CARE.

Delisi v. St. Luke's Episcopal-Presbyterian Hospital, Inc., 701 S.W.2d 170 (Mo. App. 1985).

V THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT TAYLOR'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT, AS PLAINTIFF PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT

TAYLOR'S FAILURE TO ADVOCATE DIALYSIS CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH.

Coggins v. Laclede Gas Co., 37 S.W.3d 335, 338 (Mo. App. E. D. 2000).

Derrick v. Norton, 983 S.W.2d 529, 532 (Mo. App. E. D. 1998).

Smith v. Quallen, 27 S.W.3d 845, 848 (Mo. App. E. D. 2000).

VI THE TRIAL COURT DID NOT ERR IN ALLOWING PLAINTIFF TO USE ARGUMENT EXHIBIT "B" DURING CLOSING ARGUMENT, AS SAID DOCUMENT WAS MERELY USED AS A DEMONSTRATIVE AID TO ELUCIDATE PLAINTIFF'S ARGUMENT.

Boese v. Love, 300 S.W.2d 453 (Mo. 1957)

Friend v. Yokohama Tire Corp., 904 S.W.2d 575 (Mo. App. S. D. 1995)

Robinson v. Empiregas Inc. of Hartville, 906 S.W.2d 829, 838 (Mo. App. S. D. 1995)

VII THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, BECAUSE THE COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT JUROR LOLITA JONES' FAILURE TO DISCLOSE A PRIOR LAWSUIT WAS UNINTENTIONAL AND NOT PREJUDICIAL.

Banks v. Village Enterprises, Inc., 32 S.W.3d 780, 786 (Mo. App. W. D. 2000)

Doyle v. Kenedy Heating and Service, Inc., 33 S.W.3d 199, 201 (Mo. App. W. D. 2000)

Heinen v. Healthline Management, Inc., 982 S.W.2d 244 (Mo. banc 1998)

Jackson v. Watson, 978 S.W.2d 829, 832-37 (Mo. App. W. D. 1998)

Keltner v. K-Mart Corp., 42 S.W.3d 716, 723 (Mo. App. E. D. 2001)

McHaffie v. Bunch, 891 S.W.2d 822, 829 (Mo. banc 1995)

Redfield v. Beverly Health and Rehabilitation Services, Inc.,
42 S.W.3d 703 (Mo. App. E. D. 2001)

Wingate by Carlisle v. Lester E. Cox Medical Center,
853 S.W.2d 912, 916 (Mo. banc 1994)

VIII THE TRIAL COURT DID NOT ERR IN SUBMITTING INSTRUCTION NO. 10, THE VERDICT DIRECTING INSTRUCTION AGAINST DEFENDANT TAYLOR BECAUSE THAT INSTRUCTION WAS SUPPORTED BY THE EVIDENCE IN THAT THERE WAS SUBSTANTIAL EVIDENCE THAT DEFENDANT TAYLOR'S FAILURE TO ADVOCATE FOR DIALYSIS CAUSED MARY HARVEY'S DEATH, AND THERE WAS SUBSTANTIAL EVIDENCE THAT DEFENDANT TAYLOR WAS NEGLIGENT AS TO DIALYSIS AND THE URINARY TRACT INFECTION.

ARGUMENT

I THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF ESTABLISHED THROUGH EXPERT TESTIMONY THAT THE NEGLIGENCE OF DEFENDANTS DIRECTLY CAUSED OR DIRECTLY CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH.

1. Standard of Review

When reviewing a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict this Court reviews the evidence and reasonable inferences therefrom in the light most favorable to the jury's verdict. *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 461 (Mo. 1998). This Court presumes that plaintiff's evidence is true and disregards defendants' evidence which does not support plaintiff's case. *Coggins v. Laclede Gas Co.*, 37 S.W.3d 335, 339 (Mo.App.E.D. 2000). "This Court will reverse the jury's verdict for insufficient evidence only where there is a 'complete absence of probative fact' to support the jury's conclusion." *Seitz* at 461. The evidence and reasonable inferences therefrom in the light most favorable to the jury's verdict in this case supports the finding that the negligence of defendants directly contributed to cause the death of Mary Harvey.

2. Plaintiff made a submissible case of "but for" causation through the testimony of their expert witness, David Coleman, M.D.

In *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852 (Mo. 1993), this Court held that "but for" causation is required in all cases except in the narrow category of "two fires" cases. In so

holding, the *Callahan* Court stated "'But for' is an absolute minimum for causation because it is merely causation in fact. Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with." *Callahan* at 862. Plaintiff's evidence in this case clearly established a causal connection between the defendants negligent failure to treat Mary Harvey's urinary tract infection and her death. This evidence was established through the testimony of plaintiff's expert, David Coleman, M.D.

Dr. Coleman testified that each of the defendants were negligent for failing to prescribe an antibiotic which would treat Mary Harvey's pseudomonas urinary tract infection. (Tr. 295-296; 299-300). Dr. Coleman went on to testify unequivocally that each defendant's negligent failure to treat Mary Harvey's urinary tract infection contributed to cause her death. (Tr. 315-318). When asked to explain why he believed that the negligent failure to treat the urinary tract infection contributed to cause Mary Harvey's death Dr. Coleman gave the following explanatory answer: "Because I believe the urinary tract infection that Mrs. Harvey suffered from was an important cause in concert with her renal failure, her metabolic problems in leading to the acute neurologic deterioration that was seen in the period from September 30th and October 1st ." (Tr. 316).

Doctor Coleman's testimony establishes a scenario where two conditions combine to cause the ultimate outcome, neither condition being sufficient to cause the injury by themselves. This point was further clarified by the following testimony:

> Question: Had Mary Harvey been provided with the treatment as you suggested was necessary for the treatment of the urinary tract infection and the treatment which you

suggested was necessary for the treatment of the kidney failure, if that treatment had been provided to her in the time frame that we talked about, in your opinion within a reasonable degree of medical certainty would Mary Harvey have [sic] survived the hospitalization?

Answer: Yes. But I'd like to clarify the answer a bit.

Question: Sure.

Answer: That if she had been prescribed the appropriate antibiotic for the pseudomonas in her urine that became known on the 26th and if dialysis had been initiated on or before September 29th, I think she would have survived.

(Tr. 324-5).

The testimony of Dr. Coleman clearly establishes the causal connection between the negligence of defendants and Mary Harvey's death. It is only when we get caught up in the semantics of trying to express a test for "but for" causation that this becomes unclear. This very problem was addressed by this Court in *Callahan*:

All of this discussion concerning the semantics of causation is less

> important in Missouri than in most jurisdictions because under MAI we do not use the terms 1) "proximate cause," 2) "but for causation," or 3) "substantial factor" when instructing the jury. We merely instruct the jury that the defendant's conduct must "directly cause" or "directly contribute to cause" plaintiff's injury.

Callahan at 863 (citing MAI 19.01 [1986 Revision] Verdict Directing Modification – Multiple Causes of Damage).

Defendants rely upon *Gaines v. Property Servicing Co.*, 276 S.W.2d 169 (Mo. 1955), as support for their position. Once again, defendants are relying upon semantics, not upon sound legal policy. It should be noted that *Gaines* was decided prior to the adoption of M.A.I. 19.01, and prior to this Court's decision in *Callahan*. As pointed out by the *Callahan* court, semantics are not as important in Missouri because we do not instruct juries on "but for" causation or "proximate cause." Therefore, to the extent that *Gaines* prescribes a test for causation which is more stringent than MAI 19.01, it should not apply to the present case.

Plaintiff made a submissible case of "but for" causation because Dr. Coleman's testimony unequivocally established that defendants' conduct directly contributed to cause plaintiff's death. Therefore, reviewing the evidence and the reasonable inferences therefrom in the light most favorable to the jury's verdict, disregarding any evidence to the contrary, the verdict of the jury in this case should be upheld.

3. The testimony of plaintiff's causation expert on cross-examination was not inherently self-contradictory **and, therefore, should not be considered in determining whether**

plaintiff made a submissible case.

Defendants argue that Dr. Coleman gave testimony on cross-examination contradictory to his testimony on direct examination, rendering his testimony devoid of any probative value. In support thereof, defendants argue that Dr. Coleman could not testify within a reasonable degree of medical certainty what the exact neurological event was that led to Mary Harvey's death and, therefore, it is illogical and contradictory for him to testify what caused that event. Defendants' position is incorrect.

"Where evidence equally supporting two inconsistent and contradictory factual inferences as to ultimate and determinative facts is solely relied on to make a submissible case, there is a failure of proof as the case has not been removed from the tenuous state of speculation, conjecture and surmise." *Wright v. Barr*, 62 S.W.3d 509, 527 (Mo.App.E.D. 2001) citing *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872 (Mo.App.W.D. 1985). However, a witness's testimony which is not inherently self-contradictory must be considered as a whole. *Barr v. Plastic Surgery Consultants, Ltd.*, 760 S.W.2d 585, 590. (Mo.App.E.D. 1988). Dr. Coleman's testimony regarding causation was not inherently self-contradictory and, when considered as a whole, constitutes substantial evidence of "but for" causation.

On direct examination, Dr. Coleman was asked his opinion regarding the relationship between the untreated urinary tract infection, the untreated renal failure, and the neurological event which occurred on September 30 into October 1:

> Question: Can you describe for the jury what the relationship is between those two conditions and the [sic] events of September 30th and October 1st?

Answer: Yes. I believe that Mrs. Harvey was suffering from a urinary tract infection in the period from the 24th at least through the 1st of October when her condition became irreversible.

The urinary tract infection in concert with her renal failure created an accumulation of toxic substances that caused her seizures.

That is, with the combination of her urinary tract infection and the catabolic state that I talked about earlier in concert with her fairly dramatic impaired renal function, that caused her seizures which became much more intense and much more frequent over that time period from the 27th through the late evening of the 1st.

I believe it was in combination, the seizure activity and the metabolic abnormality, that caused the neurologic injury from which the patient did not recover.

(Tr. 304-5). This testimony clearly establishes Dr. Coleman's opinion that the urinary tract infection

increased the level of toxins in Mary Harvey's blood. (Tr. 284-5). The acute renal failure affected her ability to clear those toxins from her body. (Tr. 285-6). The high level of toxins in her body caused seizures which progressively got worse. (Tr. 304-5). It was the combination of the seizure activity and her high level of toxins in her blood which caused her brain damage from which she did not recover. (Tr. 304-5; 349).

In support of their position that Dr. Coleman gave testimony on cross-examination so contradictory to his testimony on direct examination as to render his direct testimony illogical and devoid of any probative value, defendants cite page 349 of the trial transcript. At page 349 of the trial transcript the following discussion takes place:

Question: Okay. You said, you described it as a neurological event, is that right?

Answer: Yes.

Question: And you can't - - can you point to a primary neurologic injury here?

Answer: Anatomically, that's when the brain was imaged, there wasn't any evidence on the imaging study that showed it. But clearly on the electroencephalogram and by clinical examination she had brain injury.

(Tr. 349). This testimony is in no way contradictory to the opinions given by Dr. Coleman on direct examination. When asked what the neurologic injury was he testifies that on EEG and by clinical

examination she had a brain injury.

On the next page of the trial transcript, Dr. Coleman further elucidates his opinion on what the neurologic event was that led to Mary Harvey's death:

Question: My question then, Doctor, is you testified earlier that you don't think it was a stroke that happened here, right?

Answer: Right.

Question: If it wasn't a stroke, then what was it?

Answer: Well, the seizure activity that she had that was progressing from the 27th to the 30th was becoming more intense, more frequent.

And seizures can injure [sic] the brain. I believe it was a combination of the seizures, the electrical activity in the brain and the toxins.

Question: So you believe the seizures were a neurologic event?

Answer: No. I think the seizures played a role in damaging the brain.

(Tr. 350). Again, Dr. Coleman further testifies that Mary Harvey's neurologic event was brain damage caused by the seizures, the electrical activity normally in the brain, and the toxins from the urinary tract infection. This testimony does not contradict the opinions given by Dr. Coleman on direct examination, in fact, this testimony further clarifies his testimony direct examination.

Defendants also cite passages from the cross-examination of Dr. Coleman wherein he was asked if he could give an opinion within a reasonable degree of medical certainty whether Mary Harvey would have suffered the neurological event of September 30th had she been given the appropriate antibiotics. (Tr. 371). Dr. Coleman answered: "No. For the same reason I referred to earlier about the dialysis. I believe it was a combination of causes." (Tr. 371). The following passage from Dr. Coleman's direct examination illustrates why this testimony is not contradictory to his testimony that the failure to treat the urinary tract infection directly contributed to cause Mary Harvey's death:

Question: Doctor, we talked about the urinary tract infection and the renal failure and the events of October 1st. Can we separate out the issues and address each one separately and talk about what the outcome would have been if one had been treated in the absence of the other being treated?

Answer: I'm not able to do that. I can't take away one and say this patient would have done anything different. I can't pull one of the factors out and say...

Question: Why can't you do that?

Answer: Because I think the two factors are connected. They relate to one another. The urinary tract infection and the renal failure together affected the toxicity on the brain.

(Tr. 322).

Dr. Coleman's consistently testified that it was the combination of the untreated urinary tract infection and the untreated renal failure that increased the level of toxins in Mary Harvey's blood to the point that it caused seizures, then brain damage, then ultimately her death. Any alleged contradiction in his testimony is explained by the preceding passages from Dr. Coleman's testimony.

Since Dr. Coleman did not give testimony on cross-examination contradictory to his testimony on direct examination so as to render his testimony illogical and devoid of any probative value, we must look at plaintiff's evidence to determine if a submissible case was made. Plaintiff's evidence clearly established that the negligence of defendants in failing to prescribe an antibiotic which would treat Mary Harvey's urinary tract infection directly contributed to cause Mary Harvey's death. Dr. Coleman's testimony constituted substantial evidence to support the submission of causation to the jury.

4. The evidence as to causation, in the light most favorable to the jury's verdict, constitutes substantial evidence sufficient to support the submission of causation to the jury.

Defendants argue that in order to make a submissible case of "but for" causation, Dr. Coleman would have needed to testify that "but for" the failure to treat the urinary tract infection, Mary Harvey would not have died. Defendants' position is not supported by *Callahan*, MAI 19.01, nor logic.

As previously pointed out, the *Callahan* court held that the semantics of a "but for" test are not important in Missouri because we do not submit the phrase "but for causation" to the jury. *Callahan* at 863. Instead, we instruct on "directly caused" or "directly contributed to cause." In so holding, the *Callahan* court recognized that MAI 19.01 correctly submits legal and proximate cause to the jury. Plaintiff's evidence clearly supports submission of a case of causation because Dr. Coleman unequivocally

testified that defendants' negligent failure to treat the urinary tract infection directly contributed to cause Mary Harvey's death. (Tr. 315-8).

Defendants' argument that plaintiff's evidence does not establish a prima facie case of "but for" causation also defies logic. Dr. Coleman clearly testified that Mary Harvey suffered an ultimately fatal brain injury due to the accumulation of toxic substances in her blood and that had her urinary tract infection and kidney failure been properly treated, she would have lived. To allow the defendants to escape liability due to semantics flies in the face of logic in this case.

Dr. Coleman also testified that Defendant Taylor was negligent for not sufficiently advocating for initiating the dialysis of Mary Harvey (Tr. 321), and that such negligence when combined with the defendants' negligent failure to treat the urinary tract infection contributed to cause Mary Harvey's death. (Tr. 322). The two conditions which combined to cause Mary Harvey's death are both conditions that the defendants in this lawsuit were negligent for failing to properly treat. "The 'but for' causation test operates only to eliminate liability of a defendant who cannot meet this test because such defendant's conduct was not causal." *Callahan* at 862. In this case, the conduct of both defendants was causal. To allow Dr. Williams to escape liability would be to excuse a tortfeasor whose conduct was causally connected to decedent's death. Such a result seems unjust and illogical.

II THE TRIAL COURT DID NOT ERR IN SUBMITTING THE RESPECTIVE VERDICT DIRECTORS AGAINST EACH DEFENDANT, BECAUSE: (1) THE INSTRUCTION DID NOT ASSUME A DISPUTED FACT AS THE INSTRUCTION CONTAINED ONLY ONE DISPUTED FACT FOR THE JURY TO DECIDE, THE INSTRUCTION CONTAINED NO LANGUAGE THAT NECESSITATED A FINDING OF A DISPUTED FACT, AND THE INSTRUCTION WAS MODIFIED AT THE REQUEST OF DEFENDANTS, NEGATING ANY ARGUMENT OF ROVING COMMISSION, (2) THE "DIRECTLY CONTRIBUTED TO CAUSE" MODIFICATION OF THE THIRD PARAGRAPH OF THE INSTRUCTION CONFORMED TO THE EVIDENCE, AND (3) THE TERM "ADVOCATE" IN DEFENDANT TAYLOR'S VERDICT DIRECTOR WAS DEFINED BY DR. COLEMAN, WAS NOT AN UNUSUAL OR VAGUE TERM IN CONTEXT OF THE EVIDENCE IN THE CASE AND WAS NOT CONFUSING TO THE JURY.

1. <u>Standard of Review.</u>

The key to determining the sufficiency of an instruction under attack for assuming facts is whether, in its entirety, the instruction would tend to confuse the jury. *Kewanee Oil Company v. Remmert-Werner, Inc.*, 508 S.W.2d 23, 26 (Mo. App. 1974). "In resolving this, we assume the jury was composed of ordinarily intelligent laymen and should not disapprove of an instruction unless a close scrutiny thereof demonstrates that it is calculated to lead the jury to believe disputed facts are to be taken as uncontroverted". *Id*. The court should view the instructions in context of all of the facts of the case, including closing arguments. *Welch v. Hyatt*, 578 S.W.2d 905, 914 (Mo. banc 1979). A question from

a jury during deliberations about a particular instruction does not taint the instruction. *Smith v. Kovac,* 927 S.W.2d 493, 498 (Mo. App. 1996).

2. The Verdict Directors Were Not Prejudicially Erroneous Because They Did Not Assume As True The Only Disputed Fact Contained In The First Paragraph As To Whether Mary Harvey Had A Urinary Tract Infection And Contained No Language Which Necessitated Such A Finding.

At trial, there was no dispute that the defendants failed to prescribed an antibiotic which would have treated a pseudomonas urinary tract infection. Appellants are correct that the issue of whether Mary Harvey had a pseudomonas urinary tract infection was critical to the determination of liability. In fact, it was the only disputed fact submitted in the first paragraph of each verdict director for the jury to decide.

The defendants' defense at trial was that Mary Harvey never had a pseudomonas urinary tract infection, and therefore, they could not be liable for failing to prescribe an antibiotic to treat an infection that never existed. Defendants offered opinion testimony that Mary Harvey never suffered from a pseudomonas urinary tract infection. (Tr. 782-783, 771, 779, 571-72, Tr. Vol. 3, 61). On the other hand, plaintiff offered expert testimony showing that Mary Harvey did suffer from a pseudomonas urinary tract infection. (Tr. 273).

During closing arguments, plaintiff's counsel made it abundantly clear that there was no dispute that a proper antibiotic was ever prescribed to Mary Harvey. (Tr.180-181). Counsel for all parties stressed to the jury during closing argument that the question they were called upon to answer was whether Mary Harvey in fact had a pseudomonas urinary tract infection. (Tr. 209, 251, 256). In fact, Counsel for Defendant Williams stated: "Now, to find against Dr. Williams you must first find that during this period of

time, from the 26th to the 30th, that Mary Harvey had a urinary tract infection. If she doesn't have it he can't be negligent for not treating it." (Tr. 251).

The verdict director against appellants instructed the jury as follows:

> Your verdict must be for the plaintiff and against [defendant] if you believe:
>
> First, [defendant] failed to prescribe Mary Harvey an antibiotic from September 26, through September 30, 1995, which would treat Mary Harvey's pseudomonas urinary tract infection, and
>
> Second, defendant was thereby negligent, and
>
> Third, such negligence directly caused or directly contributed to cause the death of Mary Harvey.

The first paragraph in each verdict director contains only one disputed fact, which is whether Mary Harvey had a pseudomonas urinary tract infection. Each of the defendants' attorneys in closing arguments stressed that before they could find any of the defendants liable, they first must find whether Mary Harvey had a pseudomonas urinary tract infection.

Additionally, there is no language contained in the verdict director which requires the jury to find the disputed fact as true.

In *Welch*, plaintiff and defendant were involved an automobile accident in which defendant argued that the plaintiff was making a left-hand turn and failed to utilize his turn signal, causing the defendant to strike plaintiff's vehicle in the rear. *Welch*, 578 S.W.2d at 908. The comparative fault instruction stated: "First, plaintiff ....failed to signal his intention to turn." *Welch*, 578 S.W.2d at 909.

On appeal, plaintiff argued that the instruction assumed the controverted fact as to whether plaintiff

made a turn or intended to make a turn. *Welch*, 578 S.W.2d at 913. Importantly, the plaintiff did not dispute that he failed use a turn signal, rather, it was his defense that he did not turn and, therefore, there was no need to signal a turn. *Welch*, 578 S.W.2d at 913.

In holding that the instruction did not assume a disputed fact, the Missouri Supreme Court stated that, "In the total context of this case...", the instruction was not in error. *Welch*, 578 S.W.2d at 914. The Supreme Court stated: "The issue of whether there was a turn or not was made clear by the attorneys in closing arguments, and that the jury was not confused and could not be confused as to the instruction". *Welch*, 578 S.W.2d at 914. The Supreme Court recognized that the "principal dispute" was whether a left turn was made, as plaintiff could not be liable for failing to signal a turn that never occurred. *Welch*, 578 S.W.2d at 914.

The *Welch* case is analogous to the present case. The verdict directors in part state: "[Defendant] failed to prescribe Mary Harvey an antibiotic from September 26, through September 30, 1995, which would treat Mary Harvey's pseudomonas urinary tract infection". At trial, there was no dispute that the defendants failed to prescribe an antibiotic which would have treated a pseudomonas urinary tract infection. Rather, it was the defendants' argument that a pseudomonas urinary tract infection never existed and, therefore, they could not be held liable for failing to treat the infection. In *Welch*, the plaintiff did not dispute that he failed to give a signal but, rather, argued that he never turned or intended to turn, and, therefore, he could not be liable for failing to use a turn signal.

As in *Welch*, the "principal dispute" in the present case, whether there was a urinary tract infection, was the only disputed fact contained in the contested paragraph in question and was extensively addressed by defendants' counsel throughout trial and during closing arguments.

In *Welch*, the plaintiff-appellant relied on the *Bledsoe v. Northside Supply & Development Co.*, 429 S.W.2d 727 (Mo. 1968), in arguing that the instruction assumed a disputed fact. In *Bledsoe*, plaintiff brought an action for personal injury sustained in an airplane crash, and a contributory negligence instruction was given to the jury. The instruction stated that a verdict should be returned for the defendant, if the plaintiff, "Failed to retract the landing gear of the airplane after it left the ground, thus decreasing the air speed and reducing the airworthiness of said airplane"; "flew the airplane in too steep a climbing altitude under the conditions then and there existing, thus decreasing the airworthiness of said airplane." *Bledsoe*, 429 S.W.2d at 731-732.

In *Bledsoe*, the appellate court held that the instruction was erroneous because, "They assume that the facts required to be found would have certain definite results..." The Supreme Court in *Welch* distinguished *Bledsoe* on the basis that the instructions in *Bledsoe* required the jury to accept one controverted fact as true by using the word "thus".

The appellants cite *Lasky v. Union Elec. Co.*, 936 S.W.2d 797 (Mo. 1997) and *Spring v. Kansas City Area Transportation Authority*, 873 S.W.2d 224 (Mo. 1994) as support for their position that involved an instruction assumed a disputed fact. *Lasky* and *Spring* are distinguishable from the present case.

In *Lasky*, plaintiffs were firefighters and police officers who responded to an accident involving an exploded transformer. *Lasky*, 936 S.W.2d at 798. Plaintiffs alleged that the transformer contained polychlorinate biphenyls ("PCBs") which caused them injury, and that the defendant, the owner of the transformer, failed to warn them of the need to properly clean themselves in order to avoid injury from the PCBs. *Lasky*, 936 S.W.2d at 794. There was a dispute at trial as to whether or not each particular

plaintiff came into contact with the transformer and as to whether the owner knew about each contact or should have known about each contact, which would have triggered a duty to warn. *Lasky*, 936 S.W.2d at 800.

Therefore, the necessary elements that the plaintiffs had to prove were (1) whether plaintiffs in fact had come into contact with the PCB's, (2) whether it is possible to develop skin rashes from a single exposure to PCB's, and (3) whether the owner knew or should have known that the plaintiffs were exposed to the PCB's while responding to the accident. *Lasky*, 936 S.W.2d at 801.

The verdict director instructed the jury to find for the plaintiffs if it believed the following propositions:

> First, defendant knew or by using ordinary care should have known that plaintiffs had come into contact with the cooling fluid from defendant's transformer, which contained polychlorinate biphenyls ("PCB's"), and
>
> Second, defendant knew or by using ordinary care should have known the plaintiffs' contact with the cooling fluid containing polychlorinate biphenyls presented a risk of bodily harm.

In *Lasky*, the Missouri Supreme Court held that the verdict director assumed a necessary fact because the verdict director "presented the knowledge element to the jury but assumed the facts of which defendant was alleged to have had knowledge." *Lasky*, 936 S.W.2d at 801. The verdict director contained two necessary elements, the knowledge element and the disputed conduct element, whether the plaintiffs actually came into contact with the PCB's. In order to find the knowledge element, that the defendant knew or should have known, the jury necessarily must find that the disputed conduct, coming into

contact with the PCB's, occurred. *Lasky*, 936 S.W.2d at 801.

Appellant Washington, when listing the issues presented in *Lasky*, leaves out the knowledge element, because Appellant Washington recognizes that the *Lasky* jury instruction contained two elements, the disputed knowledge element and the disputed conduct element, and that in the present case there is only one disputed element, the disputed conduct element.

The *Lasky* court relied upon a previous Missouri Supreme Court decision, *Brown v. Van Noy*, 879 S.W.2d 667, 673 (Mo. App. 1994). In *Brown*, plaintiff sued the owner of a bar for injuries sustained when he was hit by another man inside the bar. *Brown*, S.W.2d at 673. The issues at trial were whether (1) the assailant had violent tendencies and (2) whether the owner knew or should of known of the assailant's violent tendencies. *Brown*, S.W.2d at 673.

The verdict director read as follows: "Defendant...knew or should have known [the assailant] was a person with vicious tendencies likely to inflict injury upon others..." The court held that the verdict director assumed a disputed fact because the instruction, "Required the jury to make a determination on the latter element, while implying the former element." *Brown*, S.W.2d at 673.

Lasky and *Brown* are clearly distinguishable from the present case. Here, the verdict directors contain only one disputed element, whether a urinary tract infection was present. In addition, the verdict directors contain no language that necessitates the finding of a disputed element as was the case in *Bledsoe*. There is no language such as "knew or should have known" which was present in *Lasky* or the word "thus" which was present in *Bledsoe*.

In addition to *Lasky*, appellants cite *Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224 (Mo. 1999) to support their proposition that verdict directors improperly assumes a disputed fact.

However, as in *Lasky*, *Spring* is clearly distinguishable from the present case.

In *Spring*, plaintiff sued the defendant for injuries she sustained when she fell on a bus operated by the defendant. *Spring*, 873 S.W.2d at 225. Plaintiff alleged that the driver negligently operated the bus when she had not reached a place of safety on the bus. *Spring*, 873 S.W.2d at 225. It was undisputed that the plaintiff had not reached her seat when the driver began to move and then suddenly hit his brakes, causing plaintiff to fall. *Spring*, 873 S.W.2d at 226. However, there was an issue for the jury to decide as to whether the plaintiff reached a reasonable place of safety at the time the driver started the bus even though she was not in her seat. *Spring*, 873 S.W.2d at 226-227. The necessary elements that the plaintiff needed to prove were (1) whether the defendant driver started the bus when the plaintiff had not reached a place of safety on the bus; (2) that the defendant driver knew or by using the highest degree of care should have known that the plaintiff had not reached a place of safety; (3) that the defendant driver was thereby negligent; and (4) that such negligence directly caused or contributed to cause damage to the plaintiff. *Spring*, 873 S.W.2d at 227.

The verdict director stated: "First, [defendant] caused the bus to move forward and suddenly stop when he knew or should have known that plaintiff had not reached a place of safety in the bus..." *Spring*, 873 S.W.2d at 226.

The Supreme Court held that the instruction assumed whether the plaintiff was in a place of safety. As in *Lasky* and *Brown*, the verdict director contained two disputed elements, the knowledge element and the disputed conduct element. *Spring*, 873 S.W.2d at 227. The jury by necessity must find the disputed conduct occurred once it determines the knowledge element.

Lasky and *Spring* are distinguishable from the present case and appellant reliance upon them is

in error. *Lasky* and *Spring* contained two disputed elements in the same paragraph and used language that "required the jury to make a determination on the latter element, while implying the former element." Verdict Director Number 8 in the present case contains only one disputed fact in the paragraph and contains no language that requires the finding of one element.

In an effort to confuse the issue, the defendants argue that since the jury asked a question about the instruction that the instruction must somehow be flawed. Defendants cite no cases which support the proposition that a jury question provides evidence of a flawed instruction.

In *Smith v. Kovac*, 927 S.W.2d 493 (Mo. App. 1996), defendant doctor argued on appeal the undefined phrase "unnecessary hysterectomy" contained in the jury questions was confusing and constituted a roving commission. Defendant argued the term needed to be defined and as further evidence of the confusion, defendant argued that a jury question regarding the instruction made it confusing. The jury asked "if we determine the hysterectomy was unnecessary does that make him negligent?" *Smith*, 927 S.W.2d at 498.

The court held the instruction was not confusing and as to the jury question stated the "jury's query about subparagraph one, however, does not taint the instruction." *Smith*, 927 S.W.2d at 498. The court correctly pointed out that "If this were the criterion, each question submitted by a jury about an instruction would render the instruction erroneous." *Smith*, 927 S.W.2d at 498.

Appellants imply that the trial court judge erred by instructing the jury to reread the instructions when she was presented with the question from the jury and "required the jury to render a verdict based on a confusing, erroneous and prejudicial verdict director." The court correctly directed the jury to the instructions as the answer to the question was clearly given in the instructions. Instruction number 3 stated:

"...This court does not mean to assume as true any fact in these instructions but leaves it to you to determine what the facts are." L. F. 173. By following the directions of the trial judge and rereading the instructions the jury would have found the answer to the question. "In the absence of exceptional circumstances, appellate courts assume that a jury obeys a trail court's directions and follows its instructions." *Smith*, 927 S.W.2d at 498.

Finally, any allegation of confusion by defendants is negated by the fact that they made changes to the verdict director which they now allege made the director confusing. Specifically, plaintiff offered a verdict director that states: "failed to prescribe an antibiotic which would treat a pseudomonas urinary tract infection." At the request of defendants it was changed to: "would treat Mary Harvey's pseudomonas infection." Tr., Vol. III (p. 165). It is plaintiff's position that the verdict director as submitted was proper as is discussed above. However, if for any reason the Court finds it to be flawed, the defendants' own request and change caused any confusion. Therefore, this Court should not grant relief for something that the defendants caused.

3. The Modification Of Instruction No. 12 By The MAI 19.01 "Contributed To Cause" A Variation Conformed With The Evidence, Complied With The Instructions of MAI, And Was Not Prejudicially Erroneous.

Defendants argue that plaintiff's decision to use the "contributed to cause" modification contained in MAI 19.01 was not supported by the evidence and, therefore, the verdict director submitted by the respondent was prejudicially erroneous. Defendants acknowledge that MAI 19.01 gives the plaintiff the discretion to determine which modification plaintiff wants to submit to the jury.

Defendants again rely upon an argument of semantics. As is discussed extensively above in this

brief, Dr. Coleman, plaintiff's expert, testified that both the failure to treat Mary Harvey's urinary tract infection and the failure to treat Mary Harvey's renal failure contributed to cause her death. While it is true that at times Dr. Coleman used the word "combined", the word choice of Dr. Coleman in no way limits the discretion given to the plaintiff by MAI 19.01. The fact of the matter is that Dr. Coleman testified that defendants' negligence contributed to cause and combined to cause Mary Harvey's death.

In an effort to further confuse the issue, defendants refer to other health problems that Mary Harvey had at the time of her hospitalization. Defendants correctly point out that no expert offered any testimony that these conditions contributed to cause Mary Harvey's death. Defendants state that Dr. Coleman's testimony was "specifically limited testimony" and then go on to argue that because Dr. Coleman was precise in his testimony that the jury could not consider anything other than what Dr. Coleman testified to at trial as contributing to cause Mary Harvey's death. Defendants' argument defies logic. Dr. Coleman testified again and again at trial that the untreated urinary tract infection and the untreated renal failure contributed to cause Mary Harvey's death. Dr. Coleman testified extensively about how the two conditions interacted to cause the neurological event which led to Mary Harvey's death. Defendants' argument that Dr. Coleman's testimony was so specific and limited that it thereby became confusing does not make any sense.

Finally, defendants once again rely upon a jury question in order to attack a jury instruction. There were two questions submitted from the jury, and defendants have challenged both of those instructions. In both cases, appellants are relying upon the jury question itself as evidence that the jury instruction must have been confusing. Again, Missouri courts have consistently held that a question from the jury does not render the instruction flawed. If questions from the jury would invalidate jury instructions, it would be difficult if

not impossible to ever have a jury return a verdict.

The modification by MAI 19.01 specifically grants a plaintiff discretion as to which language should be submitted to the jury. There is no limitation of that discretion contained in MAI 19.01. The "directly contributed to cause" language was supported by Dr. Coleman's testimony, and the fact that a jury asks a question does not render the instructions flawed.

4. The Trial Court Did Not Err In Submitting Instruction No. 10 As To Defendant Taylor, Because Plaintiff's Expert Defined And Explained What "Advocate" Required Appellant To Do, The Phrase "Failed To Advocate For Dialysis" Did Not Need To Be Defined As It Is Not Unusual Or Vague, And If Defendant Taylor Believed It Should Have Been Defined, Defendant Should Have Offered An Instruction At Trial.

Defendant Taylor argues in Point III of her brief that the phrase contained in Instruction No. 10, "Failed to advocate for dialysis treatment for Mary Harvey's kidney failure..." was vague and broad and constituted a roving commission due to the fact that "advocate" is an "imprecise verb". Further, Defendant Taylor argues that the word "advocate" in its "verb form is a rather unusual term". It is argued that Dr. Coleman did not define the word advocate and that it was not clear to the jury in what manner Defendant Taylor should have advocated for dialysis.

Dr. Coleman clearly defines what he meant by advocating for dialysis in his tesimony and specifically used the term when describing the conduct he believed to be necessary in order to conform with the appropriate standard of care. Dr. Coleman testified:

> Q Doctor, in your opinion within a reasonable degree of medical certainty, did Dr. Taylor's failure to treat the

effects of the worsening kidney function when combined with the failure of Dr. Taylor, Dr. Washington and Dr. Williams to treat the urinary tract infection contribute to cause Mary Harvey's death?

A Yes, with the caveat that Dr. Taylor would not be the one to do the dialysis. That was the nephrologist.

Q But you're critical of Dr. Taylor with her care in that regard, is that correct?

A With regard to her not in my opinion sufficiently advocating for initiating the dialysis for this patient.

Q You believe that amounted to a breach of standard of care?

A Yes.

Q Failure to do that when coupled with the collective negligence of the failure to treat the urinary tract infection contributed to cause her death, is that correct?

A Yes.

(Tr. 321-22).

Further, Dr. Coleman testified that it was incumbent "upon a neurologist to talk to a nephrologist about instituting dialysis, when the neurologist believes that the renal failure is causing the patient's seizures".

(Tr. 306). Dr. Coleman testified that Defendant Taylor was the best position of the doctors to diagnose the cause of Mary Harvey's seizures. (Tr. 383).

In addition, Defendant Taylor herself testified that when seizures are caused by renal problems it is both a neurologist's and a nephrologist's problem and would require the attention of both doctors. (Tr. 647). Defendant Taylor admitted that she knew Mary Harvey had a history of chronic renal failure and was experiencing kidney insufficiency. (Tr. 636-637). Further, Defendant Taylor testified that changes in kidney function can cause seizures and admitted that as a neurologist treating a patient with seizures it is important to diagnose and treat the cause of the seizures. (Tr.637). Defendant Taylor believed that Mary Harvey's metabolic status, (kidney insufficiency) was causing her seizures but admits she never discussed the matter with the nephrologist. (Tr. 610, 627).

In *Lashmet v. McQueary*, 954 S.W.2d 546 (Mo. App. 1997), plaintiff brought a medical malpractice case against the physician defendant based upon the physician's negligence in failing to remove a wooden toothpick that had become stuck in the patient's foot. *Lashmet*, 954 S.W.2d at 548. At trial, the jury was submitted an instruction which stated the physician could be found to be negligent if the physician "failed to adequately inform and instruct the plaintiff of the foreseeable risk of a retained toothpick in plaintiff's foot." *Lashmet*, 954 S.W.2d at 548.

After a plaintiff verdict, defendant filed a motion for new trial arguing that the jury instruction constituted an improper roving commission in that the term "adequately informed and instruct" was not defined and was ambiguous. The trial granted defendant's motion and the appellate court overturned the trial court's order granting a new trial. *Lashmet*, 954 S.W.2d at 553.

The appellate court in reviewing the evidence noted that the defendant acknowledged at trial that

it would have been important for the plaintiff to understand the risk and consequences of having the toothpick left in her foot, however, he could not recall having such a conversation with the plaintiff. *Lashmet*, 954 S.W.2d at 550. In addition, the defendant testified that he made no attempt to contact the plaintiff to inform her about the need for further medical treatment and acknowledged that it was important for the plaintiff to receive follow-up treatment. *Lashmet*, 954 S.W.2d at 551. Additionally, the defendant testified that it would have been important for the plaintiff to understand the course of treatment and the potential harm that can result from the toothpick being left in the plaintiff's foot. *Lashmet*, 954 S.W.2d at 551.

It was defendant's position that the plaintiff's expert had to define the disputed phrase for the jury. However, the court found that, "In the context of the evidence presented, the words "adequately informed and instruct" are not scientific words that expert testimony must define to aid the jury." *Lashmet*, 954 S.W.2d at 553. The court found that the words were not ambiguous, confusing, and that they are not infrequently used. *Lashmet*, 954 S.W.2d at 553. The court stated:

> "To a reasonable person on the jury, the words "failed to adequately inform and instruct the plaintiff of the foreseeable risk of a retained toothpick in plaintiff's foot" when applied to the evidence in this case, denotes a meaning of whether defendant made plaintiff sufficiently aware of the risk of her having a retained foreign object in her foot and the necessity of receiving further medical treatment for it."

Lashmet, 954 S.W.2d at 553.

Finally, the court noted that Rule 70.02(b) of the Missouri Rules states that when there is no applicable MAI, any instruction shall be "simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts". *Lashmet*, 954 S.W.2d at 550. The court indicated that to hypothesize the details of the evidence relating to the instruction in *Lashmet* would be precisely what Rule 70.02 condemned . *Lashmet*, 954 S.W.2d at 553.

In the present case, Dr. Coleman testified as to what he believed Defendant Taylor should have done, namely talked with the nephrologist about the need for dialysis in order to control Mary Harvey's seizures. Dr. Coleman's testimony outlines the specific behavior that he believes Defendant Taylor should have undertaken in order to comply with the appropriate standard of care. In fact, Defendant Taylor's own testimony sets out what the appropriate standard of care is when treating a patient with renal failure who is experiencing seizures.

Therefore, Dr. Coleman did define what he meant by "advocate" in his testimony. Even if it is argued that Dr. Coleman did not define the word "advocate", the word "advocate" in the context of the evidence presented at trial is not "A scientific word that expert testimony must define to aid the jury." *Lashmet*, 954 S.W.2d at 553. As in *Lashmet*, Defendant Taylor testified that as a neurologist it is important for her to diagnose and treat the cause of seizures, that kidney insufficiency can cause seizures, and that she believed that Mary Harvey's seizures were in fact being caused by her kidney insufficiency. The testimony of Defendant Taylor herself and the testimony of Dr. Coleman provide the context for the jury to understand what conduct they must decide was negligent.

Finally, Defendant Taylor made no request that the court define the term "advocate", nor did Defendant Taylor offer an instruction defining the term "advocate". If Defendant Taylor believed the term

needed definition, it could and should have offered an instruction "defining the term". *Chrisler v. Holiday Valley, Inc.*, 580 S.W.2d 309, 315 (Mo. App. 1979). *Smith v. Wells*, 31 S.W.2d 1014, 1022 (Mo. 1930). *Gallaher-Smith-Feutz Realty, Inc. v. Circle Z Farm, Inc.*, 545 S.W.2d 395 (Mo. App. 1976).

Appellant had every opportunity to offer an instruction defining the term "advocate", however, no such instruction was offered. Appellant should not be allowed to now use his trial strategy of not defining "advocate" in the jury instructions as a basis for overturning the jury verdict after an eight-day trial.

III THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANTS' OBJECTIONS TO DR. COLEMAN'S TRIAL TESTIMONY THAT THE FAILURE TO TREAT THE URINARY TRACT INFECTION CAUSED OR CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH BECAUSE DR. COLEMAN'S DEPOSITION TESTIMONY WAS CONSISTENT WITH HIS TRIAL TESTIMONY AND DID NOT REPRESENT A SUBSTANTIAL MATERIAL CHANGE IN HIS OPINION.

1. Standard Of Review.

"The decision of the trial court as to the admissibility of evidence is accorded substantial deference on appeal and will not be disturbed unless the trial court has abused discretion." *King v. Copp Trucking, Inc.*, 853 S.W.2d 304, 307 (Mo. App. 1993), (*citing Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991)).

A trial judge is vested with substantial discretion in the admission of expert testimony. *Goodwin v. Farmers Elevator and Exchange*, 933 S.W.2d 926, 929 (Mo. App. E. D. 1996). "Appellate courts will only convict the trial court of abuse of that broad discretion when the record is clear that the trial court's action was arbitrary and so unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Blake v. Irwin*, 913 S.W.2d 923, 931-2 (Mo. App. W. D. 1996).

2. Dr. Coleman Testified At Trial Consistent With His Deposition Testimony, And The Trial Court Properly Denied Appellants' Objections To His Testimony.

Defendants argue that the trial court should have barred Dr. Coleman from testifying at trial that

the failure to treat both the urinary tract infection and renal failure contributed to cause the neurological event of September 30th to October 1st because the testimony was a substantial material change in Dr. Coleman's deposition testimony.

Specifically, Defendant Washington asserts that "Dr. Coleman never testified that, to a reasonable degree of medical certainty, Defendant Washington's failure to treat an alleged urinary tract infection contributed to cause Mary Harvey's death." In addition, Defendant Williams asserts that Dr. Coleman testified at trial "for the first time" that Defendant Williams' failure to treat the urinary tract infection, combined with the renal failure, caused the neurological event which lead to Ms. Harvey's death.

Dr. Coleman's deposition testimony was consistent with his trial testimony, and the trial court did not err in denying appellants' objections to his testimony. Defendants rely upon single sentences taken from extensive answers in two long and complex depositions in their effort to exclude Dr. Coleman's testimony. Defendants' apparent confusion as to Dr. Coleman's deposition testimony is caused by the defendants' failure to properly formulate the "but for" test in their questions at the deposition. When Dr. Coleman was asked the correct "but for" question, he answered the same way in both his deposition and at trial.

When asked the improper "but for" questions, Dr. Coleman repeatedly testified at his deposition that he could not state an opinion that had the urinary tract infection been treated **alone** or had the renal infection been treated **alone** that Mary Harvey would not have survived. Rather, Dr. Coleman testified that the combination of the two negligent acts acting together contributed to cause Mary Harvey's death. L.F. 231 (p. 78), 232 (p. 9-10), 236-257 (p. 28-31), 238-239 (p. 33-38), 259 (p. 108-119). It was Dr. Coleman's opinion at his deposition that the combination of untreated renal failure and an untreated urinary tract infection combined together contributed to cause Mary Harvey's death.

Defendants incorrectly assert that Dr. Coleman's deposition testimony that he cannot state based upon a reasonable degree of medical certainty that had the urinary tract infection **alone** been treated that Mary Harvey would not have died is inconsistent with his trial testimony that had both the renal failure and urinary tract infection been properly treated that Mary Harvey would have lived. As is discussed in Point I of the Brief, when two joint tortfeasors' negligent acts combine to cause an injury each can be liable even though their negligent acts alone would have been insufficient to cause the injury. Defendants rely upon questions that improperly pose the "but for" test to exclude answers to questions that properly pose the *Callahan* "but for" test.

Dr. Coleman's testimony at trial in no way contradicted his deposition testimony. Dr. Coleman testified at trial that it was a combination of the factors that contributed to cause Mary Harvey's death. Dr. Coleman clearly testified, both at his deposition and at trial, that had Mary Harvey's renal failure and urinary tract infection both been treated, that she would have survived. Tr. 323-324. L.F. 236-237 (28-29).

Specifically, at his **deposition** Dr. Coleman testified that he was unable to give opinions as to what the outcome would have been had only the renal failure been treated properly or had only the urinary tract infection been treated properly:

> Q So you are going to tell me that if I take any one of the factors out, the others might still have led to her demise, or is there one of the factors and criticisms that you rendered before that all by itself –
>
> A Well, maybe we have to go through each one individually. But I just want to be clear that I think there were several

processes that interacted that caused her illness to progress, ultimately leading to her death. **I have a very difficult time taking one of those out and then answering the question that you are posing; that is, in the absence of that factor, would she have lived?...**

L. F. Vol. 231 (p. 7-8).

Q Okay. You had also said that you would not be saying that treatment of a urinary tract infection **alone** would have been enough to most probably cause her to live versus die absent the other interventions that you had talked about. Do you still hold to that opinion?

A Yes. I don't believe that I can pull out the urinary – the benefits that it would have accrued to her by treating the urinary tract infection, given all the other things that happened to her, and say yes, she would have died, or no, she wouldn't have died if that had been done. So I'm not able honestly to pull that single process out of this case and give you an informed opinion about what would have happened with her, because there is too much interconnection between all that was going on with her. She was

too sick.

L.F. 239 (p. 9-10).

When asked at his deposition if the urinary tract infection and the renal failure had **both** been treated would Mary Harvey have lived Dr. Coleman testified as follows:

> Q So if the urinary tract infection was cleared first, then she had the knee operation, and assume for my question that everything else that happened to her still happened – in terms of whatever blood loss we are dealing with, in terms of whatever kidney failure. And assume to the same degree – in other words, let's just assume for my question that the urinary tract infection didn't play a big part in causing her degree renal failure, etcetera. All right? And that but everything else sequenced after that in the way that it did for her. **But she got the kind of diagnosis and treatment that you believe she should have gotten;** they find a blood problem and they give her blood cells, and they do whatever it takes, whether that's dialysis or whatever, to try to treat her kidney failure, and so forth. What do you believe would have been her life expectancy?
>
> **MR. FRANK:** Are you asking him whether she would have survived the hospitalization?

MR. BALDWIN: Yes. And, if so, what is her life expectancy?

A I have an easier time with the former than the latter. **I believe she would have survived.**

L.F. 236-237 (p. 28-29).

Further, Dr. Coleman testified that both the urinary tract infection and the renal failure contributed to cause Mary Harvey's neurological decline which eventually caused her death. Dr. Coleman testified at his **deposition** as follows:

Q I take it from what you are telling me that other than what you have been able to do about my hypothetical in removing the hip surgery, that all the rest of this conundrum, or whatever it is, is interlocked, and removing any one of those hypothetically is not going to be something you can logically use to predict as a model of outcome? You are sure you need all of them to combine, and you can't say how it would have behaved in the absence of one of them?

A That's correct.

Q So that I get rid of the pronouns, especially since it's been a year since your deposition, what are the "thems"? What are the different factors that are going on that you believe come together to cause this problem?

A Well, the first is the urinary tract infection.

Q Right.

A Second is her renal failure.... .

L.F. 233-234 (p.16-17).

Q Now, with regard to that criticism that she should have been started on a different antibiotic, specifically Ceftazidine on the 26th, how does that play into this event that you say she had on the 30th to the 1st? Can you state to a reasonable degree of medical certainty that the failure to make that change in antibiotics is somehow related or caused or contributed to cause the event which she had on the 30th going into the 1st?

A I believe it contributed to her decline on the 30th and the 1st. What I can't say, as I mentioned earlier, is that if appropriate antibiotics had been instituted on the 26th, that she would not have had the complication and gone on to die. I can't separate that out from all the other problems that she was having. But specifically the way that the urinary - the untreated urinary tract infection was contributing to her decline was in several ways. One, it was adding to the catabolic load in this patient, and that, in the setting of acute renal failure, worsens the complications of acute renal failure. Since I believe that one of the complications of the acute renal failure were her seizures and neurologic problems, it would contribute to that. Second, it is possible - not probable, but it's

possible - that the event that she had on the 30th into the 1st was a septic event; that is, it was a manifestation of this urinary tract infection. There is evidence for and against that possibility, and I don't think it rises to the level of more likely than not, but I think it's very possible.

BY MS. REITZ:

Q Then you also talked about the catabolic load increasing - the UTI increasing the catabolic load, which increased the renal failure. Could you tell me how that would relate to the event you feel she had on the 30th and 1st?

A Well, just to state it may be a little differently: that the catabolic load increases the need for the kidneys to clear toxins. The catabolic load is another way of saying that toxins are being generated, and the kidney's important in clearing those. If you have a situation where those toxins are building up and they are affecting the nervous system, that if you develop another process concomitantly that increases the buildup of those toxins, then, in a way, that further exacerbate the effects of the renal failure on the neurologic system in this case. Okay?

Q And you feel that what was increasing the catabolic load was in part due to the UTI?

A In part, yes.

L.F. 256-257 (p. 108-110).

Dr. Coleman clearly testified at his deposition as to how the untreated renal failure and the untreated urinary tract infection interacted to cause the neurological event which led to Mary Harvey's death. The testimony clearly contradicts Defendant Washington's assertion that Dr. Coleman never testified that the "urinary tract infection contributed to cause Mary Harvey's death." In fact, Dr. Coleman testified extensively as to the exact medical process that takes place as a result of the untreated infection.

Similarly, the testimony clearly contradicts Defendant Williams' assertion that Dr. Coleman testified for the "first time" at trial that the urinary tract infection and renal failure combined to cause Mary Harvey's neurological event which lead to her death.

Defendants cite excerpts from Dr. Coleman's deposition testimony as evidence of inconsistent testimony at trial. Specifically, Defendant Williams argues that Dr. Coleman testified at his deposition that he could not state with a reasonable degree of medical certainty that any failure to treat the alleged urinary tract infection caused the neurological event of September 30th, to October 1st, and cites in support of that assertion L.F. 257 (P. 109). However, Defendant Williams fails to cite the question and answer prior to the excerpt he relies upon:

Q ...Can you state to a reasonable degree of medical certainty that, the failure to make that change in antibiotics, is somehow is related or caused or contributed to cause the event which she had on the 30th, going into the 1st?

A I believe it contributed to her decline on the 30th, and the 1st. What I can't say, as I mentioned earlier, is that if appropriate antibiotics had been instituted on the 26th, that she would not have had the complication and gone on to die, I can't separate that out from all of the other problems that she was having. **But, specifically, the way that the urinary - the untreated urinary tract infection was contributing to her decline was in several ways. One, it was adding to the catabolic load in this patient, and that, in the setting of acute renal failure, worsens the complications of acute renal failure. Since I believe that one of the complications of acute renal failure were her seizures and neurological problems, it would contribute to that..."**

L.F. 256-257 (p. 108-109).

The question and answer Defendant Williams relies upon immediately followed the above testimony:

Q So, with regard to the subject event, you can't state to a reasonable degree of medical certainty that that's [treating urinary tract infection] what caused the neurological event?

A That's correct.

L.F. 257 (p.109).

The relevant question cited by Defendant Williams asks if the urinary tract infection **alone** caused the neurological event. Dr. Coleman was not asked in that particular question to assume that Mrs. Harvey's renal condition was properly treated as outlined by Dr. Coleman and that if her urinary tract infection had been properly treated as to whether the neurological event would not have occurred based on a reasonable degree of medical certainty. Dr. Coleman was only asked if the urinary tract infection alone caused the neurological event, and he repeatedly testified that it was a combination of events that caused the neurological event.

In addition, Defendant Williams cites to Dr. Coleman's testimony that the principal cause of Mary Harvey's death was the rather acute neurological deterioration on September 30th and October 1st that led to Mary Harvey's death and that, "Exactly what caused that event, I don't know." L.F. 259 (p. 118). At trial, Defendant Williams' attorney attempted to impeach Dr. Coleman using the cited deposition testimony. (Tr. Vol. I, 372-373). However, when asked to explain by plaintiff's counsel why his deposition testimony was consistent with his trial testimony, and not inconsistent as Defendant Williams argues, Dr. Coleman stated as follows:

> Q I'd like to show you that again and have you look at that document, page 118, which answer goes over to 119.
>
> Is there anything else in that answer that you would like to read which you feel would explain your answer given there?
>
> A Yeah. Briefly.

Q Okay.

A The end of the first paragraph where I say, "Exactly what caused that event" – and that's referring to the deterioration on the 30th and the 1st – "I don't know."

And what I meant by that was I could not identify a single event that would have explained what happened to her which is what I testified to here today.

And I go on in that response and elsewhere in the deposition to say that – let me read here for a moment. It's been a long day.

I think it's clear that she had some evidence of infection as a contributing factor.

And I think elsewhere – it's not in this response – but I talk about the combination of factors. I can't find it quickly in that passage.

(Tr. Vol. I, 376-379).

Defendants use these passages from Dr. Coleman's deposition to argue that Dr. Coleman should not have been allowed to testify at trial that the combination of renal failure and an untreated urinary tract infection contributed to cause her death. However, as is discussed above in this brief, appellants are confused over the proper "but for" test in cases where there are two contributing negligent acts, each of which in and of themselves would be insufficient to cause the injury.

Dr. Coleman testified at **trial** as follows:

> Q Doctor, in your opinion with a reasonable degree of medical certainty, had Mary Harvey been provided with the care that you feel she should have been provided with for the urinary tract infection as described previously, and if she had been provided with the care for kidney failure as you described earlier, in your opinion, within a reasonable degree of medical certainty, would she have lived?
>
> A Yes....
>
> * * *

(Tr. 323-324).

At trial, Defendant Williams' attorney asked the following questions in an attempt to impeach Dr. Coleman with his deposition testimony:

> Q Doctor, as your deposition where you were sworn under oath I asked you this question:
>
> Q "But you can't state to a reasonable degree of medical certainty that if he" – and I was referring to Dr. Williams – "had done what you are suggesting he should have, the patient's outcome would have been different?"
>
> You answered: "That's right. I am not stating that."

Q "And you can't state that?"

A Right.

Q Answer: "I cannot make that statement."

A Right.

Q Answer: "I cannot make that statement."

A Right. I said that.

Q Do you remember giving those answers?

A Yes. And I think that's what I said today [at trial].

(Tr. Vol. I, 372-373).

In the attempt to impeach, Dr. Coleman asserted correctly that his trial testimony was not inconsistent with his deposition testimony that he cannot predict the outcome by taking one negligent act out of the picture without assuming that the other negligent act was not present.

Dr. Coleman's deposition testimony was consistent with his trial testimony, and the trial court did not err in denying defendants' objections to exclude his testimony. Defendants rely upon single sentences taken from extensive answers in two long and complex depositions in their effort to exclude Dr. Coleman's deposition testimony. Many of the problems arise because at Dr. Coleman's deposition defendants' questions consistently failed to properly formulate the "but for" test. When Dr. Coleman was asked the correct "but for" question, he answered it the same way in both his deposition and at trial.

Dr. Coleman repeatedly testified at his deposition that he could not state an opinion that had the

urinary tract infection been treated alone and/or had the renal failure been treated alone that Mary Harvey would not have died. However, Dr. Coleman repeatedly testified that the combination of the two negligent acts acting together contributed to cause Mary Harvey's death. It was Dr. Coleman's opinion at his deposition that the combination of untreated renal failure and an untreated urinary tract infection which together caused Mary Harvey's death. Dr. Coleman's testimony at trial did not contradict his deposition testimony. Dr. Coleman testified at trial that it was a combination of the factors that contributed to the cause of Mary Harvey's death. Dr. Coleman clearly testified, both at his deposition and at trial, that had Mary Harvey's renal failure and urinary tract infection both been treated, that she would have survived.

Even assuming Dr. Coleman offered different trial testimony from his deposition testimony (which plaintiff denies), this court should still uphold the trial court's ruling. "Testimony, even when phrased in the form of an opinion, that interprets or supports opinions contained in depositions is not improper." *Blake*, 913 S.W.2d at 931-2.

The *Blake* Court held: In the context of the entire case and the rest of plaintiff's expert's testimony, allowing plaintiff's expert to testify certainly was not so arbitrary and unreasonable as to shock the sense of justice or indicate a lack of careful consideration by the trial court. It was, therefore, not an abuse of the trial court's discretion to allow the testimony. *Blake*, 913 S.W.2d at 932. And it is similarly not an abuse of the trial court's discretion in this case.

IV THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT TAYLOR'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF PRESENTED SUBSTANTIAL EVIDENCE THAT DEFENDANT TAYLOR'S FAILURE TO ADVOCATE FOR DIALYSIS AND HER FAILURE TO TREAT THE URINARY TRACT INFECTION BREACHED THE APPROPRIATE STANDARD OF CARE.

1. Plaintiff Presented Substantial Evidence As To What Constituted The Appropriate Standard Of Care And How Appellant Breached That Standard Of Care.

Defendant Taylor argues that the trial court erred in denying her Motion for Judgment Notwithstanding the Verdict because Dr. Coleman failed to testified as to what the standard of care was for the defendant. Defendant Taylor argues that the standard of care was "left completely in the realm of conjecture and speculation".

The court correctly denied Defendant Taylor's motion because Dr. Coleman testified as to the specific conduct that constituted the appropriate standard of care and how Defendant Taylor breached the standard of care. In addition, Defendant Taylor herself testified as to what the appropriate standard of care was for a neurologist in treating a patient, such as Mary Harvey.

In support of her position, defendant selects only one answer from the trial transcript. However, at trial, Dr. Coleman further testified:

"My criticism with Dr. Taylor is in her notes in this case during that time period she indicates that the seizures the patient is having are of a metabolic origin in reference to the renal failure, and that the renal failure was increasing the need for convulsive medication. And I believe it is incumbent upon a neurologist

to talk to a nephrologist about instituting dialysis in such a patient, given that the renal failure, according to Dr. Taylor, was the most likely factor accounting for her seizures." (Tr. 305).

In addition, Defendant Taylor testified as to the standard of care for a neurologist when treating a patient such as Ms. Harvey. Defendant Taylor testified that in a patient experiencing seizures which are caused by renal problems that it is both a neurologist's and nephrologist's concern, which would require the attention of both doctors. (Tr. 646). Defendant Taylor admitted that she knew Mary Harvey had a history of chronic renal failure and was experiencing kidney insufficiency at the time she examined her. (Tr. 635-637).

Further, Defendant Taylor testified that changes in kidney function can cause seizures and that as a neurologist you must diagnose and treat the cause of the seizures. (Tr.636-637). Finally, Defendant Taylor believed that Mary Harvey's metabolic status, (kidney insufficiency) was causing her seizures, however, admits she never discussed the matter with the nephrologist until September 29th or 30th. Defendant Taylor testified that she spoke to a neurologist about the need to be more aggressive in the treatment of renal failure. Following that discussion, dialysis was started. However, it was too late; Mary Harvey was already in a coma. (Tr. 627, 628, 635, 642-643, 646-647).

As to the standard of care in treating a urinary tract infection, Dr. Coleman testified that appellant as a neurologist was qualified to diagnose and treat urinary tract infections. (Tr. 296-297). Dr. Coleman testified that Defendant Taylor's failure to prescribe an antibiotic which would treat a pseudomonas urinary tract infection amounted to a breach of the standard of care. (Tr. 296). In addition, Defendant Taylor agreed and testified that in her practice as a neurologist she orders urine cultures, treats infections, and has prescribed antibiotics to patients to treat urinary tract infections. (Tr. 638).

Dr. Coleman and Defendant Taylor herself established the appropriate standard of care. A defendant's own testimony is sufficient to establish standard of care in a medical malpractice case. *Delisi v. St. Luke's Episcopal-Presbyterian Hospital, Inc.*, 701 S.W.2d 170 (Mo. App. 1985). The conduct that would comply with the standard of care was specifically set out by both Dr. Coleman and Defendant Taylor.

In *Delisi*, plaintiff sued a doctor and hospital for an infection that developed as a result of the defendants' failure to prescribe antibiotics for a hand wound plaintiff suffered. *Delisi*, 701 S.W.2d at 172. The jury returned a verdict in favor of the plaintiff, and defendant filed a motion for directed verdict arguing plaintiff failed to establish the appropriate standard of care. The motion was denied by the trial court. *Delisi*, 701 S.W.2d at 173.

On appeal, defendant argued that the trial court erred in submitting the case to the jury because plaintiff did not adduce substantial evidence proving that the defendant failed to satisfy the standard of medical care. *Delisi*, 701 S.W.2d at 173. At trial, the plaintiff did not put forth any independent expert medical testimony as to the applicable standard of care. *Delisi*, 701 S.W.2d at 174.

The appellate court held that the plaintiff met the necessary element that the defendant failed to meet the requisite standard of medical care. Even though the plaintiff did not present any independent medical expert testimony as to the applicable standard of care, the appellate court held that the defendant established the relevant standard of care through his own testimony. *Delisi*, 701 S.W.2d at 174.

The defendant doctor at deposition and at trial testified as to what the appropriate standard of care was under circumstances similar to the plaintiff. *Delisi*, 701 S.W. 2d at 174-75. Specifically, the court found that the defendant's testimony required a doctor to administer antibiotics to a patient who had a dirty

wound. Therefore, the court held that a jury could find that the defendant violated the standard of care if he knew the plaintiff had a dirty wound, and failed to administer antibiotics. *Delisi,* 701 S.W.2d at 174. The court noted that it was undisputed that the defendant did not prescribe an antibiotic and, therefore the trial court properly denied the motion. *Delisi,* 701 S.W.2d at 175.

In the present case, Defendant Taylor herself testified that a neurologist treating a patient with seizures must treat the cause of the seizures. She admitted that in Mary Harvey's case she believed the renal failure was causing her seizures, but that she did nothing to treat the cause of the seizures. As in *Delisi,* it was undisputed that appellant did not order an antibiotic for Mary Harvey's urinary tract infection and that she did not discuss the need for dialysis with the nephrologist.

Dr. Coleman and Defendant Taylor both testified that when a neurologist is treating seizures caused by renal failure that the appropriate standard of care would be to treat the cause, namely renal failure, and to work with the nephrologist in making sure that the renal failure was properly treated. In addition, both Dr. Coleman and Defendant Taylor testified that a neurologist is qualified to treat a urinary tract infection, and that neurologists do in fact diagnose and treat urinary tract infections, and that Defendant Taylor, in particular, in her practice as a neurologist has diagnosed and treated urinary tract infections.

In the present case, Dr. Coleman testified that a neurologist treating a patient with seizures caused by renal insufficiency should be discussing the need for dialysis with the nephrologist in order to treat the cause of the seizures. Even if this Court finds that Dr. Coleman's testimony was in some way inadequate as to establishing the appropriate standard of care, the Defendant Taylor's own testimony established the standard of care. As in *Delisi,* Defendant Taylor testified as to what the appropriate standard would be for a neurologist treating a patient with seizures caused by renal failure.

V THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT TAYLOR'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT, AS PLAINTIFF PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT TAYLOR'S FAILURE TO ADVOCATE DIALYSIS CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH.

Plaintiff established his cause against Defendant Taylor for negligently failing to advocate dialysis on the testimony of Dr. David Coleman, one of plaintiff's experts. Dr. Coleman testified:

> My criticism with Dr. Taylor is in her notes in this case during that time period she indicates that the seizures the patient is having are of a metabolic origin in reference to the renal failure and that the renal failure was increasing the need for convulsive medication.
>
> And I believe it is incumbent upon a neurologist to talk to a nephrologist about instituting dialysis in such a patient, given that the renal failure, according to Dr. Taylor, was the most likely factor accounting for her seizures.

(Tr. 305).

Later in his testimony, Dr. Coleman was asked the following:

> Q Doctor, in your opinion with a reasonable degree of medical certainty, did Dr. Taylor's failure to treat the effects of the worsening kidney function when combined

with the failure of Dr. Taylor, Dr. Washington, and Dr. Williams to treat the urinary tract infection contribute to cause Mary Harvey's death?

A Yes, with the caveat that Dr. Taylor would not be the one to do the dialysis. That was the nephrologist.

Q But you're critical of Dr. Taylor with her care in that regard, is that correct?

A With regard to her not, in my opinion, sufficiently advocating for initiating the dialysis for this patient.

Q You believe that amounted to a breach of the standard of care?

A Yes.

(Tr. 321).

Dr. Coleman's testimony establishes a breach of the standard of care by Defendant Taylor for not advocating for initiating dialysis and that such failure contributed to cause the death of Mary Harvey. Defendant Taylor challenges the sufficiency of the evidence to support the submission of this claim against Defendant Taylor claiming that such a finding by the jury would require the jury to pile inference upon inference. Specifically, Defendant Taylor argues that there is not sufficient evidence to support a finding that had Defendant Taylor advocated for the initiation of dialysis, the nephrologist would have begun the dialysis in time to save Mary Harvey. Defendant Taylor is incorrect in that assertion.

The nephrologist, Satya Sager, M.D., had his deposition testimony read to the jury during plaintiff's case. The issue of the timing of the initiation of dialysis was discussed with Dr. Sager:

Q You saw her on September 25th, correct?

A Yes.

Q At that point, did you feel she needed dialysis at that time?

A No.

Q Okay. On October 1st, you believe she needed dialysis, is that correct?

A Yes.

* * *

(Tr. 436).

Q Was that due to a change in the renal function during that time period of six days?

A The decision to dialysize is not just based on renal function alone. It is based on renal function, the biochemistry and the clinical assessment.

(Tr. 436).

Dr. Sager also read from his note of September 28th, and discussed the clinical assessment and his thoughts on dialysis. "Seizures, maybe metabolic acidosis, being corrected." (Tr. 430). "Renal failure, possible chronic. Creatinine clearance, 8cc per minute. End-stage renal disease. May need to be

dialysized in the next few days." (Tr. 430).

Dr. Sager's testimony establishes that he thought there may be a connection between Mary Harvey's seizures and her worsening kidney function. He also indicates that he was considering dialysis on September 28th. Dr. Sager obviously needed more information to establish the link between the seizures and the kidney failure, as part of his clinical assessment, to lead him to the decision to dialysize. Defendant Taylor was the doctor treating Mary Harvey's seizures.

Defendant Taylor testified as to her role in treating the seizures and their correlation to Mary Harvey's kidney function. Defendant Taylor testified that she believed that Mary Harvey's worsening kidney function probably influenced her worsening neurological status beginning on September 27th. (Tr. 639). Defendant Taylor testified that a patient experiencing seizures as a result of worsening kidney function would require the attention of both a neurologist and a nephrologist. (Tr. 646). However, Defendant Taylor never discussed Mary Harvey's seizures with a nephrologist until September 29th or 30th, when she spoke with Dr. Purtel, Dr. Sager's partner. (Tr. 628). Defendant Taylor testified that she spoke with Dr. Purtel about the need to be more aggressive in the treatment of her kidney function due to her worsening neurological status. (Tr. 642-3). It was following that discussion that dialysis was started . However, at that time, Mary Harvey was already in a coma.

The standard of review of a denial of a Motion for JNOV is whether the plaintiff made a submissible case. *Coggins v. Laclede Gas Co.*, 37 S.W.3d 335, 338 (Mo. App. E. D. 2000). To make a submissible case a plaintiff must present substantial evidence to support each element of his claim. *Id*. Absolute certainty is not required in establishing a causal connection between the defendant's conduct and the plaintiff's injury. *Derrick v. Norton*, 983 S.W.2d 529, 532 (Mo. App. E. D. 1998). "This

connection can be proven by reasonable inferences from proven facts or circumstantial evidence." *Id*. In the absence of compelling evidence establishing the absence of causation, the causation question is for the jury. *Smith v. Quallen*, 27 S.W.3d 845, 848 (Mo. App. E. D. 2000).

It is reasonable to infer that had Defendant Taylor advocated for the initiation of dialysis on or before September 29th, the nephrologist would have initiated dialysis at a time when Mary Harvey's life could have been saved. We know that Dr. Sager, on September 28th, thought there might be a link between Mary Harvey's seizures and her worsening kidney function. (Tr. 430). We also know that he was considering dialysis on that date. (Tr. 430). We know that Defendant Taylor went to Dr. Sager's partner, Dr. Purtel, on September 29th or 30th, and advocated for more aggressive treatment of Mary Harvey's kidney failure due to her worsening kidney function. (Tr. 642-3). We know that dialysis was started following that discussion with Dr. Purtel. (Tr. 436). Therefore, it is reasonable to infer that had Defendant Taylor gone to the nephrologist sooner, as Dr. Coleman testified she should have, dialysis would have been initiated sooner, and that the failure to do so contributed to cause Mary Harvey's death.

A judgment notwithstanding the verdict is a drastic action and should only be granted when reasonable persons could not differ on a correct disposition of the case. *Coggins*, 37 S.W.3d at 339. Where reasonable minds could differ on a question before the jury, the court may not disturb the jury's verdict. *Id*. Therefore, for the above stated reasons, Defendant Taylor's point should be denied.

VI. THE TRIAL COURT DID NOT ERR IN ALLOWING PLAINTIFF TO USE ARGUMENT EXHIBIT "B" DURING CLOSING ARGUMENT, AS SAID DOCUMENT WAS MERELY USED AS A DEMONSTRATIVE AID TO ELUCIDATE PLAINTIFF'S ARGUMENT.

During plaintiff's counsel's rebuttal portion of closing argument, plaintiff's counsel made use of a demonstrative aid, marked as Plaintiff's Argument Exhibit "B", to illustrate and elucidate plaintiff's arguments. Defendants objected to the use of the document. (Tr. Vol. 3, 259-61). The trial court overruled the objection on the condition that plaintiff's counsel made it clear to the jury that it was prepared by him and was based upon his remembrance of the evidence. (Tr. Vol. 3, 262). Plaintiff's counsel followed the court's instruction when making reference to the document. (Tr. Vol. 3, 264). Such use of a demonstrative aid during closing argument was proper.

"A trial court possesses broad discretion in the area of closing arguments, not lightly to be disturbed on appeal." *Robinson v. Empiregas Inc. of Hartville*, 906 S.W.2d 829, 838 (Mo. App. S. D. 1995). "Absent a clear abuse of such discretion, its ruling should control." *Id*. The trial court, especially in light of its admonition to plaintiff's counsel, did not abuse its discretion in allowing the use of said chart.

The use of visual aids not admitted into evidence during closing arguments was addressed in *Boese v. Love*, 300 S.W.2d 453 (Mo. 1957):

> It would seem the use in arguments by counsel of graphic aids such as charts or diagrams or plats which have not been put into evidence is permissible, provided they are used merely to illustrate or elucidate a point in counsel's argument based on the evidence, and provided they are not

> used in such a manner as to tend to confuse or mislead the jury into considering them as evidence.

Boese, 300 S.W.2d at 461.

The trial court's admonition to plaintiff's counsel that he tell the jury that the chart was prepared by him, and set forth the evidence as recalled by him, prevented the jury from being misled into considering the chart as evidence. Therefore, the use of the chart was proper to illustrate and elucidate plaintiff's counsel's argument. The use of the chart did not introduce any new evidence into the case, but merely summarized and commented upon the testimony of defendants' expert.

Defendants' reliance upon *Friend v. Yokohama Tire Corp.*, 904 S.W.2d 575 (Mo. App. S. D. 1995), is misplaced. In *Friend*, counsel for the defendant made reference to four exhibits during closing argument which had been refused by the trial court during the evidentiary portion of the trial. The exhibits contained measurements and opinions of defendant's expert which were not in evidence in the trial. Defendant's counsel argued that the exhibits supported defendant's position. The court found the use of these exhibits to be prejudicial "because they are not based on facts in evidence." *Friend*, 904 S.W.2d at 579.

Plaintiff's use of Argument Exhibit "B" did not introduce any new evidence, as the exhibits did in *Friend*. Instead, plaintiff's chart merely summarized and commented upon the testimony of witnesses for the defense. Such use of demonstrative aid was proper, and the trial court did not abuse its discretion in allowing its use.

VII. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, BECAUSE THE COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT JUROR LOLITA JONES' FAILURE TO DISCLOSE A PRIOR LAWSUIT WAS UNINTENTIONAL AND NOT PREJUDICIAL.

In his Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, Defendant Williams raised the general issue of juror non-disclosure. L.F. 301. At the hearing on the Motion for New Trial Defendant Williams identified Juror Lolita Jones. Juror Jones was subpoenaed and appeared before the trial court on May 21, 2001. At the hearing, Juror Jones was asked about a lawsuit filed on behalf of her daughter and a lawsuit in which Juror Jones was a defendant. (P. Tr. 11-12, 23).

When this court reviews a trial court's ruling regarding juror non-disclosure, the standard of review is abuse of discretion. *Jackson v. Watson*, 978 S.W.2d 829, 832-37 (Mo. App. W. D. 1998). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration. *Doyle v. Kenedy Heating and Service, Inc.*, 33 S.W.3d 199, 201 (Mo. App. W. D. 2000). However, when this court reviews the clarity of questions on *voir dire*, the review is *de novo*. *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 723 (Mo. App. E. D. 2001).

At the post-trial hearing, Juror Jones testified as to three automobile accidents which gave rise to claims. One involved an automobile accident in 1998 in which Juror Jones' daughter was injured. (P. Tr.

8-14). Juror Jones was the next friend for her daughter in the lawsuit that was filed. Juror Jones also testified regarding an automobile accident in 1999 from which she filed a property damage claim against her own insurance company. (P. Tr. 17-19). The trial court found that no question was asked during *voir dire* which would have required disclosure of those two claims or lawsuits. (L.F. 393).

The following questions regarding prior claims or lawsuits were asked by counsel for plaintiff during *voir dire*:

> Does anybody presently have a claim or lawsuit that is presently going on at this time?

(Tr. 46).

> I just asked about pending claims. Anybody in the past who has had a claim that is now resolved or over with when they claimed some sort of injury?

(Tr. 47). Juror Jones did not respond to either of these questions.

A non-disclosure can occur only after a clear question on *voir dire* unequivocally triggers the venire person's duty to respond. *Wingate by Carlisle v. Lester E. Cox Medical Center*, 853 S.W.2d 912, 916 (Mo. banc 1994). Only after the court has determined that the question is clear does it proceed to the question of whether the non-disclosure was intentional or unintentional. *McHaffie v. Bunch*, 891 S.W.2d 822, 829 (Mo. banc 1995).

Neither of the questions asked by plaintiff's counsel would have unequivocally triggered Juror Jones to disclose the 1999 property damage claim nor the lawsuit for her daughter. The property damage claim

was not a pending claim. (P. Tr. 18). With regards to resolved claims, the only question asked was about claims involving injury. (Tr. 47). There was no question asked regarding resolved claims that did not involve injury.

With regards to the claim for her daughter's personal injury, none of the pleadings from that case are part of the record on appeal. Juror Jones testified that the suit was brought for her daughter only. (P. Tr. 11). That matter had also been resolved prior to this trial. (P. Tr. 45). In fact, it was Juror Jones' understanding that she was not a party to the lawsuit. (P. Tr. 11). The questions asked during *voir dire* would not unequivocally trigger Juror Jones to disclose a resolved case where she was next friend for her minor daughter.

In *Redfield v. Beverly Health and Rehabilitation Services, Inc.*, 42 S.W.3d 703 (Mo. App. E. D. 2001), this court held that a juror had no duty to disclose an automobile accident that he was involved in when the other driver brought a lawsuit for personal injuries, naming the juror's father as the defendant. "[The Juror] was neither a named plaintiff nor defendant. [The Juror's] father was the named defendant. [The Juror] had no claim for money damages because of the accident. Therefore, [the Juror] was not obligated to disclose this case in response to the above questions posed during *voir dire*." *Redfield*, 42 S.W.3d at 709.

Likewise, Juror Jones was not a named plaintiff nor defendant in her daughter's case. She did not perceive herself to be a party to the lawsuit. (P. Tr. 11). Juror Jones had no claim for money damages. (P. Tr. 25). Therefore, Juror Jones had no duty to disclose her daughter's claim in response to the *voir dire* question regarding resolved injury.

With regards to the automobile accident in 1991, which as a result of Juror Jones was the named

defendant in litigation, the trial court found that her failure to disclose that action was both unintentional and non-prejudicial. (L. F. 393). The standard of review on this issue is abuse of discretion. *Jackson v. Watson*, 978 S.W.2d 829, 832-37 (Mo. App. W. D. 1998).

The trial court did not abuse its discretion when it found that Juror Jones' failure to disclose the 1991 automobile accident was unintentional. "An unintentional non-disclosure occurs when the experience was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed." *Banks v. Village Enterprises, Inc.*, 32 S.W.3d 780, 786 (Mo. App. W. D. 2000).

At the post-trial hearing, Juror Jones was asked about her failure to disclose the 1991 automobile accident:

> Q When Mr. O'Malley asked about automobile accidents earlier you said there were two, and you mentioned the one in '99, and the one in '98.
>
> So when you came in this morning and he asked you that question, when were you first reminded of the '91 accident?
>
> A It didn't come to me until he told me the street. Then I remembered I had an accident on Newstead.
>
> But like I said, I actually forgot about the one in '91. I didn't even know it was '91 when that happened.
>
> Q Did you recall that lawsuit before Mr. O'Malley brought

it up this morning?

A No.

Q So when the question was asked, "Anybody ever had a claim or lawsuit brought against you by someone who claimed they were injured because of something you did," was there anything that you remembered at that time that would have triggered you to raise your hand?

A No.

(P. Tr. 41-2). The trial court found Juror Jones to be credible and agreed that the failure to disclose the 1991 automobile accident was unintentional. (L.F. 393).

In *Redfield*, 42 S.W.3d 703, this court found that a juror's failure to disclose a prior automobile injury claim was both unintentional and reasonable in light of her testimony that she did not recall the incident, and that it had occurred five years prior to the case at hand. *Redfield*, 42 S.W.3d at 709. Juror Jones testified that she did not recall the 1991 automobile accident, and that accident occurred ten years prior to her service on this jury. Therefore, the trial court did not abuse its discretion when it found Juror Jones' failure to disclose the 1991 automobile accident to be unintentional and reasonable.

If a juror non-disclosure is unintentional, the relevant inquiry becomes whether the juror's presence did influence the verdict or may have influenced the verdict so as to prejudice the party seeking a new trial. *Redfield*, 42 S.W.3d at 709. "Prejudice is a determination of fact for the trial court, its finding to be disturbed on appeal only for abuse of discretion." *Keltner*, 42 S.W.3d at 724. "A new trial is not

mandated where the information not disclosed does not bear on the case or on the prospective juror's ability to fairly evaluate the evidence." *Id*.

Juror Jones' failure to disclose the 1991 automobile accident did not have any bearing on this case. That lawsuit involved an automobile accident for personal injury. This case is a wrongful death case arising out of medical malpractice. Juror Jones was the defendant in the litigation arising out of the 1991 automobile accident. The parties claiming prejudice by her presence on this jury are also defendants.

In *Heinen v. Healthline Management, Inc.*, 982 S.W.2d 244 (Mo. banc 1998), the court held that a juror's failure to disclose five lawsuits for unpaid taxes and bills did not prejudice the defendant, as both the juror and the defendant were defendants in their respective lawsuits. *Id.* at 250. In *Redfield*, 42 S.W.3d 703, this court held that a juror's failure to disclose a bus accident was immaterial, as it was so dissimilar to the lawsuit involving wrongful death due to a defective ventilator and medical malpractice. *Id*. at 709.

As in *Heinen*, the juror involved and the party claiming prejudice are both defendants. Further, as in *Redfield*, the juror's injury claim from a car accident is so dissimilar to this wrongful death claim arising out of medical malpractice as to make it immaterial. Therefore, the trial court's finding of a lack of prejudice should not be disturbed.

VIII THE TRIAL COURT DID NOT ERR IN SUBMITTING INSTRUCTION NO. 10, THE VERDICT DIRECTING INSTRUCTION AGAINST DEFENDANT TAYLOR BECAUSE THAT INSTRUCTION WAS SUPPORTED BY THE EVIDENCE IN THAT THERE WAS SUBSTANTIAL EVIDENCE THAT DEFENDANT TAYLOR'S FAILURE TO ADVOCATE FOR DIALYSIS CAUSED MARY HARVEY'S DEATH, AND THERE WAS SUBSTANTIAL EVIDENCE THAT DEFENDANT TAYLOR WAS NEGLIGENT AS TO DIALYSIS AND THE URINARY TRACT INFECTION.

Plaintiff outlines in his Brief extensively the evidence against Defendant Taylor, and reincorporates that evidence in response to Point IV of Defendant Taylor's Brief. There is an abundance of substantial evidence to support the verdict directing instruction, and the Trial Court correctly submitted such instruction.

CONCLUSION

For all of the above-stated reasons, Plaintiff/Respondent Willie Harvey respectfully requests that this Honorable Court affirm the judgment of the Trial Court.

Respectfully submitted,

FRANK, DOLAN & MUELLER LLC

Joseph A. Frank #38241
David T. Dolan #45390
Attorneys for Plaintiff
308 North 21st Street, Suite 401
St. Louis, MO 63103-1600
(314) 421-2430
Fax: (314) 421-4404

IN THE SUPREME COURT OF MISSOURI

WILLIE HARVEY,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	SUPREME COURT NO. 84449
	)	
DENISE TAYLOR, M.D., and	)	
WENDELL WILLIAMS, M.D.,	)	
	)	
Defendants-Appellants.	)	

CERTIFICATE OF COMPLIANCE

Joseph A. Frank, the undersigned attorney of record for Plaintiff-Respondent Willie Harvey in the above-referenced appeal, certifies pursuant to Supreme Court Rule 84.06(c) that:

1. The Brief complies with the limitations contained in Supreme Court Rule 84.06;

2. The Brief, excluding the cover page, signature blocks and certificates contains 19,187 words according to the word count total contained in Corel WordPerfect Suite 8 software with which it was prepared; and

3. The disk accompanying this Brief has been scanned for viruses, and to the best knowledge, information and belief of the undersigned, is virus free.

FRANK, DOLAN & MUELLER LLC

Joseph A. Frank #38241
David T. Dolan #45390
Attorneys for Plaintiff
308 North 21st Street, Suite 401
St. Louis, MO 63103-1600
(314) 421-2430
Fax: (314) 421-4404

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Defendants-Appellants.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of Respondent's Brief, and a high density, IBM-PC-compatible floppy disk containing same, was hand-delivered, this 7th day of July, 2002, to Mr. D. Paul Myre, Anderson & Gilbert, Attorneys for Denise Taylor, M.D., 200 South Hanley, Suite 710, St. Louis, MO 63105; and Ms. Mary Reitz, The O'Malley Law Firm, Attorneys for Wendell Williams, M.D., 10 South Brentwood, Suite 102, P. O. Box 16124, St. Louis, MO 63105-0824.

FRANK, DOLAN & MUELLER LLC

Joseph A. Frank #38241
David T. Dolan #45390
Attorneys for Plaintiff
308 North 21st Street, Suite 401
St. Louis, MO 63103-1600
(314) 421-2430
Fax: (314) 421-4404