IN THE SUPREME COURT OF MISSOURI

WILLIE HARVEY	)	
	)	Circuit Court No. 972-9286
Plaintiff/Respondent	)	Court Appeals No. ED79-699
	)	Supreme Court No. SC 84449
vs.	)	
	)	Court of Appeals, Eastern District
	)	Circuit Court for City of St. Louis
WENDELL WILLIAMS, M.D.,	)	
ERIC WASHINGTON, M.D., and	)	
DENISE TAYLOR, M.D.,	)	
	)	
Defendants/Appellants.	)	

TRANSFER FROM MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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

SUBSTITUTE BRIEF OF DEFENDANT/APPELLANT DENISE TAYLOR, M.D.

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SUPREME COURT OF MISSOURI

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Defendants/Appellants.	)	

Appeal from the Circuit Court, City of St. Louis
Honorable Joan M. Burger, Judge

SUBSTITUTE BRIEF OF DEFENDANT/APPELLANT
DENISE TAYLOR, M.D.

JURISDICTIONAL STATEMENT

This Appeal is before this Court on transfer by this Court under Rule 83.04 from the Missouri Court of Appeals, Eastern District after the opinion in that court affirming the judgment of the Circuit Court of the City of St. Louis.

The case arose out of a civil action in the nature of a medical malpractice/wrongful death suit brought by Plaintiff/Respondent, against Defendants/Appellants to recover money damages sustained by Plaintiff as a result of the death of his wife, Mary Harvey, allegedly caused by negligent treatment at the hands of Defendants/Appellants.

Trial was had before a jury which awarded Plaintiff damages aggregating $1,200,000.00. From the Judgment entered in accordance with this verdict, Defendant/Appellant, Denise Taylor, M.D., whose Motions for Judgment Notwithstanding the Verdict and for a New Trial were timely filed and denied, has appealed to the Missouri Court of Appeals, Eastern District, which affirmed the judgment.

This case is a civil action for money damages in the Circuit Court of the City of St. Louis so that this appeal was within the general appellant jurisdiction of the Missouri Court of Appeals as set out in Article V, §3 of the Missouri Constitution (as amended August 3, 1976). None of the grounds which under the Constitution would confer exclusive jurisdiction upon the Supreme Court of Missouri were present; hence the jurisdiction of the Missouri Court of Appeals, Eastern District, were invoked.

STATEMENT OF FACT

On September 16, 1995, this Defendant, Dr. Denise Taylor, a neurologist, was asked by Dr. Cynthia Dugas Elliot, an internist, to examine and consult with her concerning Mary Harvey, one of Dr. Dugas Elliot's patients at Deaconess Medical Center (Tr. 594-598.)

Dr. Dugas Elliot, who had been treating Mrs. Harvey for about five years (Tr. 477), had referred her to Dr. Eric Washington, an orthopedic surgeon at Deaconess, for a right knee replacement (Tr. 332-333, 471-477). Upon her admission, Mrs. Harvey, 67 years of age, had presented with a medical history of chronic renal insufficiency, high blood pressure and rheumatoid arthritis as well as a left knee replacement (Tr. 255). Dr. Washington's standard pre-operation testing had shown that her renal condition was stable (Tr. 482). Dr. Washington had successfully performed the surgery on September 14, 2001 (Tr. 399, 491), and, as was his practice, he had referred the medical management of Mrs. Harvey's condition back to Dr. Dugas Elliot, her primary care physician (Tr. 432-433, 492-494).

On the day after surgery, September 15, Mrs. Harvey had been up and walking (Tr. 496), but on September 16, she started having seizures (Tr. 256, 494). At this point, Dr. Dugas Elliot called the neurologist, Dr. Taylor, in for consultation (Tr. 495). Upon being called into the case, Dr. Taylor ordered administration of dilantin (an anti-convulsive medication) to Mrs. Harvey (Tr. 599) and on the next day, September 17, performed an extensive neurological

examination upon Mrs. Harvey (Tr. 599-608). Dr. Taylor concluded that Mrs. Harvey had a new onset of seizures, which several factors in her history might have influenced (Tr. 606). A CT had been ordered, and Dr. Taylor suggested that Mrs. Harvey have an EEG (electroencephalogram), ordered additional dilantin, and asked for a carotid Doppler (Tr. 606-607). Dr. Taylor noted Mrs. Harvey's long-standing renal failure (Tr. 611). Dr. Taylor then discussed her findings with Dr. Dugas Elliot, Mrs. Harvey's primary care doctor, talking with her about Mrs. Harvey's rheumatoid arthritis, her creatinine, and her renal failure (Tr. 612-613). Mrs. Harvey responded to the dilantin and there was no report of generalized seizure activity from September 17 until September 27 (Tr. 257-58, 497, 621).

On September 22 Mrs. Harvey was transferred to the Rehabilitation Unit at Deaconess. Dr. Washington, Dr. Dugas Elliot, and Dr. Taylor concurred in Mrs. Harvey's release to Rehabilitation (Tr. 499). On that day Dr. Taylor talked with Dr. Dugas Elliot about Mrs. Harvey's chronic renal failure (Tr. 616), and Dr. Dugas Elliot was going to monitor Mrs. Harvey's metabolic state (Tr. 617-619).

While in Rehabilitation, it was discovered that Mrs. Harvey had a broken hip and she was readmitted to the hospital on September 24 (Tr. 257, 504). On September 25 Dr. Dugas Elliot, with the agreement of Dr. Taylor, requested a kidney consult from Dr. Satya Sagar, a nephrologist or kidney specialist (Tr. 615-618) who was the head of the Dialysis Center at Deaconess (Tr. 628, 808). Dr. Sagar's notes on Mrs. Harvey's medical record for September 25 indicate that at

that time he was aware of Mrs. Harvey's prior seizures (Tr. 622) and that he had been consulted "in relation to deteriorating renal functions." (Tr. 623).

The hip fracture was repaired on September 26. On September 27, Mrs. Harvey's seizures recurred, on which date Dr. Taylor was called back on the case and saw Mrs. Harvey again for the first time since September 22. (Tr. 631). By this time the nephrologist, Dr. Sagar, was already involved in the case (Tr. 619, 647).

On Sept 28, Dr. Sagar, the nephrologist noted on the record:

> Seizures may be metabolic acidosis, being connected renal failure, possibly chronic. Creatinine clearance. 8cc per minute. End-stage renal disease. May need to be dialyzed in the next few days (Tr. 627-628).

About that time Dr. Dugas Elliott signed off the case (Tr. 643) and Dr. Taylor on September 29 talked with Dr. Wendell Williams, a cardiologist who had been consulting Dr. Washington (Tr. 653) and with the Dr. Sagar's assistant, Sr. Purtell, about her concerns (Tr. 643-644).

On October 1, Dr. Taylor talked with Dr. Purtell regarding the need for dialysis (Tr. 629). Dr. Purtell's note for that day read:

> Dialysis not indicated this a.m. will continue to monitor. Will discuss with family. Patient has told husband in past that she did not want dialysis.

The next day, October 2, dialysis was started on Dr. Purtell's order (Tr. 630). Dr. Sagar testified, by way, of deposition:

> . . . the family was reluctant to consider dialysis. They didn't even want to accept dialysis in the beginning, and that was based on the patient's wishes who did not want dialysis (Tr. 807).

From September 30 to October 1 Mrs. Harvey experienced a severe neurological deterioration from which she never recovered (Tr. 258). By October 1 she was comatose (Tr. 640). She was subsequently put on life support and died on October 21 (Tr. 255).

As to the initiation of dialysis, Dr. Taylor testified that the start and timing of the dialysis's would be the decision of Dr. Sagar, the nephrologist, and head of the dialysis center at the hospital (Tr. 628, 632).

Plaintiff's expert witness, Dr. David Coleman, testified that Dr. Taylor's medical notes for the period between September 26 and October 1 indicated that Mrs. Harvey's seizures were of metabolic origin in reference to renal failure and that this made him believe it was incumbent upon Dr. Taylor to talk to a nephrologist about instituting dialysis. In his opinion her failure to do so constituted "a breach of standard of care" (Tr. 306), and, with the caveat that the nephrologist, and not Dr. Taylor, would be the one to do the dialysis, Dr. Taylor's "not sufficiently advocating for initiating the dialysis" amounted to "a breach of standard of care" and contributed to Mary Harvey's cause of death (Tr. 322). He

believed that if dialysis had been initiated on or before September 29 Mrs. Harvey would have survived (Tr. 324-325).

Dr. Coleman further testified that there was evidence available to Dr. Taylor prior to October 1 that Mrs. Harvey had a urinary tract infection that was not being treated, and that Dr. Taylor's failure to prescribe an appropriate antibiotic amounted to "a breach of standard of care" (Tr. 297), and that if she [Mrs. Harvey] had been prescribed an appropriate antibiotic for pseudomonas in her urine he thought she would have survived (Tr. 324-325).

Dr. Taylor testified that there was no evidence that a urinary tract infection was causing Mrs. Harvey's seizures (Tr. 626), that if there were a urinary tract infection, she would not have treated it where a primary care doctor and a nephrologist were also seeing the patient. (Tr. 625)

Dr. Edward Hogan, a board certified neurologist called as a witness for Dr. Taylor, testified from his review of the medical records that Dr. Taylor used the degree of skill and learning ordinarily used under the same or similar circumstances by a member of Dr. Taylor's profession in the care and treatment she rendered Mrs. Harvey (Tr. 815), and that he thought she gave Mrs. Harvey excellent care (Tr. 815, 828). He did not think a neurology consultant such as Dr. Taylor would assume treatment of a urinary tract infection (Tr. 824) nor did he think that a neurologist would start dialysis (Tr. 824-825) and that he thought Dr. Taylor had effectively communicated her concerns to the other doctors involved (Tr. 826).

Dr. Donald Graham, an infectious disease specialist testifying for defendant Dr. Washington (Tr. 748, 742), also working from the medical records, testified that Mrs. Harvey did not at any time suffer from a pseudomonas urinary tract infection (Tr. 779).

Dr. Arnold Tepper, an internist testifying for defendant Dr. Williams, (Tr. 716) stated that Mrs. Harvey did not have a urinary tract infection during the period between September 24 and October 1 (Tr. 731).

Dr. William Burmeister, an internist specializing in infectious disease, called as a witness by Dr. Williams, testified that Mrs. Harvey did not have a pseudomonas urinary tract infection between September 24 and September 29 (Tr. III, Page 61).

Defendant Dr. Wendell Williams testified that, it was his opinion that Mrs. Harvey did not have an active urinary tract infection during the period of September 26 through October 1 (Tr. 710).

Further than this, Defendant/Appellant, Denise Taylor, M.D., adopts and concurs in the Statement of Fact submitted in his Brief by Defendant/Appellant Wendell Williams, M.D., the other Defendant/Appellant herein.

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 10, THE VERDICT DIRECTING INSTRUCTION AGAINST DEFENDANT/APPELLANT DENISE TAYLOR, M.D., AS TO HER ALLEGED FAILURE TO ADVOCATE FOR DIALYSIS TREATMENT, BECAUSE THAT INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE IN THAT THERE WAS NO SUBSTANTIAL EVIDENCE THAT, BUT FOR SUCH FAILURE, DIALYSIS WOULD HAVE BEEN INITIATED IN TIME TO HAVE PREVENTED MARY HARVEY'S DEATH.

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 862 [5] (Mo. banc 1993);

Coonrod v. Archer-Daniels-Midland, 984 S.W.2d 529, 532 [2] (Mo. App. E.D. 1998);

Steward v. Goetz, 945 S.W.2d 520, 528 [16] (Mo. App. E.D. 1997)

Epic, Inc. v. City of Kansas City, 37 S.W.3d 360 (Mo. App. W.D. 2000);

Kuehle v. Patrick, 646 S.W. 2d 845 (Mo. App. E.D. 1982);

McIntyre v. M&K Dept. Store, Inc., 435 S.W.2d 737 (St. Louis App. 1968);

Gavin v. H.D. Tousley Company, Inc., 395 S.W.2d 266, 270 (St. Louis App. 1965);

Eidson v. Reproductive Health Services, 863 S.W.2d 621 (Mo. App. E.D. 1991).

II

THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 10 TO THE JURY BECAUSE THAT INSTRUCTION GAVE A ROVING COMMISSION TO THE JURY IN THAT INSTRUCTION NO. 10 HYPOTHESIZED THAT DR. TAYLOR "FAILED TO ADVOCATE FOR DIALYSIS" AND ADVOCATE IS SUCH AN UNUSUAL, BROAD, VAGUE, AND IMPRECISE VERB AS TO GIVE THE JURY A ROVING COMMISSION TO SPECULATE AS TO JUST WHAT DR. TAYLOR DID OR DID NOT DO THAT MIGHT HAVE CAUSED MARY HARVEY'S DEATH.

Karnes v. Ray, 809 S.W.2d 738, 742 [10] (Mo. App. S.D. 1991);

Missouri Mirror, Inc v. Glaziers, Architectural Metal and Glassworkers Local No. 513, 806 S.W.2d 469 (Mo. App. W.D. 1991);

Grindstaff v. Tyggett, 655 S.W.2d 70, 74 [4] (Mo. App. E.D. 1983).

III

THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 10, THE VERDICT DIRECTING INSTRUCTION AGAINST DEFENDANT/APPELLANT, DENISE TAYLOR, M.D., BECAUSE THAT INSTRUCTION ASSUMED THE DISPUTED FACT THAT MARY HARVEY HAD A PSEUDOMONAS URINARY TRACT INFECTION IN THAT THERE WAS SUBSTANTIAL EVIDENCE THAT SHE DID NOT HAVE A PSEUDOMONAS URINARY TRACT INFECTION.

Lasky v. Union Electric Company, 936 S.W.2d 797, 800-801 [2-4] (Mo. banc 1997);

Spring v. Kansas City Transp. Auth., 873 S.W.2d 224, 226-227 [10] (Mo. banc 1994);

Brown v. Van Noy, 879 S.W.2d 667 [16] (Mo. App. W.D. 1994).

IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT/ APPELLANT DENISE TAYLOR, M.D'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE IN THAT:

A. AS TO DR. TAYLOR'S ALLEGED FAILURE TO ADVOCATE FOR DIALYSIS TREATMENT THERE WAS NO SUBSTANTIAL EVIDENCE THAT, BUT FOR SUCH FAILURE, DIALYSIS WOULD HAVE BEEN INITIATED IN TIME TO HAVE PREVENTED MARY HARVEY'S DEATH.

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 862 [5] (Mo. banc 1993);

Coonrod v. Archer-Daniels-Midland, 984 S.W.2d 529, 532 [2] (Mo. App. E.D. 1998);

Steward v. Goetz, 945 S.W.2d 520, 528 [16] (Mo. App. E.D. 1997)

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Gavin v. H.D. Tousley Company, Inc., 395 S.W.2d 266, 270 (St. Louis App. 1965);

Eidson v. Reproductive Health Services, 863 S.W.2d 621 (Mo. App. E.D. 1991).

B. AS TO BOTH THE ALLEGED FAILURE TO ADVOCATE FOR DIALYSIS AND THE ALLEGED FAILURE TO PRESCRIBE PROPER MEDICATION THE ONLY TESTIMONY AS TO DR. TAYLOR'S NEGLIGENCE WAS BASED ON AN IMPROPER AND POSSIBLY INDIVIDUALISTIC STANDARD OF CARE.

Swope v. Printz, 468 S.W.2d 34, 40 [12] (Mo. 1971);

Koontz v. Thurber, 870 S.W.2d 885, 890 (Mo. App. W.D. 1993);

Dine v. Williams, 830 S.W.2d 453, 456 (Mo. App. W.D. 1992); MAI Mo. 1106.

V, VI, VII, and VIII

FOR POINTS V, VI, VII, AND VIII OF THIS BRIEF DEFENDANT/APPELLANT DENISE TAYLOR, M.D., CONCURS IN, ADOPTS AND INCORPORATES HEREIN BY REFERENCE POINTS II, III, IV AND V OF THE SUBSTITUTE BRIEF OF DEFENDANT/APPELLANT WENDELL WILLIAMS, M.D., DEALING RESPECTIVELY WITH:

A. INSTRUCTIONAL ERROR AS TO CONTRIBUTING AND COMBINED CAUSATION;

B. DR. COLEMAN'S TESTIMONY AT TRIAL DIFFERING FROM HIS DEPOSITION TESTIMONY;

C. THE FAILURE OF JUROR LOLITA JONES TO DISCLOSE INVOLVMENT IN LAW SUITS; AND

D. **PLAINTIFFS INTRODUCTION DURING CLOSING ARGUMENT OF "ARGUMENT EXHIBIT B,"**

POINTS AS TO WHICH DR. TAYLOR HAD JOINED WITH CO-DEFENDANTS IN HER MOTION FOR NEW TRIAL.

ARGUMENT

I. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 10, THE VERDICT DIRECTING INSTRUCTION AGAINST DEFENDANT/APPELLANT DENISE TAYLOR, M.D., AS TO HER ALLEGED FAILURE TO ADVOCATE FOR DIALYSIS TREATMENT, BECAUSE THAT INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE IN THAT THERE WAS NO SUBSTANTIAL EVIDENCE THAT, BUT FOR SUCH FAILURE, DIALYSIS WOULD HAVE BEEN INITIATED IN TIME TO HAVE PREVENTED MARY HARVEY'S DEATH.

The Standard of Review. The issue as to the sufficiency of the evidence to support a verdict is a question of law to be decided de novo by the appellate court, which must view the evidence in the light most favorable to the plaintiff. Coonrod v. Archer-Daniels-Midland, 984 S.W.2d 529, 532 [2] (Mo. App. E.D. 1998). This Court should review the trial Court's decision only with reference to the sufficiency of the evidence as to issues actually submitted by the plaintiff to the jury. Kuehle v. Patrick, 646 S.W.2d 845 (Mo. App. E.D. 1982); McIntyre v. M&K Dept. Store, Inc., 435 S.W.2d 737 (St. Louis App. 1968). Whether expert opinion is based on and supported by sufficient facts or evidence is a question of law for the Appellate Court. Gavin v. H.D. Tousley Company, Inc., 395 S.W.2d 266, 270 (St. Louis App. 1965).

Plaintiff Willie Harvey, submitted his case against Defendant Denise Taylor, M.D., for the wrongful death of his wife, Mary Harvey, on two alternative grounds: first, that Dr. Taylor failed to advocate dialysis treatment for Mrs. Harvey, and, second, that Dr. Taylor failed to prescribe an antibiotic which would treat Mary Harvey's alleged pseudomonas urinary tract infection, asserting that each of these alleged failures caused or contributed to cause Mary Harvey's death.

INSTRUCTION NO. 10

> Your verdict must be for the plaintiff and against defendant Denise Taylor, M.D., if you believe:
>
> First, defendant Denise Taylor, M.D., either:
>
> failed to advocate for dialysis treatment for Mary Harvey's kidney failure on or before September 29, 1995, or defendant Denise Taylor, M.D., 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 Denise Taylor, M.D., was thereby negligent, and
>
> Third, such negligence directly caused or directly contributed to cause the death of Mary Harvey. (Legal File Volume 1 page 191)

Whatever "failure to advocate" may mean, the only evidence tending to show that the timing of dialysis was a causative factor in Mrs. Harvey's death was the testimony of plaintiff's expert Dr. Coleman that "if dialysis had been the initiated on or before September 29th, I think she [Mary Harvey] would have survived (Tr.

324-325)." This testimony of Dr. Coleman's is no evidence whatever that the failure, if there were such a failure, of Dr. Taylor to "advocate for dialysis treatment" caused the failure to initiate dialysis treatment. On this question of causation there could be no submission of failure to advocate for dialysis unless there were substantial evidence that, but for the failure of advocacy, dialysis would have been initiated in time to have saved Mrs. Harvey's life.

As to the "but for" rule see Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 862 [5] (Mo. banc 1993) where the Supreme Court stated:

> Some lawyers look upon the "but for" test as a particularly onerous and difficult test for causation. Nothing could be further from the truth. "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 has nothing to do with. (l.c. 863 S.W.2d 862)

Having thus firmly endorsed the "but for" test, the Supreme Court proceeded to apply it to a situation that is all but identical with the situation in the case at bar.

> If Nurse Schwarz failed to inform Dr. Venglarck of Danny's presence and condition at the hospital, and the doctor had no other source of this information, then the jury could have concluded that "but for" the nurse's failure to inform the doctor, Danny would not have developed polio. As such, her conduct meets the "but for" test and, in that respect it is causal.

> This is a classic example of applying the "but for" causation test to two contributing causes.
>
> On the other hand, if the doctor had another source of information as to Danny's presence and condition at the hospital, then the doctor's negligence would have been independently sufficient to cause the injury to Danny. In this circumstance, Nurse Schwarz's failure to tell the doctor something he already knew would not be causal absent a convincing policy argument that this situation should be treated as "two fires" case. (l.c. 863S.W.2d 862)

In this connection it must be borne in mind that expert opinion must be supported by sufficient facts, Gavin v. H.D. Tousley Company, Inc., 395 S.W.2d 270 (St. Louis App. 1965). So here we have an interesting development. The only evidence that prompt initiation of dialysis was necessary in Mrs. Harvey's case was the testimony of Plaintiff's expert Dr. Coleman, and Dr. Coleman's testimony was based upon his examination of Dr. Taylor's medical notes:

> "my criticism with Dr. Taylor is in her notes in this case during that time period [between September 26th and October 1st] 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 conclusive medication. And I believe that it is incumbent upon a neurologist to talk to a nephrologist about instituting dialysis in such a patient." (Tr. 306).

Now, if Dr. Taylor's notes in the medical record were sufficient to convince Dr. Coleman that prompt initiation of dialysis was necessary, then they must have been sufficient to convince the nephrologists, Dr. Sagar and Dr. Purtell of the same thing, in which case, applying the "but for' test of causation, Dr. Taylor's failure to "advocate" would not have been a causative factor.

Conversely, if Dr. Taylor's notes were insufficient to apprise Dr. Sagar and Dr. Purtell of the necessity for prompt initiation of dialysis, then they must have also constituted an insufficient basis for Dr. Coleman's testimony that prompt initiation of dialysis was necessary. .

Therefore, on the dialysis issue we have a situation where it may be fairly said "Heads Defendant Dr. Taylor wins/Tails Plaintiff loses." If Dr. Taylor's notes are sufficient indications that prompt initiation of dialysis was necessary then Dr. Taylor prevails under the "but for" test as to causation. If the notes were insufficient indication that dialysis was necessary then there is simply no evidence that prompt initiation of dialysis was necessary and Plaintiff has failed to make a submissible case.

In any event, the question of whether or not one person refrained from doing something because another person did not advocate it is not the subject of medical expertise in the same way as the connections of nerves and tissues or the effects of various medications. Thus unless supported by some kind of factual evidence Dr. Coleman's opinion that dialysis was not initiated because Dr. Taylor did not sufficiently advocate for it is not entitled to credence as a matter of expert

opinion, and, without some kind of evidentiary support, it is merely an unwarranted conclusion.

How would Dr. Coleman know why Dr. Sagar did not initiate dialysis until October 2? Actually, as his testimony reveals, Dr. Coleman does not profess to know this. He merely makes the grand assertion that the supposedly insufficient advocacy contributed to Mrs. Harvey's death (Tr. 322) and ignores an essential link in the chain of causation between the failure to advocate by Dr. Taylor and the death of Mrs. Harvey. The essential link, as to which Dr. Coleman's testimony furnishes no evidence, is that the allegedly untimely initiation of dialysis by the nephrologists, Dr. Sagar and Dr. Purtell, was caused by Dr. Taylor's insufficient advocacy. Therefore, we must search the other evidence in order to find the missing link, and upon searching it will become apparent that the missing link is nowhere to be found.

Assuming, for the sake of argument, that the failure to initiate dialysis prior to September 29th caused the death of Mrs. Harvey, there is still no evidence, direct or indirect, that Dr. Taylor's "failure to advocate" dialysis caused the delay in initiating dialysis. Dr. Coleman based his testimony on his examination of medical records (Tr. 254). There is nothing in those records to the effect that "because Dr. Taylor did not advocate dialysis it was not initiated," or "discussion of dialysis; Dr. Taylor not enthusiastic, dialysis deferred", or that would otherwise suggest that but for Dr. Taylor's "failure to advocate", dialysis would have been initiated prior to September 29th." Nor is there anything elsewhere in the evidence

from which it could be inferred that Dr. Sagar and Dr. Purtell did not initiate dialysis prior to that date because Dr. Taylor did not suggest it to them.

Dr. Taylor was only a neurological consultant in this case, and she testified that she never requested a nephrologist consult (Tr. 647, 648). But she did testify that she discussed Mrs. Harvey's history of renal failure with the primary physician Dr. Dugas Elliot when she was first called into the case (Tr. 612), and that Dr. Dugas Elliot was going to monitor Mrs. Harvey's renal function (Tr. 618). She testified further that she talked with Dr. Dugas Elliot again about chronic renal failure on September 22, (Tr. 615-616) and that she agreed that Dr. Dugas Elliot should request a kidney consult from Dr. Satya Sagar, a nephrologist (or kidney specialist) (Tr. 615-618), who was the head of the dialysis center at Deaconess (Tr. 628-808).

On September 22 Mrs. Harvey, was transferred to the rehabilitation unit at Deaconess (Tr. 257, 499, 627, 631). Dr. Washington, Dr. Dugas Elliott, and Dr. Taylor concurred in her release to rehabilitation (Tr. 499). While in the rehabilitation unit it was discovered that Mrs. Harvey had a broken hip, and she was readmitted to Deaconess Hospital on September 24 (Tr. 257, 504).

On September 25, Dr. Dugas Elliot did consult Dr. Sagar, and Dr. Sagar's notation on Mrs. Harvey's medical record for that date, noted that he had been consulted "in relation to deteriorating renal functions," (Tr. 623). On September 26, Dr. Sagar saw Mrs. Harvey and his notes for that day indicated that Mrs. Harvey was in metabolic acidosis, which is part of renal failure (Tr. 424). On

September 27, when the seizures reoccurred. Dr. Taylor was called back onto the case and saw Mrs. Harvey (Tr. 631). At that time the nephrologist, Dr. Sagar, was already on the case (Tr. 648). The next day, September 28, Dr. Sagar noted on Mrs. Harvey's records:

> Seizures, may be metabolic acidosis, being corrected. Renal failure, possibly chronic. Creatinine clearance .8cc per minute. End-stage renal disease. May need to be dialysized in the next few days." (Tr. 627-628).

Dr. Taylor testified that on October 1 she talked about with Dr. Sagar's assistant Dr. Purtell regarding the need for dialysis, (Tr. 629). Dr. Purtell's note for that day reads:

> Dialysis not indicated this a.m. Will continue to monitor. Will discuss with family. Patient has told husband in past that she did not want dialysis (Tr. 629).

The next day, October 2, dialysis was started on Dr. Purtell's order (Tr. 630).

Dr. Sagar, the nephrologist, testified by way of deposition:

> "… the family was reluctant to consider dialysis. They didn't even want to accept dialysis in the beginning and that was based on the patient's wishes who did not want dialysis," (Tr. 807).

Thus, it would appear that Dr. Taylor discussed Mrs. Harvey's renal problems with at least three other doctors who were on the case, Dr. Dugas Elliot, Dr. Sagar and Dr. Purtell. Certainly, these doctors knew that dialysis was a

regular procedure in cases of kidney failure. Although the jury may not have believed Dr. Taylor's testimony in this respect, the medical records reveal that Dr. Dugas Elliot, Dr. Sagar and Dr. Purtell were all aware of Mrs. Harvey's renal failure (Tr. 255-258, 269, 623, 627-629). Moreover, Dr. Taylor's notes in the medical record were available to Plaintiff's expert witness, Dr. Coleman, who testified that Dr. Taylor's notes indicated that dialysis should have been considered at an early date (Tr. 306).

Nowhere in the record is there any statement by anybody or any evidence of any kind that the initiation of dialysis was delayed or deferred <u>because</u> of anything that Dr. Taylor did or failed to do, said or failed to say, advocated or failed to advocate.

Ordinarily the burden would be on the plaintiff to prove each essential element of his case. But because proving "failure to advocate" involves proving a negative, it might be argued that it would be incumbent upon Dr. Taylor to prove her advocacy, and it could be further argued that the jury may not have believed Dr. Taylor's testimony that she talked with the other doctors about renal failure and dialysis. However, as indicated above, the medical records show that the other doctors were all aware of Mrs. Harvey's seizures and her renal problems, and as pointed out by Plaintiff's expert, Dr. Coleman, perusal of Dr. Taylor's notes was sufficient to convince him of the necessity for prompt dialysis

The burden of proof as to <u>causation</u> is still upon Plaintiff, and upon causation, as upon any other issue necessary to sustain his recovery, Plaintiff's

proof may not depend upon guesswork, conjecture and speculation, and the evidence should have a tendency to exclude every reasonable conclusion other than the one desired. Steward v.Goetz, 945 S.W.2d 520, 528 [16] (Mo. App. E.D. 1997); Eidson v. Reproduction Health Services, 863 S.W.2d 621, 627 (Mo. App. E.D. 1993).

In submitting his case against Dr. Taylor on the issue of "failing to advocate" plaintiff seems to recognize the fact that, as a specialist in neurology who was called into the case by the primary physician for consultation on neurology, Dr. Taylor was in no position to initiate dialysis over the heads of Dr. Dugas Elliott, the primary care physician, and Dr. Sagar, the kidney specialist and head of the hospital's dialysis unit. The only way in which Dr. Taylor's activity or inactivity, suggestion or demand, could have caused the asserted delay in initiating dialysis would be if it had caused Dr. Dugas Elliott and Dr. Sagar to delay the initiation of dialysis. There is no evidence that Dr. Taylor's conduct caused any such delay. The only persons who could speak to that are Dr. Dugas Elliott, Dr. Sagar and Dr. Purtell, and they are silent as to Dr. Taylor's role into the situation. Dr. Dugas Elliott did not testify at all. Neither did the nephrologists, Dr. Sagar and Dr. Purtell, although two short sections of Dr. Sagar's deposition were read into evidence (Tr. 421-438, 808-809) and, there Dr. Sagar did not testify that he waited until October 2 to initiate dialysis because of any failure in comminication on the part of Dr. Taylor. On the contrary he stated that when he saw Mrs. Harvey on September 28 he did not feel that she needed dialysis, but that on October 1 she

did, and that his judgments were based on a change in renal function, biochemistry and the clinical assessment (Tr. 436-438).

Suppose Dr. Dugas Elliott, Dr. Sagar, and Dr. Purtell had been asked "if Dr. Taylor had advocated for an earlier initiation of dialysis would you have initiated dialysis on or before September 29th," What would they have answered?

A. What do you mean by "advocate"?

B. Of course we would have, we were ready to go and only hesitated because we were uncertain as to Dr. Taylor's position on the matter.

C. (By Dr. Sagar) No, I respect Dr. Taylor's expertise as a neurologist, but she is not a kidney specialist and I am, and I would have used my own judgment as head of the dialysis unit here as to when to initiate dialysis.

Only answer B, or something along similar lines, would have satisfied the "but for" rule as to establishing causation and provided that element, otherwise missing in plaintiff's case. But, of course, all this is wild speculation. The appellate court should not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative or forced inferences, Epic, Inc v. City of Kansas City, 375 S.W.2d 360, 369 [12] (Mo. App. W.D. 2000).

From all this it is apparent that the situation of Dr. Taylor in the instant case is analogous to the situation of Nurse Schwarz in Callahan. According to Plaintiff's own theory of the case and according to the testimony of Plaintiff's

witness, Dr. Coleman, there were sources other than Dr. Taylor's advocacy, namely Dr. Taylor's notes, which were sufficient to apprise treating doctor, Dr. Dugas Elliot and the nephrologists Dr. Sagar, and Dr. Purtell, of the necessity for prompt initiation of dialysis. Therefore Dr. Taylor's alleged "insufficient advocacy" fails to meet the but for test as to causation.

Instruction No. 10 as it related to advocacy for dialysis was not supported by the evidence, and the trial court erred in giving that instruction.

II. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 10 TO THE JURY BECAUSE THAT INSTRUCTION GAVE A ROVING COMMISSION TO THE JURY IN THAT INSTRUCTION NO. 10 HYPOTHESIZED THAT DR. TAYLOR "FAILED TO ADVOCATE FOR DIALYSIS" IN THAT AND ADVOCATE IS SUCH AN UNUSUAL, BROAD, VAGUE AND INPRECISE VERB AS TO GIVE THE JURY A ROVING COMMISSION TO SPECULATE AS TO JUST WHAT DR. TAYLOR DID OR DID NOT DO THAT MIGHT HAVE CAUSED MARY HARVEY'S DEATH.

Standard of Review. The question as to the meaning of an instruction is a question of law and therefore the standard for review would require a de novo determination by the Court of Appeals. Epic, Inc. v. City of Kansas City, 37 S.W.3d 360 (Mo. App. W.D. 2000).

The trial court gave Instruction No. 10 in the following form:

INSTRUCTION NO. 10

Your verdict must be for the plaintiff and against defendant Denise Taylor, M.D., if you believe:

First, defendant Denise Taylor, M.D., either:

Failed to advocate for dialysis treatment for Mary Harvey's kidney failure on or before September 29, 1995, or defendant Denise Taylor, M.D., 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 Denise Taylor, M.D., was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause the death of Mary Harvey. (Legal File Volume 1 page 191)

The word "advocate" in its verb form is a rather unusual term, especially as applied to medical treatments and procedures. Dr. Coleman, the medical expert in using the word "advocate" (or more precisely responding to counsel for plaintiff's suggestion of the word "advocating") (Tr. 322) did not define the word, and it was not clear to the jury in what manner Dr. Taylor should have "advocated" for dialysis. The jury was thus given a roving commission to speculate as to what act or omission on Dr. Taylor's part might have contributed to cause Mrs. Harvey's death. Instruction No. 10 was therefore erroneously misleading. Karnes v. Ray, 809 S.W.2d 738, 742 [10] (Mo. App. S.D. 1991); Mirror, Inc. v. Glaziers, Architectural Metal and Glassworker's Local No. 513, 806 S.W.2d 469, 474 (Mo.

App. E.D. 1991); Grindstaff v. Tygett, 655 S.W.2d 70, 74 [4] (Mo. App. E.D. 1983).

Given the situation at the trial of this case, where there was no evidence that anything that Dr. Taylor said or did or failed to do or say caused Dr. Sagar, the nephrologist, to delay the initiation of dialysis, the prejudicial nature of the instruction suggesting that she "failed to advocate for dialysis" is obvious.

In addition to criticizing Dr. Taylor for failure to advocate (Tr. 322), Dr. Coleman also criticized her for failure to talk to a nephrologist about dialysis about instituting dialysis (Tr. 306). There was evidence that Dr. Taylor did not talk to a nephrologist until September 28 and "talk" is a more concrete term than advocate and one that would have fit more tightly with the evidence. But plaintiff did not submit his case upon failure to talk. He elected to submit his case upon failure to advocate.

Under these circumstances, Plaintiff may well have wondered whether an instruction on failure to "talk" would have passed the "But For" test with the jury. Who would have believed that the nephrologists failed to start dialysis simply because Dr. Taylor did not talk to them about something of which those doctors were fully aware and which she had already laid out for them in writing?

Failing to "advocate", on the other hand, was a more evocative phrase in that it suggests failing to use the insistence, the eloquence, the demonstrative plausibility, the force of argument that would have compelled the nephrologists to start dialysis, and, since dialysis had not been initiated on or before September 29,

then obviously Dr. Taylor failed to do the necessary, whatever that may have been. In effect, the instruction, as given, directed the jury to return a verdict for Plaintiff if they found that Dr. Taylor "failed to do whatever it would have taken to compel the neurologists to start dialysis on or before September 29."

To uphold the giving of Instruction No. 10 as to advocacy would be to create, in the realm of medical malpractice litigation, a new doctrine, the "advocacy doctrine," under which a consulting physician would have to do more than present his findings or give his advice to the physician consulting him. He would be required, in the words of Dr. Coleman, to "sufficiently advocate" for whatever course of treatment some expert might later think appropriate. But what approach must he employ and to what lengths must this advocacy be carried, to arguing, to repeated telephone calls, to confronting the patients family or the hospital administration, to calling Bill McClellan, or going on a hunger strike? The instruction, as worded, suggests that the advocacy must be carried on by whatever lawful means are necessary and to whatever length is sufficient to bring about the desired result.

Under such a doctrine any advocacy that failed of the desired effect might be considered, quite logically, to be insufficient, which in turn would be tantamount to inferring negligence from an undesirable result. Surely this Court will not want to bring about such an unwarranted and undesirable innovation in the law of negligence.

III. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 10 THE VERDICT DIRECTING INSTRUCTION AGAINST DEFENDANT/APPELLANT, DENISE TAYLOR, M.D., BECAUSE THAT INSTRUCTION ASSUMED THE DISPUTED FACT THAT MARY HARVEY HAD A PSEUDOMONAS URINARY TRACT INFECTION IN THAT THERE WAS SUBSTANTIAL EVIDENCE THAT SHE DID NOT HAVE A PSEUDOMONAS URINARY TRACT INFECTION.

Standard of Review. Questions as to the correct construction or wording of an instruction are questions of law, and therefore to be decided by a court. Therefore, the standard of review on this issue is that of a de novo determination by the Court of Appeals, Epic, Inc. v. City of Kansas City. 37 S.W.3d 360 (Mo. App. W.D. 2000).

It was prejudicial error to give Instruction No. 10 because, the first hypothesis of, that instruction, in dealing with the disjunctive submission:

> . . . or defendant Denise Taylor, M.D., failed to prescribe Mary Harvey an antibiotic from September 26 through September 30, 1995 which would treat Mary Harvey's pseudomonas urinary tract infection,

assumes that Mrs. Harvey had a pseudomonas infection, which fact, was matter of dispute. Assuming a disputed fact in a verdict directing Instruction is error. Lasky v. Union Electric Company, 936 S.W.2d 797, 800-801[2-4] (Mo. banc 1997); Spring v. Kansas City Area Transp. Auth., 873 S.W.2d 224, 226-227 [10] (Mo. banc 1994); Brown v. Van Noy, 879 S.W.2d 667 [16] (Mo. App. W.D. 1994).

Whether or not Mrs. Harvey had pseudomonas urinary tract infection was definitely an essential element in plaintiff's case, and just as definitely it was an issue of fact that was in dispute.

Plaintiff's expert witness, Dr. David Coleman, testified that, based on his review of Mrs. Harvey's medical records, she had a urinary tract infection from September 24 through October 3 (Tr. 304) which contributed to her seizures (Tr. 305) and that if she has been treated with the appropriate antibiotic for pseudomonas in her urine and if dialysis had been initiated prior to September 29 she would have survived. (Tr. 324).

On the other hand, Dr. Taylor testified that there was no evidence that a urinary tract infection was causing Mrs. Harvey's seizures (Tr. 626).

Furthermore, Dr. Donald H. Graham, an infectious disease specialist testifying for defendant Dr. Washington (Tr. 748, 752), also working from his review of the medical records, was of the opinion that Mrs. Harvey did not, at any time, suffer from a pseudomonas urinary tract infection (Tr. 779).

Similarly, Dr. Arnold S. Tepper, an internist testifying for defendant Dr. Williams, (Tr. 716) stated that Mrs. Harvey did not have a urinary tract infection during the period between September 27 and October 1 (Tr. 731).

Also, Dr. William Burmeister, an internist specializing in infectious disease, called as a witness for Dr. Williams, testified that Mrs. Harvey did not have a pseudomonas urinary tract infection between September 24 and September 29 (Tr. III, 61).

And defendant Dr. Wendell N. Williams testified that, in his opinion that Mrs. Harvey did not have an active urinary tract infection during the period of September 26 through October 1 (Tr. 710).

Thus it is clear that whether or not Mrs. Harvey suffered from a pseudomonas urinary tract infection was a disputed element of plaintiff's case. Before the jury could assess liability under the pseudomonas infection theory it should have been required to find: (1) that Mrs. Harvey had a pseudomonas urinary tract infection, and (2) that Dr. Taylor failed to prescribe the appropriate antibiotic for its treatment. However, the trial court, in instructing upon Dr. Taylor's alleged failure to prescribe the appropriate antibiotic, erroneously implied that Mrs. Harvey, in fact, suffered from such an infection.

Under the guidelines laid down in Lasky and Brown, the pseudomonas infection part of Instruction No. 10 should have been broken down as follows:

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

It is evident that in the instant case the trial court's Instruction No. 10, as given, was, in this very respect, confusing to the jury, because, after they had retired to deliberate the jurors sent out to the court the following question (Tr. Vol. 3-283):

> "Based on the wording of instruction #8, #10, and #12, is the court stating that MH had a pseudomonas infection, or is that for the jury to decide." (Legal File Vol. 1 page 192)

The court answered somewhat cryptically: (Tr. Vol. 3-288);

> "The jury must be guided by the instructions as given. Please read or reread all the instructions." (Legal File Vol. 1-192).

Thereafter the jury brought in a verdict for plaintiff and against all defendants in the amount of $1,200,000. (Legal File Vol. 1, page 196).

IV THE TRIAL COURT ERRED IN DENYING DEFENDANT/APPELLANT DENISE TAYLOR, M.D.'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE IN THAT:

A. AS TO DR. TAYLOR'S ALLEGED FAILURE TO ADVOCATE FOR DIALYSIS TREATMENT THERE WAS NO SUBSTANTIAL EVIDENCE THAT, BUT FOR SUCH FAILURE DIALYSIS WOULD HAVE BEEN INITIATED IN TIME TO HAVE PREVENTED MARY HARVEY'S DEATH.

Standard of Review. The standard of review as to Point IV has been set out at length in connection with previous points. Issues as to sufficiency of evidence to

support a verdict involve questions of law to be decided de novo by the Appellate Court (see cases set out as to the standard of review in the preceding sections of this Brief).

A. Failure to Advocate for Dialysis. The Argument as to advocating for Dialysis has been fully developed along with supporting authorities under Point I of this Brief.

B. AS TO BOTH THE ALLEGED FAILURE TO ADVOCATE FOR DIALYSIS AND THE ALLEGED FAILURE TO PRESCRIBE PROPER MEDICATION THE ONLY TESTIMONY AS TO DR. TAYLOR'S NEGLIGENCE WAS BASED ON AN IMPROPER AND POSSIBLY INDIVIDUALISTIC STANDARD OF CARE.

B. Standard of Care. Evidence establishing the standard of care in medical negligence cases must be introduced by the use of expert testimony. Dine v. Williams, 830 S.W.2d 453, 456 (Mo. App. W.D. 1992). Expert testimony that the performance of a doctor was substandard must be based on the proper test of professional standards as set out at MAI 11.06, not upon some unknown and possibly individualistic standard. Swope v. Printz, 468 S.W.2d 34, 40 [12] (Mo. 1971) The pertinent inquiry is whether the physician exercised that degree of skill and learning ordinarily used under the same or similar circumstances by members of his profession Koontz v. Thurber, 870 S.W.2d 885,890 [5] (Mo. App. W.D. 1993).

Here again plaintiff has failed to introduce sufficient evidence of negligence, because nowhere does Dr. Coleman, the only witness to find fault with Dr. Taylor, testify that she failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of Dr. Taylor's profession (MAI 11.06) or accuse her in any words of similar implication. In fact, Dr. Coleman defined the word standard of care as it applied to any of the Defendants nor used any language remotely analogous to MAI 11.06 when discussing the conduct of any of the doctors involved in Mrs. Harvey's care.

Instead, Dr. Coleman, who trained in internal medicine at Yale-New Haven Hospital in New Haven, Connecticut, who is currently chief of Medical Services at VA Connecticut Health Care System, who is presently a professor of internal medicine at Yale School of Medicine, and who sees patients at the VA Hospital and at Yale-Haven Hospital, when discussing Dr. Taylor's involvement in Mrs. Harvey's case merely testifies, in answer to leading questions by Mrs. Harvey's attorney, that Dr. Taylor breached or violated a "standard of care," period.

Q. "Did Dr. Taylor's failure to order an antibiotic . . . amount to a breach of standard of care?"

A. "Yes" (Tr. 297)

Q. "You believe that [not sufficiently advocating for initiating the dialysis] amounted to a breach of the standard of care?"

A. "Yes" (Tr. 322)

But Dr. Coleman never once testified as to just what was the "standard of care" to which he referred to. Was it the standard of care practiced at Yale-New Haven Hospital? The Standard taught at Yale Medical School? His own personal standard? The matter is left completely in the realm of conjecture and speculation. In fact, Dr. Coleman never defined the term "standard of care" as it applied to any Defendant. Further, he never used any language remotely approaching that of MAI 11.06 when discussing the conduct of any Defendant. Thus, there is no substantial evidence upon which a jury could base a finding of negligence.

V, VI, VII and VIII

FOR POINTS V, VI, VII AND VIII OF THIS BRIEF DEFENDANT/APPELLANT DENISE TAYLOR, M.D., CONCURS IN, ADOPTS AND INCORPORATES HEREIN BY REFERENCE POINTS II, III, IV AND V OF THE SUBSTITUTE BRIEF OF DEFENDANT/APPELLANT WENDELL WILLIAMS, M.D., DEALING RESPECTIVELY WITH:

A. INSTRUCTIONAL ERROR AS TO CONTRIBUTING AND COMBINED CAUSATION;

B. DR. COLEMAN'S TESTIMONY AT TRIAL DIFFERING FROM HIS DEPOSITION TESTIMONY;

C. THE FAILURE OF JUROR LOLITA JONES TO DISCLOSE INVOLVMENT IN LAW SUITS; AND

D. **PLAINTIFFS INTRODUCTION DURING CLOSING ARGUMENT OF "ARGUMENT EXHIBIT B," POINTS AS TO WHICH DR. TAYLOR HAD JOINED WITH CO-DEFENDANTS IN HER MOTION FOR NEW TRIAL**.

Defendant/Appellant Denise Taylor, M.D., to the extent that such arguments apply, adopts, and incorporates herein the arguments in the Substitute Brief of Defendant/Appellant Wendell Williams, M.D., supporting Points III, IV and V in his Brief and dealing respectively with:

A. Instructional error as to contributing or combined causation.

B. Dr. Coleman's testimony at trial differing from his deposition testimony;

C. The failure of juror Lolita Jones to disclose her involvement in certain law suits; and

D. Plaintiff's introduction during closing argument of "Argument Exhibit B".

Defendant/Appellant Denise Taylor, M.D., in her Motion for New Trial joined with the other Defendants in their Motions for New Trial raising these points (Legal File, Vol. 1 p.212). These points have been adequately briefed and argued by Defendant/Appellant Wendell Williams, M.D., and Defendant/Appellant Taylor and sees no need to belabor this Court with redundant argument upon these points.

CONCLUSION

For the reasons set forth above, the judgment in favor of plaintiff should be reversed and remanded, with directions that the trial court enter judgment in favor of Defendant/Appellant Denise Taylor, M.D. In the alternative, the Court should reverse the judgment and remand the case for a new trial.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

WILLIE HARVEY	)	
	)	
Respondent/Plaintiff	)	
vs.	)	SC 84449
	)	
WENDELL WILLIAMS, M.D.,	)	
ERIC WASHINGTON, M.D., and	)	
DENISE TAYLOR, M.D.,	)	
	)	
Appellants/Defendants.	)	

CERTIFICATE OF COMPLIANCE

D. Paul Myre, the undersigned attorney of record for Defendant/Appellant Denise Taylor, M.D., in the above referenced appeal, certifies pursuant to Supreme Court Rule 84.06 (c) of the Missouri Supreme Court 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 contain 8,609 words according to the word count toll contained in Microsoft Word for Windows 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.

_____

D. Paul Myre #33061

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that two (2) copies of the foregoing Defendant/Appellant's Brief and a double-sided, high density, IBM-PC compatible floppy disk containing Appellants Brief were hand-delivered this _____ day of June, 2002 to: **Mr. Joseph A. Frank** and **David T. Dolan**, Attorneys for Respondent/Plaintiff, Frank, Dolan & Mueller, 308 North 21st Street, Suite 401, St. Louis, Missouri 63102; and one (1) copy of Defendant/Appellant's Brief on a double-sided high density, IBM-PC-compatible floppy disk containing Appellant's Brief was hand delivered to: **Ms. Mary Reitz**, Attorneys for Defendant/Appellant Wendell Williams, M.D., 10 South Brentwood, Suite 102, P.O. Box 16124, St. Louis, Missouri 63105.

_____

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