IN THE SUPREME COURT OF MISSOURI

WILLIE HARVEY, Plaintiff/Respondent vs. WENDELL WILLIAMS, M.D., ERIC WASHINGTON, M.D., and DENISE TAYLOR, M.D., Defendants/Appellants.	)))))))))))	Supreme Court No. SC 84449

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

D. Paul Myre #33061
Stuart M. Haw #16453
ANDERSON & GILBERT
200 S. Hanley, Suite 710
St. Louis, Mo 63105
Phone: (314) 721-2777
Fax: (314) 721-3515
Attorneys For
Defendant/Appellant
Denise Taylor, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASES CITED BY THE RESPONDENT CAN BE DISTINGUISHED AND DO NOT SUPPORT HIS CONTENTION THAT INSTRUCTION NO. 10 DID NOT IMPROPERLY ASSUME THAT MARY HARVEY HAD A PSEUDOMONAS URINARY TRACT INFECTION (REPLY TO RESPONDENT'S SUBSTITUTE BRIEF, POINT II (2)

Respondent's argument in support of his Point II (2) is, as to Dr. Taylor, misleading and, strictly speaking, inapplicable in that the Verdict Directing Instruction set out at page 33 of Respondent's Substitute Brief, and around which he fashions his argument, is not the verdict director addressed to Dr. Taylor. The Instruction that Respondent sets out in his Argument tracks word for word Instruction No. 8, which is addressed to the negligence of Dr. Washington and Instruction No. 12, which is addressed to Dr. Williams both of which, except for the names, read as follows:

> Your verdict must be for the plaintiff and against defendant Eric Washington if you believe:
>
> First, defendant Eric Washington, 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 Eric Washington, M.D., was thereby negligent and
>
> Third, such negligence caused or directly contributed to cause the death of Mary Harvey. (Legal File, Vol I pp. 178, 182)

But Plaintiff at page 33 of his Brief does not give the number of the instruction or set it out in its correct form. Instead, Plaintiff, simply and incorrectly states, "the verdict director against appellants [plural] instructed the jury as follows" (emphasis added), and then, deceptively, sets out the Instruction 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.

However, the Instruction as set out above at page 33 of Respondent's Brief, although it tracks with instructions No. 8 and No. 11 addressed to the alleged negligence of Defendants Washington and Williams is significantly different from Instruction No. 10 addressed to the alleged negligence of Defendant Taylor, which reads as follows:

> 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, Denise M. Taylor, M.D., was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause the death of Mary Harvey. (Legal File, Vol I, p. 180)

Blithely ignoring the important difference between the Washington and Williams instructions on the one hand and the Taylor Instruction on the other, Respondent proceeds to tar all these defendants with the same brush, stating at page 30 of his brief, "Here the verdict directors contain only one disputed element, whether a urinary tract infection was present," (emphasis added) Respondent then proceeds to argue broadly, as if the argument made sense against all three defendants, that because there were only two elements in the instruction, (1) the infection and (2) the failure to treat the infection, and because failure to treat was not an issue, the jury could infer that there was a question as to whether or not there was an infection. As Dr. Washington and Dr. Williams have shown, this argument fails as to them because the jury was never directed to find that disputed issue. It must fail all the more as against Dr. Taylor where the verdict director contained more than two elements.

Instruction No. 8 aimed at Dr. Taylor actually contains four separate elements in the first paragraph (1) that Dr. Taylor failed to advocate dialysis, (2) that Plaintiff had kidney failure, (3) that Dr. Taylor failed to prescribe an

antibiotic, and (4) that Plaintiff had a pseudomonas urinary tract infection. This instruction was even more confusing than the instructions addressed to Dr. Washington and Dr. Williams. The assumption that plaintiff suffered from kidney failure implicit in the wording of the dialysis part of the instruction might have been harmless in that nobody contested this fact. This was not the case as to urinary infection. However, the juxtaposition of the dialysis hypothesis and the prescription hypothesis may very well have led the jury to believe that the assumption of a pseudomonas infection was just as appropriate in the prescription hypothesis as was the assumption of kidney failure in the dialysis hypothesis.

These four elements not only are thrown together in the same paragraph but they are so arranged as to carry the mind along subconsciously to a forgone conclusion as against Dr. Taylor, the first element asks about dialysis, and the second element assumes kidney failure, the third element asks about antibiotic prescriptions and the fourth element assumes urinary tract infection. The first and third elements merely ask questions, but the second and fourth elements assume facts, and, while the assumption of kidney failure in the second element is admittedly correct, the assumption of urinary infection in the fourth element is the subject of controversy. Moreover, there is no variation between the phrasing of the two hypotheses by which controverted hypothesis about the urinary infection might be distinguished from the uncontroverted hypothesis about kidney failure.

When you add to this the fact that there were put before the jury not only the four elements in the Taylor instruction but also two more elements in each of

the Washington and Williams instructions, the potential for confusion is multiplied exponentially. In Point II (2) of his Brief, Respondent, has nonetheless swept along in his argument, inadvertently characterizing the submissions against Dr. Taylor in Instruction No. 10, as if they were the same in wording and in substance as the submissions against Dr. Washington and Dr. Williams in Instructions No. 8 and No. 12. How much the more so, in a situation considerably less conductive to reflection and study, might the jurors have been confused and uncertain as to which elements of the instructions in question applied to what, which applied to questions that it was theirs to decide, and which applied to the given facts upon which they were supported to anchor their decision.

The jury might well have been confused. But was it in fact confused? The clear answer to this comes from the question sent by the jury to the court as to whether the court was stating that Mary Harvey had a pseudomonas urinary infection or whether that was a question for the jury to decide (Legal File, Vol I, p.192). Plaintiff attacks this point citing Smith v. Kovac, 927 S.W.2d 493,498 (Mo. App. E.D. 1996) where it was held by this court that the jury's query about an instruction did not taint that instruction. But the instruction upheld in that case was far different from the instruction in this case. There the query was over the words "unnecessary hysterectomy in an instruction." The instruction read in its applicable parts:

> Your verdict must be for the plaintiff . . . if you believe:
>
> First, defendant Kovac performed an unnecessary hysterectomy, and

Second, defendant was thereby negligent

No fact was assumed in that instruction. The question as to whether or not the hysterectomy was unnecessary was put squarely before the jury, and the standard of care was correctly submitted to the jury under MAI. 11.06. In the instant case, on the other hand the instructions in question improperly coupled the assumption of a fact in controversy with the assumption of an uncontroverted fact. Further, the court in Smith v. Kovac, supra, quoted from Kampe v. Colom, 906 S.W.2d 796,805 (Mo App. W.D. 1995) where that court stated, "if this were the criterion, each question submitted by a jury about an instruction would render the instruction erroneous." However, the court's assertion in Kampe did not mean that there were no cases in which such questions might be considered, because the next sentence in Kampe reads, "The jury's inquiry may be considered in determining the propriety of a contested instruction, but the query is not conclusive." Thus in the case at bar, the jury's question, although it might not in itself have been conclusive, adds enough weight to the other confusing factors to settle the question of whether or not the jury was confused.

Welch v. Hyatt, 578 S.W.2d 905,914[8] (Mo. banc 1979), so strongly urged by Respondent as supportive of his contention that his verdict directors did not err in assuming a controverted fact, is actually not controlling upon that issue. This is because, although this Court held that in the total context of that case the assumption of a controverted fact was not prejudicially erroneously, this Court made it clear that its holding was to have no precedential value, stating at 578

S.W.2d 914

> [8] We believe however that, in the future when a turn is a controverted and disputed fact, MAI 17.06 should require a finding that (1) there was a turn and (2) that there was a failure to signal an intention to turn (emphasis added)

This admonition as to future cases has been quoted word for word and followed by in Beck v. Edison Bros. Stores, Inc., 657 S.W. 326,329 [5] (Mo. App. E.D. 1983). But Respondent has found it convenient to leave the part about this Court's admonition out of his discussion of Welch.

Finally, as to this point, the Respondent's, suggestion at page 41 of his Brief that Appellants can not challenge the wording of Instruction No. 8, No. 10, and No. 12, because they requested a change in its wording is without merit. Examination of the Transcript at Vol III 165-167, as suggested by Respondent, reveals that at the instruction conference, after the close of evidence, all the Defendants objected to those instructions for the very reasons asserted in their Briefs. At that time counsel for Respondent stated that at a previous unreported conference he had inserted the name "Mary Harvey" into the instruction at the request of counsel for one of the Appellants, he could not remember which. Whatever was requested by whomever on that earlier occasion would be quite irrelevant, because; thereafter at the formal instruction conference Appellants, on the record, stated their objections to these instructions, and Respondent, at that time, had the opportunity to change his instructions.

II. RESPONDENT'S ARGUMENT AS TO THE ADVOCACY INSTRUCTION ONLY SERVES TO DEMONSTRATE THE INAPPROPRIATENESS OF THAT INSTRUCTION TO THE FACTS OF THIS CASE AND TO HIGHLIGHT ITS PREJUDICIAL CHARACTER. (REPLY TO RESPONDENT'S SUBSTITUTE BRIEF, POINT II (3)

Respondent in asserting the appropriateness of the advocacy instruction relies heavily on Lashmet v. McQueary, 954, S.W.2d 546 (Mo. App. S.D. 1997), but that case is so readily distinguishable from the instant case as almost to constitute an object lesson as to why the giving of the advocacy instruction in the instant case was prejudicially erroneous.

The difference, between our case and Lashmet, and it is a difference of fundamental significance, is that in Lashmet the defendant was a physician charged with failure to adequately inform and instruct his patient of the risks of a retained toothpick in the patient's foot, whereas, in our case we are dealing with a doctor charged with failure to persuade other doctors to adopt a certain medical procedure.

In Lashmet the doctor was charged with informing a layman about the medical risks of his patient's condition, a patient who herself would have no knowledge of the medical aspects of her situation and no idea as to the appropriate course of treatment. In our case Dr. Taylor was not charged with withholding from her patient important information concerning her situation. Rather Dr. Taylor, a neurological consultant, was charged, in effect, with failure to persuade

other doctors, nephrologists, who were as well advised in the premises as she was herself, and equally, if not better, qualified than she was to judge of the appropriate treatment, failure, Appellant Taylor submits, to persuade those doctors to adopt a cause of treatment well known to all of them.

The juxtaposition of the Lashmet case and the case at bar would provide an instructive case book demonstration as to how, under one set of facts, an instruction might be appropriate, whereas, under a different set of facts, an instruction bearing some plausible, but spurious, resemblance to the first instruction would be quite improper.

It is one thing for a doctor to inform and instruct a layman of simple facts for example "if you leave that toothpick in your foot it will become infected and we shall have to amputate. To prevent these unpleasant developments you must let me remove the toothpick now, and then you must come back next week for follow up treatment." Either the doctor did or did not say something like this, and the jury could well infer that the patient being fully informed would have taken the doctors advice.

It is something altogether different to allow a jury to imagine, with no basis in the evidence, conjuring out of thin air, as it were, whatever degree of persuasive eloquence might be necessary, that the advocacy of a neurologist would have compelled two nephrologists who, as is apparent from the record, were aware of all the facts of which she was aware, to adopt a course of treatment other than the course that they did in fact adopt.

Respondent, however, argues that in the context of the evidence the jury must have realized that all the instruction meant by the language "failed to advocate for dialysis" was that Dr. Taylor failed "to talk with the nephrologist about the need for dialysis to control Mary Harvey's seizures." (Respondents Substitute Brief, p. 48, 49). If that is what Respondent meant we can only wonder why he did not frame his instruction in those words. The language would have been clear and concise and the jury might have found that Dr. Taylor was late in talking with the nephrologist. But the jury, if so instructed probably would not have believed that just talking to the nephrologist about a situation of which the nephrologist was already aware and a course of treatment in which they were specialists would have caused them to initiate dialysis any earlier than they actually did. This argument merely highlights the prejudicial character of the instruction as given.

Furthermore, the introduction of this advocacy doctrine into the law of medical malpractice would be an unfortunate development. It would mean that a specialist in one field of medicine, say neurology, who happens to entertain an idea concerning the appropriate use of a procedure in some other field, say nephrology, in order to protect herself, would need to go beyond merely mentioning her concerns to the nephrologists. It would be her duty to see to it that her suggestions were carried out and, if necessary, enter upon a course of arguing with the nephrologists and persist in her advocacy until she either persuaded them to be guided by her suggestions or until she became convinced that she was wrong

or that further argument would be useless or counter productive.

III. RESPONDENT'S CONTENTION THAT DR. TAYLOR'S OWN TESTIMONY ESTABLISHES THE STANDARD IS BASED ON STATEMENTS AS TO HER TESTIMONY THAT ARE CONTRARY TO FACT (REPLY TO RESPONDENT'S SUBSTITUTE BRIEF, POINT IV)

As to the issue of negligence or standard of care, Dr. Taylor will not reargue her assertions concerning Dr. Coleman's testimony, but will now address Respondent's contention that the testimony of Dr. Taylor herself established the standard of care (that degree of skill and learning ordinarily used under the same or similar circumstances by members of her profession) against which her treatment of Mrs. Harvey should be measured.

In this connection, Respondent leans heavily on Delisi v. St. Luke's Episcopal- Presbyterian Hospital, Inc., 701 S.W. 2d 170 (Mo. App. E.D. 1985) where it was held that the testimony of a defendant physician alone might suffice to show that he failed to exercise the required standard of care. Dr. Taylor has no quarrel with that as a general proposition. However, she must point out that Respondent in his Brief consistently misrepresents Dr. Taylor's testimony.

Respondent states at p. 70 of his Substituted Brief, citing Tr. 646, that Defendant Denise Taylor testified that "… in a patient experiencing seizures which are caused by renal problems it is both a neurologist's and a nephrologist's concern, which would require the attention of both doctors." Dr. Taylor did not testify to anything like this at Tr. 646. Actually, at Tr. 647, she was asked, "So

somebody having seizures because of kidney problems is both a nephrology problem and a neurology problem?" She answered, "If the seizures are due to the renal problems, correct." The question was about the scientific classification of the problems and concerned neurology and nephrology, not neurologists and nephrologists. So did her answer. Neither question nor answer spoke to what kind of doctor should be concerned with either problem, and Dr. Taylor never said that treating the patient "would require the attention of both doctors." In fact, what Dr. Taylor said when asked whether she undertook to treat Mrs. Harvey's kidney failure, was "with a nephrologist there, there was no need for me to do that." (Tr. Vol. II p. 647, 648)

Next, Respondent states, citing Tr. 636-637 that, "Dr. Taylor testified that changes in kidney function can cause seizure and that as a neurologist you must diagnose and treat the cause of the seizures (emphasis added)" (Plaintiff's Brief p. 57). But the transcript shows that Dr. Taylor said nothing of the kind. The actual Question and Answer at Tr. 637 ran thus:

Q. And wouldn't you agree, Doctor, that the best way to control seizures is also to treat the cause?

A. If there is a cause that can be treated.

This exchange does not indicate that anybody "must" do anything. It merely indicates that, as an abstract proposition, treating the cause in addition to treating the seizures is the best way to control seizures. It certainly does not indicate that the treatment must be done by the neurologist.

Then at page 72 of his Respondent's Brief Respondent asserts, without reference to any transcript page, that, "Defendant Taylor herself testified that a neurologist treating a patient with seizures must treat the cause of the seizures. (emphasis added)" As pointed out above, Dr. Taylor never testified that any doctor "must" do anything.

Still further, at page 73 of his Brief Respondent states "Dr. Coleman and Dr. 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 renal failure was properly treated." Once more no transcript page is cited, and once more Dr. Taylor never testified to any such thing. She never mentioned the "appropriate standard of care" and what she said about working with a nephrologist was not what Respondent would have us believe. Contrary to Respondent's assertion, Dr. Taylor's only testimony concerning a responsibility to "work with the nephrologist" came when, as pointed out above, she denied any such responsibility (Tr. 647) and, when, having been asked by Respondent's counsel "… was it your decision to start the patient on dialysis," her answer was, "There was a nephrologist, kidney specialist, involved, so that's not the decision of the neurologist." (Tr. Vol. II, P. 632).

So much for the standard of care as to advocating for dialysis, as to the treatment of the urinary infection all Respondent has to say is that (at p.73 of his Brief) that Dr. Taylor testified that a neurologist is qualified to treat a urinary infection and that she, in her practice as a neurologist has diagnosed urinary infections. This certainly will not support an inference that in Mary Harvey's

case, where there was a primary care doctor, the standards of her profession would have required her to treat any urinary tract infection.

This brings an overall aspect of the situation, which is that the statements referred to in Respondents substitute, whatever inference might be drawn from any of them in isolation, cannot be taken as representative of Dr. Taylor's view of medical standards, unless they are considered in the context of her testimony as a whole. When viewed from that perspective it is quite clear that in Dr. Taylor's view she was merely a consultant in neurology drawn into a case where a treating doctor was managing the patients over all care and where a nephrologist had been called in to take care of the patient's renal problems.

Dr. Taylor testified that her role, when called as a consultant to see a patient concerning a neurological problem, was to examine the patient, write a note at the time of seeing the patient and to generally contact the referring doctor (Dr. Dugas Elliot) to let her see what she thought was going on with the patient (Tr. 598). Dr. Taylor testified that she would not be responsible to notify the treating physician of a patient's urinary infection in a case where, as in Mrs. Harvey's case it had been reported and the treating physician was aware of it (Tr. 640), and that if a patient had a primary doctor and a nephrologist as well she would not assume treatment of a urinary infection (Tr. 625), that she was not required to monitor Mrs. Harvey's renal from July 17th to July 12th because she had a primary care doctor who was with her and had been taking care of her, and if she had a problem it was the primary care doctors responsibility to call the nephrologist (Tr. 630),

that, "with a nephrologist there, there was no need for me to do that [treat Mrs. Harvey's kidney failure]. (Tr. 648), and again where there was a primary doctor and a nephrologist present it would not be her decision when to start the patient on dialysis (Tr. 631-632). So these statements qualify whatever inferences might be drawn from the statements referred to by Respondent, and show that in the overall context of her testimony all her acts were consistent with her views as to her responsibilities.

In short, almost every statement that Plaintiff makes in Point of his Substitute Brief about Dr. Taylor's testimony is either wrong or taken out of context. In most of these instances Dr. Taylor simply did not say what Respondent says she said. As to Respondent's assertion that Dr. Taylor testified that the appropriate standard involved "work with the nephrologist," Dr. Taylor's testimony was diametrically opposed to the statements in Respondent's Brief. Thus no weight whatever can be attached to the suggestion that Dr. Taylor herself established what Plaintiff would like us to take for the appropriate standard of care.

IV. RESPONDENT'S ARGUMENT THAT BECAUSE DIALYSIS WAS STARTED AFTER DR. TAYLOR TALKED TO THE NEPHROLOGIST IT FOLLOWS THAT DIALYSIS WOULD HAVE BEEN STARTED SOONER IF SHE HAD TALKED ABOUT IT SOONER IS NOT SUPPORTED BY THE EVIDENCE (REPLY TO RESPONDENT'S SUBSTITUTE BRIEF, POINT V)

Respondent's argument under Point V of his Substitute Brief revolves around his contention that because when Defendant Taylor communicated with Dr. Purtell on September 29th (Friday in 1995), and Dr. Sagar initiated dialysis on October 2nd (Monday), it can be inferred that had Dr. Taylor told Dr. Sagar what she knew about Mrs. Harvey's situation at some date earlier than September 29th when she talked with Dr. Purtell, Dr. Sagar would have started dialysis earlier than he did, which was on October 2nd, too late according to Respondent's theory (Respondent's Brief, p.65).

This theory is an almost classic example of the post hoc ergo propter hoc fallacy in that we are asked to assume that, because the nephrologists initiated dialysis after a conversation with Dr. Taylor on September 29th or 30th, they did so because she talked with Dr. Purtell at that time about aggressive treatment for Mary Harvey's renal failure. There is no evidence to support this contention, which, in any event, is shown to be refuted in that, on October 1st, after his conversation with Dr. Taylor, Dr. Purtell wrote in Mrs. Harvey's medical record, "Dialysis: not indicated this a.m." (Tr. 629-630). Moreover, what evidence there is shows that dialysis was started when it was started, because Mary Harvey's suddenly worsening condition made dialysis advisable, and it was not started earlier because her condition earlier was different.

Respondent's theory depends on there being evidence of a time earlier than September 29th, when Defendant Taylor knew facts that called for dialysis and the nephrologist did not. The relevant evidence consists of Defendant Taylor's

testimony, Dr. Sagar's Deposition testimony, and the medical records that served as the basis for the Testimony of Plaintiff's expert, Dr. Coleman. Of course, the jury did not have to believe Defendant Taylor's testimony, and it is certainly not binding on Plaintiff. But since Dr. Taylor is the only person who testified as to what she knew and when she knew it Plaintiff has to rely upon her testimony to make his case.

To begin with, Defendant Taylor was called into the case on September 16, 1995 by Dr. Dugas Elliot, Mrs. Harvey's treating physician, because Mary Harvey had begun to have seizures that day (Tr. 598-599). Dr. Taylor actually saw Mary Harvey at the hospital the next day, September 17th (Tr. 599). Mrs. Harvey had had a generalized seizure earlier that day (Tr. 602). Dr. Taylor also found that Mrs. Harvey had a history of long standing renal failure (Tr. 611). As of September 19th Mrs. Harvey was having some cyclonic jerking, but had had no general seizures since September 17th (Tr. 607-612).

The next time Dr. Taylor saw Mrs. Harvey was on September 22nd, at which time she still had had no generalized seizures since September 17th. In fact she was essentially seizure free from September 17th until September 27th (Tr. 621). On September 22nd Mrs. Harvey was sent to rehab, and Defendant Taylor didn't see her again until her second onset of seizures on September 27th (Tr. 619).

Dr. Taylor testified that during this early period (September 16-22) she never thought it necessary to consult a nephrologist.

Q: You never requested a nephrologist in this case, is that correct?

A: I did not, no. May I just say that from the early point when I saw her I didn't think it was necessary (Tr. 647).

Plaintiff seems to imply that if Dr. Sagar, at this early period, knew what Dr. Taylor knew he would have initiated dialysis prior to September 29th. But this can hardly be so, because when Dr. Sagar came on the case on September 25th, his note on the medical record for that day shows that he was aware of Mary Harvey's seizures and her renal function (Tr. 622). Then on September 27th, the day that seizures began again, Dr. Sagar's note read "Today seizures. Given Dilantin" (Tr. 623). On September 28th, Dr. Sagar's note states "Seizures, may be metabolic acidosis, being corrected. Renal failure is probably chronic" (Tr. 627). On September 28th, Dr. Sagar's notes read "Seizures, may be acidosis, being corrected. Renal failure, possibly chronic, creatine clearance 8 cc per minute. End-stage renal disease. May need to be dialyzed in the next few days" (Tr. 627-628).

Thus it appears that up until Mrs. Harvey went to rehab on September 22nd, nothing that Dr. Taylor saw made her think any treatment by a nephrologist, much less dialysis, was necessary. And when Dr. Sagar saw Mrs. Harvey on September 25th and was able to see her medical record, he knew everything that Dr. Taylor knew, and like Dr. Taylor, did not think dialysis was necessary.

The next time Dr. Taylor saw Mrs. Harvey was when her seizures recurred on September 27th at which time Dr. Taylor testified that Mrs. Harvey was having some difficulty. By then Dr. Sagar was on the case and already aware of the

seizures. On that day he noted "Today seizures. Given Dilantin" (Tr. 627).

So this was how the matter played out. Dr. Sagar's testimony and the medical record, demonstrate that if Dr. Taylor had simply told Dr. Sagar all about Mrs. Harvey's symptoms, his reaction would be just what it was when he came on the case and examined Mrs. Harvey and her medical Records. He would not have considered dialysis necessary until after October 1st as indicated by his testimony, notes and Dr. Taylor's testimony.

All this must be viewed in respect to the argument in Respondent's Substitute Brief that because the nephrologist acted quickly after Dr. Taylor spoke to them about dialysis, they would have acted just as quickly had they known the facts as they existed earlier. But it appears that there is no evidence that they would have felt that the facts as they existed earlier warranted any such action. All that the evidence shows is that prior to September 27th and 28th neither Dr. Taylor nor the nephrologists thought dialysis was necessary, and when Mrs. Harvey's condition suddenly started worsening on September 27th and 28th the nephrologist began seriously considering dialysis.

The two cases cited in this section of Respondent's Substitute Brief, Derrick v. Norton, 983 S.W.2d 529m (Mo App. E.D. 1998) and Smith v. Quallen, 27 S.W.3d 845 (Mo App. E.D. 2000), are fine cases, but they have no bearing on the case at bar. They are both concerned with reasonable inferences of causation concerning the movements of everyday physical objects, a mirror coming disattached from a door and one car rear-ending another. Our case we are dealing

with a question of human communication and motivation. Admittedly, these are also areas susceptible to proof of causation by circumstantial evidence, but in our case, there is no evidence, either direct or circumstantial, from which any reasonable inference of causation can be drawn. Further neither of the cases cited by Respondent have any thing to do with application of but for test as to causation as explained in Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo banc 1993).

ADOPTION BY REFERENCE OF MATERIALS IN APPELLANT WILLIAM'S SUBSTITUTE BRIEF

In further reply to Respondent's Substitute Brief Appellant Taylor joins in and adopts by reference the arguments made by Appellant Wendell Williams in his Substitute Reply Brief.

CONCLUSION

For all of the reasons stated herein and in Defendant/Appellant Denise Taylor, M.D.'s Original Substitute Brief, Defendant/Appellant respectfully requests that this Honorable Court reverse the judgment in favor of Plaintiff and order that judgment in favor of Defendant, Denise Taylor, M.D., be entered due to Plaintiff's failure to make a submissible case, or in the alternative, remand the case for a new trial.

Respectfully submitted,

_____

D. Paul Myre #33061
Stuart M. Haw #16453
ANDERSON & GILBERT
200 S. Hanley, Suite 710
St. Louis, Missouri 63105
(314) 721-2777
(314) 721-3515 (Fax)
Attorneys for Defendant/Appellant
Denise Taylor, M.D.

IN THE SUPREME COURT OF MISSOURI

WILLIE HARVEY	)	
	)	
Respondent/Plaintiff	)	
	)	
vs.	)	Supreme Court No. SC 84449
	)	
WENDELL WILLIAMS, M.D.,	)	
ERIC WASHINGTON, M.D., and	)	
DENISE TAYLOR, M.D.,	)	
	)	
Appellants/Defendants.	)	

CERTIFICATE OF COMPLIANCE WITH SPECIAL RULE NO. 1

D. Paul Myre, the undersigned attorney of record for Defendant/Appellant Denise Taylor, M.D., in the above referenced appeal, certifies pursuant to Special Rule No. 1 of the Missouri Supreme Court that:

1. The foregoing Substitute Reply Brief complies with the limitations contained in Special Rule No. 1, Supreme Court Rule 84.06;

2. The Substitute Reply Brief, excluding the cover page, signature blocks and certificates contain 5,801 words according to the word count toll contained in Microsoft Word 2000 Professional software with which it was prepared; and

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

Respectfully submitted,

_____

D. Paul Myre #33061
ANDERSON & GILBERT
200 S. Hanley, Suite 710
St. Louis, Missouri 63105
Phone: (314) 721-2777
Fax: (314) 721-3515

Attorneys for Appellant/Defendant
Denise Taylor, M.D.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that two (2) copies of the foregoing Defendant/Appellant Taylor's Substitute Reply Brief and a double-sided, high density, IBM-PC compatible floppy disk containing Appellants Substitute Reply Brief were hand-delivered this _____ day of July, 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 63102l; and one (1) copy of Defendant/Appellant's Substitute Reply Brief on a double-sided high density, IBM-PC-compatible floppy disk containing Appellant's Substitute Reply 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.

_____

D. Paul Myre #33061