**MISSOURI COURT OF APPEALS**
**EASTERN DISTRICT**

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| **WILLIE HARVEY,** | ) | |
| | ) | |
| **Plaintiff-Respondent,** | ) | |
| | ) | |
| **v.** | ) | **Appeal No. ED79699** |
| | ) | |
| **ERIC WASHINGTON, M.D.,** | ) | |
| **DENISE TAYLOR, M.D. AND** | ) | |
| **WENDELL WILLIAMS, M.D.,** | ) | |
| | ) | |
| **Defendants-Appellants.** | ) | |

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

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# BRIEF OF APPELLANT ERIC WASHINGTON, M.D.

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## JURISDICTIONAL STATEMENT

This appeal arises from an action for wrongful death based on alleged medical malpractice. The action was tried to a jury in the Circuit Court of the City of St. Louis. On January 31, 2001, the trial court entered its judgment on the jury's verdict in favor of plaintiff, awarding plaintiff $1,200,000 in damages. All defendants filed timely post-trial motions.

On May 21, 2001, the trial court conducted a hearing into two issues raised in the post-trial motions: a juror's nondisclosure of her prior litigation experience and defendants' motions for periodic payments of plaintiff's judgment for future damages. The trial court denied all defendants' post-trial motions on May 29, 2001. Defendant Eric Washington, M.D., timely filed his notice of appeal on June 8, 2001.

This case does not involve the validity of a treaty or statute of the United States, the validity of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or the imposition of the death penalty. Pursuant to Article V, Section 3, of the Missouri Constitution, the Missouri Court of Appeals, Eastern District, has jurisdiction of this appeal. The Circuit Court of the City of St. Louis is within the territorial jurisdiction of this Court. § 477.050, RSMo (2000).

## STATEMENT OF FACTS

Plaintiff Willie Harvey sued Tenet Healthsystem, Inc., Deaconess Health Services Corporation, and several doctors, including Dr. Eric Washington, Dr. Denise Taylor, and Dr. Wendell Williams, alleging that defendants negligently treated plaintiff's wife, Mary Harvey. Plaintiff eventually dismissed his claims against Tenet Healthsystem and Deaconess Health Services Corporation. L.F. 12, 30. The case proceeded to trial against Doctors Washington, Taylor, and Williams.

Plaintiff alleged in his petition that defendants' negligence resulted in Mary Harvey's death. L.F. 42-46. Mary Harvey died from multiple organ failure on October 21, 1995, at the age of 67. Tr. 255; L.F. 42.

Approximately five weeks before her death, on September 14, 2001, Mary Harvey was admitted to Deaconess Medical Center for replacement of her right knee. Tr. 256. At the time of her admission, she had a medical history including chronic renal insufficiency, high blood pressure, rheumatoid arthritis, and the replacement of her left knee. Tr. 256. The surgery to replace Ms. Harvey's right knee was to be performed by defendant Dr. Eric Washington, an orthopedic surgeon to whom Ms. Harvey had been referred by Dr. Cynthia Dugas-Elliott, an internist at Deaconess who had been treating Ms. Harvey for about five years. Tr. 332, 333, 475, 477.

Before the surgery, Dr. Washington performed standard testing which showed that Ms. Harvey's renal condition was stable for surgery. Tr. 482. Prior to performing the surgery, Dr. Washington also took a urine sample from Ms. Harvey. Tr. 483. Analysis of the urine revealed the presence of bacteria, but the type of bacteria would not be identified for approximately a day. Tr. 484. Dr. Washington performed the knee replacement surgery on September 14. Tr. 485. He had prescribed that Ancef, a broad-spectrum antibiotic, be administered to Ms. Harvey before surgery to prevent infection during surgery. Tr. 485, 761. Ancef is routinely used as a prophylactic to bacterial infection from surgery. Tr. 486. Subsequent to the surgery, Dr. Washington asked Dr. Dugas-Elliott to medically manage Ms. Harvey because Dr. Dugas-Elliott had treated Mrs. Harvey for several years. Tr. 493.

The bacteria in Ms. Harvey's urine sample was eventually identified as E coli, a common bacteria that is present in the anatomical area where urine is voided. Tr. 409. The type of E coli identified was susceptible to Ancef. Tr. 409. Dr. Washington continued to administer Ancef intravenously after the surgery until September 20. Tr. 407, 486, 761. The Ancef was effective against the E coli. Tr. 265. In subsequent cultures of Ms. Harvey's urine, E coli was not present. Tr. 409, 581.

Ms. Harvey's knee replacement surgery was successful. Tr. 491. Ms. Harvey began engaging in rehabilitation shortly after the surgery. Tr. 499. The day following the surgery, she was able to ambulate; nurses notes indicate that Ms. Harvey could walk thirty feet with minimal assistance, and no problems were reported. Tr. 336, 491-92. However, at approximately noon on September 16, Mary Harvey had a grand mal seizure. Tr. 256, 494, 497. She had additional seizures later that day and on September 17. Tr. 256. There is no evidence that the seizures were related to the knee surgery.

At approximately 12:45 p.m. on September 16, shortly after the first seizure, Dr. Dugas-Elliott ordered a urinalysis and also ordered that neurologic checks be performed on Ms. Harvey every four hours. Tr. 495. Dr. Dugas-Elliott later reversed those orders, and requested a neurology consult with Dr. Denise Taylor, a neurologist. Tr. 495. Dr. Taylor prescribed anti-seizure medication. Tr. 496. Ms. Harvey responded to that medication; there was no reported seizure activity between September 18 and September 27. Tr. 257-58, 497.

Ms. Harvey continued to engage in rehabilitation. Tr. 499. She was transferred to the rehabilitation facilities at Deaconess on September 22. Tr. 257, 499. Dr. Washington, Dr. Taylor, and Dr. Dugas Elliott concurred in her release to rehabilitation. Tr. 499. When Ms. Harvey arrived in the rehabilitation unit, she complained of groin pain on her right side. Tr. 501. An x-ray of her hip was

ordered. Tr. 501. The x-ray revealed that Ms. Harvey had sustained a fracture to her hip. Tr. 501. Ms. Harvey had never indicated to anyone that she had fallen or that she had sustained any injury, and therefore there is no evidence definitively establishing when or how the hip fracture occurred. Tr. 501. However, Dr. Washington believes that the fracture might have been sustained during Ms. Harvey's grand mal seizure on September 16. Tr. 501. A grand mal seizure involves intense shaking of the body, and during Ms. Harvey's seizure, a nurse in attendance had described hearing a "pop." Tr. 501. Dr. Washington believed that "that pop could have been the time that she broke her hip." Tr. 502. Ms. Harvey's broken hip necessitated surgery as soon as possible. Tr. 503. She was readmitted to Deaconess Hospital on September 24. Tr. 257, 504.

Dr. Washington felt that he needed medical clearance from other doctors treating Ms. Harvey before he could perform surgery to correct Ms. Harvey's hip. Tr. 504. He sought clearance from Dr. Dugas-Elliott, who did not immediately respond. Tr. 504. Dr. Dugas-Elliott did, however, order that another urine culture be taken on September 24. Tr. 370. Dr. Washington also consulted with Dr. Wendell Williams, a cardiologist, because Ms. Harvey had been "identified as having some symptoms of congestive heart failure." Tr. 505. Dr. Dugas-Elliott subsequently responded to Dr. Washington's request for a consultation, and she brought in yet another consultant on the case, Dr. Sager, a nephrologist, or kidney

specialist. Tr. 505. Dr. Washington believed that Dr. Sager had been brought into the case to treat Ms. Harvey's renal disease, which had worsened. Tr. 506.

Ms. Harvey's hip surgery was postponed for two days based on recommendations from Dr. Sager and Dr. Williams. Tr. 507. During that time, Dr. Sager and Dr. Williams upgraded Ms. Harvey's condition to the point that they gave Dr. Washington clearance to perform the hip operation. Tr. 508. Dr. Washington performed a partial hip replacement on Ms. Harvey on September 26, 1995. Tr. 258, 508. As he had done when operating on Ms. Harvey's knee, Dr. Washington administered Ancef as a prophylactic during the operation to help prevent infection. Tr. 511. There were no complications during the hip surgery. Tr. 508. After surgery, Dr. Washington ordered that Ancef continue to be administered post-operatively, as a prophylactic to infection. Tr. 528.

The results of Ms. Harvey's September 24 urine culture did not become available until September 26. Tr. 370. Those results showed that there was no longer any E coli present, but the culture had grown another type of bacteria, pseudomonas aeruginosa. Tr. 258, 370, 571.

The next day, September 27, Ms. Harvey again began having seizures. Tr. 258. The seizures continued through October 1. Tr. 258. On September 28, Ms. Harvey's urine was again cultured. Tr. 258. The culture grew pseudomonas aeruginosa. Tr. 258.

From September 30 to October 1, Ms. Harvey experienced a severe neurological deterioration from which she never recovered. Tr. 258. By October 1, she was comatose. Tr. 640. Her blood pressure dropped and her heart slowed, and she was put on Dopamine to keep her blood pressure elevated. Tr. 681. She started wheezing and expelling yellow sputum from her lungs, which Dr. Williams believed indicated a lung infection, possibly caused by Ms. Harvey aspirating vomit into her lungs. Tr. 682. On October 1, Dr. Williams changed Ms. Harvey's antibiotic from Ancef to Rocephin to treat the infection in her lungs. Tr. 685. Dr. Williams stopped the administration of Ancef because Ancef and Rocephin are similar types of antibiotics, and it would have been inappropriate to have Ms. Harvey on both. Tr. 685. He also ordered that blood cultures be taken that day, and that a sputum gram stain be performed to determine whether there were white blood cells or bacteria in Ms. Harvey's sputum. Tr. 684, 690.

On October 2, Ms. Harvey was still unresponsive and remained on Dopamine to support her blood pressure. Tr. 686. She started bleeding in the upper part of her gastrointestinal tract. Tr. 686. On October 3, Dr. Williams noted that Ms. Harvey was bleeding around an intravenous tube in her stomach, and that her blood was not properly clotting. Tr. 687. Ms. Harvey's temperature had elevated to 102. Tr. 688. In the days preceding October 3, Ms. Harvey's temperature had risen slightly when she was given blood transfusions, and body

temperature commonly rises when blood is transfused. Tr. 688. October 3 was the first day that Dr. Williams believed Ms. Harvey's elevated temperature indicated an infection. Tr. 688.

Dr. Williams wrote an order for consults with a hematologist to address Ms. Harvey's blood clotting problem. Tr. 689. Dr. Williams also noted that Ms. Harvey's previous urine culture had been positive for pseudomonas, and believed that pseudomonas might possibly have also colonized in her lungs and in her blood. Tr. 690. He therefore wrote orders for Fortaz and Gentamicin, two broad spectrum antibiotics that, unlike Ancef, are effective against pseudomonas. Tr. 689. Dr. Williams had not prescribed those antibiotics on October 1, because the urine culture results showing pseudomonas had not yet been recorded on Ms. Harvey's chart on October 1. Tr. 692. At some point after October 3, Dr. Williams received the results of the blood cultures and sputum gram stain taken on October 1. Tr. 690. No bacterial growth was noted on the blood cultures. Tr. 690. Pseudomonas was not found in Ms. Harvey's sputum. Tr. 691, 770.

Staff members ordered that additional cultures of Ms. Harvey's blood be taken on October 3. Tr. 691. Those cultures grew citrobacter, a bacterial organism that is not related to pseudomonas. Tr. 692. Urine cultures taken at this time also grew citrobacter. Tr. 571.

Ms. Harvey was subsequently put on a ventilator and life support. Tr. 572. She died on October 21. Tr. 255.

Expert testimony by Dr. David Coleman and Dr. Mark Iannacone, M.D.

Plaintiff offered the opinion testimony of Dr. David Coleman regarding the cause of Ms. Harvey's death. Dr. Coleman testified that the results of the September 24 urine culture showed many white blood cells, inflammatory cells, and gram negative rods. Tr. 257, 272. Gram negative rods indicate the colony count of bacteria. Tr. 272. In Dr. Coleman's opinion, the results of the urine culture showed that Ms. Harvey had a urinary tract infection on September 24. Tr. 273. Dr. Coleman further testified that, as of September 26, there was information available to Mary Harvey's treating physicians indicating that she had a pseudomonas urinary tract infection. Tr. 288.

Dr. Coleman testified that Ms. Harvey's medical records also showed that Ms. Harvey's kidneys were not functioning properly, resulting in metabolic changes and a failure of the kidneys to clear toxins from the body. Tr. 260-61, 263. Dr. Coleman testified that Ms. Harvey's renal failure contributed to cause her seizures, although he was "not content with that as the sole explanation." Tr. 285, 382. He testified that Ms. Harvey's untreated urinary tract infection "also played a role in exacerbating the effects of the renal function by exaggerating these toxins that are harder to clear under the circumstances." Tr. 286. Dr. Coleman expressed

his opinion that Mary Harvey's death resulted from a combination of factors. He testified that Mary Harvey's urinary tract infection and renal failure combined to cause Ms. Harvey's neurological deterioration between September 30 and October 1. Tr. 379. Dr. Coleman testified that he believed Ms. Harvey would have survived if she had received dialysis before September 29 and, in addition, had received an antibiotic to treat pseudomonas bacteria on September 26. Tr. 324. Dr. Coleman stated that Dr. Washington's failure to treat the infection before October 1 contributed to cause Mary Harvey's death. Tr. 284, 309. However, Dr. Coleman testified that he could not state whether Ms. Harvey would have survived if she had received treatment for one condition and not the other. Tr. 323.

Dr. Coleman subsequently testified that, because the urine culture result was not final until September 26, Ms. Harvey's treating physicians "would not have been able to have an informed choice of which antibiotic to use until the 26th." Tr. 370. He stated that, until September 26, nothing in the chart indicated to Mary Harvey's physicians that the antibiotic should be changed from Ancef to an antibiotic effective against pseudomonas. Tr. 371. Dr. Coleman testified that, in his opinion, the antibiotic should have been changed on September 26. Tr. 371. Dr. Coleman again acknowledged that he was unable to state within a reasonable degree of medical certainty whether Mary Harvey would have experienced the

neurological deterioration that eventually resulted in her death even if her antibiotic had been changed on September 26. Tr. 371.

Plaintiff also offered the opinion testimony of Dr. Mark Iannacone. Dr. Iannacone testified that he believed Ms. Harvey had the symptoms of an E coli urinary tract infection when her knee replacement surgery was performed on September 14. Tr. 405. In Dr. Iannacone's opinion, Dr. Washington breached the standard of care when he proceeded with surgery without first treating the E coli infection. Tr. 405-06. Dr. Iannacone offered no opinion as to whether Ms. Harvey had a pseudomonas urinary tract infection between September 26 and September 30. He offered no opinion as to whether any action by Dr. Washington in performing the knee surgery contributed to cause Ms. Harvey's death. He acknowledged at trial that he had no opinion about what caused Mary Harvey's death or why she died. Tr. 409.

Plaintiff did not submit to the jury the issue of whether Dr. Washington breached the standard of care in performing the knee surgery. Thus, Dr. Coleman's testimony was the only expert opinion evidence plaintiff offered regarding whether or how Dr. Washington's actions contributed to cause Mary Harvey's death.

Expert Testimony by Dr. Edward Wittgen and Dr. Donald Graham

Dr. Washington offered expert opinion testimony that Ms. Harvey did not have a pseudomonas urinary tract infection between September 26 and September 30. Dr. Donald Graham, an infectious disease specialist, testified that the urine culture results on September 26 reflected a contaminant in Mary Harvey's urine, as opposed to a urinary tract infection. Tr. 782-83. Dr. Graham testified that a comparison of the urine culture on September 24 with a subsequent culture on September 28 indicated that the bacteria shown on September 24 came from Ms. Harvey's skin and groin area, rather than her urinary tract. Tr. 769-70, 797-98. Dr. Graham testified that Ms. Harvey at no time suffered from a pseudomonas urinary tract infection, and that pseudomonas bacteria did not play a role in Mary Harvey's death. Tr. 771, 779.

In addition, Dr. Wittgen, an orthopedic surgeon, testified on Dr. Washington's behalf. Tr. 561. Dr. Wittgen testified that Ms. Harvey's knee replacement surgery was not contraindicated based on the E coli present in her urine sample on September 14. Tr. 570. Dr. Wittgen testified that Dr. Washington's treatment of Mary Harvey met the standard of care. Tr. 564. In Dr. Wittgen's opinion, Ms. Harvey did not have any active urinary tract infection before October 3. Tr. 571-72. Dr. Wittgen opined that in October, immediately

before her death, Mary Harvey might have had a true urinary tract infection due to citrobacter. Tr. 571.

Dr. Williams, who was also a defendant in this action, testified that, in his opinion, Ms. Harvey did not have a pseudomonas urinary tract infection between September 26 and October 1. Tr. 710. Dr. Williams offered the expert testimony of Dr. William Burmeister, who likewise testified that Mary Harvey did not have a pseudomonas urinary tract infection between September 24 and September 29. Tr. Vol. 3, 61.

Motions for a Directed Verdict and Jury Instructions

Dr. Washington moved for a directed verdict at the close of plaintiff's evidence and at the close of all evidence, arguing that plaintiff failed to make a submissible case because he had failed to prove that "but for" Dr. Washington's alleged actions Mary Harvey would have lived. Tr. 456-59, L.F. 146, 166. Those motions were denied. L.F. 159; Tr. Vol. 3, 152-53.

Over defendant's objection, plaintiff then submitted the following verdict director against Dr. Washington:

Instruction No. 8

Your verdict must be for the plaintiff and against defendant Eric Washington, M.D., 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 directly caused or directly contributed to cause the death of Mary Harvey.

L.F. 178. Similar verdict directors were submitted for plaintiff's claims against Dr. Denise Taylor (Instruction Number 10) and Dr. Wendell Williams (Instruction Number 12). L.F. 180, 182.

Dr. Washington objected to the instruction on two grounds. First, Dr. Washington argued that it was "unclear from the instruction that the jury must first find that there was a pseudomonas urinary tract infection, which is a major issue in this case, and then must find that there was a duty on the part of Dr. Washington to treat such an infection." Tr. Vol. 3, 165.[1] Second, Dr. Washington again argued that plaintiff failed to prove a causal relationship between Dr. Washington's

[1] The pagination in Volume 3 of the transcript does not continue from Volume 2, and therefore Volume 3 is cited in this Brief as "Tr. Vol. 3." The transcript of the post-trial hearing which occurred on May 21, 2001, will be cited as " PTr."

actions and Mary Harvey's death. Tr. Vol. 3, 166. Counsel for Dr. Taylor and Dr. Williams made similar objections to Instructions 10 and 12. Tr. Vol. 3, 164-67. The trial court overruled defendants' objections to Instructions 8, 10, and 12. Tr. Vol. 3, 166-67.

During deliberations, the jury submitted the following questions to the court:

> 1. Please expand on the definitions of "Directly Caused" and "Directly Contributed" as it relates to the death of Mary Harvey.
>
> 2. Based on the wording of instructions # 8, #10, and #12, is the court stating that M[ary] H[arvey] had a pseudomonas infection, or is that for the jury to decide?

L.F. 192. Defendants Washington, Williams and Taylor moved the court to clarify the verdict directing instructions by informing the jurors that the existence of the infection was an issue to be determined by them. Tr. Vol. 3, 284-87. Plaintiff objected to the court making any such clarification. Tr. Vol. 3, 285, 287. The trial court decided that the requested clarification was not required, and gave the following response to the jury's question:

> The jury must be guided by the instructions as given. Please read or reread all the instructions.

L.F. 192; Tr. Vol. 3, 288.

The jury returned a verdict in favor of plaintiff and against Dr. Washington, Dr. Taylor, and Dr. Williams. L.F. 196. 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. The jury assessed each of the doctors to be 33 1/3 percent at fault for plaintiff's damages. L.F. 198. The court entered judgment on the jury's verdict on January 31, 2001. This appeal followed.

## POINTS RELIED ON

**I. THE TRIAL COURT ERRED IN DENYING DR. WASHINGTON'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE OF WRONGFUL DEATH AGAINST DR. WASHINGTON, IN THAT PLAINTIFF FAILED TO PRESENT SUBSTANTIAL EVIDENCE THAT, BUT FOR ANY ACTION OR INACTION OF DR. WASHINGTON, MS. HARVEY WOULD NOT HAVE DIED.**

*Coonrod v. Archer-Daniels-Midland Co.*, 948 S.W.2d 529 (Mo. App. 1998)

*Tillman v. Elrod*, 897 S.W.2d 116 (Mo. App. 1995)

*Super v. White*, 18 S.W.3d 511 (Mo. App. 2000)

*Hurlock v. Park Lane Medical Ctr.*, 709 S.W.2d 872 (Mo. App. 1985)

**II. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY INSTRUCTION NUMBER 8, THE VERDICT DIRECTOR AGAINST DR. WASHINGTON, (1) BECAUSE THE INSTRUCTION GAVE THE JURY A ROVING COMMISSION, IN THAT THE INSTRUCTION ASSUMED AS TRUE THE DISPUTED ISSUE OF WHETHER MARY HARVEY HAD A PSEUDOMONAS URINARY TRACT INFECTION BETWEEN SEPTEMBER 26 AND SEPTEMBER 30, AND (2) BECAUSE THE MAI 19.01 MODIFICATION OF THE THIRD PARAGRAPH OF THE INSTRUCTION DID NOT CONFORM TO THE EVIDENCE, IN THAT THE INSTRUCTION USED THE VARIATION OF MAI 19.01 STATING THAT DR. WASHINGTON'S ACTIONS CONTRIBUTED TO CAUSE THE DEATH OF MS. HARVEY, RATHER THAN DR. WASHINGTON'S ACTIONS COMBINED WITH THE ACTIONS OF THE OTHER DEFENDANTS CAUSED THE DEATH OF MS. HARVEY.**

*EPIC, Inc. v. City of Kansas City*, 37 S.W.3d 360 (Mo. App. 2001)

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

*Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224 (Mo. 1997)

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

**III. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING DEFENDANTS' OBJECTIONS AND PERMITTING PLAINTIFF'S WITNESS DR. COLEMAN TO TESTIFY THAT THE FAILURE TO TREAT THE ALLEGED URINARY TRACT INFECTION CAUSED OR CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH, BECAUSE THE COURT PERMITTED DR. COLEMAN TO GIVE TRIAL TESTIMONY THAT WAS MATERIALLY DIFFERENT FROM THE OPINIONS AND TESTIMONY DR. COLEMAN GAVE AT HIS DEPOSITION, IN THAT AT HIS DEPOSITION DR. COLEMAN TESTIFIED THAT HE COULD NOT SPECIFY TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THE CAUSE OF MARY HARVEY'S DEATH AND COULD NOT SAY WHETHER THE EVENTS LEADING TO HER DEATH WERE THE RESULT OF ANY NEGLIGENCE ON THE PART OF DEFENDANTS.**

*Green v. Fleishman*, 882 S.W.2d 219 (Mo. App. 1994)

*Bailey v. Norfolk and Western Ry.*, 942 S.W.2d 404 (Mo. App. 1997)

**IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DR. WASHINGTON'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL BASED ON JUROR LOLITA JONES' NON-DISCLOSURE OF PRIOR AND PENDING LAWSUITS, BECAUSE MS. JONES' FAILURE TO DISCLOSE THOSE LAWSUITS WAS INTENTIONAL AND THEREFORE MATERIAL AND PREJUDICIAL, IN THAT THE EVIDENCE BEFORE THE COURT SHOWED THAT THERE WAS NO REASONABLE INABILITY OF MS. JONES TO COMPREHEND THE INFORMATION SOLICITED BY THE QUESTIONS ASKED OF HER ON VOIR DIRE, AND THERE WAS NO REASONABLE INABILITY OF MS. JONES TO RECALL PRIOR LITIGATION.**

*Schultz v. Heartland Health System, Inc.*, 16 S.W.3d 625 (Mo. App. 2000)

*Jackson v. Watson*, 978 S.W.2d 829 (Mo. App. 1998)

*Doyle v. Kennedy Heating and Service, Inc.*, 33 S.W.3d 199 (Mo. App. 2000)

## ARGUMENT

Plaintiff failed to prove the "but for" causation necessary for a submissible negligence claim against Dr. Washington. Plaintiff submitted his claim against Dr. Washington only on the theory that Dr. Washington had been negligent in failing to prescribe antibiotics for Mary Harvey's alleged pseudomonas urinary tract infection. But Dr. Coleman, plaintiff's expert, admitted that he could not say whether Mary Harvey would have survived even if Dr. Washington had prescribed different antibiotics for a urinary tract infection. Because plaintiff failed to prove causation, the trial court erred in failing to direct a verdict in favor of Dr. Washington and in failing to grant Dr. Washington's motion for judgment notwithstanding the verdict. This Court should reverse the judgment in favor of plaintiff and remand this case with directions to enter judgment in favor of Dr. Washington.

If this Court concludes that plaintiff made a submissible case despite the lack of causation evidence, then the Court should still reverse and remand the case for a new trial, for several reasons. First, the trial court erred in giving Instruction Number 8, plaintiff's verdict director against Dr. Washington, because the instruction improperly assumed as true a disputed fact – whether Mary Harvey had a pseudomonas urinary tract infection – and improperly submitted the element of causation under MAI 19.01. Second, the trial court erred in permitting Dr.

Coleman to give testimony at trial that was materially different than the testimony he gave in his deposition. The improper admission of that testimony requires either outright reversal or remand for a new trial. Third, the trial court abused its discretion in refusing to grant a new trial based on a juror's failure to give candid answers to questions about prior litigation experience. This abuse of discretion also requires a new trial.

## I. THE TRIAL COURT ERRED IN DENYING DR. WASHINGTON'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE OF WRONGFUL DEATH AGAINST DR. WASHINGTON, IN THAT PLAINTIFF FAILED TO PRESENT SUBSTANTIAL EVIDENCE THAT, BUT FOR ANY ACTION OR INACTION OF DR. WASHINGTON, MS. HARVEY WOULD NOT HAVE DIED.

### 1. Standard Of Review And Burden Of Proof

In reviewing the trial court's denial of motions for directed verdict and JNOV, this Court determines whether the plaintiff made a submissible case. *Dubinsky v. U.S. Elevator Corp.*, 22 S.W.3d 747, 749 (Mo. App. 2000); *Coonrod v. Archer-Daniels-Midland Co.*, 984 S.W.2d 529, 532 (Mo. App. 1998). To make a submissible case, the plaintiff must present substantial evidence to support each

element of his claim. *Coonrod*, 984 S.W.2d at 532. In determining whether the plaintiff made a submissible case, the court reviews the evidence in the light most favorable to plaintiff, giving plaintiff the benefit of all reasonable favorable inferences and disregarding defendant's evidence except insofar as it may aid the plaintiff's case. *Id.* However, the court does not supply missing evidence or give plaintiff the benefit of unreasonable, speculative or forced inferences. *Id.* Evidence and the inferences from that evidence must support each element and not leave any issue to speculation. *Id.*

"The 'but for' test for causation in Missouri applies in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury." *Tillman v. Elrod*, 897 S.W.2d 116, 118 (Mo. App. 1995), citing *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862-63 (Mo. banc 1993). Therefore, to make a submissible case in a wrongful death action based on alleged medical malpractice, the plaintiff must establish that "but for" the actions or inaction of the defendant, the decedent would not have died. *Super v. White*, 18 S.W.3d 511, 516 (Mo. App. 2000); *Mueller v. Bauer*, 54 S.W.3d 652, 656 (Mo. App. 2001). Expert testimony is required to establish causation in a medical malpractice case where proof of causation requires a certain degree of expertise. *Super*, 18 S.W.3d at 516; *Mueller*, 54 S.W.3d at 656. When a party relies on expert testimony to provide evidence of causation in a case involving two or more

possible causes for the plaintiff's injury and damages, that testimony must be given to a reasonable degree of certainty. *Super*, 18 S.W.3d at 516; *Mueller*, 54 S.W.3d at 656. "When an expert testifies that a given action or failure to act 'might' or 'could have' yielded a given result, though other causes are possible, such testimony is devoid of evidentiary value." *Super*, 18 S.W.3d at 516.

**2. <u>Plaintiff Failed To Make A Submissible Case Against Dr. Washington.</u>**

Plaintiff attempted to establish the requisite causal connection between Dr. Washington's conduct and Mary Harvey's death through the testimony of one witness, Dr. David Coleman. Dr. Coleman, however, never testified that "but for" Dr. Washington's alleged negligence, Mary Harvey would have survived.

According to Dr. Coleman, there was more than one cause for Mary Harvey's neurological deterioration and subsequent death. Dr. Coleman testified that, in his opinion, Mary Harvey suffered from both an untreated urinary tract infection and renal failure, and the combination of those two conditions caused her deterioration and death. Tr. 379-80. He testified that Ms. Harvey would have survived if she had received dialysis for her renal failure *and* an antibiotic for her alleged infection. Tr. 324-25.

Although Dr. Coleman testified that Dr. Washington's failure to provide an antibiotic "contributed" to cause Mary Harvey's death, he admitted that he could

not express an opinion that, but for the failure to provide an antibiotic, Mary Harvey would have lived. Dr. Coleman gave the following testimony:

> Q. Now you believe that Mary Harvey's antibiotics should have been changed on the 26th?
>
> A. Yes.
>
> Q. But you can't state to a reasonable degree of medical certainty that if her antibiotics had been changed that Mary Harvey would not have gone on to have this event that you're talking about on the 30th, correct?
>
> A. No. For the same reason I referred to earlier about the dialysis. I believe it was a combination of causes.

Tr. 371.

Plaintiff was bound by Dr. Coleman's testimony, including his testimony on cross-examination. *Hurlock v. Park Lane Medical Ctr.*, 709 S.W.2d 872, 879 (Mo. App. 1985); *Bonnot v. City of Jefferson City*, 791 S.W.2d 766, 769 (Mo. App. 1990). Plaintiff had the burden to make a submissible case of wrongful death "by substantial evidence of probative force and to remove the case from the realm of speculation, conjecture, and surmise." *Hurlock*, 709 S.W.2d at 880. As a matter of law, Dr. Coleman's testimony was insufficient to establish the "but for" causation necessary to make a submissible case. No expert witness testified that, but for the

failure to prescribe Mary Harvey an antibiotic to treat a pseudomonas urinary tract infection, Mary Harvey would have lived.

Dr. Washington, Dr. Taylor, and Dr. Williams all moved for directed verdicts and for JNOV based on plaintiff's failure to establish "but for" causation. Tr. 456, 464, 468; L.F. 146, 153, 155. In response, plaintiff argued that, pursuant to *Gaines v. Property Servicing Co.*, 276 S.W.2d 169 (Mo. 1955), defendants could be held liable despite the fact that their negligence was not the "sole proximate cause" of Mary Harvey's death, because defendants' negligence was a concurrent cause. Tr. 467. The trial court, apparently accepting plaintiff's argument, denied defendants' motions.

The trial court erred. Plaintiff and, apparently, the trial court confused "but for" causation with sole proximate cause. Even assuming for purposes of argument that defendants' failure to change Ms. Harvey's antibiotic breached the applicable standard of care, Missouri law still clearly required plaintiff to prove that "but for" that failure, Mary Harvey would not have died. The justification for this requirement is simple and sound. If Mary Harvey would have died from renal failure even if Dr. Washington had changed her antibiotic on September 26, then Dr. Washington cannot be held liable for her death. Dr. Coleman unequivocally testified that he could not state whether Mary Harvey would have lived if she had been given an antibiotic to treat the alleged pseudomonas urinary tract infection.

Plaintiff therefore failed to meet his burden of proof, and nothing in *Gaines* rectifies plaintiff's failure. In fact, *Gaines* supports defendants' argument that plaintiff was required to prove "but for" causation to make a submissible case against Dr. Washington.

Like this case, *Gaines* involved injuries that allegedly resulted from concurrent causes. The plaintiff in *Gaines* was injured as the result of a fire in his apartment building that was intentionally set by his downstairs neighbor. The building was not equipped with a fire escape. *Gaines*, 276 S.W.2d at 171. When the fire reached plaintiff's apartment, he was forced to jump from a window in his apartment onto the roof of an adjoining building. *Id*. He sustained serious injuries, and later sued the owner of the apartment building alleging that the owner was negligent for failing to provide a fire escape. After judgment was entered for plaintiff, the defendant appealed, arguing that plaintiff failed to prove that defendant's conduct caused plaintiff's injuries.

In affirming the judgment for the plaintiff, the Supreme Court of Missouri recited the rule that "if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence, without such other, independent, intervening cause, would not have produced the injury." *Id*. at 173. The Court then stated the question determinative of the causation issue: "Was the failure to provide a fire escape an

active and continuing concurrent cause, which if it had not existed, the injury would not have taken place?" *Gaines*, 276 S.W.2d at 173. The Court answered that question in the affirmative:

> On this record a jury could find that defendant's unlawful and negligent failure to provide a fire escape concurred with the intentionally set fire to cause the injuries, *since there was substantial evidence that, except for defendant's failure to provide a fire escape, plaintiff would not have been injured.*

*Gaines*, 276 S.W.2d at 173 (emphasis added). Thus, the Court held that, while the defendant's act was not the sole proximate cause of the plaintiff's injuries, it was a "but for" cause. The fire and the lack of a fire escape both concurrently contributed to cause the plaintiff's injury. If the fire had not occurred or if there had been a fire escape, then plaintiff would not have been injured. In *Gaines*, the "but for" test was met.

Unlike the plaintiff in *Gaines*, plaintiff in this case presented no evidence that Mary Harvey would have lived if not for Dr. Washington's conduct. Plaintiff merely presented opinion testimony that Mary Harvey's death resulted from a combination of causes; that the defendant doctors should have treated one of those causes—a urinary tract infection—with a proper antibiotic; and that it was impossible to predict whether Mary Harvey would have lived if the doctors had

given her that antibiotic. Without any evidence that Mary Harvey would have lived, plaintiff did not prove a causal connection between Dr. Washington's conduct and Mary Harvey's death. And without proof of such a causal connection, plaintiff did not make a submissible case.

Furthermore, Dr. Coleman's testimony was, at best, inherently contradictory. He first testified that Dr. Washington's failure to treat the alleged infection "contributed" to cause Mary Harvey's death, then testified that he had no opinion as to whether Mary Harvey would have lived if Dr. Washington had treated the infection. As discussed above, mere testimony that the failure to treat with antibiotics "contributed" to cause Mary Harvey's death is not sufficient to establish "but for" causation. Even if Dr. Coleman's testimony had probative value, that testimony was effectively undercut by his later testimony that he could not say whether Mary Harvey would have lived had she been given antibiotics.

"The contradictory testimony of a single witness relied on to prove a fact does not constitute substantial evidence and is not probative of that fact in the absence of an explanation or other circumstances tending to prove or explain the contradiction." *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703-04 (Mo. App. 1973), *McClelland v. Ozenberger*, 841 S.W.2d 227, 235-36 (Mo. App. 1992). Plaintiff offered no explanation for the contradiction in Dr. Coleman's testimony.

Consequently, Dr. Coleman's contradictory testimony was not substantial evidence, and did not satisfy plaintiff's burden of proof.

Plaintiff failed to make a submissible case of wrongful death against Dr. Washington because plaintiff failed to prove that "but for" any action or inaction by Dr. Washington, Mary Harvey would have lived. The judgment for plaintiff and against Dr. Washington therefore should be reversed.

**II. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY INSTRUCTION NUMBER 8, THE VERDICT DIRECTOR AGAINST DR. WASHINGTON, (1) BECAUSE THE INSTRUCTION GAVE THE JURY A ROVING COMMISSION, IN THAT THE INSTRUCTION ASSUMED AS TRUE THE DISPUTED ISSUE OF WHETHER MARY HARVEY HAD A PSEUDOMONAS URINARY TRACT INFECTION BETWEEN SEPTEMBER 26 AND SEPTEMBER 30, AND (2) BECAUSE THE MAI 19.01 MODIFICATION OF THE THIRD PARAGRAPH OF THE INSTRUCTION DID NOT CONFORM TO THE EVIDENCE IN THAT THE INSTRUCTION USED THE VARIATION OF MAI 19.01 STATING THAT DR. WASHINGTON'S ACTIONS CONTRIBUTED TO CAUSE THE DEATH OF MS. HARVEY RATHER THAN DR. WASHINGTON'S ACTIONS COMBINED WITH THE ACTIONS OF THE OTHER DEFENDANTS CAUSED THE DEATH OF MS. HARVEY.**

**1. <u>Standard Of Review</u>**

In reviewing challenges to jury instructions, this Court checks for error that materially affected the merits of the case. *EPIC, Inc. v. City of Kansas City*, 37 S.W.3d 360, 366 (Mo. App. 2001). The jury's verdict will be reversed if the offending instruction misdirected, misled or confused the jury. *Id.*; *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 463 (Mo. 1998).

## 2. Instruction Number 8 Was Prejudicially Erroneous Because It Assumed As True The Disputed Issue Of Whether Ms. Harvey Had A Pseudomonas Urinary Tract Infection.

The only claim of negligence that plaintiff submitted against Dr. Washington was that Dr. Washington's alleged failure to treat Ms. Harvey's alleged pseudomonas urinary tract infection caused or contributed to cause Ms. Harvey's death. L.F. 178. Consequently, the issue of whether Ms. Harvey actually had a pseudomonas urinary tract infection was critical to the determination of liability.

The issue of whether Ms. Harvey had a pseudomonas urinary tract infection was contested at trial. Plaintiff offered opinion testimony from Dr. Coleman that Ms. Harvey had such an infection between September 26 and September 30, and Dr. Washington presented opinion testimony from Dr. Graham and Dr. Wittgen that Ms. Harvey never suffered from a pseudomonas urinary tract infection. Tr. 288, 571-72, 771, 779. In addition, the evidence showed that, although Ms. Harvey's blood and urine were infected at the time she died, those infections were from citrobacter, a bacterium unrelated to pseudomonas. Tr. 571, 690, 692. The issue of whether Mary Harvey suffered from a pseudomonas urinary tract infection therefore was for the jury to decide. Absent an instruction requiring the jury to determine this contested factual issue, the jury could not properly find Dr. Washington liable for Mary Harvey's death; Missouri law required that the verdict

director hypothesize the facts essential to plaintiff's claim. *Lasky v. Union Elec. Co.*, 936 S.W.2d 797, 800 (Mo. 1997).

The verdict director against Dr. Washington instructed the jury as follows:

Instruction No. 8

Your verdict must be for the plaintiff and against defendant Eric Washington, M.D., 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 directly caused or directly contributed to cause the death of Mary Harvey.

L.F. 178. Rather than hypothesizing the facts essential to plaintiff's claim – particularly the issue of whether Ms. Harvey had a urinary tract infection – Instruction Number 8 informed the jury that Ms. Harvey had a urinary tract infection, and then instructed the jury to find Dr. Washington liable if it determined that he failed to prescribe an antibiotic for that infection. The jury's confusion over the instruction was obvious. During deliberations the jury asked the court whether "the court [was] stating that M[ary] H[arvey] had a pseudomonas infection," or whether that issue was "for the jury to decide." L.F. 192. The court

elected not to clarify the instruction, and the jury was left to render a verdict against Dr. Washington based on a confusing and misleading verdict director.

The settled law in Missouri is that it is prejudicial error to submit an instruction which assumes a disputed fact. *Lasky*, 936 S.W.2d at 800; *Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224, 227 (Mo. 1997). In *Lasky*, the Missouri Supreme Court reversed a jury verdict for plaintiffs based on its determination that the verdict director failed to hypothesize the facts essential to plaintiffs' claim. The factual issues in *Lasky* were (1) whether the plaintiffs had come into contact with certain fluids from Union Electric's transformer that actually contained polychlorinate biphenyls (PCBs), and (2) whether contact with PCBs presented a risk of bodily harm. *Lasky*, 936 S.W.2d at 799. The verdict director instructed the jury to find for plaintiffs if it believed the following propositions.

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

*Id*. at 799. The jury found for the plaintiffs. On appeal, Union Electric argued that the verdict director assumed the disputed facts. *Id*. at 799. The Missouri Supreme Court agreed, and reversed and remanded the case.

The Court reasoned that "the issues of whether plaintiffs contacted the cooling fluid from defendant's transformer and whether such contact presented a risk of bodily harm were ultimate facts for determination by the jury." *Id.* at 801. The verdict director, however, "presented the knowledge element to the jury but assumed the facts of which defendant was alleged to have knowledge." *Id.* Because the verdict directing instruction "removed the issues from the jury's determination," submission of the instruction constituted prejudicial error. *Id.*

The verdict director as to Dr. Washington should have hypothesized the following: first, that Mary Harvey had a pseudomonas urinary tract infection; second, that Dr. Washington failed to prescribe an antibiotic from September 26 through September 30, 1995, to treat that infection; third, that Dr. Washington was thereby negligent; and fourth, that Dr. Washington's negligence caused Mary Harvey's death. Instead, as in *Lasky*, the verdict director as to Dr. Washington presented the element of Dr. Washington's alleged failure to treat Ms. Harvey's urinary tract infection, but assumed that the infection existed. The instruction withheld a disputed factual issue from the jury. The instruction therefore was

prejudicially erroneous. *Lasky*, 936 S.W.2d at 801; *see also Spring*, 873 S.W.2d at 227.

An instruction that assumes a disputed fact gives the jury a roving commission. *Seitz*, 959 S.W.2d at 463. Instruction Number 8 gave the jury a roving commission because it assumed, rather than required the jury to find, that Ms. Harvey had a pseudomonas urinary tract infection between September 26 and September 30. The trial court committed prejudicial error when it submitted Instruction Number 8 to the jury. *Lasky*, 936 S.W.2d at 801. The judgment in plaintiff's favor and against Dr. Washington therefore should be reversed.

**3. Instruction Number 8 Improperly Submitted The Issue Of Causation To The Jury.**

As discussed at length in Point II of the brief filed on behalf of Dr. Williams, plaintiff's verdict directors, including Instruction Number 8, improperly submitted the causation element to the jury. Instruction Number 8 improperly used the variation of MAI 19.01 stating that Dr. Washington's actions "contributed to cause" Mary Harvey's death. L.F. at 178. Even if the Court concludes that plaintiff somehow made a submissible case despite the lack of "but for" causation, plaintiff's verdict director should have used the "combined with" alternative of MAI 19.01.

Dr. Washington adopts and incorporates by reference the arguments and authorities discussed in Point II of the brief of appellant Wendell Williams on this issue.

## III. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING DEFENDANTS' OBJECTIONS AND PERMITTING PLAINTIFF'S WITNESS DR. COLEMAN TO TESTIFY THAT THE FAILURE TO TREAT THE ALLEGED URINARY TRACT INFECTION CAUSED OR CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH, BECAUSE THE COURT PERMITTED DR. COLEMAN TO GIVE TRIAL TESTIMONY THAT WAS MATERIALLY DIFFERENT FROM THE OPINIONS AND TESTIMONY DR. COLEMAN GAVE AT HIS DEPOSITION, IN THAT AT HIS DEPOSITION DR. COLEMAN TESTIFIED THAT HE COULD NOT SPECIFY TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THE CAUSE OF MARY HARVEY'S DEATH AND COULD NOT SAY WHETHER THE EVENTS LEADING TO HER DEATH WERE THE RESULT OF ANY NEGLIGENCE ON THE PART OF DEFENDANTS.

Over defendants' objections, the trial court improperly permitted plaintiff's expert witness Dr. Coleman to give testimony that was materially different from the testimony he gave at his deposition. The changes in testimony apparently were an attempt to cure Dr. Coleman's failure to establish causation in his deposition

testimony. As discussed above, Dr. Coleman's revised and supplemental opinions at trial were insufficient to prove causation. However, even if the Court somehow concludes that plaintiff made a submissible case of causation, the Court should reverse the judgment in favor of plaintiff, because the trial court should not have permitted Dr. Coleman to change the opinions he gave at his deposition.

**1. Standard Of Review**

When an expert witness has been deposed and later changes his or her opinion before trial, "it is the duty of the party intending to use the expert to disclose that new information to his adversary, thereby updating the responses made in the deposition." *Green v. Fleishman*, 882 S.W.2d 219, 221-222 (Mo. App. 1994), quoting *Gassen v. Woy*, 785 S.W.2d 601, 604 (Mo. App. 1990). A trial court is vested with broad discretion in determining appropriate sanctions when a party fails to disclose that an expert witness intends to change his deposition testimony. *Green*, 882 S.W.2d at 222. This Court reviews the trial court's assessment of sanctions under an abuse of discretion standard. *Id*. at 222. The sole task of the Court of Appeals is to determine whether the trial judge could have reasonably concluded as she did in permitting Dr. Coleman to change his testimony. *Id*.

## 2. The Trial Court Improperly Permitted Dr. Coleman To Materially Change His Testimony On The Issue Of Causation.

The trial judge abused her discretion in failing to limit Dr. Coleman's testimony or prevent him from giving different testimony than he had given at his deposition.

Dr. Coleman was deposed twice: first on December 15, 1999, and then on October 24, 2000. The first deposition was suspended to allow Dr. Coleman to review additional medical records. At his second deposition, Dr. Coleman was asked to give his opinion as to the cause of Mary Harvey's death. He testified that the principal cause "was the process that led to her rather acute deterioration on September 30th and October 1st. Exactly what caused that event, I don't know." L.F. 259 (p. 118). Dr. Coleman identified three "possible" causes of that event: sepsis (the presence of toxins in the blood or tissues), complications of acute renal failure, and microvascular strokes. L.F. 259 (p. 118). He could not say to a reasonable degree of medical certainty which of these three possible causes resulted in the "event" on September 30 to October 1. L.F. 260 (p. 121) ("I cannot say which of these is most likely. I think they are all possible"). Dr. Coleman admitted that one of these potential causes – microvascular strokes – would not have been caused by anything the defendant doctors had done or failed to do. L.F. 260 (p. 121).

At his October 24, 2000, deposition, Dr. Coleman never testified that, to a reasonable degree of medical certainty, Dr. Washington's failure to treat an alleged urinary tract infection contributed to cause Mary Harvey's death. To the contrary, Dr. Coleman testified that he could not identify with a reasonable degree of medical certainty the specific cause of the "calamitous event" on September 30. Specifically, Dr. Coleman testified that he could not state to a reasonable degree of medical certainty that any failure to treat the alleged urinary tract infection caused the neurological event on September 30th to October 1st. L.F. 257 (P. 109), 260 (p. 122). Without testimony establishing causation to a reasonable degree of medical certainty, plaintiff could not make a submissible case of liability against Dr. Washington.

Defendants filed motions in limine asking the trial court to preclude Dr. Coleman from testifying at trial differently than he did in his deposition. L.F. 94, 100, 110, 121. The trial judge denied defendants' motions, but expressed an intention to limit Dr. Coleman to his deposition testimony. Tr. 313-14. Notwithstanding this ruling, and over defendants' objections, the trial court permitted Dr. Coleman to materially change his testimony. In addition to eliminating microvascular strokes (for which defendants had no responsibility) as a

potential cause of the "event" on September 30 and October 1,[2] Dr. Coleman testified for the first time that, to a reasonable degree of medical certainty, the failure to treat the alleged urinary infection "caused or contributed to cause" Mary Harvey's death. This testimony, given without prior notice to defendants, was an obvious – though insufficient – attempt to address the inadequacy of Dr. Coleman's previous testimony on the issue of causation.

As discussed above, plaintiff failed to make a submissible case of causation even considering Dr. Coleman's trial testimony. Nevertheless, the trial court abused its discretion in permitting Dr. Coleman to change and supplement his deposition testimony in an attempt to cure the deficiency in plaintiff's causation evidence. Admittedly, the trial court has broad discretion in determining what sanctions are appropriate when a party fails to inform opposing counsel that a witness will change his testimony. But, even recognizing that discretion, the court should not permit an expert to testify that defendant's conduct caused the death of a patient, after that expert has testified in deposition that he cannot say to a

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[2] Plaintiff's counsel did advise defendants' counsel prior to trial that Dr. Coleman no longer considered microvascular strokes to be a potential cause of Mary Harvey's acute problems on September 30. Plaintiff did not inform defendants that there would be any other changes to Dr. Coleman's testimony.

reasonable degree of medical certainty what caused her death. *See Bailey v. Norfolk and Western Ry.*, 942 S.W.2d 404, 414-15 (Mo. App. 1997) (Trial court properly instructed jury to disregard defendant's expert causation testimony that differed from the expert's deposition testimony). Allowing these changes in an expert's opinion "prevent[s] a party from discovering by deposition the actual facts and opinions to which the expert is expected to testify…[and] also run[s] counter to the purpose of discovery rules to eliminate, as far as possible, concealment and surprise in the trial of lawsuits." *Bailey*, 942 S.W.2d at 415, citing *State ex rel. Plank*, 831 S.W.2d at 927; *see also Green*, 882 S.W.2d at 222, citing with approval Illinois cases excluding expert testimony in circumstances similar to this case. Dr. Coleman's trial testimony was materially different from his deposition testimony and, again, was given without prior notice to defendant. The testimony should not have been allowed.

The trial court erred in overruling defendants' objections to Dr. Coleman's changed testimony. Because that testimony was erroneously admitted, this Court should disregard Dr. Coleman's testimony that the failure to treat Mary Harvey's alleged urinary tract infection caused or contributed to cause her death, and should reverse the judgment in favor of plaintiff. In the alternative, the Court should remand for a new trial.

## IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DR. WASHINGTON'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL BASED ON JUROR LOLITA JONES' NON-DISCLOSURE OF PRIOR AND PENDING LAWSUITS, BECAUSE MS. JONES' FAILURE TO DISCLOSE THOSE LAWSUITS WAS INTENTIONAL AND THEREFORE MATERIAL AND PREJUDICIAL, IN THAT THE EVIDENCE BEFORE THE COURT SHOWED THAT THERE WAS NO REASONABLE INABILITY OF MS. JONES TO COMPREHEND THE INFORMATION SOLICITED BY THE QUESTIONS ASKED OF HER ON VOIR DIRE, AND THERE WAS NO REASONABLE INABILITY OF MS. JONES TO RECALL PRIOR LITIGATION.

### 1. Standard Of Review

A juror's nondisclosure of information during *voir dire* can be either intentional or unintentional. *Schultz v. Heartland Heath System, Inc.*, 16 S.W.3d 625, 627 (Mo. App. 2000). "Intentional nondisclosure occurs: 1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable." *Id.* "Unintentional

nondisclosure exists, where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed." *Id*.

The trial judge has discretion to determine whether nondisclosure is intentional or unintentional. *Doyle v. Kennedy Heating and Service, Inc.*, 33 S.W.3d 199, 201 (Mo. App. 2000). Although this Court gives the trial court's findings "great weight concerning whether nondisclosure was intentional, such findings must be overturned if the trial court abused its discretion." *Jackson v. Watson*, 978 S.W.2d 829, 832-33 (Mo. App. 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 indicate a lack of careful consideration. *Doyle*, 33 S.W.3d at 201. If reasonable individuals can differ about the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. *Id.*

**2. The Trial Court Abused Its Discretion In Determining That Juror Lolita Jones' Non-Disclosure Of Pending And Prior Litigation Was Unintentional.**

Lolita Jones, a nurse's aide, was a juror in this case. PTr. 6-7. In December, 1998, Ms. Jones was involved in a traffic accident. PTr. 8. Her minor daughter and godmother were passengers in her car at the time of the accident. PTr. 10-11.

Ms. Jones' daughter was injured in the accident and required hospitalization for a week. PTr. 10-11. As a result of that accident, Ms. Jones filed a lawsuit in 1999, as her daughter's next friend, against the other driver involved in the accident. PTr. 11-12. She hired an attorney, Pete Ferrara, to file the claim in the City of St. Louis, and she met with Mr. Ferrara approximately six times. PTr. 10-11. She was the decision-maker in the case, she decided whether the settlement amount was sufficient, and she did all of the work on the lawsuit with her attorney. PTr. 25-26. The lawsuit was not settled until spring of 2001; it was still pending during the trial of this case. PTr. 12.

In 1991, Ms. Jones was involved in a car accident in which she rear-ended another car. PTr. 20. The two people in the car that Ms. Jones rear-ended were injured, and an ambulance was called to the scene. PTr. 21. Both of those people later sued Ms. Jones. PTr. 23. Ms. Jones was represented by an attorney in those lawsuits. PTr. 23. She met with that attorney and gave answers to and signed interrogatories. PTr. 28. One of those suits was dismissed without prejudice in 1993, the other was dismissed in 1995. L.F. 323, 332. Ms. Jones' insurer cancelled her insurance as a result of that accident, and Ms. Jones was required to find a new insurer. PTr. 23-24.

Early in the course of *voir dire,* counsel asked the venire panel whether they knew or were patients of the defendant doctors. Tr. 24, 28-29. Various members

of the venire panel responded by describing how they were acquainted with or aware of the doctors. Tr. 24-29. Ms. Jones, in fact, responded that she had a client whom she occasionally brought to Dr. Washington, but that she had not developed a friendship with Dr. Washington. Tr. 25.

Some time later, plaintiff's counsel asked the following question:

> MR. FRANK: Does anybody presently have a claim or law suit that is presently going on at this time?

Tr. 46. One juror, Mr. Burroughs, responded that he had a pending worker's compensation claim for a shoulder injury he received at work. Tr. 46. After Mr. Burrough's response, counsel again asked whether any venire member had a pending claim:

> MR. FRANK: Anybody else who has a pending claim? How about in the chairs here? On the left side here? How about on the right side?

Tr. 47. Ms. Jones did not respond to the question.

Later, counsel asked, "Anybody ever had a claim or lawsuit brought against you by someone who claims they were injured because of something you did?" Tr. 52. Again, Ms. Jones did not respond.

After trial, Dr. Williams filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, in which Dr. Williams stated that he

was denied a fair trial because one or more jurors failed to truthfully respond to *voir dire* questions. L.F. 301. Dr. Washington and Dr. Taylor joined in that motion. L.F. 377; PTr. 4. Ms. Jones was subpoenaed, and testified in a post-trial hearing regarding her failure to respond to the questions about her prior litigation experience. When asked whether she understood the meaning of counsel's question about whether any juror had a "claim or law suit that is presently going on at this time?", Ms. Jones testified she did, in fact, understand the meaning of that question. PTr. 33-34. When questioned about the reason she did not respond to the question, Ms. Jones stated that she did not feel she had a response. PTr. 39. She then testified,

> When the question was asked I guess I kind of somewhat misunderstood. I was thinking that you were talking about with the ones that was here, that the case was going on with, Dr. Washington and them. That's why I thought you were talking about if someone had a problem with them, a case with them. So that's why I didn't raise my hand.

PTr. 39-40. Ms. Jones testified that she did not respond to counsel's question about whether any claims had ever been brought against her because she did not recall the 1991 accident which resulted in two lawsuits against her. PTr. 40-41.

The trial court found that Ms. Jones' nondisclosure of the three lawsuits was unintentional. With respect to the two lawsuits brought against Ms. Jones, the court found that Ms. Jones' nondisclosure was reasonable in light of her "credible" testimony at the hearing, and further found that the undisclosed experience was immaterial to the proceeding and not prejudicial to defendants. L.F. 393. The court found that Ms. Jones reasonably failed to disclose her pending lawsuit against the other driver involved in the 1998 accident because "there was no question asked during voir dire by any of the four lawyers which would have unequivocally triggered a response from" Ms. Jones requiring disclosure of that suit. L.F. 393.

The trial court abused its discretion in finding that Ms. Jones' nondisclosure was unintentional. Counsel's inquiry into whether any venire members "presently have a claim or lawsuit that is presently going on at this time?" was not subject to misinterpretation. The question clearly required venire members to disclose any lawsuits they might have had that were "presently going on" at the time. Ms. Jones had filed a lawsuit as her daughter's next friend, and that lawsuit was "presently going on." She was required to disclose it.

Furthermore, Ms. Jones' testimony regarding her failure to respond to the question was inherently contradictory and bordered on the absurd. She first testified that she understood the meaning of the question, then testified that she

misunderstood the meaning of the question. She claimed that she believed the lawyers were inquiring into present lawsuits against the defendants, but the question made no reference to the defendants. In addition, Mr. Burroughs' response to the question, in which he disclosed his workers' compensation claim, surely indicated that the question did not pertain to the defendants. Finally, Ms. Jones' excuse for nondisclosure makes no sense in light of the fact that the attorneys had long since asked the venire members whether they knew any of the defendants.

Ms. Jones' failure to recall the previous lawsuits against her is likewise unreasonable given the circumstances of those suits. Certain types of claims and fender-benders might be forgettable, but a rear-end collision where two persons are injured, are taken to the hospital by ambulance, and later file lawsuits does not easily fade from memory.

"If a juror intentionally withholds material information requested on *voir dire*, bias and prejudice are inferred from such concealment," and bias and prejudice must be presumed to have influenced the juror's verdict. *Doyle v. Kennedy Heating and Service, Inc.*, 33 S.W.3d 199, 201 (Mo. App. 2000). "Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional*, should the trial court inquire into prejudice." *Id.* (emphasis in original). "The fact that a prospective juror has been

sued as a defendant or has prosecuted cases as a plaintiff may cause the juror to be predisposed to defendants or to plaintiffs, as the case may be." *Id.* Consequently, "questions and answers pertaining to a prospective juror's prior litigation experience are material." *Id.*

The record does not support the trial court's conclusion that counsel's question about pending lawsuits would not have "unequivocally triggered a response from" Ms. Jones. Ms. Jones gave contradictory testimony regarding her understanding of that question. She offered unreasonable explanations for her failure to respond to questions about her involvement in past and present litigation. The only reasonable inference from Ms. Jones' testimony is that she intentionally withheld the information sought. The information was material, and bias and prejudice therefore are presumed to have occurred. *Doyle*, 33 S.W.3d at 201. The judgment in favor of plaintiff therefore should be reversed and the case remanded for a new trial.

## CONCLUSION

For the reasons discussed above, the judgment in favor of plaintiff should be reversed and remanded, with directions that the trial court enter judgment in favor of Dr. Washington. In the alternative, the Court should reverse the judgment and remand the case for a new trial on all issues.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND LOCAL RULE 360

The undersigned certifies that the foregoing Brief of Appellant includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06 and Local Rule 360. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in the Brief of Appellant is 10,732.