MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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

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

REPLY BRIEF OF APPELLANT ERIC WASHINGTON, M.D.

Thomas B. Weaver, #29176
Cynthia A. Sciuto, #43247
ARMSTRONG TEASDALE LLP
One Metropolitan Square
Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070
(314) 621-5065 facsimile

ATTORNEYS FOR APPELLANT
ERIC WASHINGTON, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

In his statement of facts, plaintiff makes several factual assertions that are not supported by the record. For example, plaintiff erroneously asserts that one of his expert witnesses, Dr. Iannacone, "testified that Dr. Washington breached the standard of care by failing to prescribe an antibiotic which would treat a pseudomonas urinary tract infection." Respondent's Br., p. 9. Dr. Iannacone did not give that testimony.

Dr. Iannacone's testimony was irrelevant to the theory of liability on which plaintiff submitted his claim. Dr. Iannacone's opinion was that Dr. Washington should have eradicated what Dr. Iannacone believed was an *e-coli* urinary tract infection before performing Ms. Harvey's knee replacement surgery on September 14. However, the sole issue of negligence submitted against Dr. Washington was whether Dr. Washington caused or contributed to cause Ms. Harvey's death by "fail[ing] to prescribe Mary Harvey an antibiotic from September 26 through September 30, 1995," which would treat her alleged urinary tract infection. L.F. 178. Dr. Iannacone gave no testimony regarding that issue. In fact, Dr. Iannacone explicitly acknowledged at trial that he was "not giving any opinion today about what caused Mary Harvey's death or why she died." Tr. 409.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DR. WASHINGTON'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Plaintiff's argument that he made a submissible case rests on a misinterpretation of the Supreme Court's opinion in *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. 1993), and an improper method of determining causation.

In *Callahan*, the infant plaintiff contracted polio after taking a live polio vaccine. Shortly after taking the vaccine he developed an abscess which compromised his immune system. Expert witnesses for the plaintiff testified that if the abscess had been appropriately treated, plaintiff would not have contracted polio. *Callahan*, 863 S.W.2d at 858.

Plaintiff introduced evidence that the abscess was not properly treated when he was taken to Cardinal Glennon hospital. *Callahan*, 863 S.W.2d at 863-64. There was an issue as to whether a nurse practitioner who examined the plaintiff failed to inform the supervising physician, Dr. Venglarcik, of the plaintiff's presence or condition. There was also an issue as to whether Dr. Venglarcik had been able to obtain that information elsewhere, such as the plaintiff's medical records. *Id.* at 859. Venglarcik testified that he did not recall examining the

plaintiff, but admitted that his signature appeared on the plaintiff's chart. *Id.* Consequently, there was a dispute as to whether Venglarcik failed to examine the plaintiff altogether, or whether he in fact examined the plaintiff, but nevertheless failed to treat the abscess. *Id*. There was no question, however, that Venglarcik did not incise the abscess and treat it with antibiotics, which plaintiff's experts identified as the proper treatment.

Plaintiff's experts in *Callahan* "were able to assert a reliable scientific basis for their theory" that the improper treatment of the abscess caused the plaintiff to develop polio. *Id.* at 863. The Supreme Court discussed "but for" causation in response to the plaintiff's contention that a "substantial factor" causation test was applicable because the plaintiff's injury resulted from the acts of multiple tortfeasors. Rejecting plaintiff's argument, the Supreme Court held that the "but for" causation test applies in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury. *Id.* at 862-63.

The Court then illustrated how the "but for" test could be applied to the *Callahan* facts by describing different scenarios that might have established "but for" causation against SLU based on Venglarcik's failure to treat the abscess. Each of the scenarios described in *Callahan* reflected that there was evidence to support a finding that the failure to treat the abscess was a "but for" cause of the infant's injury, and that each defendant, by acting properly, could have prevented

that injury. Each scenario was based on the assumption that the scenario could be supported by the evidence. *Id*. at 862. At no point in *Callahan* did the Supreme Court suggest that "but for" causation can be established by first assuming facts not supported by the evidence.

Unlike the plaintiff in *Callahan*, plaintiff in this case did not offer expert testimony that the failure to treat Mary Harvey's alleged urinary tract infection was a "but for" cause of her death. Rather, Dr. Coleman testified that he could not state what Mary Harvey's outcome would have been if her alleged urinary tract infection had been treated as he suggested. Tr. 371. He also could not state what Ms. Harvey's outcome would have been if only her renal failure had been treated. Tr. 323, 364.

Despite the insufficiency of Dr. Coleman's testimony, plaintiff claims that, under *Callahan*, he could prove "but for" causation with the following two-part method: first, assume a fact not in evidence – that Mary Harvey received dialysis by September 29th – and second, ask whether the evidence shows that Ms. Harvey "would have lived" if she had also received treatment for the alleged infection. Respondent's Br., p. 21. One obvious fallacy in this method is that Mary Harvey did not receive dialysis by September 29, and *Callahan* does not authorize the fact finder to assume that she did. Ms. Harvey was suffering from renal failure which,

according to Dr. Coleman, might have resulted in her death even if defendants had treated the alleged infection.

Furthermore, even if *Callahan* did permit plaintiff's assumption that Mary Harvey's renal failure (and other conditions) *had* been treated, plaintiff still could not establish "but for" causation by asking whether Mary Harvey "would have lived" if her alleged urinary tract infection were also treated. Plaintiff bore the burden of proving that Mary Harvey died because of the failure to give an antibiotic, not that Mary Harvey would have lived if she had been given an antibiotic, and she was not suffering from renal failure. Thus, even assuming treatment for renal failure that was never given, the relevant question would be this: "Assuming Mary Harvey's alleged renal failure had been treated, would the failure to give her antibiotics for her urinary infection have caused her death?" Dr. Coleman's answer to this question was "I don't know." Dr. Coleman was unable to state whether Ms. Harvey would have lived "assuming" that only her renal condition had been treated.

Plaintiff argues that *Callahan* and this case both involve a situation where two conditions combined "to cause the ultimate outcome (death), neither condition being sufficient to cause the injury by itself." Respondent's Br., p. 19. Plaintiff misreads *Callahan* and ignores his own expert's testimony. In *Callahan* there was a single physical source of injury – an untreated abscess that compromised the

child's immune system. The Supreme Court described various scenarios under which each defendant could have been found to have caused the injury, independent of the negligence of the other defendant, and explicitly noted that each defendant rises and falls on his own "but for" causation test. *Callahan*, 863 S.W.2d at 862.

No similar scenarios can be described here. Plaintiff claimed that Ms. Harvey suffered from two conditions – renal failure and a urinary tract infection. Plaintiff did not present evidence that Dr. Washington could have prevented Ms. Harvey's death by treating her alleged pseudomonas infection, independent of any failure to treat her renal condition.

Moreover, contrary to plaintiff's repeated assertions, there was no testimony that two causes—"each of which alone would be insufficient to cause injury"—combined to cause Ms. Harvey's death. Respondent's Br., p. 22. Dr. Coleman did not testify that either the renal condition alone or the alleged pseudomonas infection alone would have been insufficient to cause Ms. Harvey's death. Rather, Dr. Coleman expressly admitted that he could not say whether plaintiff would have died if either Ms. Harvey's alleged pseudomonas infection or her renal dysfunction had been treated.[1]

[1] *Callahan* recognizes only one exception to the requirement of "but for" causation: when a case involves two independent torts, either of which is alone

Plaintiff could have tried to show that the two conditions combined to cause plaintiff's injuries and that neither by itself would have resulted in her death. He did not make this showing. Plaintiff also could have tried to show that either the failure to treat the renal condition or the failure to treat the pseudomonas infection was independently sufficient to cause Ms. Harvey's death. Plaintiff did not prove this either. Instead, he offered speculative testimony that either condition alone might or might not have caused her death. That testimony falls far short of the required proof that, to a reasonable degree of medical certainty, Ms. Harvey would have lived but for Dr. Washington's failure to treat her alleged pseudomonas infection. Plaintiff's problems with causation are not the result of defendants' interpretation and application of the "but for" test, or of the questions defendants asked, but rather are the result of Dr. Coleman's equivocations and uncertainty.

"'But for' is an absolute minimum for causation because it is merely causation in fact." *Callahan*, 863 S.W.2d at 862. Plaintiff failed to make a submissible case of causation, and therefore the Court should reverse the judgment against Dr. Washington.

---

sufficient to cause the injury. 863 S.W.2d at 862. Plaintiff does not and cannot claim that the exception applies here. Again, Dr. Coleman testified that he could not say, one way or the other, whether either the renal failure or alleged urinary tract infection would have independently caused Ms. Harvey's death.

II. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY INSTRUCTION NUMBER 8.

Contrary to plaintiff's argument, *Welch v. Hyatt*, 578 S.W.2d 905 (Mo. 1979), does not support the giving of Instruction 8.

The issue in *Welch* was whether the plaintiff was contributorily negligent for a car accident. The jury had to determine whether the plaintiff "intended to and did turn left into [a farm] driveway" that ran off of the highway. *Welch*, 578 S.W.2d at 914. The contributory negligence verdict director instructed the jury to find for defendant if it believed "first, plaintiff . . . failed to signal his intention to turn." *Id* at 909. On appeal, the plaintiff argued that the instruction was erroneous because it assumed a controverted fact – "the plaintiff intended to and did turn left." *Id.* at 913. The Supreme Court held that, in the "total context" of the case, the instruction was not erroneous because the jury was not confused by it. Nevertheless, the Court admonished that, in future instructions, each disputed factual issue should be set forth in separate paragraphs:

> 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.

Welch, 578 S.W.2d at 914-15.

Plaintiff's verdict director against Dr. Washington did not adhere to the Court's admonishment in *Welch.* The jury was not asked to first find that Mary Harvey had a pseudomonas infection, and then find that Dr. Washington failed to prescribe an antibiotic to treat that infection. L.F. 178. As phrased, Instruction 8 assumed that Ms. Harvey had a urinary tract infection. Therefore, the instruction was prejudicial. Moreover, in stark contrast to *Welch*, the record in this case shows that the jury was, in fact, confused by the instruction.

Lasky v. Union Electric Company is directly on point here, notwithstanding plaintiff's attempt to distort it. In *Lasky*, the parties disputed (1) whether plaintiffs came into contact with contaminated transformer fluids, and (2) whether contact with the contaminant presented a risk of bodily harm. *Lasky*, 936 S.W.2d at 797, 799 (Mo. 1997). The jurors, however, were not instructed to find either of those facts. *Id.* The instruction was prejudicially erroneous because it assumed the disputed facts of contact and contamination, and only required the jury to find the defendant's knowledge. *Id.* at 799-800. Similarly, in this case, Instruction 8 was prejudicially erroneous because it assumed Mary Harvey had an infection, and only required the jury to find that defendant failed to prescribe antibiotics to treat it.

Plaintiff claims that Instruction 8 was proper because there was "no dispute that the defendants failed to prescribe an antibiotic which would have treated a

pseudomonas urinary tract infection," and therefore the jury was never really required to find that Dr. Washington failed to prescribe an antibiotic. Respondent's Br., pp. 24, 32. According to plaintiff, the instruction could be erroneous only if it assumed one disputed fact and still presented a second disputed fact in the same paragraph. Respondent's Br., p. 32. Plaintiff's somewhat elusive argument not only ignores the facts and issues presented in this case, but also is contrary to Missouri law.

An allegedly "undisputed" submission in an instruction does not cure the prejudice resulting from that instruction's assumption of a disputed fact. For example, in *Duncan v. Andrew County Mutual Insurance Company*, plaintiffs sued their insurer on a policy providing theft coverage for soybeans and tools located on the "Heck Farm." *Duncan*, 665 S.W.2d 13, 15 (Mo. App. 1983). One of the contested issues at trial was whether plaintiffs owned any soybeans on the Heck Farm that were the subject of the alleged theft. *Id.* There was no dispute, however, that the defendant insurer had issued the policy to plaintiffs. *Id.*

The verdict director instructed the jury to find for plaintiffs if it determined:

> First, defendant issued its policy to plaintiffs on soybeans and equipment covering loss due to theft, and
>
> Second, such property was damaged by theft.

Id. at 15. The instruction thus assumed that plaintiffs owned soybeans on the property, and merely required the jury to find that the property was stolen, and the "undisputed" fact that the insurer issued the policy. The court of appeals found that submission of the instruction was reversible error because it assumed a controverted fact. *Id.* at 18.

Duncan, *Welch*, and *Lasky* all hold that verdict directors should submit each required finding in a separately numbered paragraph. Thus, assuming certain facts were "undisputed" in this case, the jury still should have been required to make four distinct findings: first, that Mary Harvey had a pseudomonas urinary tract infection; second, that Dr. Washington failed to prescribe an antibiotic to treat that infection; third that Dr. Washington was negligent in failing to prescribe such an antibiotic; and fourth, that said negligence caused Mary Harvey's death. Instruction 8 required only three findings; it did not require the jury to find that Ms. Harvey had a pseudomonas urinary tract infection.

Plaintiff wrongly argues that any error in Instruction 8 was cured by Instruction 3, which informed the jury that the court did not "mean to assume as true any fact in these instructions." The Supreme Court rejected the exact same argument in *Bledsoe v. Northside Supply & Development Co.*, 429 S.W.2d 727 (Mo. 1968): "An instruction such as Instruction 9 [stating that the court did not mean to assume any facts] could be helpful in making clear indefinite or

ambiguous language; but in the case of a clear direct assumption of a controverted fact in a verdict directing instruction, we have said this cannot be cured by other instructions properly submitting the issue." *Id*., at 733. Like the instruction in *Bledsoe*, Instruction 8 was not merely ambiguous or indefinite; it assumed a disputed fact.

Citing *Smith v. Kovac*, 927 S.W.2d 493 (Mo. App. 1996), plaintiff apparently suggests that the Court should ignore the jurors' note asking whether the court was stating that Ms. Harvey had a pseudomonas infection. Respondent's Br., p. 33. Plaintiff misinterprets *Kovac.*

The jury's note in *Kovac* did not relate directly to the objection against the instruction. The jurors' note in this case, however, reflected the exact concern that defendants had raised in their objection to the instruction—whether the instruction assumed a disputed fact.

Furthermore, *Kovac* does not hold that a jury's query about an instruction is irrelevant to a determination of whether an instruction was erroneous. *Kovac*, 927 S.W.2d at 498-99. In *Kampe v. Colom,* 906 S.W.2d 796, 805-06 (Mo. App. 1995), cited by the court in *Kovac*, the court of appeals held that, although not necessarily conclusive, "the jury's inquiry [about an instruction] may be considered in determining the propriety of a contested instruction."

Finally, plaintiff makes the absurd argument that Dr. Washington waived the error in Instruction 8 because plaintiff allegedly changed the instruction at defendant's request. There is no record of a discussion in which Dr. Washington, or any other defendant, requested that plaintiff submit a verdict director with the language contained in Instruction 8. The "record" referenced by plaintiff is his own counsel's statement to the court that he changed the verdict director at the request of "one of the defendants." Tr. 167. The original verdict director that plaintiff apparently intended to submit instructed the jury to find against a defendant doctor if that doctor "failed to prescribe an antibiotic which would treat a pseudomonas urinary tract infection." Tr. 167. Thus, plaintiff's initial verdict director still assumed a disputed fact – the existence of a pseudomonas infection – but did not even expressly refer to Mary Harvey. Assuming plaintiff changed the erroneous initial verdict director in response to an objection by "one of the defendants," that change did not vitiate all objections to the still erroneous latter version eventually submitted to the jury.

Instruction 8 is improper because it assumes a disputed fact. The trial court erred in submitting Instruction 8, and the judgment for plaintiff should be reversed.

III. THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' OBJECTIONS AND PERMITTING DR. COLEMAN TO TESTIFY.

The record controverts plaintiff's claim that Dr. Coleman expressed an opinion in deposition "that the combination of untreated renal failure and an untreated urinary tract infection combined" to cause Mary Harvey's death. In the deposition pages that plaintiff cites, Dr. Coleman expressed no such opinion. Respondent's Br., p. 44. Instead, in deposition, Dr. Coleman was asked the following question: "Doctor, what is your opinion regarding Mary Harvey's cause of death, if you have one?" L.F. 259, p. 118. In response, Dr. Coleman summed up his opinion:

> Well, I think the principal cause of her death was the process that led to her rather acute deterioration on the evening of the 30th heading into the 1st of October. Exactly what caused that event, I don't know. I think there were three possibilities. The sepsis that I mentioned, possible but not probable. A uremic encephalopathy; that is complications of acute renal failure manifested by depressed mental status and by her seizures. And another possibility is that she had microvascular strokes. . . . I can't say which of these is most likely. . . . Whatever that cause was – and they are not mutually exclusive, and I think it's clear that she had some evidence of

> infection as a contributing factor, even if the primary event was a uremic encephalopathy or a stroke – I believe it's that combination of events that led to her death.

L.F. 259, pp. 118-19. The "combination" of events that Dr. Coleman referred to apparently consisted of the undefined "major event" and other conditions, not resulting from alleged malpractice, that also contributed to Ms. Harvey's death. L.F. 259, p. 119.

In deposition, Dr. Coleman repeatedly acknowledged that he did not know what caused Ms. Harvey's "event." He stated that a stroke, or a sepsis, or "something caused the major brain damage that . . . prevented her from sustaining life." L.F. 244, p. 59. But when asked if he could "say with any reasonable degree of medical certainty as to what the exact cause of the calamitous event was," Dr. Coleman responded, "No." L.F. 244, p. 59. Dr. Coleman also never testified in deposition that failure to treat a urinary tract infection, combined with a failure to give dialysis, caused Mary Harvey's death. He never stated that an untreated urinary tract infection was one of two primary causes of Ms. Harvey's death.

At trial, Dr. Coleman changed his testmony. This change from his deposition testimony was given without proper notice to the defendants, and over the defendants' objections.

The purpose for the rules governing discovery is to eliminate concealment and surprise in the trial of lawsuits. *Bailey v. Norfolk and Western Ry.*, 942 S.W.2d 404, 415 (Mo. App. 1997). Surely, that purpose should not be flouted in cases like this, where the plaintiff fails to explain why his expert's opinion has changed, or why the defendants were not timely advised of that changed opinion. While Dr. Coleman's trial testimony remained insufficient to make a submissible case, it should not have been admitted at all. *See Id. at* 414-15.

The trial court abused its discretion in admitting Dr. Coleman's opinion testimony over defendant's objections. The judgment for plaintiff therefore should be reversed.

ADOPTION OF ARGUMENTS OF OTHER APPELLANTS

Dr. Washington also adopts the arguments in the reply briefs of appellants Wendell Williams, M.D., and Denise Taylor, M.D., to the extent applicable to the issues discussed in this brief.

CONCLUSION

The judgment in plaintiff's favor should be reversed and remanded with directions that the trial court enter judgment in Dr. Washington's favor. Alternatively, this Court should reverse the judgment and remand the case for a new trial on all issues.

Respectfully submitted,

Thomas B. Weaver #29176
Cynthia A. Sciuto #43247
Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070 telephone
(314) 621-5065 fax

ATTORNEYS FOR APPELLANT
ERIC WASHINGTON, M.D.

CERTIFICATE OF SERVICE

Two copies of the Reply Brief of Appellant and a disk containing the brief were mailed on January 28, 2001, to:

Mr. Joseph Frank
Frank, Dolan & Mueller
308 N. 21st Street, Suite 401
St. Louis, Missouri 63103

Mr. Paul D. Myre
Anderson & Gilbert
200 S. Hanley, Suite 710
St. Louis, Missouri 63105

Ms. Mary Reitz
The O'Malley Law Firm
10 South Brentwood, Suite 102
P.O. Box 16124
St. Louis, Missouri 63105-0824

CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND LOCAL RULE 360

The undersigned certifies that the foregoing Reply 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 Microsoft Word program, the undersigned certifies that the total number of words contained in the Reply Brief of Appellant is 3658, excluding the cover, certificate of service, certificate of compliance, and signature block.