IN THE SUPREME COURT OF MISSOURI

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

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

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

SUBSTITUTE BRIEF OF DEFENDANT/APPELLANT WENDELL WILLIAMS, M.D.

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JURISDICTIONAL STATEMENT

This is an appeal from an action for wrongful death based upon 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. All defendants filed timely post-trial motions.

On May 7, 2001, the trial court conducted its initial hearing on all defendants' post-trial motions. (L.F. 358). The Court ordered a further hearing on one of the issues raised in the post-trial motions, a juror's non-disclosure of her prior litigation experience, and Defendants' Motions for Periodic Payments of Plaintiff's Judgment for Future Damages. This hearing occurred on May 21, 2001. The trial court denied all defendants' post-trial motions on May 29, 2001. (L.F. 393). Defendant Wendell Williams, M.D., timely filed his Notice of Appeal on June 8, 2001. (L.F. 407). Timely Notices of Appeal were also filed by Defendants Taylor and Washington. The matter was briefed and argued before the Court of Appeals for the Eastern District of Missouri.

On February 26, 2002, the Court of Appeals for the Eastern District of Missouri issued a Per Curiam Opinion denying the appeals of all defendants.

On March 13, 2002, defendant Wendell Williams, M.D., filed a timely Motion for Rehearing and Application for Transfer to the Supreme Court. Defendants Taylor and Washington also filed timely Motions for Transfer and/or Applications for Transfer. On

April 17, 2002, the Court of Appeals denied the Motions for Rehearing and/or Applications

of Transfer of all defendants.

On May 1, 2002, defendant Wendell Williams, M.D., filed a timely Application for Transfer to this Court. On May 28, 2002, this Honorable Court entered its Order accepting transfer of this case pursuant to Rule 83.04.

STATEMENT OF FACTS

Mary Harvey died from multiple system organ failure on October 21, 1995, at the age of 67. (Tr. 255; L.F. 42). Plaintiff Willie Harvey sued Tenet HealthSystem, Inc., Deaconess Health Services Corporation and five physicians, including Dr. Cynthia Dugas-Elliot, Dr. Phung Dang, Dr. Eric Washington, Dr. Denise Taylor, and Dr. Wendell Williams, alleging that defendants negligently treated plaintiff's wife, Mary Harvey, causing her death. (L.F. 42-46).

Tenet HealthSystem, Inc. was dismissed from the case on August 27, 1998. (L.F. 12). Dr. Cynthia Dugas-Elliot and Dr. Phung Dang, who were never served, were dismissed without prejudice by Plaintiff on January 19, 2001, immediately before trial began. An Order dismissing Deaconess Health Services Corporation from the case with prejudice upon payment of its own costs, was entered on January 20, 2001. (L.F. 30).

On September 14, 1995, Mary Harvey was admitted to Deaconess Hospital for replacement of her right knee by Defendant Eric Washington, M.D., an orthopedic surgeon. (Tr. 256). At the time of her admission, Mary Harvey's medical history included chronic renal insufficiency, high blood pressure, rheumatoid arthritis, and a replacement of her left knee several years earlier. (Tr. 256). Ms. Harvey had been referred to Dr. Washington for her knee replacement by Dr. Cynthia Dugas-Elliott, an internist at Deaconess Hospital, who had been treating Ms. Harvey for her various medical conditions for about five years. (Tr. 332, 333, 475, 477).

Prior to performing the knee replacement surgery, Dr. Washington took a urine

sample from Ms. Harvey. (Tr. 483). Analysis of the urine showed the presence of bacteria, but the type of bacteria could not be immediately identified. (Tr. 484). Dr. Washington prescribed Ancef, a broad spectrum antibiotic, to be administered to Ms. Harvey before surgery to prevent infection during surgery. (Tr. 485, 761). Ancef is routinely used as a prophylactic for bacterial infection from surgery. (Tr. 486). Dr. Washington performed the knee replacement surgery on September 14, 1995. (Tr. 485). Subsequent to the surgery, Dr. Washington asked Dr. Dugas-Elliott to medically manage Ms. Harvey because Dr. Dugas-Elliott had treated her for several years. (Tr. 493).

The bacteria in the urine sample taken on September 14, 1995, was eventually identified as E coli. (Tr. 409). The type of E coli identified was susceptible to Ancef. (Tr. 409). Dr. Washington continued to administer the 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).

The knee replacement surgery performed on September 14, 1995, was successful. (Tr. 491). Ms. Harvey began rehabilitation shortly after the surgery. (Tr. 499). On September 15, the day following the surgery, she was able to ambulate and nurses notes indicate that she could walk thirty feet with minimal assistance with no problems. (Tr. 336, 491-92). At approximately noon on September 16, 1995, however, Mary Harvey had a grand mal seizure. (Tr. 256, 494, 497). Additional seizures occurred later that day and the next. (Tr. 256).

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 consult with Dr. Denise Taylor, a neurologist. (Tr. 495). Dr. Taylor prescribed anti-seizure medication. (Tr. 496). Ms. Harvey responded to that medication and there was no reported seizure activity between September 18 and September 27, 1995. (Tr. 257-58, 497).

On September 22, 1995, Mary Harvey was transferred to the rehabilitation facilities at Deaconess. (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 for the first time of groin pain on her right side. (Tr. 501). An x-ray of her right hip was ordered. (Tr. 501). The x-ray revealed that Ms. Harvey had fractured 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). Ms. Harvey's broken hip necessitated surgery as soon as possible. (Tr. 503). She was readmitted to Deaconess Hospital on September 24, 1995, for surgical treatment of her broken hip. (Tr. 257, 504).

Dr. Washington sought medical clearance for the hip surgery from Dr. Dugas-Elliott on September 24, 1995. Dr. Dugas-Elliot did not immediately respond to that request but did order another urine culture which was taken on September 24, 1995. (Tr. 370, 504). Dr. Dugas-Elliot subsequently responded to Dr. Washington's request for a consultation,

and at that time requested a consult with Dr. Sagar, a kidney specialist. (Tr. 505). 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). This was Dr. Williams' first involvement in the care of Mary Harvey. (Tr. 653-654). After examining the patient, Dr. Williams determined that Mary Harvey was suffering from active congestive heart failure. (Tr. 657). Because congestive heart failure is a potentially life threatening condition, especially in a patient required to undergo surgery, Dr. Williams recommended the surgery be postponed. (Tr. 668-669). Dr. Williams ordered that the Ancef the patient was currently receiving be continued. (Tr. 670). Dr. Williams provided treatment for Mary Harvey's congestive heart failure and within two days brought the condition under sufficient control to allow her to undergo the surgery to repair her hip fracture. (Tr. 508).

During the period Dr. Williams was treating the patient's heart failure, Dr. Sagar, the nephrologist, also saw Mary Harvey. In his consultation note of September 25, 1995, Dr. Sagar noted Mary Harvey had metabolic acidosis from her kidney failure which

needed to be corrected or improved and he ordered treatment for this condition. (Tr. 424, 425). On September 26, 1996, Dr. Sagar cleared Mary Harvey for surgery. (Tr. 508).

On September 26, 1995, Dr. Washington performed hip replacement surgery on Mary Harvey. (Tr. 258, 508). Dr. Washington ordered that Ancef be administered during the surgery and continued post-operatively. (Tr. 508, 511). There were no complications

during the hip surgery. (Tr. 508).

The results of Ms. Harvey's urine culture ordered by Dr. Dugas Elliot on September 24th did not become available until at least September 26th. (Tr. 370). Those results showed that there was no longer any E coli present, but the culture grew another type of bacteria, pseudomonas aeruginosa. (Tr. 258, 370, 571).

On September 27, 1995, the day after surgery, Ms. Harvey again began having seizures. (Tr. 258). Dr. Dugas-Elliot again consulted with Dr. Denise Taylor, the neurologist, to manage the seizure disorder. (Tr. 624). Dr. Taylor saw the patient on September 27th. (Tr. 624). She saw no evidence of a urinary tract infection during her initial examination. (Tr. 625, 626). The seizures continued through October 1, 1995. (Tr. 258).

Dr. Sagar's progress notes of September 27, 1995, indicate that Ms. Harvey had a new onset of seizures that day and had received Dilantin. (Tr. 623). On September 28, 1995, Dr. Sagar's progress notes indicate that the seizures might be related to Mary Harvey's metabolic status and he planned to place her on dialysis within the next few days. (Tr. 628). On September 28, Dr. Sagar ordered that Mary Harvey's urine again be cultured. (Tr. 258).

Dr. Purtell, Dr. Sagar's assistant, took over the patient's care on September 29, 1995. (Tr. 628). Dr. Purtell's renal note of October 1st stated that he did not feel dialysis was indicated. (Tr. 629). Dialysis was started for Ms. Harvey on Dr. Purtell's orders, on October 2, 1995. (Tr. 630).

Because Mary Harvey continued to have seizures a CT of her head was performed on September 30, 1995. (Tr. Vol. 3, 66).[1] While undergoing the CT, Mary Harvey suffered a seizure. (Tr. Vol. 3, 66). During the seizure, Mary Harvey vomited. (Tr. Vol. 3, 66, 67). After the seizure in the CT lab, Mary Harvey was transferred to the Intensive Care Unit. (Tr. Vol. 3, 69). On Sunday, October 1, 1995, following the events in the CT lab, Mary Harvey went into respiratory failure, was placed on a ventilator and became less responsive. (Tr. Vol. 3, 70). Ultimately she became non-responsive and comatose. (Tr. 640, 737). In addition, on October 1st her blood pressure dropped and her heart rate slowed. (Tr. 681). Dr. Williams ordered Dopamine to keep her blood pressure elevated. (Tr. 681). The nurses noted that yellow sputum was being suctioned from Mary Harvey's lungs. (Tr. 682). Her lungs were no longer clear and there was concern that when she vomited during her seizure in the CT lab she aspirated materials from the stomach into her lungs. (Tr. 681, 682). On October 1, 1995, Dr. Williams ordered a sputum gram stain to determine if there was any bacteria in the sputum and a blood culture to determine if there was bacteria in the blood. (Tr. 684, 685). Because there was concern of an infection in the lungs which may have spread to the blood, Dr. Williams changed her antibiotics from Ancef to Rocephin. (Tr. 684).

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[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 "P.Tr."

On October 2, 1995, Mary Harvey remained unresponsive and continued to require Dopamine to support her blood pressure. (Tr. 686). On October 3, 1995, she developed a temperature of 102. (Tr. 687, 688). Unlike previous temperature elevations during the admission, this was not associated with a blood transfusion. (Tr. 688). Dr. Williams believed the elevated temperature on October 3 indicated an infection. (Tr. 688). Because Mary Harvey's cardiac status was being compromised by a septic-type picture which included blood clotting problems, an elevated temperature and Dopamine to support her blood pressure, Dr. Williams again changed her antibiotics. (Tr. 689). In view of the presence of pseudomonas in the urine culture and the positive gram stain from the patient's sputum, Dr. Williams thought the gram negative rods in the sputum might represent pseudomonas. (Tr. 689, 690). Although Dr. Williams thought the positive urine culture represented a colonization and not a urinary tract infection, he was concerned the same bacteria found in the urine might be found in the lungs and may have

spread from the lungs to the blood. (Tr. 689, 690). Dr. Williams, therefore, ordered blood cultures and new antibiotics, Fortaz and Gentamicin. (Tr. 689, 690).

The blood cultures taken on October 1st were negative and did not show pseudomonas or any other bacteria in the blood. (Tr. 690). The sputum, while gram negative positive, did not grow pseudomonas. (Tr. 770).

Additional blood cultures were drawn on October 3rd on the order of the house staff of the hospital. (Tr. 691). The house staff is part of "Covered Medicine" to which Dr.

Dugas-Elliot, Mary Harvey's primary care physician, transferred the patient's care on September 29, 1995. (Tr. 390, 691). The cultures drawn on October 3, 1995, were positive for a bacteria called "citrobacter." (Tr. 691). Citrobacter is not in any way related to pseudomonas. (Tr. 692). Citrobacter was also later found in cultures of the patient's urine. (Tr. 571).

Mary Harvey remained in the hospital receiving treatment following October 3, 1995. On October 21, 1995, Mary Harvey died of multiple organ failure, at the age of 67. (Tr. 255, L.F. 42).

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

Plaintiff called two expert witnesses, David Coleman, M.D., an infectious disease specialist and Mark Iannacone, M.D., an orthopedic surgeon. Dr. Iannacone offered no opinions or criticisms of Dr. Williams, a cardiologist or Dr. Taylor, a neurologist. (Tr. 408). Dr. Iannacone also offered no opinions regarding what caused Mary Harvey's death. (Tr. 407). As a result, the only expert witness for plaintiff who offered testimony on the standard of care of Dr. Williams, a cardiologist, or on the cause of death was Dr. Coleman.

Dr. Coleman testified that he believed Mary Harvey had a urinary tract infection on September 24, 1995. (Tr. 273). Dr. Coleman also testified that the culture report which indicated the patient had a pseudomonas urinary tract infection was available to her treating physicians on September 26, 1995. (Tr. 288). Dr. Coleman testified that, in spite of this, Mary Harvey's antibiotics were not changed to an antibiotic which would specifically treat pseudomonas until October 3. According to Dr. Coleman, Rocephin, the antibiotic begun

on October 1st when the Ancef was stopped, is sometimes effective against pseudomonas. (Tr. 277, 278, 288).

In addition, Dr. Coleman testified that there was evidence available to show Mary Harvey had worsening renal failure between September 15th and September 24th which was causing metabolic changes. (Tr. 269, 270). Dr. Coleman also testified that this worsening renal function caused uremia, which in his opinion was of sufficient magnitude to cause her seizures. (Tr. 284, 285). Dr. Coleman testified the infection played a role in exacerbating the effects of the deteriorating renal function by making toxins which were harder for the kidneys to clear. (Tr. 286). Although Dr. Coleman testified that the worsening kidney function contributed to cause the patient's seizures, he was "not content with that as the sole explanation." (Tr. 382).

Dr. Coleman testified that the failure to treat the urinary tract infection combined with the renal failure led to an acute neurological deterioration from September 30th to October 1st. (Tr. 316). He testified that Mary Harvey never recovered from this neurological deterioration and that he did not believe the patient would have survived following the events of September 30th to October 1st. (Tr. 258, 259). Dr. Coleman could not testify with a reasonable degree of medical certainty what the exact neurological event was that he claims occurred on October 1st. (Tr. 349).

In spite of this, Dr. Coleman testified that he believed Ms. Harvey would have survived if she had received dialysis before September 29th and, in addition, had received an antibiotic to treat pseudomonas bacteria on September 26th. (Tr. 324). He had no criticism

of Dr. Williams related to the patient's renal failure. (Tr. 371). His only criticisms of Dr. Williams had to do with the treatment of what Dr. Coleman believed to be a urinary tract infection. (Tr. 369). Dr. Coleman answered "yes" when asked if Dr. Williams' failure to treat the infection prior to October 1st contributed to cause Mary Harvey's death. (Tr. 318). However, Dr. Coleman testified that he could not state whether Ms. Harvey would have survived if she had received treatment for the alleged urinary tract infection and not the kidney failure or vice versa. (Tr. 323, 363, 364).

Dr. Coleman testified that because the urine culture result was not final until September 26th, 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 26th, 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 26th. (Tr. 371). Dr. Coleman acknowledged, however, that he was unable to state within a reasonable degree of medical certainty whether Mary Harvey would have experienced the neurological deterioration that he believed eventually resulted in her death even if her antibiotic had been changed on September 26. (Tr. 371-374).

Dr. Coleman gave two depositions before trial, one on December 15, 1999 and one on October 24, 2000. (Tr. 325, L.F. 230). During the October 24, 2000 deposition of Dr. David Coleman, Dr. Coleman testified that he felt there were three possible causes of Mary Harvey's death, sepsis, acute uremic encephalopathy and microvascular strokes.

(L.F. 259). Because Dr. Coleman changed his testimony at trial from that given in his deposition, counsel for defendant made numerous objections throughout the testimony of Dr. Coleman, but these objections were overruled. (Tr. 307, 318, 324).

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

Dr. Washington called two expert witnesses, Edward Wittgen, M.D., an orthopedic surgeon and Donald Graham, M.D., an infectious disease specialist. (Tr. 560, 748). Dr. Donald Graham testified that in his opinion, the urine culture results on September 26th reflected a contaminant in Mary Harvey's urine, as opposed to a urinary tract infection. (Tr. 782-783). He further testified that a comparison of the urine culture on September 24th with a subsequent culture on September 28 indicated that the bacteria on the September 24th specimen came from Ms. Harvey's skin and groin area, rather than her urinary tract. (Tr. 769-70, 797-98). Dr. Graham testified that at no time did Ms. Harvey suffer from a pseudomonas urinary tract infection, and that pseudomonas bacteria did not play a role in Mary Harvey's death. (Tr. 771, 779).

In Dr. Wittgen's opinion, Ms. Harvey did not have any active urinary tract infection before October 3. (Tr. 571-72). He opined that in October, immediately before her death, Mary Harvey might have had a true urinary tract infection due to citrobacter. (Tr. 571).

Expert Testimony by Dr. R. William Burmeister, Dr. Arnold S. Tepper, and Dr. William Hamilton

Dr. Williams called three expert witnesses, R. William Burmeister, M.D., an

infectious disease specialist, Arnold S. Tepper, M.D., an internal medicine specialist with subspecialities in geriatrics and pulmonary disease, and William Hamilton, M.D., a cardiologist. (Tr. 716. Tr. Vol. 3, 7, 106). Dr. Burmeister testified that he reviewed the records of Mary Harvey and according to those records, Dr. Williams did not become involved in her care until September 24, 1995. (Tr. Vol. 3, 14-16). He further testified that the care Dr. Williams rendered was appropriate and he acted with that degree of skill and learning ordinarily used by physicians under the same or similar circumstances. (Tr. Vol. 3, 14, 82-83).

Dr. Burmeister offered expert testimony that Ms. Harvey did not have a pseudomonas urinary tract infection between September 24th and September 29th. (Tr. Vol. 3, 61). He testified that the presence of bacteria does not mean infection. (Tr. Vol. 3, 25). Dr. Burmeister further testified that the urine cultures of September 24th and September 28th showed the presence of four different strains of pseudomonas aeruginosa explaining that each strain was susceptible to different antibiotics. (Tr. Vol. 3, 54, 63, 64). He also testified that the strain of pseudomonas seen in the September 24th urine culture was not present in the culture of September 28th. (Tr. Vol. 3, 6). According to Dr. Burmeister, the urine culture of September 28th showed a decrease in the number of white cells which one would not expect with an active, untreated infection. (Tr. Vol. 3, 63-65). He went on to state that these findings gave further confirmation that there was no progressive active infection and the results of the culture most probably represented colonization with

pseudomonas. (Tr. Vol. 3, 64). Dr. Burmeister defined colonization as having bacteria present which is not causing any disease. (Tr. Vol. 3, 22).

Dr. Burmeister testified that between September 24th and October 3rd, the temperature variations the patient had were normal and the temperatures combined with the other data available showed Mary Harvey had no active infection. (Tr. Vol. 3, 49).

Dr. Burmeister testified Mary Harvey's death was multifactorial. (Tr. Vol. 3, 81). She had a probable aspiration pneumonia, septicemia due to citrobacter, and worsening chronic renal failure requiring dialysis. (Tr. Vol. 3, 81-82). Dr. Burmeister testified the probable aspiration pneumonia was most likely a result of the seizure she had in the CT lab when she vomited and was thought to have aspirated material into her lungs. (Tr. Vol. 3, 66-69). He did not believe anyone could have prevented the events in the CT lab. (Tr. Vol. 3, 80-81). He did not believe the citrobacter septicemia was due to anyone's deviation from the standard of care. (Tr. Vol. 3, 80). He also testified the fractured hip was the beginning of the cascade of events which caused her death. (Tr. Vol. 3, 82).

Arnold S. Tepper, M.D. testified that Dr. Williams gave Mary Harvey appropriate and excellent care. (Tr. 721). Dr. Tepper testified that one could have colonization of bacteria or the presence of an asymptomatic bacteria in the bladder and not have an active infection. (Tr. 721). He stated that the presence of such bacteria does not indicate or require any treatment. (Tr. 722). Dr. Tepper's opinion was that Ms. Harvey did not have a urinary tract infection which required antibiotics between September 26th and October 1st.

(Tr. 731). Dr. Tepper concluded that the presence of the pseudomonas in the urine samples of September 24th and September 28th did not play any role in Ms. Harvey's death. (Tr. 735). Rather, her death was the result of multi-organ failure that was caused by renal failure, hypertension, heart disease, and the citrobacter bacteria that

grew in her blood. (Tr. 734). Dr. Tepper also testified that he believed the hip fracture was the deciding event that sent her on a downhill course. (Tr. 734).

Dr. William Hamilton testified that Dr. Williams' care of Mary Harvey was appropriate. (Tr. Vol. 3, 134). He testified that no infection affected Ms. Harvey's heart function until the very end of her care and that the organism causing this infection did not evolve from the urinary tract. (Tr. Vol. 3, 134). Finally, Dr. Hamilton opined that Ms. Harvey's death was caused by multi-organ failure because of her inability to rehabilitate her fractured hip. (Tr. Vol. 3, 139).

In addition, Dr. Williams testified that in his opinion Mary Harvey did not have a pseudomonas urinary tract infection between September 26th and October 1st. (Tr. 710).

Closing Argument

During the rebuttal portion of closing argument Plaintiff was allowed to use, for the first time, an exhibit purporting to summarize the testimony of certain defense experts. (Tr. Vol. 3, 264). The exhibit was labeled as "Argument Exhibit B" for identification purposes. (Tr. Vol. 3, 172). All defense counsel objected to the use of the exhibit. (Tr. Vol. 3, 260-263). Counsel for Defendant Williams objected to the use of this exhibit on the basis that it

(1) misstated the evidence, (2) unduly highlighted only portions of each witnesses' testimony, (3) presented plaintiff's counsel's interpretation of the evidence in a printed form which gave the impression that it was an accurate depiction of the expert testimony from a transcript, (4) had not been used at any time during trial. (Tr. Vol. 3, 260) The trial court overruled all defendants' objections to the exhibit, but did advise plaintiff's counsel that he was to advise the jury the exhibit was prepared by him from his recollection of the evidence. (Tr. Vol. 3, 262).

Motions for a Directed Verdict and Jury Instructions

Dr. Williams 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 on the issues of liability and causation. Defendant Williams further specifically argued that the Plaintiff had failed to prove "but for" causation as to Dr. Williams. (Tr. 464-66, L.F. 152, 162). Those motions were denied. (L.F. 159; Tr. Vol. 3, 152-53).

Plaintiff proposed the following verdict director as to Dr. Williams:

Instruction No. 12

> Your verdict must be for the plaintiff and against defendant Wendell Williams, M.D., if you believe:
>
> First, defendant Wendell Williams, 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 Wendell Williams, M.D., was thereby negligent,

and

Third, such negligence directly caused or directly contributed to cause the death of Mary Harvey. (L.F. 182).

Similar verdict directors were proposed as to Dr. Washington (Instruction 8) and Dr. Taylor (Instruction 10). (L.F. 178, 180).

Dr. Williams objected to Instruction #12 and argued that it was not clear that the jury "must first find that Mary Harvey had a pseudomonas urinary tract infection before they can find Dr. Wendell Williams negligent for not having prescribed an antibiotic." (Tr. Vol. 3, 164-65). Further, Dr. Williams argued that plaintiff's evidence did not support the variation of MAI 19.01 submitted by the plaintiff. (Tr. Vol.3, 165). Counsel argued the testimony in the case did not support a claim that Dr. Williams' actions contributed to the death of Ms. Harvey; rather, the theory put forward by plaintiff was that Dr. Williams' actions combined with the acts of other defendants to cause Ms. Harvey's death. The instruction, therefore, failed to conform to the evidence. (Tr. Vol. 3, 165). The jury instruction submitted used the "contributed" option from MAI 19.01 rather than the "combined" option. (L.F. 182). The trial court overruled the objections to Instructions 8, 10, and 12. (Tr. Vol. 3, 166-67).

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

1. 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?

2. Please expand on the definitions of "Directly Caused" and "Directly Contributed" as it relates to the death of Mary Harvey.

(L.F. 192). Defendants Washington, Williams and Taylor moved the court to clarify the instruction 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 and1/3 percent at fault for plaintiff's damages. (L.F. 198). The court entered judgment on the jury's verdict on January 31, 2001.

The Court held hearings on the post trial motions of all defendants on May 7, 2001 and May 21, 2001. (L.F. 358, P.Tr. 1).

Subsequent to the trial, counsel for Defendant Wendell Williams, M.D. discovered from a review of the court records that Juror Lolita Jones had failed to disclose her involvement in several civil litigation claims involving allegations of personal injury. (L.F.

315). The court ordered an evidentiary hearing with Juror Jones. (L.F. 377). At the evidentiary hearing Juror Jones testified she was paying attention during voir dire and listening to the questions directed to her and the whole jury panel. (P.Tr. 7-8). She testified that she recalled during voir dire that all of the jurors were asked about claims or suits that had been brought or that they had brought against other people. (P.Tr. 30, 31). While she did not recall other people talking about claims they had made, she did remember them mentioning "different cases that they had, different problems they had." (P.Tr. 30-31). Juror Jones testified she remembered Mr. Frank asking and understood the following questions: "Does anybody presently have a claim or lawsuit that is presently going on at this time?"; "I just asked about pending claims. Anybody in the past who has had a claim that is now resolved or over with where they claimed some sort of injury?"; and "Anybody ever had a claim or lawsuit brought against you by someone who claims they were injured because of something you did?" (P.Tr. 32-34). Ms. Jones admitted that she understood these questions. (P.Tr. 33-34). Ms. Jones also testified that, at the time voir dire in this case occurred, she had a suit presently pending, a claim in which she had been a defendant and a claim she had made that had already been settled. (P.Tr. 33-34). In fact Ms. Jones testified at the post-trial hearing that she had been in an automobile accident in December of 1998 in which she and her daughter had been injured, that she had filed a lawsuit on behalf of her daughter, a minor, in the City of St. Louis in 1999, that the case had settled in March or April of 2001 after the trial in this case, and that she had spoken to her lawyer in that case during the Harvey trial. (P.Tr. 8-14). Ms. Jones admitted she did not

disclose this case during voir dire. (P.Tr. 39-40). Her reason for not disclosing the case was that she "guessed" she misunderstood the question to mean whether anyone had a problem with the defendants. (P.Tr. 39-40). During the hearing Ms. Jones also admitted to having been in a car accident in 1999 which resulted in her making a claim against her insurance carrier. (P.Tr. 17-19). She also admitted that in 1991 on the day after her birthday she was in a car accident and that she remembered being sued by two people because of the accident. (P.Tr. 20-22). She knew the case had been settled and that her insurance was canceled because of the accident. (P.Tr. 22-23). Ms. Jones' stated reason for not disclosing the suits by the two people in the 1991 accident during voir dire was because she had forgotten about the accident. (P.Tr. 41).

On May 29, 2001, the Trial Court denied Defendants' Motions for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial. (L.F. 393). This appeal followed.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING THE MOTION OF DR. WILLIAMS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITH-STANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE IN THAT DR. COLEMAN, PLAINTIFF'S EXPERT, COULD NOT STATE THAT "BUT FOR" THE ALLEGED FAILURE OF DR. WILLIAMS TO TREAT MARY HARVEY'S ALLEGED URINARY TRACT INFECTION, SHE WOULD HAVE LIVED.

Baker v. Guzon, 950 S.W.2d 635 (Mo. App. E.D. 1997).

Callahan v. Cardinal Glennon Hospital, 863 S.W. 852 (Mo. banc. 1993).

Hurlock v. Park Lane Medical Center, Inc., 709 S.W.2d 872 (Mo. App. W.D. 1985).

Super v. White, 18 S.W.2d 926 (Mo. 1992).

II. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NUMBER 12, THE VERDICT DIRECTOR AGAINST DR. WILLIAMS, TO THE JURY BECAUSE THIS INSTRUCTION GAVE THE JURY A ROVING COMMISSION IN THAT IT ASSUMED THE DISPUTED FACT THAT MARY HARVEY HAD A PSEUDOMONAS URINARY TRACT INFECTION WHEN

THERE WAS EVIDENCE TO THE CONTRARY AND IN THAT THE MAI 19.01 "DIRECTLY CONTRIBUTED TO CAUSE" MODIFICATION OF THE THIRD PARAGRAPH OF THE INSTRUCTION DID NOT CONFORM TO THE EVIDENCE.

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

King v. Unidynamics Corp., 943 S.W.2d 262 (Mo. App. E.D. 1997).

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

Spring v. Kansas City Area Transp. Auth., 873 S.W.2d 224 (Mo. banc 1994).

Missouri Approved Jury Instructions 19.01 [1996 Rev.].

III. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT WILLIAMS' OBJECTION TO THE TRIAL TESTIMONY OF DR. COLEMAN AND PERMITTING DR. COLEMAN TO TESTIFY THAT THE FAILURE TO TREAT THE ALLEGED URINARY TRACT INFECTION CAUSED OR CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH BECAUSE THIS TESTIMONY DIFFERED SUBSTANTIALLY FROM HIS DEPOSITION TESTIMONY IN THAT AT DEPOSITION DR. COLEMAN TESTIFIED THE DEATH WAS DUE TO A NEUROLOGICAL EVENT, THE CAUSE OF WHICH HE COULD NOT STATE TO A REASONABLE DEGREE OF MEDICAL CERTAINTY.

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

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

V.A.M.R. 56.01(b)(2) (1999).

V.A.M.R. 56.01(e)(2) (1999).

IV. THE TRIAL COURT ERRED IN DENYING DR. WILLIAMS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, BECAUSE THE COURT'S DETERMINATION THAT THE FAILURE OF JUROR LOLITA JONES TO DISCLOSE CERTAIN PRIOR AND PENDING SUITS WAS UNINTENTIONAL AND NOT PREJUDICIAL TO DEFENDANT WAS AN ABUSE OF DISCRE-TION IN THAT THE FAILURE TO DISCLOSE BY JUROR JONES WAS NOT REASONABLE AND PREJUDICED DEFENDANT BY PREVENTING FURTHER INQUIRY INTO POTENTIAL BIASES DURING VOIR DIRE.

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

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

Williams by Wilford v. Barnes Hosp., 736 S.W.2d 33 (Mo. banc 1987).

V. THE TRIAL COURT ERRED IN OVERRULING DR. WILLIAMS' OBJECTIONS TO PLAINTIFF'S "ARGUMENT EXHIBIT B" AND IN ALLOWING PLAINTIFF TO USE THE EXHIBIT DURING REBUTTAL BECAUSE IT WAS PREJUDICIAL IN THAT IT MISSTATED THE EVIDENCE AND INTRODUCED NEW EVIDENCE FOR THE FIRST TIME DURING CLOSING.

Hagedorn v. Adams, 854 S.W.2d 470 (Mo. App. W.D. 1993).

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

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION OF DR. WILLIAMS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITH-STANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE IN THAT DR. COLEMAN, PLAINTIFF'S EXPERT, COULD NOT STATE THAT "BUT FOR" THE ALLEGED FAILURE OF DR. WILLIAMS TO TREAT MARY HARVEY'S ALLEGED URINARY TRACT INFECTION, SHE WOULD HAVE LIVED.

Plaintiff's sole causation expert, Dr. Coleman, could not state to a reasonable degree of medical certainty that Mary Harvey would have lived if Dr. Williams had changed her antibiotics. (Tr. 371). Dr. Coleman's only criticism of Dr. Williams was the alleged failure to change Mary Harvey's antibiotics. (Tr. 369). Since Dr. Coleman could not state that Mary Harvey would have lived or even more likely than not would have survived if Dr. Williams had changed the antibiotics, plaintiff failed to establish "but for" causation as to Dr. Williams.

1. Standard of Review and Burden of Proof

When reviewing the trial court's denial of motions for directed verdict and judgment notwithstanding the verdict, the issue to be determined by this Court is whether the plaintiff made a submissible case. *Dubinsky v. U.S. Elevator Corp*., 22 S.W.3d 747, 749 (Mo. App. E.D. 2000); *Coonrod v. Archer-Daniels-Midland Co.*, 984 S.W.2d 529, 532 (Mo. App. E.D. 1998) (*citing Brown v. Hamilton Insurance Co.*, 956 S.W.2d 417, 419 (Mo. App. E.D. 1997)).

Missouri courts have held that there must be "but for" causation if a medical malpractice or wrongful death action based on medical negligence is to be submissible. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W. 2d 852, 862 (Mo. banc 1993). "The fact that the conduct of a particular defendant either does or does not meet 'but for' causation has no impact on the remaining defendants. The remaining defendants rise or fall on their own 'but for' causation test." Callahan, 863 S.W.2d at 862. "In wrongful death actions, plaintiffs must establish that, 'but for' the actions or inaction of the defendant, the decedent would not have died." *Baker v. Guzon*, 950 S.W.2d 635, 644 (Mo. App. E.D. 1997)

Expert testimony is required to establish "but for" causation in a medical malpractice case where proof of causation requires a certain degree of expertise. *Super v. White*, 18 S.W.3d 511, 516 (Mo. App. W.D. 2000) (citations omitted); *Mueller v. Bauer*, 54 S.W.3d 652, 656 (Mo. App. E.D. 2001) (citation omitted). Further, the court has held that the expert testimony must be more than mere speculation.

> When a party relies on expert testimony to provide evidence as to causation when there are two or more possible causes, that testimony must be given to a degree of certainty. *Wyckoff v. Davis*, 297 S.W. 2d 490, 494 (Mo. 1957). When an expert merely 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. *Bertram v. Wunning*, 385 S.W. 2d 803, 807 (Mo. App. 1965).

Baker, 950 S.W. 2d at 646 (*citing Tompkins v. Cervantes*, 917 S.W.2d 186, 189 (Mo. App.

E.D. 1996)).

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 (*citing Brown*, 956 S.W.2d at 419). In a medical malpractice case the elements a plaintiff must prove include "but for" causation. The evidence and the inferences from that evidence must support each element of plaintiff's case and not leave any issue to speculation. *Coonrod*, 984 S.W.2d at 533 (*citing Brown*, 956 S.W.2d at 419). Admittedly, when determining whether a plaintiff made a submissible case, the court reviews the evidence in the light most favorable to plaintiff and disregards the defendant's evidence except to the extent it aids plaintiff's case. The court does not, however, give the plaintiff the benefit of unreasonably speculative or forced inferences and does not supply missing evidence. *Id.* If the testimony fails to establish "but for" causation to a reasonable degree of medical certainty, then the plaintiff has failed to meet the required burden of proof and the case is not submissible.

2. Plaintiff did not establish that "but for" the alleged failure of Dr. Williams to prescribe an antibiotic between September 26th and October 1st Mary Harvey would have lived and plaintiff, therefore, failed to make a submissible case against Dr. Williams.

Dr. Coleman was plaintiff's only expert to testify as to any causal connection between Dr. Williams' care and Mary Harvey's death. However, Dr. Coleman failed to establish the requisite "but for" causation required under Missouri law.

Dr. Coleman testified that there was more than one cause for Mary Harvey's

neurological deterioration and subsequent death. (Tr. 304-05, 378). Dr. Coleman testified that in his opinion Mary Harvey suffered from both an untreated urinary tract infection and renal failure and that the combination of those two conditions caused the neurological deterioration which he believed ultimately caused her death. (Tr. 379-80). While Dr. Coleman testified that Ms. Harvey would have survived if she had received dialysis for her renal failure and an antibiotic for her alleged infection during a specific time period, he also testified that he could not state what the exact neurological event was which led to Mary Harvey's death. (Tr. 324-25, 349). This testimony is inherently flawed. To state that he does not know what the exact neurological event was, but to claim he knows what caused the event is illogical, contradictory and by its very nature lacks the required medical certainty to establish causation, much less to establish the "but for" causation needed for submissibility. Plaintiff was bound by Dr. Coleman's testimony, including his testimony on cross-examination. *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 879 (Mo. App. W. D. 1985); "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), [citations omitted]. See also *McClelland v. Ozenberger*, 841 S.W.2d 227, 235-36 (Mo. App. W.D. 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 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 since he could not state to a reasonable degree of medical certainty what the cause of the condition was which he testified resulted in her death.

Dr. Coleman's testimony also fails to establish the "but for" causation needed to make a submissible cause because Dr. Coleman could not state that "but for" defendant Williams' failure to prescribe an antibiotic for the alleged urinary tract infection, Mary Harvey would not have died.

In *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. 1993), this Court held that "but for" causation was required for Plaintiff to make a submissible case,

stating that "'(b)ut for' is an absolute minimum for causation because it is merely causation in fact." *Callahan*, 863 S.W.2d at 862.

The infant plaintiff in *Callahan* 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. The plaintiff's experts testified that proper treatment would have been to incise the abscess and treat with antibiotics. *Callahan*, 863 S.W.2d at 858. 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 infant plaintiff to develop polio. *Id.* at 863.

In *Callahan,* Plaintiff alleged negligence against Cardinal Glennon Hospital for the alleged failure of a nurse practitioner to advise the physician of the patient's presence and condition and for the alleged failure of a physician to examine the patient or for examining the patient and not treating him. *Callahan,* 863 S.W.2d at 858. There was, however, no question that the patient did not receive the treatment Plaintiff's experts claimed was necessary to prevent him from developing polio.

On appeal the plaintiff in *Callahan* contended that a "substantial factor" causation test was applicable because the child'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. [2]

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. Each scenario used by the Court in *Callahan* to illustrate how "but for" causation could be established as to each

[2]Plaintiff does not contend that this exception applies in the present case.

defendant was based on the assumption that the scenario could be supported by the evidence. *Callahan*, 863 S.W.2d at 862.

Plaintiff herein claimed that Ms. Harvey suffered from two conditions - renal failure and an alleged urinary tract infection and contends that his expert, Dr. Coleman, established that Mary Harvey's death was due to these two events, neither one of which alone was sufficient to cause death. In order to establish "but for" causation under this scenario, Dr. Coleman would have needed to testify that, if the alleged urinary tract infection was treated, Mary Harvey would have lived because her death was due to a combination of the urinary tract infection and the renal failure. Dr. Coleman instead testified that he could not state that Mary Harvey would have lived if she had received treatment for one of the conditions. (Tr. 371). In essence, Dr. Coleman testified that he did not know if Mary Harvey would have lived or died if only one of the conditions was treated. This testimony is insufficient to establish "but for causation.

Gaines v. Property Servicing Co., 276 S.W.2d 169 (Mo. 1955) addressed a situation similar to that presented in the instant case. In *Gaines* the plaintiff was injured as a result of a fire in his apartment building which was not equipped with a fire escape. The fire was intentionally set by his downstairs neighbor. *Gaines*, 276 S.W.2d at 171. When the fire reached plaintiff's apartment he was forced to jump from his window to the roof of an adjoining building to avoid being injured by the fire. *Gaines*, 276 S.W.2d at 171. Unfortunately, the plaintiff sustained serious injuries escaping the fire in this manner. The plaintiff sued the owner of the building alleging negligence in failing to provide a fire

escape. The plaintiff was awarded a judgment which the defendant appealed on the basis that plaintiff failed to prove that defendant's conduct caused plaintiff's injuries.

The Supreme Court of Missouri affirmed the judgment for the plaintiff noting 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 was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury." *Id*. at 173. [citations omitted]. The Court stated the question determinative of the causation issue in *Gaines* as: "Was the failure to provide a fire escape an active and continuing concurring 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. Williams' conduct. Plaintiff merely presented opinion testimony that Mary Harvey's death resulted from a combination of causes and that the defendant doctors should have treated one of those causes, an alleged urinary tract infection, with a proper antibiotic; but that it was impossible to predict whether she 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. Williams' conduct and Mary Harvey's death. And without proof of such a causal connection, plaintiff did not make a submissible case.

Dr. Coleman's testimony contained other significant flaws which undermined the submissibility of Plaintiff's case against Dr. Williams. Dr. Coleman could not state to a reasonable degree of medical certainty that Ms. Harvey would have survived if she had been treated with the antibiotic he felt was appropriate. (Tr. 371). Dr. Coleman openly admitted that he could not state what Mary Harvey's prognosis would have been if she received only the antibiotic treatment for her urinary tract infection. (Tr. 371). When questioned on this issue, his testimony was as follows:

> 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). Dr. Coleman also conceded that he could not state to a reasonable degree of medical certainty that if Dr. Williams had done exactly what he, Dr. Coleman, suggested the patient's outcome would have been any different. (Tr. 374). Dr. Coleman never testified that "but for" Dr. Williams' failure to provide an antibiotic to treat the alleged pseudomonas urinary tract infection between September 26th and October 1st, Mary Harvey would have survived. (Tr. 371). Dr. Coleman, who was plaintiff's only expert against Dr. Williams, clearly did not establish "but for" causation.

The burden rested on plaintiff "to make a submissible case by substantial evidence of probative force and to remove the case from the realm of speculation, conjecture, and surmise." *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 880 (Mo. App. W.D. 1985) (citations omitted). However, plaintiff's expert did not meet this standard. His testimony was speculative and failed to state that "but for" the actions of Dr. Williams, Mary Harvey would have survived. The judgment for plaintiff and against Dr. Williams should, therefore, be reversed and judgment entered in favor of Dr. Williams.

II. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NUMBER 12, THE VERDICT DIRECTOR AGAINST DR. WILLIAMS, TO THE JURY BECAUSE THIS INSTRUCTION GAVE THE JURY A ROVING COMMISSION IN THAT IT ASSUMED THE DISPUTED FACT THAT MARY HARVEY HAD A PSEUDOMONAS URINARY TRACT INFECTION WHEN THERE WAS EVIDENCE TO THE CONTRARY AND IN THAT THE MAI 19.01 "DIRECTLY CONTRIBUTED TO CAUSE" MODIFICATION OF THE THIRD PARAGRAPH OF THE INSTRUCTION DID NOT CONFORM TO THE EVIDENCE.

While it is this defendant's position that plaintiff failed to make a submissible case, should this Honorable Court rule otherwise, the verdict in favor of the plaintiff should still be overturned due to prejudicial instructional error. Plaintiff's verdict director gave the jury a roving commission to find Dr. Williams negligent for not treating an infection, the existence of which was in question. In addition, the instruction gave the jury a roving commission to decide that the failure to treat the alleged infection alone caused or contributed to cause the patient's death when there was no evidence to support such a finding.

1. <u>Standard of Review and Applicable Law</u>

In reviewing the propriety of a jury instruction, the applicable standard the court seeks to apply is whether the erroneous instruction "materially affected the merits of the case." *Gorman v. Walmart Stores, Inc.*, 19 S.W.3d 725, 730 (Mo. App. W.D. 2000) (*citing Powers v. Ellfeldt*, 768 S.W.2d 142, 146 (Mo. App. W.D. 1989)). If the instruction

materially affected the jurors' decision and misdirected or confused the jury, then the jury's verdict should be reversed. *EPIC, Inc. v. City of Kansas City*, 37 S.W.3d 360, 366 (Mo. App. W.D. 2000) (*citing Williams v. Finance Plaza, Inc.*, 23 S.W.3d 656, 658 (Mo. App. W.D. 2000)); *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 463 (Mo. banc 1998).

It is "error for an instruction to assume a disputed fact; rather, the verdict directing instruction hypothesizes propositions of fact to be found or rejected by the jury." *Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224, 226 (Mo. banc 1994) *(citing Weltscheff v. Medical Center of Independence, Inc.*, 597 S.W.2d 871, 878 (Mo. App. W.D. 1980)). When a jury instruction infringes upon the jury's ability to render judgment on a factual question, the modification is unlawful. *Yoos v. Jewish Hosp. of St. Louis*, 645 S.W.2d 177, 192 (Mo. App. E.D. 1982). The court has held that when a paragraph unlawfully removes from the jury the factual question, it amounts to a remark by the judge that he or she has determined the disputed fact to be true. *Id*. Such an "unwarranted comment on the evidence constitutes reversible error." *Id*.

"It is a well settled rule of law that any issue submitted to the jury in an instruction must be supported by evidence from which the jury could reasonably find such issue." *King v. Unidynamics Corp*., 943 S.W.2d 262, 266 (Mo. App. E.D. 1997) (*citing Gruhala v. Lacy*, 559 S.W.2d 286, 289 (Mo. App. 1977)). "It is error to give an instruction where there is no substantial evidence to support the issue submitted." *King*, 943 S.W.2d at 267 (*citing Cowan v. Perryman*, 740 S.W.2d 303, 304 (Mo. App. S.D. 1987)).

2. <u>Instruction Number 12 assumed as true the disputed issue of whether</u>

Mary Harvey had a pseudomonas urinary tract infection, removing the determination of this issue of fact from the jury which constitutes reversible error.

Plaintiff's sole claim of negligence against Dr. Williams is that he failed to prescribe appropriate antibiotics to treat Mary Harvey's alleged pseudomonas urinary tract infection. (Tr. 369). Plaintiff's claim against Dr. Williams hinges on the very existence of Mary Harvey's alleged pseudomonas urinary tract infection between September 26th and October 1st. In the absence of the infection, Dr. Williams cannot be held liable for not having treated it. The existence of the infection is consequentially a pre-requisite to plaintiff's claim against Dr. Williams. If existence of the infection is assumed, then that issue has been removed from the jury's consideration. The assumption of the existence of the infection is, therefore, prejudicial to Dr. Williams and amounts to reversible error.

The existence of the alleged pseudomonas urinary tract infection was contested at trial. Plaintiff's expert, Dr. Coleman, opined that Ms. Harvey had a urinary tract infection between September 24th and October 1st. (Tr. 273). However, Dr. Williams' experts, Dr. Burmeister and Dr. Tepper, disputed the fact that any active pseudomonas infection ever existed. (Tr. 731, Tr. Vol. 3, 81-2). Dr. Graham and Dr. Wittgen, the experts for Dr. Washington, also disputed the existence of the alleged urinary tract infection. (Tr. 288, 571-72, 771, 779). Clearly the exsistence of the alleged pseudomonas urinary tract infection was a question of fact to be decided by the jury. Missouri law requires a verdict director to hypothesize the facts essential to Plaintiff's claim. *Lasky v. Union Elec. Co.*, 936 S.W.2d 797, 800 (Mo. banc 1997).

To allow the jury the opportunity to make the requisite factual determinations, the jury instruction should have been drafted in the form of a hypothetical. *Spring*, 873 S.W.2d at 226; *Lasky*, 936 S.W.2d at 800. In other words, the instruction in this case should have contained a paragraph which required a finding that Mary Harvey had a pseudomonas urinary tract infection and a separate paragraph which required a finding that Dr. Williams failed to treat that infection. Instead the instruction in the case at bar asserts that Ms. Harvey, in fact, did have a pseudomonas urinary tract infection. (L.F. 182). The verdict director against Dr. Williams instructed the jury:

Instruction No. 12

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

First, defendant Wendell Williams, 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 Wendell Williams, M.D., was thereby negligent, and

Third, such negligence directly caused or ***directly contributed***

to cause the death of Mary Harvey.

(L.F. 182). (emphasis added). The verdict director did not properly hypothesize that there may have been a urinary tract infection, but rather it decided this issue of fact for the jury.

Missouri law holds that it is prejudicial error to submit an instruction which assumes a disputed fact. *Lasky*, 936 S.W.2d at 800; *Spring*, 873 S.W. 2d at 227.

In *Lasky* the disputed issues were (1) whether the plaintiffs came into contact with contaminated transformer fluids; and 2) whether contact with the contaminated fluids caused a risk of bodily harm. *Lasky*, 936 S.W.2d at 799. The verdict director which was the subject of the defendant's appeal instructed the jury to find in favor of the plaintiffs if:

> 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 bipheinys (PCB's), and
>
> Second, defendant knew or by using ordinary care should have known that plaintiff's contact with the cooling fluid containing polychlorenated bipheinys (PCB's) presented a risk of bodily harm.

Lasky, 936 S.W.2d at 799.

On appeal, the defendant argued the verdict director assumed disputed facts. *Lasky*, 936 S.W.2d at 799. The parties disputed both whether the plaintiffs came into contact with the contaminated fluid and whether the contact, if it occurred, was sufficient to cause a risk of bodily harm. *Lasky*, 936 S.W.2d at 799.

The Missouri Supreme Court reversed the verdict based on the failure of the verdict director to hypothesize facts essential to the plaintiffs claim. Specifically, the court found the instruction assumed both the disputed facts of contact and contamination and required

the jury to find only defendant's knowledge. *Lasky,* 936 S.W.2d at 799.

The submitted instruction in this case assumed the infection existed and allowed the jury to find Dr. Williams negligent for not treating an infection which may not have even been present. As written, the instruction did not allow the jury to determine the existence of the urinary tract infection and was therefore prejudicially erroneous.

The importance of the factual decision regarding the existence of the alleged pseudomonas urinary tract infection was pivotal in the trial. The only allegation against Dr. Williams was that he failed to treat Ms. Harvey's alleged pseudomonas urinary tract infection properly. (Tr. 369). Defendant's contention was that there was not an infection that needed treatment, and therefore, non-treatment of the infection was impossible. (Tr. 731; Tr. Vol. 3, 381-82). If the jury was instructed that the infection did in fact exist, then that factual issue was removed from the jury's consideration which is impermissible and reversible error. *Spring*, 873 S.W. 2d at 227.

During jury deliberations any argument by plaintiff that the instruction was not confusing was nullified when the jury asked the court whether, "[t]he court [was] stating that M[ary] H[arvey] had a pseudomonas infection," or if that issue was "for the jury to decide." (L.F. 192). This question from the jury shows that the timely objections to the instruction by the defense were well-founded. In response to the inquiry, the court did not advise the jury that the existence of the infection was for them to decide but merely replied that, "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 court's decision not to clarify the instruction required the

jury to render a verdict based on a confusing, erroneous and prejudicial verdict director which assumed a disputed fact.

According to *Bledsoe v. Northside Supply & Development Co.*, 429 S.W.2d 727 (Mo. 1968), "[a]n 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." *Bledsoe*, 429 S.W.2d at 733 [citations omitted]. Likewise, in the present case, Instruction Number 12, plaintiff's verdict director was prejudicially erroneous and the giving of Instruction 3, which advised the jury that the Court did not "mean to assume as true any fact in these instructions" was not sufficient to cure the error.

An instruction which assumes a disputed fact gives the jury a "roving commission." *Lay v. P & G Health Care, Inc.*, 37 S.W.3d 310, 329 (Mo. App. W.D. 2000); *Seitz*, 959 S.W.2d at 463. Because Instruction Number 12 assumed a disputed fact, instead of requiring the jury to find that fact, and gave the jury a "roving commission," the trial court committed prejudicial error when it submitted Instruction Number 12 to the jury. The judgment in plaintiff's favor and against Dr. Williams therefore should be reversed.

3. <u>The modification of Instruction 12 by the MAI 19.01 "contributed to cause" variation instead of the "combined with" variation did not conform to the evidence and was prejudicially erroneous.</u>

Assuming for argument purposes only that plaintiff presented sufficient evidence of

"but for" causation to be allowed to submit a verdict director against Defendant Williams, the evidence was not sufficient to support the verdict director submitted by the plaintiff. Plaintiff's flawed theory of causation was that the alleged failure of Dr. Williams to change an antibiotic, combined with the alleged failure of others to treat the decedent's renal failure caused a neurological event which resulted in Mary Harvey's death. MAI 19.01 contains the permissible verdict directing modifications to be used when multiple causes of damage exist. The options for modification are:

> Third, such negligence directly caused or directly contributed to cause damage to plaintiff or
>
> Third, such negligence either directly caused damage to plaintiff or combined with the [acts of *(here describe another causing damage)*]
>
> [condition of the *(here describe product)*] to directly cause damage to plaintiff.

M.A.I. 19.01 [1996 Rev.] at 256.

Plaintiff in the present case submitted Instruction No. 12 using the "directly contributed to cause" modification from MAI 19.01. Defendant Williams objected to the use of this version of the modification because it was not supported by plaintiff's evidence. (Tr. Vol. 3, 165). While MAI 19.01 gives the plaintiff some discretion as to which of the modifications to make, nothing in MAI 19.01 alters the long-standing, well-established rule that to be proper an instruction must be supported by the evidence.

Plaintiff's infectious disease expert, Dr. Coleman, plaintiff's only expert against Dr. Williams, testified that the failure of Dr. Williams to prescribe certain antibiotics between September 26th and October 1st combined with the failure of others to treat Mary Harvey's renal failure with dialysis led to her death by causing a catastrophic neurological event on September 30th to October 1st . (Tr. 316)[3]. When questioned by Mr. Frank at trial as to whether the alleged untreated urinary tract infection and the renal failure **combined** to cause the neurological events of September 30th and October 1st, Dr. Coleman responded that the combination caused the events. (Tr. 379-80). Later, when asked if the causes of Ms. Harvey's demise could be separated and the impact of each determined, Dr. Coleman responded that they could not. (Tr. 371). He stated, "I believe it was a **combination** of causes." (Tr. 371). (emphasis added) Dr. Coleman offered no other condition, event or alleged failure which could have combined with the alleged failure to treat the alleged urinary tract infection to cause death. Clearly, Plaintiff's theory of the case was that the actions of Dr. Williams' combined with the acts of others in not treating Mary Harvey's renal failure caused her death.

When Dr. Coleman was asked by plaintiff's counsel "Did Dr. Williams' failure to treat the urinary tract infection prior to October 1st of 1995 contribute to cause Mary

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[3]While not relevant to this issue, it is significant that Dr. Coleman could not state the exact cause of the neurological event which he testified was caused by the alleged urinary tract infection and the renal failure. (Tr. 324-25, 349).

Harvey's death?" He said "Yes" but was immediately asked by plaintiff's counsel if the reason was the same as he stated for Drs. Washington and Taylor. (Tr. 318). The reason Dr. Coleman stated he believed the failure to treat Mary Harvey's alleged urinary tract infection contributed to cause Mary Harvey's death was because he believed the infection in concert with her renal failure lead to the acute neurologic deterioration of September 30th to October 1st which he believed ultimately caused her death. (Tr. 259, 316). Dr. Coleman was, however, unable to testify that Mary Harvey would have lived even if Dr. Williams had prescribed the antibiotics Dr. Coleman felt necessary. (Tr. 371-374).

The evidence did not support the "contributed to cause" modification used by plaintiff. Much evidence was presented during the trial regarding Mary Harvey's many health conditions including, but not limited to, her rheumatoid arthritis, fractured hip, hypertension and congestive heart failure. (Tr. 256, 657). No expert offered testimony that any of these conditions together with the failure to treat the alleged urinary tract infection contributed to cause the decedent's death. In the present case the "directly contributed to cause" modification was unsupported by the evidence and resulted in a roving commission. The jury was given no guidance as to what factors could legitimately be considered as contributing with Dr. Williams' alleged negligence to cause the death. In light of the specifically limited testimony of Dr. Coleman, an instruction suggesting the jury could consider anything other than the alleged failure of others to treat the alleged renal failure was confusing, misleading and prejudicial. It also constituted a roving commission for the jury to decide without guidance what the alleged failure of Dr. Williams might have

contributed with to cause the death. Support for the proposition that the instruction was perplexing and confusing in light of the evidence is found in the record. During deliberations the jury submitted the following question to the court:

1. Please expand on the definitions of "Directly Caused" and "Directly Contributed" as it relates to the death of Mary Harvey.

(L.F. 192). The Court did not clarify these terms for the jury. The jury was, therefore, left to speculate what factors could be considered in rendering its decision.

"It is error to give an instruction where there is no substantial evidence to support the issue submitted." *King v. Unidynamics Corp.*, 943 S.W.2d at 267 (*citing Cowan*, 740 S.W.2d at 304). The was no substantial evidence to support the MAI 19.01 modification selected by the plaintiff.

The trial court erred in submitting Instruction No. 12 because it gave the jury a roving commission in that it assumed a disputed fact and did not conform to the evidence. The judgment in plaintiff's favor and against Dr. Williams should therefore be reversed.

III. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT WILLIAMS' OBJECTION TO THE TRIAL TESTIMONY OF DR. COLEMAN AND PERMITTING DR. COLEMAN TO TESTIFY THAT THE FAILURE TO TREAT THE ALLEGED URINARY TRACT INFECTION CAUSED OR CONTRIBUTED TO CAUSE MARY HARVEY'S DEATH BECAUSE THIS TESTIMONY DIFFERED SUBSTANTIALLY FROM HIS DEPOSITION TESTIMONY IN THAT AT DEPOSITION DR. COLEMAN TESTIFIED THE DEATH WAS DUE TO A NEUROLOGICAL EVENT, THE CAUSE OF WHICH HE COULD NOT STATE TO A REASONABLE DEGREE OF MEDICAL CERTAINTY.

In the event the Court denies the previous points, the verdict in favor of plaintiff should still be reversed because Dr. Coleman, plaintiff's only expert as to Dr. Williams materially changed his testimony between his deposition and trial. Dr. Coleman testified at deposition that he believed a neurological event caused the death of Mary Harvey but that he could not state to a reasonable degree of medical certainty what the cause of the event was. (L.F. 259). He provided three possible causes for the event leading to the death but he could not state which one caused the death. (L.F. 259). At trial Dr. Coleman told a completely different story in an effort to cure the failure of his deposition testimony to establish causation. At trial Dr. Coleman testified for the first time that the failure of Dr. Williams to treat an alleged urinary tract infection combined with the acts of others in failing to treat the decedent's renal failure caused the neurological event he believed resulted in Mary Harvey's death. (Tr. 282-284). The changes in Dr. Coleman's testimony were substantial,

material and prejudicial. The witness went from a list of possible causes for the event he thought resulted in death which did not even include the failure to treat the alleged urinary tract infection, to stating that the combination of the failure to treat the alleged urinary tract infection along with the failure to treat the renal failure caused the decedent's death. As discussed in detail in Point I of this brief, even Dr. Coleman's revised opinions were insufficient to establish causation. If, however, the Court determines Dr. Coleman's trial testimony was sufficient to establish causation, the verdict in favor of Plaintiff should be reversed because the trial court erred in allowing Dr. Coleman to change the opinions rendered at deposition.

1. Standard of Review

"The decision of the trial court as to the admissibility of evidence is accorded substantial deference on appeal and will not be disturbed unless the trial court has abused discretion." *King v. Copp Trucking, Inc.*, 853 S.W.2d 304, 307 (Mo. App. W.D. 1993) (*citing Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991)). The party that has been prejudiced by the introduction of evidence has the burden of showing the evidence would not have otherwise been introduced. *King v. Copp Trucking, Inc.*, 853 S.W.2d at 307 (*citing Around the World Importing v. Mercantile*, 795 S.W.2d 85, 89 (Mo. App. E.D. 1990)).

"When an expert witness has been deposed and after the deposition, but before trial, either changes his opinion or bases an opinion upon new facts from those which were disclosed in the deposition, the party intending to use the expert witness must disclose the new information to the adverse party." *King v. Copp Trucking, Inc.*, 853 S.W.2d at 307;

(*citing Gassen v. Woy*, 785 S.W.2d 601, 604 (Mo. App. W.D. 1990)). The court's ruling in *King* is based upon V.A.M.R. 56.01(b)(2) which states, "a party may discover by deposition the facts and opinions to which the expert is expected to testify . . ." and 56.01(e)(2) which states that "[a] party is under a duty to amend a prior response seasonably if the party obtains information upon the basis of which the party knows that the response (A) was incorrect when made or (B) though correct when made is no longer true." V.A.M.R. 56.01 (1999) .

> A trial court is vested with broad discretion as to its choice of a course of action during trial when evidence has not been disclosed in response to appropriate discovery, and in the sound exercise of its discretion the trial court may reject such evidence or impose other appropriate sanctions.

Green v. Fleishman, 882 S.W.2d. 219, 222 (Mo.App. W.D. 1994) (*citing Gassen v. Woy*, 785 S.W.2d 601, 604 (Mo. App. W.D. 1990)). The complete striking of an expert's testimony is within the discretion of the court if the expert alters his opinion and one party fails to disclose the new opinion to the other. *Green,* 882 S.W.2d at 224.

2. <u>The trial court abused its discretion in allowing Dr. Coleman to change his testimony at trial from that given at his deposition.</u>

Plaintiff's expert, David Coleman, M.D., gave two depositions in this case before trial. The first deposition was given on December 15, 1999, but was not completed because Dr. Coleman did not have all of the records and because of travel difficulties of counsel for

the parties. (Tr. 325). The second deposition occurred on October 24, 2000 and was a continuation of the deposition from December 15, 1999. (L.F. 230). During the second deposition Dr. Coleman testified that to the extent there were any inconsistencies between the first and second depositions he would stand by the opinions given in the October 24, 2000 deposition. (L.F. 263).

During the October 24, 2000 deposition of Dr. David Coleman, he testified that he felt there were three possible causes of Mary Harvey's death. (L.F. 259). Dr. Coleman stated that the three possible causes were

> The sepsis that I mentioned; possible 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 . . ."

(L.F. 259). Dr. Coleman could not determine which of these causes actually did lead to Ms. Harvey's death, and, in fact, he could not even say which was the most probable

cause. (L.F. 259).[4] Further, Dr. Coleman stated that he could not comment with any degree of certainty as to how a change in antibiotics would have affected Ms. Harvey's outcome. (L.F. 118). Dr. Coleman could not say "that if appropriate antibiotics had been instituted on the 26th, that she would not have had the complications and gone on to die." (L.F. 108-09).

Dr. Coleman's deposition testimony laid out three possible, yet inconclusive causes of death and a failure to change the antibiotics was not one of them. (L.F. 259). The suggested change in antibiotics was the only criticism that Dr. Coleman had of Dr. Williams. (L.F. 112). However, Dr. Coleman reiterated that even if Dr. Williams had instituted the changes in antibiotic that Dr. Coleman suggested, the outcome may not have been any different. (L.F. 112).

In limine Defendant Williams moved to exclude or limit Dr. Coleman's trial testimony to the opinions given in his deposition. (L.F. 100-02). The court denied this motion. (L.F. 100-02). Further, because at trial Dr. Coleman changed his testimony from that given in his deposition, counsel for defendant made numerous objections throughout

the testimony of Dr. Coleman in an effort to have the court restrict the witness to the

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[4]Between the October 24, 2000, deposition of Dr. Coleman and the trial of the case, plaintiff's counsel notified counsel for defendants that Dr. Coleman no longer believed a stroke had caused the events of September 30th to October 1st. No objection is raised regarding this change in testimony.

opinions given at his deposition. (Tr. 307, 318, 324).

At trial Dr. Coleman was allowed, over the objection of Defendant Williams, to testify that in his opinion to a reasonable degree of medical certainty, Mary Harvey's alleged urinary tract infection contributed to cause the neurological event of September 30th to October 1st. (Tr. 282-284). The alleged urinary tract infection was not even on the list of possible causes for the neurological event given by Dr. Coleman in his deposition. (L.F. 259). This is a substantial and material change in Dr. Coleman's testimony of which defendants were not given notice. Allowing this testimony under the circumstances was unduly prejudicial to Defendant Williams especially considering that the only criticism against Dr. Williams was an alleged failure to prescribe antibiotics for the alleged urinary tract infection.

Dr. Coleman went on to testify at trial that the combination of the alleged failure to treat the alleged urinary tract infection and the alleged failure to treat the renal failure caused the neurological event of September 30th to October 1st. (Tr. 316). This is another substantial and material change in Dr. Coleman's testimony of which defendants were not given notice. At his October 24, 2000, deposition, Dr. Coleman did not even place this combination on the list of possible causes for the neurological event Dr. Coleman believed led to Mary Harvey's death.

Finally, at trial Dr. Coleman was allowed to testify that the failure of Dr. Williams to prescribe an antibiotic for the alleged urinary tract infection contributed to cause Mary

Harvey's death. (Tr. 318). At deposition, however, he testified the death was due to the alleged neurological event for which he could not state a definitive cause. (L.F. 259). The alleged failure to treat the alleged urinary tract infection was not on the list of three possible causes for the neurological event. (L.F. 259). Dr. Coleman's trial testimony is completely inconsistent with his deposition testimony. Defendants were obviously surprised by the introduction of these new opinions and consistently objected to the testimony stating that it was surprising, unexpected, and beyond the scope of Dr. Coleman's original testimony. (Tr. 324, 364, 380).

If Dr. Coleman had not been allowed to give his changed opinions regarding causation at trial, the new theory of causation would not have been introduced. Dr. Coleman was plaintiff's sole expert concerning causation as it related to Dr. William's care. His new testimony regarding causation was unique and not supported by plaintiff's other expert in deposition or at trial. No other witness testified to the theory of causation introduced by Dr. Coleman at trial. This demonstrates that the evidence would not have been introduced at trial if Dr. Coleman had not changed his opinion. The presentation of Dr. Coleman's new theory of causation for the first time at trial prejudiced the defendants by eliminating the opportunity to review the theory with their experts in order to cross-examine Dr. Coleman at trial and by preventing defendants the opportunity to prepare their experts to rebut the theory. The new testimony regarding causation should have been excluded.

As discussed in Point I of this Brief, even with Dr. Coleman's changed opinions, plaintiff failed to make a submissible case of causation at trial. Regardless of the

insufficiency of the new causation opinions, the trial court erred in permitting Dr. Coleman to change and supplement his deposition testimony in an attempt to cure the deficiency in plaintiff's causation evidence. Defendant acknowledges 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. The court should not, however, permit an expert to testify at trial that defendant's conduct caused the death of a patient when that very same expert has testified in deposition that he cannot say to a reasonable degree of medical certainty what caused the death. *See Bailey v. Norfolk and Western Ry.*, 942 S.W.2d 404, 414-15 (Mo. App. W.D. 1997) (Trial court properly instructed jury to disregard defendant's expert causation testimony which differed from the expert's deposition testimony). Allowing such 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 926, 927 (Mo. 1992); *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 failure of the court to prevent plaintiff's expert from changing his testimony regarding causation was an abuse of discretion. The admission of this new testimony materially prejudiced Defendant Williams. The judgment in favor of plaintiff and against Dr.

Williams should, therefore, be reversed.

IV. THE TRIAL COURT ERRED IN DENYING DR. WILLIAMS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, BECAUSE THE COURT'S DETERMINATION THAT THE FAILURE OF JUROR LOLITA JONES TO DISCLOSE CERTAIN PRIOR AND PENDING SUITS WAS UNINTENTIONAL AND NOT PREJUDICIAL TO DEFENDANT WAS AN ABUSE OF DISCRETION IN THAT THE FAILURE TO DISCLOSE BY JUROR JONES WAS NOT REASONABLE AND PREJUDICED DEFENDANT BY PREVENTING FURTHER INQUIRY INTO POTENTIAL BIASES DURING VOIR DIRE.

In the event this Honorable Court concludes that plaintiff made a submissible case, that there was no instructional error and that Dr. Williams was not prejudiced by Dr. Coleman's change in testimony, the verdict in favor of plaintiff should still be reversed because of juror nondisclosure. During jury selection, the venire panel was asked clear and simple questions regarding their civil litigation experiences. In spite of several questions in this area, Juror Lolita Jones failed without reasonable explanation to disclose numerous civil suits involving personal injury in which she had been involved.

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

When this court reviews trial court decisions regarding juror non-disclosure, the standard of review is whether the trial court abused its discretion. *Jackson v. Watson*, 978 S.W.2d 829, 832-33 (Mo. App. W.D. 1998).

The trial court abuses its discretion when its ruling is clearly against the logic of the

circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Doyle v. Kennedy Heating and Service, Inc.*, 33 S.W.3d 199, 201 (Mo. App. W.D. 2000) (*citing Wingate v. Lester E. Cox Medical Center,* 853 S.W.2d 912, 917 (Mo. banc 1993)).

The Missouri Supreme Court has stated: "At the cornerstone of our judicial system lies the constitutional right to a fair and impartial jury, composed of twelve qualified jurors." *Williams by Wilford v. Barnes Hosp*., 736 S.W.2d 33, 36 (Mo. banc 1987) (*citing* Mo. Const. Art. I §22(a) and *Beggs v. Universal C.I.T. Credit Corporation*, 387 S.W.2d 499, 503 (Mo. banc 1965)). Additionally, on voir dire examination, jurors have a duty to truthfully, fully, and fairly answer all questions directed to them individually and to the panel generally to allow their qualifications to be determined and challenges to be intelligently exercised. *Williams*, 736 S.W.2d at 36 (*citing Rinkenbaugh v. Chicago Rock Island & Pacific R. Co.*, 446 S.W.2d 623, 626 (Mo. 1969)).

Missouri recognizes both intentional and unintentional non-disclosure of information requested of potential jurors on voir dire. Intentional non-disclosure 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." *Williams*, 736 S.W.2d at 36 (*citing Anderson v. Burlington Northern R. Co.*, 651 S.W.2d 176, 178 (Mo. App. E.D. 1983)). When a juror intentionally refrains from disclosing material information requested on voir dire,

prejudice and bias are inferred from such concealment. *Williams,* 736 S.W.2d at 37 (*citing Rinkenbaugh*, 446 S.W.2d at 626 and *Beggs*, 387 S.W.2d at 503).

Unintentional non-disclosure occurs "where, for example, the experience forgotten was insignificant or remote in time." *Williams*, 736 S.W.2d at 36 (*citing Anderson*, 651 S.W.2d at 178). ". . . [W]here nondisclosure is found to be both unintentional and reasonable, the relevant inquiry becomes whether, under the circumstances, the juror's presence on the jury did or may have influenced the verdict so as to prejudice the party seeking a new trial." *Williams*, 736 S.W.2d at 37 (*citing Hampy v. Midwest Hanger Company*, 355 S.W.2d 415, 421 (Mo. App. 1962)).

Prejudice is a determination of fact for the trial court, and, when unintentional non-disclosure is present, the party seeking the new trial should prevail if he is able to show the presence of bias. *Williams*, 736 S.W.2d at 37. "The determination of whether concealment is intentional or unintentional is left to the sound discretion of the trial court." *Id*. at 36.

2. <u>It was an abuse of discretion for the trial court to determine that Juror Lolita Jones' nondisclosure of pending and prior lawsuits was unintentional</u>.

In the present case, the venire panel (including Ms. Jones) was asked three distinct questions regarding lawsuits:

1. "Does anybody presently have a claim or law suit that is presently going on at this time?" (Tr. 46).
2. "I just asked about pending claims. Anybody in the past who has had a claim that is now resolved or over with

when they claimed some sort of injury. And I'll also ask about workmen's comp. as well." (Tr. 47).

3. "Anybody ever had a claim or lawsuit brought against you by someone who claims they were injured because of something you did?" (Tr. 52).

While several venire persons responded to the first two questions, no one responded to the third. Lolita Jones, a juror in this case, did not respond to any of these clear and understandable questions, even after hearing the responses of the other members of the venire panel.

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). Ms. Jones was subpoenaed to testify in the post-trial hearing regarding Defendant Williams' motion addressing juror non-disclosure.

In December, 1998 Ms. Jones was involved in a traffic accident. (P.Tr. 8). Her minor daughter and godmother were passengers in her car at the time of the accident. (P.Tr. 10-11). Ms. Jones' daughter was injured in the accident and required hospitalization for a week. (P.Tr. 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. (P.Tr. 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. (P.Tr. 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. (P.Tr. 25-26). The lawsuit was not settled until Spring of 2001; it was still pending during the trial of this case. (P.Tr. 12). Ms. Jones even testified that she had spoken to her lawyer during the trial of the present case. (P.Tr. 8-14).

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

Ms. Jones was asked a series of questions at the post-trial hearing including why she had not responded to the question of whether she had a "claim or law suit that is presently going on at this time?" Ms. Jones initially responded that she understood that question but then claimed that she did not understand the meaning of it. (P.Tr. 33-34). She also initially testified that she did not respond because she did not feel she had a response but then testified that:

> 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.

(P.Tr. 39-40). Ms. Jones also stated that she failed to respond to the other questions regarding prior lawsuits and accidents because she "actually forgot about the one in '91." (P.Tr. 40-41). Ms. Jones claimed to have forgotten an accident which occurred the day after her birthday, resulted in her being sued multiple times, one suit being settled on her behalf, and her insurance being cancelled. (LF. 325, 328 & P.Tr. 20-24, 28). Ms. Jones' explanation that she forgot the 1991 accident, which she readily recalled at the post-trial hearing, was implausible.

The trial court determined that Ms. Jones' nondisclosure about her prior accidents and the resulting lawsuits was unintentional and non-prejudicial. The court specifically found "that the nondisclosure by juror no. 181 (Lolita Jones) of lawsuits stemming from a 1991 auto accident as raised by Defendant Williams' Motion was unintentional and reasonable, in light of her credible testimony at the post trial hearing. Further, the court [found] that the undisclosed experience is immaterial and not prejudicial to Defendants . . ." (L.F. 393). The court went on to find Ms. Jones' failure to disclose the pending claim reasonable 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). Under the circumstances of this case, this ruling by the court constituted an abuse of discretion.

The questions from plaintiff's counsel during voir dire regarding prior claims was

very clear. The lawsuits involving Lolita Jones were not so far in the distant past or so minor that they would be easily forgotten by the juror. Her explanation that she merely forgot these suits which she easily recalled at the post-trial hearing was not reasonable. As a result, the failure to disclose this information should be deemed to be intentional and prejudicial. "If a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from such concealment." *Doyle*, 33 S.W.3d at 201 (*citing Williams by Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 36 (Mo. banc 1987)). Bias and prejudice must be presumed to have influenced the juror's verdict if nondisclosure is intentional. *Id*. "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 question concerning currently pending claims asked by plaintiff's counsel during voir dire was also abundantly clear. Ms. Jones' failure to disclose a currently pending claim, although filed on her daughter's behalf, was a significant nondisclosure. Ms. Jones' testimony that she guessed she "misunderstood the question" and thought it related only to claims against the defendants, especially when combined with her failure to respond to other

equally clear voir dire questions and the answers of other panel members to the inquiry, should not be construed as anything other than intentional. Because prior litigation experiences are material, bias and prejudice must be presumed from Juror Jones' failure to disclose this key information.

Even if the conclusion could be drawn that the nondisclosure of the multiple accidents resulting in numerous suits was unintentional, the failure was still prejudicial. The defendants were prevented from exploring with this potential juror whether her experiences in being named a defendant on three separate occasions affected her ability to fairly evaluate the evidence in the case. The defendants were prevented from exploring with the potential juror whether the fact that her suits were apparently all resolved prior to trial in any way biased her against defendants who defend their case through trial. Further, the failure to disclose her currently pending claim as a plaintiff could affect her view of the evidence and her ability to fully and fairly evaluate the evidence in the case. Defendants were precluded from specifically inquiring into these areas with Juror Jones due to her failure to disclose the suits. The failure to disclose this information also prevented the defendants from being able to exercise their right to remove Ms. Jones from the jury using a peremptory strike. The verdict for the plaintiff in this case clearly shows the bias of the jury for the plaintiff and the participation of jurors who failed to disclose claims involving personal injury must be deemed to have influenced the verdict.

The record does not support a finding that Juror Jones' nondisclosure of her multiple prior suits was unintentional or that there was no question asked which required her to

disclose her currently pending suit. Ms. Jones gave contradictory testimony regarding her failure to respond to questions regarding her presently pending suit. She also offered unreasonable explanations for her failure to disclose her multiple past suits. The only plausible explanation for Juror Jones' multiple nondisclosures is that they were intentional. The information was material, and bias and prejudice must be presumed to have occurred. Further, even if the nondisclosure was unintentional, it was material and prejudicial. The judgment in favor of plaintiff and against Dr. Williams should, therefore, be reversed.

V. THE TRIAL COURT ERRED IN OVERRULING DR. WILLIAMS' OBJECTIONS TO PLAINTIFF'S "ARGUMENT EXHIBIT B" AND IN ALLOWING PLAINTIFF TO USE THE EXHIBIT DURING REBUTTAL BECAUSE IT WAS PREJUDICIAL IN THAT IT MISSTATED THE EVIDENCE AND INTRODUCED NEW EVIDENCE FOR THE FIRST TIME DURING CLOSING.

During the rebuttal portion of closing argument plaintiff introduced for the first time an exhibit purporting to summarize and comment on the testimony of various witnesses. The exhibit misstated the evidence and as a result, prejudicially introduced new "evidence". The exhibit also presented plaintiff's counsel's view of the testimony in such a manner that it appeared to be evidence.

1. Standard of Review

During closing arguments, the "permissible field of argument is broad and **as long as counsel does not go beyond the evidence** and issues drawn by the instructions . . ." the argument will be allowed. *Hagedorn v. Adams*, 854 S.W.2d 470, 478 (Mo. App. W.D. 1993) (*citing Titsworth v. Powell*, 776 S.W.2d 416, 422 (Mo. App. E.D. 1989)) (Emphasis added). It is improper for counsel to use arguments or exhibits which inaccurately depict expert testimony or for counsel to use exhibits/arguments not based on the facts. *Friend v. Yokohama Tire Corp*., 904 S.W.2d 575, 579 (Mo. App. S.D. 1995). The use of exhibits not supported by previously admitted evidence amounts to the presentation of additional evidence which is prejudicial and deemed to be error. *Id*.

Regarding the use of exhibits at closing argument, the court has specifically held

that:

> [T]he use in argument by counsel of graphic aids such as charts or diagrams or plats which have not been put into evidence is permissible, provided they are used merely to illustrate or elucidate a point in counsel's argument ***based on the evidence***, and provided they are ***not used in such a manner as to tend to confuse or mislead the jury into considering them as evidence***.

Id. (*citing Boese v. Love*, 300 S.W.2d 453, 461 (Mo. 1957)). (Emphasis added.) Therefore, if an exhibit is confusing, misquotes testimony, or misrepresents the facts, the exhibit should be barred as it is prejudicial. *Friend*, 904 S.W.2d at 579.

In reviewing issues related to closing argument, the standard of review is whether there has been an "abuse of discretion." *Hagedorn*, 854 S.W.2d at 478 *(citing St. Louis Southwestern Railway Company v. Federal Compress and Warehouse Company*, 803 S.W.2d 40, 45 (Mo. App. E.D. 1990)).

2. Argument Exhibit B was not based on the evidence and was presented in plaintiff's closing argument in such a manner as to confuse the jury into considering plaintiff's counsel's interpretation of the testimony of certain experts as evidence.

During the rebuttal portion of the closing argument in the present case, plaintiff's counsel was allowed to use, for the first time, an exhibit purporting to summarize the testimony of certain defense experts. (Tr. Vol. 3, 264). The exhibit was labeled "Argument Exhibit B" for identification purposes. An 8-1/2" x 11" photocopy of Argument Exhibit B is attached hereto as Appendix A for the court's reference. The exhibit was first shown to

counsel for defendants immediately before the rebuttal argument of plaintiff. (Tr. Vol. 3, 259). All defense counsel objected to the use of the exhibit which had not been introduced into evidence during the trial. (Tr. Vol. 3, 260-63).

This exhibit contained not only plaintiff's counsel's recollection of the testimony, but also plaintiff's counsel's opinion that either the testimony or the facts upon which the testimony was based was incorrect. (Tr. Vol. 3, 259-63). Counsel for Defendant Wendell Williams, M.D. objected to the use of this exhibit on the basis that it misstated the evidence, unduly highlighted only portions of the testimony of each witness, presented plaintiff's counsel's interpretation of the evidence in a printed form which gave the impression that it was an accurate depiction of the expert testimony from a transcript, and because the exhibit was not used at any time during the trial. (Tr. Vol.3, 260). The trial court overruled all of these objections, allowing plaintiff to use the exhibit, but ordering plaintiff's counsel to make one addition to the exhibit to show that certain testimony of Dr. Graham, Defendant Eric Washington, M.D.'s infectious disease expert, was given in deposition. (Tr. Vol. 3, 262). The court also advised plaintiff's counsel that he had to "make it clear" to the jury that the chart was prepared by him from his remembrance of the evidence. (Tr. Vol.3, 262). No other restriction on the use of the exhibit was issued by the trial court.

"Argument Exhibit B" was inaccurate, misleading and confusing in several respects. Counsel for all defendants argued that the exhibit should be excluded because it misstated the evidence and was prejudicial.

In Argument Exhibit B, plaintiff asserted that Dr. Tepper "agree[d] that

the . . . clinical picture **is** consistent with the diagnosis of a urinary tract infection." (Tr. Vol. 3, 265). (emphasis added) This statement is a mischaracterization of Dr. Tepper's testimony and as such tended to confuse the jury. Dr. Tepper merely testified that the clinical picture hypothesized to him by plaintiff **"could be"** or might be consistent with diagnosis of a urinary tract infection. (Tr. 742). (Emphasis added).

The portion of Argument Exhibit B addressing the testimony of Dr. Graham has the word "**WRONG**" at the end of each statement. (Tr. Vol. 3, 265-66 and Brief Exhibit A). This presentation implies that the testimony and opinions of Dr. Graham are wrong, not that plaintiff believes or argues that the testimony and opinions are wrong. It is not clear from the exhibit or plaintiff's argument that the statement "WRONG" is merely plaintiff's counsel's opinion regarding Dr. Graham's testimony.

In Argument Exhibit B Plaintiff also stated that Dr. Graham testified that a "Urinary tract infection could account for all of the conditions which caused Mary Harvey's death." (Tr. Vol. 3, 266 and Brief Exhibit A). This is a complete misrepresentation of Dr. Graham's testimony. Dr. Graham testified that Mary Harvey did not have a urinary tract infection and the positive urine cultures had nothing to do with her death. (Tr. 770-71).

Finally, with regard to the portion of the exhibit pertaining to the testimony of Dr. Wittgen, plaintiff held out to the jury that Dr. Wittgen's testimony that Mary Harvey did not have a urinary tract infection because she was asymptomatic was "WRONG." (Tr. Vol. 3, 266 and Brief Exhibit A). Again, as with the mischaracterization of the testimony of Dr. Graham, this assertion is made at the end of

the statement, which seems to imply that the opinion itself is wrong, not that plaintiff's counsel *believes* the testimony is wrong or that plaintiff's counsel *believes* the testimony is based on an erroneous interpretation of the evidence.

The above examples are not exhaustive, but demonstrate that the exhibit misstated the evidence and its prejudicial nature. The trial court did nothing to make clear that the exhibit was the opinion of plaintiff's counsel and not a summation of the evidence or fact. The court merely advised plaintiff's counsel that he had to "make it clear" to the jury the chart was prepared by him from his memory of the evidence. Plaintiff's introduction of the exhibit simply stated "And I have prepared this chart based upon what I believe that testimony was, and I'd like to go through this with you now." (Tr. Vol. 3, 264). Such an introduction was inadequate to instruct the jury that the exhibit consisted of argument by plaintiff's counsel and was not to be considered as evidence. Clearly, allowing "Argument Exhibit B" to be used under these circumstances created confusion and was an abuse of discretion to allow its use.

The exhibit was neither a complete nor an accurate illustration of the testimony of the experts whose testimony was described therein. Additionally, the exhibit contained statements which were merely opinions held by plaintiff's counsel, not facts based on the evidence. The exhibit was plaintiff's biased interpretation of the testimony of defendants' experts and not an accurate reflection of that testimony. The use of plaintiffs' counsel's interpretation of the evidence in printed form as though it were a quotation from the experts' testimony was prejudicial and unfair. Use of the printed exhibit in this format with only a

brief sentence of introduction by plaintiff's counsel identifying it as his own interpretation of the experts' testimony would tend to confuse or mislead the jury into considering the opinions of plaintiff's counsel as evidence. This is an impermissible use of such an exhibit. *Friend*, 904 S.W.2d at 579.

The use of this prejudicial exhibit during rebuttal further compounded the resulting prejudice since defendants were afforded no opportunity to remind the jury that the exhibit was not evidence and should not be considered as such, nor were defendants allowed an opportunity to address the misstatements in the exhibit. Plaintiff's use of Argument Exhibit B during closing argument was clearly erroneous and prejudicial to Defendant Williams, and therefore, the judgment against defendant and for plaintiff should be reversed.

FURTHER ARGUMENT

In further support of the points raised in this brief, Defendant Williams joins in and adopts by reference the arguments made by Defendant/Appellant Taylor in her brief to the extent applicable.

CONCLUSION

For all of the above-stated reasons, Defendant/Appellant Wendell Williams, M.D., respectfully requests that this Honorable Court reverse the judgment in favor of plaintiff and order that judgment in favor of Defendant Wendell Williams, M.D., be entered. In the alternative, Defendant/Appellant Wendell Williams, M.D. requests the judgment in favor of Plaintiff be reversed and the case be remanded for a new trial.

Respectfully submitted,

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IN THE MISSOURI COURT OF APPEALS

WILLIE HARVEY,	)	
	)	
Respondent/Plaintiff	)	
	)	Supreme Court Number SC84449
V.	)	
	)	
WENDELL WILLIAMS, M.D.,	)	
ERIC WASHINGTON, M.D. and	)	
DENISE TAYLOR, M.D.,	)	
	)	
Appellants/Defendants	)	

CERTIFICATE OF COMPLIANCE

Mary L. Reitz, the undersigned attorney of record for Defendant/Appellant Wendell Williams, M.D., in the above-referenced appeal, certifies pursuant to Supreme Court Rule 84.06(c) of the Missouri Supreme Court that:

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

2. The Brief, excluding the cover page, signature blocks and certificates contains 18,195 words according to the word count total contained in Corel WordPerfect Suite 8 software with which is was prepared; and

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

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that two (2) copies of the foregoing Defendant/Appellant's Brief and a double-sided, high density, IBM-PC-compatible floppy disk containing Appellant's Brief were hand-delivered this _____ day of June, 2002 to: **Mr. Joseph A. Frank** and **David T. Dolan**, Attorneys for Respondent/Plaintiff, Frank, Dolan & Mueller, 308 North 21st Street, Suite 401, St. Louis, Missouri 63102; and one (1) copy of Defendant/Appellant's Brief and a double-sided high density, IBM-PC-compatible floppy disk containing Appellant's Brief was hand-delivered to: **Mr. D. Paul Myre**, Attorney for Appellant/Defendant Denise Taylor, M.D., Anderson & Gilbert, 200 South Hanley Road, Clayton, Missouri 63105.

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MLR/plp
F:\Briefs on File\SC84449 HARVEY sub app WILLIAMS.wpd
June 27, 2002 (5:46pm)