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

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REPLY TO PLAINTIFF'S JURISDICTIONAL STATEMENT

In his Jurisdictional Statement Plaintiff challenges the jurisdiction of this Court on the basis that this case involves no matters of general interest or importance and that none of the requirements of Rule 83.02 or 83.04 have been satisfied. Plaintiff's challenge to this Court's jurisdiction is without merit. Rule 83.02 states in pertinent part that "[transfer may be ordered because of the general interest or importance of a question involved in the case or for the purpose of reexamining existing law." Contrary to Plaintiff's assertion that this case does not involve a matter of general interest or importance, all of the issues in this case are matters of general interest and importance. Specifically, but not by way of limitation, Defendant/Appellant notes that this case involves the proper application of the "but for" causation test, instructional error relating to the assumption of a disputed fact and the proper application of M.A.I. 19.01, and a change in expert testimony between deposition and trial. These are matters which trial attorneys must address on a regular basis and the guidance of this Court on those issues is therefor of general interest and importance. Additionally, plaintiff's argument that there is no opinion from the Court of Appeals and therefor no opinion which is contrary to a previous decision of an appellate court of this state ignores that a per curiam opinion was issued. It is the position of Defendant/Appellant that the decision upholding the judgment in this case is contrary to previous decisions of appellate courts in this state. If the appellate court had followed precedent, judgment would have been reversed and judgment entered in favor of Defendant/Appellant. This Court should not and cannot be barred from reviewing a matter simply because the court of appeals issued a per curiam decision instead of a full opinion. Obviously, even if this case arguably does not involve an issue of general interest or importance, or an opinion contrary to existing law, this Court has the power to

review the case under Rule 83.02 solely for the purpose of reexamining existing law. Transfer to this Court was properly granted and this Court has jurisdiction to hear this appeal.

SUPPLEMENTAL STATEMENT OF FACTS

To the extent that Plaintiff's Statement of Facts is inconsistent with that of this Defendant, Defendant Williams disputes Plaintiff's Statement of Facts. Defendant's disputes with Plaintiff's Statement of Facts, include, but are not limited to, the following:

1. Plaintiff's claim that Mary Harvey's urine culture showed that she had a pseudomonas urinary tract infection." (Respondent's Substitute Brief P. 6, 8) As stated in Defendant's original brief, the evidence was that the culture was positive. Whether or not that positive culture indicated a urinary tract infection was a disputed issue.

2. Plaintiff's claim that Dr. Sagar's note of September 28, 1995 "recommends" a change to Fortaz. (Respondent's Brief P. 8) The note by Dr. Sagar stated that Dr. Sagar "will put [Mary Harvey] on Fortaz" (Tr.431). The issue of whether this was a recommendation or a plan was never fully resolved.

3. Plaintiff's claim that Dr. Williams was brought into the case by Dr. Washington for "medical clearance for the hip replacement surgery." (Respondent's Brief P. 7) Dr. Washington testified that he felt Mary Harvey needed to be seen by a cardiologist because she had been identified as having some signs of congestive heart failure. (Tr. 505)

4. Plaintiff's claim that Dr. Williams diagnosed Mary Harvey as having a pseudomonas urinary tract infection, not a colonization. (Respondent's Brief P. 9) Although Dr. Williams testified he was aware Mary Harvey's urine was infected on

September 26, he specifically testified that he did not make a diagnosis of a urinary tract infection, but

only thought that was a possibility. (Tr. 697-698).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION OF DR. WILLIAMS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING 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 correctly notes in its brief on this point that "but for" causation is the standard by which the submissibility of Plaintiff's case is judged. Plaintiff also correctly notes that *Callahan v. Cardinal Glennon Hosp*., 863 S.W. 2d 852 (Mo. banc 1993) addresses the application of the "but for" test for causation.[1] Plaintiff, however, fails to acknowledge that the issue of submissibility is a matter of law to be determined by the court and not the jury. *Killion v. Bank Midwest, N.A.*, 987 S.W.2d 801, 808,(Mo. App. W.D. 1998) citing *Gary Surdyke Yamaha, Inc. v. Donelson*, 743 S.W.2d 522, 523 (Mo. App. E.D. 1987). Upon a proper request for a directed verdict, such as was made in this case, the trial court has the duty to determine if the evidence of the plaintiff is sufficient to establish negligence and legal "but for" causation. *Hitchell v. Strauss*, 748 S.W.2d 771, 772 (Mo. App.

[1]It is significant that while plaintiff continues to rely on Callahan to support his position that plaintiff made a submissible case, plaintiff has completely altered his interpretation of how Callahan should be applied and why it is in his favor from the positions set forth in his brief before the Court of Appeals.

W.D., 1988) citing *Meyer v. Lanning*, 620 S.W.2d 34, 35 (Mo. App. W.D., 1981). If plaintiff fails to meet the burden of establishing a submissible case, the trial court has the duty to direct a verdict for the defendant and the case never reaches the jury. The trial court in this case erred in not directing a verdict for Defendant/Appellant Williams.

Plaintiff also seems to argue that because the M.A.I. instructions use the language "directly caused" or "directly contributed to cause" the burden of plaintiff to establish "but for" causation is somehow changed, lessened or relieved. This is not the case. *Callahan* and prior Missouri cases clearly require the Plaintiff to prove that "but for" the Defendant's alleged negligence, the injury or death would not have occurred. *Callahan*, 863 S.W. 2d at 861. *Baker v. Guzon*, 950 S.W.2d 635, 644 (Mo. App. E.D. 1997). The language of the verdict director does not in any way change this burden or the duty of the court to determine if "but for" causation has been established before the case is submitted to the jury.

Plaintiff uses the logic that since *Gaines v. Property Servicing Co*., 276 S.W.2d 169 (Mo. 1955) was issued before *Callahan* and the approval of M.A.I. 19.01, the "but for" test set forth therein is no longer applicable. Neither *Callahan* nor M.A.I. 19.01

overrule *Gaines* nor alter the "but for" test to be used in determining causation for purposes of submissibility.

The "but for" test "operates to eliminate liability of a defendant who cannot meet this test because such defendant's conduct was not casual." *Callahan*, 863 S.W. 2d at 862. In the present case, Dr. Coleman could not establish that "but for" this Defendant's alleged failure to treat Mary

Harvey's alleged urinary tract infection, she would have lived. (Tr. 371, 374, 364, 349, 346). This is not a matter of semantics as plaintiff suggests but a matter of substance. There is a clear flaw in the testimony of Dr. Coleman. Plaintiff contends that his expert, Dr. Coleman, established that Mary Harvey's death was due to two events, neither of which alone was sufficient to cause death. (Respondent's Substitute Brief pp. 19-20.) To establish "but for" causation under this theory, plaintiff needed to prove 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, plaintiff's only expert on causation, did not testify to this. In fact Dr. Coleman could not rule out renal failure as a sole cause of death since he did not know whether one of the conditions alone was sufficient to cause Mary Harvey's death. (Tr. 371.) If the renal failure alone was sufficient to cause decedent's death, Dr. Williams alleged failure to treat an alleged urinary tract infection was not causally related to her death. Dr. Coleman's testimony is therefor insufficient to establish "but for" causation as to Dr. Williams.

Further, if the renal failure alone may have still resulted in death, there is no way Dr. Coleman could know to a reasonable degree of medical certainty that the combination of the renal failure and the alleged pseudomonas urinary tract infection combined to cause the death. Any testimony to the contrary is inconsistent, speculative and inherently contradictory. Dr. Coleman's testimony did not remove this case from the realm of "speculation, conjecture and surmise" as required to make a submissible case. *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 880 (Mo. App. W.D. 1985).

The brain injury discussed at page 349 of the trial transcript and page 25 of Respondent's

Substitute Brief was the very neurological event for which Dr. Coleman testified he could not state an exact cause. The testimony cited by plaintiff at page 25 in his brief does nothing to explain away the contradiction cited in the Appellant's Brief. Dr. Coleman essentially testified that A and B caused C but he wasn't exactly sure what caused C and C might have still occurred event without A or B. This testimony is insufficient to establish causation.

In addition, as outlined in Defendant/Appellant Taylor's Brief adopted by this defendant, Dr. Coleman's testimony failed to make a submissible case because he did not establish that there was a deviation from the standard of care by Defendant Williams or any other defendant. As noted in Defendant/Appellant Taylor's Brief, Dr. Coleman never defined the standard of care. (Defendant/Appellant Taylor's Substitute Brief p. 38) Dr. Coleman never testified what he meant when he said standard of care. He never used the MAI 11.06 language at any point in his testimony, nor did he ever indicate he was testifying as to anything other than his personal belief. Since Dr. Coleman's testimony does not establish negligence, it cannot possibly establish "but for" causation.

Plaintiff had the burden to make a submissible case but failed to do so and the judgment in favor of Plaintiff should be reversed and judgment entered in favor of Defendant 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.

Plaintiff alleges in his brief that there was no dispute at trial regarding whether Defendants prescribed an antibiotic which would have treated a pseudomonas urinary tract infection. This allegation is not completely accurate. The jury heard evidence regarding the antibiotics administered, who prescribed antibiotics, who had the duty to prescribe antibiotics, which antibiotics were prescribed, when the antibiotics were given, what the antibiotics were for and what organism the antibiotics were effective against. One of the key issues was who should have prescribed the antibiotics considering the various physicians' roles in the patient's care.

Plaintiff argues that the only "disputed fact" submitted in paragraph one of the verdict director is whether Mary Harvey had a pseudomonas urinary tract infection. This argument ignores two significant issues. First, the verdict director does not submit the issue of whether decedent had a pseudomonas urinary tract infection to the jury for decision, but instead states the disputed fact as true. Second, there was another issue submitted in the first paragraph: Whether this Defendant, as opposed to someone else, was the one who failed to prescribe an antibiotic to decedent for the alleged urinary tract infection.

To support his position, Plaintiff cites *Welch v. Hyatt*, 578 S.W. 2d 905 (Mo. banc 1979). While *Welch* is distinguishable because the instruction did not involve multiple parties or the issue of which defendant had the duty to act, some guidance can be obtained from *Welch* concerning how to review a claim that an instruction assumes a disputed fact, and how the instruction in this case should have been written. The court in *Welch* stated that "while the general principle has been and is that an instruction assuming controverted facts is error, the facts of each case must be inquired into. If close scrutiny of the instruction demonstrates that it is calculated to lead the jury to believe assumed disputed facts the instruction suffers from the infirmity of the principle." *Welch v. Hyatt*, 578 S.W. 2d 905, 914 (Mo. banc 1979) citing *Cf. Kewanee Oil Company v. Remmert-Werner, Inc.*, 508 S.W.2d 23, 26 (Mo. App. 1974). Close scrutiny of the instruction in this case clearly shows it assumes decedent had a pseudomonas urinary tract infection.

In addition, while the *Welch* court upheld the verdict, holding the instruction in that particular case was not prejudicially erroneous, the court also stated, "We believe, however, that in the future when a turn is a controverted and disputed fact, MAI 17.06 should require a finding that (1) there was a turn and (2) that there was a failure to signal an intention to turn." *Welch* 578 S.W. 2d at 914. Following the guidance from *Welch*, the instruction in this case should have first required a finding that Mary Harvey had a pseudomonas urinary tract infection, and second, required a finding that Defendant Williams failed to treat the infection.

Plaintiff argues that *Lasky v. Union Elec. Co.*, 936 S.W. 2d 797 (Mo. banc 1997) and *Spring v. Kansas City Area Transportation Authority*, 873 S.W. 2d 224 (Mo. banc 1994) are distinguishable from the present case because the verdict directors in those cases submitted multiple

disputed facts in one paragraph, and compelled the jury to find one of the disputed facts in plaintiff's favor. As outlined above, Plaintiff's verdict director does attempt to submit multiple disputed issues. The verdict director also compels a finding that Mary Harvey had a pseudomonas urinary tract infection. *Lasky* and *Spring* are, therefore, not distinguishable.

Additionally plaintiff claims that Instruction 12 was proper because there was "no dispute that the defendants failed to prescribe an antibiotic which would have treated a psuedomonas urinary tract infection," and therefore the jury was never really required to find that Dr. Williams failed to prescribe an antibiotic. (Respondent's Substitute Brief, p. 32.) Plaintiff is apparently under the mistaken impression that his instruction could be erroneous only if it assumed one disputed fact and still presented a second disputed fact in the same paragraph. (Respondent's Substitute Brief, p. 38.) This is not the law.

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

The verdict director in *Duncan* instructed the jury to find for the plaintiffs if:

> First, defendant issued its policy to plaintiffs on soybeans and equipment covering loss due to theft, and

Second, such property was damaged by theft.

Duncan, 665 S.W.2d at 15. While the instruction submitted the "undisputed fact" that the insurer issued a theft policy, it also assumed that the plaintiffs owned soybeans on the Heck Farm. The court of appeals found that the instruction assumed a controverted fact and constituted reversible error. *Duncan*, 665 S.W.2d at 18.

Duncan, Welch, and *Lasky* all hold that verdict directors should submit each required finding in separately numbered paragraphs. The jury in this case should have been required to make four separate and distinct findings: first, that Mary Harvey had a psuedomonas urinary tract infection; second that Dr. Williams had a duty to prescribe an antibiotic but did not; third that Dr. Williams was thereby negligent; and fourth, that said negligence caused Mary Harvey's death. Plaintiff's verdict director required only three of

these findings' It did not require a finding that Mary Harvey had a psuedomonas urinary tract infection.

Defendant does not argue, as Plaintiff seems to suggest, that the instruction was flawed because the jury had questions about the findings it was required to make. Instead it is Defendant Williams' position that the questions from the jury should be considered by the Court in reviewing this matter because they show that the timely objections made to the instruction were well founded. In support of his argument that the questions from the jury should be discounted, Plaintiff cites to *Smith v. Kovac*, 927 S.W.2d 493, 498 (Mo. App. E.D. 1996) which in turn cites *Kampe v. Colom*, 906 S.W. 2d 796 (Mo. App. W.D. 1995). Admittedly, the *Kampe* court stated, as quoted in *Smith*, that if an inquiry from the jury was the sole test of the validity of an instruction, "each question submitted by the jury about an instruction would render the instruction erroneous". *Kampe*, 906 S.W. 2d at 806. The

Kampe court went on, however, to state that, "[t]he jury's inquiry may be considered in determining the propriety of a contested instruction, but the query is not conclusive." *Kampe*, 906 S.W. 2d at 806. Defendant Williams is simply requesting that the questions from the jury be considered when reviewing the propriety of Plaintiff's verdict director and the validity of the timely objections made to the instruction.

Plaintiff asserts that all of the Defendants' arguments as to the first paragraph of the verdict director are negated because Defendants "made changes to the verdict director which they now allege made the director confusing." (Respondent's Substitute Brief P. 41.) This argument is based on the false premise that Defendant "made changes to the verdict director." Defendant Williams' counsel, along with other defense counsel, objected to the original form of the verdict director proposed by Plaintiff. The original verdict director cited by plaintiff in its brief was never formally tendered to the court. In response to the objections to the original draft of the verdict director, which did not even refer to Mary Harvey, Plaintiff voluntarily revised the instruction before tendering it to the Court. When Plaintiff tendered the new instruction, Defendant again objected to it because although revised, it remained erroneous. Under these circumstances, Defendants cannot reasonably be argued to have made changes to the instruction or to have waived the objections to it.

In response to Defendants' argument that the MAI 19.01 modification used by Plaintiff was not supported by the evidence, Plaintiff argues that "Defendants
correctly point out that no expert offered any testimony that these conditions contributed to cause Mary Harvey's death." (Respondent's Brief P. 43.) This argument misstates Defendant's Brief and the evidence at trial. Defendant Williams correctly stated in his original Brief that no expert offered

testimony that any of decedent's other conditions contributed with the failure to treat the alleged urinary tract infection to cause death. Several of the experts who opined that no infection existed further testified that decedent's other conditions, such as her fractured hip, contributed to cause her death. There was no evidence which supported a conclusion that these other conditions combined with the alleged urinary tract infection caused decedent's death. Plaintiff's verdict director, as modified by MAI 19.01, allowed the jury to draw such a conclusion and was therefor, unsupported by the evidence.

The trial court erred in submitting Instruction No. 12. The instruction 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 arguing this point Plaintiff raises an alleged misinterpretation by Defendants of the "but for" test. As discussed above in Point I, Plaintiff misinterprets the *Callahan* case. More importantly, however, Plaintiff's argument regarding "but for" causation is irrelevant and immaterial to the issue of whether Dr. Coleman changed his testimony. The issue relating to the Court's ruling on the admissibility of Dr. Coleman's testimony is simple: Did he give different opinions at trial than at his deposition? The resounding response, even when one reviews the pages of his deposition cited by Plaintiff in its Brief, is "yes." Defendant does not, as suggested by Plaintiff, rely upon single sentences from extensive answers to support the argument that Dr. Coleman's trial testimony should have been limited or excluded. This Defendant relies on both specific answers and the context of the deposition as a whole to support its argument that, at trial, Dr. Coleman changed the opinions he had expressed in deposition. At deposition Dr. Coleman stated unequivocally that he did not know what caused the acute deterioration on the evening of the 30th to the 1st which he believed was the principal

cause of death. (L.F. 244, p. 59 and 259, pp. 118-119.) At deposition Dr. Coleman could not state to a reasonable degree of medical certainty what the cause of death was but at trial he was miraculously able to testify that the alleged failure to treat the alleged pseudomonas urinary tract infection contributed to cause the neurological event he believed caused Mary Harvey's death. This new testimony was given without proper notice to the defendants and over the objections of defendants. The new testimony regarding causation should have been excluded. The failure of the court to prevent Plaintiff's expert from changing his testimony on this issue 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.

Plaintiff contends that questions posed by Plaintiff's counsel during voir dire did not unequivocally trigger Juror Jones' duty to disclose a 1999 property damage claim nor a lawsuit brought by Juror Jones as next friend/representative on behalf of her daughter. Plaintiff argues that the questions did not elicit responses because the property damage case was not a pending claim, and because Jones did not perceive herself to be a party in the lawsuit regarding her daughter. Plaintiff also argues that Juror Jones' failure to disclose her involvement in three other lawsuits resulting from one automobile accident was inadvertent and should be disregarded. These arguments request this Court to state that it was acceptable for Juror Jones, who was personally involved in numerous lawsuits as both plaintiff and defendant, not to disclose **all** of them on voir dire. In light of the number of suits, the clarity of the questions on voir dire, and the juror's ease in recalling the events at the post-trial hearing, this is unreasonable.

At the post-trial hearing, Juror Jones gave the following testimony concerning the claim she filed

on behalf of her daughter:

Q. Were you a party as her representative or next friend?

A. Correct.

P.Tr. 11 L. 15-17.

Q. And the lawsuit was pending while you were in the Harvey case?

A. She was underage so we were just waiting until she turned eighteen to get her money actually.

P.Tr. 12 L. 3-6.

Q. So the case was pending at the time?

A. Right.

P.Tr. 12 L. 15-16.

Q. Now in that case you brought a claim against somebody because they had done something that injured you or your daughter, is that correct?

A. Correct.

P.Tr. 26 L. 13-16.

Juror Jones clearly knew the case involving her daughter was still pending during the trial of this case and clearly understood she was a party to the suit as her daughter's representative. This information should have been disclosed in response to the questions on voir dire.

Plaintiff's reliance on *Redfield v. Beverly Health and Rehabilitation Services, Inc.*, 42

S.W.3d 703 (Mo. App. E.D. 2001) is misplaced. Respondent cites to *Redfield* to assert the proposition that Juror Jones was not obligated to disclose her daughter's suit because she was not a named plaintiff nor defendant. However, *Redfield* was a case that dealt with a juror failing to disclose a suit where her father was held liable for her actions because the juror was a minor at the time. *Id*. The juror in *Redfield* failed to respond to a question regarding participation in any past legal actions because she was an unnamed minor and not a defendant. This was held not to violate disclosure rules. *Redfield* 42 S.W.3d at 708. In the case at bar, Juror Jones brought the suit on behalf of her daughter, hired the attorney, spoke to the attorney, and made the decisions in the action. She was an active participant in the litigation. In contrast, the juror in *Redfield* was wholly absent from the litigation process. The father was the named defendant and the daughter could honestly respond that she had nothing to do with the litigation. Because Juror Jones was the party that brought suit, was the decision-maker in her daughter's suit, and was involved in this suit while the Harvey case was ongoing, she should have disclosed her participation during *voir dire* and her failure to do so was prejudicial.

Plaintiff seems to suggest *Heinen v. Healthline Management, Inc.*, 982 S.W. 2d 244 (Mo. banc 1998) stands for the proposition that when the party claiming non-disclosure and the juror who failed to disclose information are both defendants, there is no prejudice. This is an over-statement of *Heinen*. The court in *Heinen* held that, after the juror was asked about one suit by plaintiff's counsel, he was asked no questions about additional lawsuits, and the juror, therefore, reasonably concluded that no additional disclosure was requested. The court noted that defense counsel's questions on voir dire were limited to whether the juror had been a plaintiff, and no one alleged the juror had been a plaintiff. *Heinen* at 982 S.W. 2d at 249. The *Heinen* court concluded the non-disclosure

by this juror and others was not intentional and that the trial court abused its discretion in ordering a new trial on the basis of intentional non-disclosure. *Heinen*, 982 S.W.2d at 250. The court went on, however, to discuss the various jurors' non-disclosure to determine if the unintentional non-disclosure was prejudicial. Specifically with respect to Juror Brown, who had the five lawsuits for unpaid taxes and bills mentioned in Plaintiff's Brief, the court found the defendant "failed to meet his burden of showing that the five lawsuits for unpaid taxes and bills created prejudice, because Brown and Guillen were each defendants in their respective lawsuits." *Heinen*, 982 S.W.2d at 250 citing *Brines by Harlan v. Cibis*, 882 S.W. 2d 138, 140 (Mo. banc 1994.) The court then also noted that, "In fact, Brown voted against assessing any liability to Healthline Management, Inc., the corporate defendant in this case." *Heinen*, 982 S.W.2d at 250. The situation in *Heinen* is clearly distinguishable. Juror Jones was both a plaintiff and a defendant in her non-disclosed cases and she voted for the Plaintiff.

Juror Jones' non-disclosure was intentional and prejudicial. The verdict in favor of Plaintiff should be reversed.

FURTHER ARGUMENT

In further reply to Respondent's Brief, Defendant Williams joins in and adopts by reference the arguments made by Defendant/Appellant Taylor in her Reply Brief to the extent applicable.

CONCLUSION

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

Respectfully submitted,

THE O'MALLEY LAW FIRM

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IN THE MISSOURI COURT OF APPEALS

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

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Mary L. Reitz, the undersigned attorney of record for Defendant/Appellant Wendell Williams, M.D., in the above-referenced appeal, certifies pursuant to Rule 84.06 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 5,757 words according to the word count total contained Microsoft Word 6.0/95 software with which it was prepared; and

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

THE O'MALLEY LAW FIRM

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Attorneys for Appellant/Defendant
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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 July, 2002 to: **Mr. Joseph A. Frank** and **David T. Dolan**, Attorneys for Respondent/Plaintiff, Frank, Dolan & Mueller, 308 North 21st Street, Suite 401, St. Louis, Missouri 63102; and two (2) copies 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.

_____

MLR/plp
SC84449 Williams reply brief