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II. JURISDICTIONAL STATEMENT

This is an appeal from the trial court's ruling granting Dr. Wright's second Alternative Motion to Amend his Answer and thereupon entering its Judgment for an amount \$100,000.00 less than the jury verdict based on a credit under Section 537.060 R.S.Mo. due to a pre-trial settlement with other defendants in a wrongful death civil action filed in

and tried before the Circuit Court of Greene County, Missouri.

This action does not involve the construction of the Constitution of the United States or of this State, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the Revenue Laws of this State, title to any office under this State or a criminal offense involving a sentence of death or life imprisonment. Thus, this appeal is within the general appellate jurisdiction of the Missouri Court of Appeals, Southern District, V.A.M.S. Const. Art. V, Sec. 3.

III. STATEMENT OF FACTS

A. SUMMARY

This is an appeal in a civil case alleging wrongful death from improper health care, and is limited to a review of the trial court's post-trial granting of the defendant's second Alternative Motion to Amend his Answer to add an affirmative defense for the first time seeking a reduction of the jury's verdict pursuant to Sec. 537.060 R.S.Mo., two years after trial, and the judgment entered granting such relief. None of the fundamental procedural facts of the underlying trial are in dispute, and any evidentiary facts which were in dispute at trial have no bearing on any issue in this appeal. There are no issues presented related to any evidence, jury instructions, nor procedure during trial. Thus, there is no need for a transcript nor any detailed review of the evidence presented during, or of the procedures of, the trial itself. A transcript would only add unnecessary volumes of paper to this Court's file and unduly increase the expense of this appeal to the parties. All the pertinent factual information necessary for this appeal is contained in the Legal File, and such will be described in greater detail below. For simplicity and clarity, the plaintiffs-appellants, Mr. and Mrs. Norman, will be referred to as the Normans, and the defendant-respondent, Andy J. Wright, M.D., will be referred to as Dr. Wright, no disrespect is intended.

The underlying suit alleging improper health care was brought by the surviving parents claiming that the wrongful death of their first child was directly caused by the improper delay of his delivery by Dr. Wright, the attending obstetrician, and contributed to be caused by other doctors and the hospital staff. Due to a settlement with and a dismissal of those other parties, the trial proceeded against Dr. Wright only. The jury returned its verdict against Dr. Wright and in favor of the Normans in the total amount of \$308,855.35.

Dr. Wright later filed both a Motion to Amend his Answer, which was denied, and an after-trial motion which the court sustained reducing the jury's verdict by \$100,000.00, representing the total sum of a pre-trial settlement with two other defendants. The trial court then entered its judgment for the net amount of \$208,855.35 plus costs and post-judgment interest. The Normans appealed and the trial court's ruling was affirmed. The Normans later filed for transfer to the Supreme Court, which was granted. The Supreme Court remanded the case to the trial court and Dr. Wright filed an identical second Alternative Motion to Amend, which this time was sustained, the same judgment was entered, and the Normans are again appealing.

This appeal is limited to the propriety of the trial court's granting of the second Alternative Motion to Amend Dr. Wright's Answer and the entry of the judgment thereon, wherein the Normans are requesting that the judgment be reversed, and that the trial court be ordered to enter a new judgment in the full amount of the jury's verdict effective for all purposes as of the date the original judgment was entered by the trial court, August 30, 2000.

B. EVIDENTIARY FACTS IN THE UNDERLYING SUIT

The following general background facts are not in dispute, however, a very brief and limited description is offered as a courtesy to aid this Court in more quickly understanding the material facts and parties in relevant context to the legal issues.

In early 1995, Kim and Jerry Norman were expecting the birth of their first child, a boy named Kenneth. L.F. 28, tab # 2. Defendant Dr. Wright, was the attending obstetrician for Mrs. Norman and Kenneth.

On the evening of February 16, 1995, Mrs. Norman presented to the labor and

delivery department of St. John's Hospital in Springfield, Missouri, reporting that she had not been feeling the normal amount and type of movement of her child as she had previously experienced. Id. Dr. Wright was not available at that time, however, his partner, Dr. Johnson, was providing call coverage for Dr. Wright, and Dr. Johnson provided care to Mrs. Norman and her baby that evening. Id.

Upon Mrs. Norman's arrival at the hospital, throughout that night, and until Kenneth's delivery after 11 a.m. the next morning, the nurses used fetal heart monitoring equipment to record his heart rate and general condition. Dr. Johnson was in contact with the nurses several times by telephone that evening and discussed Mrs. Norman and her baby, but at no time did Dr. Johnson ever come into the hospital to see them. Id. at 28-29. At 6:00 a.m. the next morning, the hospital's labor and delivery nurses paged Dr. Wright and informed him that Mrs. Norman and her baby had been in the hospital all night. Id. at 30. At that time, Dr. Wright resumed his role as the attending physician and he soon thereafter came to the hospital to see his patients. Id.

Several hours later, at 10:46 a.m., Dr. Wright ordered an emergency C-section. Kenneth was born at 11:10 a.m. with his umbilical cord wrapped approximately five times around his neck, and he suffered extensive brain damage directly causing multiple devastating disabilities and his death five months later on July 21, 1995. Id. at 31.

C. PROCEDURAL FACTS MATERIAL TO THIS APPEAL

The following procedural facts are not disputed. The Normans originally filed suit for wrongful death against Drs. Johnson, Wright and Dix alleging they negligently delayed the delivery of their son, and against St. John's Hospital alleging negligent nursing treatment by its employees contributing to that delay. L.F. 24-39, tab # 2. On September

13, 1999, Dr. Dix was dismissed without prejudice from the case, and she was never brought back in as a party. L.F. 8, tab # 1. On November 30, 1999, this case was scheduled for trial to begin on October 30, 2000. Id. The Normans disclosed several doctors and a nurse as expert witnesses whom they expected to call at trial to testify that each of the remaining defendants was negligent, and that such negligence directly caused or directly contributed to cause Kenneth's injuries and death. L.F. 672-679, 680-685, tabs # 34, 35.

On July 26, 2000, by judgment and order of the trial court, the Normans jointly settled their claims with both the hospital and Dr. Johnson, and those defendants were voluntarily dismissed from the case with prejudice. L.F. 41-42, tab # 4. Counsel for Dr. Wright did not appear at the hearing for the circuit court's approval of the settlement, nor at any time did Dr. Wright ever make or file any objection regarding the proceedings of this settlement. L.F. 10-20, tab # 1.

The settling defendants jointly paid the single sum of \$100,000 to the Normans without requesting that the court make any allocation of the amount of the payment between the two settling defendants, nor any allocation of that amount among the various categories of damages alleged by the Normans and set forth in Section 538.215 R.S.Mo., nor any apportionment of any fault among any parties. L.F. 10, 24-39, 81-83, tabs # 1, 2, 14. At no time did Dr. Wright ever request that the trial court make any of the Section 538.215 R.S.Mo. allocations of the money paid in the settlement. L.F. 10-20, tab # 1.

The intent of the parties to the release was expressed on several different topics in the release and it expressly released only Dr. Johnson and St. John's Hospital, and expressly reserved to the Normans the right to proceed on all their claims against Dr. Wright. L.F. 84-85, tab # 14. Dr. Wright was not a party to that release. Id. The release did not contain any

express language stating that any of the parties expected or had any intent to confer any benefit to Dr. Wright directly or indirectly as a result of the money paid by the settling defendants. Id.

When the settlement was presented to the court for approval, Dr. Wright chose to neither intervene in any way nor to appear at the hearing, nor did he assert any rights or claims to any offset under any statutory scheme. L.F. 10, 107, 121, tabs #1, 16, 17

About two weeks after the court approved the settlement and dismissed the other defendants, Dr. Wright amended his Answer by interlineation to add the specific affirmative defense of apportionment of fault under Section 538.230 R.S.Mo.:

“In accordance with Section 538.230, R.S.Mo., defendant requests the trier of fact to apportion fault between the defendant and the former settling defendants to this action.” (Paragraphs 9, Count I; 13, Count II; and 17, Count III) L.F. 43-46, tab #5. However, Dr. Wright did not state any general factual basis to support his allegations of such fault. Id.

In response to Dr. Wright’s request for apportionment, the Normans filed their Motion to Strike Defendant’s Request for Apportionment attacking Dr. Wright’s request as factually and legally insufficient. L.F. 47-50, tab # 6. At that point, nearly one year before the actual trial, the Normans pointed out to the court that they would be extremely prejudiced if Dr. Wright’s position regarding his affirmative defense was not clearly resolved well before trial. L.F. 50, tab # 6.

Dr. Wright responded with his suggestions in opposition to the Norman’s motion to strike in which he acknowledged various things including the following:

1. “Comparative fault is an affirmative defense which must [be] pleaded. Id. [citing Adams by Ridgell v. Children’s Mercy Hosp., 848 S.W.2d 535 (Mo. App. W.D.

1993)] The reason for such a rule is to give notice to the opposing parties so that they may adequately prepare the issues. Id. Defendant has put plaintiffs on notice by specifically requesting apportionment of fault, pursuant to section 538.230 R.S.Mo. in his answer”. L.F. 54, tab # 7, (emphasis added).

2. Citing Hewlett v. Lattinville, 967 S.W.2d 149 (Mo. App. E.D. 1998), Dr. Wright conceded that in improper health care cases, “...’[s]ection 538.230 indeed changes the common law in important respects.’ Id. at 152. It [the court in Hewlett] pointed out that a defendant’s liability is capped at his proportionate share, plus the share of any defendant whose percentage was lesser. Id. Furthermore, the offset for payments is not measured in terms of the amount of settlement, but instead by the settling defendant’s equitable share, based on the jury verdict. Id.” Id. at 52, (emphasis added).
3. “MAI provides that the burden of proof and the responsibility to tender such a verdict director [against the settling parties] is on the party seeking an assessment of a percentage of fault to a released party. See MAI 36.22, Notes on Use (1998 New), p. 690. Thus at trial, defendant must adduce proof supporting apportionment and tender the appropriate verdict director and form of verdict.” Id. at 54.
4. (Citing the Adams case again), Dr. Wright conceded that it would not be an abuse of discretion for the trial court to allow a party to amend its pleadings to add an affirmative defense request for apportionment under 538.230 R.S.Mo. so long as the plaintiffs were not surprised nor prejudiced and it was done before trial began. Id. at 53.

The Norman’s motion to strike was considered by the court along with Dr. Wright’s

opposing suggestions, and on August 22, 2000, the court entered this order.

Plaintiffs' Motion to Strike Defendant's Request for Apportionment is accepted as a Motion Requesting a More Definite Statement, and as such is hereby sustained and Defendant Wright is ordered within 20 days, due on or before September 11, 2000, to amend his answer so as to include a short and plain statement of facts for each allegation of negligence and/or fault asserted against any separate settling defendant, namely Joseph C. Johnson, Jr., M.D. and/or St. John's regional Health Center, for which Defendant Wright requests Apportionment of Fault pursuant to Section 538.230 R.S.Mo.

L.F. 56-57, tab # 8.

Dr. Wright did not file any amendment to his answer within the time permitted. L.F. 10, tab # 1.

On September 15, 2000, the Normans moved the court for leave to file their Second Amended Petition which contained the same allegations against Dr. Wright, but which eliminated all claims previously set forth against the settling defendants, Dr. Johnson and St. John's Hospital, so that the only pleadings on file exclusively alleged fault against Dr. Wright. L.F. 60-61,63-72, tabs # 9, 11. On the same date, the Normans again moved to strike Dr. Wright's request for apportionment. L.F. 60-61, tab # 10. The Second Amended Petition was ordered filed by leave of court on September 26, 2000 and Dr. Wright was granted 10 days to answer. L.F. 12, 62-72, tabs #1, 11

In response to the filing of the Normans' Second Amended Petition, Dr. Wright moved to dismiss the same, and at the same time he filed his Alternative Answer. L.F. 73-

78, tab # 12. In paragraph # 3 of all three counts of his Alternative Answer, with nearly identical language as he used previously, (L.F. 43-46, tab #5), Dr. Wright again asserted his right to apportionment of fault under the same statute, but this time he added language to his affirmative defense stating that the prior defendants were released pursuant to Section 538.230.3 R.S.Mo.:

3. In accordance with Section 538.230 R.S.MO, defendant requests the trier of fact to apportion fault between defendant and former defendants St. John's Regional Health Center and Joseph C. Johnson, Jr., M.D., which former defendants have been released pursuant to Section 538.230.3.

L.F. 76, tab # 12, (emphasis added).

On October 10, 2000, the court sustained the Norman's motion to strike insofar as it alleges contribution, striking those parts of Dr. Wright's answer in two days if no specific allegations pled. L.F. 13, tab # 1. Dr. Wright did not file any specific allegations by the court's deadline. L.F. 13, tab # 1.

Shortly thereafter, this case was continued from its trial setting of October 30, 2000, and was set for trial to begin on July 23, 2001. L.F. 13-14, tab # 1.

Just prior to the commencement of trial, the Normans again attacked Dr. Wright's continued affirmative request for apportionment of fault under Section 538.230 R.S.Mo., and finally, through his counsel, Dr. Wright openly announced his waiver and withdrawal of such affirmative defense. L.F. 92, 124, tabs # 15, 18. At that time, Dr. Wright decided to proceed to trial without amending his answer to substitute a similar affirmative request for any offset or credit under Section 537.060 R.S.Mo. in place of his withdrawn affirmative

request for relief under 538.230 R.S.Mo. L.F. 17, 124, tab # 1, 18.

The trial commenced and was completed based on the existing pleadings without any affirmative request from Dr. Wright that either the jury or the court should apportion any fault or allocate any offset or credit under either statute. L.F. 17-19, tab # 1. As such, no evidence was presented supporting the fault of anyone other than Dr. Wright, and accordingly, the exclusive submission of fault on the verdict form was that of Dr. Wright. L.F. 79, tab # 13.

After the completion of trial on July 31, 2001, the jury returned its verdict in favor of the Normans and against Dr. Wright in the total sum of \$308,855.35. L.F. 18-19, 79, tabs # 1, 13.

At no time during the trial and prior to the return of the verdict did Dr. Wright move to add any affirmative defense or request for any affirmative relief under Section 537.060 R.S.Mo. L.F. 17-19, tab # 1. The trial court reviewed the jury's verdict and approved it as being in appropriate form, duly noted it as filed, and discharged the jury without any objection nor any further request for any type of relief whatsoever from Dr. Wright. L.F. 18-19, tab # 1. Dr. Wright did not request that the evidence be reopened, or that the jury be ordered to return to deliberations and determine any offset or credit under any statute. Id.

On August 7, 2001, about a week after the verdict, for the very first time in the case, Dr. Wright filed a motion based on Section 537.060 R.S.Mo. asking the trial court for affirmative relief in the form of a reduction of the jury's verdict by \$100,000, representing a dollar-for-dollar credit in the amount of the prior joint settlement with Dr. Johnson and St. John's Hospital based on Section 537.060 R.S.Mo. L.F. 19, 81-91, tabs # 1,14. On August 16, 2001, Dr. Wright's motion was presented for oral argument at a hearing that was

not on the record, at which time Dr. Wright submitted his supporting written suggestions (L.F. 92-95, tab # 15). L.F. 20, 106, tabs #1, 16. Since the Normans did not have any advance opportunity to review and respond to those suggestions, the court permitted them until August 20, 2001 to file opposing suggestions (L.F. 96-116, tab # 16), and two days later Dr. Wright filed his reply suggestions (L.F. 117-122, tab # 17). *Id.* In their very first response to Dr. Wright's request for a set off, the Normans asserted that Dr. Wright had totally and irreversibly waived any right to any offset in open court before trial. L.F. 108, 113, 114, tab # 16.

After the Normans filed their suggestions pointing out the deficiency of Dr. Wright's pleadings (L.F. 107, tab # 16), Dr. Wright responded by filing his first motion to amend his answer asking the court for leave to add the belated request. L.F. 123-140, tab # 18

As a point of clarification, Dr. Wright's "Alternative Answer" appears twice in the Legal File. They are identical, and the pertinent parts are denominated Paragraph 3 under Counts I, II, and III, alleging the Section 538.230 R.S.Mo. affirmative defense. L.F. 75-78, 130-133, tabs # 12, 18. The "Alternative Answer" at tab # 12 is Dr. Wright's original filing in the alternative with his Motion to Dismiss filed on October 2, 2000. L.F. 12, tab # 1. Dr. Wright's motions to dismiss were overruled and his "Alternative Answer" was effectively filed on October 10, 2000. L.F. 13, tab # 1. The "Alternative Answer" at tab # 18 is a copy of the same filing but is marked as "Exhibit C" and attached to Dr. Wright's first motion to amend after trial. L.F. 123-133, tab # 18.

Furthermore, at L.F. 136-140, tab # 18, a nearly identical document exists. This is Dr. Wright's "Amended Alternative Answer" marked as "Exhibit D" and attached to Dr.

Wright's first motion to amend after trial and was offered to amend the "Alternative Answer" described in the above paragraph. (emphasis added) The pertinent parts of this amended answer as compared to Dr. Wright's previously filed answer is limited to the addition of Paragraph 4 under Counts I, II, and III, alleging the Section 537.060 R.S.Mo. affirmative defense. L.F. 137, 138, 139, tab # 18. In this document, Dr. Wright sought to assert both affirmative defenses in the alternative. Id. Dr. Wright's "Amended Alternative Answer" was never filed. L.F. 19-21, tab # 1.

Apparently packaged together, Dr. Wright's previously filed motion "For Reduction of the Jury Verdict" (L.F., tab # 14) contains exhibits marked "A" and "B", thus explaining the sequence of Exhibits "C" and "D" subsequently filed as part of his first Alternative Motion to Amend (L.F., tab # 18).

On August 29, 2001, after extensive argument, the court denied Dr. Wright's motion to amend but sustained his motion to reduce the verdict pursuant to section 537.060 R.S.Mo., thus reducing the verdict the jury originally returned in the Normans' favor for the total amount of \$308,855.35, by \$100,000 down to \$208,855.35. L.F. 20, 147-149, tabs # 1, 20.

On August 30, 2000, the court entered its judgment for the reduced amount. L.F. 147-149, tab # 20. Dr. Wright filed a Motion for New Trial, which was limited to claims that the verdict was against the weight of the evidence; it did not present nor preserve any issue regarding the denial of his first Motion to Amend his Answer. L.F. 150-165, tab #21. That motion was overruled and Dr. Wright elected to not appeal that ruling. L.F. 20, tab #1.

The day after the judgment was entered, the Normans timely filed their motion for new trial, and alternative motion to amend the judgment opposing the reduction of the jury's

verdict, which the court overruled on October 2, 2001. L.F. 20, 166-168, tabs # 1, 22.

Later that same morning the Normans timely filed their first appeal. L.F. 20, 169-171, tabs # 1, 23.

After a complete briefing process and oral arguments, the Missouri Court of Appeals for the Southern District issued its opinion on June 18, 2002, affirming the trial court's ruling and upholding the reduction of the jury's verdict. The Normans timely filed their Application for Transfer to the Supreme Court of Missouri pursuant to Rule 83.02 which was denied by the Southern District on July 10, 2002. On August 27, 2002, the Normans' timely-filed Application for Transfer to the Supreme Court of Missouri pursuant to Rule 83.04 was granted. The Supreme Court of Missouri reversed and remanded the case on March 18, 2003. L.F. 172-176, 190, tabs #24, 26; Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003).

After remand, Dr. Wright filed his second Motion to Amend his Answer on March 27, 2003. L.F. 21, 177-189, tabs #1, 25. Following more briefing and opposition by the Normans (L.F. 191-193, tab #27), the second Alternative Motion to Amend his Answer was granted by the trial court on May 20, 2003. L.F. 22, 194, tabs # 1, 28. On May 21, 2003, Dr. Wright filed his "Alternative Answer" containing offset requests under both statutes, Sections 538.230 and 537.060 R.S.Mo. L.F. 198, 199, 200, tab # 29. The Normans filed their motion for reconsideration on June 4, 2003 (L.F. 22, 202-207, 686-698, tabs #1, 30, 36), which was overruled, and on July 30, 2003, the trial court entered judgment for the reduced amount. L.F. 22, 194, 699-700, 701, tabs # 1, 28, 37, 38.

On August 28, 2003, the Normans filed their motion to amend the judgment which was overruled that same day. L.F. 22, 702-708, tabs # 1, 39. The next day, the Normans

filed their notice of appeal. L.F. 23, 709-713, tabs # 1, 40.

IV. POINTS RELIED ON AND AUTHORITIES

POINT ONE

The Trial Court abused its discretion and erred to the Normans' prejudice in sustaining Dr. Wright's second Alternative Motion to Amend his Answer to add an affirmative defense of partial satisfaction two years after the trial was completed and the jury was discharged, and thereupon entering its Judgment for a dollar amount \$100,000 less than the jury's verdict pursuant to the dollar-for-dollar credit under Section 537.060 R.S.Mo.,

Because, a Trial Court deciding a party's right to amend their answer to add a new claim must be balanced against all of the following factors and then be determined to weigh in favor of the movant:

- 1. Possible hardship on the movant if leave is denied;**
- 2. The timeliness of the request in relation to the rest of the case;**
- 3. Any reasons offered for the delay;**
- 4. Possible hardship on or injustice to the opponent;**
- 5. Whether the amendment changes the pending claims;**

In that, the Trial Court failed to balance all the proper factors, which if properly evaluated on the undisputed facts weigh overwhelmingly against granting the amendment since:

- 1. Any alleged hardship on Dr. Wright is illusory at best, and is only the result of his own strategic miscalculations;**
- 2. Dr. Wright ignored many chances to pursue and protect his right to amend well before the first appeal;**

3. Dr. Wright never provided, nor did the Trial Court require him to provide, a rational reason or excuse for his delay in requesting the amendment;

4. The hardship on and injustice to the Normans is paramount and manifest, both in terms of the presentation at trial and the dollar amount of the judgment;

5. Dr. Wright's amendment significantly changed the pending claims in his favor;

Therefore, either such Judgment must be reversed and the Trial Court ordered to strike Dr. Wright's Amended Alternative Answer, and to enter Judgment for the full amount of the jury's verdict without any such reduction, or in the alternative, pursuant to Rule 84.14 this Court must reverse such Judgment, order Dr. Wright's Amended Alternative Answer stricken, and enter the correct Judgment as the Trial Court should have entered for the full amount of the jury's verdict without any such reduction, and in either event, such Judgment must be shown as being effective for all purposes as of the date the original Judgment was entered by the Trial Court, August 30, 2000.

Foman v. Davis, 371 U.S. 178 (1962).

Lester v. Sayles, 850 S.W.2d 858 (Mo. banc 1993).

Kenley v. J. E. Jones Const. Co., 870 S.W.2d 494 (Mo. App. 1994).

Kanefield v. SP Distributing Company, 25 S.W.3d 492 (Mo. App. 2000).

POINT TWO

The Trial Court erred to the Normans' prejudice in sustaining Dr. Wright's

second Alternative Motion to Amend his Answer to add an affirmative defense of partial satisfaction two years after the trial was completed and the jury was discharged, and thereupon entering its Judgment for a dollar amount \$100,000 less than the jury's verdict pursuant to the dollar-for-dollar credit under Section 537.060 R.S.Mo.,

Because, a party wishing to amend its answer to add a new affirmative defense must seek leave of court before the jury is discharged, otherwise the defense is waived, and any failure to appeal the denial of such a motion to amend bars subsequent amendment efforts by estoppel and/or as the law of the case,

In that, Dr. Wright both:

Failed to offer his first Alternative Motion to Amend his Answer until well after trial was completed and the jury was discharged, thus denying the Normans their right to possibly invoke the provisions of Section 538.230 R.S.Mo. for a decision by the same jury, and

Failed to preserve any issue and to appeal the Trial Court's denial of his first Alternative Motion to Amend his Answer, thus accepting it as binding on him and prohibiting any relief subsequently requested under his second Alternative Motion to Amend his Answer,

Therefore, either such Judgment must be reversed and the Trial Court ordered to strike Dr. Wright's second Alternative Amended Answer, and to

enter Judgment for the full amount of the jury's verdict without any such reduction, or in the alternative, pursuant to Rule 84.14 this Court must reverse such Judgment, order Dr. Wright's second Alternative Amended Answer stricken, and enter the correct Judgment as the Trial Court should have entered for the full amount of the jury's verdict without any such reduction, and in either event, such Judgment must be shown as being effective for all purposes as of the date the original Judgment was entered by the Trial Court, August 30, 2000.

Nusbaum v. City of Kansas City, 100 S.W.3d 101 (Mo. banc 2003)

Shady Valley Park & Pool v. Weber, Inc., 913 S.W.2d 28 (Mo. App. 1995)

Buus v. Stocker Oil Co., 625 S.W.2d 236 (Mo. App. 1981).

Williams v. Casualty Reciprocal Exchange, 929 S.W.2d 802 (Mo. App. 1996).

POINT THREE

The Trial Court erred to the Normans' prejudice in sustaining Dr. Wright's second Alternative Motion to Amend his Answer to add an affirmative defense of partial satisfaction two years after the trial was completed and the jury was discharged, and thereupon entering its Judgment for a dollar amount \$100,000 less than the jury's verdict pursuant to the dollar-for-dollar credit under Section 537.060 R.S.Mo.,

Because, the exclusive remedy for a health care provider as the only defendant in an action under Chapter 538 R.S.Mo. Tort Actions Based on Improper Health Care seeking to obtain a direct benefit in the form of a credit against any subsequent jury verdict arising from a pretrial partial settlement paid by other health care providers is limited to the apportionment of fault provisions of the special statute Section 538.230 R.S.Mo., and such a party cannot unilaterally opt out of that special statute in order to apply the dollar-for-dollar credit provisions otherwise available to non-health care providers in tort actions under the general statute Section 537.060 R.S.Mo.,

In that, either:

1. Fundamental statutory construction compels the controlling application of the terms of a special statute which addresses a particular type of party in a particular type of action instead of the terms of a general statute which addresses all other types of parties in tort actions generally, or

2. Dr. Wright directly bound himself to the application of

the express terms set forth in Section 538.230 R.S.Mo. when he specifically invoked the authority of the same and requested his relief thereunder and filed his second Alternative Amended Answer, which cannot now be granted as such was not timely filed before the discharge of the jury,

Therefore, either such Judgment must be reversed and the Trial Court ordered to strike Dr. Wright's second Alternative Amended Answer, and to enter Judgment for the full amount of the jury's verdict without any such reduction, or in the alternative, pursuant to Rule 84.14 this Court must reverse such Judgment, order Dr. Wright's second Alternative Amended Answer stricken, and enter the correct Judgment as the Trial Court should have entered for the full amount of the jury's verdict without any such reduction, and in either event, such Judgment must be shown as being effective for all purposes as of the date the original Judgment was entered by the Trial Court, August 30, 2000.

State ex rel. Nat. Super Markets, Inc. v. Sweeney, 949 S.W.2d 289 (Mo. App. 1997).

Lett v. City of St. Louis, 948 S.W.2d 614 (Mo. App. 1996).

Burns v. Elk River Ambulance, 55 S.W.3d 466 (Mo. App. 2001).

Benoit v. Missouri Highway and Transp. Comm'n, 33 S.W.3d 663 (Mo. App. 2000)

V. STANDARD OF REVIEW

The sole issue presented in this appeal involves a review of the trial court's after trial ruling permitting the belated amendment of Dr. Wright's answer and the judgment subsequently entered thereon, and that ruling is challenged on three different grounds which allege an abuse of discretion (Point I), and an improper ruling of law (Points II and III). There are no material arguments or issues concerning any dispute over any evidence or factual matters during the trial itself or the submission of jury instructions.

The standard of review on appeal challenging the trial court's ruling under Point I on the discretionary basis requires a finding that the trial court clearly abused its discretion in granting the amendment. "The decision of the trial court to allow an amendment of a pleading after trial has commenced is a discretionary matter which we will not overturn unless that discretion has been clearly abused." Nieberg Real Estate Co. v. Taylor-Morley-Simon, Inc., 867 S.W.2d 618, 625 (Mo. App. 1993). This discretion applies to the evaluation of certain factors discussed in detail under Point I.

The review on appeal of the trial court's legal ruling involves the interpretation and application of certain statutes and legal principles to the established facts. As such, this Court's standard of review is a de novo determination of a legal issue, and the only question before this Court is whether the trial court drew the proper legal conclusions from the undisputed record and applied the law accordingly. Schroeder v. Horack, 592 S.W.2d 742, 744 (Mo. 1979); Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. 1985); Cottey v. Schmitter, 24 S.W.3d 126, 128 (Mo. 2000). This is very similar to a court's ruling as a matter of law on a summary judgment motion. Thus, this Court should view the

record in a light most favorable to the non-movant Normans. On appeal from an order granting summary judgment, this Court views the evidence in a light most favorable to the non-movant. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo. banc 1993).

VI. ARGUMENT

A. SUMMARY AND BACKGROUND

The sole issue on this appeal may be concisely stated: did the trial court err to the Normans' prejudice in granting Dr. Wright's second Alternative Motion to Amend his Answer two years after trial, and entering judgment thereon for a reduced amount? The argument and analysis proceeds alternatively along both discretionary and legal principles.

The Normans deserved the right to not have the rules changed two years after the game. Very strong and important legal and policy reasons support the requirement of affirmatively pleading any request for an offset from a pretrial settlement in improper health care cases well in advance of trial, and most certainly before the jury is sent home; and no such policy reasons exist, nor can there be any hardship claimed by the party desiring to benefit from a payment made by other parties, to either justify or excuse the lack of such affirmative pleading before such times. Likewise, once the trial court makes a specific ruling which is not appealed, that ruling should stand as the law of the case.

First Point: The trial court obviously abused its discretion in granting Dr. Wright's second Alternative Motion to Amend his Answer at such a late date almost as if to make sure Dr. Wright received the full dollar-for-dollar credit of the pretrial settlement payment, regardless of the pleadings, the law, or the prejudice to the Normans. As harsh as this statement seems, the facts bear it out as the simple truth when the proper factors are fairly considered and balanced since there was never any rational excuse or strategic explanation required of Dr. Wright for either his so very belated motion since he has never claimed surprise, or even why he would think he had to affirmatively plead the benefit of one statute

but not another.

Second Point: Dr. Wright had many opportunities over a long time within which to pursue an amendment; all before the first appeal began. The Normans doggedly opposed Dr. Wright's every attempt to request the benefit of any offset or credit long before trial, and he ultimately elected to proceed with trial after expressly withdrawing his affirmative request under Section 538.230 R.S.Mo., but without substituting any other similar request under Section 537.060 R.S.Mo. Now that trial is complete, the jury verdict was accepted by Dr. Wright without any challenge or request for additional findings such as apportionment of fault, the jury was discharged, his first Alternative Motion to Amend his Answer was denied and he elected to not appeal that ruling, Dr. Wright's persistent failure to act and protect any right to amend his answer constitutes a complete waiver and estoppel of any such statutory rights under either statute at this late date, and constitutes the law of the case barring any such later amendment. To simply give him yet another chance at such a late date patently violates any conceivable notion of fairness. As he was solely in control of his pleadings and his own decisions to not appeal, Dr. Wright cannot ignore, and is now bound by his waiver, barred and estopped from further relief, and not the least bit unjustly so. Likewise, the trial court is bound by the law of the case.

Third Point: The Normans readily agree that if he had timely requested such in his pleadings under Section 538.230 R.S.Mo., (and, not conceding but arguing only in the alternative, possibly under Section 537.060 R.S.Mo.), Dr. Wright would have had a right to some sort of credit or offset against the jury verdict in this case as a consequence of the pretrial payment to the Normans from two settling defendants. However, as a health care provider, a class of professionals enjoying very unique protection and benefits provided by

a special statute which are not available to other tort-feasors in general, the Normans steadfastly believe that Dr. Wright's statutory right of election, if any, was exclusively available to him only under the specific terms of Section 538.230 R.S.Mo. As such, the trial court's action in granting the amendment and the resulting credit under Section 537.060 R.S.Mo. is erroneous as a matter of law.

What effect has all this caused? The practical implications of so belatedly asserting the right to affirmative relief under either, or neither, statute is critical and substantial, not just for the Normans here, but for any future similarly situated party. The Normans went into trial relying on the state of the pleadings to formulate their strategy and their presentation of evidence, just as they should be entitled. For identical reasons, they pursued their first appeal successfully, only to have the rulings later changed solely to achieve a specific result. They deserve to not have the opposing party bring in a request for affirmative relief for the very first time two years after the trial; certainly not any more so than if the shoe were on the other foot. It would be absurd to suggest that a plaintiff should be permitted to make such a wholesale change in their request for relief in such a fashion. Aside from the money issues, the pending claims and the course of the entire trial would have been significantly altered had Dr. Wright raised his request under Section 537.060 R.S.Mo. before rather than two years after trial. Different evidence would have been presented regarding the fault and causal consequences of the other parties; additional expert witnesses and expert testimony would have been presented by both sides; arguments of counsel would have been altered; different jury instructions would have been submitted to and considered by the jury; the jury would have deliberated and decided different issues; an entirely different verdict form would have been required; and, finally, most likely, the net

payment by Dr. Wright to the Normans would have been significantly greater.

Regardless of the particular legal basis relied on to identify the error here, the prejudice to the Normans is paramount, and the implications for the future are enormous. The principles of advance notice and fundamental fairness underlying the age-old requirement that parties must expressly plead all requests for affirmative relief in the form of offsets or credits, especially those created solely by statute, before the jury is discharged, and preferably before trial begins, consistently ring true regardless of whether the matter at issue arises in contract or tort. Absent such a simple requirement, if Dr. Wright's timing and tactics here are approved, then severe prejudice will become easy to impose, widespread, and impossible to rectify.

B. SECTION 538.230 and SECTION 537.060:

WHAT'S THE DIFFERENCE?

These two statutes have much in common but differ in some very significant ways, thus a quick review of both is required.

SECTION 537.060 R.S.Mo.: The traditional common law principle of joint and several liability was modified slightly by Section 537.060 R.S.Mo. in that a settling defendant could now completely buy his peace and forever avoid all fear of any future contribution action against him by a trial defendant. And, if the trial defendant wisely requested the benefits of this statute in his pleadings, then such settlement agreement would benefit the trial defendant by reducing the claim [of the plaintiff] by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. Section 537.060 R.S.Mo. [**Note:** This clause will be referred to as the 060 reduction clause, and contrasted with the 230 reduction clause] This benefit is available in all general, non-

medical negligence tort actions, and amounts to a simple dollar-for-dollar offset. That section in full provides:

Contribution between tort-feasors--release of one or more, effect.

537.060. Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tortfeasor to whom it is given from all liability for contribution or non-contractual indemnity to any other tortfeasor. The term "non-contractual indemnity" as used in this section refers to indemnity between joint tort-feasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

SECTION 538.230 R.S.Mo.: In 1986, our legislature carved out new exceptions exclusively for health care providers by enacting Chapter 538 Tort Actions Based on Improper Health Care, which more significantly modified Missouri's common/statutory law of joint and several liability beyond that previously set up by Section 537.060 R.S.Mo., and it included a new scheme for calculating how pretrial settlements may, or may not,

affect verdicts. The three subsections of Section 538.230 R.S.Mo. duplicated some existing law, and created some completely new rules. That statute provides:

Apportionment of fault authorized--defendants jointly and severally liable, when--
release of one defendant, effect.

538.230 1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services where fault is apportioned among the parties and persons released pursuant to subsection 3 of this section, the court, unless otherwise agreed by all the parties, shall instruct the jury to apportion fault among such persons and parties, or the court, if there is no jury, shall make findings, indicating the percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability under subsection 3 of this section.

2. The court shall determine the award of damages to each plaintiff in accordance with the findings, subject to any reduction under subsection 3 of this section and enter judgment against each party liable on the basis of the rules of joint and several liability. However, notwithstanding the provisions of this subsection, any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant.

3. Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all

liability for contribution or indemnity but it does not discharge other persons or entities liable upon such claim unless it so provides. However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release.

The **first** subsection of Section 538.230 R.S.Mo. tells us that, **unless otherwise agreed by all the parties**, the jury **must** be instructed to apportion the percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability under subsection 3 of this section. Section 538.230.1 R.S.Mo. (emphasis added). Therefore, in the case of an improper health care claim, it is very clear that if the trial defendant does not request apportionment of fault and the plaintiff agrees, then the court does **not** instruct the jury to determine any apportionment of fault of any party, including that of any settling defendant; and, on the other hand, if the defendant does not request apportionment, the plaintiff is equally entitled to force it upon the defendant simply by requesting it in plaintiff's pleadings. Thus, the practical effect is that absent an agreement, either side has carte blanche power to force the court to submit apportionment to the jury simply by proper pleading, proof, and submission of jury instructions.

The **second** subsection of Section 538.230 R.S.Mo. further modifies our tort rules of joint and several liability but only as to claims against health care providers on a big, medium, and small tortfeasor basis. Since this provision only applies to situations in which an apportionment of fault determination has been requested by one the parties and made by the jury, which was not done in the present case, this provision does not apply here.

A clear understanding of the **third** subsection of Section 538.230 R.S.Mo., and a comparison to Section 537.060 R.S.Mo., is critical for the proper analysis of the present case. Section 538.230.3 R.S.Mo. consists of only two sentences; whereas Section 537.060 R.S.Mo. contains four sentences:

(1) Regarding the discharge effect of any settlement, the **first** sentence of Section 538.230.3 R.S.Mo. tracks and essentially duplicates the terms of the first half of the second sentence, and all of the third sentence, of Section 537.060 R.S.Mo.

(A) Section 538.230.3 R.S.Mo.: Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity but it does not discharge other persons or entities liable upon such claim unless it so provides.

(B) Section 537.060 R.S.Mo.: When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; . . . The Agreement shall discharge the tortfeasor to whom it is given from all liability for contribution or non-contractual indemnity to any other tortfeasor.

In other words, this clearly establishes that Section 538.230 R.S.Mo. and Section 537.060 R.S.Mo. operate independently of each other, otherwise the legislature would have

simply included within Section 538.230 R.S.Mo. a direct reference to the same provisions in Section 537.060 R.S.Mo., without repeating virtually identical language. These two sections cannot apply simultaneously in improper health care cases, and are not unilaterally available as alternate choices at the whim of one party, unless otherwise agreed by all the parties.

It is also **very important** to note at this point that Section 538.300 R.S.Mo. specifically excludes 13 other statutes from applying to any Chapter 538 action, along with Sections 537.067 and 537.068 R.S.Mo., but it **does not** exclude Section 537.060 R.S.Mo. The reason for this precise exclusion is very rational and practical and will be discussed more fully under Point III herein, but for now, let it suffice that this exclusion is designed to achieve fairness in certain cases involving a mix of defendants, some of which are health care providers under Chapter 538 and some which are not. For example, if the legislature had added Section 537.060 R.S.Mo. to the Section 538.300 R.S.Mo. exclusion, then in a combination case involving a products liability defendant settling before trial and a health care defendant proceeding to trial, the health care defendant at trial would have no means of obtaining any settlement credit since Section 538.230 R.S.Mo. would not apply to the settling products liability defendant and the benefit of Section 537.060 R.S.Mo. would not be available.

(2) The **second** sentence of Section 538.230.3 R.S.Mo. tracks but very significantly deviates from the second half of the second sentence of Section 537.060 R.S.Mo., or the 060 reduction clause described above, thus creating the functional difference between the dollar-for-dollar versus the percentage offsets.

(A) Section 538.230.3 R.S.Mo.: However, the claim of the releasing person

against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release. (emphasis added)

(B) Section 537.060 R.S.Mo.: however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater.

This second sentence of Section 538.230.3 R.S.Mo. is the 230 reduction clause which allows a trial defendant health care provider a very unique and critically strategic option to potentially leverage pretrial settlements well above the dollar-for-dollar benefit as provided to the general tortfeasor under Section 537.060 R.S.Mo. In contrast with the dollar-for-dollar offset provided in the 060 reduction clause, the 230 reduction is based first on an equitable share to be determined by the jury, which is then converted by the trial court to a dollar offset by multiplying the verdict by the settling defendant's percentage of allocated fault. Section 538.230.3 R.S.Mo. An equitable share of zero fault on behalf of the settling health care provider provides no offset and the trial defendant pays the full verdict, and the plaintiff keeps the entire pretrial settlement.

C. THE STRATEGIC LEVERAGE ADVANTAGE:

A SIMPLIFIED EXAMPLE OF WHY THE DIFFERENCE BETWEEN

THE TWO STATUTES IS SO SIGNIFICANT

The difference between the two statutes present a very significant impact not only in terms of money, but also on trial strategies and decisions regarding the presentation of witnesses and evidence. Besides costing the Normans a large portion of their verdict, the delay in amending his answer allowed Dr. Wright to use perfect hindsight to reap a large windfall by escaping one-third of the verdict the jury said he owed to the Normans.

Using the example of a pretrial settlement of \$100,000, and a verdict of \$300,000, the significant leveraging advantages between the two different statutory offset options available to a health care provider trial defendant, as compared to an ordinary tort trial defendant, may be demonstrated as follows.

1. **Non-health care defendant:** Under Section 537.060 R.S.Mo., so long as the trial defendant timely pleaded and proved that he was entitled to the benefit from the settlement under this statute, then the trial court would automatically make a dollar-for-dollar deduction of the \$100,000 settlement from the verdict, for a net judgment of \$200,000, regardless of who was how much at fault. However, if the verdict was successfully held to \$100,000 or less, then the trial defendant would pay nothing, again, regardless of fault allocations. Therefore, for the non-health care trial defendant, the primary objective, and the primary risk, would be to simply hold the dollar amount of the verdict as low as possible gaining a substantial windfall if the verdict does not exceed the settlement.

2. **Health care provider trial defendant:** Here, assuming the same \$100,000 settlement, there is a matrix of four possibilities, each with varying attendant risks stated in terms of verdict dollars and the amount of fault assessed to the settling defendant: high verdict/high fault; high verdict/low fault; low verdict/high fault; and low verdict/low fault.

For demonstration purposes, the extremes of verdicts, \$5,000,000, and \$100,000, and of fault assessed to the settling health care defendant, 95%, and 5%, will be assumed.

A. **High verdict/high fault:** (\$5,000,000/95%) - Here, the effect of the \$100,000 settlement will be greatly magnified so that the health care defendant will get a huge benefit in terms of an offset of \$4,750,000, forty-seven and a half times the actual dollars paid by the settling defendant; plaintiff, on the other hand, nets a total of only \$350,000 on a five **million** dollar verdict (including his settlement).

B. **High verdict/low fault:** (\$5,000,000/5%) - Despite losing the battle over fault, this health care defendant will still greatly benefit by an offset of \$250,000, or two and a half times the actual dollar amount paid by the settling defendant; whereas, plaintiff will still net less than the full verdict, or a total of \$4.85 million (including his settlement).

C. **Low verdict/high fault:** (\$100,000/95%) - With this result, the health care defendant “loses” his battle of fault, but he still retains the benefit 95% of the insulating effect of the pretrial settlement which cost him nothing, and he ends up paying only \$5,000; for the health care defendant, a great big help; for the plaintiff, a great big gamble, but a very small win.

D. **Low verdict/low fault:** (\$100,000/5%) - This is the only one out of the four results in which the health care defendant stands to lose his gamble, and pays \$95,000. By contrast, it is still a big gamble for the plaintiff, with a reasonable win, yet still not even doubling his money in return for the high cost and risk of trial.

In conclusion of this example, it is easy to see how the health care provider trial defendant has many more strategic options available to consider before going to trial after a

settlement by other health care defendants than that faced by the ordinary trial defendant. At the same time, the plaintiff must also consider the same strategies, and must stand ready to play off of the defendant's moves, or lack thereof.

This matrix-analysis becomes far more complicated if after a pretrial settlement the case then proceeds to trial against two or more defendants. Thus, the havoc and confusion will expand and compound exponentially if parties are allowed, as Dr. Wright was, to delay asserting claims to offsets from settlements for the very first time until long after trial in improper health care cases.

Furthermore, it is anticipated that Dr. Wright may try to assert a claim of fairness to support his defensive argument, that is, asserting that it might be seen as unfair for the Normans to keep the full benefit of the risky bargain they worked hard for and the bargain which they struck with the settling defendants such that for some unknown reason their total gross payments should not be allowed to exceed the ultimate verdict, thus arguing it amounts to a windfall. At first blush this sounds quite logical, but the argument fails in further analysis. For example, first, as demonstrated above, the prospect that a partial settlement might have very easily resulted in the Normans getting substantially less than the full verdict is a result Dr. Wright would very doubtfully call unfair despite the fact that he would indeed reap a windfall. Secondly, if the verdict had come back at only \$50,000, for example, Dr. Wright may or may not have received an offset depending on the other facts, but in no event would the Normans be required to pay back any portion of the settlement funds so as to reduce their total gross payments in order to equal the verdict. Both settling plaintiffs and trial defendants are bound by a bad settlement just as they are entitled to retain the full benefit of a good settlement. To argue otherwise is simply disingenuous hindsight.

Whatever the facts, both parties must carefully consider their options, make their decisions and place their bets so to speak, then go to trial, and live with the results; neither should be allowed to change their Abet after the results are posted.

D. THE PLEADING HISTORY IN THIS CASE

The Normans did everything they could at every stage of this case to plan ahead and protect their interests based on the existing state of the pleadings, yet the ruling of the trial court two years after the jury was released allowed the pleadings to be completely changed and the outcome altered dramatically.

Initially, Dr. Wright asserted bare allegations and requests for an offset under Section 538.230 R.S.Mo., but he never presented nor preserved any right or benefit under Section 537.060 R.S.Mo. L.F. 43-46, tab # 5.

The Normans consistently and repeatedly attacked the sufficiency of Dr. Wright's request for an offset under Section 538.230 R.S.Mo., and eventually, just before trial, Dr. Wright decided and announced in open court that he affirmatively withdrew those allegations and waived any benefit of any offset under Section 538.230 R.S.Mo. L.F. 92-95, 123-133, tabs # 15, 18. Before trial commenced, Dr. Wright never amended his pleadings under either statute to include any short and plain statement of any facts supporting any claim for an offset nor any apportionment of fault against any settling defendants. As such, during trial Dr. Wright never made any record or offered any evidence to the court of any kind relating to the release or settlement, or suggesting that any settling defendant was at fault in any way for the Normans' damages, nor did Dr. Wright ever offer any competent expert testimony on such issues. After trial, Dr. Wright never offered any apportionment of fault jury instructions pursuant to Section 538.230 R.S.Mo.

For the very first time in the history of this entire case, spanning more than four years from filing to verdict, involving many very contested hearings on many different issues, it was only after trial was completed and the jury was sent home, and after the court's acceptance of the jury's verdict, that Dr. Wright raised an affirmative defense and an affirmative request for relief under a specific statute, Section 537.060 R.S.Mo. in his first Alternative Motion to Amend his Answer. The pleadings history of this matter is essentially as follows:

- 12/04/98 Plaintiffs' Motion to Amend by Interlineation is Granted. L.F. 7, tab # 1.
- 12/16/98 Motion of Defendant Andy Wright for a More Definite Statement of Petition as amended by interlineation filed. Id.
- 7/25/00 By agreement, Defendant's Motion to Dismiss and Motion to Strike overruled over Defendant's objections. Defendant's Motion for More Definite Statement overruled except paragraph 20(c) stricken. Defendant to file answer by 8/7/00. L.F. 10, tab # 1.
- 7/26/00 Petition for Approval of Proposed Settlement filed. Plaintiffs in person and by attorney Ransin. Defendant St. John's by attorney Schrock; Defendant Johnson by Attorney Bellm. Jury waived, testimony taken. Court approves settlement per Judgment and Order Approving Settlement entered and filed. This is a partial settlement and case remains pending as to Defendant Andy Wright. L.F. 10, tab #1.
- 8/8/00 Answer of Defendant Andy J. Wright, M.D. to Plaintiffs' Amended

Petition by Interlineation filed. L.F. 43-46, tab # 5.

[**Note:** Dr. Wright's request for apportionment was limited to: **A**n accordance with Section 538.230, R.S.Mo., defendant requests the trier of facts to apportion fault between defendant and the former settling defendants to this action.]

8/10/00 Plaintiffs' Motion to Strike Defendant's Request for Apportionment filed, Notice of Hearing set for 8/17/00. L.F. 11, tab # 1.

8/21/00 Defendant's Suggestions in Opposition to Plaintiffs' Motion to Strike Defendant's Request for Apportionment filed. L.F. 11, tab # 1.

8/22/00 Order Regarding Interrogatory Objections and Pleading of Apportionment of Fault entered and filed. Plaintiffs' Motion to Strike Defendant's Request for Apportionment is accepted as a Motion Requesting A More Definite Statement, and as such is hereby sustained and Defendant Wright is ordered within 20 days, due on or before September 11, 2000, to amend his answer so as to include a short and plain statement of facts for each allegation of negligence and/or fault asserted against any separate settling defendant, namely Joseph C. Johnson, Jr., M.D. and/or St. John's Regional Health Center, for which Defendant Wright requests Apportionment of Fault pursuant to Section 538.230 R.S.Mo. L.F. 56-57, tab # 8.

9/15/00 Plaintiffs' Motion for Leave to Amend Petition; Motion to Strike Defendant's Request for Apportionment and Notice of Hearing on 9/21/00 filed. L.F. 12, tab # 1.

9/26/00 Order granting leave to file Amended Petition entered and filed. Amended Petition filed. L.F. 12, tab # 1.

9/29/00 Defendant files his alternative answer. L.F. 73-78, tab #12.
[Note: Dr. Wright's request for apportionment was modified only very slightly: In accordance with Section 538.230 R.S.Mo., defendant requests the trier of fact to apportion fault between defendant and former defendants St. John's Regional Health Center and Joseph C. Johnson, Jr., M.D., which former defendants have been released pursuant to Section 538.230.3.]

10/02/00 Defendant's Motion to Dismiss Second Amended Petition filed. L.F. 12, tab # 1.

10/10/00 Defendant's Motion to Dismiss Plaintiffs' Second Amended Petition is overruled. Alternative Motion to Dismiss for Failure to State a Claim overruled. Defendant's Alternative Motion to Strike overruled. Motion to Strike Answer Insofar as it Alleges Contribution sustained in 2 days if no specific allegations pled. L.F. 13, tab # 1.

11/6/00 By agreement (Ransin and Malkmus). This case is set for trial (#1) by jury at 9:30 a.m., July 23, 2001. L.F. 13, tab # 1.

7/23/01 Prior to trial, the Normans again attacked Dr. Wright's blanket assertions of the right to apportionment under Section 538.230 R.S.Mo., and ultimately defendant conceded by withdrawing all such allegations. L.F. 92, 123, tabs # 15, 18.

8/7/01 After the verdict, and for the very first time in the case, Dr. Wright

filed his motion asking the trial court for affirmative relief based on Section 537.060 R.S.Mo. in the form of a reduction of the jury's verdict by \$100,000, representing the amount of the prior settlement with Dr. Johnson and St. John's Hospital. L.F. 81-85, tab # 14.

8/20/01 The Normans filed suggestions opposing such request as untimely and improper as Dr. Wright's own pleadings failed to plead the affirmative request. L.F. 96-116, tab # 16.

8/22/01 Dr. Wright filed suggestions in reply to the Norman's opposing suggestions. L.F. 117-122, tab # 17. After the Normans pointed out in their opposing suggestions that Dr. Wright was not entitled to any reduction since none had been set forth in his answer, after the verdict and before entry of the formal judgment, Dr. Wright filed his first Alternative Motion to Amend his Answer . L.F. 123-140, tab # 18.

8/29/01 The court denied leave to amend, and Dr. Wright did not appeal that ruling. L.F. 19-20, tab # 1. The court sustained Dr. Wright's motion to reduce the verdict and ruled "on the basis that deft is entitled to such offset or credit as a matter of law pursuant to section 537.060 R.S.MO." L.F. 20, 147, tabs # 1, 20.

8/30/01 The court entered judgment for the reduced amount. L.F. 147-149, tab # 20.

8/31/01 The Normans timely filed their motion for new trial, and alternative motion to amend the judgment opposing the reduction of the jury's verdict, which the court overruled on October 2, 2001. L.F. 20, 166-

- 168, tabs # 1, 22. Later that same morning the Normans timely filed their first appeal. L.F. 20-21, 169-171, tabs # 1, 23.
- 3/18/03 The Supreme Court of Missouri granted the Normans' Application for Transfer and reverses the trial court and remands the case to the Circuit Court. L.F. 172-176, 190, tabs #24, 26.
- 3/27/03 Dr. Wright files his second Alternative Motion to Amend his Answer. L.F. 177-189, tab #25.
- 4/30/03 The Normans file suggestions opposing Dr. Wright's second Alternative Motion to Amend his Answer. L.F. 191-193, tab #27.
- 5/20/03 The trial court sustains Dr. Wright's Second Motion to Amend his Answer and notifies counsel by letter. L.F. 194, tab #28.
- 5/21/03 Dr. Wright files his Amended Alternative Answer to Plaintiffs' Second Amended Petition requesting relief under **both Section 537.060 R.S.Mo. and Section 538.230 R.S.Mo.** L.F. 195-201, tab #29.
- 6/4/03 The Normans move the trial court to reconsider its granting of leave to amend. L.F. 202-207, tab # 30.
- 7/30/03 The Normans supplement their motion to reconsider. L.F. 22, tab #1. The trial court denies the motion to reconsider and enters judgment for the reduced amount. L.F. 22, tab #1.
- 8/28/03 The Normans move to amend the judgment, which is overruled the same day. L.F. 22, tab #1 .
- 8/29/03 The Normans file their notice of appeal in this matter. L.F. 23, tab #1.

E. POINT ONE

The Trial Court abused its discretion and erred to the Normans' prejudice in sustaining Dr. Wright's second Alternative Motion to Amend his Answer to add an affirmative defense of partial satisfaction two years after the trial was completed and the jury was discharged, and thereupon entering its Judgment for a dollar amount \$100,000 less than the jury's verdict pursuant to the dollar-for-dollar credit under Section 537.060 R.S.Mo.,

Because, a Trial Court deciding a party's right to amend their answer to add a new claim must be balanced against all of the following factors and then be determined to weigh in favor of the movant:

- 1. Possible hardship on the movant if leave is denied;**
- 2. The timeliness of the request in relation to the rest of the case;**
- 3. Any reasons offered for the delay;**
- 4. Possible hardship on or injustice to the opponent;**
- 5. Whether the amendment changes the pending claims;**

In that, the Trial Court failed to balance all the proper factors, which if properly evaluated on the undisputed facts weigh overwhelmingly against granting the amendment since:

- 1. Any alleged hardship on Dr. Wright is illusory at best, and is only the result of his own strategic miscalculations;**
- 2. Dr. Wright ignored many chances to pursue and protect his right to amend well before the first appeal;**
- 3. Dr. Wright never provided, nor did the Trial Court**

require him to provide, a rational reason or excuse for his delay in requesting the amendment;

4. The hardship on and injustice to the Normans is paramount and manifest, both in terms of the presentation at trial and the dollar amount of the judgment;

5. Dr. Wright's amendment significantly changed the pending claims in his favor;

Therefore, either such Judgment must be reversed and the Trial Court ordered to strike Dr. Wright's Amended Alternative Answer, and to enter Judgment for the full amount of the jury's verdict without any such reduction, or in the alternative, pursuant to Rule 84.14 this Court must reverse such Judgment, order Dr. Wright's Amended Alternative Answer stricken, and enter the correct Judgment as the Trial Court should have entered for the full amount of the jury's verdict without any such reduction, and in either event, such Judgment must be shown as being effective for all purposes as of the date the original Judgment was entered by the Trial Court, August 30, 2000.

This Court is certainly no stranger to this case, having reviewed it recently on a very closely related issue during the first appeal. Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003). Regardless of whether a defendant in an improper health care claim elects to request an offset under either Section 537.060 R.S.Mo. or Section 538.230 R.S.Mo., both are clearly an effort to gain the benefit of a right derived directly from a statute, and thus, to be effective, such a request must be properly pleaded as an affirmative request pursuant to

Rule 55.21(a). Id. at 786. In addition, Rule 55.08 requires all affirmative defenses, including but not limited to the offset of accord and satisfaction and comparative fault, to be affirmatively set forth in the pleadings or they will be waived. Also, the same Rule requires that all such affirmative defenses or avoidances must contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. Similarly, Rule 55.05 lays out the same requirement of a short and plain statement of the facts showing that the pleader is entitled to relief. These are all very well known rules of law and should not surprise seasoned litigators. In fact, such was precisely the basis on which the trial court sustained the Normans' motion to strike Dr. Wright's request for apportionment long before trial. L.F. 56-57, tab #8. The fundamental fairness of advance notice to opposing parties of requests for affirmative relief which directly affect both the process of trial and the outcome cannot be denied. In fact, Dr. Wright has conceded the same. L.F. 51-55, tab #7. This is exactly why plain statements in the open on paper are required by the above Rules which have also been codified in Sections 509.050, 509.090 and 509.220 R.S.Mo.

Once a responsive pleading is served, a pleading may be amended only by leave of court or by the written consent of the adverse party. Rule 55.33; Curnutt v. Scott Melvin Transp., Inc., 903 S.W.2d 184, 193 (Mo. App.1995). The issue here focuses on the propriety of the time at which and the conditions under which such a claim may be added to Dr. Wright's answer. The standard of review is discretionary as noted in the Standard of Review section above, and it is within such discretion that the trial court must carefully evaluate certain factors in light of established facts. Hatfield v. McCluney, 893 S.W.2d 822, 828 (Mo. banc 1995); Lay v. P & G Health Care, 37 S.W.3d 310, 327 (Mo. App.

2000).

Some of the more important factors to be considered by the trial court in deciding whether to grant a motion to amend are hardship to the moving party if the motion is denied, the timeliness of the request, the reasons for the moving party's failure to include new matter in its original pleading, injustice to the opposing party should leave be granted, and how the amendment may change the pending claims. Foman v. Davis, 371 U.S. 178, 182 (1962); Lester v. Sayles, 850 S.W.2d 858, 869 (Mo. banc 1993); Hospital Dev. Corp. v. Park Lane Land Co., 813 S.W.2d 904, 907 (Mo. App. 1991); Baker v. City of Kansas City, 671 S.W.2d 325, 329 (Mo. App. 1984).

A fair and impartial review of these factors in light of the known and undisputed facts overwhelmingly required the denial of Dr. Wright's second Alternative Motion to Amend his Answer, and the granting of that motion under these circumstances was an obvious and palpable abuse of the trial court's discretion, all to the severe prejudice of the Normans.

1. Hardship on the movant:

Dr. Wright has never suggested that he was under any hardship or in any way unable to have simply amended his answer before trial to include his request under Section 537.060 R.S.Mo. Any claim of hardship now made by Dr. Wright is simply contrived, and at his own hand. Dr. Wright is expected to claim losing the motion to amend would cost him \$100,000. What he fails to recognize is that it would also cost the Normans the same amount. How then can this weigh only in his favor, unless one completely and unfairly ignores the impact on the Normans? Also, as noted in Point III, below, this cost if any is not only the direct result of the gamble he elected to take, but losing the benefit of a dollar-for-dollar credit is also the cost of the protection afforded to him under Section 538.230

R.S.Mo. Therefore, this factor does not weigh in Dr. Wright's favor, and in fact weighs heavily against him.

2. Timeliness of the request to amend:

As set forth in greater factual detail under Point II, below, Dr. Wright had many, many very easy chances to raise Section 537.060 R.S.Mo. as a setoff over a very long period of time without any impediments in his way to do so, but he repeatedly chose to ignore the same, thus this factor tilts the scales very heavily against him.

In State ex rel. Harvey v. Wells, 955 S.W.2d 546 (Mo. banc 1997), it was explained why timing is so important: "The goal of fact pleading is the quick, efficient, and fair resolution of disputes." Id. at 547. As a prudent defendant, if Dr. Wright were considering amending his answer, he should have immediately sought leave to plead additional theories of obtaining a credit, if he really wanted it. In fact, Dr. Wright did exactly that when he included both statutes in his second Alternative Answer. L.F. 197-201, tab # 29.

Another case which denied an amendment after judgment is In re Estate of Anderson v. Day, 921 S.W.2d 35 (Mo. App. 1996). The court stated Petitioner could have included the count earlier and probably should have, based on the facts. However, Petitioner did not ask to amend until after summary judgment on the undue influence claim. "Liberal amendment rules are not meant to be employed as a stratagem of litigation; rather, the purpose of the grant of an amendment is to allow a party to assert a matter unknown or neglected from inadvertence at the time of the original pleading. Kenley, 870 S.W.2d at 498 (citing Rigby Corp. v. Boatmen's Bank and Trust Co., 713 S.W.2d 517, 547 (Mo. App. 1986))." Id. at 38.

Deatherage v. Cleghorn, 115 S.W.3d 447 (Mo. App. 2003) is instructive by

comparison. There a party was properly denied the right to amend their pleadings since the request was not filed until after summary judgment had been granted. The court could not conclude that the party did not get a full and fair opportunity to present all their claims the first time around, and found that the party failed to exercise reasonable diligence in bringing such claims to before the court in proper time. Id at 459.

In similar fashion, denial was proper when the attempted amendment by was filed 20 days after the case was tried. These rules are intended to permit cases to be prepared for trial, and to be tried, in an orderly manner with the issues concisely stated and well-framed. The day of attempting to ambush an opponent or sandbag him is not intended, or permitted, by today's rules of pleading and practice. In re Marriage of Morris, 726 S.W.2d 505, 508 (Mo. App. 1987). That court held that if appellant desired to amend her pleadings, it was her responsibility to timely ask leave to do so, and such failure was an adequate basis to deny the amendment. Id at 507.

The reason timeliness is so important is that if the issue is raised either before trial starts or no later than when the verdict is returned, any error or prejudice is capable of correction by presenting more evidence and ordering the jury to return for further deliberation, and the better practice is to give the trial court the best opportunity to correct error while correction is still possible. Douglass v. Safire, 712 S.W.2d 373, 374 (Mo. banc 1986).

Dr. Wright's lack of timeliness was totally ignored by the trial court, and if considered, would have weighed overwhelmingly in favor of the Normans and against granting the amendment.

3. Reason for failure to request at an earlier time

Why not? This question has never been answered.

Despite having been invited in hearings, oral argument, suggestions and briefs, years have passed since trial and Dr. Wright still has never suggested any valid reason for his decision to not request a more timely amendment. This factor is particularly significant since Dr. Wright did amend his answer to add the affirmative defense under Section 538.230 R.S.Mo. before trial, and then ended up pleading both statutes two years after trial!

Therefore, it is obvious that a very important factor is a valid and reasonable excuse for the delay. Dr. Wright has never explained, and cannot explain, why he would be required to affirmatively plead the benefit of one statute, but would not be required to so plead the very similar benefit of a different statute. Nor has he ever offered any good public policy reason to justify the trial court ignoring the long delay in presenting his claim to an offset.

At one point, Dr. Wright at least posed this question rhetorically, but he still never answered it. L.F. 144-145, tab # 19. The best that can be gathered from his suggestions is that Dr. Wright simply “did not” because he felt “he didn’t need to.” Such a position is inherently inconsistent with his first post-trial motion to amend.

If no valid reasons are given, that alone is sufficient to warrant denial of a late amendment. Moore v. Firststar Bank, 96 S.W.3d 898, 904(Mo. App. 2003). The Plaintiff in Kanefield did not present the trial court with any reasons why the theory of promissory estoppel could not have been raised earlier, and the amendment was properly denied. Kanefield v. SP Distributing Company, 25 S.W.3d 492, 499 (Mo. App. 2000). In Gardner, the landowners offered no factual allegations claimed to have been "overlooked or unknown", and the denial was proper. Gardner v. City of Cape Girardeau, 880 S.W.2d 652, 656 (Mo. App. 1994). Likewise, in Downey, the party did not contend in the trial court nor

before the appellate court that the allegation sought to be amended and so belatedly asserted was unknown or overlooked in her first two pleadings, and denial was upheld. Downey v. Mitchell, 835 S.W.2d 554, 556 (Mo. App. 1992). Simply put, no excuse is no excuse, and this alone merits denial. Dr. Wright has never given any reason or excuse, the trial court failed to require or even ask for one as such is required to exercise proper of discretion, and thus, such discretion was abused and the amendment should have been denied.

4. Hardship/injustice on opposing party:

The record is replete with the Normans' complaints of hardship and injustice imposed on them and their protests against the same.

The court in Lay v. P & G Health Care, 37 S.W.3d 310, 327-328 (Mo. App. 2000) recognized the importance of this factor where it noted that the moving party should have asked for leave well before the time it was requested, and that allowing the leave would have financially burdened and substantially prejudiced the opponent.

Nowhere in the record of this case is it even suggested that the trial court even took into consideration even one of the multiple ways the Normans would be harmed by granting this motion. All the money and expense issues aside, the Normans were fully prepared to call experts to support apportionment of fault claims regarding the fault of the settling Defendants under Section 538.230 R.S.Mo. L.F. 208-671, tabs # 31, 32, 33, 34, 35.

The letter from the trial court announcing its ruling does mention in passing that the Normans could have ended up in a better position, but the trial court immediately turned around and summarily denounced that possibility with an opposing statement, all without any mention of the compelling evidence minimizing any fault on the part of the settling

defendants, or the fact that Dr. Wright had absolutely no supporting or contrary witnesses or evidence to support the trial court's supposition. L.F. 194, tab # 28. Furthermore, calling it a windfall for the Normans but ignoring the identical \$100,000 windfall in Dr. Wright's favor, only highlights the lack of consideration of this and all the other important factors, and thus, the lack of proper discretionary review the law requires. As such, this factor also weighs in favor of the Normans, and against Dr. Wright.

5. Change of the pending claims:

Dr. Wright's amended answer changed the pending claims significantly. If the Section 537.060 R.S.Mo. amendment had been made before trial, the Normans were prepared to trump it with their own Section 538.230 R.S.Mo. request in an amended pleading, thus completely altering the pending claims and evidence. They had ample expert witness testimony disclosed to and fully deposed by Dr. Wright ready to put minimal fault on the settling defendants. L.F. tabs 31, 32, 33. By waiting to tender his amendment until after trial, it also significantly altered matters by completely taking the fact issue of apportionment of fault away from the jury and denying the Normans' their statutory right to have apportionment of fault submitted as provided in Section 538.230 R.S.Mo. Proper analysis of this factor weighs heavily against granting the amendment.

Dr. Wright in his pleadings, well before trial, admitted that if a credit under Section 538.230 R.S.Mo. were injected into the case by his pleadings, things would change dramatically as he would bear the burden of additional proof and submission of jury instructions. L.F. 54, tab # 7. Amending pleadings to add a request for a credit instead under Section 537.060 R.S.Mo. also causes the same result as the Normans were prepared to trump such a request with their own, which Dr. Wright also admitted in the same pleading

that the Normans had the right to do. Id. at 53.

In Boling, the amendment requested by the defendant presented an additional defense within a month before trial. The facts upon which the amended answer was based were or should have been known to the defendant at the time all discovery was completed six months prior to trial. By delaying the motion for the amendment until so late, and if it was granted, it would have required plaintiffs to meet a new defense, and this was a valid basis to deny the motion. Boling v. State Farm Mutual Auto. Ins. Co., 466 S.W.2d 696 , 699 (Mo. 1971). Similarly, yet from the opposing perspective, another court ruled that granting a motion to amend would have subjected the defendant to yet another claim which could be considered prejudicial, thus justifying the denial. Baker v. City of Kansas City, 671 S.W.2d 325, 330 (Mo. App. 1984).

This is the fifth of five factors, all of which consistently weigh against the trial court's decision to sustain Dr. Wright's Second Motion to Amend his Answer.

6. Public Policy Considerations:

Timing is everything.

Under the trial court's ruling, any party to an improper health care action, plaintiff or defendant, could conceivably now submit apportionment of fault under Section 537.230 R.S.Mo., (or no request for any credit at all), finish the trial, and depending on the verdict, if pure hindsight proves that the better alternative for him would have been the dollar-for-dollar credit rather than the equitable share credit, then he is free to reverse course, "waive" the "230 reduction," completely ignore the percentage of fault findings by the jury, and file his after trial motion requesting a credit instead under Section 537.060 R.S.Mo.

And, logically, vice versa would be true. There would be nothing to stop any party

from going to trial pleading a Section 538.060 R.S.Mo. credit, or even from making no such pleading at all, and after trial filing his motion requesting a finding of fact by the trial court for an apportionment of fault under Section 537.230 R.S.Mo. The provisions of Section 537.060 R.S.Mo. and Section 537.230 R.S.Mo. regarding settlement credits are very similar; they just use different schemes: dollar-for-dollar versus equitable share. If absolutely no pretrial pleading is required in a improper health care case to preserve the right to the dollar-for-dollar credit, and since a Section 537.060 R.S.Mo. motion would be deemed to be a proper motion in a improper health care case for the first time after the verdict, then why would a Section 537.230 R.S.Mo. motion not be equally permissible for the first time after a verdict seeking a credit based on an equitable share?

Most improper health care cases involve multiple defendants at trial, and applying this decision to such cases clearly illustrates the incredible problems the trial court's ruling will likely cause litigants around the state. Depending on the relative dollar amounts in terms of the pretrial settlement and the verdict, and accounting for the percentages of fault allocated by the jury, it is not very difficult to imagine a scenario where one defendant after trial might prefer the dollar-for-dollar credit but another defendant could insist on paying only his equitable share! And, again, or vice versa.

Finally, since this is not just a plaintiff or a defendant issue, to take Dr. Wright's arguments before the trial court to the logical extreme, what would prevent a plaintiff from sandbagging until after the trial and then submitting his own request under a different statute to gain a better net verdict? Absolutely nothing if the trial court's ruling is upheld here. There is simply nothing in any of the case law nor in either of the statutes that says one statute automatically applies to the exclusion of the other if it is elected by any party.

How much additional collateral litigation and appeals might this spawn? How much sandbagging, surprise, and unfairness will this cause? Certainly this is a serious and important question that requires reversal of the trial court's ruling.

Improper health care litigants, both plaintiff and defendant, deserve to be free of the uncertainty, inconsistency, extra expense, and sandbagging that this ruling will create. Such are the fundamental goals of the longstanding public policy requiring affirmative pleadings, and to avoid such chaos and collateral litigation. For litigants going into an expensive and complex trial, when there are two very similar statutes that might apply to a verdict but each with different results, all the litigants in the case should be able to know before trial begins and be able to confidently rely on which statutory credit scheme, if either, will still be "in the case" after a verdict is returned and the jury is excused; anything less invites unfairness and sharp practice of counsel by effectively changing the rules after the game is finished. Such can hardly be called justice.

If these five factors are properly evaluated, they all support denial of both of Dr. Wright's motions to amend, and the second one all the more so. It appears none of these factors were considered at all. Or, at best, the trial court applied a one-sided hardship test, focusing exclusively on possible hardship on Dr. Wright and ignoring any hardship on the Normans. Finally, no rational concept of fairness, nor any valid public policy, is furthered by a new rule consistent with the trial court's ruling. In fact, only the opposite is true. Therefore, this case must be reversed and remanded as requested by the Normans.

F. POINT TWO

The Trial Court erred to the Normans' prejudice in sustaining Dr. Wright's second Alternative Motion to Amend his Answer to add an affirmative defense of partial satisfaction two years after the trial was completed and the jury was discharged, and thereupon entering its Judgment for a dollar amount \$100,000 less than the jury's verdict pursuant to the dollar-for-dollar credit under Section 537.060 R.S.Mo.,

Because, a party wishing to amend its answer to add a new affirmative defense must seek leave of court before the jury is discharged, otherwise the defense is waived, and any failure to appeal the denial of such a motion to amend bars subsequent amendment efforts by estoppel and/or as the law of the case,

In that, Dr. Wright both:

Failed to offer his first Alternative Motion to Amend his Answer until well after trial was completed and the jury was discharged, thus denying the Normans their right to possibly invoke the provisions of Section 538.230 R.S.Mo. for a decision by the same jury, and

Failed to preserve any issue and to appeal the Trial Court's denial of his first Alternative Motion to Amend his Answer, thus accepting it as binding on him and prohibiting any relief subsequently requested under his second Alternative Motion to Amend his Answer,

Therefore, either such Judgment must be reversed and the Trial Court ordered to strike Dr. Wright's second Alternative Amended Answer, and to enter Judgment for the full amount of the jury's verdict without any such reduction, or in the alternative, pursuant to Rule 84.14 this Court must reverse such Judgment, order Dr. Wright's second Alternative Amended Answer stricken, and enter the correct Judgment as the Trial Court should have entered for the full amount of the jury's verdict without any such reduction, and in either event, such Judgment must be shown as being effective for all purposes as of the date the original Judgment was entered by the Trial Court, August 30, 2000.

After losing his first Alternative Motion to Amend his Answer, Dr. Wright elected to not move the trial court for reconsideration. After obtaining the verdict reduction, Dr. Wright did file a Motion for New Trial, but he elected to not raise any complaint regarding the denial of his request to amend. L.F. 150-165, tab 21. After the Normans filed their first appeal, Dr. Wright elected to not pursue any cross appeal regarding the same denial by the trial court. As such, he has waived any right to raise any further motion to amend at a later date, and should have been barred and estopped from the same. Likewise, the trial court, having considered the first motion to amend, and apparently deciding under the circumstances that it should not be granted, is also barred and estopped by the rule of "the law of the case" from reversing his decision under identical if not far more compelling circumstances, and granting the requested amendment. The Normans worked hard to protect their claims and preserve the issues for review based on what they believed were a static, not dynamic, set of facts of the case. It is only fair and just that they should be

entitled to definitely rely on the history of the milestone decisions in the case and that those will not be changed later in the proceedings, thus forcing further delays, appeals, and expense which would not have been otherwise incurred but for Dr. Wright's failure to act in a timely fashion and the trial court's unpredictable and unreasonable "flip flop".

A prior decision on the same issue becomes the law of the case as to all questions directly raised and passed upon and on all matters that arose before the first appeal that might have been raised but were not, and governs successive appeals involving the same issues and facts. Ironite Products Co., Inc. v. Samuels, 17 S.W.3d 566, 571 (Mo. App. 2000). As such, Dr. Wright was presented with the adverse decision of the denial of his motion to amend. He knew that the trial court's decision of granting the verdict reduction was not supported by his existing pleadings, and that the Normans would contest the reduction on that precise basis that his pleadings were deficient as a matter of law. He knew the Normans were appealing and that he could easily raise a provisional cross appeal out of an abundance of caution to preserve all-important issues. Nusbaum v. City of Kansas City, 100 S.W.3d 101, 102 (Mo. banc 2003). Simple analysis of the very limited issues at the time should have easily revealed the obvious adverse consequences to Dr. Wright's position if the Normans' arguments were successful on appeal that the reduction request must be raised or waived. Sanders v. Hartville Milling Co., 14 S.W.3d 188, 215 (Mo. App. 2000). If so, he would have been left needing a specific pleading that he did not have; exactly where he is today; and solely as a result of his own continued inaction. Simply put: had Dr. Wright timely raised and preserved the denial of his first Alternative Motion to Amend, this case would have been fully resolved more than a year ago. It is precisely this additional expense and delay of resolution that the rules of waiver, bar, and law of the case are designed to

avoid as a matter of good judicial and public policy.

Important policies of great public interest and the advancement of judicial economy will be seriously degraded if the ruling of the trial court is allowed to stand and be applied in this case and in future cases. “The law of the case is more than merely a courtesy: it is the very principle of ordered jurisdiction by which the courts administer justice.” Davis v. J.C. Nichols Co., 761 S.W.2d 735, 738 (Mo. App. 1988). It is simply not permissible for Dr. Wright to have filed his second motion, and for the trial court to have reversed its ruling on Dr. Wright’s first motion, solely as a means to achieve the singular goal of granting the verdict reduction in total disregard for the state of the pleadings, or the unchanged facts of the case.

It can be anticipated that Dr. Wright might argue that the law of the case doctrine does not apply to new issues introduced following remand by amended pleadings, as was noted in Davis, at 742 n. 6. However, that exception to the rule is easily distinguished from our present case because it would only apply to instances where the situation changed such as if there was either no trial before the appeal, or after the appeal at the request of one party the case was remanded for a new trial. Neither situation exists here. In our case, the issues and factual situation remained identical after remand insofar as it concerned the reasonableness of the timing of Dr. Wright’s motion to amend. Such an argument by Dr. Wright would otherwise amount to mere circular, bootstrapping logic. Prior to the trial court completely reversing itself, absolutely nothing had changed after the first appellate process other than Dr. Wright repeating his identical request for the same relief he was denied the first time around, and the denial of which he chose to not complain.

Dr. Wright might try to now argue that “the law was changed on him” regarding his

pleading requirements between the times of his two motions to amend. If so, such an argument would be purely disingenuous. Although it is true that the Norman I decision pronounced a ruling never before specifically addressed upon these precise facts, the law applied there was certainly far from new or changed. Except for a single case (Brizendine v. Conrad, 71 S.W.3d 587, 592-93 (Mo. banc 2002)), every case cited in Norman I in this regard predated the trial of this case by many years, and some by many decades. Norman, at 785-86. In addition, it is significant to note that Brizendine itself cited cases dated well before the trial of our case. Brizendine, at 592-93. These include cases which stand for very well-known concepts like:

Set-off has traditionally been considered an independent action that must be pleaded as a counterclaim. Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 129-30 (Mo. banc 1985) (set-off is an independent action by the defendant against the plaintiff). See also Edmonds v. Stratton, 457 S.W.2d 228, 232 (Mo. App. S.D. 1970) (discussing the nature of set-off, recoupment, and counterclaim, and noting that a set-off, "a term loosely and confusingly used," is "included within the remedy of a counterclaim."). No counterclaim for set-off was filed here.

There is also authority for treating set-off as an affirmative defense rather than as a counterclaim. See Bank of Kirksville v. Small, 742 S.W.2d 127, 131 (Mo. banc 1987) (characterizing a set-off claim as an affirmative defense); Reynolds County Memorial Hosp. v. Sun Bank of America, 974 S.W.2d 636, 666 (Mo. App. S.D. 1998) (same).

Id. Therefore, given the above established law, the result in Norman I should have been

predictable as quite likely since it was merely the application of “old law” to a set of “new facts”, and thus prudence would dictate covering and preserving all the relevant issues just in case the Normans’ arguments succeeded.

Pleading in the alternative is not a new concept. In fact, Dr. Wright employed alternative pleading tactics repeatedly in this case. His original motions right after trial were a motion for reduction and an “Alternative Motion” for leave to amend. L.F. 123-140, tab 18. In consistent fashion, his amended answer was denominated as his “Amended Alternative Answer.” L.F. 197, tab 29. Furthermore, in that same Amended Alternative Answer, Dr. Wright specifically included both statutes in his affirmative allegations for an offset against the verdict. L.F. 198, 199, 200, tab 29. Therefore, not only was Dr. Wright entitled to preserve the issue of the timeliness of his motion to amend on the first appeal, he has demonstrated his awareness that he could use alternative pleadings, but he either forgot or strategically decided to not take advantage of that important tool. Shady Valley Park & Pool v. Weber, Inc., 913 S.W.2d 28, 37 (Mo. App. 1995). Either way, as he was exclusively in control of that option and decision, the burden and the consequences of Dr. Wright’s inaction should rest squarely on his own shoulders, not on the Normans’.

It can also be anticipated that Dr. Wright might now try to now claim he relied on Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App. 1999), before trial in deciding to not raise any affirmative defense by amendment to assert a set off under Section 537.060 R.S.Mo. If so, such a position is purely false, and actually works to his disadvantage. First, if such reliance were indeed true, one would naturally expect Dr. Wright to have vigorously advanced that same argument and the Julien case in support of his first Alternative Motion to Amend his Answer in his pleadings before the trial court. A review of his motion and

suggestions reveals no such argument or citation. L.F. 123-140, 141-146, tabs 18, 19. Second, the Julien case obviously involved completely different facts and different issues, and thus was easily distinguishable long before it was distinguished, not over ruled, in Norman, at 785. The pertinent issue in Julien was specifically limited to the procedural calculation of time deadlines for filing motions after trial under Rules 75.01 and 81.05(a); reading it as addressing issues concerning the content of pleadings or proper timing of amendments is more than a “stretch”. Julien, at 151-52. Finally, the appellant in Julien also failed to take diligent steps to file timely motions to protect issues on appeal to secure a set off against the verdict. Julien, at 152-53. Therefore, if Julien has any relevance to this current appeal, it would be that it stands for the proposition that a litigant such as Dr. Wright is well admonished to anticipate the critical issues and to take diligent steps to timely file motions to preserve the issues in his favor; a very important part of that decision which Dr. Wright failed to heed.

Apparently Dr. Wright did not feel a verdict in favor of the Normans was likely enough to worry about any later possible offset issues. Despite his repeated pleadings under Section 538.230 R.S.Mo., Dr. Wright has never explained or contended in the trial court that his post-verdict request for an offset under Section 537.060 R.S.Mo. was either unknown or overlooked in his various pleadings during all the years preceding trial, nor in the more than two years during the appeals process.

The Normans agree that at some point Dr. Wright had the right to request an offset under at least Section 538.230 R.S.Mo., and, (subject to the position argued in Point III, herein) possibly Section 537.060 R.S.Mo., or neither statute. He chose neither, and should be bound by that choice. Dr. Wright has candidly admitted he affirmatively waived all of his

rights under Section 538.230 R.S.Mo. before trial. L.F. 92, tab 15. The Normans fairly and reasonably relied on the state of his pleadings that reflected his express intent in this regard. There is nothing in Section 537.060 R.S.Mo. that makes such right to an offset automatic or self-enforcing as an affirmative defense absent proper and timely pleading to give fair notice and assert the same; the defendant still has to take certain, very simple, steps to preserve those rights, either by agreement, or by pleading and proof. Norman, at 786. Likewise, there is absolutely nothing in Section 538.230 R.S.Mo. even suggesting that if that specific statute does not apply, that the parties must apply Section 537.060 R.S.Mo., and certainly nothing making such application mandatory and automatic. This is a fundamental responsibility of the party seeking to gain the benefit of a set off. Failing to take such steps in a timely and effective manner before trial waives all such rights under Section 537.060 R.S.Mo. as well. Therefore, through his own affirmative waiver, followed by his own inaction, Dr. Wright here preserved no right to any offset, and his motion should have been denied.

The Court's opinion in Williams v. Casualty Reciprocal Exchange, 929 S.W.2d 802, 809-810 (Mo. App. 1996) is directly on point here. There a defense seeking a credit was waived by lack of timely action to preserve the same. Just as a party is free to waive a claim like that in Williams, Dr. Wright was equally free to waive his rights here, and he very effectively did so, but the trial court ignored this issue after it was pointed out by the Normans. L.F. 686-698, tab # 36.

In Storage Masters-Chesterfield, L.L.C. v. the City of Chesterfield, 27 S.W.3d 862, 865 (Mo. App. 2000), the court held that the defendant waived the affirmative defense of the statute of limitations by failing to plead it in its answer. In Stine v. Warford, 18 S.W.3d

601, 604-05 (Mo. App. 2000), the court considered whether the defendant had properly asserted a defense of claim preclusion well after the time had passed for filing an answer, and denied the same. The court in State v. Polley, 2 S.W.3d 887, 892 (Mo. App. 1999), held that the trial court correctly ruled that a defense of failure to mitigate damages, not unlike a credit against the verdict, was waived for failure to plead it as required by Rule 55.08. The rule is well-known that an affirmative defense not pleaded with the particularity required by Rule 55.08 is waived if not timely raised by the opposing party. Tindall v. Holder, 892 S.W.2d 314, 325 (Mo. App. 1994).

Notice and waiver are complementary concepts here. There can be no valid argument that Dr. Wright did not know and did not fully realize it was his very important obligation to affirmatively assert any right to an offset in his pleadings, and the significant purpose thereof. In his suggestions opposing the Normans' efforts to strike his request under Section 538.230 R.S.Mo. very soon after the settlement, on page 4, Dr. Wright stated: "Comparative fault is an affirmative defense which must be pleaded. Id. The reason for such a rule is to give notice to the opposing parties so that they may adequately prepare the issues. Id. Dr. Wright has put plaintiffs on notice by specifically requesting apportionment of fault, pursuant to Section 538.230 R.S.MO. in his answer." L.F. 53, tab # 7. Dr. Wright just never took the same simple measures **before trial** to protect any rights which might have been available to him under Section 537.060 R.S.Mo., nor to notify the Normans of his intent to assert the same. Furthermore, he gained the benefit of a reduction knowing such was not supported by his pleadings. Despite that knowledge, and the knowledge that the Normans were appealing the reduction, Dr. Wright decided to not ask the court to reconsider the denial of the requested amendment, and decided to not appeal

the trial court's ruling. A cross appeal could have been easily filed out of an abundance of caution to at least preserve the issue. Dr. Wright decided to do nothing.

The Normans should not thus be unilaterally denied their substantive rights to make strategic settlement and subsequent trial decisions based on the options otherwise available to them under these statutes and the state of the pleadings at the commencement of trial.

The public and practical policy strongly supports the significance of this factor. All courts strive for rules which force the potential error to the forefront as soon as possible so that if any remedy is available in contemporary fashion, such can fairly and most efficiently be achieved. Thus, delay without excuse is not favored. In similar fashion, such is true in the area of timely objections to instructions, including forms of verdict instructions, which are required to be made in motions for new trial unless made at trial. Rules 70.03, 78.07, and 78.09. A complaint concerning a mere technical or formal defect in a verdict must be voiced prior to the discharge of the jury so that corrective steps may be taken. If not then made, the complaint is waived. Buus v. Stocker Oil Co., 625 S.W.2d 236, 239-240 (Mo. App. 1981). Likewise, if a verdict is so inconsistent that it is logically self-destructive and requires a new trial, the complaining party must raise that claim before the jury is discharged so that the trial court may order further deliberations. Otherwise, the claim is waived and cannot be raised for the first time later in the case. Douglass v. Safire, 712 S.W.2d 373, 374 (Mo. banc 1986). The same rationale and requirements hold true here, and Dr. Wright's right to an amendment should have been deemed waived, thus barring him from seeking a second motion to amend his answer.

G. POINT THREE

The Trial Court erred to the Normans' prejudice in sustaining Dr. Wright's second Alternative Motion to Amend his Answer to add an affirmative defense of partial satisfaction two years after the trial was completed and the jury was discharged, and thereupon entering its Judgment for a dollar amount \$100,000 less than the jury's verdict pursuant to the dollar-for-dollar credit under Section 537.060 R.S.Mo.,

Because, the exclusive remedy for a health care provider as the only defendant in an action under Chapter 538 R.S.Mo. Tort Actions Based on Improper Health Care seeking to obtain a direct benefit in the form of a credit against any subsequent jury verdict arising from a pretrial partial settlement paid by other health care providers is limited to the apportionment of fault provisions of the special statute Section 538.230 R.S.Mo., and such a party cannot unilaterally opt out of that special statute in order to apply the dollar-for-dollar credit provisions otherwise available to non-health care providers in tort actions under the general statute Section 537.060 R.S.Mo.,

In that, either:

1. Fundamental statutory construction compels the controlling application of the terms of a special statute which addresses a particular type of party in a particular type of action instead of the terms of a general statute which addresses all other types of parties in tort actions generally, or

2. Dr. Wright directly bound himself to the application of

the express terms set forth in Section 538.230 R.S.Mo. when he specifically invoked the authority of the same and requested his relief thereunder and filed his second Alternative Amended Answer, which cannot now be granted as such was not timely filed before the discharge of the jury,

Therefore, either such Judgment must be reversed and the Trial Court ordered to strike Dr. Wright's second Alternative Amended Answer, and to enter Judgment for the full amount of the jury's verdict without any such reduction, or in the alternative, pursuant to Rule 84.14 this Court must reverse such Judgment, order Dr. Wright's second Alternative Amended Answer stricken, and enter the correct Judgment as the Trial Court should have entered for the full amount of the jury's verdict without any such reduction, and in either event, such Judgment must be shown as being effective for all purposes as of the date the original Judgment was entered by the Trial Court, August 30, 2000.

The Normans assert that the trial court erred as a matter of law because in a case involving only health care defendants, Section 538.230 R.S.Mo. is the exclusive remedy for any offset against a verdict from a pretrial settlement, unless otherwise agreed among all the parties.

The Normans are not unmindful that this Court has stated:

Section 537.060 applies to all tort actions. See Brewster v. Gauss, 37 Mo. 518, 519 (1866); Spalding v. Citizens' Bank, 78 Mo. App. 374, 383 (1899).

Section 538.230, discussed above, applies only to tort actions based on

improper health care. The General Assembly specifically lists certain sections of chapter 537 that do "not apply" to improper-health-care torts. Sec. 538.300. Section 537.060 is not listed. Id. Thus, if all the parties agree not to apportion fault under Section 538.230, Section 537.060 applies. See Vincent, 833 S.W.2d at 863.

Norman, at 785. However, with all due respect, the Normans disagree with the stated conclusion and maintain that under the facts of our present case, the only relief available as a matter of law to Dr. Wright was that under Section 538.230 R.S.Mo.

First, the Brewster and Spalding cases were obviously decided nearly a century or more before the enactment of Section 538.230 R.S.Mo., and thus neither decision addresses the interaction of the two subject statutes which is the precise issue here. Therefore, the fact that neither of these cases could have possibly contemplated the current issue prohibits their effective use as controlling precedent to resolve the current issue.

Second, The Normans respectfully submit that the Court's analysis based on the fact that Section 537.060 R.S.Mo. was not included in Section 538.300 R.S.Mo. is incomplete and equally incorrect. Simply presuming that Section 537.060 R.S.Mo. must apply universally in all tort cases regardless of the particular facts, other statutes and issues involved, just because that statute was not expressly excluded, ignores a very legitimate explanation for the decision by the legislature for not adding Section 537.060 R.S.Mo. to the list of exclusions in health care cases. A very valid and logical explanation arises in the "mixed defendant" scenario, which is set forth in more detail below.

Third, this Court's reference to the Vincent case is misplaced and does not support the stated conclusion. The method of reducing the verdict in that case was not automatic

under Section 537.060 R.S.Mo., but rather was exclusively the product of an agreement concocted for that particular case by the parties. The Normans submit that it is neither fair nor just to bind them in this case based on a private agreement between parties and counsel in another unrelated case. In fact, Section 537.060 R.S.Mo. was not even mentioned in the Vincent decision, and it did not play any role whatsoever in any legal sense there, thus, Vincent is not a valid legal basis upon which to pronounce the rule suggested in Norman as quoted above. The rationale set up by the Legislature for these two statutes is designed to operate very simply: the statute to be applied to obtain the benefit of credits from pretrial settlements depends upon the types of defendants paying and seeking the credit. It is not at all uncommon to see a case with “mixed defendants,” some health care providers and others not, such as car wrecks, products or premises liability claims, in which there is also alleged some form of improper health care during treatment for the primary injuries. In such cases, it makes perfect sense that, as it concerns credits sought between defendants of a like type, that their particular statute would apply: doctor/doctor, apply Section 538.230 R.S.Mo.; car driver/car driver, apply Section 537.060 R.S.Mo. When there is a mix of types of defendants, as when either a car driver settles, and a doctor seeks the credit, or vice versa, then only Section 537.060 R.S.Mo. can logically apply since the special benefit and protection afforded by Section 538.230 R.S.Mo. exclusively extends to and protects health care providers, not general tort-feasors. However, here, Dr. Wright wishes to unilaterally opt out of this special protection under Section 538.230 R.S.Mo. without offering as much as a substantive explanation of why or how this works other than to blindly claim it’s automatic in that if he fails to request relief under Section 538.230 R.S.Mo., then somehow Section 537.060 R.S.Mo. springs to his rescue.

Section 538.230 R.S.Mo. is a special statute uniquely and exclusively applying to improper health care defendants, and Section 537.060 R.S.Mo. is a general statute enacted much earlier in time and applicable to tort claims in general. Statutes must be read in harmony with one another, and a statute which deals with a subject in general terms will yield to a second statute dealing with the same subject in a more detailed fashion. State ex rel. Nat. Super Markets, Inc. v. Sweeney, 949 S.W.2d 289, 292 (Mo. App. 1997). A chronologically later statute, which functions in a particular way, will prevail over an earlier statute of a more general nature, and the later statute will be regarded as an exception to or qualification of the earlier general statute. Lett v. City of St. Louis, 948 S.W.2d 614, 619 (Mo. App. 1996). Statutory construction is clearly a question of law. Burns v. Elk River Ambulance, 55 S.W.3d 466, 484 (Mo. App. 2001). The rule of statutory interpretation requires this Court to first ascertain the intent of the legislature by considering the language used while giving the words used in the statute their plain and ordinary meaning. Benoit v. Missouri Highway and Transp. Comm'n, 33 S.W.3d 663, 673 (Mo. App. 2000). "Only when language is ambiguous, or when it leads to an illogical result, may courts look past the plain and ordinary meaning of the statute." Carmack v. Missouri Dept. of Agric., 31 S.W.3d 40, 46 (Mo. App. 2000). Applying the rationale of limited availability depending on the defendant "mix" as advocated here allows these statutes to operate in harmony serving an obvious purpose, and avoids incongruous results as we have experienced in the trial court below.

The interpretation Dr. Wright urges this Court to adopt, which was followed by the trial court, would have this Court substantially re-write and add to Section 538.230 R.S.Mo. as follows:

538.230. 1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services where fault is apportioned among the parties and persons released pursuant to subsection 3 of this section, the court, unless otherwise agreed by all the parties, **in which event the provisions of Section 537.060 shall automatically apply in lieu of this section**, shall instruct the jury to apportion fault among such persons and parties, or the court, if there is no jury, shall make findings, indicating the percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability under subsection 3 of this section.

2. The court shall determine the award of damages to each plaintiff in accordance with the findings, subject to any reduction under **either** subsection 3 of this section **or under Section 537.060**, and enter judgment against each party liable on the basis of the rules of joint and several liability. However, notwithstanding the provisions of this subsection, any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant, **unless such defendant is not a health care provider**.

3. Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity but it does not discharge other

persons or entities liable upon such claim unless it so provides. However, the claim of the releasing person against other persons or entities is reduced by **either** the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release, **or by the appropriate dollar amount calculated under Section 537.060 if no such apportionment of fault is determined.**

(emphasized portions added.)

This Court must be very hesitant against re-writing any statutes which are otherwise very clear on their face. There is no indication that the legislature intended to allow a defendant like Dr. Wright here to pick and chose a verdict-credit remedy between the two statutes. The provisions of Chapter 538 expressly and very specifically control all aspects addressed therein of any cause of action asserted against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services. Section 538.230.1 R.S.Mo. Section 538.230 R.S.Mo. contains its own version of how we should address pretrial settlements which in part mirrors but is still somewhat different than the terms of Section 537.060 R.S.Mo. In lieu of any provisions expressly to the contrary as suggested in the example above, such provisions of Section 538.230 must supercede any other general statute to the contrary, including Section 537.060 R.S.Mo. Dr. Wright fails to point us to any statutory provision reflecting any legislative intent or interpretation to suggest that if the terms of Section 538.230 R.S.Mo. are not to apply to a particular case, that the different offset scheme contained in Section 537.060 R.S.Mo. is even available to him, much less automatically imposed.

Further analysis of Dr. Wright's argument that Section 537.060 R.S.Mo. completely

and automatically replaces Section 538.230 R.S.Mo. if no apportionment of fault is submitted by either party demonstrates that such is not valid. If Dr. Wright's analysis holds true, then the health care provider would also instantly lose the benefit of the modified joint and several liability specially designed for them in Section 537.230.2 R.S.Mo. The Normans seriously doubt Dr. Wright intends such a result, and thus his legal analysis is not valid, but only result motivated.

Dr. Wright has also snared himself by his own amended answer. He, and the trial court, totally failed to recognize that he requested relief under both statutes. L.F. 705, tab # 39. The absurdity of granting such an amendment is revealed at this point. The very clear reading of Section 538.230 R.S.Mo., now mandates that the trial court must submit apportionment of fault to the same jury. The trial court ignored that legal requirement, and its ruling granting relief under Section 537.060 R.S.Mo. was thus erroneous as a matter of law. No party has asked for a new trial based on this issue, and it is far too late to obtain a fair one now. Besides not being able to get the same jury back for an apportionment, Dr. Wright would be burdened with presenting expert witness testimony and evidence which he does not have as none was ever disclosed by him to support the allegations now contained in his amended answer. Dr. Wright openly admits in his filings that such would be his burden. L.F. 54, tab # 7. This unsolvable Gordian's Knot was brought to the attention of the trial court, but it was ignored. L.F. 705-706, tab # 39.

What Dr. Wright wants this Court to completely ignore is that all benefits come with attendant burdens. The special protective provisions of Section 538.230 R.S.Mo. afforded exclusively to health care providers has a cost: to obtain the desired benefit, that defendant must point the finger of fault toward a colleague, and that is very rarely desirable. Dr.

Wright has conceded to this legal requirement. L.F. 54, tab # 7. The fact that this requirement was terribly unpalatable to Dr. Wright is easily inferred from his persistent refusal to meet his obligations of amending his answer to contain a short and plain statement of fact supporting his claim for apportionment of fault despite repeated invitations to do so by the trial court at the Normans' urging. Despite his renewal of his Section 538.230 R.S.Mo. claims, he never identified any expert witness to support such pleadings.

If Dr. Wright's position is upheld here and the Normans' position is denied, then the fundamental requirement inherent in Section 538.230.1 R.S.Mo. will be completely usurped and nullified. That subsection obligates the court to instruct the jury to apportion fault unless otherwise agreed by all the parties; here, although there may have been an agreement by default or silence that no such apportionment was affirmatively requested by either party, it cannot be denied that there was absolutely no agreement that Dr. Wright was affirmatively entitled to, asking for, or gave fair notice to the Normans that he expected any offset or credit under 537.060 R.S.Mo. Thus, under Dr. Wright's argument, by his waiver of such apportionment rights, any similarly situated trial defendant would almost always compel the plaintiff to request apportionment, thereby effectively denying the plaintiff the equal right of any choice between the two statutes, or neither. Such a result contradicts the true meaning and legal concept of an agreement, and could never amount to any type of agreement as that word was explicitly chosen by the legislature, and would deny such plaintiffs a fair trial.

Important public policy reasons abound in favor of reversing this ruling and judgment. Partial settlements before trial, which are to be encouraged, will be discouraged

if the existence, much less the basis, of a credit can be completely changed long after trial. Appeals will flourish, and continue, and repeat for years after trial. The purpose of our amendment rules should be applied consistent with the pronouncement of Rule 1: they shall be construed and administered to secure the just, speedy, and inexpensive determination of every action. The after trial history of this case has been the exact opposite. The jury would be rightfully appalled to learn that the verdict they agreed upon regarding the amount that Dr. Wright himself owed to the Normans was being usurped and manipulated long after the fact based upon matters neither they nor the Normans had any reason to suspect would be invoked.

VI. CONCLUSION

In conclusion, Dr. Wright apparently did not want to point the finger at other local health care providers, which he would have been required to do if he had maintained his pretrial request for apportionment, therefore he decided to affirmatively waive his right to any offset under Section 538.230 R.S.Mo. just prior to trial. Also, Dr. Wright apparently was not terribly worried about suffering a significant verdict against him, and he elected through his inaction to waive and to not even try to pursue the dollar-for-dollar offset under Section 537.060 R.S.Mo. before trial. In essence, Dr. Wright chose to put all his eggs in a single defense verdict basket, gambled, and lost. After the fact, Dr. Wright sought to completely reverse the outcome; to change his “bet” after the trial. Such is neither just, nor contemplated anywhere, by statute, rules, or case law. He filed his first Alternative Motion to Amend his Answer; it was denied, and he chose to not appeal that decision. He chose to do nothing, and that is exactly what the law should now provide to him in response to his motion. After the first appeals process, he again tried to change his bet, and the trial court this time sustained his second Alternative Motion to Amend his Answer, turning everything upside down. If it was too late to amend the first time two weeks after trial, it was all the more so the second time two years after trial. A flawed trial strategy cannot be remedied by his second Alternative Motion to Amend his Answer. Allowing Dr. Wright’s actions here and sustaining his second Alternative Motion to Amend his Answer simply takes the fact issues away from the jury where they belong. The action taken by the trial court allowing this post-hoc reduction was an obvious abuse of discretion which severely prejudiced the Normans by completely denying them their substantive rights to rely on the pleadings, to fair notice of competing claims for affirmative relief, and to decide and arrange their

settlement and trial strategies accordingly. Dr. Wright's motion to amend was clearly without any merit, and should have been denied as a matter of law, and consistent with the law of the case and the pleadings as they existed at the beginning of trial, judgment should have been entered for the full amount of the jury's verdict without any reduction, fully effective as of the original date of entry, which this Court must now do.

Respectfully Submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned certifies that on this 13th day of September, 2004, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were hand delivered to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 21,812 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

David W. Ransin