
IN THE SUPREME COURT OF MISSOURI

No. SC86089

**JERRY & KIMBERLY NORMAN, individually and
as husband and wife, and JERRY NORMAN, as
plaintiff ad litem for KENNETH NORMAN, a deceased minor,
Appellants**

vs.

**ANDY J. WRIGHT, M.D.,
Respondent**

**Appeal from the Circuit Court of Greene County, Missouri
Honorable J. Miles Sweeney, Judge**

APPELLANTS' REPLY TO RESPONDENT'S SUBSTITUTE BRIEF

APPELLANTS REQUEST ORAL ARGUMENT

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REPLY TO DR. WRIGHT’S STATEMENT OF FACTS

Dr. Wright has supplemented the Normans' statement of facts. Aside from minor inconsistencies, the below correction is required.

The only significant disagreement appears on page 12 of his brief where he states that this Court "abrogated existing caselaw by holding that Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App. 1999) 'should no longer be followed.' Norman, supra at 785." First, the claim that this Court "abrogated existing caselaw" is as much argumentative as it is incorrect. Such argument has no place in the Statement of Facts, and the subject will be dealt with in more detail in the Argument portion of this reply brief at page 12.

Second, the partial quote from this Court's opinion is deceptively incomplete, and thus has been taken out of proper context. This Court stated: "Julien does not specifically address the pleading requirement for a reduction under Section 537.060. To the extent inconsistent with this opinion, Julien should no longer be followed." Norman v. Wright, 100 S.W.3d 783, 785 (Mo. banc 2003).

REPLY TO DR. WRIGHT'S POINTS RELIED ON

POINT ONE

The trial court palpably and obviously abused its discretion and thus erred, when it granted Dr. Wright's second motion for leave to amend his answer two years after the completion of trial,

because a trial court must examine all the factors that apply to a request for leave to amend a pleading and not just a single factor to the exclusion of the other factors,

in that the trial court focused only on achieving the end result so that the Normans would be limited to receive no more than "the entire amount awarded to them by the jury" as the exclusive factor in its analysis of whether to grant Dr. Wright's second motion to amend, and in thereby entering its judgment for the reduced amount.

POINT TWO

The trial court erred as a matter of law, not as a matter of discretion, when it granted Dr. Wright's second motion for leave to amend his answer two years after the completion of trial despite its prior denial of an identical first motion to amend a few weeks after trial, which ruling Dr. Wright accepted and chose to not appeal or contest in any fashion,

because,

- a) **assuming that a health care defendant has a choice between the two statutory offset schemes, if he elects to take no timely steps to assert such rights and proceeds to trial without affirmatively pleading any request for any offset whatsoever, but then is allowed, for the first time two years after trial, to amend his pleadings to add an affirmative offset request under Section 537.060 R.S.Mo., the plaintiffs can no longer respond and effectively amend their pleadings and obtain any relief under their counter request for apportionment of fault under Section 538.230 R.S.Mo.,**
- in that, prior to the commencement of trial, based on the pleadings existing at the time, the Normans had absolutely no reason to request any offset or apportionment under either statute given the total absence of any affirmative defense by Dr. Wright requesting any offset, and thus, the Normans are prohibited from doing so now,**
- and**
- b) **a defendant is an aggrieved party if he expects to benefit from a judgment affirmatively granting him specific relief which he knows is not supported by anything in his pleadings due to the denial of his request to amend to add the pertinent affirmative defense, and such a defendant is able to preserve the issue by contesting the adverse ruling on his motion to amend his answer in his after trial motions and by a provisional cross-**

appeal,

in that, after the denial of his first motion to amend, it was obvious to Dr. Wright that the offset granted by the first judgment was not supported by anything alleged in his answer, he knew the Normans were appealing the first judgment on that precise basis, and prudence dictated taking affirmative protective measures out of an abundance of caution rather than waiving the right to appeal a critical issue by taking no action whatsoever, thus the trial court was barred from granting the second motion to amend as its prior denial stood as the unchallenged law of the case.

Furthermore, this Court should review the Normans' contention regarding the law of the case doctrine since it does apply to this case, and they did include it in their appellate brief to the Court of Appeals, and they did request that the trial court deny Dr. Wright's second motion to amend consistent with its first ruling on the first motion to amend, and the judgment should be amended accordingly without any offset.

POINT THREE

This Court should review the Normans' claim that principles of statutory construction preclude the application of Section 537.060 R.S.Mo. to this case,

because there is a distinction between stating and thus preserving the precise trial court ruling which is contended to be erroneous as compared to what arguments are advanced to support that allegation of error made by the trial court,

in that the sole issue on this appeal concerns the erroneous granting of the second motion to amend and the reduced judgment entered thereon, which the Normans have consistently preserved while advancing refined arguments before the trial court and on appeal addressing that same single issue.

ARGUMENT

PRELIMINARY MATTERS

IMPROPER POINTS RELIED ON

Dr. Wright's points relied on do not comply with Rule 84.04(d). Compliance with Rule 84.04 is mandatory. Thummel v. King, 570 S.W.2d 679 (Mo. banc 1978). The Normans have endeavored to, but should not be required to, rewrite his points in order to make them comprehensible.

The rubric of Rule 84.04 is not merely a matter of form over substance, but rather the purpose is to finitely frame the issues on appeal between the parties. Grimes v. Bagwell, 837 S.W.2d 554 (Mo. App. 1992). Failure to abide by the requirements of Rule 84.04 is proper grounds for this Court to completely ignore his argument. Schneider v. Schneider, 824 S.W.2d 942 (Mo. App. 1992). Nonetheless, without waiving their objections to these deficiencies, the Normans will attempt their most direct reply to these points under the circumstances.

REPLY TO DR. WRIGHT'S FIRST POINT

This reply will track the same format and outline in Dr. Wright's brief.

A. Standard of Review

The Normans have no disagreement with the Standard of Review as stated by Dr. Wright, however as noted below, he confuses which arguments are matters of discretion and which are matters of law.

B. Factual Background

Several important points must be made here.

In his first paragraph, Dr. Wright admits that he "eventually waived his rights" under Section 538.230 R.S.Mo. and allowed the case to proceed to trial without alleging any offset under Section 537.060 R.S.Mo., but he fails to state any facts why his obvious waiver of any affirmative request for benefits under one statute does not waive the same for both statutes. Respondent's Brief, p. 16.

In his third paragraph, Dr. Wright admits that the trial court heard "'extensive' oral argument" on his second motion to amend covering all the factors, but fails to note the fact that in issuing its ruling the trial court acknowledged its reliance on only one factor: its perceived "windfall for the Plaintiffs." *Id.*, (L.F. 194, tab #28).

C. Analysis

1. Hardship on the moving party

Dr. Wright complains that the Normans have looked at the comparative hardship on both parties instead of focusing exclusively on the hardship on Dr. Wright if the motion were

denied. Dr. Wright boldly asserts that it is “undisputed” that the hardship on him will be severe, but he fails to note that the sole reason such hardship would fall on him lies with his own repeated failure to act to protect himself from the very hardship of which he now complains. Respondent’s Brief, p. 20. He failed to move to amend to add an offset request under Section 537.060 R.S.Mo. after his request for apportionment was stricken; similarly, he failed to move to amend the morning trial began when he openly waived his right to apportionment; after trial, he failed to amend before he moved for reduction of the verdict; he failed to contest the trial court’s denial of his first motion to amend; and he failed to cross appeal that denial. His complaints of hardship at his own hand, combined with his failure to compare it to the hardship on the Normans who now suffer serious hardship plus years of multiple appeals despite their repeated and concerted efforts to avoid the same, should fall on deaf ears at the very least. No court owes sympathy to those whose own delay causes their own hardship.

Dr. Wright claims that the Normans have failed to show any facts that the trial court erred in analyzing this factor. Respondent’s Brief, p. 20. The trial court’s own letter belies the reality that the trial court was singularly result-oriented in its effort to force the offset for Dr. Wright regardless of the proper decision which would be compelled by a fair analysis of the necessary factors. (L.F. 194, tab # 28).

This total disregard for the fair and just analysis of the pertinent factors is also demonstrated by Dr. Wright’s own words when, after the first appeal to this Court, he argued to the trial court that this Court’s opinion gave the trial court “a second chance to reach the same result through the use of a different procedural vehicle than that originally chosen by this

court.” (L.F. 188, tab # 25). Clearly, the hard, cold facts prove that Dr. Wright urged a purely result-oriented analysis, and the trial court erred in accepting that false analysis.

This factor was not fairly and justly analyzed by the trial court; it adopted Dr. Wright’s argument of “result-oriented” analysis instead. As such, this factor weighs heavily in the Normans’ favor

2. Why no timely amendment?

Dr. Wright never answers this question.

Plain and simple, had he made a timely amendment before trial, there never would have been any appeal, much less two trips all the way to this Court.

Instead, he now rationalizes that he relied on the holding of Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App. E.D. 1999) before trial to support his strategy that he was perfectly safe to wait until after trial before raising a request for offset under Section 537.060 R.S.Mo.

Again, the truth belies the falsehood in Dr. Wright’s argument here. If in fact he did so intently and specifically rely on Julien for such a calculated and risky strategy as he now claims, one would most certainly expect that the Julien case citation, and that precise argument, would have been very vigorously raised by Dr. Wright to the trial court at the very first opportunity immediately after trial. Neither happened.

Instead, this defensive “explanation/argument,” and the case of Julien, were never raised for the first time until the Respondent’s brief was filed on the first appeal. Julien is not cited in any of Dr. Wright’s filings before the first appeal. (L.F. tabs #14, 15, 17-19, 21).

In the first appeal Dr. Wright's counsel was asked point blank by this Court during oral argument why he affirmatively pleaded one statute but never affirmatively pleaded the other. No direct answer was ever given.

Nowhere in his after trial papers, nor anywhere in any of his appellate briefs does Dr. Wright answer this question, not even in his substitute brief; and at no time did the trial court ever ask Dr. Wright's counsel for any explanation to support its fair and just analysis of this factor, as it was obligated to do. The trial court simply did not analyze this factor; and, without any valid answer from Dr. Wright's counsel, the trial court had no factual basis by which to analyze this "timing" factor, and thus, did not do so.

Dr. Wright also falsely claims that this Court's first opinion in this case "abrogated" the holding of Julien. Such is simply not accurate.

As noted in the above reply to Dr. Wright's statement of facts, it is important to consider the full and proper context of this Court's reference to Julien. It was a distinction on a factual basis, not an abrogation of any existing legal concept. This Court noted that: "Julien does not specifically address the pleading requirement for a reduction under Section 537.060." Norman, 785. And, limited to that extent, this Court stated that Julien should not be construed as addressing anything regarding pleading requirements.

Dr. Wright has repeatedly argued that the case law was changed on him in the middle of the case; that this Court "abrogated" the holding of Julien. All this Court did in its reference to Julien was a limitation or distinction; not an overruling or "abrogation." The comment about Julien was quite limited to the pronouncement that since nothing in Julien dealt with any issue

concerning pleading requirements for a reduction under Section 537.060 R.S.Mo., to that extent it should not be read as supporting such an argument. In fact, since nothing in the facts of Julien had anything to do with such pleading requirements, it requires a real stretch of legal analysis to even make that connection to the issues in our present case. All this Court did was to cut off any future contorted arguments beyond the facts of that case.

The bottom line is that Dr. Wright's claims on appeal to have relied on Julien in formulating his pretrial strategy do not track his arguments made at the time his alleged reliance and strategy would have been most obviously fresh in his mind. Furthermore, Julien was not "abrogated," and no case law was "changed" on Dr. Wright in the middle of this case.

3. No prejudice proven to the Normans

In short, the record is filled with explanations to the trial court how the Normans had planned to "trump" any offset request made by Dr. Wright under Section 537.060 R.S.Mo. with their own apportionment request under Section 538.230 R.S.Mo.

Incredulously, Dr. Wright claims that: "This statement is completely unsupported by any factual basis." Respondent's Brief, p. 25. He argues that they fail to win on this factor because their brief contains no facts supporting what did not happen, simply because he did not amend his pleadings to add the affirmative request under Section 537.060 R.S.Mo. before trial; a purely tautological and false argument given the facts of this case.

Finally, in the same fashion as the trial court did in its letter, he argues that the Normans could have ended up in a better or a worse position had he amended his answer before trial. What Dr. Wright, and the trial court, consistently ignore are two crucial matters of undisputed

fact. The Normans claimed that the damage to Kenneth all happened within about one hour before his birth, and that he should have been delivered by C-section several hours earlier. First, Dr. Wright had no experts identified and prepared to testify at trial whose testimony would shift more blame to the settling parties than to him. Second, the mere chronological facts of the case made such an argument almost impossible. The settling parties were responsible for the health care during the evening before and up to about 6:00 a.m. of the morning of birth. At about 6:00 a.m. Dr. Wright took over and remained in full control. The concept of causation made the logical connection to fault on the part of the settling defendants very weak at best. For Dr. Wright now to suggest that the defendants who were no longer responsible for the child's well being might be somehow found more at fault than he was is pure disingenuousness, and lacks candor to the Court. The trial court was also very much aware of these details, and ignoring them further reveals the result-oriented approach advocated by Dr. Wright and adopted by the trial court in contravention of these important factors.

At page 27 of his brief, Dr. Wright argues the nonlegal point that despite the net effect of the \$100,000 offset against them, the Normans have "already received" the same amount awarded to them by the jury, as if this financial fact should somehow totally excuse him from all legal substantive and procedural requirements of proper and timely pleading. Again, this is purely result-oriented analysis and equally improper. The only case cited by Dr. Wright on this point is Brown v. Kneibert Clinic, 871 S.W.2d 871-872 (Mo. App. 1993) which was a "mixed" defendant case; an issue discussed under Point Three herein in more detail. Brown does not hold for the apparently implied contention that, regardless of pretrial settlements, and

regardless of the state of affirmative defense pleadings before trial or lack thereof, the plaintiff is limited as a matter of law to a total recovery of no more than the amount awarded by the jury. If the Normans had settled for \$500,000 and received the same verdict against Dr. Wright, there would be no “payback” to achieve any offset or reduction so that the Normans only recover the amount awarded by the jury. This jury only heard evidence of Dr. Wright’s fault. They were given jury instructions telling them to determine the amount that Dr. Wright owed the Normans for their losses that he caused, not any damages caused by anyone else. The jury never heard any expert testimony that anyone else in any way caused any damage to the Normans. If Dr. Wright wanted to present such evidence, he could have, but he chose not to. The jury’s verdict was against Dr. Wright and Dr. Wright only. (L.F. 79, tab # 13). It would be a terrible miscarriage of justice many years after trial to contort the jury’s verdict into a result it did not intend and into one which Dr. Wright chose to not ask for.

D. Remaining Factors

1. Timeliness of Dr. Wright’s request

Here, Dr. Wright audaciously claims that since there was no case precisely on point before this trial stating that Section 537.060 R.S.Mo. must be pleaded as an affirmative defense, his failure to do so should be completely excused. What Dr. Wright, and the trial court, totally ignore is the huge body of existing case law, and the Rules, very clearly stating that affirmative defenses must be raised or they are waived. Such is a very basic lesson every first year law student learns right away. The fact that no case had yet declared that the general rule of pleading affirmative defenses applies to a Section 537.060 R.S.Mo. offset request is

no excuse for Dr. Wright to have not exercised an “abundance of caution” to protect his rights accordingly. The claim for an offset is effectively one for partial satisfaction which is a classic affirmative defense. Furthermore, Dr. Wright, and the trial court below, totally ignore his acknowledgment that he was required to plead one statute seeking an offset as an affirmative defense, but totally fails to explain to any court why that is so, but now he should be wholly excused for not pleading a different statute for the same if not even larger offset!

Under this point, Dr. Wright again raises Julien incorrectly claiming since that case held that a motion for offset is a proper after trial motion in terms of calculating the time requirements for after trial pleadings and jurisdiction, then that case should shield him from the consequences of his before trial pleading insufficiencies. Such is simply neither true in fact nor the law. This was just discussed above, and need not be repeated here.

In the middle of page 30 of his brief, Dr. Wright makes further incredulous assertions. He claims he filed his first motion to amend at the very earliest possible date: 22 days after trial. He ignores the months if not years before trial that his request for apportionment was attacked during which he could have very easily moved to amend to add a request for offset under Section 537.060 R.S.Mo. Again, he makes arguments ignoring the obvious facts without explanation, and the trial court erred in requiring none.

2. Cure the inadequacy

Dr. Wright argues that the trial court ruled correctly because granting his second motion to amend “would completely cure” any defect in his pleadings. Respondent’s Brief,

p. 32. Again, in very consistent fashion, Dr. Wright points to only part of the truth. In a technical vacuum, he is correct. However, his first and his second motions to amend each asked to add both statutes to his answer in the form of pleading affirmative defenses. (L.F. tabs #18, 19, 25, 29). The trial court totally ignored the fact apportionment under Section 538.230 R.S.Mo. was requested in Dr. Wright's second amended answer in this regard despite it being brought to its attention by the Normans. (L.F. 205, tab #30). Both Dr. Wright and the trial court erroneously focused only on obtaining relief for Dr. Wright under Section 537.060 R.S.Mo. completely ignoring the actual legal content of his requests. Likewise, Dr. Wright here on appeal also ignores the fact that his second motion to amend added his request for apportionment under Section 538.230 R.S.Mo., yet he completely fails to explain to any court why, if the motion was properly considered and granted, the trial court was not required to apply apportionment under Section 538.230 R.S.Mo. as he specifically requested in lieu of the dollar for dollar offset under Section 537.060 R.S.Mo. The only reason is obvious: both Dr. Wright and the trial court were singularly focused on the result, not the fair and just process of analyzing the proper factors, the historic facts of the case, and the state of the pleadings and the consequences of granting the second motion to amend. As such, no, granting the motion does not "completely cure" the defects in Dr. Wright's pleadings; it only makes them worse, and the trial court erred as a matter of law by granting the second motion to amend.

3. Change the pending claims, and public policy

Here, Dr. Wright addresses this issue out of "an abundance of caution"; the same abundance of caution he chose to not exercise before trial, after trial, nor in a cross appeal; all

of which would have been prudent and timely. If any of those efforts had been made, we likely would not be here today. It is obvious that granting the second motion to amend vastly changed the entire complexion of this case.

The first portion of this part of Dr. Wright's argument appears to be a rehash of the argument addressed above claiming that his inaction until after trial did not bar the Normans from pursuing apportionment and will not be repeated here.

On page 34 of his brief, Dr. Wright argues that the parties "agreed" to "waive" the application of Section 538.230 R.S.Mo. by proceeding to trial without either party requesting its application in their pleadings, but he totally fails to explain why the same analysis and the same conclusion does not apply to the application of Section 537.060 R.S.Mo. since neither party requested application of that statute in their pleadings before proceeding to trial.

This very point is accentuated all the more by Dr. Wright's concession of the obvious: "The facts giving rise to respondent's affirmative defense were known to the parties both well in advance of trial." Respondent's Brief, p. 36. Why, if Dr. Wright was possessed of such completely equal knowledge well in advance of trial, should he not be required to plead an offset from that settlement "well in advance of trial," and that the trial court's granting of his second motion despite the unexcused delay of more than two years after trial is not too much, and should be permitted? Dr. Wright offers no answers.

At the bottom of page 36 and continuing to the top of page 37, Dr. Wright again inexplicably lapses into blaming the Normans for not requesting apportionment themselves despite his total failure to suggest any valid reason for them to do so. Somehow Dr. Wright

cannot fathom why a plaintiff would not be motivated to take the initiative to move for leave of court to affirmatively amend their own pleadings to request a reduction of the very verdict they have worked so hard to recover solely to benefit the defendant. Dr. Wright completely misses the pertinent issues.

Near the bottom of page 37 of his brief, Dr. Wright offers nothing more than a bold statement that future litigants will not be allowed to ask for apportionment under Section 538.230 R.S.Mo. at trial, and then be allowed to switch positions and ask for an offset under Section 537.060 R.S.Mo. He offers neither logical explanation, nor supporting case law, to justify this statement. The fact that but for the differences in making a pretrial apportionment request, this is exactly what he is asking this Court to approve here. He fails to answer why affirming the trial court's belated granting of his second motion to amend would not open this endless can of worms for all future litigants, and appellate courts.

Finally, on page 38 of his brief, Dr. Wright concedes that it is factually and legally impossible for the Normans to now submit and obtain relief by apportionment under Section 538.230 R.S.Mo. Yet, he fails to admit that the Normans had the right to consider invoking such a request if he timely raised an offset request under Section 537.060 R.S.Mo. At the same time, he wants this Court to allow him to make a request for an even greater offset more than two years after trial, and he believes that is fair and just. He simply either does not understand the issues, or completely ignores the legal issues in favor of an exclusively result-oriented mind set.

In conclusion, Dr. Wright failed to demonstrate he was justly and fairly entitled to have

his second motion to amend granted two years after trial, and the trial court abused its discretion and erred by failing to consider all the required factors to be used in that analysis. If properly evaluated by the correct use of its discretion, the trial court would have obviously denied the motion, and having granted the same, this Court must now reverse that decision.

REPLY TO DR. WRIGHT'S SECOND POINT

A. Standard of review

Dr. Wright misconstrues the argument made in this second point as being a matter of discretion. Instead, the argument is founded on waiver, bar, estoppel, and law of the case which are all matters of law, not discretion. Dr. Wright either did or did not waive his right to request an offset, and if waived, the trial court had no discretion to allow the request to be made two years later. If the trial court's denial of Dr. Wright's first motion to amend followed by the total failure to appeal that issue constitutes the law of the case, then the trial court had no discretion to reverse itself and two years later grant an identical motion.

B. Factual background

No substantive reply is needed as this is only a repeat of limited facts.

C. Denial of the Normans' right to apportionment

As discussed above, Dr. Wright admits that by the time the trial court granted his second motion to amend, it was far too late for the Normans to compel any relief by apportionment under Section 538.230 R.S.Mo. Nonetheless, as if totally ignoring his own admission just

noted, and with circular logic, Dr. Wright complains that the Normans have cited “no authority for the proposition that they were somehow barred from asking for apportionment,” therefore, this complaint by the Normans must fail. Respondent’s Brief, p. 43. On the next page, he asserts that the Normans could have asked for apportionment themselves before trial. While such is true in a logical vacuum ignoring all the facts of this case, it also ignores the reality that the Normans had no interest in reducing their own verdict just to benefit Dr. Wright.

D. Dr. Wright was an aggrieved party and could have cross appealed

Dr. Wright’s arguments are consistently inconsistent.

Immediately above, Dr. Wright argues because the Normans could have requested apportionment before trial when it would have not benefitted them, that having not so requested, they should then be barred from requesting apportionment after trial when it would benefit them.

In contrast, here Dr. Wright argues that even though he could have very easily requested an offset under Section 537.060 R.S.Mo. before trial when it would have been subject to counter efforts by the Normans, that having not so requested, he should then be allowed to request the same offset long after trial when that request can no longer be subject to any counter efforts by the Normans.

The very clear bottom line here is that after the denial of his first motion to amend, Dr. Wright knew he could file motions asking the trial court to reconsider the denial; he chose to do nothing. After the Normans filed their appeal, which Dr. Wright clearly knew was coming, he could have filed a cross appeal; but, again, he chose to do nothing. The only real issue in the

first appeal was the lack of any affirmative defense. Dr. Wright knew he was relying on obtaining affirmative benefits from the trial court's judgment which were not supported by any affirmative request in his answer, and that if the Normans won their appeal, that his answer would be deficient because the trial court denied his amendment which sought to do nothing but cure that same deficiency. Dr. Wright was certainly an aggrieved party in that specific context. The chance of an adverse ruling against Dr. Wright on appeal was far from a mere possibility or a "remote consequence." If nothing more, the same "abundance of caution" which he repeatedly refers to in his brief before this Court would dictate that he at least file the cross appeal as he would suffer no harm if it were dismissed as improper on the basis he now so belatedly raises. He chose to do nothing, and nothing is what he deserves.

A detailed review of the cases cited by Dr. Wright under this point would not benefit the analysis nor change the facts. His cross appeal would have raised a provisional issue which was neither of no "practical effect" nor was it moot given the posture of the issues and the facts. The Normans submit that had Dr. Wright properly and timely preserved the issue and raised it by cross appeal, this Court's footnote #2 would have been unnecessary; the entire case would have been squarely presented and decided, as it very well should have been but for Dr. Wright's failure to raise all the pertinent issues in a timely fashion.

Just as it rings true regarding the trial court's granting of the second motion to amend, Dr. Wright's arguments on this point are "too little, too late."

E. Law of the case was raised and does apply

Dr. Wright argues that the Normans did not preserve and raise the law of the case issue

in their second point relied on. In fact, they did in the middle of page 61 of their brief. Furthermore, the Normans first raised this point in their April 30, 2003 argument and letter to the trial court before this second appeal was filed. (L.F. 191-192, tab #27). Strenuous arguments were made to the trial court that it could not simply reverse its established, unchallenged ruling, on an identical motion solely in order to achieve a predetermined result. Simply put: if two weeks is too late the first time, two years is very clearly too late. The trial court was told it had no discretion as it was bound by Dr. Wright's own waiver, and its own prior ruling. The trial court erred in ignoring both legal principles to the severe prejudice of the Normans.

More inconsistency abounds as Dr. Wright defends his position on this point. Despite the April 30, 2003 argument documented in the Legal File and noted above, Dr. Wright boldly claims on page 49 of his brief that the Normans "never brought the applicability of the law of the case doctrine to the trial court's attention." (citations omitted). Also, despite his admission that the Southern District's opinion in this case is a "nullity" (his footnote 2 on page 50), on page 49 he argues that the Normans did not raise the concept in the lower court of appeals. Just as his arguments about his second motion to amend, Dr. Wright cannot have it both ways.

Later, Dr. Wright argues that "new issues" were raised after the first appeal of this case. The Normans do not see any new issues now which were not "in full bloom" well before the first appeal was filed. Respondent's Brief, p. 51.

In similar fashion, contrary to the protests of Dr. Wright, this Court's opinion has not

“dramatically changed the nature” of this case. Id. Dr. Wright is still trying to justify his delay followed by his belated amendment efforts he started by filing his first motion to amend.

Therefore, the cases cited by Dr. Wright are not on point, and detailed discussion of their facts and holdings would not benefit the analysis of the true issues on this appeal.

Nothing legally or factually changed in any material way to Dr. Wright’s benefit to justify the trial court’s complete reversal of its rulings, and it was bound as a matter of law to deny the second motion to amend just as it had the first.

REPLY TO DR. WRIGHT’S THIRD POINT

A. Statutory construction was presented and has merit

Well before the first appeal during the heavy exchange of motions in the trial court, Dr. Wright cited to the case of Brown, and the Normans replied by distinguishing it on the basis that it involved a mix of health care and non-health care defendants, thus explaining very simply why in very limited instances it is proper to apply the offset under Section 537.060 R.S.Mo. to a case involving a health care defendant. (August 20, 2001) (L.F. 15-16, tab # 16). This issue was raised and argued to the trial court, but the focus shifted and quickly centered on the key issue of what was or was not contained in Dr. Wright’s answer and whether such was required. Thus, once again, arguments were indeed raised to the trial court which Dr. Wright now tells this Court were not.

There is also a difference between preserving a claim on appeal by stating the precise ruling which is contended to be in error, as compared to formulating various legal arguments

as to why that particular ruling constitutes error. In this case, we have but one erroneous ruling by the trial court which was timely and properly preserved for appeal, but the Normans are raising three alternative legal arguments why that ruling was erroneous. No new error of the trial court has been raised, and Dr. Wright confuses the alleged error with the different arguments advanced by the Normans to support that allegation of error. This point raises an argument in the form of an issue of law, not discretion, and it is before this Court de novo, and such is proper.

In contrast to the contrary arguments Dr. Wright makes in his brief, at page 62 he argues that this Court's opinion where it cites Vincent by Vincent v. Johnson, 833 S.W.2d 859 (Mo. banc 1992) constitutes the law of this case and thus defeats the Normans' argument under their third point. It is important to note that this part of the opinion was not necessary for its decision and is merely dictum, and not of any binding effect on any court. As has been suggested in their brief, the Normans believe this Court should now use this appeal as an opportunity to revisit that portion of the prior opinion in light of the current issue and arguments.

This Court will probably remember and can take judicial notice that this issue regarding Sec. 538.230 R.S.Mo. as the exclusive option for Dr. Wright was raised in the briefs during the prior appeal, and was discussed at oral argument as a subject raised by questions from the bench. This argument is not new to this case, and very strong judicial and public policy require that it be fully addressed.

B. Section 538.230 R.S.Mo. was waived, then brought back again

Once again, Dr. Wright's arguments are inconsistent.

He argues that despite his waiver of any contest of the trial court's denial of his first motion to amend, he should nonetheless be able to reverse course and raise the same offset by his second motion to amend.

Now, he admits he waived apportionment before trial under Section 538.230 R.S.Mo., nonetheless, that very same waiver should hold fast and deny any operative effect to his later request for apportionment in his amended answer. Respondent's Brief, p. 64.

Again, on page 65 of his brief, he advances his position that his prior waiver of apportionment should not be ignored, and therefore the subsequent request is inoperative, but he fails to explain why his prior waiver of any Section 537.060 R.S.Mo. offset should be ignored so that his subsequent request for that offset can be operative. He cannot have it both ways.

This is a critical issue which has been properly raised and deserves the full attention of this Court.

CONCLUSION

For the above reasons, the judgment of the trial court must be reversed and a new judgment entered for the full amount of the jury's verdict as requested in the Normans' substitute brief

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 29th day of October 2004, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed to the office of

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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 6678 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