

IN THE SUPREME COURT OF MISSOURI
SC 90708

JANA KIVLAND, et al.,

Appellants-Plaintiffs,

v.

COLUMBIA ORTHOPAEDIC GROUP, LLP, et al.,

Respondents-Defendants.

Appeal from the Circuit Court of the County of Boone, Missouri
Cause No. 05BA-CV02721
Judgment dated March 4 2009
Honorable Gary M. Oxenhandler

Transferred after Opinion from the Western
District Court of Appeals by Order of this Court.

APPELLANTS' SUBSTITUTE BRIEF

Stephen R. Woodley, #36023
Joan M. Lockwood, #42883
Thomas K. Neill, #51959
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
swoodley@grgpc.com
jlockwood@grgpc.com
tneill@grgpc.com
[314] 241-5620 Office
[314] 241-4140 Fax

Counsel for Appellants

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JURISDICTIONAL STATEMENT

Jurisdiction is appropriate pursuant to Rule 83.04 in that, following an Opinion by the Court of Appeals, Western District, this Court sustained Appellants' application for transfer.

This is an appeal from the summary judgment entered on March 4, 2009 by the Circuit Court of Boone County, Missouri. A1-2.¹ The Judgment was entered in favor of Respondents Columbia Orthopaedic Group and Robert Gaines, M.D. on the claims of Appellants Jana Kivland and Kristin K. Bold for wrongful death and lost chance of survival. A1-2.

Rule 74.01(b) permits a circuit court to certify a judgment of "one or more but fewer than all of the claims or parties" as final if the circuit court expressly finds "no just reason for delay." *Nicholson Construction Company v. Missouri Highway and Transportation Commission*, 112 S.W.3d 6, 10 (Mo.App. W.D. 2003) quoting Rule 74.01(b). Here, the March 4, 2009 Judgment was entered pursuant to Rule 74.01(b) and expressly stated that there was no just reason for delay. A2.

To confirm that a judgment disposing of less than all claims is final, a court must decide whether each dismissed claim constitutes a single, yet complete, claim. *Fischer v. City of Washington*, 55 S.W.3d 372, 377 (Mo.App. E.D. 2001). A judgment is final if it

¹ This version of the Judgment is found at L.F. 00501-502. For the signed copy of the Judgment, see L.F. 00496. Appellants have attached the unsigned copy of the Judgment in the Appendix as it is in a larger font and easier to read.

disposes of a distinct “judicial unit.” *Id.* at 378, *citing Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. 1997). “It is ‘differing,’ ‘separate,’ ‘distinct’ transactions or occurrences that permit a separately appealable judgment, not differing legal theories or issues presented for recovery on the same claim.” *Id.*

Here, the Circuit Court’s order granting summary judgment disposed of claims for Wrongful Death (Count VII) and Lost Chance of Survival (Count VIII). L.F. 00040-44, A2. These claims are entirely distinct from the claims which remain pending below: Medical Negligence/Personal Injury (Counts I, II, III, and IV), Loss of Chance (Count V) and Loss of Consortium (Count VI). L.F. 00026-39. These pending claims each vested in a plaintiff upon the original negligent acts. But the two claims disposed of by the trial court did not vest until the death of decedent. Further, while the pending claims are of common law origin, the wrongful death and lost chance of survival claims are statutory causes of action. Mo. Rev. Stat. § 537.080 and Mo. Rev. Stat. § 537.021. Because the claims dismissed by the trial court’s grant of summary judgment are distinct judicial units, this matter is appealable pursuant to Rule 74.01(b).

STATEMENT OF FACTS

This case involves a claim of medical malpractice which caused paralysis, intractable pain, and ultimately death. The case was originally brought by Gerald and Jana Kivland alleging claims for personal injury; loss of chance; and loss of consortium. After Mr. Kivland's death, the petition was amended to include claims for wrongful death and lost chance of survival, and to add Mr. Kivland's daughter, Kristen Bold, as a party. At issue on appeal is the propriety of summary judgment entered in favor of Respondents on the wrongful death and lost chance of survival claims.

A. Gerald Kivland's state of mind prior to the January 10, 2005 spinal surgery.

Prior to undergoing spinal surgery by defendants on January 10, 2005, Mr. Kivland lived a very active life that had no limitations. L.F. 00186, L.F. 00189-90 (p. 88-89). He lived with his wife, Jana Kivland, at their home in Tampa, Florida. L.F. 00169 (p. 7). Mr. Kivland enjoyed a normal lifestyle—working, playing and traveling. L.F. 00218. He walked on the beach at least every other day, and enjoyed doing home and yard maintenance. L.F. 00177-78 (p. 37-42), L.F. 00180-81 (p. 52-54), L.F. 00186 (p. 74). Additionally, he enjoyed swimming, golfing, boating, riding on wave runners and socializing with friends. L.F. 00219 (p. 17-18), L.F. 00188 (p. 82-83), L.F. 00196 (p. 114). Mr. Kivland was a strong-willed man who never complained. L.F. 00199 (p. 125). Before his back surgery, he never appeared to be depressed, L.F. 0049, nor had he needed chronic pain medication. L.F. 00186.

In 2004, Mr. Kivland began feeling pain in his mid to lower back and noticed a significant curve in his spine. L.F. 00188. It was ultimately decided that he would

undergo surgery in Columbia, Missouri in January 2005 with Dr. Robert Gaines as his surgeon. L.F. 00189 (p. 87-88). As of December 2004, one month before his surgery, Mr. Kivland's activities had not decreased. L.F. 00189.

B. The January 10, 2005 spinal surgery left Gerald Kivland a parapalegic.

On January 10, 2005, Dr. Gaines performed surgery on Mr. Kivland's lower back to correct the curvature of his spine. L.F. 00048. Dr. Hanscomb, a surgeon who observed the surgery, told Mrs. Kivland that a probe was incorrectly used during the surgery. L.F. 00183 (p.61-62). Less than an hour after the surgery, Mrs. Kivland received a call from the hospital notifying her that her husband could not wiggle his toes. L.F. 00192 (p. 97). Following surgery, Mr. Kivland was paralyzed from the waist down and never regained function. L.F. 00049, L.F. 00202 (p. 137).

C. Gerald Kivland's state of mind following the spinal surgery that left him paralyzed and in progressive, debilitating pain.

Dr. Gaines's surgery left Mr. Kivland paralyzed from the waist down and left him in agonizing pain that progressively worsened until the last day of his life. L.F. 00049, L.F. 00202 (p. 137). The excruciating and progressive pain in his lower extremities could not be suppressed by pain doctors. L.F. 00197 (p. 118-19). Mr. Kivland's pain originated in his hips and tightened around his testicular area. L.F. 00200 (p. 129). He felt a burning sensation in his legs as if they were on fire. L.F. 00200 (p. 129). The pain was so acute that it even hurt to have a sheet touch his legs. L.F. 00227 (p. 52).

Since the day following the surgery, Mr. Kivland took Neurontin for pain and shortly thereafter was prescribed Wellbutrin, an antidepressant, to treat his arthritis.

L.F. 00198 (p. 124). He was also placed on two anti-anxiety medications. L.F. 00358. During his stay at a rehabilitation facility after the surgery, Mr. Kivland was examined by specialists to treat his pain. L.F. 00067. At the rehabilitation center, doctors increased the dosages of Neurontin and prescribed Oxycontin to treat the pain along his nerves. L.F. 00067, L.F. 00338. Doctors there also increased the dosage of Wellbutrin to an “antidepressant dose” to treat major depressive disorder. L.F. 00067. Later, he was prescribed Baclofen and Methadone to treat his pain. L.F. 00341.

In order to reduce pressure on his testicles, Mr. Kivland had to sit with his legs far apart in the position of a V, making wheelchairs very painful for him. L.F. 00199 (p. 128). Towards the end of his life, transferring in and out of his wheelchair was so painful that he could only transfer a single time before having to lie in bed. L.F. 00199 (p. 125). Mr. Kivland often cried out in pain; at times, he was unable to sleep due to the pain. L.F. 00199 (p. 125), L.F. 00227 (p. 52).

Mr. Kivland had a morphine pump surgically implanted and received numbing agents and “different concoction[s]” of medication in hopes that it would help him feel better. L.F. 00227 (p. 52). The surgical placement of the morphine pump took place on February 10, 2006, less than one month before his death. L.F. 00344. Unfortunately, the pain only worsened. L.F. 00227 (p. 52).

Believing he had exhausted all of his medical options, Mr. Kivland felt that his neuropathic pain would only worsen. L.F. 00229 (p. 60). After the surgery, he was diagnosed with depression. L.F. 00339. He could not understand why he felt so much pain while others who were paralyzed did not experience any pain. L.F. 00199 (p. 125).

He was very aware of his situation as he watched his body deteriorate and found it difficult to cope. L.F. 00200 (p. 130), L.F. 00201 (p. 136). Mr. Kivland felt defeated, expressing to his daughter that “he just couldn’t figure out what to do.” L.F. 00228 (p. 53). Prior to the end of his life, he was told that there was nothing to better his situation and that it would only worsen. L.F. 00229 (p. 59).

On March 9, 2006, Mr. Kivland committed suicide. L.F. 00207 (p. 158). Prior to that time, he prepared farewell notes to his wife and daughter, writing “my condition will only deteriorate over time, and all the bad changes we have seen over time will worsen” and “my courage has come to an end.” L.F. 00282-83. One note specifically told his wife “when the time is right, make sure you let Dr Gaines know of the pain he brought to the two of us, because of his negligence.” L.F. 00282.

Because of the paralysis, disability, and extreme pain that resulted from the January 10, 2005 surgery, Mr. Kivland was of the mindset that death was his only reasonable option. L.F. 00285. He had options available to him, but was unable to consider them due to the perception caused by his dire condition. L.F. 00285. His torment resulting from the January 10, 2005 operation prevented him from making a rational choice between continued life, love of family, and the possibility of relief versus death. L.F. 00285. There is evidence that Mr. Kivland was bereft of reason because of his mindset that he had no option other than suicide, when in fact he did. L.F. 00285.

D. Proceedings Below

Prior to filing their Second Motion for Partial Summary Judgment, the motion granted by the trial court, Respondents filed their first Motion for Partial Summary

Judgment on January 14, 2008. L.F. 00012. In response to the first Motion, Appellants filed the affidavit of Dr. Michael Jarvis, a board certified psychiatrist and Chief Medical Director of Inpatient Psychiatry at Barnes-Jewish Hospital in St. Louis, Missouri. L.F. 00284. Dr. Jarvis has extensive education and training in psychiatry. L.F. 00288-00297.

In his affidavit, Dr. Jarvis stated his opinions to a reasonable degree of medical certainty based upon his review of Mr. Kivland's medical records and depositions in this case. L.F. 00285-00286. Dr. Jarvis opined:

...

5. It is my opinion based upon review of those materials that Mr. Kivland died as a direct result of the injuries suffered during the surgery of January 10, 2005, which caused Mr. Kivland's paralysis, disability and severe and progressive pain.

6. It is my opinion that the paralysis, disability and pain brought about by the surgery of January 10, 2005, caused and/or contributed to cause Mr. Kivland's death by suicide.

7. It is my opinion that at the time of his death, because of his paralysis, disability and pain from the surgery of January 10, 2005, Mr. Kivland was of the mind set that death by suicide was his only reasonable option.

8. It is my opinion that Mr. Kivland did have other reasonable options that he was not able to consider because of his mind set that was brought about by his condition of paralysis, disability and pain.

9. Suicide, by definition, is the intentional infliction of one's own death. An involuntary act is one that is not preceded by rational choice. It is my opinion that the injuries sustained by Mr. Kivland in the operation of January 10, 2005 including paralysis, disability and pain caused him to be of the mind set such that he was not making a rational choice between continued life, love of his family and the possibility of relief verses death.

10. It is my opinion that while "insanity" is not a medical diagnosis, if it is defined as bereft of reason, there is evidence that Mr. Kivland met that criteria because of his perception that he had no option other than suicide when in fact he did.

...

L.F. 00285.

Respondents' first Motion for Partial Summary Judgment was denied on April 15, 2008. L.F. 00014.

Subsequently, Dr. Jarvis testified by deposition. L.F. 00232. He reiterated the points he made in his affidavit. L.F. 00232-267. Consistent with his affidavit, Dr. Jarvis did not testify that Gerald Kivland became insane following the surgery or that Gerald Kivland's suicide was a result of an insane impulse. A3. Rather, he confirmed that insanity is not a medical diagnosis. L.F. 00258 (p. 102).

On September 19, 2008 Respondents filed a Motion to Strike Plaintiffs' Expert Witness, Dr. Jarvis. L.F. 00016. Although Respondents asked that Dr. Jarvis be completely barred from testifying, the court ruled only that:

Michael Jarvis shall not be permitted to testify at the trial of this matter as an expert on the issue that:

- alleged negligence of the Defendants caused Gerald Kivland to become insane in the sense that 1) the insanity prevented the [sic] Gerald Kivland from understanding what he was doing or understanding its inevitable or proper consequences, or 2) Gerald Kivland's act of suicide was the result of an insane impulse which prevented reason from controlling his actions; or
- that Gerald Kivland was insane.

L.F. 00130-132, A4. The order did not exclude any of Dr. Jarvis's opinions.

On December 15, 2008, Respondents filed a Second Motion for Partial Summary Judgment, which was granted. L.F. 00046-47, A1-2. After an opinion from the Court of Appeals, Western District, this Court sustained Appellants' application for transfer pursuant to Rule 83.04.

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE SUMMARY JUDGMENT WAS IMPROPER IN THAT THE EVIDENCE ESTABLISHED THAT, OR CREATED A GENUINE ISSUE OF FACT WHETHER, MR. KIVLAND'S DEATH WAS PROXIMATELY CAUSED BY RESPONDENTS' NEGLIGENCE.**

Wallace v. Bounds, 369 S.W.2d 138 (Mo. 1963)

Eidson v. Reproductive Health Services, 863 S.W.2d 621 (Mo.App. E.D. 1993)

- II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE RULING VIOLATES ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION, THE OPEN COURTS PROVISION, IN THAT IT UNREASONABLY RESTRICTS A RECOGNIZED CAUSE OF ACTION.**

Mo.Const.Art. 1 §14

Kilmer v. Mun, 17 S.W.3d 545 (Mo. 2001)

Mo.Rev.Stat. §537.080

STANDARD OF REVIEW

The grant of summary judgment is reviewed *de novo*. *ITT Comm. Financial Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). Summary judgment is an extreme remedy which a trial court should not invoke without exercising great caution. *Bell v. Garcia*, 639 S.W.2d 185, 190 (Mo.App. E.D. 1982). Summary judgment “borders on a denial of due process” because it deprives an individual of his “right to a day in court.” *Wilson v. Simmons*, 103 S.W.3d 211, 220 (Mo.App. W.D. 2003). The facts and all reasonable inferences must be viewed in favor of the non-moving party. *ITT*, 854 S.W.2d at 376; *United Missouri Bank, N.A. v. City of Grandview*, 105 S.W.3d 890, 898 (Mo.App. W.D. 2003). Summary judgment is appropriate “only when no theory within the scope of the pleadings, depositions and affidavits filed would permit recovery.” *Hammonds v. Jewish Hosp. of St. Louis*, 899 S.W.2d 527, 530 (Mo.App. E.D.1995).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE SUMMARY JUDGMENT WAS IMPROPER IN THAT THE EVIDENCE ESTABLISHED THAT, OR CREATED A GENUINE ISSUE OF FACT WHETHER, MR. KIVLAND'S DEATH WAS PROXIMATELY CAUSED BY RESPONDENTS' NEGLIGENCE.

Appellants have established all of the elements of Missouri's Wrongful Death Statute. A *prima facie* case for medical negligence requires a showing that: (1) an act or omission of the defendant failed to meet the requisite medical standard of care; (2) the act or omission of the defendant was performed negligently; and (3) there was a causal connection between the act or omission and plaintiff's injury. *Wilson v. Lockwood*, 711 S.W.2d 545, 550 (Mo.App. W.D. 1986). Missouri's wrongful death statute, Mo. Rev. Stat 537.080, states:

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages....

Mo. Rev. Stat. §537.080.

Before the trial court, Appellants produced evidence that Mr. Kivland's paralysis was the result of Respondents' negligence. L.F. 00417 (p. 44 1.18-25). In fact, Respondents' Second Motion for Partial Summary Judgment did not even dispute that

their negligence was a “but for” cause of Mr. Kivland’s death. L.F. 00053-59. Rather, Respondents argued that the suicide was an intervening cause, such that the causal connection between their conduct and Mr. Kivland’s death was terminated. L.F. 00055-57. As a matter of law, suicide is not an intervening cause in every instance. Rather, the law is clear that causation can be an issue for the jury in suicide cases. *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470 (8th Cir. 1987). Here, the evidence demonstrates the existence of a jury question as to whether Respondents’ negligence caused or contributed to cause Mr. Kivland’s death.

A. Appellants satisfied the “but for” test to establish that Mr. Kivland’s death was caused or contributed to be caused by Respondents’ negligently performed surgery.

This Court has established that causation is determined by a “but for” test. *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 860 (Mo. 1993). The “but for” test provides causation if a plaintiff’s injury would not have occurred “but for” the defendant’s conduct. *Id.* at 861. A defendant’s conduct must directly cause or directly contribute to cause the plaintiff’s injury. *Id.* at 863. The injury to plaintiff does not have to be foreseeable, but rather it is sufficient that defendant “could foresee the person who would be injured as opposed to the nature of the injury.” *Id.* at 865. It must simply be a natural and probable consequence of the act or omission of the defendant. *Id.* at 865.

The practical test for proximate cause is whether the negligence is an efficient cause which sets in motion the chain of circumstances leading to the plaintiff’s injury or damages. *Schaffer v. Bess*, 822 S.W.2d 871, 876 (Mo.App. E.D. 1991). This test

requires courts to look back, after the occurrence, and examine whether the injury appears to be the reasonable and probable consequence of the defendant's conduct. *Buchholz v. Mosby-Year Book, Inc.*, 969 S.W.2d 860, 861-62 (Mo.App. E.D. 1998).

An intervening cause is a new and independent force which so interrupts the chain of events as to become the responsible, direct, proximate, and immediate cause of the injury, rendering the prior negligence too remote to operate as the proximate cause. *Schaffer*, 822 S.W.2d at 877. For a tortfeasor to escape liability, the intervening act "must be of a wholly independent, distinct, successive, unrelated character." *Boggs v. Lay*, 164 S.W.3d 4, 19 (Mo.App. E.D. 2005). "Negligent conduct ceases to be the proximate cause of an injury only when the intervening act constitutes such a new and independent cause that it interrupts, rather than contributes to, the chain of events set in motion by the original negligence." *Id.* "[T]he omissions and acts of either party to a damage suit for personal injuries suffered by plaintiff cannot be a new and independent cause." *Chambers v. Bunker*, 598 S.W.2d 204, 207 (Mo.App. S.D. 1980)

Here, the self-inflicted gun shot wound was an event set in motion by the injuries sustained in the original, negligent surgery that rendered Mr. Kivland paralyzed and in constant, chronic, debilitating pain. L.F.00202 (p. 137, l. 18-20), L.F. 00350-353. He was on experimental drug therapies to combat the pain, and even that did not provide relief. L.F. 00342-346. He believed that there was nothing that could be done to treat or alleviate his pain. L.F. 00282, L.F. 00200 (p. 130-131, l. 23-12). In the note he left his wife, Mr. Kivland indicated that he took his life because of the difficulties, the pain, and the change in circumstances caused by the negligently performed surgery. L.F. 00282.

He specifically told his wife “when the time is right, make sure you let Dr. Gaines know of the pain he brought to the two of us, because of his negligence.” L.F. 00282. This death was by no means wholly independent, distinct, or unrelated to the negligent surgery. At the very least, this is an issue of material fact.

“The trier of fact normally decides causation, especially where reasonable minds could differ as to causation on the facts of the case.” *Williams v. Missouri Highway and Transp. Com'n*, 16 S.W.3d 605, 611 (Mo.App. W.D. 2000)(reversing summary judgment and rejecting defendant’s argument of an intervening cause)(internal citations omitted). The issue of intervening cause is for the jury when the facts presented are of such a nature and are so connected and related to each other that the conclusion that the negligence was the proximate cause of the injury may be fairly inferred. *Swindell v. J. A. Tobin Const. Co.*, 629 S.W.2d 536 (Mo.App.W.D. 1981).

In *Kuhn*, plaintiff’s decedent was struck and killed by a shuttle bus being driven by an off-duty, intoxicated employee of the bus owner. *Kuhn v. Budget Rent-A-Car of Missouri, Inc*, 876 S.W.2d 668 (Mo.App. W.D. 1994). The trial court granted summary judgment in favor of the bus owner. The appellate court reversed, finding that there was an issue of fact as to causation and rejecting the bus owner’s claim of intervening cause. Similarly, the issue of fact as to causation in this case precludes Respondents’ claim of an intervening cause.

1. **Appellants produced uncontroverted expert testimony which established that Mr. Kivland's death was caused by Respondents' negligence.**

Michael Jarvis, M.D. is a board certified psychiatrist and Chief Medical Director of Inpatient Psychiatry at Barnes-Jewish Hospital in St. Louis, Missouri. L.F. 00284-286. He has extensive education and training in psychiatry, and has experience and training in diagnosing and treating patients similar to Mr. Kivland. *Id.* L.F. 00288-297.

Dr. Jarvis reviewed medical records and deposition testimony in this case and is familiar with Mr. Kivland's medical course and ultimate death. L.F. 00284. It is Dr. Jarvis's opinion that:

- Mr. Kivland died as a direct result of the injuries suffered during the surgery, which caused his paralysis, disability and severe and progressive pain.
- The paralysis, disability and pain brought about by the surgery caused and/or contributed to cause Mr. Kivland's suicide.
- Because of the paralysis, disability and pain, Mr. Kivland was of the mindset that suicide was his only reasonable option, when in fact he had other reasonable options.
- The injuries sustained by Mr. Kivland in surgery caused him to be of such a mindset that he was not making a rational choice between continued life, love of his family and the possibility of relief verses death.

- While “insanity” is not a medical diagnosis, there is evidence that Mr. Kivland was bereft of reason.

L.F. 00285. This evidence demonstrates that the self-inflicted gun shot wound was caused or contributed to be caused by the negligent surgery, and not, as Respondents urge, “wholly independent” of the surgery.

In their Second Motion for Partial Summary Judgment, Respondents argued that Appellants do not have an expert witness to establish causation for Mr. Kivland’s death. L.F. 00057. This is incorrect and belied by the record. When ruling on Respondents’ Motion to Strike Dr. Jarvis, the trial court did not preclude Dr. Jarvis from rendering a single opinion he holds in this case. A3-4. Rather, the trial court held:

Michael Jarvis shall not be permitted to testify at the trial of this matter as an expert on the issue that:

- alleged negligence of the Defendants caused Gerald Kivland to become insane in the sense that 1) the insanity prevented the [sic] Gerald Kivland from understanding what he was doing or understanding its inevitable or proper consequences, or 2) Gerald Kivland’s act of suicide was the result of an insane impulse which prevented reason from controlling his actions; or
- that Gerald Kivland was insane.

A4. Implicit in this order is the trial court’s permission for Dr. Jarvis to testify at trial as to matters not specifically barred. If the trial court had decided to bar Dr. Jarvis from

testifying at all, then surely it would not have gone through the effort of listing the specific opinions which he could not offer.²

Moreover, when ruling on the Second Motion for Partial Summary Judgment, the trial court confirmed that its evidentiary order merely “limited” Dr. Jarvis’s testimony and did not bar the opinions set forth in his affidavit. A1-2.

As such, all of the opinions offered by Dr. Jarvis remain. Despite his uncontroverted testimony, the trial court granted Respondent’s Second Motion for Partial Summary Judgment. *Id.*

² The Court of Appeals significantly broadened the scope of the trial court’s order, holding that “when the trial court limited Dr. Jarvis from testifying that Kivland was insane or suffering from an insane impulse, it prevented Dr. Jarvis from testifying that Kivland's suicide was involuntary.” *Kivland v. Columbia Orthopaedic Group, LLP*, 2009 WL 4907865, 6 (Mo.App. W.D. 2009). But the trial court’s proscription of opinions is specific and finite, and whether the death was voluntary was not among the opinions barred. A4. Because the ruling on appeal is the grant of summary judgment, not the evidentiary ruling, the record must be reviewed in the light most favorable to Appellants. *ITT Commercial Finance Corp. v. Mid America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. 1993). As such, the scope of the order cannot be expanded on appeal.

B. The evidence establishes that, or at least shows a genuine issue of material fact whether, Mr. Kivland was bereft of reason at the time of his death.

In Missouri, it has been held that death caused by voluntary suicide can be an intervening act which breaks the causal connection between the negligent act and the death. But it is well recognized that this is not always the case. As this Court held:

[W]here, as the proximate result of the injury the person injured becomes insane and bereft of reason, and while in this condition and as a result thereof he takes his own life, his act being involuntary, the act causing the injury has been held to be the proximate cause of death.

Wallace v. Bounds, 369 S.W.2d 138, 143-144 (Mo. 1963).³

³ It should be noted that in *Wallace* the plaintiff presented no expert testimony. As such, the Court did not hold that there must be testimony identical to the standard it announced in order to submit the case to the jury. It also did not require, as the Court of Appeals did, that there must be testimony that “the victim was suffering from a mental disease.” *Kivland, supra*, at 5. If the law is to require the finding of a specific mental disease, that would significantly increase the burden on plaintiffs. Because suicide necessarily precludes a psychological examination of the decedent, and because the decedent’s condition may have gone untreated, experts must necessarily engage in a retrospective review. While such a review might allow an expert to determine whether the decedent was bereft of reason, acting involuntarily, or whether the injury was a cause of the death,

Here, the evidence and expert testimony is that the suicide was involuntary, it was caused by the injuries Mr. Kivland suffered during surgery, and that Mr. Kivland was bereft of reason. L.F. 00285. This evidence alone comports with *Wallace* and is sufficient to present the issue to the jury.

Additional evidence confirms that the case meets *Wallace*. Mr. Kivland's extreme and progressively worsening pain, which developed as a result of the surgery, caused him to be of the mindset that death was his only reasonable option, when, in fact, there were reasonable options which he was unable to consider due to his condition. *Id.* He was on various pain medications and his physicians had resorted to pain management hotlines and national experts in an attempt to help him. L.F. 00352-353. His final days were spent in excruciating pain during which he had difficulty coping and sleeping. L.F. 00199 (p. 125, l. 8-9), L.F. 00201 (p. 136, l. 9-15). As Dr. Jarvis testified, an involuntary act is one that is not preceded by rational choice. L.F. 00285. The paralysis, disability, and pain suffered by Mr. Kivland as a result of the surgery⁴ caused him to be of such a mindset that he was not making a rational choice between continued life, love of his family, and the possibility of relief versus death. *Id.*

the review will likely not allow an expert to place a finer point on the decedent's condition.

⁴ The record is replete with evidence that Mr. Kivland's injuries were the result of Respondents' negligence. L.F. 00153; L.F. 00417.

The only portion of the *Wallace* standard for which there is arguably no evidence involves the word “insane.” But the uncontroverted evidence is that insanity is not a medical diagnosis. As such, use of the word “insane” in *Wallace*, now almost fifty years old, must be taken in context.

Wallace held that suicide is not a bar where an injury causes a person to become “insane and bereft of reason, and while in this condition and as a result thereof he takes his own life, his act being involuntary.” *Wallace, supra*, at 144. The focus, therefore, seems to be whether the act of suicide was “involuntary.” Additionally, the maxim *noscitur a sociis*⁵ suggests a close relationship between “insane” and “bereft of reason.”

Here, the evidence demonstrates that Mr. Kivland’s suicide was involuntary and that he was bereft of reason. L.F. 00285. Respondents have produced no evidence refuting Dr. Jarvis’s testimony.

Rather, Respondents argued that it was necessary for Appellants to produce verbatim testimony that Respondents’ negligence caused Mr. Kivland to become insane in the sense that 1) the insanity prevented him from understanding its inevitable or probable consequences; or 2) his act was done under an insane impulse which is

⁵ This maxim, which suggests that the meaning of a word can be ascertained by referring to other words associated with it, was recognized by this Court in the context of a statute prohibiting the abandonment of a corpse. *State v. Bratina*, 73 S.W.3d 625 (Mo. 2002). There, it was recognized that the otherwise ambiguous word “leaves” gains meaning through its use alongside the words “abandons, disposes, deserts.” *Id.*

irresistible because the insanity has prevented his or her reason from controlling his or her actions. L.F. 00055.

The trial court obviously agreed with Respondents' argument that to survive summary judgment, use of the word "insane" was the *sine qua non*. Specifically, the trial court held:

Although Plaintiffs argue that "insanity" is an archaic term and a term no longer used in the medical profession, it is nonetheless a term still used by Missouri courts and the standard which Plaintiffs must, in this case, meet in order to establish a causal connection between Defendants' alleged negligence and Gerald Kivland's suicide.

A1-2.

This ruling elevates form over substance. Missouri courts should not require an expert to utter magic words. *See generally, Wicklund v. Handoyo*, 181 S.W.3d 143 (Mo.App. E.D. 2005). This is particularly troubling because the word which must be uttered is no longer used in medicine. As such, Appellants are being held to an impossible standard.

At the Court of Appeals, Respondents suggested that while insanity is not a medical diagnosis, the test set forth in *Eidson* explains how to prove insanity, to wit:

Appellants must prove that Kivland was insane "**in the sense that** 1) the insanity prevents the injured party...or 2) the injured party's act is done under an insane impulse which is irresistible because the insanity has prevented his or her reason from controlling his or her actions."

Respondents' Appellate Brief, p.15, citing *Eidson v. Reproductive Health Services*, 863 S.W.2d 621, 627 (Mo.App. E.D. 1993)(emphasis by Respondents). But this is a circular standard; it defines “insane” by using the word “insanity.” As such, it fails to eliminate the problem caused by using the non-medical term “insane.”

In *Eidson*, a family planning clinic could not be held liable when a fourteen year old girl with an extensive psychiatric history committed suicide following an abortion. *Id.* at 622-624. Prior to the abortion, the decedent had a history of behavioral and emotional issues. *Id.* at 621. She had received counseling and psychiatric therapy. *Id.* She had witnessed the stabbing death of her brother when she was only 7 years old. *Id.* It had been recommended that she undergo behavior modification following that incident. *Id.* By age 12, she had begun abusing alcohol. *Id.*

On appeal following a verdict in plaintiff’s favor, the Eastern District found that plaintiff failed to make a submissible case. *Id.* at 622. In making this finding, the court focused on plaintiff’s expert’s testimony that the decedent was suffering from major depression for weeks before her suicide and that there was no testimony that decedent “was suffering from an uncontrollable impulse at the time of the suicide.” *Id.* at 628.

The facts in *Eidson* contrast sharply with those present in this case. Here, Mr. Kivland was not emotionally disturbed or depressed prior to the failed surgery. L.F. 0049. Moreover, the evidence established that he was bereft of reason, unable to make a rational choice about taking his life, and that the death was involuntary. L.F. 00285.

Under the traditional analysis of intervening causes, discussed above, this case goes to the jury. And under a fair reading of the *Wallace* standard too, this case goes to

the jury. The only way this case does not go to the jury is if Appellants are required to produce verbatim testimony that Mr. Kivland was “insane.” But as indicated, this is impossible because insanity is no longer a medical diagnosis.⁶

But there are other, more general problems with the *Wallace* standard. The standard, quite obviously, places a greater burden on a plaintiff compared to the traditional intervening cause standard. As such, a plaintiff could establish that defendant’s negligence is a cause which set in motion the chain of circumstances leading to the death, and that the death is not wholly independent, distinct, or unrelated to the negligence. While this would defeat a typical intervening cause defense, the plaintiff might nevertheless fail to survive *Wallace* for want of expert testimony that the decedent was “insane.”

Such a scenario would produce a bizarre result in which a defendant whose negligence contributed to cause a death would benefit from that death. While the negligence, in the absence of the death, would have resulted in significant damages extending over many years, upon death the damages are essentially capped. Without a wrongful death claim, the defendant escapes even the possibility of bearing the full cost of the damages caused by his negligence.

While that scenario could describe this case, it could equally describe others, including intentional torts. The intervening cause defense could even absolve a

⁶ Even Chapter 552 of the Missouri Revised Statutes, which governs criminal proceedings involving mental illness, does not once use the word insane or insanity.

defendant who attempted to kill another, failed, and yet whose victim later took his own life because of the injuries suffered in the attempt.

But these scenarios and the *Wallace* standard generally all run afoul of the notion that juries shall compare the relative fault of the parties and that damages shall be determined accordingly. MAI 37.01 and 37.03. *Wallace* was decided twenty years before this Court adopted the Uniform Comparative Fault Act in *Gustafson v. Benda*, 661 S.W.2d 11, 17-19 (Mo.1983). That Act states, in pertinent part, that:

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Unif.Comparative Fault Act § 1 [Effect of Contributory Fault].

Post-*Gustafson*, it makes sense for this wrongful death case to be decided by the jury. This is particularly true because the jury is going to decide the personal injury claim.

In fact, not allowing the jury to decide the wrongful death portion of the case creates its own issues. One which has already been illuminated involves how to explain Mr. Kivland's absence to the jury. While the Court of Appeals found that:

[T]he fact that Kivland's pain was so immense that he chose to end his life will be relevant at the trial of the remaining counts in the underlying action as to the issue of the degree of pain (i.e. non-economic damage) that Kivland alleges to have sustained as a direct result of the alleged negligent acts.

Kivland, supra, p. 6, fn. 3. Respondents have proposed that the jury be instructed that Mr. "Kivland's death on March 9, 2006 was due to causes unrelated to any acts or omissions of Respondents." Respondents' Motion to Modify, p. 6. But that would be instructing the jury on a false issue.

The evidence in this case requires that it be heard by a jury under both the traditional analysis of intervening causes and under *Wallace*. Moreover, both *Gustafson* and pragmatism favor rejection of the disparate treatment of suicide from other intervening cause defenses.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE RULING VIOLATES ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION, THE OPEN COURTS PROVISION, IN THAT IT UNREASONABLY RESTRICTS A RECOGNIZED CAUSE OF ACTION.

As discussed, the uncontradicted evidence is that “insanity” is not a medical term. L.F. 00285. By holding that proximate cause cannot lie unless Mr. Kivland was “insane” at the time of his death, the trial court’s ruling violates the open courts provision of the Missouri Constitution. Mo.Const. Art. 1 §14.

An open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable. *Kilmer v. Mun*, 17 S.W.3d 545, 549-50 (Mo. 2001). “Put most simply, article I, section 14 ‘prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury.’” *Id.* at 549 (emphasis in original).

Section 537.080 recognizes a cause of action for wrongful death “whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof.” Mo. Rev. Stat. § 537.080. Further, Missouri law allows wrongful death claims where death was by suicide. *Stafford, supra*. Clearly, Appellants have a recognized cause of action.

It is also clear that Appellants' cause of action is being restricted. And by requiring Appellants to produce unsupportable testimony, the restriction is unreasonable. In fact, the restriction creates the untenable situation of requiring that misleading testimony to be presented to the Court.

If this ruling stands, the law will provide Appellants and others only the illusion of a cause of action for wrongful death. In fact, no such claim could ever reach the jury.

CONCLUSION

Summary Judgment was improper because the evidence established that, or at least established an issue of material fact whether, Gerald Kivland's death was proximately caused by Respondents' negligence. Because the death was not wholly independent, distinct, or unrelated to the negligent surgery, there is no question that under the traditional analysis of intervening cause a jury should decide this case. And because the suicide was involuntary, was caused by the injuries Mr. Kivland suffered during surgery, and because Mr. Kivland was bereft of reason, *Wallace* too requires that a jury decide this case.

Summary Judgment was also improper because it unreasonably restricted Appellants' causes of action and therefore violated the Open Courts Provision of the Missouri Constitution. If a cause of action exists only in the presence of a word which has no meaning, the cause of action is unreasonably restricted and, in essence, does not exist.

For each of these reasons, Summary Judgment should be reversed and the case remanded for trial.

Respectfully Submitted,

GRAY, RITTER & GRAHAM, P.C.

By:  _____

Stephen R. Woodley, #36023

Joan M. Lockwood, #42883

Thomas K. Neill, #51959

701 Market Street, Suite 800

St. Louis, MO 63101

swoodley@grgpc.com

jlockwood@grgpc.com

tneill@grgpc.com

(314) 241-5620

(314) 241-4140 (fax)

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06(c), this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b) and contains 7,400 words, exclusive of the material identified in Rule 84.06(b), as determined using the word count program in Microsoft Word. The undersigned also certifies, pursuant to Rule 84.06(g) that the accompanying disk has been scanned and found free of viruses.



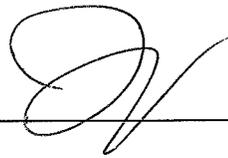
CERTIFICATE OF SERVICE

The undersigned certifies that two hard copies of this brief and a disk, pursuant to Rules 84.05(a) and 84.06(g) were served via Federal Express, this 26th day of April, 2010, to:

Mr. Theodore D. Agniel
Greensfelder, Hemker & Gale, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102-1774
Attorney for Columbia Orthopaedic Group, Robert Gaines

Hon. Gary Oxenhandler
Boone County Circuit Court
705 E. Walnut St.
Columbia, MO 65201-4486

Boone County Circuit Court
705 E. Walnut St.
Columbia, MO 65201-4486



NOTICE OF ENTRY
(SUPREME COURT RULE 74.03)

In The 13TH JUDICIAL CIRCUIT Court, Boone County, Missc

JANA KIVLAND ET AL V COLUMBIA ORTHOPAEDIC ET AL

CASE I

To: STEPHEN RANDALL WOODLEY
SUITE 800
701 MARKET STREET
ST LOUIS MO 63101-1850

YOU ARE HEREBY NOTIFIED that the court duly entered the following:

<u>Filing Date</u>	<u>Description</u>
23-Feb-2009	Cause Taken Under Advisement ATTORNEYS NEILL AND AGNIEL APPEARS. PATIES ARGUE DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED DECEMBER 15, 2008. WITHOUT OBJECTION, PLAINTIFF GIVEN LEAVE TO FILE AMENDED RESPONSE TO DEFENDANT'S STATEMENT OF UNCONTROVERTED FACTS. SAME SHALL BE FILED FORTHWITH. CAUSE TAKEN UNDER ADVISEMENT. GO/II (mln) Filed By:GARY M OXENHANDLER 04-Mar-2009 Order Scheduled For:23-Feb-2009 9:00 AM;GARY M OXENHANDLER;Boone
04-Mar-2009	Order March 4, 2009. This is a Judgment. After due consideration of Defendants Columbia Orthopaedic Group and Robert Gaines Second Motion for Partial Summary Judgment filed 12-15-8 and the pleadings and argument of counsel attendant thereto, the Court finds as follows: -"To make a prima facie case of medical malpractice in Missouri, three elements must be established by the evidence: 1) proof that an act or omission of the defendant failed to meet the requisite medical standard of care; 2) proof that the act or omission was performed negligently; and 3) proof of a causal connection between the act or omission and the plaintiff's injury." Wilson v. Lockwood, 711 S.W.2d 545, 550 (Mo.App.W.D. 1986). -Causation is determined by a "but for" test. Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 860 (Mo. 1993). This test provides causation if plaintiff's injury would not have occurred "but for" defendant's conduct. Id. at 861. A defendant's conduct must "directly cause" or "directly contribute to cause" plaintiff's injury. Id. at 863. Missouri courts have held that "[e]xpert testimony is required to establish causation in a medical malpractice case where proof of causation requires a certain degree of expertise." Mueller v. Bauer, 54 S.W.3d 652 (Mo.App.E.D. 2001). -The general rule in Missouri holds that suicide is a voluntary act that constitutes an intervening, superseding event, breaking the connection between a prior negligent act and the person's death. Neurological Medicine, Inc. v. General American Life Insurance Company, 921 S.W.2d 64, 66 (Mo.App.ED 1996). Therefore, plaintiffs generally cannot recover for wrongful death in the event of suicide. The exception to the general rule is that recovery is allowed for wrongful death if the alleged negligence caused the person to become insane in the sense that (1) the insanity prevented the decedent from understanding what he or she was doing or understanding its inevitable or proper consequences, or (2) the decedent's act of suicide was the result of an insane impulse which prevented reason from controlling his actions. Id. -On November 19, 2008, this court entered an order granting Defendants Columbia Orthopaedic Group and Robert Gaines Motion to Strike Michael Jarvis, M.D. as an expert. Specifically, Dr. Jarvis was prohibited from testifying at trial as an expert on the issue that the alleged negligence of the Defendants caused Gerald Kivland to become insane in the sense that (1) the insanity prevented the Gerald Kivland from understanding what he was doing or understanding its inevitable or proper consequences, or (2) Gerald Kivland's act of suicide was the result of an insane impulse which prevented reason from controlling his actions; or that Gerald Kivland was insane.

(CONTINUED TO SECOND ENTRY)

Order

JANA KIVLAND ET AL V COLUMBIA ORTHOPAEDIC ET AL

CASE NO : 05BA-CV02721

Filing DateDescription

(CONTINUED FROM 1ST ENTRY)

-Notwithstanding the fact that Dr. Jarvis' testimony was limited by the November 19, 2008 order of this court, it is clear that Plaintiffs intend to go forward with their case without any other expert witness to establish that Gerald Kivland's act of suicide was the result of an insane impulse which prevented reason from controlling his actions. Although Plaintiffs argue that "insanity" is an archaic term and a term no longer used in the medical profession, it is nonetheless a term still used by Missouri courts and the standard which Plaintiffs must, in this case, meet in order to establish a causal connection between Defendants' alleged negligence and Gerald Kivland's suicide. Absent any such testimony, Plaintiffs can not establish that there is a genuine issue of material fact with respect to Count VII and Count VIII of Plaintiffs' Third Amended Petition; simply stated, Plaintiffs can't make their case on Counts VII and VIII. Defendants Columbia Orthopaedic Group and Robert Gaines second motion for partial summary judgment is therefore granted pursuant to Missouri Rule of Civil Procedure 74.04. There being no just reason for delay, this order shall be deemed to be a final judgment for purposes of appeal or writ pursuant to Rule 74. /s/gary oxenhandle

Clerk of Court

CC: File
HAMP FORD JR
STEPHEN RANDALL WOODLEY
THEODORE D AGNIEL

Date Printed : 04-Mar-2009

Case continued from previous page.

05BA-CV02721 JANA KIVLAND ET AL V COLUMBIA ORTHOPAEDIC ET AL

Security Level: 1 Public

19-Nov-2008 **Order**
Judgment (continued from first order entry of this date)
The admission of such an opinion would be highly prejudicial to the defendants and improper under Missouri law. Admission of the doctor's opinion would be an abuse of discretion.
Motion to Strike granted as follows:
Michael Jarvis shall not be permitted to testify at the trial of this matter as an expert on the issue that:
-alleged negligence of the Defendants caused Gerald Kivland to become insane in the sense that 1) the insanity prevented the Gerald Kivland from understanding what he was doing or understanding its inevitable or proper consequences, or 2) Gerald Kivland's act of suicide was the result of an insane impulse which prevented reason from controlling his actions; or
-that Gerald Kivland was insane.
There being no just reason for delay, this order shall be deemed to be a final judgment for purposes of appeal or writ pursuant to Rule 74. GO//

15-Dec-2008 **Certificate of Service**
OF DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT, STATEMENT OF UNCONTROVERTED MATERIAL FACTS IN SUPPORT, MEMORANDUM OF LAW IN SUPPORT AND EXHIBITS A-J IN SUPPORT FILED. (mIn)
Filed By: HAMP FORD

Motion Filed
SECOND MOTION OF DEFENDANTS COLUMBIA ORTHOPAEDIC GROUP, LLP AND ROBERT GAINES, MD FOR PARTIAL SUMMARY JUDGMENT FILED. (mIn)
Filed By: THEODORE D AGNIEL

Filing:
STATEMENT OF UNCONTROVERTED MATERIAL FACTS IN SUPPORT OF SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT OF DEFENDANTS COLUMBIA ORTHOPAEDIC GROUP, LLP AND ROBERT GAINES MD FILED. (mIn)
Filed By: THEODORE D AGNIEL

Memorandum Filed
MEMORANDUM OF LAW IN SUPPORT OF SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT OF DEFENDANTS COLUMBIA ORTHOPAEDIC GROUP, LLP AND ROBERT GAINES, MD. (mIn)
Filed By: THEODORE D AGNIEL

14-Jan-2009 **Suggestions in Opposition**
MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT FILED. (mIn)
Filed By: STEPHEN R WOODLEY

Response Filed
PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT FILED. (mIn)
Filed By: STEPHEN R WOODLEY

Response Filed
PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNCONTROVERTED MATERIAL FACTS FILED. (mIn)
Filed By: STEPHEN R WOODLEY