

SUPREME COURT NO. SC87827

**IN THE
SUPREME COURT OF MISSOURI**

**KAREN LINDQUIST, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF MICHAEL LINDQUIST,
DECEASED,
Plaintiff/Cross-Appellant,**

v.

**MID-AMERICA ORTHOPAEDIC SURGERY INC.,
Defendant/Appellant.**

DEFENDANT/APPELLANT/RESPONDENT'S BRIEF

**Appeal from the Circuit Court of
City of St. Louis, Missouri
Cause No. 002-8663
Honorable Mark H. Neill**

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JURISDICTIONAL STATEMENT

This appeal arises from the Trial Court's entry of Judgment on February 21, 2006. (LF 209)(Attached as **Appendix Tab 1**). The underlying lawsuit is a claim brought by Plaintiff against multiple defendants for medical malpractice. This case was previously before the Missouri Court of Appeals and styled as Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635 (Mo.App. E.D. 2005).

The first appellate decision affirmed the judgment notwithstanding the verdict ("JNOV") granted to defendant Scott Radiological Group, reversed in part the award of a new trial to the remaining defendants, and remanded for a new trial on past economic damages. On December 13, 2005, a new trial was conducted on the issue of past economic damages, and the Trial Court issued its "Finding of Fact, Conclusions of Law, and Judgment" on February 21, 2006. (LF 209). Defendant Mid-America Orthopaedic Surgery Inc. (hereinafter "Mid-America") filed its Notice of Appeal on March 6, 2006. (LF 213-215). Mid-America also filed a Motion for New Trial, or in the alternative, to amend judgment and Plaintiff filed a Motion to Modify Judgment. (LF at 219 and 224). Plaintiff also filed a notice of cross-appeal directly to this Court on June 28, 2006.

Mo. Rev. Stat. § 512.020 and Mo. R. Civ. P. 81.05 provide appellate authority here. Hillhouse v. Creedon, 2005 WL 2082735 (Mo. App. S.D. 2005) and Sturgeon v. Sturgeon, 984 S.W.2d 859 (Mo. App. E.D. 1998). As Plaintiff challenges in her cross-appeal the constitutionality of a statute, Article V, Section 3 of the Missouri Constitution provides that this Court has exclusive appellate jurisdiction. On October 2, 2006, the

Missouri Court of Appeals, to which Mid-America appealed, transferred this action to this Court based on the constitutional issue. (Attached as **Appendix Tab 2**).

STATEMENT OF FACTS/PROCEDURAL HISTORY

In the first trial, the jury returned a verdict in favor of the Plaintiffs Michael and Karen Lindquist, awarding \$5,500,000.00 to Michael and \$1,350,000.00 to Karen. (LF 144-146). The jury allocated fault as follows: Scott Radiological Group – 5%; Open MRI of Missouri – 5%; Family Medical Group based on Dr. Farrell’s care of April 8, 1999 – 5%; Family Medical Group based on Dr. Farrell’s care of June 9, 1999 – 15%; Family Medical Group based on Dr. Hingst’s care – 15%; Mid-America based on Dr. Weis’ care of May 4, 1999 – 5%; Mid-America based on Dr. Weis’ care of May 11, 1999 – 5%; Mid-America based on Dr. Weis’ care of May 25, 1999 – 10%; Mid-America based on Dr. Weis’ care of June 1, 1999 – 20%; Dr. Gardiner – 5%; Dr. Deline – 5%; and Washington University – 5%. (LF 145).

The total liability found against Mid-America for Dr. Weis’ care equaled 40%. On June 18, 2003, the Trial Court entered its “Judgment”. (LF 147-148). The Trial Court also issued a “Memorandum” indicating that Mid-America’s equitable share of the damages was \$2,200,000 ($\$5,500,000 \times 40\%$) as to Michael Lindquist and \$540,000 ($\$1,350,000 \times 40\%$) as to Karen Lindquist. (LF 151). Numerous post-trial motions were filed by the defendants. On October 16, 2003, the Trial Court entered a JNOV in favor of Scott Radiological Group. (LF 153). (Attached as **Appendix Tab 3**) In the same order, the Trial Court granted a new trial to all the other defendants on all claims due to instructional error and the excessive award. (LF 154). Finally, the Trial Court stated that the “judgment” against Mid-America and the other defendants was “set aside.” (LF 154). Specifically, the Trial Court stated in its October 16, 2003 Order that: “The judgment in

favor of plaintiffs Michael and Karen Lindquist and against defendants Mid-America Orthopaedic Surgery, Inc. and Barnes-Jewish St. Peters Hospital is hereby set aside, and the case is transferred to Division 1 for reinstatement on the trial calendar.” (LF 154)

Karen Lindquist appealed this October 16, 2003 order granting a JNOV in favor of Scott Radiological and a new trial on all issues against the remaining defendants. *See Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635, 640 (Mo.App. E.D. 2005). The Missouri Court of Appeals reached the following conclusion in the first appeal: “The Judgment of the Circuit Court granting Defendants Mid-America and Barnes-Jewish a new trial is reversed and remanded with instructions that the Trial Court reinstate the original jury verdicts on all issues except with respect to past economic damages. The case is remanded for a new trial on past economic damages. The Judgment granting Scott Radiological’s JNOV is affirmed.” *Id.* at 656.

Thus, the original jury verdicts were reinstated, and the matter was remanded for a new trial on past economic damages and for entry of judgment. Defendant Mid-America filed a motion for rehearing/application for transfer from this appellate decision, which was denied by this Court. Plaintiff did not file a motion for rehearing or application for transfer. The Missouri Court of Appeal’s mandate issued on September 7, 2005.

On remand, the parties extensively briefed the question of post-judgment interest before the Trial Court. (LF 161-208). Plaintiff argued that interest accrued from the date of the original judgment, June 18, 2003, at over \$1,200.00 per day. (LF 162). Mid-America argued that post-judgment interest would start to accrue after the second trial, as

there may be only one judgment in a case and the amount of interest was unascertainable until after retrial on the issue of past economic damages. (LF 179).

A new trial was conducted on the issue of past economic damages. (LF 209). On February 21, 2006, the Trial Court entered Judgment based upon the evidence presented at the retrial and found the past economic damages totaled \$358,437.24, and that Mid-America's 40% equaled \$143,374.89. (LF 209-212). The Trial Court also concluded, without offering any analysis, that: "Plaintiff is entitled to post-judgment interest for damages awarded to Michael Lindquist from June 18, 2003, with the exception of past economic damages for which the Court of Appeals has ordered a new trial." (LF 211). The Trial Court also awarded post-judgment interest on damages awarded to Karen Lindquist from June 18, 2003. (LF 211). Mid-America appeals from this Judgment. (LF 213).

Mid-America filed a notice of appeal to the Missouri Court of Appeals raising the potential issues of: 1) Trial Court error in making the award of post-judgment interest; and 2) Trial Court error in calculating the amount of past economic damages. (LF 213-218).¹ Plaintiff filed a cross-appeal challenging the Trial Court's February 21, 2006 determination that Mid-America is not liable for the additional five percent (5%) allocation of fault assessed against Scott Radiological Group which had been lost due to

¹ Mid-America chooses to pursue on appeal only its claim of trial court error relating to the award of post-judgment interest.

the JNOV. Plaintiff filed her cross-appeal directly with this Court and challenges the constitutionality of RSMo. § 538.230.

Both parties also filed post-judgment motions. Mid-America filed a Motion for New Trial, or in the alternative, to Amend the Judgment (LF 219-223) and Plaintiff filed a Motion to Modify the Judgment (LF 224-229). These motions were not ruled upon by the Trial Court, but under Rule 78.06 were deemed overruled 90 days after the last timely filed post-judgment motion. In August 2006, after the appellate process had begun, Defendant Mid-America through its carrier, tendered its policy limits plus interest since the February 21, 2006 Judgment. The issue of post-judgment interest prior to the entry of the February 21, 2006 Judgment was specifically reserved for determination through the appellate process and this appeal ensues.

PRIMARY APPEAL BY DEFENDANT MID-AMERICA

POINTS RELIED ON AND AUTHORITIES

I. THE TRIAL COURT ERRED IN AWARDING POST JUDGMENT INTEREST DATING BACK TO THE JUNE 18, 2003 JUDGMENT BECAUSE UNDER RSMo. § 408.040 INTEREST SHOULD RUN ONLY FROM THE FEBRUARY 21, 2006 JUDGMENT IN THAT (a) THERE IS NO JUNE 18, 2003 JUDGMENT, (b) NO MONEY WAS DUE TO PLAINTIFF UNTIL THE FEBRUARY 21, 2006 JUDGMENT, AND (c) PLAINTIFF'S OWN APPEALS RENDERED SATISFACTION OF JUDGMENT IMPOSSIBLE.

Brickner v. Normandy Osteopathic Hosp., 746 S.W.2d 108, 119 (Mo.App. E.D. 1988)

Erwin v. Jones, 191 S.W. 1047 (Mo.App. 1917)

Gomez v. Construction Design, Inc., 157 S.W.3d 652, 654 (Mo.App. W.D. 2005)

Investors Title Co. v. Chicago Title Ins. Co., 18 S.W.3d 70, 72 (Mo.App. E.D. 2000)

Johnson-Mulhern Prop. v. TCI Cablevision, 980 S.W.2d 171, 172 (Mo.App. E.D. 1998)

Kansas City Power & Light Co. v. Bibb & Assoc., 197 S.W.3d 147 (Mo.App. W.D. 2006)

Kennard v. Wiggins, 353 Mo. 681, 687; 183 S.W.2d 870 (Mo. 1944)

Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635 (Mo.App. E.D. 2005)

Meglio v. Hebel, 823 S.W.2d 116 (Mo.App. E.D. 1991)

RSMo. § 408.040

RSMo. § 512.160

Rule 74.01(a)

Rule 74.01(b)

State ex rel Southern Real Estate & Financial Co. v. City of St. Louis, 115 S.W.2d 513,

515 (Mo.App. 1938)

STANDARD OF REVIEW

A Trial Court's decision in a court-tried case will be affirmed on appeal unless no substantial evidence supports it, it is against the weight of the evidence, it erroneously declares the law or it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Appeal from the interpretation and application of a statute, however, involves a question of law, and review is *de novo*. Psychiatric Healthcare Corp. of Mo. v. Dep't of Soc. Servs., 100 S.W.3d 891, 899 (Mo.App. W.D. 2003). Section 408.040 RSMo., governs awards of post judgment interest. The interpretation and application of § 408.040 to the facts at bar is a question of law that this Court reviews independently of the Trial Court's determination and without deference to its interpretation. Gomez v. Construction Design, Inc., 157 S.W.3d 652, 654 (Mo.App. W.D. 2005).

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING POST JUDGMENT INTEREST DATING BACK TO THE JUNE 18, 2003 JUDGMENT BECAUSE UNDER RSMo. § 408.040 INTEREST SHOULD RUN ONLY FROM THE FEBRUARY 21, 2006 JUDGMENT IN THAT (A) THERE IS NO JUNE 18, 2003 JUDGMENT, (B) NO MONEY WAS DUE TO PLAINTIFF UNTIL THE FEBRUARY 21, 2006 JUDGMENT, AND (C) PLAINTIFF'S OWN APPEALS RENDERED SATISFACTION OF JUDGMENT IMPOSSIBLE.

The applicable statute on post-judgment interest awards is RSMo. § 408.040. There may be a dispute between the parties as to whether the 2004 version of the statute applies, or the version as amended by HB 393 effective August 28, 2005 applies in this case. Plaintiff argued to the Trial Court that the 2005 version applied (LF 167), and Mid-America argued that the 2004 version applied (LF 189). The Trial Court awarded 9%, and thus seemingly applied the 2004 version of the statute. (LF 211-212).

The statutory provision in effect in 2004 provides in relevant part: "Interest shall be allowed on all money due upon any judgment or order of any court from the day of rendering the same until satisfaction be made..." RSMo. § 408.040 (2004). The statutory provision adopted as part of HB 393 effective August 28, 2005 reads in pertinent part: "[I]n tort actions, interest shall be allowed on all money due upon any judgment or order of any court from the date of judgment is entered by the trial court until full satisfaction." RSMo. § 408.040(2005) (Both the 2004 and 2005 versions of the statute are attached as **Appendix Tab 4**). The operative language remains similar enough that Mid-America

contends the issue of when interest begins to accrue is the same under either version of the statute. However, the issue of the percentage rate may be affected by this Court's determination of which statute applies.

Under RSMo. § 408.040, the Appellate focus should be what is the "judgment," when was it "entered," and when was payment "due." It is the defendant's position that while Judge Bush entered judgment on the jury's verdict on June 18, 2003, he also "set aside" that judgment in his October 16, 2003 Order. (LF 153-154)(Attached as **Appendix Tab 3**). Therefore, on October 16, 2003, there was no judgment and no money was "due".

A) No Judgment Until February 21, 2006.

Post-judgment interest does not run from the date of a jury verdict, but only from the entry of judgment. Kansas City Power & Light Co. v. Bibb & Assoc., 197 S.W.3d 147 (Mo.App. W.D. 2006). A judgment is not rendered, until it is entered. Id. Citing Rule 74.01(a). A judgment is entered, when a writing signed by the judge and denominated a judgment or decree is filed. Id.

The original jury verdicts were received on May 13, 2003. Thereafter the Trial Court entered a Judgment on June 18, 2003. However, Judge Bush "set aside" and vacated that Judgment on October 16, 2003. (LF 154). The original Trial Court determined that the jury award was excessive and demonstrated the prejudice of the jury, and specifically ordered "a new trial on all issues." (LF 154). Thus as of October 16, 2003, there was no finding of liability against Mid-America, and no Judgment.

The Judgment in this matter was not entered until February 21, 2006. Plaintiff cannot argue that she had a judgment prior to that date because the Missouri Court of Appeals' opinion, on which a mandate issued in September, 2005, did not adjudicate the claims, rights, and liabilities of all parties. *See* Rule 74.01(b). The Missouri Court of Appeals ordered a new trial on the issue of past economic damages, therefore, the liabilities were not, prior to this determination, fully adjudicated. In the absence of an express determination by the court, "any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action." Rule 74.01(b). There was no judgment, upon which post-judgment interest could accrue, until the rights and liabilities of all the parties, as to all claims was adjudicated by the Trial Court as reflected in the February 21, 2006 Judgment.

Additionally, post-judgment interest is only allowed on the judgment "entered by the *trial court* until full satisfaction." RSMo. § 408.040.2² (emphasis added). The Missouri Court of Appeals issuance of a mandate in September 2005 to reinstate the jury verdicts, was not the entry of judgment by the Trial Court. Rather the entry of judgment by the Trial Court was the February 21, 2006 Judgment, and there may only be one

² This citation is to RSMo. 408.040 (2005). The 2004 version simply says "court" as opposed to "trial court," and Mid-America submits the addition of the word "trial" is a only a clarification of legislative intent. Here the Court of Appeals did not award interest so the language change is meaningless in this setting.

judgment in a matter. Johnson-Mulhern Prop. v. TCI Cablevision, 980 S.W.2d 171, 172 (Mo.App. E.D. 1998) (“Generally, there can be but one judgment in a case and a judgment is not final for purposes of appeal unless it disposes of all counts in the petition.”); see also Brickner v. Normandy Osteopathic Hospital, 746 S.W.2d 108, 119 (Mo.App. E.D. 1988) (“Since there can be but one judgment in any case, the judgment on the \$1,000,000 verdict was held in abeyance pursuant to the Trial Court’s order of a new trial and our mandate on the first appeal.”). Similarly, in this matter, there was no judgment until February 21, 2006, because the original Trial Court set aside the judgment and ordered a new trial, and the mandate on the first appeal did not reinstate or affirm a judgment, but rather reinstated jury verdicts and required, like in Brickner, that further proceedings be conducted to calculate damages.

B) No Money was “Due.”

The statute also provides that interest is “allowed on all money due upon any judgment” RSMo. § 408.040. There was no money due until the February 21, 2006 Judgment.

When construing a predecessor to RSMo. § 408.040, the Missouri Supreme Court interpreted the word “due” to mean “time for payment.” Kennard v. Wiggins, 353 Mo. 681, 687; 183 S.W.2d 870 (Mo. 1944). No one could reasonably argue that Mid-America was obligated to pay Plaintiffs on October 16, 2003, when the judgment was set-aside and the matter was to be tried anew. Thus, it was not “time for payment” and no money was “due” for purposes of RSMo. § 408.040.

The Kennard Court also indicated that if “there could be no process for collection of money” then the judgment was not due. Id. On October 16, 2003, there was no legal mechanism for Plaintiffs to collect money from Mid-America because the judgment in Plaintiffs’ favor had been set-aside. Thus there was no money “due” upon any judgment on October 16, 2003, and it was error for the Trial Court in its February 2006 ruling to award post-judgment interest going back to the June 2003 Judgment.

Additionally, the instant set of facts is similar to that in Erwin v. Jones, 191 S.W. 1047 (Mo.App. 1917). In Erwin, Plaintiff recovered a judgment against defendant for \$5,000 on December 9, 1914. Defendant moved for new trial and argued the verdict was excessive. The Trial Court found the verdict was excessive and entered judgment in favor of the Plaintiff for \$3,500 on March 19, 1915. Defendant appealed and the judgment was affirmed. Defendant then paid the \$3,500, and Plaintiff contended interest was owed from the December 9, 1914 judgment. The Appellate Court disagreed. The Erwin court stated: “Under these circumstances and under the statute we can conceive of no reason why the judgment of March 19, 1915, should begin to draw interest prior to its rendition.” Id. at 1047. Furthermore, the court stated, “we hold that where a new judgment is entered, the Plaintiff can only recover interest from the date of the new judgment.” Id. at 1048.

Similarly, in this matter, the Trial Court’s June 2003 Judgment was set aside by the October 2003 Order. The June 2003 Judgment was never affirmed. Rather, in the prior appellate opinion, the Court reversed and remanded with directions to reinstate the verdicts as to all issues except past economic damages, and ordered a new trial on that

damage element. Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635 (Mo.App. E.D. 2005) The verdicts were reinstated, and a new trial was held to determine past economic damages, and the Trial Court, after determining damages was then to enter judgment, as it did on February 21, 2006.

There are also policy reasons against back-dating an award of interest. “As a general rule, interest on an unliquidated claim is not awarded because where the person liable [on a judgment] does not know the amount he owes he should not be considered in default because of failure to pay.” Meglio v. Hebel, 823 S.W.2d 116 (Mo.App. E.D. 1991). On October 16, 2003, there was no award of damages or finding of liability against Mid-America, and there were certainly no liquidated damages that Mid-America was required to pay or face the penalty of post-judgment interest. There was no process for collection of money on the June 18, 2003 Judgment, and thus Plaintiffs are not entitled to post-judgment interest accruing from that date. See Kennard v. Wiggins, 183 S.W.2d 870 (Mo. 1944) (stating that interest is allowed on money “due” and “due” means time for payment and noting that “there could be no process for the collection of money” and Plaintiff was not entitled to interest).

C) Plaintiff’s Own Appeals Rendered Satisfaction of Judgment Impossible.

Missouri courts have recognized that the purpose of the post-judgment interest statute is to compensate the judgment creditor (in this case Plaintiff) for the judgment debtor’s (here Mid-America) delay in satisfying the judgment pending appeal. *See Investors Title Co. v. Chicago Title Ins. Co.*, 18 S.W.3d 70, 72 (Mo.App. E.D. 2000). In

Investors Title, Plaintiff sued for breach of contract and defendant counterclaimed. The court entered judgment in favor of Plaintiff plus prejudgment interest and found in favor of defendant on its counterclaim. The court then entered an amended judgment deleting the award of prejudgment interest and defendant appealed. Plaintiff cross-appealed and the judgment was affirmed. On remand, the Plaintiff sought post-judgment interest, but the Trial Court denied the request, finding that a judgment creditor is not entitled to interest pending its own appeal. Plaintiff appealed again.

The Investors Title Court found that when a judgment creditor (Plaintiff) appeals on the ground of inadequacy from a recovery in his-her favor, and the judgment is affirmed on appeal, the judgment creditor is not entitled to interest pending the appeal. Id. at 72. The Investors Title Court was unambiguous in its holding: “If Plaintiff had not filed an appeal, it would be entitled to post judgment interest back to the date of the amended judgment; however, because Plaintiff chose to appeal, it completely forfeited its right to claim post judgment interest.” Id. at 75. Our Plaintiff was the appellant on all issues in the first appeal. There was no money due and owing, and thus there was no delay caused by Mid-America, nor was Mid-America truly a judgment debtor because the judgment had been set aside.

The Western District Court of Appeals reached the same conclusion regarding the effect of a cross-appeal on post-judgment interest in Gomez v. Construction Design, Inc., 157 S.W.3d 652 (Mo.App. W.D. 2005). In Gomez, Plaintiff received \$3.76 million jury award, which was reduced through remittitur and an amended judgment entered for \$2.76 million on May 31, 2001. Id. at 653. Defendant appealed, and Plaintiff cross-appealed

claiming the award of \$3.76 million was not excessive. The \$2.76 was ultimately affirmed on appeal on January 13, 2004. The parties disagreed on what was required for satisfaction of judgment. Plaintiff contended interest accrued from the May 31, 2001 date, rather than the January 13, 2004 date. The trial court ruled in favor of defendants on the issue and the appellate court affirmed. Id. at 654-55.

The rationale is simple, if the judgment creditor is to blame for the delay in entry of a final judgment, then the judgment creditor is not entitled to interest. Plaintiff is responsible for the delay in reaching final judgment between October 2003 and February 2006 because she chose to appeal the October 2003 Order granting a new trial, rather than proceeding to the new trial. The Gomez court cited approvingly to State ex rel Southern Real Estate & Financial Co. v. City of St. Louis, 115 S.W.2d 513, 515 (Mo.App. 1938) for the proposition that “since it was by his own act that the proceeding was delayed and prolonged until such time as judicial sanction of the correctness of the judgment finally culminated in its affirmance by the appellate court” the judgment creditor was not entitled to interest. 157 S.W.3d at 655. Plaintiff filed the first appeal in this action. There was, at the time of the first appeal, no judgment in favor of Plaintiff, nor could Defendant have possibly satisfied the judgment while Plaintiff’s appeal was pending. *See Gomez* at 655. The Trial Court improperly penalized Mid-America by awarding interest back to 2003 because defendant could not have tendered any payment to Plaintiff. Accordingly, an award of post-judgment based on June 2003 judgment was erroneous and prejudicial.

Similarly, Plaintiff should not be entitled to interest pending this appeal. She has cross-appealed challenging the adequacy of her recovery and seeking an additional \$270,000 on the claim that the 5% assessed by the jury to Scott Radiological should be reallocated to Mid-America. Plaintiff is again challenging the adequacy of her recovery and thereby delaying the finality of the proceedings. It is inequitable to penalize Mid-America by awarding hundreds of thousands of dollars in post-judgment interest for the more than two year delay caused by Plaintiff's appeals.³

³ Further, RSMo. § 512.160 does not support the Trial Court's award. Plaintiff argued in her briefing to the Trial Court, that RSMo. § 512.160.4 (1999) (Attached as **Appendix Tab 5**) and RSMo. § 408.040 supported her right to post-judgment interest. (LF 194-203). That statute is not applicable because the Missouri Court of Appeals did not affirm any judgment in favor of Plaintiff, nor did it award any interest. See Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635 (Mo.App. E.D. 2005). Plaintiff appealed from an Order granting a new trial, as is permitted by RSMo. § 512.020.4, and from the judgment in favor of Scott Radiological. There was thus no judgment in her favor to "affirm."

CONCLUSION

For the foregoing reasons, the Trial Court erred in awarding post-judgment interest for the over two and a half year period between June 18, 2003, and February 21, 2006. Mid-America respectfully requests this Honorable Court, pursuant to Rule 84.14, reverse in part the February 21, 2006 Judgment of the Trial Court awarding post-judgment interest to Michael and Karen Lindquist from June 18, 2003. Mid-America requests this Court not remand the action, but rather enter the judgment that the Trial Court should have properly entered. Rule 84.14 (“give such Judgment as the court ought to give”). In particular, Mid-America requests that this Court enter judgment awarding interest at 9% running from February 21, 2006 until June 28, 2006 when the Plaintiff filed her Notice of Appeal.

DEFENDANT MID-AMERICA'S RESPONDENT
BRIEF TO PLAINTIFF'S CROSS APPEAL CHALLENGING
THE CONSTITUTIONALITY OF RSMo. § 538.230

Point Relied On

Plaintiff raises one point in her opening brief filed October 26, 2006. Mid-America repeats that point here for the Court's convenience:

I. The Trial Court erred in depriving Plaintiff of \$272,921.88 of damages awarded under § 538.230 RSMo. in that the court denied Plaintiff's claim that based on 40% fault assessment *Mid-America* was *jointly* liable for the entire damages award, particularly the 5% assessed against Scott Radiology even after Co-Defendant Scott Radiological Group won JNOV on Defendants' cross claims thereby canceling its *several* liability for that 5%, and the court thereby limited *Mid-America* to 40% *several* liability, because § 538.230 RSMo is unconstitutionally vague or is unconstitutional as applied, in violation of the Due Process Clause of the Missouri Constitution.

This point should be rejected because: (a) the Constitutional challenge is not preserved for review; (b) this Court has previously upheld the Constitutionality of RSMo. § 538.230; and (c) Scott Radiological was found not liable, and therefore not a joint tortfeasor.

A. Preservation of Error

Plaintiff alleges that RSMo. § 538.230 is either unconstitutionally vague, on its face, or is unconstitutional as applied. (Attached as **Appendix Tab 6**) This constitutional challenge is not properly preserved for this Court's review. "As a general matter, a constitutional question must be presented at the earliest possible moment that good pleading and orderly procedure will permit under the circumstances, otherwise it will be waived." Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635, 654 (Mo.App. E.D. 2005) (citing Callier v. Dir. of Revenue, 780 S.W.2d 639 (Mo. banc 1989)). To properly raise the issue, the party must: (1) raise the question at the first available opportunity; (2) designate explicitly the specific constitutional provision claimed to have been violated; (3) state the facts showing the violation; and (4) preserve such question throughout for appellate review. Id. at 654. Additionally, "in order for the issue of constitutional validity of a statute to be preserved for appellate review, the issue must not only have been presented to the Trial Court, but the Trial Court must have ruled thereon." Id. citing Estate of McCluney, 871 S.W.2d 657, 659 (Mo.App. W.D. 1994).

Plaintiff's constitutional challenge to RSMo. § 538.230 is not preserved because: (1) it was not raised until Plaintiff's post-judgment motion of March 24, 2006; (2) this post-judgment motion was untimely filed; and (3) the Trial Court did not rule on the constitutional challenge to the statute.

After the Missouri Court of Appeals issued its mandate on September 7, 2005, Plaintiffs filed briefs with the Trial Court addressing RSMo. § 538.230 and asking that

the 5% assessed against Scott Radiological be reallocated to Mid-America. (See LF 163; 201-202). Plaintiffs did not argue that failure to reallocate would be an unconstitutional deprivation of property. Instead, Plaintiffs argued that RSMo. § 538.230 was the governing statute and that the 5% should be reallocated. (LF 201-202). It was only after Plaintiff's argument was rejected by the Trial Court, that Plaintiffs first raised the constitutional issue in her March 24, 2006 "Motion to Modify Judgment." (LF 224-229). Thus, it was only after the Trial Court rejected Plaintiff's interpretation of RSMo. § 538.230 that she chose to assert the statute was unconstitutional. However, "an attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." Land Clearance for Redevelopment v. Kansas City, 805 S.W.2d 173, 176 (Mo. banc 1991).

Additionally, Plaintiff's post-judgment motion was untimely filed on Friday, March 24, 2006, thirty-one days after entry of the Trial Court's February 21, 2006 Judgment. In order to be preserved for appellate review, allegations of Trial Court error must generally be raised in a motion for new trial. Burnett v. Griffith, 769 S.W.2d 780 (Mo banc 1989); Mo Rule Civ. P. 78.07. An untimely motion for new trial preserves nothing for appellate review. Miller v. Varsity Corp., 922 S.W.2d 821, 823 (Mo.App. E.D. 1996). Allegations of error in an untimely post-trial motion may only be examined for plain error. Mosher v. Levering Investments, Inc., 806 S.W.2d 675, 676 (Mo banc 1991). Missouri Rule of Civil Procedure 78.04 provides that: "Any motion for new trial and any motion to amend the judgment or opinion shall be filed not later than thirty days after the

entry of judgment.” Although a party in a court-tried case, is not absolutely required to file a motion for new trial, the party must make some effort to bring the alleged error to the Trial Court’s attention. SD Investments, Inc. v. Michael-Paul, LLC, 90 S.W.3d 75, 84 (Mo.App. W.D. 2002). This is especially true when the allegation of error involves a constitutional challenge to a statute. Plaintiff did not timely file her motion to modify the judgment to reallocate fault and, thus, has not preserved the issue for review.

Third, the Trial Court never addressed the constitutional issue raised in the untimely post-judgment motion. As the Trial Court did not rule on the constitutionality, the issue is not preserved.

B. Constitutionality of RSMo. § 538.230 Has Already Been Determined.

The Missouri Supreme Court has already specifically rejected a constitutional challenge to RSMo. §538.230. Adams v. Children’s Mercy Hospital, 832 S.W.2d 898 (Mo. banc. 1992).

A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution. Id. at 903. A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution. Id. citing Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 828 (Mo. banc 1991). When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming the statute is unconstitutional. Id.

In Adams Plaintiffs challenged the constitutionality of RSMo. § 538.210; RSMo. § 538.220; and RSMo. § 538.230.2. This Court specifically rejected a Due Process challenge; the same challenge raised by Plaintiff herein. The Court stated that the Due

Process clause guarantees “no more than that a claimant is entitled to whatever process is constitutionally mandated or permitted under the laws extant at the time of claim”. Id. at 907. The Adams Court observed that RSMo. § 538.230.2 “alters common law joint and several liability,” and that the “alteration of joint and several liability limits the potential financial exposure of a health care defendant to the amount of that defendant’s own responsibility for the Plaintiff’s injury.” Id. at 905 (emphasis added). The Court ultimately upheld all the challenged provisions against attacks under the Equal Protection, Open Courts, Due Process, and other challenges.

Our Trial Court interpreted RSMo. § 538.230 just as this Court previously stated -- the Trial Court limited Mid-America’s exposure to the amount of its responsibility as assessed by the trier of fact (in this case 40%). Thus, this Court should reject Plaintiff’s contention that the statute was unconstitutional as applied to her. The Trial Court was correct in not reallocating the 5% fault assessed to Scott Radiological for the additional reasons that: (1) JNOV was entered in favor of Scott Radiological finding Scott Radiological not liable, and thus there was no joint liability; and (2) the Missouri Court of Appeals mandate specifically reinstated the original jury verdict with respect to Mid-America, and the jury assessed fault at 40%.

In order for joint and several liability to apply, two or more defendants have to be found negligent, and the negligence of each found to contribute to the Plaintiff’s injury. Hein v. Oriental Gardens, Inc., 988 S.W.2d 632, 634 (Mo.App. 1992). The Missouri Court of Appeals found there was insufficient evidence to establish that Scott Radiological was negligent and that such negligence caused Plaintiff’s injuries. See

Lindquist v. Scott Radiological, 168 S.W.3d 635, 654-55 (Mo.App. 2005) (the Court of Appeals specifically found “deficiencies in proof” and that the “record lacks sufficient evidence” as to the claim against Scott Radiological). Thus, Scott Radiological was found not liable, and there can be no joint liability between Mid-America and Scott Radiological. The statute provides in subsection two, that “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.” RSMo. § 538.230.2. Scott Radiological was found to be not liable, its fault is thus zero. Zero is less than 40%, but a reallocation of zero adds nothing to the amount of damages owed by Mid-America.

Additionally, the Court of Appeals specifically mandated that “the Trial Court reinstate the original jury verdicts on all issues except with respect to past economic damages” and affirmed the judgment of JNOV in favor of Scott Radiological. Id. at 656. The mandate does not allow for the Trial Court to reallocate fault or liability among the parties as Plaintiff has requested. The Court of Appeals decision is the “law of the case” and controlling on all subsequent proceedings. See Missouri Board of Pharmacy v. Tadrus, 926 S.W.2d 132, 137 (Mo.App. 1996); see also Lombardo v. Lombardo, 120 S.W.3d 232, 243 (Mo.App. 2003).

C. Other Arguments.

Plaintiff raises several other issues within her one point on appeal which require brief attention here.

(i.) Cross-Claim – Plaintiff asserts at various points in her brief (between pages 24 – 28) that Mid-America cross-claimed for apportionment of fault and that it was somehow Mid-America’s responsibility to appeal the grant of JNOV in favor of Scott Radiological, a co-defendant. On page 28, Plaintiff asserts: “Mid-America did, in fact, implead and cross claim against Scott [Radiological] hoping to shift fault away from itself.” This is spurious; Mid-America did not implead or file a cross-claim against Scott Radiological. Scott Radiological was named as a defendant in Plaintiff’s Petition. (See LF 66, Plaintiff’s Second Amended Petition Caption; and LF 106, Count I of the Second Amended Petition prayer for relief specifically seeking a judgment against Scott Radiological). There is a distinction between raising RSMo. § 538.230 as an affirmative defense and impleading a party.

Further, the apportionment of fault among the defendants was at Plaintiff’s request via Jury Instruction and the verdict form. (LF 144-146). This apportionment is also required by RSMo. § 538.230.

(ii.) Zero Liability – Plaintiff several times acknowledges that Scott Radiological owes nothing as it was granted a JNOV. (See for example Plaintiff’s Brief at 28, 29). However, Plaintiff argues that although Scott Radiological was not liable and owed nothing, the court should reallocate approximately \$270,000 to Mid-America. This is incorrect and unfair. It is just as likely that had Scott Radiological been found not liable by the jury, the amount of damages awarded by the jury would have been less. Mid-America can only be jointly liable with those who are liable, and Scott Radiological was found to be not liable.

(iii.) Joint and Several Liability – Plaintiff extensively discusses the roots and purposes of joint and several liability. This is to no avail. The Missouri Legislature specifically modified joint and several liability for medical malpractice actions. RSMo. § 538.230; Adams v. Children’s Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992). Further, since the Trial Court and the Court of Appeals held that Plaintiff (not Mid-America) had failed to prove that Scott Radiological was at fault, they cannot be considered to be a joint tortfeasor. As Scott Radiological was not liable, and not a joint tortfeasor, Plaintiff’s contention that Mid-America could seek contribution from Scott Radiological is also inaccurate.

(iv.) Secondary Authorities – Plaintiff has cited to both the MoBar CLE manuals and to the RESTATEMENT THIRD OF TORTS. (Plaintiff’s Brief at 30-31, 34-35). First, these are not controlling authorities, and need not be followed by this Court. Second, these authorities discuss situations where there are joint tortfeasors. For example, RESTATEMENT THIRD OF TORTS, § D18, cited by Plaintiff, begins: “If the independent tortious conduct of two or more persons is the legal cause of an indivisible injury, each defendant is assigned a percentage of comparative responsibility....”(Plaintiff’s Appendix Tab 7). This is on its face inapplicable. Scott Radiological was found not liable—not to have committed tortious conduct; it is not a joint tortfeasor. Additionally, Plaintiff cites Missouri Damages, § 22.17 (MoBar 2d ed. 2001). That section is entitled “Plaintiff Not at Fault—Tort Actions *Other Than Medical Malpractice.*” (emphasis added). That section is, on its face, not applicable to this lawsuit.

(v.) Void for Vagueness – Plaintiff argues that RSMo. § 538.230 is unconstitutional because it is vague. (Brief at 36-38). This argument should be summarily rejected by this Court. The cases cited by Plaintiff discuss application of the doctrine to penal statutes and statutory enactments with civil or criminal penalties. RSMo. § 538.230 is not a penal statute. Further, Plaintiff does not cite what words from the statute make it vague. Plaintiff cites Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. banc 1999), which sets forth a standard of review that would strongly weigh in favor of upholding the statute. That case states that “courts must endeavor by every rule of construction” to give effect to the statute and that civil statutes are afforded “greater tolerance” than criminal. Id. at 957. The cases cited do not support reversal based on application of the “void for vagueness” doctrine.

D. Conclusion

Plaintiff’s constitutional challenge to RSMo. § 538.230 is not properly preserved for this Court’s review and should not be entertained. If this Court reviews for plain error, the Constitutionality of the statute has already been upheld in Adams v. Children’s Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992). The Trial Court did not err in refusing to reallocate the 5% originally assessed to Scott Radiological to Mid-America. Mid-America respectfully requests that Plaintiff’s point be denied, and the judgment of the Trial Court be affirmed in this regard.

As set forth in Mid-America’s Points Relied On, Mid-America respectfully requests that the Trial Court’s judgment of February 21, 2006 awarding post-judgment interest from June 18, 2003 to both Michael and Karen Lindquist be reversed in part as

such award was in error, and that this Court enter judgment pursuant to Rule 84.14 granting Plaintiff interest on her judgment only from February 21, 2006 to June 28, 2006 when she filed her Notice of Appeal.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by United States mail, postage pre-paid, this ____ day of November, 2006, to following counsel of record:

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), the undersigned attorney certifies that:

1. This brief includes the information required by Missouri Rule of Civil Procedure 55.03.
2. This brief complies with Missouri Rule of Civil Procedure 84.06(b) and Local Rule 360(a)(1)(a).
3. This brief contains approximately 6,958 words according to the Word Count feature of Microsoft Word.
4. The submitted disk has been scanned for viruses and is virus-free.

SANDBERG, PHOENIX & von GONTARD, P.C.

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