

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**NATALIE ADKINS, ET AL.**

**v.  
JILL HONTZ**

**APPELLANTS-RESPONDENTS,**

**RESPONDENT-APPELLANT.**

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DOCKET NUMBER WD72549 Consolidated with WD72550 and WD72571

DATE: March 15, 2011

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Appeal From:

Buchanan County Circuit Court  
The Honorable Weldon C. Judah, Judge

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Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

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Attorneys:

Herbert W. McIntosh, Kansas City, MO, for appellants-respondents.

Kevin D. Weakley, Overland Park, KS, for respondent-appellant.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

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**v.  
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No. WD72549 Consolidated with WD72550 and WD72571

Buchanan County

Before Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

This appeal is from a judgment awarding the plaintiffs and the Estate of Malorie Adkins damages arising out of an automobile accident resulting in the death of Malorie Adkins.

Malorie Adkins ("Malorie"), age thirteen, was tragically killed in an automobile accident in Kansas caused by the negligence of the driver of the vehicle, Jill Hontz. Malorie's parents, Natalie and Bryan Adkins ("Plaintiffs") filed a lawsuit for wrongful death, on their own behalf and filed a survival action for the Estate of Malorie Adkins, asking for past and future economic and non-economic damages. This was a single car accident caused by the driver's inattention. The vehicle rolled several times and Malorie, who was not wearing a seatbelt, was ejected from the vehicle. The Plaintiffs argued that Hontz was negligent in failing to ensure that Malorie was wearing a seatbelt. After a trial, the jury awarded the plaintiffs \$492,771.16 and awarded the Estate \$50,000. In its Judgment, the court applied the Kansas statutory cap on non-economic damages of \$250,000 pursuant to K.S.A. section 60-1903 and a \$50,000 credit toward each judgment based on prior payments. Both parties now cross appeal.

**WE AFFIRM**

In Point One, the plaintiffs argue the trial court abused its discretion and deprived them of their right to a fair and impartial jury by preventing them from inquiring during voir dire whether any panel member had in mind a preconceived dollar figure as to damages that he or she would never exceed regardless of the evidence. The proposed question is proper and not objectionable because it did not commit the jury to a specific verdict or amount of damages. However, reversal is not required because the plaintiffs were not prejudiced. They were able to inquire extensively into the jurors' beliefs toward each category of damages and the trial court has the discretion to limit voir dire to promote efficiency. The plaintiffs did not show a real probability of prejudice so as to undermine our confidence in the jury. Point One is denied.

In Point Two, the plaintiffs argue the trial court abused its discretion in excluding the opinion testimony of plaintiffs' expert Zimmerman as to the value of services that Malorie would likely have provided to the plaintiffs for care giving to and care management of them in *their* senior years of life. The trial court's exclusion of Zimmerman's testimony was not in error.

Zimmerman is not an expert economist and her proposed testimony's relevance was slight because there was no evidence that the numbers used by Zimmerman had any relation to the plaintiffs. Further, given the slight relevance of the proposed testimony, the chance for misleading and confusing the jury was great. Finally, even if excluding the testimony was error, it was not prejudicial because it was cumulative to evidence presented by plaintiff's expert Dr. Ward. Point Two is denied.

In Point Three, the plaintiffs argue the trial court erred in granting Hontz's pre-judgment "Motion to Apply Offset or Credit" in the wrongful death case in its "Docket Entry and Order" on May 24, 2010, with respect to the personal injury protection (PIP) payments made to or for Natalie and Bryan Adkins under Kansas law because the court lacked authority to grant that motion because it was filed under Rule 75.01 and the court's docket entry and order was entered more than thirty days after entry of the judgment.

Because the parties and this Court all agree that the Amended Judgment is a nullity this point on appeal is moot and the defendants have not appealed the failure of the trial court in the Judgment to apply a credit or offset for PIP payments. Point Three is denied.

In Point Four, the plaintiffs argue the trial court erred in granting Hontz's "Motion to Enter Judgment to Conform with K.S.A. § 60-1903 Cap on Non-Economic Damages," which applies a statutory cap of \$250,000 on non-economic damages in plaintiffs' wrongful death case because that capping statute is unconstitutional as a violation of §§1, 2, 5, 18 and 20 of the Kansas Constitution's Bill of Rights. Because the case cited by the plaintiffs that may decide whether the statutory cap is unconstitutional under the Kansas Constitution is pending before that court, we cannot take judicial notice of the decision. Currently, the state of Kansas law is clear that the statutory cap on non-economic damages does not offend the constitution of the State of Kansas and we must defer to that determination. Point Four is denied.

In Point Five, the Estate argues the trial court erred in refusing to set aside its interlocutory grant of partial summary judgment against the Estate in the survival action on the issue of the submissibility of punitive damages. In Kansas, to recover punitive damages in a civil case, the plaintiff has the "burden of proving, by clear and convincing evidence [ . . . ] that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice." K.S.A. § 60-3701. The plaintiffs argued Hontz's conduct was wanton. The facts of this case are clear that the failure of Hontz to require Malorie to wear a seatbelt was not wanton under Kansas law, which requires a reckless disregard of imminent danger and indifference to probable consequences. Therefore, the trial court did not err in refusing to submit to the jury the issue of punitive damages as there was no submissible case on the issue.

Hontz's Point One on Cross-Appeal argues that the Amended Judgment was a nullity. The parties and the court agree this is so because the trial court attempted to amend the Judgment after it had lost the power to do so. Accordingly, this appeal is taken from the original Judgment.

Hontz's Point Two on Cross-Appeal argues that the trial court erred in awarding post-judgment interest in its Amended Judgment because it failed to apply the requisite statutory interest rate set forth in section 408.040, in that it applied a nine percent interest rate to the wrongful death judgment rather than the 5.25 percent interest rate required.

Because the parties and the court all agree that the Amended Judgment is a nullity, this point on appeal is moot. However, the court notes that the wrongful death case was filed prior to August 28, 2005, and, therefore, section 408.040, in effect at that time, mandated that all judgments bore an interest rate of nine percent. It was unnecessary to specify the interest rate in the judgment itself. The award in favor of the Estate has been entirely satisfied by a credit and, therefore, this issue of its proper interest rate is moot.

Opinion by Gary D. Witt, Judge

March 15, 2011

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