

IN THE SUPREME COURT OF MISSOURI

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SC 90708

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JANA KIVLAND, et al.,

*Appellants-Plaintiffs,*

v.

COLUMBIA ORTHOPAEDIC GROUP, LLP, et al.,

*Respondents-Defendants.*

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Appeal from the Circuit Court of the County of Boone, Missouri

Cause No. 05BA-CV02721

Judgment dated March 4, 2009

Honorable Gary M. Oxenhandler

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RESPONDENTS' SUBSTITUTE BRIEF

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Kevin F. O'Malley  
Theodore D. Agniel  
Marcus C. Wilbers  
GREENSFELDER, HEMKER &  
GALE, P.C.  
10 S. Broadway, Suite 2000  
St. Louis, Missouri 63102  
Office: (314) 241-9090  
Fax: (314) 241-8624

*Counsel for Respondents*

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## INTRODUCTION

In this appeal, Appellants ask this Court to disregard the well-established and widely held standard of proving causation in wrongful death cases in which the decedent committed suicide. Appellants ask this Court to declare that an individual's premeditated, deliberately planned suicide is, as a general rule, involuntary because, in Appellant's expert's opinion, suicide is almost never a rational choice. In short, Appellants hope to completely reverse existing Missouri law on this issue.

This lawsuit arose from Gerald Kivland's ("Kivland") lower back surgery performed by Respondent Robert Gaines, M.D. ("Dr. Gaines"). Kivland was unable to move his legs after this surgery. Approximately fourteen months later, he committed suicide. After his death, Appellants' lawsuit raised various theories of liability, including medical negligence, loss of a chance, lost chance of survival, and wrongful death. This appeal addresses the trial court's order granting summary judgment on two claims: wrongful death (Count VII) and lost chance of survival (Count VIII). The other claims remain.

Appellants Jana Kivland and Kristen Bold, Kivland's wife and daughter, respectively, argue that Dr. Gaines is legally responsible for Kivland's death. Suicide is now generally considered a voluntary act that breaks any causal connection between a defendant's alleged negligence and the person's death. Causation can only be established if that person killed himself because he was insane as a result of the defendant's conduct. Kivland was never insane. Appellants' theory of liability disregards well-established Missouri law.

The trial court correctly applied Missouri law and granted summary judgment on Counts VII and VIII for two reasons. First, Appellants have no expert witness to establish a causal connection between Kivland's suicide and Dr. Gaines' alleged negligence, as required by Missouri law. Second, all the evidence demonstrated that Kivland had no diagnosable mental dysfunction that was either connected to the Respondents' alleged negligence or that caused him to take his life. His personality was the same after the surgery as it was before. Before and after his back surgery he was engaging, clear-minded, rational, realistic and was never diagnosed, before or after his death, with any mental disorder. Therefore, the court properly held that Kivland's suicide was a voluntary act breaking any causal connection to Dr. Gaines' surgery.

## STATEMENT OF FACTS

Kivland's lower back surgery on January 10, 2005 left him in pain and unable to move his legs. LF00049; LF00202 (p. 137). This was not Kivland's first spine surgery, however. LF00177 (p. 38). In fact, he had four previous surgeries on his neck to repair discs. LF00177 (p. 38-41) He also underwent two lower back surgeries prior to Dr. Gaines' surgery and, on another occasion, received radioactive seeds for his prostate. LF00181 (p. 55); LF00179 (p. 46-47).

Despite the pain and paralysis following his January 2005 surgery, he resumed his normal life as much as possible. LF00049; LF00198 (p. 124). On July 22, 2005, Gerald Kivland and Jana Kivland sued Dr. Gaines and Columbia Orthopaedic Group, alleging medical negligence theories of liability. LF00001. Kivland remained very aware of his situation while the lawsuit was pending. LF00200 (p. 130).

Kivland's wife and daughter have testified that Kivland's personality was no different after Dr. Gaines' surgery than it was before. LF00200 (p. 130; p. 132). He had a great memory, enjoyed watching educational television programs and telling stories. LF00200 (p. 130, 132). He never seemed depressed about his condition and did not see a psychiatrist or psychologist for any mental health issues. LF00198 (p. 124) ("until the day he died I never really saw him depressed."); LF00199 (p. 128) ("And I asked him are you depressed, and he said no. And he never acted depressed."); LF00200 (p. 130); LF00201 (p. 133); LF00211 (p. 176). Kivland had a prescription for Wellbutrin, an antidepressant, which was used to help him sleep and treat his arthritis, but his wife stated he was "never depressed." LF00067. His emotional well being was "very good" and "he

still cared about life and [his daughter's] life and [his wife's] life, his granddaughter's life, his older brother, sister, watched the news, kept up on current events." LF00227 (p. 50-51).

Kivland admittedly experienced pain. He believed that his pain would continually increase. LF00200 (p. 130 – 131); LF00202 (p. 137). He eventually decided that he no longer wanted to live with his pain, so he began planning to kill himself. LF00201 (p. 136); LF00212 (p. 177); LF00229 (p. 59). Kivland purchased a gun and ammunition and wrote farewell letters to the Appellants. LF00254 (p. 85-86); LF00282; LF00283. In the letter to his wife, he stated that he had written it "a thousand times in my head," indicating he had "stewed" about the decision for some time. LF00252 (p. 79); LF00282. His letters clearly and rationally explained the reasons for his decision, asked forgiveness for the pain his death would cause Appellants, discussed plans to handle his remains. LF00282; LF00283. Kivland was able to keep his detailed plans secret from his wife, with whom he shared a home, and his daughter. LF00201 (p. 133); LF00212 (p. 177); LF00220 (p. 24). Appellants were not aware that he was planning his suicide. LF00201 (p. 133); LF00212 (p. 177); LF00220 (p. 24).

On March 9, 2006, approximately 8 months into the lawsuit, Kivland killed himself. LF00207 (p. 158). That morning, Kivland had a rational conversation with his wife regarding his meal and medication, and spoke to his daughter to congratulate her on obtaining a new job. LF00075; LF00088-89. After speaking with Appellants, Kivland wheeled himself out of his condominium to an open space nearby with a blanket covering his lap to hide the gun. LF00209 (p. 166-67). He taped his condominium key inside a

card and mailed it to his wife. LF00206 (p. 153); LF00261 (p. 115-116). He also attached a post-it note on the box of ammunition explaining how to dispose of the bullets. LF00208 (p. 164); LF00261 (114).

Appellants have admitted that Kivland knew what he was doing and that he had obviously planned his death. LF00199 (p. 126); LF00205 (p. 152); LF00209 (p. 165); LF00229 (p. 59). Appellant Bold stated that Kivland “was of clear mind and knew exactly what he was doing” in planning his death. LF00229 (p. 59). Appellant Jana Kivland agreed that “he obviously had this planned.” LF00199 (p. 126); LF00209 (p. 165). She further testified that the level of planning and preparation for his suicide “shows you how clear-minded my husband was.” LF00205 (p. 152).

Appellants’ expert witness, Michael Jarvis, M.D. (“Dr. Jarvis”), testified by deposition on July 2, 2008. LF00232. He admitted that he could not offer any diagnosis of Kivland to any degree of medical certainty. LF00238 (p. 22); LF00250 (p. 70); LF00254 (p. 85-86). He agreed that Kivland was not “in a psychotic state” and was not “psychiatrically delusional” or “suffering from dementia.” LF00254 (p. 85-86). Kivland’s behavior before his death showed “no presence of a thought disorder or delirium” according to Dr. Jarvis. LF00261 (p. 113-116); LF00262 (p. 117). Dr. Jarvis testified that neither “insanity” nor “bereft of reason” [the term preferred by Appellants] are medical terms. LF00237 (p. 19); LF00258 (p. 102).

Based on the absence of any expert medical testimony, Dr. Gaines and Columbia Orthopaedic Group moved to strike Dr. Jarvis as an expert. LF00016. The trial judge agreed and struck Dr. Jarvis as an expert witness because he “had no basis, factually or

scientifically, for his opinions.” LF00018. “Without a medical diagnosis for Kivland, the statements in Dr. Jarvis’s affidavit and deposition testimony become only personal opinions, not scientific conclusions.” LF00019. The court concluded that “admission of such an opinion would be highly prejudicial to the defendants and improper under Missouri law.” LF00019.

Appellants failed to identify a medical expert to replace Dr. Jarvis on the issue of Kivland’s suicide. On March 4, 2009 the trial court entered partial summary judgment on the wrongful death and lost chance of survival claims. LF00021. The trial judge found that Dr. Jarvis had been struck and that Appellants were “without any other expert witness” to establish causation as required by Missouri law. LF00021. The court concluded that, without testimony demonstrating that Kivland was insane, Appellants could not make a submissible case on Counts VII and VIII. LF00021. The other Counts remain.

## STANDARD OF REVIEW

“The standard of review of appeals from summary judgment is essentially *de novo*.” State ex rel. Koster v. Olive, 282 S.W.3d 842, 846 (Mo. 2009) (en banc). The Court reviews the record in the light most favorable to the non-moving party and accords the non-movant all reasonable inferences from the record. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Co., 854 S.W.2d 371, 376 (Mo. 1993) (en banc).

“The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially.” Id. A party is entitled to summary judgment if the pleadings, affidavits, admissions, and exhibits demonstrate that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Mo. Sup. Ct. R. 74.04. When faced with a motion for summary judgment, the nonmoving party may not rest upon the mere allegations set forth in its pleadings, but must set forth specific facts that demonstrate the existence of an outstanding genuine issue of material fact for trial. Mo. Sup. Ct. R. 74.04(c).

This standard of review applies to all points relied on.

## ARGUMENT

Respondents are entitled to summary judgment on Counts VII and VIII because the trial court correctly applied Missouri law. This court should affirm that decision, and decline Appellants' invitation to rewrite Missouri law for three reasons. First, Appellants' have no expert witness and, therefore, cannot make a submissible case Counts VII and VIII. Second, the standard enunciated in Wallace is the prevailing view in Missouri and in jurisdictions around the country and, when applied to this case, prevents Appellants from proving causation. Finally, this standard does not violate the open courts provision.

**I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANTS' ARGUMENT FOR ABROGATING THE WALLACE STANDARD CONCERNING PROXIMATE CAUSATION IN SUICIDE CASES IS MOOT IN THAT APPELLANTS HAVE NO EXPERT WITNESS TO SUPPORT THEIR CAUSATION ARGUMENT WITH RESPECT TO COUNTS VII AND VIII AS REQUIRED BY MISSOURI LAW.**

Appellants ask this Court to abrogate the standard established in Wallace v. Bounds, 369 S.W.2d 138 (Mo. 1963). That case held that “where, 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.” Id. at 143-44.

Appellant's argument for abrogating the Wallace standard is moot because they have no expert witness to support them on this issue.

To prevail on their claims for lost chance of survival and wrongful death, Appellants must prove (1) that an act or omission of Defendants failed to meet the standard of care; (2) that the act or omission was negligently performed; and (3) that "the act or omission caused the plaintiff's injury." Mueller v. Bauer, 54 S.W.3d 652, 656 (Mo. Ct. App. 2001). "Expert testimony is required to establish causation in a medical malpractice case where proof of causation requires a certain degree of expertise." Id. (citing Brickey v. Concerned Care of the Midwest, Inc., 988 S.W.2d 592, 596 (Mo. Ct. App. 1999)).

"To make a submissible case, substantial evidence is required for every fact essential to liability." Steward v. Goetz, 945 S.W.2d 520, 528 (Mo. Ct. App. 1997). "The evidence and inferences must establish every element and not leave any issue to speculation." Id. Testimony about causation must be given to a reasonable degree of medical certainty and must not exclusively resort to using terms such as "maybe," "possibly" or "could" when describing the causal link. See Sundermeyer v. SSM Reg'l Health Servs., 271 S.W.3d 552, 555-56 (Mo. 2008) (en banc).

In Missouri, "suicide is considered a new and independent intervening act which breaks the causal connection between the allegedly negligent act and the death." Eidson v. Reproductive Health Servs., 863 S.W.2d 621, 627 (Mo. Ct. App. 1993); see also Neurological Medicine, Inc. v. Gen. Am. Life Ins. Co., 921 S.W.2d 64, 66-67 (Mo. Ct.

App. 1996) (“In Missouri, suicide is generally deemed to be an independent intervening act which breaks the causal connection between a prior negligent act and the death”).

As an exception to the general rule, a plaintiff may still make a submissible case by proving that the defendant’s negligence “caused decedent to become insane in the sense that 1) the insanity prevents the injured party from understanding what he or she is doing or from understanding its inevitable or probable consequences or 2) the injured party’s act is done under an insane impulse” in the sense that it prevented reason from controlling his actions. Eidson, 863 S.W.2d at 627.

This Court does not need to entertain Appellants’ invitation to abrogate this well-established standard because doing so would not affect the viability of the two claims at issue. This is so because Appellants do not have an expert witness to support any causal connection between Respondents’ conduct and Kivland’s death. As such, the trial court’s granting of summary judgment on Counts VII and VIII was proper regardless of the standard applied.

Appellants’ only expert witness, Dr. Jarvis, was stricken by the trial court on November 19, 2008. LF00018-19. Appellants argue that this order merely prevented Dr. Jarvis from testifying about certain opinions. However, the trial court’s order leaves no doubt:

Although Dr. Jarvis’ affidavit and deposition testimony claimed to be within reasonable degree of medical certainty, **he admittedly had no basis, factually or scientifically, for his opinions. All the facts presented by Plaintiffs in this case, however, undisputed by Dr. Jarvis,**

**showed him that Kivland was not insane or operating under any form of depression or psychosis during the time between Dr. Gaines' surgery and the date of his death.**

For a person such as Dr. Jarvis to be qualified as an expert, Mo. Rev. Stat. § 490.065 requires him to rely on facts and data of a type reasonably relied on by experts in his field and the facts and data must be otherwise reasonably reliable. Mo. Rev. Stat. § 490.065. **Without a medical diagnosis for Kivland, the statements in Dr. Jarvis's affidavit and deposition testimony become only personal opinions, not scientific conclusions.** (continued to second order entry of this date)

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.

LF00018-19 (emphasis added). This passage clearly demonstrates that the trial court struck Dr. Jarvis because of the bases for his opinions, not simply the opinions themselves. This decision is well founded. Even Dr. Jarvis admitted that he did not have a diagnosis for Kivland and that his opinions about Kivland's mental state were mere "suspicions." LF00238 (p. 22). Appellants failed to appeal the court's order striking Dr. Jarvis, despite the fact that it was certified for appeal. LF00018 ("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.”) Therefore, the interpretation of the trial court’s order striking Dr. Jarvis as an expert witness is not properly before this Court.

After the trial court struck Dr. Jarvis as an expert, Appellants failed to retain an expert medical witness to testify about the issue of causation. Their failure to do so does not necessitate a change in Missouri law, as they argue in their Brief. They have no expert testimony that Kivland was insane, mentally unstable, or suffering from any medically-diagnosable mental illness when he killed himself. Under well-established Missouri law, therefore, Appellants cannot make a submissible case on Counts VII and VIII of their Third Amended Petition. Therefore, this Court should affirm the trial court’s partial summary judgment on those Counts.

**II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE EVIDENCE DEMONSTRATED THAT GERALD KIVLAND WAS NEITHER INSANE NOR SUFFERING FROM ANY DIAGNOSABLE MENTAL ILLNESS AT THE TIME OF HIS DEATH AND, THEREFORE, APPELLANTS CAN NOT CAUSALLY CONNECT RESPONDENTS' ALLEGED CONDUCT AND KIVLAND'S DEATH.**

**[Response to Appellants' Point Relied on I.]**

This Court should apply the Wallace standard and affirm the trial court's order for four reasons. First, controlling Missouri law should not be overruled. Second, Missouri law is not an outdated, "impossible standard" as Appellants suggest. Third, the facts of the case clearly demonstrate that Kivland was not insane at the time of his death and he understood the natural and probable consequences of his actions. Finally, Appellants' proposed "bereft of reason" and "rational choice" standard is wholly subjective, unhelpful, unreasonably broad, and would lead to absurd results.

**1. Supreme Court precedent on the controlling issue should not be overruled.**

A Missouri Supreme Court decision "should not be lightly overruled, particularly where, as here, the opinion has remained unchanged for many years." Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 546 (Mo. 1963) (en banc). The Missouri Supreme Court ruled on the controlling issue of Appellants' argument in 1963. The key portion of that opinion has remained unchanged since then. Specifically, the Court set forth the

standard for proving proximate cause in a personal injury action where the decedent committed suicide as follows:

Suicide, due to a mind disordered by an accident or injury or even by an assault accompanied by mental torture, has been held not so related to the wrongful acts as to furnish a ground for the action, where the act of suicide of the insane person is voluntary and done with knowledge of its purpose and physical effect; **but where, 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, 143-44 (Mo. 1963) (emphasis added).

Since 1963, the Wallace standard has been applied several times. In 1986, the Eighth Circuit applied Wallace in upholding a jury verdict for plaintiff. Stafford v. Neurological Medicine, Inc., 811 F.2d 470 (8th Cir. 1986). The court held that the jury properly found that defendants caused decedent's death when she committed suicide after reading an insurance form which incorrectly stated she had a brain tumor. Id. at 471. The shock of the improper "diagnosis" caused plaintiff's wife to become insane after reading the words "brain tumor." Id. at 473-74. Unlike Kivland in this case, the decedent immediately became withdrawn and stopped speaking after reading the incorrect diagnosis. Id. at 472. Two or three days later, she hung herself. Id. These facts are unlike this case where, more than one year after the alleged negligence occurred,

Kivland deliberately planned his death and during the entire period showed no signs of being controlled by an irresistible impulse.

Seven years after Stafford, the Eastern District Court of Appeals thoroughly examined Wallace and upheld a jury verdict in favor of defendants. Eidson v. Reproductive Health Services, 863 S.W.2d 621 (Mo. Ct. App. 1993) rehearing and/or transfer denied (Oct. 27, 1993); transfer denied (Jan. 25, 1994). The decedent in Eidson was a fifteen year old girl with a long history of mental illness. Id. at 622-23. She committed suicide after having an abortion and then learning, a month later, that her boyfriend had impregnated another girl. Id. at 624. Quoting Wallace and the Second Restatement of Torts, the court explained that, to prove a causal connection between the abortion clinic's alleged negligence and the girl's death required evidence that the clinic caused the girl to become insane in the sense that she did not understand what she was doing or that she committed suicide under an insane impulse. Id. at 627. Plaintiff's expert testified that the decedent suffered from major depression at the time of her death. Id. However, since plaintiff "presented no evidence that [decedent] became insane," the court of appeals affirmed. Id. Similarly, in this case, Kivland was never diagnosed as having any mental illness. Unlike the decedent in Eidson, however, Kivland was never diagnosed with depression.<sup>1</sup>

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<sup>1</sup> Appellants' contention that Kivland was suffering from "major depression" is incorrect and not supported by the record. (Appellants' Substitute Brief, p. 5) Kivland took Wellbutrin, an antidepressant, to help him sleep and to treat his arthritis. LF00067. In

Three years after Eidson, the Eastern District Court of Appeals addressed the contribution action following the Eighth Circuit's decision in Stafford. Specifically, the defendant found liable in Stafford sued the insurance company who generated the incorrect report diagnosing the decedent with a brain tumor. Neurological Medicine, Inc. v. Gen. Am. Life Ins. Co., 921 S.W.2d 64 (Mo. Ct. App. 1996) rehearing and/or transfer denied (April 11, 1996); transfer denied (May 28, 1996). Unlike the federal case, however, plaintiff did not introduce any evidence of the decedent's mental state immediately prior to the suicide. Id. at 67. Since there was no evidence of the decedent's mental state, plaintiff could not meet the Wallace standard. Id. at 67-68.

Finally, in 1997, the Eastern District Court of Appeals relied on these same principles and affirmed a directed verdict for defendants where the decedent committed suicide after taking prescription drugs known to possibly cause suicidal thoughts. Beer v. Upjohn Co., 943 S.W.2d 691, 692-93 (Mo. Ct. App. 1997) rehearing and/or transfer denied (March 31, 1997); transfer denied (May 27, 1997). The court held that a directed verdict in favor of the defendant was proper because there "was no evidence in [the] medical records specifically diagnosing" decedent with any mental illness. Id. at 694. Similarly in the present case, there is un-denied and irrefutable evidence that Kivland had no mental illness.

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fact, Jana Kivland testified that Kivland "didn't need" any other medication for any depression because he was "never depressed." LF00067.

These cases have all recognized Wallace as controlling Missouri law. The opinion in Wallace tracks the Restatement (Second) of Torts. See Wallace, 369 S.W.2d at 143-44 (citing § 455 of the Restatement). This rule is also the prevailing view in jurisdictions around the country. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 44 at 310-11 (5th Ed. 1984) (“[I]t is the prevailing view that when insanity prevents one from realizing the nature of one’s act or controlling one’s conduct,” the defendant may be held liable for the suicide). See also: Crumpton v. Walgreen Co., 871 N.E.2d 905 (Ill. App. 2007); Sindler v. Litman, 887 A.2d 97 (Md. App. 2005); Bertrand v. Air Logistics, Inc., 820 So.2d 1228 (La. Ct. App. 2002); McMahon v. St. Croix Falls School Dist., 596 N.W.2d 875 (Wis. App. 1999); Clift v. Narragansett Television L.P., 688 A.2d 805 (R.I. 1996); Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994); Exxon Corp. v. Brecheen, 526 S.W.2d 519 (Tex. 1975); Orcutt v. Spokane County, 364 P.2d 1102 (Wash. 1961); Appling v. Jones, 154 S.E.2d 406 (Ga. App. 1967); Cauverien v. De Metz, 188 N.Y.S.2d 627 (N.Y. Sup. 1959); Long v. Omaha & C.B. Street Ry. Co., 187 N.W. 930 (Neb. 1922).

Even those jurisdictions that have not adopted the Restatement’s insanity test have retained some form of objective measure of the decedent’s mental condition. For example, California’s rule (regarded as a more liberal trend) states that a defendant can be found liable “if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide.” Tate v. Canonica, 180 Cal.App.2d 898, 914-915 (Cal. Ct. App. 1960) (emphasis added). Tate also recognizes that if the “injured person is able to realize the nature of the act of suicide and has the power to control it if he so desires, the act then becomes an independent intervening force and the wrongdoer

cannot be held liable for the death.” Id.; see also Tuscon Rapid Transit Co. v. Tocci, 414 P.2d 179 (Ariz. Ct. App. 1966) (quoting Tate); Porter v. Murphy, 792 A.2d 1009 (Del. Super. Ct. 2001) (quoting Tate). Respondents have found no state court decision adopting Appellants’ subjective standard, that simply because a decedent takes his life, he is “bereft of reason, unable to make a rational choice about taking his life, and that the death [is] involuntary.” (Appellants’ Substitute Brief, p. 23).

**2. The Missouri standard for proving proximate causation in cases where the decedent commits suicide is not a “magic words” test.**

Appellants claim Wallace is an “impossible standard” because it requires the utterance of “magic words.” (Appellants’ Substitute Brief, p. 22). However, this characterization results solely from Appellants’ contorted interpretation of Missouri law, rather than a fair reading of it.

Appellants argue that “insanity” is not a medical diagnosis, which makes Wallace an “impossible standard” to meet. (Appellants’ Substitute Brief, p. 22). Appellants apparently ignore the fact that in Stafford. v. Neurological Medicine, a case on which they rely, the Eighth Circuit upheld a jury verdict for plaintiff. Moreover, the standard itself explains how to prove insanity. Appellants must prove that Kivland was insane “**in the sense that** 1) the insanity prevents the injured party from understanding what he or she is doing or from understanding its inevitable or probable consequences 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.” Eidson, 863 S.W.2d at 627 (emphasis added). Appellants complain that this is a “circular standard” because

“insanity” is used in the explanation. As discussed more fully in Section II(4) below, Appellants argue for a new standard using “bereft of reason” and “rational choice” instead of “insanity.” (Appellants’ Substitute Brief, p. 20). However, Appellants’ own expert witness testified that “bereft of reason” is “not a medical term.” LF00237 (p. 19). Therefore, Appellants’ proposed standard does nothing to cure their chief complaint about existing Missouri law.

Appellants have no facts and no credible expert testimony to show that Kivland was insane, or that he had a diagnosed mental condition that was caused by the Respondents’ alleged negligence, or that the mental condition caused him to have an uncontrollable impulse to commit suicide. An “insanity” standard is neither impossible to meet nor novel in Missouri law.

In insurance coverage disputes, the Missouri Supreme Court has declared “[i]t is well settled law that the phrase ‘accidental bodily injury’ does not include suicide while **sane**.” Miller v. Home Ins. Co., 605 S.W.2d 778, 780 (Mo. 1980) (en banc) (emphasis added). The court went on to “conclude that suicide while **sane** was not a covered risk” for purposes of accidental death benefits. Id. (emphasis added). The Court’s discussion demonstrates that using “sanity” or “insanity” as a standard – a standard for judging whether suicide was an accident – is not problematic, because it is “well settled” law. This standard parallels the one currently before this Court. A person’s affirmative decision to take his own life cannot be deemed “accidental” or the result of another person’s actions when the decedent is aware of the consequences of his or her own actions.

The “insanity” defense in criminal law is another analogous standard. This defense does not amount to a mere recitation of “magic words,” but instead focuses on a person’s mental state. “**Insanity** is a true affirmative defense, that is, the burden of persuasion is on the defendant to show by a preponderance of the evidence that the defendant had a **mental disease or defect** excluding responsibility for his conduct at the time of the crime.” 32 MoPrac § 4.5. (emphasis added).

A defendant is not responsible for his or her criminal conduct “if, at the time of such conduct, **as a result of a mental disease or defect** such person was **incapable of knowing and appreciating the nature, quality, or wrongfulness of such person’s conduct.**” Mo. Rev. Stat. § 552.030. (emphasis added). This is essentially a restatement of the M’Naghten rule. 32 MoPrac § 4.5. This rule requires the criminal defendant to “overcome the statutory presumption of **sanity** by showing by a preponderance of the evidence that he or she suffered from a **mental illness** that precluded him or her from **appreciating the nature, quality or wrongfulness of his or her criminal conduct.**” State v. Bass, 81 S.W.3d 595, 615 (Mo. Ct. App. 2002) (emphasis added).

At the heart of all three standards – in tort, insurance and criminal law – is the concept that people are presumed to be sane and that they are responsible and accountable for their own actions unless it is proven that they suffered from a mental illness that prevented them from understanding the nature and consequences of their conduct. This concept is essential to orderly functioning of civil society, as people are expected to conform their conduct to societal standards. Their culpability is diminished when they are unable to do so because of a mental illness that impairs their proper cognitive abilities.

The trial court entered partial summary judgment against Appellants not because Dr. Jarvis failed to use “magic words,” as claimed by Appellants, but because Dr. Jarvis did not and could not articulate a mental disease or illness that caused Kivland to lose control of himself. The chief reason for Dr. Jarvis’ inability to do so is that Kivland was clearly in control of himself. In a sane and rational way, he simply decided he did not want to live anymore. In fact, Dr. Jarvis admitted that he had no psychiatric diagnosis of Kivland, and that his opinions about his mental state were mere “suspicions.” LF00238 (p. 22). Appellants complain that they should be entitled to submit their claims to a jury because Kivland’s suicide “was involuntary, it was caused by the injuries Mr. Kivland suffered during the surgery, and that Mr. Kivland was bereft of reason.” (Appellants’ Substitute Brief, p. 20). However, it is clear from the Wallace standard and the analogous tests cited above that Appellants must identify a mental illness that controlled Kivland’s cognitive ability. Even California’s holding in Tate, which is regarded as a more liberal rule, required some showing of “mental illness.” Tate v. Canonica, 180 Cal.App.2d at 914-15. In short, they must prove that he was insane, and that his insanity prevented him from understanding or controlling his decision to commit suicide. It is undisputed that Appellants failed to prove this and, therefore, this Court should affirm the trial court’s partial summary judgment.

**3. The evidence demonstrates that Gerald Kivland was not insane at the time of his death and that he understood the natural and probable consequences of his actions.**

The trial court correctly noted in its Summary Judgment Order that Appellants “can not establish that there is a genuine issue of material fact with respect to Count VII and Count VIII of [Appellants’] Third Amended Petition; simply stated, [Appellants] can’t make their case on Counts VII and VIII.” LF00475. The evidence establishes that Kivland was not insane at the time of his death and that he knew the natural and probable consequences of his actions. Respondents are, therefore, entitled to partial summary judgment as a matter of law as entered by the trial court.

A person such as Kivland is presumed to be sane “until evidence of insanity is introduced.” V\_\_ D. S \_\_ v. W \_\_ E. S \_\_, 490 S.W.2d 344, 351 (Mo. Ct. App. 1973). Lay witnesses are permitted to testify about a person’s sanity as long as “the person alleged to be insane displays psychotic behavior that is easily discernable to the lay person.” Skaggs v. Aetna Life Ins. Co., 884 S.W.2d 45, 47 (Mo. Ct. App. 1994). However, Appellants have presented no such evidence of insanity in this case. In fact, both lay and expert witness testimony demonstrated that Kivland was sane and rational up to his death.

Kivland’s personality was no different after the surgery; he was rational, clear-minded, engaging and interested in Appellants’ lives. LF00198 (p. 124); LF00200 (p. 130 - 132); LF00201 (p. 136); LF00202 (p. 137- 138); LF00212 (p. 177); LF00227 (p. 50-51). Even on the day of his death, Kivland spoke with Appellants at separate times

and had rational conversations about his meal, his medication and his daughter's job. LF00206 (p. 156); LF00207 (p. 157); LF00228 (p. 53-54). Kivland never appeared depressed, was never diagnosed with any mental illness, and never saw a psychiatrist or psychologist for any mental health issues. LF00198 (p. 124); LF00199 (p. 128); LF00200 (p. 130); LF00211 (p. 176).

Appellants admit that Kivland's suicide was deliberately and rationally planned. Appellant Bold testified that, due to the manner in which Kivland committed suicide, she believed "he was of clear mind and knew exactly what he was doing and it was more like euthanasia." LF00229 (p. 59). Appellant Bold believed "he obviously had this planned." LF00199 (p. 126); LF00209 (p. 165). Appellant Jana Kivland testified that the level of Kivland's planning and preparation for his suicide "shows you how clear-minded my husband was." LF00205 (p. 152).

Dr. Jarvis was unable to offer any medical diagnosis of Kivland, much less that Kivland was insane or suffered from a mental disease or defect. LF00238 (p. 22); LF00250 (p. 70); LF00254 (p. 85-86). Dr. Jarvis instead offered his "suspicion," which could not be given to a reasonable degree of medical certainty. LF00238 (p. 22); LF00250 (p. 70); LF00254 (p. 85-86). Dr. Jarvis could not even offer an opinion to a reasonable degree of medical certainty as to whether Kivland was depressed when he took his own life. LF00250 (p. 70). Dr. Jarvis believed, however, that Kivland was not "in a psychotic state" or "psychiatrically delusional" and that Kivland was not experiencing hallucinations or "suffering from dementia." LF00254 (p. 85-86). Dr.

Jarvis admitted that Kivland's behavior prior to his death exhibited "no presence of a thought disorder or delirium." LF00261 (p. 113-116); LF00262 (p. 117).

The above facts demonstrate that Kivland was not suffering from any diagnosable mental illness following his back surgery. Therefore, his suicide was "a new and independent intervening act" breaking the causal connection between Dr. Gaines' surgery and Kivland's death. As a result, this Court should affirm the trial court's grant of summary judgment.

**4. Plaintiff's proposed "bereft of reason" or "rational choice" standard is wholly subjective, unhelpful, unreasonably broad and would lead to absurd results.**

Appellants claim that they have satisfied the "but for" test and urge this Court to craft a new proximate cause standard. However, a "negligence action will not lie, even where the "but for" test is satisfied, if the cause is remote and other, intervening events arise." Sundermeyer, 271 S.W.3d at 555; citing Baker v. Guzon, 950 S.W.2d 635, 646 (Mo. Ct. App. 1997).

Appellants argue for a new proximate cause test despite the fact that the Wallace standard, established by this Court, has been followed by Missouri Courts of Appeals and the Eighth Circuit and it is the prevailing view in jurisdictions around the country. This Court should not entertain Appellants' suggestion.

Appellants' proposed standard is fraught with problems. Appellants argue that a jury question exists as to causation because Dr. Jarvis testified that Kivland "was bereft of reason, unable to make a rational choice about taking his life, and that the death was

involuntary.” (Appellants’ Substitute Brief, p. 23) Dr. Jarvis’ testimony illustrates why Appellants’ proposed standard would be wholly uninformative and needlessly confusing:

[Counsel for Respondents]: . . . [S]o what do you mean by the term bereft of reason?

[Dr. Jarvis]: Well, it is not a medical term. Bereft of reason, I guess, could mean somebody with a thought disorder. It could be anybody that – again, it is not a medical term, so bereft of reason, if you want to be flippant about it, is anybody who goes to the boats and gambles.

[Counsel for Respondents]: Who else besides those people?

[Dr. Jarvis]: Besides gamblers, bereft of reason could be people that have a thought disorder which are, I guess, people that do not think logically and sequentially their thoughts jump which could be reflective for any number of reasons. Bereft of reason could mean somebody who is demented, somebody who is having organic psychosis, either a complication of medicine or some other infirmity. Bereft of reason may be defined as somebody who is a minor.

LF00237 (p. 19).

Appellants argue that Kivland’s suicide was involuntary because “[a]n involuntary act is one that is not preceded by rational choice.” (Appellants’ Substitute Brief, p. 20).

Kivland's suicide was involuntary, Appellants claim, because his pain prevented him from "making a rational choice between continued life, love of his family, and the possibility of relief versus death." (Appellants' Substitute Brief, p. 20). According to Appellants, he believed that "suicide was his only reasonable option, when in fact he had other reasonable options." (Appellants' Substitute Brief, p. 16).

Rational choice and voluntary acts are independent concepts that are not interrelated. An act is "voluntary" when it is "done by design or intention." BLACKS LAW DICTIONARY, (8<sup>th</sup> Ed. 2004). Appellants have admitted that Kivland's suicide was intentional and well-planned. LF00199 (p. 126); LF00205 (p. 152); LF00209 (p. 165); LF00229 (p. 59). Rational choice theory states that people will choose to act in ways that have benefits outweighing the costs. See BLACK'S LAW DICTIONARY, (8<sup>th</sup> Ed. 2004) (defining rational-choice theory as "[t]he theory that criminals engage in criminal activity when they believe that the potential benefits outweigh the risks of committing the crime."); Michael Allingham, *Choice Theory* 27 (Oxford University Press 2002) ("Choice is rational if and only if it is utility maximizing.").

Whether an action is voluntary has little to do with whether that action is rational. People can act "by design or intention" even though those acts are not utility maximizing. Sometimes even the most well thought out plans turn out to be bad ideas, or have unintended consequences. Under Appellants' theory, however, any time a person acts on a bad idea, that action is involuntary. The practical effect of this standard would allow recovery in practically every wrongful death case in which the decedent committed suicide. Dr. Jarvis admits that "I'm sure there are people that rationally commit suicide.

I think that can happen, but I think that is an extremely rare event.” LF00246 (p. 56). In other words, nearly every suicide is irrational and involuntary, according to Dr. Jarvis.

Also, there is no objective element to Appellants’ proposed standard. Appellants disregard the “insanity” issue and fail to include any requirement for a medically diagnosable mental illness in their proposed standard. Without an objective element such as a medically diagnosable mental disease or illness, Appellants’ standard would permit Missouri courts to avoid all expert testimony on the issue of causation and simply ask whether the decedent had “other reasonable options” available besides suicide. This would result in a complete reversal of current Missouri law.

In addition, Appellants argue that suicide should be an issue of comparative fault to be determined by the jury.<sup>2</sup> Under their theory, Appellants claim any other result would be confusing to the jury, especially if they were instructed that Kivland died due to causes unrelated to any of Respondents’ acts or omissions. Appellants claim such a

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<sup>2</sup> This was not a basis for their arguments before the Court of Appeals. This Court may, therefore, disregard this argument. Mo. R. Civ. Pro. 83.08(b); State ex rel. Zobel v. Burrell, 167 S.W.3d 688, 691 n.2 (Mo. banc 2005). In any event, Appellants argue that Kivland’s suicide cannot be an intervening cause because “acts of either party to a damage suit for personal injuries . . . cannot be a new and independent cause.” (Appellants’ Substitute Brief, p. 14). Their argument is misplaced, however, because Gerald Kivland is not a party to the lawsuit, in particular the wrongful death and lost chance of survival claims. Beer, 943 S.W.2d at 694.

statement would be instructing the jury on a false issue. This is incorrect. Since Appellants have not met the Wallace standard, Kivland's death *by law* was not due to Respondents' conduct. It is far too simplistic to simply suggest that since some claims will be addressed by the jury, all claims should therefore be resolved by the jury. If this were sound policy, summary judgment would be completely unnecessary.

Therefore, this Court should affirm the trial court's order granting Respondents' Motion for Partial Summary Judgment.

**III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE RULING DOES NOT VIOLATE THE OPEN COURTS PROVISION OF THE MISSOURI CONSTITUTION IN THAT IT DOES NOT RESTRICT A RECOGNIZED CAUSE OF ACTION.**

**[Response to Appellant’s Point Relied on II.]**

The Wallace standard does not violate the open courts provision of the Missouri Constitution because it is not an “arbitrary or unreasonable” restriction on wrongful death claims. Therefore, Appellants’ argument is without merit.

Appellants claim that the application of the Wallace standard will ensure that no wrongful death claims involving suicide “could ever reach the jury.” (Appellants’ Substitute Brief, p. 28). This hyperbole is directly contradicted by Stafford v. Neurological Medicine, a case Appellants rely on in their own brief. In Stafford, the Eighth Circuit upheld jury verdict for the plaintiff because there was evidence that the decedent committed suicide while under an irresistible impulse. Stafford v. Neurological Med. Inc., 811 F.2d 470, 473 (8<sup>th</sup> Cir. 1987). The court focused on whether the suicide was the result of an “irresistible impulse,” because “[a]n ‘irresistible impulse’ is a form of insanity that could lead to an involuntary suicide.” Id. Therefore, Appellants’ argument is contradicted by authority cited in their own brief.

In addition, the open courts provision of Missouri’s Constitution does not apply in the current situation. The open courts provision “applies only to judicial or legislative acts that impose *procedural* bars to access to Missouri courts.” Mo. Highway & Transp. Comm. v. Merritt, 204 S.W.3d 278, 285 (Mo. Ct. App. 2006) (emphasis in original) see

also Kilmer v. Mun, 17 S.W.3d 545, 549 (Mo. 2000) (en banc) (“the ‘right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes.’”). The open courts provision “does not assure that a substantive cause of action once recognized in the common law will remain immune from legislation or judicial limitation or elimination.” Id.

The Wallace standard states substantive law. It is not merely a procedural obstacle. The case cited by Appellants, on the other hand, discussed a statute that granted a civil action only if the civil defendant had been criminally convicted for selling liquor when the sale was the proximate cause of the personal injury or death. Kilmer, 17 S.W.3d at 550. quoting Mo. Rev. Stat. § 311.310. The Missouri Supreme Court held that this limitation violated the open courts provision because it erected a “barrier that subjects a recognized injury to the discretion of the prosecuting attorney.” Id. at 554.

Appellants are improperly asking this Court to re-write substantive law as opposed to removing a procedural barrier from an otherwise valid claim. The trial court’s proper entry of partial summary judgment was not a violation of the open courts provision and, therefore, Appellants’ argument is unavailing.

### **CONCLUSION**

Appellants have no expert witness and no evidence that Kivland was insane. They cannot make a submissible case on Counts VII and VIII of their Third Amended Petition. Therefore, Respondents respectfully request this Court to affirm the trial court’s judgment and deny Appellants’ invitation to rewrite Missouri law.

Respectfully submitted,

GREENSFELDER, HEMKER & GALE, P.C.,

By \_\_\_\_\_

Kevin F. O'Malley, #23135

kom@greensfelder.com

Theodore D. Agniel, #35096

tda@greensfelder.com

Marcus C. Wilbers, #59802

mcw@greensfelder.com

10 S. Broadway, Suite 2000

St. Louis, MO 63102

(314) 241-9090

(314) 241-1265 (facsimile)

*Counsel for Respondents*

### **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). Excluding the material identified in Rule 84.06(b), it contains 7,994 words, as determined by the word count feature in Microsoft Word. The undersigned also certifies that the accompanying CD-ROM has been scanned and found free of viruses.

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## CERTIFICATE OF SERVICE

The undersigned certifies that two hard copies of this brief and a CD-ROM, pursuant to Rules 84.05(a) and 84.06(g) were served via United States Mail, first class, postage prepaid, this 14th day of May, 2010, to:

Stephen R. Woodley,  
Gray, Ritter & Graham, P.C.,  
701 Market Street, Suite 800,  
St. Louis, Missouri 63101  
Counsel for Appellants Kivland and Bold

Hamp Ford  
Ford, Parshall & Baker, LLC,  
3210 Bluff Creek Drive,  
Columbia, MO 65201-3525  
Co-counsel for Defendants Columbia Orthopaedic Group, LLP and Robert Gaines, M.D.

One courtesy copy was also sent to Hon. Gary Oxenhandler, Boone County Circuit Court, 705 E. Walnut St., Columbia, Missouri 65201-4486 and to Boone County Circuit Clerk, 705 E. Walnut St., Columbia, Missouri 65201-4486.

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