

**IN THE SUPREME COURT OF MISSOURI
SC 90708**

JANA KIVLAND, et al.,

Appellants-Plaintiffs,

v.

COLUMBIA ORTHOPAEDIC GROUP, LLP, et al.,

Respondents-Defendants.

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

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

APPELLANTS' SUBSTITUTE REPLY BRIEF

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I. The trial court did not bar Dr. Jarvis from testifying, but only limited his testimony.

(In reply to respondents' argument that this appeal is moot.)

Contrary to respondents' assertion, Dr. Jarvis was not stricken by the trial court. While respondents moved for an order barring Dr. Jarvis from testifying in the case, L.F.00130-31, the trial court did not provide respondents the relief sought. A3-4. Rather, the trial court's Order listed several specific opinions which Dr. Jarvis would not be permitted to state at trial:

Motion to Strike *granted as follows:*

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

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

-that Gerald Kivland was insane.

A4 (emphasis added).

Implicit in this Order is the trial court's refusal to preclude Dr. Jarvis from testifying as to matters not specifically barred. If the trial court had decided to bar Dr.

Jarvis from offering any opinion whatsoever, then surely it would not have gone through the effort of listing specific opinions which he could not offer.

Subsequently, the trial court confirmed that it had not barred Dr. Jarvis from testifying as to all matters. In ruling on respondents' Second Motion for Partial Summary Judgment, the trial court reiterated that "Dr. Jarvis' testimony was *limited* by the November 19, 2008 order." A1-2 (emphasis added). Had the trial court barred Dr. Jarvis from offering any opinions, it would not have described its prior Order as only "limiting" his testimony. As such, appellants intend to call Dr. Jarvis at trial and expect him to offer the opinions expressed in his Affidavit, none of which were barred by the trial court. L.F.00284-286.

Respondents attempt to create two issues related to the trial court's Order regarding Dr. Jarvis. Respondents argue that the trial court "struck Dr. Jarvis because of the bases for his opinions." But even if the trial court had misgivings related to the bases of Dr. Jarvis's opinions, the trial court declined to bar him from testifying.¹

¹ Respondents claim that "Dr. Jarvis admitted...that his opinions about Kivland's mental state were mere suspicions." Respondents' Substitute Brief, p. 11. This is incorrect. When asked whether he had "a diagnosis for him," Dr. Jarvis responded that "[t]here are suspicions." L.F.00238 (p.22). While Dr. Jarvis may only have had suspicions about an exact diagnosis for Mr. Kivland, he did testify to a reasonable degree of medical certainty regarding Mr. Kivland's mental state. Specifically, Dr. Jarvis testified, *inter alia*, that Mr. Kivland's paralysis, disability and pain caused him to be of the mind set that suicide

Respondents would have this Court expand the scope of the trial court's well delineated evidentiary ruling and bar Dr. Jarvis entirely. But because the ruling on appeal is the grant of summary judgment, the record must be reviewed in the light most favorable to Appellants. *ITT Commercial Finance Corp. v. Mid America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. 1993). In that light, it is clear that the trial court chose not to strike Dr. Jarvis despite the quotations selected from the Order by respondents.

Respondents note that appellants have not appealed the Order regarding Dr. Jarvis. Here, respondents are correct. But even if appellants could appeal that Order, they have no need to. The evidentiary Order does not preclude Dr. Jarvis from offering any opinion at trial which he had intended to offer, including the following:

- Mr. Kivland died as a direct result of the injuries suffered during the surgery, which caused his paralysis, disability and severe and progressive pain;
- The paralysis, disability and pain brought about by the surgery caused and/or contributed to cause Mr. Kivland's suicide;
- Because of the paralysis, disability and pain, Mr. Kivland was of the mind set that suicide was his only reasonable option, when in fact he had other reasonable options;

was his only reasonable option and prevented him from making a rational choice between continued life, love of his family and the possibility of relief verses death. L.F.00285.

- The injuries sustained by Mr. Kivland in surgery caused him to be of such a mind set that he was not making a rational choice between continued life, love of his family and the possibility of relief verses death;
- That Mr. Kivland's suicide was not based upon a rational choice and, therefore, was not voluntary; and
- While “insanity” is not a medical diagnosis, there is evidence that Mr. Kivland was bereft of reason.

L.F.00285; L.F.00247 (p. 60).

Additionally, even if the evidentiary Order had barred Dr. Jarvis from offering an opinion which he held, the Order was not appealable. Generally, only a final judgment is appealable, and an order on a motion is not a judgment. *State ex rel. Tuemler v. Goldstein*, 237 S.W. 814 (Mo.App. 1922)(“It has been ruled over and over again that in the absence of an express statute no appeal lies from the ruling of courts on motions.”). Here, the Order on respondents’ Motion to Strike was not a judgment, but merely an evidentiary ruling. A3-4.

Rule 74.01(b) permits a circuit court to certify a judgment of “one or more but fewer than all of the claims or parties” as final if the circuit court expressly finds “no just reason for delay.” But the Order on the Motion to Strike did not dispose of any claims or any parties; it only limited the testimony Dr. Jarvis could offer.

And while the Order was labeled a “judgment” and used the language prescribed by Rule 74.01(b), it remains just an evidentiary ruling. A trial court cannot invest an

appellate court with jurisdiction merely by referring to Rule 74.01(b) and calling its ruling a judgment. *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. 1997). This Court must determine on its own whether it has jurisdiction. *Nicholson Constr. Co. v. Mo. Highway & Transp. Comm'n*, 112 S.W.3d 6, 9 (Mo.App. W.D. 2003). Had appellants appealed the trial court's Order on respondents' Motion to Strike, this Court would surely have found itself lacking jurisdiction and dismissed the appeal.

Because the trial court's Order on respondents' Motion to Strike does not bar Dr. Jarvis from testifying as to the opinions offered in his Affidavit, and because appellants had neither the need nor the ability to appeal from that Order, this appeal is not moot.

II. Appellants have produced evidence of causation and Mr. Kivland's death should not be considered an intervening cause which terminates that causation.

(In support of appellants' Point Relied on I.)

There can be no dispute that appellants have produced evidence of causation. In fact, the only evidence before the trial court regarding the cause of Mr. Kivland's death was the testimony of Dr. Jarvis.² As mentioned, that evidence is that Mr. Kivland's paralysis, disability and pain caused him to be of the mind set that suicide was his only

² Appellants also produced evidence that Mr. Kivland's paralysis was the result of respondents' negligence. L.F.00153; L.F.00417.

reasonable option and prevented him from making a rational choice between continued life, love of his family and the possibility of relief verses death. L.F.00285.

Respondents argue that the relief sought by appellants requires the overruling of this Court's precedent. But that is only true if the cases require the use of a magic word "insane." In fact, the relief sought by appellants requires only a holding that verbatim testimony that a decedent was "insane" at the time of his suicide is not necessary, but that it is sufficient if there is evidence that the suicide was not voluntary.

Such a holding would be entirely consistent with this Court's holding in *Wallace v. Bounds*, 369 S.W.2d 138 (Mo. 1963). There, it was held that:

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

Id., at 143-144(emphasis added). Here, the evidence is that the suicide was involuntary, it was caused by the injuries Mr. Kivland suffered during surgery, and that, while insanity is not a medical diagnosis,³ if it is defined as bereft of reason, there is evidence that Mr. Kivland meets that definition. L.F.00285; L.F.00247 (p. 60).

In *Wallace*, plaintiff presented no expert testimony. In announcing the standard, therefore, this Court did not hold that there must be verbatim testimony that the decedent was "insane" in order to submit the case to the jury.

³ The uncontroverted evidence in this case is that insanity is not a medical diagnosis.

Subsequent cases have confirmed that expert testimony need not state that the decedent was “insane.” In *Stafford*, the appellate court found that a jury question existed as to whether medical negligence was the proximate cause of a woman’s suicide. *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470 (8th Cir. 1987). While the psychiatric testimony was that decedent’s suicide was the result of “an irresistible impulse,” *Id.*, at 473, the plaintiff’s expert appears not to have stated that decedent was insane. Rather, the court concluded that an irresistible impulse is a form of insanity.

Like the testimony in *Stafford*, Dr. Jarvis did not use the word “insane.” But in all other respects his testimony comports with the language used in *Wallace*. As respondents would have it, this evidence is insufficient to put the issue of causation before the jury because Dr. Jarvis did not use the word “insane.” Aside from the Constitutional implication of such a rule, discussed below, respondents’ view elevates form over substance by requiring the use of a magic word, a notion generally rejected by the courts. *Wicklund v. Handoyo*, 181 S.W.3d 143 (Mo.App. E.D. 2005).

Also like in *Stafford*, Dr. Jarvis testified that “an uncontrollable impulse, if what you mean by that of [sic] where he felt he had no other choice, in the grand assessment of everything in his life, other than death, then that was an uncontrollable impulse if you consider it in that way.” L.F.00245 (p. 52).

Contrary to respondent's claim, it is not necessary for this Court to overrule Wallace or to craft a new standard. The evidence clearly puts this case within the scope of *Wallace*.⁴

Nevertheless, the trial court's ruling was abundantly clear that summary judgment was required in the absence of evidence that Mr. Kivland was "insane." The trial court held that "[a]lthough Plaintiffs argue that "insanity" is an archaic term and a term no longer used in the medical profession, it is nonetheless a term still used by Missouri courts and *the standard* which Plaintiffs must, in this case, meet..." A2 (emphasis

⁴ Continuing in their argument that appellants seek to overturn *Wallace*, respondents rely on several out of state cases. As mentioned, the relief sought by appellants does not require *Wallace* to be overturned. But even if that were true, it is interesting to note that several of the foreign cases on which respondents rely overturned the existing law in their state or represented a departure from the predominate view at the time. In *Tate*, the court recognized that the leading case announcing the "older rule" was *Scheffer v. Washington City, V.M. & G.S.R. Co.*, 105 U.S. 249 (U.S. 1881), which held that suicide, not another's negligence, was the proximate cause of a death. *Tate v. Canonica*, 180 Cal.App.2d 898, 914 (Cal.App. 1960). See also, *Orcutt v. Spokane County*, 364 P.2d 1102, 1105 (Wash. 1961) (departing from the rule that "in all cases where the decedent knows the nature of his act, or where his actions indicate the use of reasoning in carrying out the acts resulting in his death, the suicide will be considered an independent intervening cause....").

added). “Insanity” is not merely archaic; it a word which no longer has meaning in the medical community. To require medical experts to use that word places appellants, as well as similarly situated plaintiffs, in the impossible position of needing expert testimony which cannot exist.

In an attempt to sweep aside the fact that insanity is not a medical diagnosis, respondents argue that the standard explains how to prove insanity. But the standard cited by respondents defines “insane” by using the word “insanity.” Respondents’ Brief, p.18 (“Appellants must prove that Kivland was insane ‘in the sense that 1) the insanity prevents the injured party...or 2) the injured party’s act is done under an insane impulse which is irresistible because the insanity has prevent his or her reason from controlling his or her actions.’”). This standard does not eliminate the problem caused by using the non-medical term “insane.”

Although appellants pointed out in their Brief that this circular standard fails to correct the problem of the “insanity” requirement, respondents failed to defend the standard. Rather, respondents merely noted that “bereft of reason” is also not a medical term. Respondents’ Substitute Brief, p. 19. This is a red herring. Bereft of reason has never been a medical term and its meaning is obvious. As this Court has recognized, a “lack of clarity that can occur when the legal profession tries to impose its terms on other professions.” *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 682 (Mo. 1992). Imposition of the word “insanity” does exactly that.

Trying to cast appellants’ argument as calling for a new standard, respondents suggest that without requiring a finding of “insanity” there is no objective element to the

standard. Respondents ignore the fact that any test to determine insanity could be no more objective than a test to determine whether a person is bereft of reason, whether a choice is rationally made, or whether an act is voluntary.

Respondents criticize Dr. Jarvis's opinion that Mr. Kivland's death was involuntary because it was not preceded by rational choice. Respondents' Substitute Brief, p. 26. But the only evidence before the trial court on that issue was the testimony of Dr. Jarvis. Respondents also fault his opinion as applying to practically every wrongful death case involving suicide. While respondents might disagree with his opinions, their criticisms go to the weight of the evidence. At a minimum, this is an issue of fact which precludes summary judgment.

Attempting to draw an analogy between the *Wallace* standard and the insanity defense in criminal cases, respondents suggest that at their heart each requires a finding of mental illness. But the insanity defense is codified in a statute that specifically requires the finding of a mental disease or defect. Mo.Rev.Stat. §552.030.⁵ *Wallace*, however, has no requirement that a "mental disease or defect" be diagnosed. Given that the person to which *Wallace* applies will necessarily be unavailable for examination, it is understandable why a specific diagnosis is not required. Moreover, the crux of *Wallace* is more straightforward: if the suicide is involuntary, the act causing the injury can be the

⁵ Chapter 552 of the Missouri Revised Statutes does not once use the word insane or insanity.

proximate cause of death. *Wallace*, 369 S.W.2d at 143-144. The evidence here meets that standard.

Finally, respondents rely on *Sundermeyer* for the proposition that, even where but for cause is established, an action will not lie if there is an intervening act. But that case is better cited for a different proposition, as immediately following the quotation cited by respondents, this Court stated:

In *Callahan*, however, this Court cautioned that a causation analysis should not lose sight of the ultimate issue:

“All of this discussion concerning the semantics of causation is less important in Missouri than in most jurisdictions because under MAI we do not use the terms 1) ‘proximate cause,’ 2) ‘but for causation,’ or 3) ‘substantial factor’ when instructing the jury. We merely instruct the jury that the defendant’s conduct must ‘directly cause’ or ‘directly contribute to cause’ plaintiff’s injury.”

Sundermeyer v. SSM Regional Health Services, 271 S.W.3d 552, 555 (Mo. 2008), quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863 (Mo. 1993).

In this case, the ultimate issue is whether or not the operation performed on Mr. Kivland directly caused or directly contributed to cause his death.⁶ The only evidence on

⁶ Respondents suggest that because Mr. Kivland is not a party to the wrongful death claim, comparative fault is inapplicable. Respondents’ Substitute Brief, p. 27, fn. 2. But in a wrongful death case, the fault of the decedent may properly be assessed by the jury.

that issue is that it did. Respondents would have this Court deprive appellants their day in court over not only semantics of causation, but over an obsolete word that no doctor can state.

III. The trial court's Judgment violates the Open Courts Provision of the Missouri Constitution by unreasonably restricting a recognized cause of action.

(In support of appellants' Point Relied on II.)

If respondents' position is adopted, and use of the word "insane" is held to be a prerequisite for finding proximate cause in this context, that ruling would violate the open courts provision. Because no medical testimony can support the proposition that Mr. Kivland, or anyone for that matter, was "insane" at the time of death, the standard advanced by respondents presents an insurmountable bar. This rule would violate the open courts provision of the Missouri Constitution because: (1) plaintiffs have a recognized cause of action; (2) that is being restricted; and (3) the restriction is arbitrary or unreasonable. Mo.Const. Art. 1 §14; *Kilmer v. Mun*, 17 S.W.3d 545, 549-50 (Mo. 2001). There is no dispute that appellants have a right to pursue a wrongful death claim despite the fact that decedent took his own life. But that right is illusory if the law arbitrarily and unreasonably demands that appellants produce medical testimony which is incompatible with the state of medicine.

Mo.Rev.Stat. §537.085; *O'Neal v. Pipes Enterprises, Inc.*, 930 S.W.2d 416, 424-25 (Mo.App. W.D. 1995).

Respondents argue that the open courts provision applies to procedural bars. But as the Supreme Court held in *Kilmer*: “Put most simply, article I, section 14 ‘prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury.’” *Kilmer v. Mun*, 17 S.W.3d at 549. (Emphasis in original.) The Court added, “where a barrier is erected in seeking a remedy for a recognized injury, the question is whether it is arbitrary or unreasonable.” *Id.*, at 550.

This Court also found a violation of open courts provision in *Strahler*, holding:

Our society takes great pride in the fact that the law remains forever at the ready to “jealously guard” the rights of minors. Section 516.105, RSMO 1978, arbitrarily and unreasonably denies them a set of rights without providing any adequate substitute course of action for them to follow. We consider § 516.105, RSMO 1978, as it pertains to minors, a statutory aberration which runs afoul of our state Constitution and we accordingly hold it constitutionally infirm.

Strahler v. St. Luke’s Hosp., 706 S.W.2d 7, 12 (Mo. 1986). As *Strahler* confirms, the constitutional safeguard is broader than respondents suggest.

Moreover, respondents’ reliance on *Merritt* is misplaced. There, the issue was whether an employer’s right of subrogation as to settlement proceeds obtained by its employee from a third-party for injuries suffered on the job, as permitted by the workers’ compensation scheme, violated the open courts provision. *Mo. Highway & Transp. Comm. v. Merritt*, 204 S.W.3d 278, 283 (Mo.App. E.D. 2006). But the employee failed

to preserve the constitutional issue for appeal, having not raised it at the earliest opportunity. Nevertheless, the Court noted that the open courts provision was not violated because plaintiff had actually filed his suit against the third-party and chosen to settle it. *Id.*

Finally, respondents cite *Stafford* for the proposition that the *Wallace* standard is not impossible to meet. But in *Stafford* the plaintiff's expert did not testify that decedent was "insane," it was the court which supplied that term. *Stafford v. Neurological Medicine, Inc.*, 811 F.2d at 473. The lesson to be taken from *Stafford* is that the *Wallace* standard has more flexibility than respondents suggest, and the constitutional issue can be avoided by recognizing that appellants' evidence is sufficient for a jury to decide the claims for wrongful death and lost chance of survival.

IV. Conclusion

Summary Judgment was improper because the evidence established that, or at least established an issue of material fact whether, Mr. Kivland's death was proximately caused by respondents' negligence. Summary Judgment was also improper because it unreasonably restricted appellants' causes of action and therefore violated the Open

Courts Provision of the Missouri Constitution. For each of these reasons, Summary Judgment should be reversed and the case remanded for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06(c), this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b) and contains 3,092 words, exclusive of the material identified in Rule 84.06(b), as determined using the word count program in Microsoft Word. The undersigned also certifies, pursuant to Rule 84.06(g) that the accompanying disk has been scanned and found free of viruses.

CERTIFICATE OF SERVICE

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

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**APPENDIX TO
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