

IN THE SUPREME COURT OF MISSOURI

**KAREN LINDQUIST, Individually and)
As Personal Representative of the Estate)
of MICHAEL LINDQUIST)
)
 Plaintiffs/Cross-Appellants)
)
 vs.) **No. SCT 87827**
)
**MID AMERICA ORTHOPAEDIC)
SURGERY, INC.,)
 Defendant/Respondent,)
)****

**APPEAL FROM CIRCUIT COURT OF THE CITY
OF ST. LOUIS, STATE OF MISSOURI**

PLAINTIFF/CROSS APPELLANTS' BRIEF

Respectfully submitted,

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Jurisdiction

Pending before the Court is plaintiff Karen Lindquist’s cross appeal from a judgment of the Circuit Court of the City of St. Louis, The Hon. Mark Neill, February 21, 2006, in a personal injury damage suit due to medical malpractice, in which the court denied plaintiff \$272,921.88 (5% of total damages, \$5,458,437.21) based on its’

construction and application of §538.230 RSMo. (1986) (Appendix Tab 1) in favor of Defendant Mid-America Orthopedic Group, Inc., holding *Mid-America* was only *severally* liable for 40% of plaintiffs’ damages based on the jury’s 40% assessment of fault, and not *jointly* liability for 5% fault assessed against co-defendant Scott Radiological Group, Inc., where the Missouri Court of Appeals affirmed J.N.O.V. for *Scott* and ordered a re-trial limited to the issue of “past economic” damages. *Lindquist v. Scott Radiological Group, Inc., et. al.*, 168 S.W.3d 635, 651, 654-656 (Mo.Ct. App.E.D. 2005). The faultless plaintiff challenges denial of \$272,921.88 of her judgment against *Mid-America* under §538.230 RSMo (1986) because the statute either is unconstitutionally vague, or as applied results in unconstitutional deprivation of property without due process of law in violation of Mo.Const. art. I § 2, and Mo.Const. art. 1 §10. This appeal challenges the validity of a state statute, §538.230 RSMo (1986), and hence the Missouri Supreme Court has jurisdiction pursuant to Mo. Const. art. V, § 3, which gives the court exclusive jurisdiction in “all cases involving the validity . . . of a statute or provision of the constitution of this state . . .”. *Smith v. Coffey*, 37 S.W.3d 797 (Mo. banc 2001) and *Beatty v. Metro St. Louis Sewer District* 700 S.W.2d 831, 834 (Mo.banc 1985).

Pursuant to the recommendations in Missouri Practice Series, Vol. 17, Civil Rules Practice, 3d Ed. (2005) §**84.04-3 Jurisdictional Statement**, pg. 439, essential and unusual procedural steps in this case are outlined below to validate the timely exclusive jurisdiction in the Missouri Supreme Court over plaintiff’s challenge to the constitutionality of §538.230 RSMo (1986) under Mo. Const. art. V § 3.

Plaintiffs Karen and the late Michael Lindquist sued ten defendants, all corporate employers of individual health care providers, alleging more than eighteen separate occurrences of negligent mismanagement of care and treatment of Michael Lindquist from April 8, 1999 through June 28, 1999, combined to allow *multiple myeloma* spinal cancer to progress undiagnosed and untreated in Lindquist's 5th Thoracic vertebra to the point it collapsed on the evening of June 28, 1999, paralyzing him below the chest. (Amended Petition, L.F. 66-118). Defendant *Mid-America* cross-claimed against all co-defendants for apportionment of fault under §538.230.1 RSMo (1986). (Amended Answer, L.F. 120-143, at 141-142). Before trial two defendants, (1) Washington University and (2) Multi-Care Medical P.C., settled with plaintiffs. Trial commenced April 21, 2003. During trial two additional defendants, (3) Open MRI of Missouri L.L.C., and (4) Missouri Insurance Guaranty Fund on behalf of defendant SEC Emergency Physicians Inc., settled with plaintiffs. Also during trial defendant (5) Family Medical Group of St. Peters, Inc. agreed to pay its proportionate share of any judgment entered on the jury verdict within a high and low amount range, and remained an active adversary in the case.

At trial all remaining defendants elected to submit their cross-claims for apportionment of equitable fault by the jury rather than subtract settlement payments from the damages assessed in the verdict. The jury returned its verdict May 13, 2003 assessing fault to defendants on 12 of the 18 occurrences submitted as negligent. (L.F. 144-146; Appendix Tab 2). The trial court entered the original judgment June 18, 2003, along with a Memorandum Opinion. (L.F. 147-148 and 149-152). The first trial court

explained §538.230.2 applied so that Mid-America was *jointly* liable for the entire award, including particularly the 5% assessed to *Scott*. (L.F. 151). Family Medical Group of St. Peters ultimately paid its 35% portion of that judgment pursuant to the trial high-low settlement agreement mentioned above. On October 16, 2003 the trial court granted *Scott Radiology J.N.O.V.* and ordered a new trial on all issues because the past economic damages award exceeded the evidence, and because it thought the jury verdict directing instructions were wrong.

Plaintiffs appealed; *Mid-America* did not cross appeal. Michael Lindquist died while his appeal was pending, and Karen was substituted as his personal representative. Court of Appeals handed down its Opinion, *Lindquist v. Scott, supra*, May 31, 2005, reversing the order for new trial, upholding the verdict directing jury instructions and \$5,100,000.00 in damages, upholding vicarious liability of Barnes for the negligence of its ER doctors, and affirming JNOV in favor of *Scott Radiology*. Defendant Barnes Jewish St. Peters Hospital settled with plaintiffs soon thereafter. On August 30, 2005, this Court denied *Mid-America's* Motion to Transfer.

Based on the finality of the appeal, later that same day, August 30, 2005, Lindquist filed a motion in the trial court for a judgment against defendant *Mid-America* in the amount of 45% of plaintiffs' total damages, plus 9% interest on reinstated damage amounts in the *original* judgment June 18, 2003 to August 28, 2005; and after August 28, 2005, interest at the new rate per §408.040.R.S.Mo.Supp (2005)(L.F. 155-158).

The court of appeals remanded the case on September 7, 2005. On remand the Lindquist and *Mid-America* waived a jury trial, and the court conducted a bench trial

December 13, 2005 limited to past economic damages. The plaintiff renewed the motion for 45% fault and interest against *Mid-America*, and both parties briefed the legal issues for the court. The trial court issued its “Findings of Fact, Conclusions of Law, and Judgment” February 21, 2006. (L.F.209-211; Appendix Tab 3).

Mid-America filed its Notice of Appeal March 6, 2006 (L.F. 213-218); on March 23, 2006, *Mid-America* filed a Motion for New Trial or to Amend the Judgment (L.F. 219-223). *Mid-America* appeals claiming the award of **\$ 358, 437.24** in “past economic” damages was excessive, and that plaintiff should not have “interest” under §512.160.4 RSMo (1999) on the 5.1 million dollar portion of plaintiff’s damages in the original judgment that the Court of Appeals affirmed and reinstated.

Lindquist also filed a Motion to Modify the Judgment March 24, 2006. (L.F. 224-230). (In preparing the legal file, *Mid-America* omitted all the attachments listed #1-7 at L.F. 225, beginning with the interest statute §512.160 RSMo (2000)). The trial court did not rule on either of the parties’ post judgment motions within the next 90 days.

Plaintiff filed a Notice of Cross-Appeal to the Missouri Supreme Court June 28, 2006, along with a Jurisdiction Statement, within 10 days of the earliest time defendant’s *premature* Notice of Appeal – Rule 81.04(b) – of the Court’s Judgment February 21, 2006 may be construed “final”. Apparently due to confusion, the Plaintiffs Notice of Cross-Appeal was not docketed in this Court until August 30, 2006.

Both parties filed motions to transfer *Mid-America*’s appeal from the Missouri Court of Appeals, Eastern District to this Court. On Oct. 2, 2006, the Missouri Court of Appeals Ordered the case and file transferred to this Court. (Appendix Tab 4).

Consequently, plaintiff cross appellant files this original – not substitute- brief under Rule 84.04(j).

STATEMENT OF FACTS

On June 28, 1999, Michael Lindquist became paraplegic when his 5th thoracic vertebra collapsed as a result of undiagnosed spinal cancer. Leading up to that injury, from April 8, 1999 through June 28, 1999, Lindquist visited several health care providers more than 18 times for severe pain in his upper back. Lindquist succinctly summarized the course and scope of his symptoms in a questionnaire and diagram he prepared at Nydic Open MRI the morning of June 28, 1999, which he incorporated into his Amended

Petition (L.F. 98-99, Appendix Tab 6, pg. A-). The Lindquists filed an Amended Petition against ten corporate employers of health care providers who negligently mismanaged Lindquist's care and treatment on more than 18 occasions from April 18, 1999, through June 28, 1999. The Amended Petition outlined the series of treatments chronologically, and incorporated salient medical records. (L.F.66-119). To acquaint the Court with Lindquist's disease, plaintiff provides a CIBA illustration of *multiple myeloma* from the trial in April and May 2003, (Appendix Tab 5, A11; Ex. appendix pg. 121 in the Lindquist v. Scott Radiological Inc. et al. first appeal).

Co-defendant/Respondent Mid-America Orthopaedic Surgery, Inc. Answered plaintiffs' petition alleging cross-claims against other co-defendants and non-parties based on 538.230 RSMo. (L.F. 120-143 at 142). All other co-defendants made similar cross claims. Hereafter plaintiff outlines each visit alleged, followed with the jury's verdict assessing fault with respect to that occurrence, and the original judgment of the trial court on that verdict.

On April 8, 1999 Lindquist visit Dr. Farrell at Family Medical Group of St. Peters Inc., where Dr. Farrell neglected any imaging studies and diagnosed "thoracic somatic dysfunction". (L.F. 66-70). The jury found Dr. Farrell negligently mismanaged that visit, and assessed 5% comparative fault to *Family Medical*. (L.F. 144, 3rd finding). The trial court entered Judgment on that 5% assessment (L.F. 147), and incorporated it with additional fault assessed against Family Medical in other visits holding, (L.F. 148)

that plaintiff MICHAEL LINDQUIST have and recover of defendants MID-AMERICA ORTHOPAEDIC SURGERY INC. and FAMILY MEDICAL

GROUP OF ST. PETERS, INC. jointly and severally the sum of \$1,925,000;...

and that plaintiff KAREN LINDQUIST have and recover of defendants MID-AMERICA ORTHOPAEDIC SURGERY, INC. and FAMILY MEDICAL GROUP OF ST. PETERS, INC. jointly and severally the sum of \$472,500;

This was based on the trial court's "Discussion" in its memorandum opinion, (L.F. 150), and "Conclusion":

"Section 538.230.2 RSMo provides that "the court shall enter judgment against each party liable on the basis of the rules of joint and several liability..[h] however, any defendant against whom an award of damages shall be made is jointly liable only with those defendants whose apportioned fault percentage of fault is equal to or less than such defendant."

On April 20, 1999, Lindquist visited Dr. Weis at Defendant Mid-America Orthopedic Surgery, Inc. (L.F. 70 ¶ 15 through L.F. 74 ¶ 18). The jury assessed 'zero' fault to *Mid-America* regarding Dr. Weis management of that visit. (L.F. 144, line 7).

On May 4, 1999 Lindquist revisited Dr. Weis at *Mid-America*, (L.F. 70-76, ¶ 24-27). The jury found Dr. Weis was negligent and assessed 5% fault regarding that visit. (L.F. 144, line 8). The trial court entered judgment on the verdict (L.F. 147-152).

On May 11, 1999 Lindquist revisited Dr. Weis at *Mid-America*, (L.F. 70-76, ¶ 24-27). The jury found Dr. Weis was negligent and assessed 5% fault regarding that visit. (L.F. 144, line 9). The trial court entered judgment on the verdict (L.F. 147-152).

On May 25, 1999 Lindquist revisited Dr. Weis at *Mid-America*, (L.F. 70-77, ¶ 28-32). The jury found Dr. Weis was negligent and assessed 10% fault regarding that visit. (L.F. 144, line 10). The trial court entered judgment on the verdict (L.F. 147-152).

On June 1, 1999 Lindquist revisited Dr. Weis at *Mid-America*, (L.F. 70-79, ¶ 33-38). The jury found Dr. Weis was negligent and assessed 20% fault regarding that visit. (L.F. 144, line 11). The trial court entered judgment on the verdict (L.F. 147-152).

The fault assessed against *Mid-America* occurrence by occurrence added to 40%. The total 40% fault assessed to that defendant was greater than the fault assessed to any other defendant, and the 20% fault assessed with respect to the June 1 visit was the most assessed on any single occurrence. Accordingly, the first trial court adjudged *Mid-America* was *jointly* liable with each and every other co-defendant for *all* plaintiffs' damages. (L.F.148).

On June 7, 1999 Lindquist visited Barnes Jewish St. Peters Hospital Emergency Room. (L.F. 79-87, ¶ 39-49). On the defendants' cross claims, the jury found Dr. Gardiner was negligent on that visit and assessed 5% fault to him. (L.F. 144, line 12). Dr. Gardiner was not a defendant in this case. Dr. Gardiner's immediate employer was (were) SEC/EMCARE Emergency Care, defendants #5,6,7 in the Amended Petition. (L.F. 66). EMCARE's insurance went into liquidation while the case was pending. The Missouri Insurance Guarantee Association settled with Mr. Lindquist for its \$300,000.00 limit during trial.

On June 8, 1999 Lindquist returned to Barnes Jewish St. Peters Hospital Emergency Room. (L.F. 88-90, ¶ 50-54). On the defendants' cross claims, the jury found

Dr. Deline was negligent on that visit and assessed 5% fault to him. (L.F. 145, line 1). Dr. Deline was not a defendant in this case. Dr. Deline's immediate employer was (were) SEC/EMCARE Emergency Care, defendants #5,6,7 in the Amended Petition. (L.F. 66). EMCARE's insurance went into liquidation while the case was pending. The Missouri Insurance Guarantee Association settled with Mr. Lindquist for its \$300,000.00 limit during trial which included liability for both Dr. Gardiner on June 7 and Dr. Deline on June 8. The trial court entered judgment recognizing and reciting that settlement. (See L.F. 45 & 147). The defendants benefited from combined 5% equitable share of fault attributable to Dr. Gardiner and 5% equitable share of fault attributable to Deline, for a total of 10%, being greater in value than the \$300,000 settlement amount plaintiff Mike Lindquist received.

Also regarding *ER* treatment June 7 and 8, 1999, Lindquist sued *BJSPH* as vicariously liable for its emergency room doctors. (L.F. 79-90, and 109-114, and 116 - 117 Count 8). The jury found *BJSPH* responsible for Dr. Gardiner and Dr. Deline. (L.F.145) The trial court entered judgment recognizing and reciting the settlement between SEC/EMCARE and MIGA and plaintiffs. (L.F. 147).

On June 9, 1999 Mr. Lindquist returned to Dr. Farrell. (L.F. 90-92, ¶ 55-60). The jury found Dr. Farrell negligently mismanaged that visit, and assessed 15% fault to *Family Medical Group*. (L.F. 144 line 4). The trial court entered judgment on that finding. (L.F. 147-148).

On June 14, 1999 Lindquist visited Dr. Haithcock at defendant Multi-Care Medical Group, Inc., and that included several days of hospitalized treatment when Dr.

Haithcock worked him up from the perspective of a gastro-intestinal specialist. *Multi-Care Group* paid Mr. and Mrs. Lindquist \$50,000.00 each to settle before trial. (See L.F. 145 & 147). Defendants elected to have the jury assess Dr. Haithcock's relative fault rather than subtract the amount of settlement as a credit. The defendants failed to prove and persuade the jury that Dr. Haithcock was negligent, and so the jury assessed "zero" fault to Dr. Haithcock on defendants' cross claims related to care June 14, 16,17, and 22. (L.F. 145, lines 2,3,4 and 5).

On June 25, 1999 Lindquist and his relatives called *Family Medical* and contacted Dr. Hingst. (L.F. 94 – 95, ¶ 70-72). The jury found against plaintiffs' claim that Dr. Hingst was negligent in failing to refer Lindquist to an emergency room that night, and assessed "zero" comparative fault to Dr. Hingst on defendants' cross claims. (L.F. 144, line 5).

On June 28, 1999 Lindquist started the day by returning to *Family Medical*, where Dr. Hingst undertook to treat him. (L.F. 95-96, ¶ 71-75). The jury found Dr. Hingst was negligent in sending Lindquist for an "L" - meaning lumbar - MRI, when his symptoms had always been thoracic, and assessed 15% fault to Dr. Hingst's negligent mismanagement. (L.F. 144, line 6). The court entered Judgment on that finding. (L.F. 147-148; Memorandum @ 150-151).

On June 28, 1999 Lindquist went directly from Dr. Hingst's office to Nydic Open MRI of St. Peters to have an MRI of his *lumbar* spine. (L.F. 95-100, ¶ 76-81, and pg. 107). This is where Lindquist completed the questionnaire plaintiff placed at Appendix Tab 6. Although Lindquist diagrammed pain in his thoracic spine, Nydic MRI employees

followed Dr. Hingst’s script and imaged Lindquist’s lumbar spine; in the initial “scout” film, the image included Lindquist’s 9th thoracic vertebra (T9), which was also diseased with this cancer (called *multifocal* – in other words T5 and T9 – *plasmacytoma* at this stage in its evolution toward systemic *multiple myeloma*). After the testimony of Lindquist’s treating oncologist at Washington University, Dr. Safdar, about Open MRI employees, that defendant Open MRI settled during trial and paid Mr. and Mrs. Lindquist \$50,000.00 each. (See L.F. 147 & 149). The jury assessed 5% fault to Nydic on defendants’ cross-claim requesting apportionment of equitable fault. (L.F. 144, line 2). The court entered judgment in essence relieving all defendants of that 5% equitable share. (L.F. 145-147).

On June 28, 1999 Nydic Open MRI delivered Lindquist’s MRI films via courier to *Scott Radiologic Group, Inc.* offices on Brentwood Blvd. in St. Louis County. *Scott* employed Dr. McGowan. Dr. McGowan ‘read’ the MRI images of Lindquist’s back taken at NYDIC’s St. Peters office earlier that morning. (L.F. 100-103, ¶87-89 and pg. 106 ¶105-108 and Prayer.) The jury found Dr. McGowan was negligent in overlooking Lindquist’s diseased 9th Thoracic vertebra in the scout film of the MRI, and other respects submitted, and assessed his fault at 5%. (L.F. 144, line 1). In the original Judgment June 18, 2003, the court wrote salient to Lindquist’s appeal now pending before this Court, (L.F. 148):

*... and that plaintiff MICHAEL LINDQUIST have and recover of
defendants MID-AMERICA ORTHOPAEDIC SURGERY, INC., FAMILY
MEDICAL GROUP OF ST. PETERS, INC., BARNES JEWISH ST.PETERS*

HOSPITAL, INC. and SCOTT RADIOLOGICAL GROUP, INC. jointly and severally the sum of \$275,000...

.... and that plaintiff KAREN LINDQUIST have and recover of defendants MID-AMERICA ORTHOPAEDIC SURGERY, INC., FAMILY MEDICAL GROUP OF ST. PETERS, INC., BARNES JEWISH ST.PETERS HOSPITAL, INC. and SCOTT RADIOLOGICAL GROUP, INC. jointly and severally the sum of \$67,500.

Next on the afternoon of June 28, 1999, Mr. Lindquist went from *Nydic Open MRI* to *BJSPH* for full back x-rays. (L.F. 103-105, ¶ 92-102, and Count 7 @ 115-116). Washington University contracted with *BJSPH* to provide radiologists at *BJSPH*. Dr. Ruhs was the radiologist Washington University employed and supplied to *BJSPH* to cover the Radiology Dept. on June 28, 1999. Lindquist had full back x-rays that afternoon at *BJSPH* and was discharged. At some unknown time that day Dr. Ruhs “read” the x-rays and overlooked Lindquist’s “moth-eaten” T5. Washington University paid Mr. & Mrs. Lindquist \$50,000.00 each to settle before trial. (see L.F. 147). Defendants submitted the equitable fault of Washington University to the jury, which found Dr. Ruhs was negligent and assessed 5% to Washington University. (L.F. 105, line 6; App. 4).

On Oct. 16, 2003 the trial court granted *Scott* J.N.O.V. (L.F. 153).

Plaintiffs appealed the trial court’s Order of Oct. 16, 2003, and *BJSPH* cross appealed that it was entitled to judgment that it could not be vicariously liable for its

emergency room doctors fault under the agreements it had with SEC to staff the ER.¹ *Mid-America* did not appeal the JNOV for Scott Radiological, despite having asserted the cross-claim. While the appeal was pending Michael Lindquist died, and subsequently Mrs. Karen Lindquist as personal representative of the Estate of Michael Lindquist was substituted.

In *Lindquist v. Scott Radiological Group, Inc., et. al.*, 168 S.W.3d 635, 651, 654-656 (Mo.Ct. App.E.D. 2005) trans. denied, the court (1) affirmed JNOV in favor of *Scott*;² (2) reversed the trial court Order for new trial on all issues; (3) affirmed the verdict in favor of plaintiffs against *BJSPH*; (4) affirmed the entire verdict award of \$1,350,000.00 damages in favor of Mrs. Karen Lindquist; (5) affirmed the jury's award

¹ On October 24, 2003, the Lindquists appealed the order to the Missouri Supreme Court, asserting a constitutional challenge to Mo. Rev. Stat. § 538.300 and raising other issues, including the entry of JNOV in favor of the various Defendants. In January 2004 this Court *sua sponte* transferred the case to the Missouri Court of Appeals, Eastern District.

² Lindquist's diseased T-9 never collapsed, and its appearance remained constant throughout Lindquist's hospitalization at Washington Univ. /Barnes the summer of 1999. The court of appeals rejected Lindquist's argument that the *counterfactual* causation proof was sufficient in that had Dr. McGowan carefully observed T-9 on the MRI scout frame he would have immediately hospitalized Lindquist in bed, and thereby indirectly prevented the collapse of T-5 that paralyzed Lindquist at home the evening of June 28.

of “past non-economic” damages of \$1,750,000.00, and “future non-economic” damages of \$1,000,000.00, and “future economic” damages of \$1,000,000.00 dollars in favor of Michael Lindquist; (6) and ordered a new trial limited to the single issue of “past economic damages” which plaintiffs conceded exceeded the evidence in support of the definition of “past economic damages” in the jury instructions. In total, the court affirmed \$ 5,100,000.00 damages the jury found in favor of the Lindquists.

Mid-America then filed a timely motion for rehearing or transfer. The Court of Appeals denied *Mid-America’s* motion. *Mid-America* next filed an application for transfer in this Court. *BJSPH* settled with plaintiffs shortly before this Court, on August 30, 2005, denied *Mid-America’s* transfer application. The court of appeals remanded the case and assessed costs on September 7, 2005.

On December 13, 2005, the issue of past economic damages was retried before the Honorable Mark H. Neill. The trial court, acting as fact finder, found that Mr. Lindquist suffered the following “past economic” damages (L.F. 210): (1) Medical Expenses from Ex. 186, \$190,381.00; (2) additional medical expenses amounting to \$37,445.28; (3) lost earnings June 28, 1999 through October 2001, \$55,149.00; (4) lost earnings June 30, 2002 through trial May 13, 2003 due to early retirement, \$75,461.54. The total past economic damages the court tallied was **\$358,437.24.**³ (L.F. 210).

The trial court found that *Mid-America* was liable for only 40% of those damages, or \$143,374.89. [Finding of Fact, Conclusions of Law, and Judgment filed 2/21/2006 at 2-3] (L.F. 211) In the Conclusions of Law the court stated:

³ The correct addition is **\$358,436.82**, but the court totaled those as \$358,437.24.

1. *Plaintiff is entitled to post-judgment interest on the court's judgment of June 18, 2003 in favor of Karen Lindquist.*

2. *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 the new trial.*

3. *Defendant Mid America Orthopaedic Surgery, Inc., is not liable for an additional Five Percent (5%) allocation of fault due to the original trial court setting aside judgment against Scott Radiological Group.*

[Id. at 3. Underscoring emphasis supplied by Appellant Lindquist] (L.F. 211_.)

The court entered judgment against *Mid-America* as follows:

1. *Plaintiff Karen Lindquist, individually, shall have and recover the sum of \$540,000.00 (forty percent (40%) of \$1,350,000.00) plus simple interest at nine percent (9%) from June 18, 2003, from Defendant Mid America Orthopaedic Surgery, Inc.*

2. *Karen Lindquist, Personal Representative of the Estate of Michael Lindquist, shall have and recover the sum of \$1,500,000 (forty percent (40%) of \$3,750,000.00) plus*

simple interest at nine percent (9%) from June 18, 2003 from Mid America Orthopaedic Surgery, Inc.

3. *Karen Lindquist, Personal Representative of the Estate of Michael Lindquist shall have and recover the sum of One Hundred Forty-Three Thousand Three Hundred Seventy-Four and 89/100 (\$143,374.89), which equals forty percent (40%) of Three Hundred Fifty-eight Thousand Four Hundred Thirty-Seven and 23/100 Dollars (\$358,437.24), as and for past economic damages.*

4. *Costs are assessed against Defendant Mid America Orthopaedic Surgery, Inc.*

[Findings etc. filed 2/21/2006 at 3-4] (L.F. 211-212)

Essentially, the judgment orders *Mid-America* to pay 40% of the judgment based on the *several* 40% fault assessed to it, but contrary to the applicable joint and several liability statute, § 538.230 RSMo, *Mid-America* was not jointly liable for the 5% fault that the original jury had attributed to *Scott Radiology* on *Mid-America's* cross-claim. In other words, 5% of the total fault vanished and the Lindquists, who were completely without fault, were stripped of 5% of the total judgment, and *Mid-America* gaining a reciprocal windfall.

Mid-America appealed the judgment to the Court of Appeals, challenging both the amount of past economic damages and the award of interest on the damages reinstated on

appeal. Mrs. Lindquist filed a cross-appeal in this Court to challenge, on constitutional grounds, the trial court's refusal to reinstate *Mid-America's* joint liability for the 5% fault assessed against *Scott* pursuant to *Mid-America's* cross claim, which was nullified by the affirmation of JNOV in favor of Scott. She contends that the trial court's misapplication of § 538.230 RSMo deprived the Lindquists of property without due process of law.

On October 2, 2006 the Court of Appeals transferred *Mid-America's* appeal to the Missouri Supreme Court, for consolidation with Lindquist's appeal, as we detailed in the Jurisdiction Statement.

POINT RELIED ON

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.

- Mo. Const. art. I, §§ 2,10
- *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955 (Mo. banc 1999)
- *Smith v. Coffey*, 37 S.W.3d 797 (Mo. 2001)
- *Capell v. Abbick*, 123 S.W.3d 192 (Mo. App. W.D. 2003)

ARGUMENT

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 plaintiffs' entire damage 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.

A. Standard of Review:

Murphy v. Carron, 536 S.W.2d 30,32 (Mo. 1976) settled the standard of appellate review in bench trials under Mo.S.Ct. Rule 73.01 (1974) as follows:

*appellate 'review * * * as in suits of an equitable nature,' as found in Rule 73.01, is construed to mean that the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong. The use of the words de novo and clearly erroneous is no longer appropriate in*

appellate review of cases under Rule 73.01.

Rule 73.01(2005) has undergone subtle refinements since *Murphy v. Carron*, but remains essentially the same. In this bench trial of a civil case wherein the trial court construed a statute governing liability following partial settlement under a comparative fault scheme, this Court reviews the interpretation of statutes without any particular deference to the trial court. *Jensen v. Ara Services Inc.*, 736 S.W.2d 374 (Mo.banc 1987) (reversing judgment construing §537.060 RSMo in calculating damages in personal injury damage suit judgment after partial settlement).

B. Argument

Plaintiff contends that the joint and several liability statute for medical malpractice cases, § 538.230 RSMo violates the Missouri Constitution because its application in this case has deprived Lindquist of property without due process of law. *Id.* art. I, § 10. Specifically, after the court of appeals affirmed JNOV in favor of *Scott*, thereby nullifying the jury's assessment of 5% fault and reducing it to zero%, the trial court refused to apply joint liability law to *Mid-America* even though the court of appeals upheld and ordered reinstated the jury's 40% assessment of fault to *Mid-America*. *Mid-America's* 40% fault is greater than or equal to *Scott's* 0% fault after JNOV. Under the literal language of the §538.230.2 RSMo, *Mid-America* remained jointly liable for the remaining 5% of plaintiffs' damages after *Mid-America* simply lost its' contribution apportionment claim vis-à-vis *Scott*. The Judgment of the trial court Feb.21, 2006, lawlessly stripped Lindquist of 5% of her judgment by refusing to apply *joint* liability law

to *Mid-America* after *Mid-America* lost and abandoned its' comparative fault cross claim against *Scott*.

Mo. Rev. Stat. §538.230.2 RSMo (1986)⁴ is a special component of medical malpractice law, and consequently we turn to the specific language regarding application of settled joint and several liability (See App. Tab 1):

*2. The court shall determine the award of damages to each plaintiff in accordance with the findings, subject to any reduction under subsection 3 of this section and enter judgment against each party liable on the basis of the rules of joint and several liability. **However, notwithstanding the provisions of this subsection, 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.***

(emphasis added).

Subsection 1 and subsection 3 address calculations in which some defendants settle and others proceed to trial. These sections do not address management of a post verdict judgment that a defendant is not liable for any fault, canceling a jury's assessment to "zero". The relevant part of subsection 3 states that when there is a settlement between the plaintiff and a defendant, that particular defendant cannot be found liable to anyone

⁴ Section 538.230 was repealed during the 2005 legislative session, but the repeal does not affect cases filed before its effective date. *See* 2005 H.B. 393 § 2.

for contribution or indemnity, “but does not discharge other persons or entities upon such claims unless is so provides.” Id. § 538.230.3 RSMo.

So permit us to dissect § 538.230.2 RSMo, clause by clause. First, it seems to be following the first direction, “The court shall determine the award of damages to each plaintiff”. The court of appeals upheld and ordered reinstated 5.1 million damages for plaintiff and the trial court found “past economic” damages totaled \$358,437.24 in a straightforward assessment. Accordingly Karen Lindquist as an individual plaintiff is entitled to the \$1,350,000.00 the jury originally assessed as her damages, and Karen Lindquist as representative of her late husband is entitled to the remainder, \$4, 108,437.24. (without calculating interest).

The next direction in the statute is: “... and enter judgment against each party liable on the basis of the rules of joint and several liability”.

The jury found *Mid-America* liable and the court of appeals upheld that finding, and ordered it reinstated. So, what is the ‘basis of the rules of joint and several liability’ in Missouri? Permit us to explore, briefly, the history.

As codified in 1.010 RSMo, The Common Law of England is the rule of action in Missouri. Scholars at the American Law Institute trace joint and several liability for independent tortfeasors to *Hill v. Goodchild*, 98 Eng. Reprints 465, 5 Buff. 2790, (K.B. 1771) (Mansfield, J.). See, Restatement Third, Torts: Apportionment of Liability § C18 cmt. a. History, pg. 189. Missouri courts have embraced joint and severally liability law stemming from *Hill v. Goodchild* for a long time. The classic statement of the common-

law rules is fairly clear, as set forth *Berry v. Kansas City Public Service Co.*, 343 Mo. 474, 121 S.W.2d 825 (1938):

Joint or concurrent tort-feasors are severally, as well as jointly, answerable to the injured party for the full amount of the injuries. The injured party may sue all or any of the joint or concurrent tort-feasors and obtain a judgment against all or any of them. The injured [party] is entitled to but one satisfaction for the injuries inflicted and that satisfaction may come from all or any of the joint tort-feasors. When an injured plaintiff compromises or settles with one of the joint tort-feasors for a portion of the injuries, the injured person still retains her cause for action against the other tort-feasors and recovery may be had for the balance of the injury. Unless the damage caused by each of such concurrent or joint tort-feasors is clearly separable, permitting the distinct assignment of responsibility to each, each is liable for the entire damage. The degree of culpability is immaterial.

Id. at 488, 121 S.W.2d at 833. More recently this Court wrote, “[j]oint and several liability is a generally applicable principle that furthers Missouri’s policy of placing the financial burden of injuries on the parties at fault in causing those injuries.” *Smith v. Coffey*, 37 S.W.3d, 797, 799 (Mo. 2001). Joint and several liability has been “firmly imbedded” in the law long before § 538.230 RSMo was passed. *Id.* (discussing waiver of sovereign immunity in a highway case). In a long unbroken line of cases, Missouri courts have reiterated that common law rules of joint and several liability do not

contemplate rendering a blameless plaintiff less than whole. With this general history in mind, what about the application of principles of joint and several liability in malpractice cases?

Medical malpractice cases decided before § 538.230 RSMo was enacted applied these common law rules of joint and several liability. See, e.g., *Koenig v. Babka*, 682 S.W.2d 96 (Mo. App. E.D. 1985); *Brickner v. Normandy Osteopathic Hosp., Inc.*, 687 S.W.2d 910 (Mo. App. E.D. 1985) (en banc). Both of these cited cases involved multiple defendants and challenges to jury instructions. In *Koenig*, the court stated,

“[w] here two or more persons, although acting independently, are in combination the cause of a single injury to another, the injured person may recover for the entirety of the injury from any one or all of the tort-feasors whose acts have contributed hereto.” *Id.* at 99 (emphasis added).

The court added:

Under this rule, a defendant need not suffer any injustice from being held solely responsible for an entire injury resulting from a combination of wrongs. He may seek contribution from others who participated in causing the damage merely by impleading them and requesting an apportionment of relative fault . . .

Id.

In *Brickner*, the court noted, “[n]o reason has been advanced against applying general concepts of joint and several liability to the field of medicine.” 687 S.W.2d at

912-13. In *Brickner*, the defendants failed to diagnose and treat a patient's testicular cancer and the patient died. A hospital, its resident, and two other doctors were sued and one doctor settled before trial. The jury found the second doctor liable, awarding damages of \$1 million, and found the hospital not liable. The trial court granted the plaintiff's motion for a new trial as to the hospital and the hospital appealed. The second doctor also appealed but settled the case while the case was on appeal. *Id.* at 911.

The appellate court found error in a verdict-directing instruction and remanded the case for retrial on liability only; the court vacated the verdict against the second doctor. Thus, only a single defendant—the hospital—remained in the case. The court stated:

One may argue that with the vacation of the judgment against Dr. Bean and his dismissal from the lawsuit, the necessity of limiting the new trial to the issue of the Hospital's liability has vanished. For two reasons, we nevertheless consider the better course is to limit the issue at the new trial. First, insofar as practicable, we desire to put the parties in the position they would have been in had no uncorrected trial court error occurred . . .

Id. at 914 (emphasis added).

Returning the remarks quoted from *Koenig, supra, Mid-America* did, in fact, implead and cross claim against *Scott* hoping to shift fault away from itself. While the jury assessed 5% of the fault to *Scott*, the JNOV absolved *Scott* of any liability. In other words, *Mid-America's* cross-claim ultimately failed; moreover, *Mid-America* abandoned review of JNOV in favor of *Scott*. The court ruled *Scott's* fault is 0%. Using the literal

words of § 538.230.2 RSMo, *Scott's* 0% fault after JNOV is “equal to or less than” *Mid-America's* 40% fault. Returning to the original Judgment composed by Judge Bush, *infra* pg.15, JNOV in favor of Scott should lead, simply, to subtracting Scott's name from these passages:

... and that plaintiff MICHAEL LINDQUIST have and recover of defendants MID-AMERICA ORTHOPAEDIC SURGERY, INC., FAMILY MEDICAL GROUP OF ST. PETERS, INC., BARNES JEWISH ST.PETERS HOSPITAL, INC. and SCOTT RADIOLOGICAL GROUP, INC. jointly and severally the sum of \$275,000...

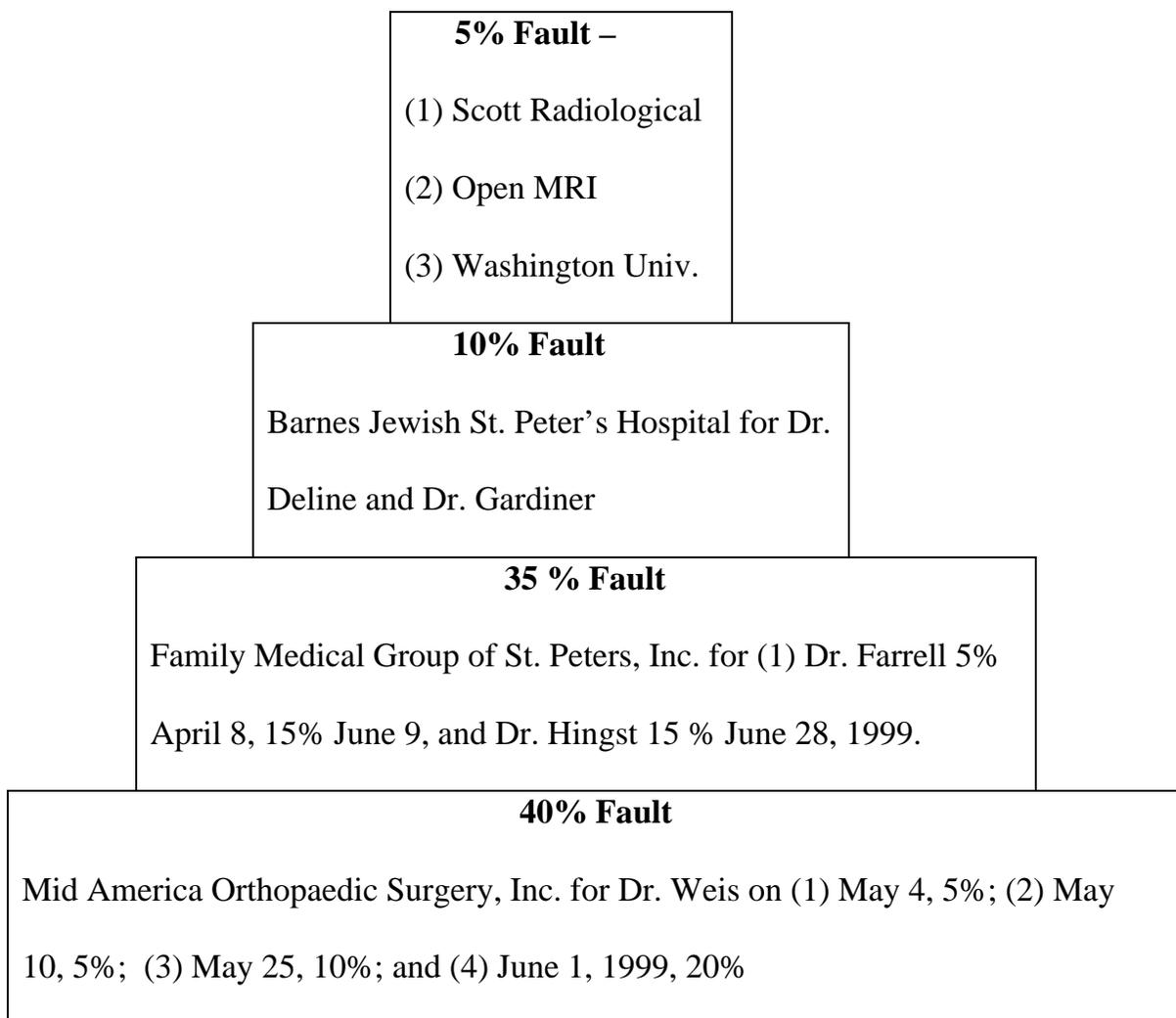
.... and that plaintiff KAREN LINDQUIST have and recover of defendants MID-AMERICA ORTHOPAEDIC SURGERY, INC., FAMILY MEDICAL GROUP OF ST. PETERS, INC., BARNES JEWISH ST.PETERS HOSPITAL, INC. and SCOTT RADIOLOGICAL GROUP, INC. jointly and severally the sum of \$67,500.

In this case, the trial court should have put the parties in the position they would have been in had the jury returned a finding of zero fault by *Scott* (which is what the JNOV accomplished). *Mid-America* was seeking contribution from *Scott*; *Scott* was not liable for contribution. Since under the law of joint and several liability of multiple tortfeasors vis-à-vis plaintiffs *Mid-America* was liable to plaintiff from the outset for the 5% fault the jury tagged to *Scott*, this does not involve a calculus of “shifting” or of “re-apportioning” 5%! Instead, this is a matter of subtracting from *Mid-America's* universe of rights the right to be reimbursed that 5% contribution from *Scott*. This, then, brings us to

the next clause in §538.230.2: *...However, notwithstanding the provisions of this subsection, 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.*

Missouri's joint and several common law liability preceded the innovation of "comparative fault" and "apportionment", paradigms by which relative fault is assessed and damages either diminished mathematically according to a plaintiff's fault, or distributed among several wrongdoers in proportion to their relative wrongdoing. The law now accommodates the practice of "apportioning" fault. Apportioning fault in no way vitiates "joint liability": "...[a] pportionment of fault between defendants has no effect on a plaintiff's right to collect the full amount of a judgment from any one of the defendants." *Capell v. Abbick*, 123 S.W.3d 193, 195 (Mo. App. W.D. 2003) (emphasis added) (citing *Gaunt v. State Farm Mut. Auto. Ins. Co.*, 24 S.W.3d 130, 135 (Mo. App. W.D. 2000); *Elfrink v. Burlington N. R.R.*, 845 S.W.2d 607, 615 (Mo. App. E.D. 1992)). In operation, "comparative fault" of plaintiff in a malpractice case as contrasted with "apportionment of fault" among defendants pursuant to cross claims are treated distinctly and involve different instruction packages: See discussion, 1 Mo. Tort Law, § 8.20, Liability of Health Care Providers, Joint and Several Liability, Vicarious Liability and Apportionment of Fault, (MoBar 2d ed. 1990 and 1993-2005 supplements). See also, Mo Damages, § 22.9; 22.17; 22.19; and 22.21 Apportionment of Damages, Medical Malpractice. (MoBar 2d ed. 2001 and Supp.2003-5). In Damages Chapter 22.19 the author, Sandra Wunderlich, describes the scheme in §538.230.2 metaphorically as a

pyramidal threshold for joint liability, and she continues with the observation, “ Unlike 537.067 RSMo 2000, §538.230 does not outline a procedure by which the noncollectible amount is reallocated”. Id @ pg. 22-31. That void is the source of vagueness, which vexes writers, and the constitutionality of the statute. Under § 538.230.2 RSMo, *Mid-America* was *jointly* liable to plaintiff for the entire pyramid of fault above its base 40%, the largest assessment, including Scott’s 5%.



The choice of words, “re-allocation” and “shift” is suspect where the most at fault defendant’s joint liability for the entirety of plaintiff’s indivisible injury exists from the outset. The subtraction of a “non-collectable” tortfeasor is just that: subtraction. It is an equal subtraction from both sides of the equation. Plaintiff suffers a subtraction of a collectible contributor; simultaneously, jointly liable co-defendants suffer the equal loss of a collectible contributor. The simultaneous subtraction from both plaintiff’s universe of remedies and co-defendants universe of remedies results in the same balanced equation between the plaintiff and the most at fault co-defendant that always existed. Consequently, there is no lawful, as in justified consistent with constitutional due process of law, basis to subtract from plaintiff 5% of her judgment.

To be sure, defendants who settled are dismissed and have no additional liability to plaintiffs or co-defendants for any more payment of the judgment. It just so happens that in this case, *Mid-America* is the only nonsettling defendant left in the case. Plaintiff must be made whole, and under Missouri rules of joint and several liability, *Mid-America* should be responsible for the remainder of the verdict. The relevant part of subsection 3 of § 538.230 states that when there is a settlement between the plaintiff and a defendant, that particular defendant cannot be found liable to anyone for contribution or indemnity, “but it does not discharge other persons or entities upon such claim unless it so provides.” *Id.*, (emphasis added). Instead, the jury determines the settling defendant’s fault and the verdict is adjusted accordingly. *Id.*

Mid-America’s lamentation that having to pay the extra 5% is ‘unfair’ is idle. There are no perfect equities in apportionment, and there is nothing unsound or unlawful

in requiring a jointly liable co-defendant from paying plaintiff 45% instead of 40% of plaintiffs' entire damage. The United States Supreme Court observed without flinching that joint and several liability can result in one defendant's paying more than its apportioned share of liability when plaintiff's recovery from other defendants is limited by factors beyond plaintiff's control *McDermott v. AmClyde and River Don Castings*, 511 U.S. 202, 128 L.Ed. 148, 114 S.Ct. 1461, at 1471 (1994). *McDermott v. Amclyde* was an Admiralty case involving contributions of several who were involved in the collapse of a crane and subsequent damage to a deck. Recapping its analysis of the various merits and demerits of pro tanto and proportionate liability, the Court wrote, *Id.*:

Joint and several liability applies when there has been a judgment against multiple defendants. It can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as defendant's insolvency. When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than the innocent plaintiff, responsible for the shortfall.

So it is here, Mid-America should be liable to plaintiff for the cancellation of Scott's several liability under the statute. Moreover, it is idle for Mid-America to complain where the fault attributed to settling parties, 5% to Nydic, 5% to Washington Univ., 5% to Gardiner, and 5% to Deline, exceeded the monetary value of plaintiffs' settlement with each of those parties: *Mid-America* got an unfair – but not unlawful – windfall benefit by electing proportional liability offset instead of settlement amount

subtraction from the verdict, and if Scott was entitled to JNOV, there was no way Washington Univ. could properly be assessed 5% based on Dr. Ruh's review of Lindquist's routine (non-stat) x-ray at some unknown but late-in-the-day time at *BJSPH* when Lindquist had long before been discharged from the hospital.

The Missouri pyramidal approach to joint liability in medical malpractice cases is a unique variant of the Hybrid Liability Based on Threshold Percentage of Comparative Responsibility formulated as Track D in the Restatement Third, Torts: Apportionment of Damages. In this case, plaintiff submitted a modified verdict form patterned on the recommendations in Restatement Third, Torts: Apportionment of Damages, (2000) § D19. Assignment of Responsibility: Both Jointly and Severally Liable Defendants – cmt.m.

To amplify Lindquist's first position, that is, short of finding unconstitutional ambiguity (which the Court is most reluctant to do), simply by interpreting Missouri's malpractice hybrid threshold for joint liability statute as written the judgment should be reversed and remanded for entire liability of Mid-America, with offsets for 55% fault resulting in a net liability adjudged against Mid-America for 45% liability of plaintiff's entire damages, Lindquist borrows from Restatement Third, Torts: Apportionment of Damages, § D19 (2000).cmt. n. *Form of judgment*: (since this is only available "on reserve" at St. Louis Univ. Law Library, plaintiff places a copy of D18, and D19 comment n at Appendix, Tab 7 for the convenience of the court and parties):

If any defendant's share of responsibility exceeds the threshold, the assignment of responsibility to any other nonparties, immune persons, or

insolvent parties is irrelevant to the liability of the defendant assigned responsibility above the threshold. Thus, in illustration 3, the jointly and severally liable defendant is liable for the full amount of plaintiff's recoverable damages. If the applicable law imposes joint and several liability on a defendant for a portion of plaintiff's damages, the allocation of responsibility to any other nonparties, immune persons, or insolvent parties is irrelevant to the liability of the defendant with regard to the joint and several portion of the damages.

This passage presents impeccable legal logic.

If however, the Court remains unconvinced, then we crash into unconstitutional ambiguity in the statute, for anything else is simply making up rules of interpretation to fill the void.

The Missouri Constitution guarantees that “no person shall be deprived of life, liberty or property without due process of law.” Mo. Const. art. I, § 10. See also Mo. Const. art. I, § 2. Plaintiff has a property interest in the final judgment. See *Jacobs v. Fodde*, 458 S.W.2d 588 (Mo. App. St. Louis 1970) (recognizing that causes of action are property that may be assigned). In this case, the trial court deprived Plaintiff of her property interest in receiving all the damages the jury and the trial court decided she is owed.

“If a court has jurisdiction, of person and subject-matter, of a case affecting a party's rights of property, all action taken within the limit of that jurisdiction is ‘due process of law,’ within the meaning of the fourteenth amendment . . . however erroneous

the judgment may be.” *Davidson v. Hartford Life Ins. Co.*, 151 Mo. App. 561, 132 S.W. 291, 292 (K.C. Ct. App. 1910).

The trial court’s failure to apply “the rules of joint and several liability” suggests one of two problems: either the statute is unconstitutionally vague in that subsection 2 provides no meaningful guidance, or that the statute, while not vague, was applied unconstitutionally in this case.

1. Section 538.230 is unconstitutionally vague.

The “void for vagueness” doctrine stems from the Fourteenth Amendment of the U.S. Constitution and article I, § 10 of the Missouri Constitution. These two clauses require that when a statute deprives a person of liberty or property, the statute must be worded with sufficient precision so that a reasonable person can know what conduct is expected of him. See, e.g., *Kolender v. Lawson*, 461 U.S. 358, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903,909 (1983) (“void for vagueness doctrine requires that a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement”); *State v. Mahurin*, 799 S.W.2d 840, 852 (Mo. banc 1990) (“[i]f the terms or words used in the statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirements as to definiteness and certainty”).

The principles are set forth in a (somewhat bawdy!) liquor-control case:

*It is a basic principle of due process that an enactment
is void for vagueness if its prohibitions are not clearly*

defined. The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. However, neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague. Moreover, it is well established that “if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and . . . courts must endeavor, by every rule of construction, to give it effect.” Finally, courts employ “greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”

Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955, 957 (Mo. banc 1999) (citations omitted). This requirement of reasonable precision is also directed to those who apply the statutes, and thus, makes arbitrary or discriminatory interpretation less likely.

Although the common-law rules of joint and several liability clearly support reapportionment of the 5% fault, § 538.230 does not contain any language making that result explicit, leaving everyone to guess how to handle the situation this case presents. The statute simply does not authorize a court to excuse a liability defendant from paying the whole remaining verdict after settlements have been accounted for. The statute does not authorize a court to leave a plaintiff less than whole; the principles of joint and several liability dictate otherwise. A statute that is devoid of guidance is simply ambiguous, and when the result is to deprive innocent persons of \$270,000, it is unconstitutionally vague. The trial court's decision is also silent. Rather than explaining why the 5% disappeared, the trial court merely stated that it would not reapportion the fault to the remaining defendant.

If this Court concludes that the statute is unconstitutionally vague, it should declare the statute invalid, such that common-law principles of joint and several liability apply instead. And then, Mid-America will be liable for plaintiff's entire damage, and have a right of credit for amounts plaintiff obtained in settlement and partial satisfaction of judgment from others.

2. Section 538.230 is unconstitutional as applied.

If the Court concludes that § 538.230 is not unconstitutionally vague, it should rule in favor of plaintiff, for the reasons outlined above. Otherwise, the statute is being applied unconstitutionally because Plaintiff cannot recover the \$272,000+—which is a legal debt owed to her—from anyone.

CONCLUSION

§ 538.230.2 RSMo does not explicitly address how to make a plaintiff whole when a defendant found liable by the jury is absolved of liability on a JNOV or on appeal. The statute refers to “the principles of joint and several liability.” Those principles direct that the plaintiff must be made whole and co-defendants who are found liable must be responsible for making the plaintiff whole. Nevertheless, the trial court implicitly concluded that Plaintiff is out 5% of the verdict without explaining why, or how the statute directed that result.

This Court should reverse the trial court’s ruling and order that Defendant, *Mid-America*, remain *jointly* liable for the 5% fault assessed against co-defendant *Scott* even though *Scott*, as a party, has had its’ fault reduced to zero by the court.

Respectfully submitted.

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RULE 84.06 CERTIFICATION

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I, James Hullverson, Jr. Certify in accordance with Rule 84.06(c) that:

- (1) I am a lawyer and I have composed and prepared this brief in accordance with Rule 55.03;
- (2) that this entire brief complies with the limitations in Rule 84.06(b) in that it is less than 31,000 words (cover to cover);
- (3) This APPELLANTS' BRIEF, contains 9,245 words, excluding the cover.
- (4) I have provide an electronic copy of Appellant's Brief , MS-Word for Mac format, on CD because I do not have any equipment to make a "Floppy" disc copy, checked if and there are no viruses, and the CD is affixed to the cover filing letter.

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CERTIFICATE OF SERVICE

The undersigned James E. Hullverson, Jr. certify that I filed 10 copies (1 original and 9 copies) of Appellant's Brief with the Clerk of the Supreme Court, together with an electronic copy on CD –Rom, and I provided 2 copies of this brief with an electronic copy on CD-Rom to defense counsel, Ken Bean, listed below, by depositing these copies with Fed Ex for delivery on Tuesday, October 24, 2006.

I do not have the capability of copying to a floppy disc, and hence provide CD-Rom instead.

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