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IN THE SUPREME COURT OF MISSOURI

KAREN LINDQUIST, Individually and )  
As Personal Representative of the Estate )  
of MICHAEL LINDQUIST )

Plaintiffs/Cross-Appellants )

vs. )

MID AMERICA ORTHOPAEDIC )  
SURGERY, INC., )  
Defendant/Respondent, )

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MISSOURI SUPREME COURT

No. SCT 87827

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

PLAINTIFF/CROSS APPELLANTS' "SECOND" BRIEF  
UNDER RULE 84.04(j)

Respectfully submitted,

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## POINTS RELIED ON

I. Response to Mid-America Orthopedic Surgery, Inc. Point 1: The trial court correctly applied §512.160.4 RSMo (2000) and §408.040 RSMo (2000) in awarding Lindquist interest on 5.1 million dollars in damages from June 18, 2003, the date of the original judgment on the verdict, at 9% per annum, because in *Lindquist v. Scott Radiological Group, Inc., et. al.*, 168 S.W.3d 635 (Mo. Ct. App.E.D. 2005) the Court of Appeals upheld that portion of the damages assessed in the verdict and awarded in the original judgment, and mandated the verdict be reinstated in accordance with its opinion.

- § 512.160.4 RSMo (2000)
- *Reimers v. Frank B. Connet Lumbar Co.* 273 S.W.2d 348 (Mo.1954)
- *Contour v. Chair-Lounge Co. v. Laskowitz*, 330 S.W. 2d 817, 826[19] (Mo. 1959))
- *Senn v. Commerce – Manchester Bank*, 603 S.W.2d 551, 553 (Mo. banc, 1980)

## POINT RELIED ON

2. Response to Mid-America Orthopaedic Rebuttal to Point 1: Pursuant to the Mandate directing the circuit court to “reinstate the original jury verdicts on all issues except with respect to past economic damages...” (LF 159, App.pg.1-2) in accordance with the opinion in *Lindquist v. Scott Radiological Group, Inc., et. al.*, 168 S.W.3d 635 (Mo.Ct. App.E.D.2005), the circuit court was required to adjudge that plaintiff was entitled to recover all damages from Mid-America Orthopaedic Surgery, Inc. because the jury assessed the most fault to Mid-America, and to adjudge Mid-America entitled to offset of 55% based on the sum of equitable fault of other defendants affirmed on appeal, for a net 45% liability for plaintiff’s damages, and 45% liability for interest on the amounts of the judgment.

- Mo.S.Ct. Rule 73.01(d)
- §537.067 RSMo (2000)
- §538.230.2 RSMo (2000)
- Restatement, Third, Torts: Apportionment of Liability §10; 17; D19

## ARGUMENT, RESPONSE TO RESPONDENT POINT ONE

1. Response to Mid-America Orthopedic Surgery Point 1: The trial court correctly applied §512.160.4 RSMo (2000) and §408.040 RSMo (2000) in awarding Lindquist 9% interest on 5.1 million dollars in damages from June 18, 2003, the date of the original judgment on the verdict, because in *Lindquist v. Scott Radiological Group, Inc., et. al.*, 168 S.W.3d 635 (Mo. Ct. App.E.D. 2005) the Court of Appeals upheld that portion of the damages assessed in the verdict and awarded in the original judgment, and mandated the verdict be reinstated in accordance with its opinion.

### A. Standard of Review, revised:

Now that Mid America Orthopedic Surgery, Inc. (Mid-America hereinafter) has abandoned its appeal of the amount of past economic damages found by the trial court, three issues remain for this Court to decide on the parties' respective appeals. First, under §512.160.4 RSMo (2000) (Appendix pg. A3-5) is plaintiff entitled to interest on those portions of the *original* judgment June 18, 2003 on the verdict of May 13, 2003 that the court of appeals upheld, which in this case amounts to \$5,100,000.00 and all liability assessed against Mid-America? Second, under §538.230 RSMo, (2000) is Mid-America *jointly* and severally liable to plaintiff for all damages assessed because the jury assessed the most fault - 40% - against Mid-America? Third, what is the rate or what are the applicable rates of interest on the judgment under §408.040 RSMo (2000) (App.pg.6-7) and §408.040 RSMo (2005)(App. 8-9) where the original judgment was entered June 18, 2003, the interest rate law changed August 28, 2005, the appeal was final on August 30,

2005, the Mandate was written September 7, 2005, and the Judgment after retrial of past economic damages was entered February 21, 2006. Under Mo.S.Ct. Rule 73.01 (bench trial) and Rule 84.13(d)(1)(review of bench trial) and *Murphy v. Carron*, 536 S.W.2d 30,32 (Mo. banc 1976), this court reviews de novo and without deference whether the circuit court erroneously declared the law... or erroneously applied the law in the judgment in the case. All canons of statutory construction operate in the review. *Lewis v. Gibbons*, 80 S.W.3d 461 (Mo.banc 2002); see also Statutory Construction in Missouri, J.Mo.Bar May-June 2003, pg. 120 by Sullivan.

**B. The trial court correctly awarded 9% interest per annum from June 18, 2003, the date of the original judgment on the verdict, on the 5.1 million part of damages the court of appeals upheld and mandated be reinstated.**

§512.160. 4. RSMo (2000) (App. pg. 3-5) provides:

*Upon the affirmance of any judgment or order, or upon the dismissal of any case, the appellate court may award to the respondent such damages not exceeding ten percent of the amount of the judgment complained of as may be just, and when such judgment shall be affirmed for part of the sum of which judgment was rendered by the trial court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the trial court. ... (L. 1943 p. 353 ◆ 140). (emphasis by Lindquist).*

Mo. Damages §20.88, MoBar 2d ed. (2001), Effect of Appeal on Postjudgment Interest pg. 20-90, summarizes cases that have construed this statute in the following passage:

*“When an appealed judgment is affirmed only in part, that part that is affirmed bears interest from the date of rendition of the original judgment. §512.160.4 R.S.MO (2000); Contour Chair –Lounge Co. v. Laskowitz, 330 S.W. 2d 817, 826 (Mo. 1959). Similarly, if a verdict is modified on appeal – up or down – interest runs on the modified amount from the date of the original judgment. Ohlendorf v. Feinstein, 670 S. W. 2d 930 (Mo.App. E.D. 1984)....*

*If a trial court sets aside a verdict, ordering a new trial, and the order to set aside is later held erroneous and the original verdict reinstated, interest accrues from the date of the original judgment or verdict. Reimers v. Frank B. Connet Lumbar Co., 273 S.W.2d 348 (Mo.1954).”*

*Reimers v. Frank B. Connet Lumbar Co., 273 S.W.2d 348 (Mo.1954)* reversed an order setting aside a \$35,000 judgment on a verdict for Reimers in an auto collision case. § 1222 (1943) is the forerunner of §512.160.4 RSMo (2000) (App.pg.1-4). Without mentioning that statute, the Missouri Supreme Court held *Reimers* was entitled to interest from the time of the *original* judgment on the verdict, because the legal effect of reversing the order was to ‘reinstate’ the verdict *and* judgment. That is fair. It is fair because the defendant judgment debtor caused the trial court error that delayed the legal recognition (*ie.* judgment) and collection (execution on the judgment) of an indebtedness to plaintiff that was justly determined by the jury. Moreover, *Reimers v. Frank Connet Lumbar* overturned *Scullin v. Wabash R.Co.* 90 S.W.1028 (Mo.1900). *Id.* @ 349. That is

important because *Scullin v. Wabash* is the precedent underlying the cases Mid-America relies upon, which we discuss in more detail later. At bottom §512.160.4 RSMo (2000) ameliorated the unfair deprivation of interest on a judgment epitomized by *Scullin v. Wabash* a century ago.

*Contour Chair-Lounge Company v. Laskowitz*, 330 S.W. 2d 817, 826[19] (MO. 1959) affirmed *part* of the judgment on the verdict in favor of Laskowitz, a patent owner, in a case to distribute proceeds of a patent infringement case. Contour Chair – Lounge was a licensee of Laskowitz’ patent. Contour Chair won more than \$12000 in a patent infringement suit against a third person, so Laskowitz sued Contour for his share as inventor. The jury returned a verdict in favor of Laskowitz awarding him over \$9000, and the court immediately entered judgment for that amount in his favor. Contour appealed, and the court of appeals reduced that award, and then resolved a post appeal motion for interest, writing:

*“ As a matter of law the judgment for \$5,239.50, entry of which is directed by the opinion, will bear interest from April 23, 1958, the date of the rendition of the original judgment, because Sec. 512.160(4) provides that: ‘\* \* \* when such judgment shall be affirmed for part of the sum of which judgment was rendered by the trial court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the trial court.’ Modification of the opinion is unnecessary to accomplish this result.”*

The rule that interest runs from the time of an original judgment that includes ‘parts’ affirmed was extended to include lesser and greater damages in a modified judgment in *Senn v. Commerce – Manchester Bank* 603 S.W.2d 551, 553 (Mo.banc 1980), *Senn II*. *Senn v. Commerce* originated as a complex multiple party commercial class action damage suit in which the trial court amalgamated the determination of many rights in a collective “final judgment”. *Senn I* upheld that claimants were entitled to compensatory and punitive damages. In *Senn II* the Court resolved the issue of calculating interest on a modified judgment, writing, @ 553:

*“When a judgment is modified upon appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment.”*

See also *Ohlendorf v. Feinstein*, 670 S.W.2d 930, 935-936 (Mo. App. E.D. 1984).

In *Lindquist v Scott & Mid-America et. al.* the jury returned a “general verdict” as defined by Rule 71.01, with many itemized discrete ‘parts’ of damages and assessed fault on each claim and cross-claim. The itemized parts of the verdict allowed the court to review identifiable separate “parts” of damage and fault determinations to establish the Lindquists’ rights to collect from each defendant, and the defendants’ rights to contribution from one another. In turn, the *original* judgment June 18, 2003, had many discrete identifiable “parts” as to both liability and damages, and resolved the separate

claims of Mr. & Mrs. Lindquist, and the cross-claims for contribution among all the defendants. In short, that judgment had many ‘parts.’<sup>1</sup>

A verdict is simply a decision by the jury. A Judgment *entered on* a verdict is a phrase of legal art referring to the establishment of legal rights and liabilities in accordance with the findings of fact the jury returned in the verdict. After a verdict is returned, a court then either enters a judgment *on the verdict* in favor of the party that prevailed in the verdict, or a judgment *notwithstanding the verdict* in favor of a party that lost.

The word “reinstate” is a transitive verb that means to place again in possession, or in a former state; to restore to a state, condition or position, etc. from which one had been removed; as, to *reinstate* the king. *See*, Websters New Twentieth Century Dictionary. BLACK’S LAW DICTIONARY, 4<sup>TH</sup> ED.1951 defines “Reinstate” this way: To reinstall; to reestablish; to place again in a former state or position from which the object or person had been removed.

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<sup>1</sup> Mo.S.Ct.Rule 74.01 defines “Judgment”. Rule 74.02 defines “Order”. This dichotomy exhausts the universe of trial court writings vis a-vis pending cases. Judgments may include declarations of the rights of several people, and several separate claims those people assert against one another, and consequently Judgments may encompass several individual judgments, and thus have many ‘parts’. *Senn I* and *II* involved in part directions to the trial court to enter “individual” judgments.

I have been unable to find a construction or definition of the legal phrase of art, “reinstate the verdict”. Nevertheless, in criminal cases courts routinely write variations of ‘reinstate the verdict’ direction without mentioning a judgment of conviction. For example, I quote *USA v. Montgomery* \_\_ F.3d\_\_ (10<sup>th</sup> Cir., Kan, slip op. Nov. 14, 2006), available @ <http://www.kscourts.org/ca10/cases/2006/11/05-3263.htm> , the court wrote: “Reversed. We REINSTATE the jury’s verdict and REMAND for sentencing” without mentioning the judgment of conviction necessary on the verdict. It is simply implied and understood by the direction to ‘reinstate the verdict’. One can Google this and find an inexhaustible supply of courts that “reinstate verdicts” without mentioning the judgment which really operationalizes the verdict. Only when the court enters a judgment on the verdict does the verdict get installed as something meaningful. Courts routinely use the phrase ‘*reinstate the verdict*’ as a contraction for the larger phrase *reinstate the judgment on the verdict* the to communicate this intent.

It seems more precise and better for appellate courts to write ‘reinstate the verdict and judgment,’ or ‘reinstate the judgment on the verdict.’ For example, see *State ex rel Strum v. Allison*, 384 S.W.2d 544, 546 (Mo.banc 1964). *Strum* was a Will contest case. The jury rendered a verdict in favor of the validity of a Last Will and Testament of Mr. Powell, and the invalidity of a codicil. The trial court entered an Order we now typically call ‘notwithstanding the verdict.’ The Missouri Supreme Court reversed that order and remanded the case. The trial court seemed somewhat rebellious and entered another order in favor of the validity of the codicil. On a second appeal The Missouri Supreme Court Remand Order was an exemplar of clarity:

*This court did reverse the order and judgment of the trial court and remanded the cause with directions to reinstate the verdict and judgment originally entered thereon. The court's opinion is Sturm v. Routh, Mo., 373 S.W.2d 922, to which reference is made for all matters considered and decided. For present purposes, it is sufficient to say that this court found that 'substantial evidence was adduced which supported the verdict of the jury' on the issue of whether the testator possessed sufficient mental capacity to execute the codicil. 373 S.W.2d 928. The concluding paragraph of the opinion is as follows: 'For the reasons heretofore discussed the judgment is reversed and cause remanded with directions to reinstate the verdict and judgment to the effect that the paper writing dated November 6, 1959, is not the codicil to the last will and testament of testator.' 373 S.W.2d 930. (Emphasis Lindquist's)*

A verdict simply is what it is – the decision of the jury. That verdict has no independent legal power. It is only when the judge enters a “Judgment” on the verdict establishes the legal efficacy of the decision and enables enforcement of the rights determined. ‘Reinstate the verdict’ implicitly recognizes the concomitant judgment on that verdict. In practice permutations of ‘reinstate the verdict’ words and phrases used interchangeably to mean the same thing. A verdict simply is what it is. The verdict only becomes operational legally when a judgment is entered “on it”.

In this case, the Mandate of the Court of Appeals incorporated the opinion, and that opinion made clear that “reinstatement of the verdict meant to reinstate the judgment

on the verdict with respect to the following parts of the original judgment: (1) in favor of Mr. & Mrs. Lindquist against Mid-America and the other defendants; (2) assessment of 40% of fault as to Mid-America Orthopedic, and assessment of relative fault of to other defendants except Scott Radiology; 1.75 million dollars past non-economic damages assessment in favor of Mike Lindquist ; 1 million dollars future non-economic damages assessment in favor of Mike Lindquist; 1 million dollars future economic damages assessment in favor of Mike Lindquist; \$675,000.00 dollars past damages assessment in favor of Karen Lindquist; \$675,000.00 dollars future damages assessment in favor of Karen Lindquist. "Reinstatement of the verdict" in the context of reversing the new trial order, and the entirety of the opinion, means re-store the verdict to its prior state in those component parts - which can only mean the parts of the original judgment itemized above were affirmed. There is no way to "reinstate" parts of a verdict without re-entering the original judgment on that verdict.

In the end, the Court of Appeals Mandate in the Lindquist to reinstate the verdict places the remedy within the ambit of the fairness remedy of §512.160.4 RSMo (2000). The original judgment June 18, 2003 in favor of Mrs. Lindquist, 1.35 million dollars against the defendants, jointly, is identical to the judgment entered on her claim February 21, 2006. Mid-America argues that since she was right in all of her legal positions she loses interest in the interval because the court of appeals mandated reinstatement of the verdict, without explicitly writing judgment on the verdict, would mark a new chapter in the annals of pyrrhic victories. Better yet, if the Lindquists had been given the option to have the verdict and original judgment thereon reinstated without relitigating the past

economic damages issue, then they would have been entitled to 9% per annum interest on 5.1 million dollars for the time between June 18, 2003 and September 7, 2005 without question: 1.2 million dollars in interest v. \$350,000 in past economic damages! According to Mid-America, the price Lindquist pays for correctly prosecuting the claim of single past economic issue retrial is more than a million dollars in interest is perverse.

Mid-America's position is meritless, and Mid-America's "authority" for that position has been distinguished, overruled, and displaced by the statute. Mid America's reliance on *Erwin v. Jones*, 191 S.W. 1047 (Mo.App.S.D.1917) is misplaced. *Erwin v Jones* began as a breach of an engagement contract case that included a claim of damages for child support. *Erwin v. Jones*, 180 S.W. 428 (Mo.App.S.D.1915). Mary Erwin agreed to marital relations *after* (not in return for) Mr. Jones' promised to marry her, and as a result of those relations she gave birth to his child. Erwin sued Jones when he reneged. The jury awarded Mary \$5,000.00 and the circuit court immediately entered an *original* judgment on that verdict December 9, 1914. On March 19, 1915 the court set aside the *original* judgment, ordered remittitur, and after Erwin consented entered a *new* judgment for \$3,500.00. In the first appeal the court affirmed the *new* judgment for \$3,500.00. In *Erwin II*, the appellate court held that the interest on the *new* judgment ran from the day the court entered it, March 19, 1915, instead of the date of the *original* judgment on the verdict December 19, 1914. So not only did Mary Erwin loose \$1500 by remittur, she lost 3 months interest on the remitted amount in the amended judgment. That isn't fair. The court rested its decision on *Scullin v. Wabash R. Co.* , 90 S.W. 2d 1028 (Mo.1900), in

which the unfairness of denying interest to the prevailing judgment creditor was glaring. As we pointed out above, the Missouri Supreme Court overruled *Scullin* in *Reimers*.

*Erwin* was distinguished in *Walton v. United States Steel Court*, 378 S.W. 2d 240(Mo. App. 1964). *Walton v. US Steel* was a personal damage suit in which the jury returned a verdict awarding \$146,000.00 upon which the circuit court promptly entered a judgment in plaintiff's favor April 25, 1961. In July Walton accepted a \$46,000.00 remittur and on July 13, 1961 the trial court entered an "new" judgment for \$90,000.00, concluding, "... plaintiff have and recover of both defendants the sum of \$90,000.00. as and of April 25, 1961, together with the cost of this proceeding, ...". Subsequently the Missouri Supreme Court affirmed Walton's \$90,000 judgment. *Walton v. U.S. Steel*, 362 S.W. 2d 617 (Mo. 1963) but its mandate was silent about the time for calculating interest. Pursuant to the mandate, defendant paid \$1168 disputed interest (April through July) to the circuit court clerk under protest. After the circuit court ordered the interest repaid to defendant based on *Erwin v. Jones*, Walton appealed. In Walton II, although the amended judgment was 'rendered' in July, the court of appeals upheld its active date as of April as stated in the Judgment itself, reversed the order to pay the interest to U.S. Steel. The Court distinguished *Erwin* with a line of remittitur cases, without mentioning §512.160.4 RSMo.

In 1943 the legislature ameliorated the inequity of denying interest by enacting §512.160.4 RSMo. *Erwin* and *Walton* are easily viewed through the prism of §512.160.4. In *Erwin* the *original* judgment was for \$5000, and in *Walton* the *original* judgment was for \$146,000.00. In *Erwin* the amended judgment was for \$3500, and in

*Walton* the amended judgment was for \$90,000.00. In both cases the existence of a debt of damages from defendant to plaintiff exists as of the date of the *original* judgment. In both cases, the amount of the debt in the amended judgment is less than the amount of the debt in the original judgment: \$3500 is *part* of \$5000; and \$90,000.00 is *part* of \$146,000.00. Consequently, had *Walton* relied on the statute, the concern about a judgment entered on one date referring to an effective earlier date would have been obviated.

Next, Mid-America's reliance on *Kennard v. Wiggins*, 183 S.W.2d 870 (Mo. 1944) is also misplaced. *Kennard v. Wiggins* was a declaratory judgment action to assert rights under a testamentary trust established by John Wiggins that became effective when he died November 1897. The litigation began in May of 1920. The court outlined the following 20 years of litigation leading to this 1944 decision. At 872. *Kennard* didn't construe the statutes that apply in this case, and the court explained that interest was unavailable because, "The judgment on the merits was not for money due for payment. Under said judgment there could be no process for collection of money." At 872[4]. In this *Lindquist* case, the only thing due is money damages.

Next, Mid America's reliance on *Southern Real Estate and Financial Company v. City of St. Louis*, 115 S.W.2d 513 (Mo.App. 1938), and the discussion surrounding that at Page 16, 17 and 18 is meritless. At Page 17 Mid America begins the paragraph as follows:

*"The rationale is simple, if the judgment creditor is to blame for the delay in entry of a final judgment, then the judgment creditor is not entitled to*

*interest. Plaintiff is responsible for the delay in reaching final judgment between October 2003 and February 2006 because she chose to appeal the October 2003 Order granting a new trial rather than proceeding to the new trial."*

First, as a result of the October 16, 2003 Order of the trial court setting aside the judgment in favor of plaintiff and ordering a new trial, plaintiff was no longer the "judgment creditor". Mid-America incorrectly equates the Lindquists with judgment creditors as appellants. Furthermore, the Lindquists were successful in their appeal of the new trial order.

Next, in *State ex rel Southern Real Estate and Financial Company v. City of St. Louis*, the Court affirmed a judgment denying the City of St. Louis interest on a condemnation award because the City of St. Louis unsuccessfully appealed that judgment claiming compensation award was inadequate. That condemnation case examined 1939 statutes and charters, not current statutes, and is irrelevant to this case.

In conclusion, the trial court properly reconciled the Mandate direction to reinstate the verdict on all other issues with §512.160.4 RSMo (2000) so as to adjudge the Lindquist entitled to interest on the part of the damages upheld, 5.1 million dollars, from the date of the original judgment, June 18, 2003, because 5.1 million dollars is "part" of the 6.85 million dollars originally awarded. Mid-America's appeal of the award of interest is meritless in this case.

**Part C: What is, or what are, the correct interest rates?**

In Senn III, *Senn v. Commerce – Manchester Bank*, 630 S.W.2d 572 fn.1 (Mo.banc 1982) the Court observed:

“The interest rate was six percent until September 28, 1979, when it became nine percent. § 408.040, RSMo Cum.Supp.1981. See Senn II, 603 S.W.2d at 553.”

It is axiomatic that the rate of interest is procedural and should apply prospectively.

Simple 9% per annum interest based on §408.040 RSMo (2000) is appealing in this case because it is simple and straightforward amidst a forest of legal and factual issues, and at this point six years of litigation. Nevertheless H.L.Mencken’s admonition lurks: "There is always an easy solution to every...problem -neat, plausible, and wrong."

In this case the best application of law is to apply the interest rate of 9% per annum on 5.1 million dollars from June 18, 2003 through August 27, 2005. Beyond that time the “new” Federal rate plus 5% should apply, and apply to the amounts due. The amount due changes by the addition of the past economic damages in the judgment of February 21, 2006. And Mid-America is liable for 45% of all interest because of its joint liability under 538.230 RSMo, to which we now turn.

## ARGUMENT ON RESPONSE TO REBUTTAL POINT 1

**2. Response to Mid-America Rebuttal to Point 1:** Pursuant to the Mandate directing the circuit court to “reinstate the original jury verdicts on all issues except with respect to past economic damages...” in accordance with the opinion in *Lindquist v. Scott Radiological Group, Inc., et. al.*, 168 S.W.3d 635 (Mo.Ct. App.E.D.2005), the circuit court was required to adjudge that plaintiff was entitled to recover all damages from Mid-America Orthopedic Surgery, Inc. because the jury assessed the most fault to Mid-America, and to adjudge Mid-America entitled to offset of 55% based on the sum of equitable fault of other defendants affirmed on appeal, for a net 45% liability for plaintiff’s damages, and 45% liability for interest on the amounts of the judgment.

Mid-America’s claim Lindquist did not preserve her claims that Mid-America is jointly liable for all plaintiffs damages is meritless. First, from the outset Lindquist alleged Mid America was *jointly* liable for *all* plaintiffs’ damages. See Plaintiffs’ Second Amended Petition, (LF pg. 71-78; 108-109). Secondly, as soon as this court rejected transfer on August 30, 2005, Lindquist specifically filed a motion to establish Mid America was *jointly* liable for all plaintiffs’ damages. (LF 155-157). Third, Lindquist reiterated that assertion before trial in the law memoranda submitted Dec. 12, 2005. (LF 161-168). Fourth, Lindquist restated that in the proposed findings filed December 29, 2005. (LF 169-173). Fifth Lindquist filed a memorandum of law on these issues January 5, 2006. (LF 194-203). To be sure, Lindquist did not file a declaratory judgment action to invalidate 538.230 RSMo on Constitutional grounds because the original judgment

June 18, 2003 made Mid-America jointly liable for all the Lindquists' damages and applied the statute to the most at fault defendant according to the terms of the statute and constitutionally.

Quite simply, the first opportunity for Lindquist to assert a constitutional objection was after the unconstitutional application of the statute so as to deprive Lindquist of 5% of the award in the judgment February 21, 2006.

Next, since the judgment did not involve an error of the form or language of the judgment, under Rule 73.01(d) and Rule 78.07(c), *Speer v. Colon*, 155 S.W 3d 60, fn.9 (Mo.banc 2005), plaintiff had no obligation to file any post judgment motion to preserve all error for appeal.

Next, there was a two-month gap between the bench trial and the entry of Judgment February 21, 2006. Under Rule 74.03 the clerk of the court was obliged to send the judgment to counsel in accordance with Rule 43.01. The clerk did that by mailing me a copy of the Judgment. Under Rule 44.01 (e) service by mail adds 3 days to the time to file. I construed that combination to include mailed Judgments, and filed the Lindquist post judgment motion on March 24, 2006, on the 31<sup>st</sup> day after the court entered the Judgment. So I did a superfluous and unnecessary act within the time allowed; but if the court holds it was outside the time allowed, then the superfluous act was not timely filed and makes no difference whatsoever because all the objections were preserved in Mrs. Lindquist's timely Notice of Appeal and jurisdiction statement. The essence of that position is simply that the Court mis-read and mis-applied the statute in relieving Mid-America of an additional 5% liability for which it was jointly liable in the original

judgment... and which was Mandated reinstated by the court of appeals. If that position is incorrect, then the statute is unconstitutionally vague and misapplied.

Beyond that, there is simply nothing but hop, skip, and jump illogic in Mid-America's brief on this issue.

Return to basics, succinctly stated. When people are jointly and severally liable to an injured person, the injured person may sue for and recover the full amount of recoverable damages from any jointly and severally liable person. Restatement, Third, Torts: Apportionment of Liability, §10. When there is no assessment of fault to plaintiff, tortfeasors who combine to cause injury are jointly liable to plaintiff. Restatement Id., §17; §537.067 RSMo (2000). In Missouri, the most at fault medical malpractice professional is jointly liable to plaintiff for the entirety of plaintiff's damages. §538.230.2 RSMo. (2000). The claim of the releasing person against others is reduced by the amount of the equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault just as if there had been no release. §538.230.3 RSMo. (2000). Where the court affirmed JNOV for Scott, it canceled the 5% equitable share the jury had assessed. In turn, it canceled the subtraction of that share from plaintiffs claim. Every other defendant has been dismissed with prejudice pursuant to settlement or satisfaction of the judgment as to that defendant.

The result of this math in this case, is that Mid-America is liable for 45% of Lindquist's damages, and interest on Lindquists judgment until it is satisfied.

The total relative fault of other co-defendants affirmed by the court of appeals was 55%. By operation of law, Lindquist's judgment is deemed 55% partially satisfied by that total. The reciprocal of that math of partial satisfaction is that Mid-America is liable "jointly" - as the most at fault joint tortfeasor - for the remaining unsatisfied 45% of Lindquist's judgment. Approached from the perspective the % of plaintiffs' judgment deemed partially satisfied, of from the perspective Mid-America is entitled to diminution based on equitable share of fault attributable to others, Mid-America is liable to plaintiffs for 45% of the judgment, plus interest, until the entire judgment is satisfied.

Next, the court of appeals Mandate directed, "adjudges. And remanded with instructions to reinstate the original jury verdicts on all issues except with respect to past economic damages and is remanded for new trial on past economic damages and is affirmed in all other respects...". (LF 159-160; App.1-2). Affirmation in all other respects included the imposition of joint liability against Mid-America for all plaintiffs damages, claim by claim. Mid-America's net joint liability was 45% of the entire award. (LF 155-157).

#### ADDENDUM

Mid-America's brief mentions, pg. 6, " In August 2006, after appellate process had begun, Mid-America through its carrier tendered its policy limits plus interest since the February 21, 2006 Judgment." We dispute the propriety of planting that in the brief, and the substance of it, and the "policy limits" representation, and hence we respond to it. Mid-America *repeatedly* responded to standard interrogatory and request for production discovery with insurance answers and a Policy Summary Page representing that was the

policy, copies of which we place in the Appendix. Mid-America now claims previously undisclosed policy provisions defined “each” to mean its antonym, “all”, and hence that its insurance limit is 1 million dollars for “all” episodes of Dr. Weis’ treatment under the “each” clause. Lindquist filed an ‘equitable garnishment’ suit under § 379.200 RSMo on January 25, 2006 against Mid-America’s successors and insurers to require payment of insurance and collect money due under the judgment. That suit remains pending, #064-00294. During the summer of 2006 Intermed moved to pay “interest” into the clerk of the court under procedures popular in cases cited herein such as *Erwin* and *Walton*. Lindquist objected, and the court denied their motions. After that failed Intermed paid some money, in return for the “Partial Satisfaction of Judgment” in the appendix.

#### CONCLUSION

Mrs. Lindquist is entitled to a judgment of \$1,350,000.00 for herself individually and have and recover from Mid-America 45% of that amount, plus simple interest on the entire amount computed at 9% from June 18, 2003, and continuing day to day.

Mrs. Lindquist, as representative of her husband, is entitled to a judgment of \$4,108,436.82<sup>2</sup> and to have and recover from Mid-America 45% of that amount. In addition she is entitled to interest at 9% on \$3,750,000.00 from June 18, 2003 through February 21, 2006, and after that interest on the total amount at the Federal rate effective on that date, plus 5%.

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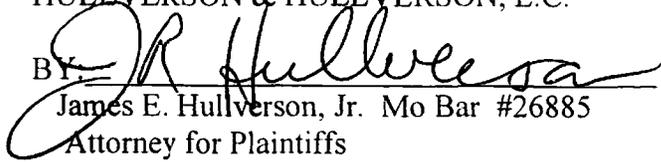
<sup>2</sup> The correct sum is \$358,436.82, although the court totaled \$358,437.24. (L.F. 210).

Lindquist also moves for costs, and as much as 10% allowed by 512.160.2 RSMo (2000) in fairness under the total circumstances of these repeated appeals, and costs.

Respectfully submitted.

HULLVERSON & HULLVERSON, L.C.

BY



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**RULE 84.06 CERTIFICATION**

This APPELLANTS' SECOND BRIEF is filed by

JAMES E. HULLVERSON, JR.  
Bar Number 26885  
1550 Sevens Building  
7777 Bonhomme  
Clayton, MO 63105  
(314) 725-1616

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 7,750 (25% of 31,000 words)(cover to cover);
- (3) This APPELLANTS' SECOND BRIEF, contains 6034 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.

HULLVERSON & HULLVERSON, L.C.

BY: \_\_\_\_\_

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[jr@hullverson.org](mailto:jr@hullverson.org)

## 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 Ambassador Courier for delivery to court, and return copy delivery on Dec.11, 2006.

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

HULLVERSON & HULLVERSON, L.C.

BY: 

James E. Hullverson, Jr. Mo Bar #26885

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9/2/05

STATE OF MISSOURI,  
City of St. Louis

} SS.



# In the Missouri Court of Appeals Eastern District

## MANDATE

KAREN LINDQUIST, AS THE )  
PERSONAL REPRESENTATIVE OF THE )  
ESTATE OF MICHAEL LINDQUIST, )  
DECEASED, )

Plaintiff/Appellant, )

vs. )

SCOTT RADIOLOGICAL GROUP, )  
INC., MID-AMERICA ORTHOPEDIC )  
SURGERY, INC., AND BARNES- )  
JEWISH ST. PETERS HOSPITAL, )

Defendants/Respondents. )

No. ED84085

Appeal from the Circuit Court  
of the City of St. Louis,  
No. 002-8663, Div. 4

The Court, being sufficiently advised of and having considered the premises, adjudges that the judgment rendered by the St. Louis City Circuit Court in cause No. 002-8663 be reversed in part as to the granting Defendants Mid-America and Barnes-Jewish a new trial and remanded with instructions to reinstate the original jury verdicts on all issues except with respect to past economic damages and is remanded for a new trial

on past economic damages, and affirmed in all other respects in accordance with this Court's opinion delivered May 31, 2005. It is further ordered that appellant and respondent equally divide the costs of this appeal, namely:

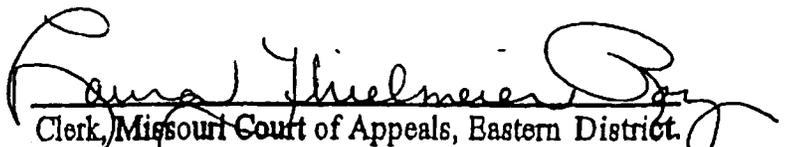
Docket fee in Appellate Court. . . . .	\$	70.00
Cost of preparing transcript on appeal. . .	\$	<u>8,112.00</u>
Total Appellate Court Costs . . . . .	\$	<u>8,182.00</u>

It is ordered that one-half of these costs, or \$ \$4,091.00, be taxed in favor of appellant in the Circuit Court, for which execution may issue.

STATE OF MISSOURI, ss.

I, LAURA THIELMEIER ROY, Clerk of the Missouri Court of Appeals, Eastern District, certify that the above and foregoing is a full, true and complete transcript of the judgment rendered in the above entitled cause, as fully as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis this 7th day of September 2005.

  
Clerk, Missouri Court of Appeals, Eastern District.

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A2

Ch. 512 APPEALS TO APPELLATE COURTS § 512.160

requiring printed abstracts and briefs. Johnson County v. Bryson, 26 Mo.App. 484.

4. Power to prescribe rules

A court of appeals had the inherent power to prescribe rules governing the transaction of its business even in cases not covered by R.S.1939, § 1195, which applied only to cases covered by §§ 1193, 1194, relating to perfecting of appeal, nor covered by § 2004, relating to rolls and records. State ex rel. Kansas City Light & Power Co. v. Trimble, 237 S.W. 1021, 291 Mo. 532.

5. Necessity of rules

In the orderly course of procedure, the necessity of rules for the guidance of litigants seeking review of cases has long been recognized. Pfotenhauer v. Ridgway, 271 S.W. 50, 307 Mo. 529.

6. Violation of rules, in general

Where appellant's brief did not state points relied on as required by Supreme Court Rule, Supreme Court was without sufficient information on which to proceed and there was no question before it for review. Clark v. Empire Trust Co., Sup., 248 S.W.2d 603.

An appellate court is reluctant to dismiss appeals for failure to comply with rules of court, but it cannot ignore statutory requirements to vest it with jurisdiction. McPike v. St. Louis County Bank, App., 193 S.W.2d 962.

The penalty for infraction by appellant of rules governing appeal, if infraction is more than a mere petty infraction, is a dismissal of appeal. Gorman v. Kauffman, App., 188 S.W.2d 70.

512.160. Questions considered on appeal—disposition by court—damages—executions

1. Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court.

2. No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action.

3. The appellate court shall examine the transcript on appeal and, subject to the provision of subsections 1 and 2 of this section, award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, or give such judgment as such court ought to have given, as to the appellate court shall seem agreeable to law. Unless justice requires otherwise the court shall dispose finally of the case on appeal and no new trial shall be ordered as to issues in which no error appears.

4. Upon the affirmance of any judgment or order, or upon the dismissal of any case, the appellate court may award to the respondent such damages not exceeding ten per cent of the amount of the judgment complained of as may be just, and when such judgment shall be affirmed for part of the sum of which judgment was rendered by the trial court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the trial court.

A3

5. The appellate court, upon the determination of any case on appeal, may award execution to carry the same into effect, or may remand the case, with the decision, to the trial court from whence the cause came, and such determination shall be carried into execution by such trial court. (L.1943 p. 353 § 140)

Former Revisions. 1939, §§ 973, 1227-1231; 1929, §§ 821, 1061-1065; 1919, §§ 1276, 1512-1516; 1900, §§ 1850, 2081-2085; 1899, §§ 659, 804-807, 809; 1889, §§ 2100, 2302-2305, 2307.

Mo.R.S.A. § 847.140.

**Constitutional Provisions**

Const.1945, art. 5, § 5 provides that the supreme court may establish rules of practice and procedure for all courts, but the rules shall not change the right of appeal.

Const.1945, art. 5, § 10 provides that cases pending in any court of appeals shall be transferred to the supreme court when any member of the court of appeals or any division thereof dissents from the majority opinion and certifies that he deems said opinion contrary to any previous decision of the supreme court or of any of the courts of appeals.

Const.1945, art. 5, § 10 provides that cases pending in any court of appeals may, after opinion, be transferred to the supreme court by order of either the court of appeals or the supreme court because of the general interest or importance of a question involved in the case, or for the purpose of re-examining the existing law, or pursuant to supreme court rule.

Const.1945, art. 5, § 10 provides that the supreme court may finally determine all causes coming to it from any court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

Const.1945, art. 5, § 11 provides that in all proceedings reviewable on appeal

by the supreme court or a court of appeals, appeals shall go direct to the court having jurisdiction thereof, but want of jurisdiction shall not be ground for dismissal, and the proceeding shall be transferred to the appellate court having jurisdiction thereof.

Const.1945, art. 5, § 20 provides that the practice, procedure, administration and jurisdiction of magistrate courts, and appeals therefrom, shall be as provided by law for justices of the peace.

Const.1945, art. 5, § 22 provides that all final decisions, findings, rules and orders of any administrative officer or body, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law.

Const.1945, art. 5, § 22 provides that the review of all final decisions, findings, rules and orders of any administrative officer or body, which are judicial or quasi-judicial and affect private rights, shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

**Editorial Comment**

On question of allegations of errors to be considered, see the leading cases of Wampler v. A. T. & S. F. R. Co., 269 Mo. 464, 190 S.W. 908, and State v. Mason, 98 S.W.2d 574.

Upper courts are required to dispose finally of cases on appeal unless justice requires otherwise, in which event the review court may award a new trial either in whole or in part, as may be just.

Subsection 2. Compare Federal Rules of Civil Procedure, Rule 61, 28 U.S.C.A. Compare also §§ 88.263, 90.220, 511.260, 511.270 re non-prejudicial errors.

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§§ 58, 59, 60;  
1825, p. 635,  
§§ 46-48; L.  
1849, p. 93, §  
Laws 1871, p  
p. 56, § 37;  
1889, pp. 182,

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"§ 1229. Duty of court in disposition of cases. The supreme court, St. Louis court of appeals and Kansas City court of appeals, in appeals or writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law; but it shall not be necessary, for the review of the action of any lower court on appeal or writ of error that any pleading, motion, instruction or record entry in the case, or any written or printed matter offered in evidence upon the trial and properly identified and deposited with the clerk, to remain in his custody until after the determination of the cause in the appellate court, shall be copied or set forth in the bill of exceptions filed in the lower court: Provided, the bill of exceptions so filed contains a direction to the clerk to copy the same, and the same are so copied into the record sent up to the appellate court. When the facts in a special verdict are insufficiently found, they may remand the cause and

order another trial to ascertain the facts.

"§ 1230. Damages awarded, when. Upon the affirmance of any judgment or decision, or upon the dismissal of any case, the supreme court and courts of appeal may award to the appellee or defendant in error such damages not exceeding ten per cent of the amount of the judgment complained of as may be just, and when such judgment shall be affirmed for part of the sum for which judgment was rendered by the trial court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the trial court.

"§ 1231. The court may award execution or remit to lower court. The supreme court, upon the determination of any cause in appeal or error, may award execution to carry the same into effect, or may remit the record, with their decision thereon, to the court from whence the cause came, and such determination shall be carried into execution by such court."

**Cross References**

- Administrative proceedings, see § 536.140.
- Appeals from probate court, see § 467.010 et seq.
- Appeals to wrong court, transfer, see § 477.080.
- Arbitration, see §§ 435.140, 435.190.
- Assignments for benefit of creditors, see §§ 426.210, 426.220.
- Damages, see § 511.310.
- Errors of substance, see Supreme Court rule 3.27.
- Forcible entry and detainer, executions, see § 534.570.
- Formal exceptions unnecessary, see § 510.210.
- Imperfections for which judgment not reversed or affected, see §§ 511.260, 511.270.
- Jurisdiction of appeals, see § 477.040 et seq.
- New trial, see § 510.330 et seq.
- Parks and recreation, see §§ 90.220.
- Reversal on appeal, limitations, see § 516.230.
- Scope of review in cases tried without jury, see § 510.310.
- Special assessments, see § 88.263.
- Stay of execution, see § 547.130.
- Waiver of objections, see §§ 509.340, 509.400.

**Law Review Commentaries**

Missouri appellate practice and procedure in civil cases. Walter E. Bennic. 1951 Wash.U.L.Q. 486 (Dec. 1951). The necessity of preservation in trial court of points for review is discussed in this article as follows:

"It is thus to be seen that an appellate court, when exercising its appellate jurisdiction, is purely a court of review,

which means that for it to be put in a position where it may determine whether error was committed by the lower court, the appellant, generally speaking, must not only have presented the matter of which he complains to the lower court for its decision, but he must also have preserved his objection to the adverse ruling in such a way as

to entitle the upon it. Even which are said on appeal, the and is precluded matter which sh not, made a gr a new trial, wh required for pre appellate review.

"But as in the one likewise ha are to be found preme Court Ru mulgated as sup of code provisal Stat. § 512.160(1 served that ques er the subject i ficiency of the pl or defense can late court with served in a moti is but a transiti that such ques face of the re not matters of with errors occu of jurisdiction c necessarily viti ing; and the q jurisdiction may advantage of at the proceedings, the appellate co question of a and completely of action or clai be granted, and

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- VII. HARMLI
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- IX. MANDA
- X. DAMAGI

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Historical and Statutory Notes

The 1979 amendment inserted "in no event shall any prepayment penalty exceed two percent of the balance at the time of prepayment".  
The 1990 amendment, in the first sentence inserted "notwithstanding any other provision of this chapter" at the beginning and inserted the proviso at the end of the sentence; and added the second sentence.

The 1992 amendment, in the first sentence, inserted "to the contrary", inserted "and" following "and prior to maturity", inserted "and 1992", and added the third sentence.

L.1998, H.B. No. 1189, § A inserted the exception in the first sentence.

Library References

Interest  $\Rightarrow$  III.  
WESTLAW Topic No. 219.  
C.J.S. Affidavits §§ 2 to 6.

Notes of Decisions

active application of this section prohibiting prepayment penalties. *Hoynes v. Prudential Sav. & Loan Ass'n* (App. E.D. 1986) 711 S.W.2d 899.

2. Contracts

This section does not operate to prevent mortgage and mortgagor from contracting in note for predetermined penalty for prepayment, as long as terms do not run afoul of statute. *Skyles v. Burge* (App. E.D. 1990) 789 S.W.2d 116.

Contracts 2  
Validity 1

1. Validity

Prepayment penalty clause in loan agreement did not merely impose on bank duty to accept prepayment if borrowers chose to exercise their "privilege" to prepay principal with penalty, but granted bank a vested right to prepayment penalties should borrowers pay principal prior to maturity, rendering unconstitutional only retro-

408.040. Interest on judgments, how regulated—tort cases, prejudgment interest allowed when, procedure

1. Interest shall be allowed on all money due upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than nine percent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear nine percent per annum until satisfaction made as aforesaid.

2. In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section, shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier. Nothing contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract.

(R.S.1939, § 3228. Amended by L.1979, H.B. No. 85, p. 580, § 1; L.1987, H.B. No. 700, § B, eff. July 1, 1987.)

Ab

TRADE AND COMMERCE

TRADE AND COMMERCE

408.040

penalty for overcharge, limitation to be determined, when, how, dis-  
positions authorized

References

- 35 MO Practice Series § 8.8, Defenses
- 38 MO Practice Series § 3.4, Second Mortgages-  
Applicability of Statutes.

Decisions

action for usury claims against national banks, and  
state law claims for usury did not exist. Phipps v.  
F.D.I.C., C.A.8 (Mo.)2005, 417 F.3d 1006. Federal  
Civil Procedure ⇨ 1742(2)

National Bank Act (NBA) preempted action  
brought by mortgagors against mortgagee, seeking  
to recover allegedly unlawful fees charged on sec-  
ond mortgage loans, under Missouri Second Mort-  
gage Loan Act (SMLA), and thus, removal to  
federal court was warranted; mortgagee was fed-  
erally chartered national bank, NBA completely  
preempted state law claims challenging interest  
charged by national banks, and alleged unlawful  
fees qualified as interest under the NBA. Phipps  
v. F.D.I.C., C.A.8 (Mo.)2005, 417 F.3d 1006.  
States ⇨ 18.19

to the contrary, the recording fees, including  
may include the following:

- as provided in section 136.055, RSMo;
- ing the debtor's motor vehicle or other title or  
a;
- party; and
- e common ownership.

(1) and (2) of subsection 1 of this section may be  
s interest or service charges for the purposes of  
as provided in subdivision (2) of subsection 1

H.B. No. 959, § A.)

Notes

References

- 25 MO Practice Series § 12.7, Intra Vires and  
Ultra Vires Powers of Corporations.

408.036 Prepayment penalty by lender prohibited, maximum permitted, ex-  
ceptions—return of moneys above maximum permitted

Research References

Treatises and Practice Aids

- 6 MO Practice Series § 3.21, In General
- 6 MO Practice Series § 3.60, Prepayment  
Clause
- 1A MO Practice Series § 27.6, Prepayment
- 18 MO Practice Series § 230, When Prepayment  
Available

- 18A MO Practice Series § 1200, Damages
- 18A MO Practice Series § 1223, Prepayment
- Restatement (3d) of Property (Mortgages) § 6.2,  
Enforceability of Prohibitions and Restrictions  
on Prepayment
- Restatement (3d) Property Security (Mortgages)  
§ 6.2, Enforceability of Prohibitions and Re-  
strictions on Prepayment

408.040 Interest on judgments, how regulated—tort cases, prejudgment inter-  
est allowed when, procedure

1. In all nontort actions, interest shall be allowed on all money due upon any judgment or  
order of any court from the date judgment is entered by the trial court until satisfaction be  
made by payment, accord or sale of property; all such judgments and orders for money upon  
contracts bearing more than nine percent interest shall bear the same interest borne by such  
contracts, and all other judgments and orders for money shall bear nine percent per annum  
until satisfaction made as aforesaid.

2. Notwithstanding the provisions of subsection 1 of this section, in tort actions, interest  
shall be allowed on all money due upon any judgment or order of any court from the date of  
judgment is entered by the trial court until full satisfaction. All such judgments and orders  
for money shall bear a per annum interest rate equal to the intended Federal Funds Rate, as  
established by the Federal Reserve Board, plus five percent, until full satisfaction is made.  
The judgment shall state the applicable interest rate, which shall not vary once entered. In  
tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement  
of a claim, to the party, parties or their representatives, and to such party's liability insurer if  
known to the claimant, and the amount of the judgment or order exceeds the demand for  
payment or offer of settlement, then prejudgment interest shall be awarded, calculated from a  
date ninety days after the demand or offer was received, as shown by the certified mail return  
receipt, or from the date the demand or offer was rejected without counter offer, whichever is  
earlier. In order to qualify as a demand or offer pursuant to this section, such demand must:

- (1) Be in writing and sent by certified mail return receipt requested; and
- (2) Be accompanied by an affidavit of the claimant describing the nature of the claim, the  
nature of any injuries claimed and a general computation of any category of damages sought  
by the claimant with supporting documentation, if any is reasonably available; and
- (3) For wrongful death, personal injury, and bodily injury claims, be accompanied by a list  
of the names and addresses of medical providers who have provided treatment to the claimant  
or decedent for such injuries; copies of all reasonably available medical bills; a list of  
employers if the claimant is seeking damages for loss of wages or earning; and written  
authorizations sufficient to allow the party, its representatives, and liability insurer if known  
to the claimant to obtain records from all employers and medical care providers; and
- (4) Reference this section and be left open for ninety days.

Unless the parties agree in writing to a longer period of time, if the claimant fails to file a  
cause of action in circuit court prior to a date one hundred twenty days after the demand or  
offer was received, then the court shall not award prejudgment interest to the claimant. If  
the claimant is a minor or incompetent or deceased, the affidavit may be signed by any person  
who reasonably appears to be qualified to act as next friend or conservator or personal  
representative. If the claim is one for wrongful death, the affidavit may be signed by any  
person qualified pursuant to section 537.080, RSMo, to make claim for the death. Nothing  
contained herein shall limit the right of a claimant, in actions other than tort actions, to  
recover prejudgment interest as otherwise provided by law or contract.

3. In tort actions, a judgment for prejudgment interest awarded pursuant to this  
subsection should bear interest at a per annum interest rate equal to the intended Federal

A7

Funds Rate, as established by the Federal Reserve Board, plus three percent. The judgment shall state the applicable interest rate which shall not vary, nor be entered, until the date of the judgment. (R.S.1939, § 3228, Amended by L.1979, H.B. No. 85, p. 580, § 1, eff. 1/1/1987, H.B. No. 700, § B, eff. July 1, 1987; L.2005, H.B. No. 393, § A.)

### Historical and Statutory Notes

#### 2005 Legislation

L.2005, H.B. No. 393, § A, rewrote the section, which prior thereto read:

"1. Interest shall be allowed on all money due upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord or sale of property, all such judgments and orders for money upon contracts bearing more than nine percent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear nine percent per annum until satisfaction made as aforesaid.

"2. In tort actions, if a claimant has made a demand for payment of a claim or an offer of

settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section, shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier. Nothing contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract."

### Research References

#### LR Library

120 ALR 5th 559, State Offer of Judgment Rule—Construction, Operation, and Effect of Acceptance and Resulting Judgment.

23 ALR 5th 75, Liability of Insurer for Prejudgment Interest in Excess of Policy Limits for Covered Loss.

9 ALR 5th 63, Right to Prejudgment Interest on Punitive or Multiple Damages Awards.

10 ALR 5th 191, Divorce and Separation: Award of Interest on Deferred Installment Payments of Marital Asset Distribution.

#### Encyclopedias

17 Am. Jur. Proof of Facts 2d 345, Forensic Economics—Use of Economists in Cases of Dissolution of Marriage.

#### Restatements and Practice Aids

2 MO Practice Series § 19.22, Interest on Judgments—Prejudgment Interest.

2 MO Practice Series § 19.23, Interest on Judgments—Post Judgment Interest.

3 MO Practice Series F 3.216, Judgment Allowing Claim—Trial by Court (V.A.M.S. § 473.403, Civil Rule 74).

16 MO Practice Series § 74.01-2, Entry and Form of a Judgment.

17 MO Practice Series § 77.04-2, Effect of Making Offer.

17 MO Practice Series § 81.01-8, General Civil Appeals Statute—Final Judgments.

17 MO Practice Series § 81.09-9, Determining the Amount of the Bond.

17 MO Practice Series § 84.19-2, Factors Considered in Assessing Sanctions.

2A MO Practice Series § 39.21, Settlement Demand Presentation.

2A MO Practice Series § 39.22, Prejudgment Interest.

24 MO Practice Series § 1.1, Overview of the Missouri Appellate Courts.

24 MO Practice Series § 1.4, Appellate Jurisdiction of the Missouri Supreme Court.

24 MO Practice Series § 10.6, Restitution.

24 MO Practice Series § 4.20, Civil Cases—Authorized After Trial Motions.

30 MO Practice Series § 5.16, Trial—Prejudgment Interest.

34 MO Practice Series § 3.8, Damages.

34 MO Practice Series § 12.10, Law and Practice Notes.

34 MO Practice Series § 13.13, Damages.

34 MO Practice Series § 28.12, Damages.

34 MO Practice Series § 38.12, Damages.

35 MO Practice Series § 16.12, Damages.

35 MO Practice Series § 19.12, Damages.

35 MO Practice Series § 23.15, Interest Awards in Equity.

35 MO Practice Series § 32.12, Damages.

### Notes of Decisions

#### 1. Validity

Construction company's constitutional challenge to statute governing prejudgment interest in tort actions was merely colorable; did not invoke the Supreme Court's exclusive jurisdiction under the Missouri Constitution, and thus Court of Appeals was not deprived of jurisdiction over the claim, in negligence action against construction company by worker injured by electrical shock and by his wife for loss of consortium, where worker and his wife

made a settlement demand that clearly invoked the statute, worker and his wife asked for prejudgment interest pursuant to the statute, in their amended petition, company in its responsive pleadings did not challenge constitutionality of statute, company did not assert its constitutional challenge until after second trial, and thus company waived constitutional challenge. McCormack v. Capital Elec. Const. Co., Inc. (App. W.D. 2004) 159 S.W.3d 387, rehearing and/or transfer denied.

#### 4. Time interest commences

Notwithstanding statutory provision on post-judgment interest, which provides that interest shall be allowed on all money due upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord or sale of property, where a judgment creditor appeals on the ground of inadequacy from a recovery in his favor, and the judgment is affirmed on appeal, the judgment creditor is not entitled to interest pending such appeal. Investors Title Co. v. Chicago Title Ins. Co. (App. E.D. 2000) 18 S.W.3d 70, rehearing and/or transfer denied. Interest @ 5%

Under no circumstances would title company be entitled to interest back to date on which trial court entered original judgment, where trial court amended judgment. Investors Title Co. v. Chicago Title Ins. Co. (App. E.D. 2000) 18 S.W.3d 70, rehearing and/or transfer denied. Interest @ 39(3)

#### 7. Prejudgment interest

For a demand to be sufficiently definite such that a tort claimant is entitled to prejudgment interest if the amount of the judgment exceeds the demand, the amount due must be readily ascertainable. Kaplan v. U.S. Bank, N.A. (App. E.D. 2005) 2005 WL 3041002. Interest @ 39(2.50)

Statute providing for prejudgment interest in tort actions if a claimant has made a demand for payment or an offer of settlement, and the amount of the judgment exceeds the demand or offer, serves two public policies; first, it compensates claimants for the true cost of money damages they have incurred due to the delay of litigation, and second, where liability and damages are fairly certain, it promotes settlement and deters unfair benefit from the delay of litigation. Kaplan v. U.S. Bank, N.A. (App. E.D. 2005) 2005 WL 3041002. Interest @ 39(2.50)

Owner of mobile home park was not entitled to prejudgment interest on any damages awarded to owner in negligence action that mobile home park owner brought against bank after remediation contractor hired by bank to clean up secured property dumped contaminated material on owner's property, as owner did not make a demand for payment or an offer of settlement as required in order for tort claimant to be entitled to prejudgment interest if a judgment exceeded amount of demand or offer, letter sent to bank was notice of intent to file a lawsuit, though owner requested bank to take corrective action the letter did not specify a dollar

AS

# TurnerReid

DUNCAN, LOOMER & PATTON, P.C.

Rodney E. Loomer  
 Michael J. Patton  
 Sherry A. Rozell  
 Joseph P. Winget  
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Of Counsel:  
 Kenneth H. Reid  
 Donald R. Duncan  
 Ben K. Upp

August 17, 2006

**VIA FEDERAL EXPRESS**

Mr. James E. Hullverson, Jr.  
 Attorney at Law  
 Hullverson & Hullverson  
 1515 The Sevens Building  
 7777 Bonhomme Avenue  
 St. Louis, MO 63105

In re: Lindquist v. Mid-America Orthopaedic

Dear J.R.:

Pursuant to our recent discussions, please find Intermed's drafts made payable as follows:

- (1) **\$540,000.00**, payable to "Karen Lindquist, Individually and Hullverson & Hullverson. L.C.". This represents satisfaction of that portion of the February 21, 2006 judgment awarding damages in the amount of \$540,000.00 to Karen Lindquist, individually.
- (2) **\$460,000.00**, payable to "Karen Lindquist, as the Personal Representative of the Estate of Michael Lindquist and Hullverson & Hullverson. L.C.". This represents partial satisfaction of that portion of the February 21, 2006 judgment awarding damages in the amount of \$1,500,000.00 to Karen Lindquist, as the Personal Representative of the Estate of Michael Lindquist.
- (3) **\$14,934.06**, payable to "Karen Lindquist, Individually and as the Personal Representative of the Estate of Michael Lindquist and Hullverson & Hullverson. L.C.". This represents satisfaction of that portion of the February 21, 2006 judgment awarding court costs to the plaintiffs.

Physical Address:  
 1355 E. Bradford Parkway, Suite A  
 Springfield, MO 65804

Phone: 417-883-2102  
 Fax: 417-883-5024  
 Website: [www.turnerreid.com](http://www.turnerreid.com)

Mailing Address:  
 P.O. Box 4043  
 Springfield, MO 65808

- (4) **\$6,327.98**, payable to "Karen Lindquist, as the Personal Representative of the Estate of Michael Lindquist and Hullverson & Hullverson. L.C.". This represents satisfaction of post-judgment interest on that portion of the February 21, 2006 judgment awarding damages in the amount of \$143,374.89 to Karen Lindquist, as the Personal Representative of the Estate of Michael Lindquist, for past economic damages, calculated at 9% per annum from February 21, 2006 until August 18, 2006.
- (5) **\$4,091.00**, payable to "Karen Lindquist, Individually and as the Personal Representative of the Estate of Michael Lindquist and Hullverson & Hullverson. L.C.". This represents satisfaction of the appellate costs assessed against defendant Mid-America by the Missouri Court of Appeals, Eastern District (Case No. ED84085), pursuant to its Mandate, dated September 7, 2005.
- (6) **\$348.92**, payable to "Karen Lindquist, Individually and as the Personal Representative of the Estate of Michael Lindquist and Hullverson & Hullverson. L.C.". This represents satisfaction of interest, calculated at 9% per annum, and accruing on the appellate costs assessed against defendant Mid-America by the Missouri Court of Appeals, Eastern District (Case No. ED84085), pursuant to its Mandate, dated September 7, 2005, and calculated from September 7, 2005 until August 18, 2006.
- (7) **\$496,059.30**, payable to "Karen Lindquist, Individually and as the Personal Representative of the Estate of Michael Lindquist and Hullverson & Hullverson. L.C.". This represents interest which has accrued on the jury award of \$2,040,000, from June 18, 2003 until February 21, 2006, and which is the subject of the pending appeal. Pursuant to our agreement, you will escrow this amount in an interest-bearing account until such time as any appeal is fully adjudicated, resolved or dismissed, subject to the approval of the Office of the Chief Disciplinary Counsel.
- (8) **\$90,699.30**, payable to "Karen Lindquist, Individually and as the Personal Representative of the Estate of Michael Lindquist and Hullverson & Hullverson. L.C.". This represents partial satisfaction of that portion of the February 21, 2006 judgment awarding post-judgment interest on \$2,040,000 and court costs at 9% per annum, accruing from June 18, 2003 until August 18, 2006. As you know, that part of the judgment awarding interest from June 18, 2003 until February 21, 2006 is the subject of an appeal and is in dispute. However, the amount being paid hereunder is that portion of the interest that has accrued from February 21, 2006 until August 18, 2006, which is not in dispute.

Also pursuant to our agreement, we would ask that you execute the enclosed satisfaction before endorsing or depositing the enclosed drafts, fax us a copy of the satisfaction, and Federal Express the original to us for filing by our office. We also would ask that you complete and sign the enclosed W-9 and return it to Intermed in the envelope provided herewith.

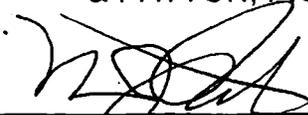
Of course, while me may at some point in the future disagree as to the legal effect of these payments, the amounts being paid by Intermed as set forth herein are being paid to stop the accrual of interest on the judgment, pursuant to Intermed's policy. Additionally, Intermed is making these payments following the service of your equitable garnishment action.

Should you have any questions, please feel free to give us a call.

Very truly yours,

TURNER, REID, DUNCAN, LOOMER  
& PATTON, P.C.

By



Michael J. Patton

MJP:seb

Enclosures

cc: Ms. Becky Myers  
Mr. Brian Winer

11

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS  
STATE OF MISSOURI

KAREN LINDQUIST, as the Personal	)	
Representative of the Estate of Michael	)	
Lindquist, Deceased, and KAREN	)	
LINDQUIST,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Cause No. 002-8663
	)	
MID-AMERICA ORTHOPAEDIC	)	Division No. 5
SURGERY, INC.,	)	
	)	
Defendant.	)	

**PLAINTIFF'S RECEIPT AND ACKNOWLEDGMENT**  
**OF PARTIAL SATISFACTION OF JUDGMENT**

COMES NOW Plaintiff Karen Lindquist, individually and as the Personal Representative of the Estate of Michael Lindquist, Deceased, and pursuant to Missouri Supreme Court Rule 74.11 acknowledges receipt of the total amount of **ONE MILLION SIX HUNDRED TWELVE THOUSAND, FOUR HUNDRED SIXTY DOLLARS AND FIFTY-SIX CENTS, (\$1,612,460.56)**, as partial satisfaction of the judgment entered by the court on February 21, 2006, and representing payment as follows:

- (1) **\$540,000.00**, representing satisfaction of that portion of the February 21, 2006 judgment awarding damages in the amount of \$540,000.00 to Karen Lindquist, individually.
- (2) **\$460,000.00**, representing partial satisfaction of that portion of the February 21, 2006 judgment awarding damages in the amount of \$1,500,000.00 to Karen Lindquist, as the Personal Representative of the Estate of Michael Lindquist.
- (3) **\$14,934.06**, representing satisfaction of that portion of the February 21, 2006 judgment awarding court costs to the plaintiffs.
- (4) **\$6,327.98**, representing satisfaction of post-judgment interest on that portion of the February 21, 2006 judgment awarding damages in the amount of \$143,374.89 to Karen Lindquist, as the Personal Representative of the Estate of Michael Lindquist, for past economic damages, calculated at 9% per annum from February 21, 2006 until August 18, 2006.

- (5) **\$4,091.00**, representing satisfaction of the appellate costs assessed against defendant Mid-America by the Missouri Court of Appeals, Eastern District (Case No. ED84085), pursuant to its Mandate, dated September 7, 2005.
- (6) **\$348.92**, representing satisfaction of interest, calculated at 9% per annum, and accruing on the appellate costs assessed against defendant Mid-America by the Missouri Court of Appeals, Eastern District (Case No. ED84085), pursuant to its Mandate, dated September 7, 2005, and calculated from September 7, 2005 until August 18, 2006.
- (7) **\$586,758.60**, representing partial satisfaction of that portion of the February 21, 2006 judgment awarding post-judgment interest on \$2,040,000 and court costs at 9% per annum, accruing from June 18, 2003 until August 18, 2006, which amount is being disputed.

THE PARTIES FURTHER ACKNOWLEDGE, AGREE AND STIPULATE:

It is stipulated by the parties that of the amount paid pursuant to Paragraph seven (7) herein, \$496,059.30, representing interest which has accrued on the jury award of \$2,040,000, from June 18, 2003 until February 21, 2006, will be escrowed by Plaintiff's counsel in an interest-bearing account until such time as any appeal is fully adjudicated, resolved or dismissed. At that time, said amount and any accrued interest will be distributed to whichever party prevails on appeal and in accordance with any appellate decision rendered therein.

*X. James E. Hullverson, Jr.*  
HULLVERSON & HULLVERSON, L.C.  
BY: *James E. Hullverson, Jr.*  
James E. Hullverson, Jr., No. 26885  
1500 Sevens Building,  
7777 Bonhomme,  
Clayton, MO 63105  
(314) 725-1616  
Attorney for Plaintiff

- f. Names and addresses of the persons or organizations under whose direction and upon whose behalf it was taken or made;
- g. Please attach an exact copy of the original of said statement, interview, report, film, or tape to you answers to these interrogatories, if oral, please state verbatim the contents thereof.

ANSWER: None, other than those contained in plaintiff's medical records. ✓

2. **RETAINED EXPERTS:** Pursuant to Rule 56.01(b) (4) (a), Identify each person by name, address, occupation, place of employment and qualifications to give an opinion, who defendant **Mid-America Orthopaedic Surgery, Inc.** expects to call as an expert witness with respect to any aspect of the suit and state the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition fee. [The expert's curriculum vitae may be attached to the interrogatory answers in lieu of stating the qualifications of the expert to give an opinion if such information is available on the expert's curriculum vitae.]

ANSWER: Unknown at this time. Defendant will timely supplement this response. ✓

3. **NON-RETAINED EXPERTS:** Pursuant to Rule 56.01(b) (5), Identify each non-retained expert witness, including a party, who the defendant expects to call at trial who may provide expert witness opinion testimony by providing the expert's name, address and field of expertise. State also any opinions the expert will testify to at trial.

ANSWER: Unknown at this time. Defendant will timely supplement this response. ✓

4. **INSURANCE:** Pursuant to Rule 56.01(b) (2) , Identify any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, including any excess coverage or umbrella coverage, for defendant **Mid-America Orthopaedic Surgery, Inc.** , and for Dr. Weis, and with respect to each please state:

- a. The type of insurance which give rise to the interest, including but not limited to whether excess or primary;
- b. Limits of coverage;
- c. Effective policy period;
- d. Whether there exist medical pay coverage in addition to coverage listed in (a) above, and if so, the amount;
- e. Policy number;
- f. Identity of all insureds;
- g. Insurer's identify;
- h. Is a reservation of rights being made?
- i. Attach a complete copy of the declaration page and policy of any insurance agreement identified.

ANSWER: a. Primary;  
b. \$1,000,000/\$3,000,000;  
c. 9-8-2000 to 9-8-2001;  
d. No.  
e. PLC 44020;  
f. Mid-America Orthopaedic Surgery, Inc.  
Gary W. Farley, D.O.  
Richard B. Helfrey, D.O.  
Terry J. Weis, D.O.  
Timothy G. Graven. D.O.

g. Intermed Insurance Comp  
h. No. ;  
i. See attached.

A14 221

*Jr*

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS  
STATE OF MISSOURI

Michael and Karen Lindquist	)	
Plaintiffs,	)	Cause #002-8663
v.	)	
	)	Div. #1
(1) Scott Radiological Group Inc.,	)	
(2) Open MRI of Missouri – St. Peters	)	
(3) Family Medical Group of St. Peters,	)	
Inc.	)	
(4) Mid-America Orthopaedic Surgery,	)	
Inc.	)	
(5) SEC/EMCARE Emergency Care Inc.	)	
(6) EMCARE Physician Services, Inc.	)	
(7) EMCARE of Missouri, Inc.	)	
(8) Multi-Care Medical, P.C.	)	
(9) Washington University	)	
(10) Barnes – Jewish St. Peters Hospital	)	
A Missouri nonprofit public benefit	)	
Defendants.	)	Jury Trial Demand

**PLAINTIFF'S APRIL 18, 2001 REQUEST FOR PRODUCTION  
DIRECTED TO DEFENDANT MID-AMERICA ORTHOPAEDIC SURGERY, INC.**

Pursuant to Rules 56.01(b)(1), 57.03 and 58.01 state and provide for Production of tangible things and documents from a party in conjunction with a deposition, 56.01 (b)(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter; and Rule 58.01(a): Scope. Any party may serve on any other party a request

(1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, and copy, any designated documents within twenty (20) days, including any and all writings, drawings, graphs, charts, photographs, phono records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form, or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 56.01(b) and which are in the possession, custody or control of the party upon whom the request is served; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, and

*22*  
*oav*

# INFORMED INSURANCE CO.

## DECLARATIONS PHYSICIANS, SURGEONS AND DENTISTS PROFESSIONAL LIABILITY POLICY

Policy No.: PLC44420

Renewal of Policy No.: PLC44021

Named Insured: Mid America Orthopedic Surgery, Inc.

Mailing Address:

~~12740 Manchester Road~~ 12277 DePaul Drive, Suite 100  
~~DesPeres MO 63131~~ Bridgeton MO 63044

Office Premises Address (if different than above):

Policy Period: from 12:01 A.M. 09/08/2000 to 12:01 A.M. 09/08/2001

The Named Insured is: a Corporation

Schedule of Coverages:

The insurance afforded is only with respect to such of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability for each such coverage shall be as stated herein, subject to all the provisions of this policy having reference thereto.

COVERAGE TITLES	LIMITS	PREMIUMS
Coverage A - Individual Professional Liability	Each Medical Incident	\$1,000,000.00
	Deductible Amount	\$ 0.00
	Annual Aggregate	\$3,000,000.00
Coverage B - Clinic, Partnership Association or Corporation Professional Liability	Each Medical Incident	\$1,000,000.00
	Deductible Amount	\$ 0.00
	Annual Aggregate	\$3,000,000.00

Forms and endorsements made a part of this policy at time of issue: 44420.1 44420.2 44420.3     \$ 2,863.00  
Total Premium \$ 88,064.00

Retroactive Date: See Endorsement 44420.2  
Policy Form: CLAIMS MADE

Date: 08/15/2000  
Form No: RPLC0595

*Brenda S. Judd*  
Authorized Representative

Home Office Copy

228.5  
A16

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' "SECOND" BRIEF  
UNDER RULE 84.04(j)

---

Respectfully submitted,

James E. Hullverson, Jr., # 26885  
HULLVERSON & HULLVERSON, L.C.  
7777 Bonhomme Avenue, Suite 1500  
Clayton, Missouri 63105  
Telephone: (314) 725-1616  
Facsimile: (314) 863-5953  
[jr@hullverson.org](mailto:jr@hullverson.org)