**IN THE MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

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| ROBERT E. FAST, M.D. and ST. JOSEPH OB-GYN, INC., | ) | |
| Appellants/Plaintiffs, | ) | WD 68672 |
| vs. | ) | |
| F. JAMES MARSTON, M.D., | ) | |
| Respondent/Defendant. | ) | |

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# APPELLANTS' BRIEF

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Respectfully Submitted,


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## JURISDICTIONAL STATEMENT

Appellants Robert E. Fast, M.D., and St. Joseph OB-GYN, Inc. appeal the summary judgment granted to Respondent F. James Marston, M.D. Judgment was entered on July 25, 2007 by the Honorable Weldon C. Judah, Circuit Judge, Division 2, in the Circuit Court of Buchanan County, Missouri. This appeal does not involve an issue or matter within the exclusive jurisdiction of the Missouri Supreme Court. This Court has general appellate jurisdiction over this appeal pursuant to Mo. Const., Art. V, § 3 and Mo. Rev. Stat. § 477.070.

## STATEMENT OF FACTS

This indemnity case arises out of jury verdict in an underlying medical negligence case styled *Kimberly Black v. St. Joseph OB-GYN, Inc. et al.,* No. WD 67377 (Case No. 04CV74478, Division 2 – Circuit Court of Buchanan County, Missouri) ("*Black*"). [L.F. 5 at ¶ 4, 8 at ¶ 4; Tr. 4] In *Black*, the jury found Appellant Robert E. Fast, M.D., zero ("0") percent at fault, and Respondent F. James Marston, M.D. one hundred ("100") percent at fault. Nonetheless, the trial court in *Black* entered judgment against Dr. Fast and Appellant St. Joseph OB-GYN, Inc. ("the Corporation")[1] for the full amount of the verdict. Then, in the instant case, the same trial court ruled that Appellants have no indemnification rights against Dr. Marston. The effect of the two judgments is to impose

[1]Judgment against the Corporation was based on the trial court's ruling that the Corporation was vicariously liable for Dr. Fast, who, in turn, was vicariously liable for Dr. Marston.

an entire verdict on a blameless, fault-free physician and then deprive that physician of any right of indemnity against the tortfeasor whom the jury found to be entirely responsible. The pertinent facts are as follows:

**A. The *Black* Lawsuit (WD 67377)**

In *Black*, the underlying medical negligence case, plaintiff Black alleged personal injuries from a retained surgical lap sponge following a June 1997 gynecologic surgery. [L.F. 12 at ¶ 1, 42 at ¶ 1] Prior to the trial of that case, plaintiff Black entered into a settlement with defendant Heartland Regional Medical Center ("Heartland"), which had been sued based on allegations that its nurses negligently failed to account for all surgical sponges and incorrectly reported that the sponge count at the end of surgery was correct. [L.F. 6 at ¶ 6] As part of the settlement, Heartland was dismissed with prejudice and the claims against its nurses were released. That left Appellant Dr. Fast, Respondent Dr. Marston, and Appellant Corporation as the remaining defendants. Dr. Marston was plaintiff Black's surgeon; Dr. Fast acted as the assistant surgeon. [L.F. 13 at ¶ 4, 42 at ¶ 4] At the time of the surgery, Drs. Fast and Marston were both employees of the Corporation. [L.F. 13 at ¶ 5, 42 at ¶ 5]

Dr. Marston also entered into a pre-trial settlement with plaintiff Black and was given a "RELEASE OF ALL CLAIMS." [L.F. 175 at ¶ 3, 212 at ¶ 3] Plaintiff Black then proceeded to trial against Dr. Fast and the Corporation. [L.F. 6 at ¶ 7, 42 at ¶ 7] The *Black* jury was instructed to apportion fault between Drs. Fast and Marston. [L.F. 32] The jury unanimously apportioned one hundred ("100") percent of the fault to Dr. Marston and zero ("0") percent of the fault to Dr. Fast. [L.F. 32] The verdicts contained

no finding that Dr. Fast was vicariously liable for Dr. Marston's acts or omissions. [L.F. 30-32] Nevertheless, on May 30, 2006, the trial court entered judgment against Dr. Fast and the Corporation for the full jury verdict of $223,000. [L.F. 33-35] The *Black* judgment is on appeal as WD 67377. [L.F. 14 at ¶ 15, 43 at ¶ 15]

**B. Facts Pertinent To This Case**

On September 25, 2006, Dr. Fast and the Corporation brought the instant action for indemnity against Dr. Marston. [L.F. 1, 5] The Petition alleged, *inter alia*, that "Dr. Marston was the primary, supervising surgeon for the entire surgical procedure. Dr. Marston, as surgeon, controlled the placement and removal of the laparotomy sponges. Dr. Fast was called in to assist during surgery and was present for 35 minutes. Dr. Fast as assistant neither introduced nor removed laparotomy tapes." [L.F. 6 at ¶ 5] The Petition further alleged that the jury apportioned 100 percent of the fault to Dr. Marston, and that "[t]he trial court ruled that Dr. Fast was vicariously liable for the fault apportioned to Dr. Marston and that St. Joseph OB-GYN, Inc. was vicariously liable for the fault imputed to Dr. Fast from Dr. Marston." [L.F. 6-7 at ¶¶ 8-9] Appellants pleaded that they were entitled to indemnity from Dr. Marston for the judgment, costs and expenses. [L.F. 7 at ¶ 11]

In his answer, Dr. Marston asserted several affirmative defenses, including that "Defendant Marston was discharged from all liability for contribution or indemnity to any other person by operation of § 538.230.3 and/or § 537.060 RSMo 2000" when he obtained the release from plaintiff Black. [L.F. 9 at ¶ 10] The release Dr. Marston had obtained from plaintiff Black provided, in pertinent part:

In consideration for the settlement amounts set forth in this Release, the **Releasing Party** [Kimberly Black] releases, acquits and forever discharges **Defendant** [Dr. Marston] from any and all claims, actions, causes of action, demands, rights, damages, loss of services, expenses and compensation whatsoever which the **Releasing Party** now has or which may hereafter accrue on account of or in any way arising out of any and all known and unknown, foreseen and unforeseen damages, and the consequences thereof resulting from the injury occurring on June 6 [sic], 1997.

In addition **Releasing Party** specifically releases St. Joseph OB-GYN, Inc., from any and all claims, actions causes of action, demands, rights, damages, loss of services, expenses and compensation whatsoever **directly** related to **Defendant's** conduct as allaged [sic] in the aforesaid Petition, or flowing from any assertion of St. Joseph OB-GYN, Inc.'s vicarious liability solely as Defendant Marston's former employer as well as its subsidiaries, affiliates, companies, predecessors, successors, assigns, insurers, owners, shareholders, directors, officers, employees, agents and attorneys.

It is specifically agreed to by **Releasing Party** and **Defendant** that **Releasing Party** reserves the right to claim vicarious liability regarding the separate defendant Robert Fast and separate defendant St. Joseph OB-GYN, Inc.

[L.F. 175 at ¶ 4, 212 at ¶ 4]

Cross-motions for summary judgment followed. On January 25, 2007, Appellants moved for summary judgment on the basis that – as vicariously liable, fault-free defendants – they were entitled to indemnity from Respondent Dr. Marston, the tortfeasor whose liability was imputed to them. [L.F. 13] On April 5, 2007, Respondent filed his cross-motion for summary judgment based on the release and R.S.Mo. (1986) § 538.230.3. [L.F. 174]

A hearing on the motions took place on July 2, 2007. Following argument and a discussion at the Bench, the trial court immediately denied Appellants' motion for summary judgment on ripeness grounds and took Respondent's cross-motion under advisement. [Tr. 21] Then, on July 25, 2007, the trial court entered a "Judgment and Order," which provided in pertinent part:

> Plaintiffs under the **PETITION FOR INDEMNIFICATION** seek recovery against Defendant for sums awarded to another Plaintiff and against them under the theory of "vicarious liability" following the determination by a jury as to that other Plaintiff's entitlement thereto under the case of Kimberly Black v. Robert E. Fast, M.D. et al. . . . Following presentation of the MOTIONs, and despite the fact that the Court made known to Plaintiffs the Court's belief that their action was premature and not ripe for adjudication, Plaintiffs declined to dismiss their action, without prejudice to the refiling of the same, and insisted upon this Court's ruling as to their MOTION. [see also, SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP., et al., 128 S.W.3d 534 (E.D., 2003), Curators

of the University of Missouri v. Moorhouse, 181 S.W.3d 612 (W.D., 2006) and Hewlett v. Lattinville, 967 S.W.2d 149 (E.D., 1998)] Accordingly, and being fully advised,

As to **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**, the Court is unable to find that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law, and the Court will deny Plaintiffs [sic] request for relief thereunder.

As to **DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**, the Court finds that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law, and the Court will grant Defendant's request for relief thereunder.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the issues in the **PETITION FOR INDEMNIFICATION** are determined in favor of Defendant and that Plaintiffs shall take nothing by their action thereunder.

[L.F. 253-54].

On July 30, 2007, Appellants' notice of appeal was timely filed. [L.F. 255] Shortly thereafter, on August 8, 2007, Appellants moved to consolidate this appeal with the underlying pending appeal in *Black*, WD 67377.[2] The motion to consolidate was denied on August 21, 2007.

[2] A motion to consolidate was also filed in *Black*, WD 67377.

## POINTS RELIED ON AND SUPPORTING AUTHORITY

### POINT RELIED ON NO. 1

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE TRIALCOURT'S RULING THAT APPELLANTS' PETITION FOR INDEMNITY WAS "NOT RIPE" PRECLUDED THE COURT FROM TAKING THE INCONSISTENT ACTION OF ADJUDICATING RESPONDENT'S MOTION, THEREBY SUBJECTING APPELLANTS TO DISPARATE TREATMENT AND DENYING THEM DUE PROCESS.

***Brinson v. Whittico***, 793 S.W.2d 632 (Mo.App. E.D. 1990)

***Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940 (Mo.App. S.D. 1996)

***Hemme v. Bharti***, 183 S.W.3d 593 (Mo. 2006)

***Stacy v. Truman Med. Ctr.***, 836 S.W.2d 911 (Mo.banc 1992)

### POINT RELIED ON NO. 2

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE JUDGMENT WAS BASED ON A PARTIAL AND INCONSISTENT APPLICATION OF R.S.MO. SECTIONS 538.230 AND 537.060, WHICH DEPRIVED APPELLANTS OF THEIR RIGHT TO INDEMNITY AS FAULT-FREE PARTIES BEARING A JUDGMENT BASED SOLELY ON VICARIOUS LIABILITY.

***Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940 (Mo.App. S.D. 1996)

Mo. Rev. Stat. § 537.060 (2000)

Mo. Rev. Stat. § 538.230 (1986)

## ARGUMENT

## POINT RELIED ON NO. 1

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE TRIALCOURT'S RULING THAT APPELLANTS' PETITION FOR INDEMNITY WAS "NOT RIPE" PRECLUDED THE COURT FROM TAKING THE INCONSISTENT ACTION OF ADJUDICATING RESPONDENT'S MOTION, THEREBY SUBJECTING APPELLANTS TO DISPARATE TREATMENT AND DENYING THEM DUE PROCESS.

### Standard Of Review

The standard of review for the grant of summary judgment is essentially *de novo*. ***Woodson v. City of Independence***, 124 S.W.3d 20, 26 (Mo.App. W.D. 2004). "It is the law that a summary judgment may be entered only when the party seeking it shows, by unassailable proof, that he is entitled to judgment as a matter of law. The proof submitted should leave no room for controversy and should show, affirmatively, that the other party would not be entitled to recover under any discernible circumstances." ***Wright v. Wrehe***, 415 S.W.2d 781, 783 (Mo. 1967) (citation omitted).

"The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." ***ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp***., 854 S.W.2d 371, 380 (Mo. 1993) (citations omitted). The record is reviewed "in the light most favorable to the party against whom judgment

was entered." ***Id.*** "We accord the non-movant the benefit of all reasonable inferences from the record." ***Hampton v. Carter Enter., Inc.***, WD 66706 2007 WL 2362575 at *2 (Mo.App. W.D.), *transfer denied* (Sept. 25, 2007) (***citing ITT Commercial***, 854 S.W.2d at 376). Thus, the record and all inferences are to be viewed in the light most favorable to Dr. Fast and St. Joseph OB-GYN, Inc.

**The Trial Court's Order was Inherently Inconsistent**

In an inexplicable act of inconsistency, the trial court simultaneously ruled that Appellants' indemnity petition was premature *and* that Respondent was entitled to summary judgment on the petition. [L.F. 254] Either the lawsuit is ripe as to both parties or it is not. By analogy, a woman is either pregnant, or she is not. There is no "in between."

Cognizant of well-established case law, Appellants filed their petition for indemnity on September 25, 2006. [L.F. 5] This followed the trial court's entry of judgment in *Black* on May 30, 2006 and the August 22, 2006 denial of post-trial motions. [L.F. 33-35] ***See Hemme v. Bharti***, 183 S.W.3d 593, 598 (Mo. 2006) (when the indemnity is based on liability, ripeness occurs when "the defendant has suffered a judgment"); ***Burns & McDonnell Eng'g Co. v. Torson Const. Co.***, 834 S.W.2d 755, 758 (Mo.App. W.D. 1992) ("[i]f the indemnity is against liability, the cause of action accrues as soon as liability occurs, and no actual loss need be shown"); ***Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940, 960 (Mo.App. S.D. 1996) ("neither payment by Hospital nor a showing of actual loss is a necessary prerequisite for the court to have entered judgment on Hospital's claim for indemnity" against physicians who had settled

with plaintiff prior to trial). Notwithstanding Appellants' belief that the trial court committed numerous errors in the *Black* case, Appellants nevertheless expected the same trial court to rule consistently on the same issues in this case.

A prompt filing and resolution of this indemnity action had several benefits. Among them, if the *Black* judgment imposing vicarious liability on Appellant Dr. Fast were upheld on appeal, then a judgment for indemnity would allow Dr. Fast, as a blameless, fault-free physician, to argue that the judgment against him should not be reported to the National Practitioner Data Bank because, ultimately, that verdict would be paid by Dr. Marston, who the jury determined bore all of the fault. A prompt appeal and consolidation of the appeals would also be available if the trial court's rulings were fatally inconsistent with its rulings in *Black*. Having made mutually inconsistent rulings, the trial court could not be correct in both cases. A fault-free physician could not shoulder someone else's liability with no right of indemnification.

The trial court obviously did not expect the instant lawsuit. The court said, "I never thought I would see an action like this as it was timed." [July 2, 2007 Hearing Tr., p. 18] The trial court recognized that there were legitimate claims of error in the *Black* case, saying, "The problem that we have is the instruction regarding the apportionment of fault at the trial was very probably a mistake. Whether it's going to result in reversal in part or in toto, I don't know." [July 2, 2007 Hearing Tr., p. 17] Faced with the dilemma of either perpetuating what "was very probably" error or now ruling inconsistently, the trial court attempted to avoid the predicament by suggesting that Appellants dismiss the indemnity case without prejudice and refile it if the *Black* judgment were affirmed.

Notwithstanding the case law as described in ***Hemme, Burns & McDonnell*** and ***Glidewell***, *supra*, and notwithstanding the fact that Respondent never raised the ripeness issue in his motion for summary judgment, the trial court told counsel for Appellants, "Your client's entitled to indemnification of nothing so far. He has not paid one penny so far." [July 2, 2007 Hearing Tr., p. 17] The trial court stated, "As such, I cannot find that the plaintiff is entitled to entry of a judgment in his favor as a matter of law under your petition and the motion for summary judgment." [July 2, 2007 Hearing Tr., p. 19] While such statements fail to recognize the difference between indemnity for liability and indemnity for loss,[3] the real concern are the claims of error that the trial court declined to fix on post-trial motions, preferring instead to leave the issues to this Court. The trial court said,

> I don't know what the Court of Appeals is going to do. They may say the whole thing is reversed; it's zero. They may say Dr. Marston should be credited. They may decide to retry it on the issue of apportionment. They may say too bad, Dr. Fast is paying the whole deal. I don't know. But once there's a judgment upon which execution may be had, then you're a lot closer to a legitimate cause of action which is ripe for judicial determination.

[July 2, 2007 Hearing Tr., p. 19-20]

The trial court further said, "I think I'd be dismissing this thing without prejudice with the agreement that where there's a final judgment entered, it may be refiled and you

[3] ***See Hemme***, 183 S.W.3d at 598-99.

can … take your motion up again." [July 2, 2007 Hearing Tr., p. 19] This suggestion overlooks the Missouri Supreme Court's holding that a judgment is final regardless of an appeal. In ***Stacy v. Truman Medical Center***, 836 S.W.2d 911, 929 (Mo.banc 1992), the Court held that "[t]here is no such thing as a 'final judgment' or a 'non-final judgment.' When a judgment is entered, it is always non-contingent and absolute on its face even though it may be subject to some modification by the trial court or on appeal." ***Id.*** In any event, Appellants declined to voluntarily dismiss this case without prejudice.[4]

The trial court's dilemma remained. It could either grant Appellants' motion for summary judgment, which would likely result in Respondent's appealing and claiming the very same errors that Appellants are claiming in their appeal of the *Black* case, or it could grant Respondent's motion for summary judgment, and thereby make opposite rulings than it made in the *Black* case (and which it had recently declined to make on post-trial motions), as explained in Point Relied On 2, *infra*. Such would illustrate the errors committed in *Black*, and would also subject these Appellants to mutually inconsistent rulings and thereby deprive them of due process (if the *Black* judgment were affirmed).

[4] The trial court's judgment noted, "Following presentation of the MOTIONs, and despite the fact that the Court made known to Plaintiffs the Court's belief that their action was premature and not ripe for adjudication, Plaintiffs declined to dismiss their action, without prejudice to the of the same, and insisted upon this Court's ruling as to their MOTION." [L.F. 253-54]

Not entirely unexpectedly, the trial court granted Respondent's cross-motion for summary judgment on the basis of the identical arguments it had previously rejected when made by Appellants in the *Black* case. *See* Point Relied On No. 2, *infra*. What *was* unexpected was the internal inconsistency within the judgment below, as the trial court simultaneously ruled that Appellants' indemnity petition was premature *and* that Respondent was entitled to summary judgment on the petition. [L.F. 254]

Appellants recognize that the denial of their motion for summary judgment is not appealable. But that is not the point. The point is that if a case is not ripe, the remedy is to allow it to pend until it becomes ripe, not grant an opposing motion for summary judgment. ***Brinson v. Whittico***, 793 S.W.2d 632, 633 (Mo.App. E.D. 1990). Another proper action, if the case is premature, is a dismissal without prejudice. ***Id.***

The trial court's granting summary judgment in favor of Respondent, with its *res judicata* attributes, in an action that the court ruled was premature, was error. ***Id.*** If the case is ripe, as the entry of judgment in favor of Respondent shows, then it is error to consider only one party's motion for summary judgment. Such is tantamount to having open access to the courts for the Respondent, but not the Appellants. Accordingly, Appellants were denied their right to due process. As a matter of law, the summary judgment in favor of Respondent Marston should be reversed.

## POINT RELIED ON NO. 2

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE JUDGMENT WAS BASED ON A PARTIAL AND INCONSISTENT APPLICATION OF R.S.MO. SECTIONS 538.230 AND 537.060, WHICH DEPRIVED APPELLANTS OF THEIR RIGHT TO INDEMNITY AS FAULT-FREE PARTIES BEARING A JUDGMENT BASED SOLELY ON VICARIOUS LIABILITY.

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"The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." ***ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp***., 854 S.W.2d 371, 380 (Mo. 1993) (citations omitted). The record is reviewed "in the light most favorable to the party against whom judgment was entered." ***Id.*** "We accord the non-movant the benefit of all reasonable inferences from the record." ***Hampton v. Carter Enter., Inc.***, 2007 WL 2362575 at *2 (Mo.App.

W.D. 2007) (***citing ITT Commercial***, 854 S.W.2d at 376). Thus, the record and all inferences are to be viewed in the light most favorable to Dr. Fast and St. Joseph OB-GYN, Inc.

## A. Appellants' Right to Indemnity

Appellants are fault-free, blameless parties. The *Black* jury apportioned Dr. Fast zero ("0") percent of the fault. Missouri law has consistently recognized Appellants' right to indemnity.

In the underlying *Black* trial, the trial court erroneously entered judgment for the entirety of the verdict against these fault-free Appellants. That error has now been compounded as the trial court below denied Appellants their right of indemnity against the very tortfeasor who a unanimous jury determined bore one hundred ("100") percent of the fault. Yet, blameless parties like Appellants have long been protected from having to pay a judgment foisted upon them by operation of law.

> Indemnity is a right that inures to the person who has discharged a duty that is owned by him, but which, as between himself and another, should have been discharged by the other, so that if the other does not reimburse the person, the other is unjustly enriched to the extent that his liability has been discharged. This right of indemnity is based on the principle that everyone is responsible for the consequences of his own wrongdoing, and if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.

***SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP***, 128 S.W.2d 3d 534, 539 (Mo.App. E.D. 2003), *rehrg and/or transfer denied* (Feb. 26, 2004) (*citing* 42 C.J.S. Indemnity § 3; 41 Am Jur 2d, Indemnity § 2). This bedrock principle has long been recognized in Missouri. ***E.g.***, ***State ex rel. Siegel v. McLaughlin,*** 315 S.W.2d 499, 507 (Mo.App. 1958) ("[I]t is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized."); ***Campbell v. Preston***, 379 S.W.2d 557, 559 (Mo. 1964) ("As a general rule, indemnity is allowed in favor of one who is held responsible *solely* by imputation of law because of his relation to the actual wrongdoer . . . ."). As vicariously-liable parties, Appellants are entitled to indemnity.

**B. Partial And Inconsistent Application Of R.S.Mo. Section 538.230**

At the heart of this case lies R.S.Mo. (1986) § 538.230[5] and § 537.060. In his Answer, Respondent claimed that "Defendant Marston was discharged from all liability for contribution or indemnity to any other person by operation of § 538.230.3 and/or § 537.060 RSMo 2000 when he entered into a written settlement agreement with Kimberly Black prior to the jury trial and judgment in Black v. Fast et al., case no. 05CV74478, and was released from liability for all claims arising out of the medical treatment he provided to Kimberly Black on June 24, 1997." [L.F. 9-10, ¶10] Ironically, the arguments with

[5] R.S.Mo. (1986) § 538.230 applied because the *Black* petition was filed May 14, 2004, well before the repeal of § 538.230 by H.B. 393, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005) (effective Aug. 28, 2005).

respect to § 538.230 that Appellants made in *Black*, but which the trial court rejected, are now the same arguments that the trial court accepted from Dr. Marston in granting his motion for summary judgment.

In the *Black* trial, the trial court (erroneously) ruled that R.S.Mo. (1986) § 538.230 did not apply to the issue of vicarious liability for Respondent Dr. Marston's negligence. In the instant case, the trial court aggravated the situation by reversing course and holding that *part* of § 538.230 applied.[6] The prejudicial effect of this reversal was intensified by the fact that it was only a partial reversal, applying only part of the statute while ignoring the rest. While Appellants will not reargue here their appeal in *Black*, it is necessary to understand the extent and nature of the trial court's inconsistency in order to understand how Appellants have been denied due process of law by reason of the inconsistent rulings made in this case. [L.F. 152]

Section 538.230 lays out a specific method for handling the fault of released persons in medical negligence cases. Among other things, § 538.230 requires: 1) total fault apportionment among all defendants and released persons who bore fault, 2) reduction of the plaintiff's claim against remaining defendants by the percentage of fault

[6] We must presume that since the trial court did not clearly state the grounds for its decision, that it relied on the grounds stated in Respondent's motion. ***Central Mo. Elec. Co-op. v. Balke***, 119 S.W.3d 627, 635 (Mo.App. W.D. 2003). Respondent stated that his motion was "governed by the terms of the release agreement, by Section 538.230, Revised Statutes of Missouri . . . and by controlling court decisions." [L.F. 174]

apportioned to released persons, and 3) discharge from liability for contribution or indemnity for released persons following the total fault apportionment and claim reduction.[7]

One of the arguments Appellants made in the *Black* trial was that § 538.230.3 required the trial court to reduce plaintiff Black's claim by the percentage of fault apportioned to Dr. Marston. This, of course, would have reduced plaintiff Black's claim by one hundred ("100") percent, leaving Appellant Dr. Fast liable for the remaining zero ("0") percent, which is exactly the amount of fault the jury apportioned to him. Similarly, the Corporation would have been vicariously liable for Dr. Fast's equitable share – also zero ("0") percent.

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[7] In particular, subsection 3 of § 538.230 provides:

> Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action … discharges that person or entity from all liability for contribution or indemnity but it does not discharge other person or entities liable upon such claim unless it so provides. However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release.

However, the *Black* trial court held that § 538.230 did not apply and refused to follow the language of § 538.230.3 (*i.e.*, "However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation ….") and reduce plaintiff Black's claim by the one hundred ("100") percent of the fault apportioned by the jury to Dr. Marston. As a result, the trial court *increased* plaintiff's claim against Dr. Fast by one hundred ("100") percent – entering judgment against Appellants for the entirety of the verdict even though Dr. Fast bore zero ("0") percent of the fault and despite no specific jury finding that Dr. Fast was either negligent or vicariously liable for Dr. Marston's conduct. Relying on those rulings, Appellants sued Dr. Marston for indemnity.[8]

Now, in this indemnity case, the trial court has reversed itself by holding that § 538.230.3 *does* apply and that Respondent's settlement discharged him from all liability for contribution or indemnity. The result of this flip-flop is that fault-free, blameless parties were burdened with one hundred ("100") percent of the verdict with no right of indemnity from the released tortfeasor. In other words, the trial court has consecutively said that Dr. Fast is legally responsible for Dr. Marston's fault and that Dr. Fast has no

[8] Appellants had a right to rely on the trial court's prior rulings regarding these same parties and legal issues. Such reliance is supported by both notions of fairness and, analogously, the doctrine of "the law of the case," which "insures uniformity of decisions, protects the parties' expectations, and promotes judicial economy." ***Walton v. City of Berkeley***, 223 S.W.3d 126, 128-29 (Mo.banc 2007) (citation omitted).

legal right to have Dr. Marston indemnify him for the judgment Dr. Fast now owes due to Dr. Marston's conduct.

These inconsistent rulings by the trial court were aggravated by the fact that the trial court applied only part of § 538.230.3 to this case. The trial court reversed course as to the first sentence, yet again rejected the second, sentence of subsection 3 of § 538.230, which provides:

> 3. Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity but it does not discharge other persons or entities liable upon such claim unless it so provides. *However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release*. (emphasis added)

It is hornbook law that one may not single out a sentence from a statute but must consider the object and policy of the statute. ***See State v. Haskins***, 950 S.W.2d 613, 615 (Mo.App. S.D. 1997) (citations and quotations omitted); ***see also Ferrell Mobile Homes, Inc. v. Holloway***, 954 S.W.2d 712, 715 (Mo.App. S.D. 1997); ***State v. Meggs***, 950 S.W.2d 608, 610 (Mo.App. S.D. 1997). The object and policy of § 538.230 was to

eliminate pure joint and several liability law in medical negligence cases and replace it with a scheme under which a "defendant whose percentage of fault is smaller than that of any other defendant is liable, at the most, only for a proportionate share as determined by a jury, and this is so even though defendants found to be more at fault are judgment proof." ***Hewlett v. Lattinville***, 967 S.W.2d 149, 152 (Mo.App. E.D. 1998).

Obviously, if plaintiff Black's claim against Appellants had been reduced by the amount of Respondent Dr. Marston's fault, then Respondent would have been discharged from all liability for indemnity and the corporation would have been reduced as there would have been no need for indemnity. Black's claim against Dr. Fast been reduced by the one hundred ("100") percent apportioned to Respondent Dr. Marston. As a consequence, there would have been no percentage of fault left to impute to Dr. Fast. Absent vicarious liability, there is no need for indemnity.

Accordingly, the subsection 3 of § 538.230 makes sense if it is applied in its entirety and not piecemeal. Claim reduction is a pre-condition to discharge of liability for indemnity. Discharge is appropriate *if* full fault apportionment and claim reduction are *also* performed for the remaining defendants.

From this it should be clear that Appellants were prejudiced not only by the inconsistent rulings, but also when the trial court partially reversed course and applied only half of § 538.230.3 to this case. This allowed one hundred ("100") percent of the fault to be incorrectly imputed to Appellants with no right of indemnity.

## C. Misinterpretation Of The "Release of All Claims"

But it gets worse. In the Release given to Respondent, plaintiff Black specifically released "St. Joseph OB-GYN, Inc., from any and all claims, actions, causes of action, demands, rights, damages, loss of services, expenses and compensation whatsoever directly related to [Dr. Marston's] conduct as alleged [sic] in the aforesaid Petition, or flowing from any assertion of St. Joseph OB-GYN's vicarious liability[9] solely as Defendant Marston's former employer. . . ." [L. F. 175 at ¶3-4; L. F. 212 at ¶3] The Release further provided that plaintiff Black "reserves the right to claim vicarious liability regarding separate defendant Robert Fast and separate defendant St. Joseph OB-GYN, Inc." [L.F. 176 at ¶4]

The plain-language, common-sense reading of this Release is that plaintiff Black released all claims and causes of action against Dr. Marston, and further released the Corporation and its employees for all vicarious liability based on Dr. Marston's conduct. But plaintiff Black reserved her cause of action against Dr. Fast and reserved her claim that the Corporation could be vicariously liable for Dr. Fast's conduct.

Perplexingly, however, the *Black* trial court ruled that Dr. Fast was vicariously liable for Dr. Marston's conduct, and that the Corporation was vicariously liable for the

[9] Vicarious liability is liability that is not based on any direct negligence by the vicariously liable party. ***Lowe v. Norfolk and W. Ry. Co.***, 753 S.W.2d 891, 895 (Mo. 1988); ***see Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940, 946 (Mo.App. S.D. 1996).

vicarious liability imputed to Dr. Fast. *See* ***Appellants' Brief***, WD 67377, at 71-72. In other words, while the Release prohibited plaintiff Black from imputing Dr. Marston's liability directly to the Corporation, the trial court in *Black* allowed Black to indirectly impute Dr. Marston's liability to the Corporation by first imputing it to Dr. Fast and then imputing it to the Corporation. Thus, the trial court made the Corporation vicariously liable for Dr. Fast's vicarious liability (*i.e.*, vicarious liability twice removed).

Accordingly, the trial court ruled inconsistently regarding § 538.230.3 when it, first, improperly imputed Respondent Dr. Marston's fault to Appellant Dr. Fast and, second, erroneously denied Dr. Fast his right of indemnity below. These § 538.230.3 rulings, combined with the trial court's erroneous interpretation of the Release, then imposed *indirect* vicarious liability on the Corporation with no right of indemnity from the original tortfeasor.

### D. The Failure To Allow A Full Fault Apportionment

Remarkably, the situation gets even worse. In *Black*, the trial court rejected application of § 538.230's requirements of a "full fault apportionment." The court ruled, contrary to Appellants' urging, that the nurses who incorrectly reported and recorded a "correct" sponge count would not be included in the fault apportionment process. [10] While this had the likely result of artificially increasing the percentage of fault apportioned to Dr. Marston, this error may have been harmless here had Appellants been allowed to pursue indemnity. But when the trial court, in granting summary judgment to

[10] *See* ***Appellants' Brief***, WD 67377, at 62-63.

Respondent, held that § 538.230.3 discharged Respondent from all liability for indemnity, the effect of this was to artificially inflate Dr. Marston's fault by the fault of the released hospital and nurses, then impute this inflated liability to these fault-free and blameless Appellants (rather than to reduce plaintiff's claim by this amount per § 538.230.3),[11] and finally to deny Appellants the right of indemnity. The inconsistency of the trial court's rulings in this case has imposed an artificially-inflated verdict on a blameless physician with no remedy.

## E. The Application of *Glidewell* and Section 537.060

An examination of R.S.Mo. (2000) § 537.060 and ***Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940, 946 (Mo.App. S.D. 1996), and a comparison to § 538.230, are also in order. Section 537.060 provides that a release "shall discharge the tort-feasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tort-feasor" *unless* the indemnity "comes about . . . by reason of vicarious liability." ***Id.*** emphasis added). Thus, application of § 537.060 to this case reveals that Appellants have been erroneously denied their right to indemnity from Respondent Dr. Marston because 537.060 does *not* discharge a released tortfeasor from indemnity based on vicarious liability.

[11] This further resulted in a denial of Appellants' rights under § 538.230.2 that "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."

In ***Glidewell*** the plaintiff sued a physician and hospital for the physician's alleged negligent failure to diagnose cancer. 923 S.W.2d at 943. The physician settled with the plaintiff and obtained a release before trial. ***Id.*** The hospital cross-claimed for indemnity from the physician for any sums the plaintiff might recover. ***Id.*** Plaintiff tried his case against the hospital based solely on vicarious liability and obtained a substantial judgment. ***Id.*** at 944. The trial court then sustained the hospital's motion for summary judgment on its cross-claim for indemnity against the physician. The physician appealed, arguing that R.S.Mo. § 538.230, the fault apportionment statute for actions against health care providers, applied to protect him from indemnity. ***Id.*** at 943. The Court of Appeals disagreed, holding that § 537.060 governed because the hospital's liability was solely derivative. ***Id.*** at 959, 960 n.2 (holding that "§ 538.230 is inapposite in this case because Hospital's liability was solely derivative"). Likewise here, 538.230 is inapposite because Appellants' liability for the *Black* judgment is solely derivative. Thus, the hospital was entitled to indemnity. ***Id.*** at 947.

The ***Glidewell*** court also found that the existence of a release did not change the application of the statute. The court held that "the pertinent rule in Missouri in release cases involving vicarious liability is provided by § 537.060." ***Id.*** at 946. In addition, the release given to the settling physician in ***Glidewell*** "recited that Plaintiff could continue to pursue Hospital", which was alleged to be vicariously liable for physician's conduct. ***Id.*** at 944. For all these reasons, the release given to the physician did not protect the physician from the hospital's indemnity action. ***Id.*** at 946.

Two important aspects of ***Glidewell*** should be recognized. First, the claim for indemnity was litigated at the same time as the underlying action. This was held to be proper and there was no holding that the indemnity action was premature or "not ripe" due to a lack of payment. Second, ***Glidewell*** differs from the instant case in one important respect. In ***Glidewell***, the plaintiff sued only one "active" tortfeasor who allegedly committed negligent acts (the physician). ***Glidewell*** also sued one defendant (the Hospital) that was not alleged to have acted negligently; rather, it was alleged only to be vicariously liable for the negligence of the defendant-physician. Contrast that with the instant case in which plaintiff Black sued multiple "active" tortfeasors (the Heartland nurses, Dr. Marston and Dr. Fast), all of whom plaintiff Black alleged acted negligently. Plaintiff Black further asserted vicarious liability claims against Heartland Regional Medical Center and the Corporation. Moreover, one of the principle contested issues in the *Black* appeal (WD 67377) concerns the trial court's rulings imposing vicarious liability against Dr. Fast under a disputed joint venture theory.

In ***Glidewell***, there was no basis for an apportionment of fault, as the physician was the only "active" tortfeasor sued. Consequently, once the physician settled before trial, and the remaining claim against the hospital was *solely* derivative, based *only* on vicariously liability, it was held that § 537.060 applied, not § 538.230, because there was no basis for an apportionment of fault and, therefore, no basis for a reduction of the plaintiff's claim by the amount of the settling physician's fault. ***Id***. at 959. Consequently, the vicariously-liable hospital was entitled to full indemnity against the

settling physician notwithstanding the plaintiff's release of the claim against the physician. ***Id.*** at 947.

In *Black*, the trial court should have applied § 538.230 since the remaining claim against Dr. Fast was not "solely derivative." Plaintiff Black alleged and attempted to prove that Dr. Fast committed his own negligent acts, in addition to the claim (the existence of which is disputed) that Dr. Fast was vicariously liable for Dr. Marston's negligence under a joint venture theory. Thus, § 538.230 mandated a "total" fault apportionment with plaintiff Black's claim being reduced by the "amount of the released persons' or entities' equitable share of the total obligation." The fact that the jury ultimately found Appellant Dr. Fast to have zero ("0") percent fault (*i.e.*, he did not commit any negligent act or omission), does not retroactively convert this case from a § 538.230 case to a § 537.060 case.

Had § 538.230 been applied in its entirety in ***Black***, plaintiff Black's claim would have been reduced by one hundred ("100") percent and there would have been no vicarious liability imposed on Appellants and no need for indemnity. Had § 537.060 been applied here, the clear language would have precluded any discharge of liability for indemnity based on vicarious liability. What was fundamentally unfair to Appellants was for the trial court to deny the applicability of § 538.230 in the *Black* case, and now reverse course but utilize only part of § 538.230.3 below. This denied Appellants the right to indemnity preserved by § 537.060 as well as the statutory protection precluding the need for indemnity provided by § 538.230.3. Appellants were victims of a "heads-you-win, tails-I-lose" series of contradictory rulings, resulting in a denial of due process.

***See, e.g., State v. Williams,*** 529 S.W.2d 883, 890 (Mo.banc 1975) (concurring opinion); ***Endler v. Schutzbank***, 436 P.2d 297, 301 (Cal. 1968) (finding that a "heads-I-win, tails-you-lose procedure" is unconstitutional).

Based on the foregoing errors, the summary judgment granted in favor of Respondent Dr. Marston should be reversed. Dr. Marston did not have an "undisputed right to summary judgment." ***ITT Commercial***, 854 S.W.2d at 380.

## CONCLUSION

Appellants have been twice victimized by inconsistent rulings. The same arguments that the trial court rejected in *Black* have been used to deny Appellants their right under Section 537.060 to indemnity. There is no support, whether in the case law or Section 538.230, for the trial court's flip-flop on the law. Consequently, reversal is warranted.

## RULE 84.06(c) CERTIFICATION

Pursuant to Mo.R.Civ.P. 84.06(c), the undersigned hereby certifies that: (1) this brief includes the information required by Rule 55.03; (2) this brief complies with the limitations contained in Rule 84.06(b); and (3) this brief contains 7,161 words, as calculated by the Microsoft Word software used to prepare this brief.

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