IN THE SUPREME COURT OF MISSOURI

ROBERT E. FAST, M.D. and ST. JOSEPH OB-GYN, INC., Appellants/Plaintiffs, vs. F. JAMES MARSTON, M.D., Respondent/Defendant.	))))))))))	SC 89734

APPELLANTS' SUBSTITUTE REPLY BRIEF

Respectfully Submitted,

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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 TRIAL COURT'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.

Appellant Dr. Robert Fast[1] contends that, in ruling on cross-motions for summary judgment, the trial court erred when it simultaneously ruled that Dr. Fast's indemnity petition was premature *and* that Respondent Marston was entitled to summary judgment on the petition. [L.F. 254] Either the lawsuit is ripe as to both parties or it is not. In his response brief, Dr. Marston does not dispute that such a ruling is inherently inconsistent.

Dr. Marston seeks to sidestep the inherent inconsistency by offering an argument not borne out by the record. After conceding that Dr. Fast's cause of action for indemnity was not premature, and that Dr. Fast's motion for summary judgment was ripe for consideration, Dr. Marston is left only with the contention that the trial court "ruled

[1] For ease, reference will be made to Dr. Fast only, rather than to both him and appellant St. Joseph OB-GYN, Inc.

on the merits of" Dr. Fast's motion, and allegedly did not rule that Dr. Fast's motion was premature.

On the contrary, the trial court expressly refused to consider the merits of Dr. Fast's summary judgment motion due to ripeness. At the summary judgment hearing, the trial court incorrectly expressed its belief that indemnity was premature unless and until the judgment was paid. [Tr. 18-19]. The court said:

> But the fact of the matter is, I can't order Dr. – if I figured out that he was entitled to, I couldn't order Dr. Marston to pay [Dr. Fast] one nickel because he hasn't had to pay anything yet. Now, if he wants to go ahead and pay everything to the plaintiff, Kimberly Black, then we're talking. I suspect that's not the position we're going to take. As such, I cannot find that the plaintiff is entitled to entry of judgment in his favor as a matter of law under your petition and the motion for summary judgment.

[Tr. 18-19]. The court further stated, "I perhaps could find that the defendant may be entitled to entry of the judgment in his favor under the cross-motion, but not upon the basis articulated. *It would be because, in fact, the action's premature*." [Tr. 19] (emphasis added). After advising Dr. Fast to dismiss the action, the trial court added, "As I say, I think it's premature, but you do whatever you want to do. I'm going to deny the Plaintiffs' Motion for Summary Judgment and I'll take the Defendant's Motion for Summary Judgment under advisement…." [Tr. 21]. Then, in its Order and Judgment, the trial court wrote, "despite the fact that the Court made known to Plaintiffs the Court's

belief that their action *was premature and not ripe for adjudication*, the plaintiffs declined to dismiss their action, without prejudice…." [L.F. 254] (emphasis added).

The trial court left no doubt about its reasoning that Dr. Fast's motion for summary judgment was being denied because it "was premature and not ripe for adjudication." But, as the Court of Appeals correctly noted, Dr. "Fast's claim for indemnity against Marsten [sic] was properly before the court." Opinion, WD 68672, at 6. As a consequence, it cannot be disputed that Dr. Fast was denied due process when the trial court refused to consider his motion for summary judgment on the merits due to an erroneous belief that it was not ripe, yet considered Dr. Marston's cross-motion on its merits. This denial of due process left Dr. Fast, a fault-free physician, saddled with the liability of Dr. Marston with no right of indemnification.

Just as the Court of Appeals ruled, this Court should reverse the summary judgment entered in favor of Respondent Marston and remand the case with directions to grant summary judgment in favor of Appellants.

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.

This Court, like the Court of Appeals below, should reverse the judgment because Dr. Fast is entitled to summary judgment as a matter of law. This Court should reject Dr. Marston's position that a misapplication of R.S.Mo. § 538.230 is acceptable or that a disparate application of the statute that allows fault-free, blameless parties to bear a substantial judgment with no right of indemnity is tolerable.

Both Dr. Fast and Dr. Marston agree that R.S.Mo. § 538.230 should have applied to the underlying *Black* case as well as this case. Their disagreement concerns whether the trial court can now incorrectly apply an isolated part of § 538.230.3 in this case *after* previously having refused to apply the other part of § 538.230.3 in the underlying *Black* case. Thus, a threshold issue is whether the first sentence of R.S.Mo. §538.230.3 ("any release…discharges that person…from all liability for…indemnity") can apply in the absence of the application of the second sentence of R.S.Mo. §538.230.3 ("However, the [plaintiff's claim] against other persons or entities is reduced by the amount of the released person's equitable share of the total fault").

In the *Black* trial, the trial court (erroneously) ruled that R.S.Mo. (1986) § 538.230 did not apply to the issue of Dr. Marston's negligence. In the instant case, the trial court reversed course and held that *part* of § 538.230 applied. But subsection 3 of § 538.230 makes sense *only* if it is applied in its entirety and not piecemeal. Claim reduction is a pre-condition to discharge of liability for indemnity. Discharge for liability for indemnity under §538.230 is appropriate *only if* full fault apportionment and claim

reduction are also performed for the remaining defendants. Had the trial court performed the claim reduction in *Black*, Dr. Marston would have been discharged for liability for indemnity because there would be no need or reason for indemnity. The claim reduction is a condition precedent to discharge for liability for indemnity because only then is there no longer any fault of the settling tortfeasor which can be imputed vicariously to another party. In other words, if the fault of the settling party is eliminated, that fault is no longer available to impute to another party because to do so would render the second sentence of § 538.230.3 meaningless.

Dr. Marston does not dispute that claim reduction was required by § 538.230.3. He impliedly concedes the trial court did commit error in *Black*. Yet, Dr. Marston simply argues that the trial court's failure to perform the claim reduction in *Black* cannot now be raised to dispute whether Dr. Marston has truly been discharged from any liability for indemnity. In other words, Dr. Marston argues that the absence of the statutory condition precedent can be overlooked – and the fault-free defendant can be burdened with the entire verdict and the liability of another – provided the trial court error occurred after the settling party was dismissed and was no longer a party to the case. But that will happen in every instance because a settling defendant will always be dismissed before the jury apportions fault in its verdict and before the trial court can perform the § 538.230.3 claim reduction.

Moreover, Dr. Marston fails to address the underlying due process issue. The trial court's rulings in both of these cases cannot coexist. The denial of Dr. Fast's due process rights springs from these mutually antagonistic rulings. "Heads I win, tails you

lose" is not a fairness concept. Due process cannot mean that Dr. Fast can be disadvantaged by inconsistent rulings by the same judge on the same issues *and*, after a jury exonerates him, be forced to bear a substantial judgment based solely on the fault of Dr. Marston with no right of indemnity.

Furthermore, Dr. Fast timely filed motions to consolidate this appeal with the *Black* appeal, noting the trial court's inconsistent rulings regarding § 538.230 in both cases. The denial of those consolidation motions was error because the two appeals are inextricably linked. To rule in this case regarding § 538.230 without factoring in the trial court's rulings in *Black* ignores the elephant in the room. "Heads I win" is not a troubling concept in isolation. But when the rules change and "heads I win" is combined with "tails you lose," then unfairness and lack of due process become evident. Accordingly, due process was undermined when Dr. Fast's vicarious liability and the foreclosure of his right to indemnity were based on mutually-antagonistic trial court rulings, which were then compounded by the Court of Appeals' denial of the consolidation of these appeals, rendering it impossible to resolve the inconsistent rulings.

With regard to Dr. Marston's related contention that he "bought his peace" and was released by his settlement agreement with plaintiff Black, it should again be noted that the trial court ruled inconsistently in *Black*. In *Black*, the trial court rejected the same argument when made by Dr. Fast,[2] determining that the release Ms. Black gave Dr.

[2] Among other things, Appellants sought a withdrawal instruction that any claim against St. Joseph OB-GYN, Inc. and its employees based on the conduct of Dr. Marston had

Marston was only partial and preserved claims of vicarious liability based on Dr. Marston's conduct. The trial court said:

> I don't agree with you. I agree that's what the words say. And I agree that is the way you are reading them … I don't find the release language, and particularly that relating to vicarious liability spoken as to Dr. Marston and St. Joseph OB-GYN and spoken as to Dr. Fast and St. Joseph OB-GYN, does not reserve to the plaintiff the right to persue [sic] a vicarious liability suit as to this defendant and other persons.

[L.F. 169 (tr. 569:2-23)].

While the release clearly prohibited plaintiff Black from imputing Dr. Marston's liability to the Corporation, the trial court in *Black* perplexingly 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). In sum, Dr. Marston did not "buy his peace" as the release left him exposed to a potential

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been released. [*See* L.F. 172 (tr. 660); L.F. 56 in *Black v. Fast et al.*, WD 67377]. In opposition, Plaintiff Black argued vehemently that the release she gave Dr. Marston was not complete in that it supposedly allowed her to go after Appellants for vicarious liability based on Dr. Marston's conduct. [*See* L.F. 172 (tr. 660)]. The trial court agreed. *Id.* Thus, unlike Respondent Marston, plaintiff Black saw the release she gave as *preserving* certain claims arising out of Dr. Marston's conduct.

indemnity action if Dr. Fast was found vicariously liable for Dr. Marston's conduct, which is exactly what happened.

Dr. Fast and Dr. Marston agree that the *Black* trial court erred in interpreting the release. In fact, they agree that the trial court's interpretation of the release conflicts with the requirements of § 538.230.3. If Dr. Marston, as a settling defendant, was to be discharged from any liability for indemnity – and Ms. Black's claim against Dr. Fast was to be reduced by the amount of Dr. Marston's equitable share of the total fault – then there is no basis to find that the release agreement allowed Dr. Marston's entire equitable share of fault to be imputed to Dr. Fast. Again, there should have been no fault of Dr. Marston left to impute (and no vicarious liability cause of action based on Dr. Marston's conduct reserved to plaintiff Black by the release) because of the mandatory § 538.230.3 claim reduction requirement. The trial court's interpretation of the release in *Black* rendered the second sentence of § 538.230.3 meaningless. The result of the trial court's combined errors in these two cases was to find that the release agreement allowed Dr. Marston's entire equitable share of fault to be imputed to Dr. Fast, but that Dr. Fast would have no right to indemnity even though he was found 0% at fault by the jury. Again, the threshold issue is whether the first sentence of R.S.Mo. § 538.230.3 ("any release…discharges that person…from all liability for…indemnity") can apply when the trial court's interpretation of the release made it impossible to apply the second sentence of R.S.Mo. § 538.230.3 ("However, the [plaintiff's claim] against other persons or entities is reduced by the amount of the released person's equitable share of the total fault").

Dr. Fast and Dr. Marston agree that, in *Black*, the trial court should have applied § 538.230, and not § 537.060, since the claim against Dr. Fast was not "solely derivative." However, this leads to a subsequent threshold issue of whether the Court must now apply § 537.060 because (a) the first sentence of § 538.230.3 cannot apply to discharge Dr. Marston from liability for indemnity since the trial court erred in failing apply the second sentence of § 538.230.3, and (b) the Court of Appeals' refusal to consolidate the appeals now makes it impossible to correctly and consistently apply § 538.230 to *Black* and this case.

The benefit of § 538.230 is that its full application avoids the circuitous action that can occur with § 537.060. With § 538.230, the plaintiff's claim is reduced by the amount of the released defendant's share of equitable fault. The released defendant is discharged from all liability for contribution or indemnity because the reduction of plaintiff's claim by the released defendant's percentage of fault does not allow for joint or imputed liability. Such would promote settlement, protect the interests of non-settling defendants, and promote judicial economy.

By comparison, under the express terms of § 537.060, a settlement does not discharge a tortfeasor from liability from indemnity based on vicarious liability. ***Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940, 946 (Mo.App. S.D. 1996). Instead, the plaintiff is allowed to recover from the vicariously liable defendant a judgment based on the imputed negligence of a released defendant. That vicariously liable defendant would then have a right to full indemnity from the released defendant. The released defendant, upon paying the claim for indemnity, would then have any rights

back against the plaintiff under any indemnification or hold harmless language in their settlement and release agreement. In the end, the plaintiff could receive, and then give back, that part of her judgment based on the imputed negligence of a released defendant. The end result is essentially the same as that of § 538.230 – provided everyone makes good on their liability for indemnity – but § 538.230 would clearly be the preferable approach when applicable. The end result must be that a vicariously liable defendant has the right to be made whole by indemnity (§ 537.060) – or not being vicariously liable in the first place (§ 538.230). It is an unacceptable result for the innocent to pay.

The Court of Appeals held that § 538.230 "applies only in those cases '*where fault is apportioned*.'" Opinion, WD 68672, at 8. Because no fault was apportioned to Dr. Fast, the Court of Appeals held that § 538.230 was inapplicable to both Dr. Fast's claim for indemnity and Dr. Marston's defense, and that § 537.060 applied. *Id.* Dr. Marston argues that the fact that the jury apportioned 100% of the fault to Dr. Marston and 0% to Dr. Fast does not operate to retrospectively make § 538.230 inapplicable. In other words, fault *was* apportioned; it is just that Dr. Fast was apportioned 0%. While Dr. Marston's point appears to be well-taken, it still begs the threshold questions of whether the (a) the first sentence of §538.230.3 can now be applied to discharge Dr. Marston from liability for indemnity since the trial court erred in failing apply the second sentence of § 538.230.3, and (b) the Court of Appeals' refusal to consolidate the appeals now makes it impossible to correctly and consistently apply § 538.230 to *Black* and this case. Dr. Marston's argument would leave Dr. Fast, a fault-free party bearing the entire judgment

with no right of indemnity. Dr. Marston's arguments fail to address the threshold questions.

If § 538.230 cannot be fully and properly applied, then § 537.060 must be applied. There appears to be no other option now that consolidation of the appeals was denied. Section 537.060 did not discharge Dr. Marston from liability for indemnity based on vicarious liability. As the Court of Appeals noted, Dr. Fast's liability was purely based on the vicarious liability for Dr. Marston's conduct:

> "Fast, the only defendant to go to trial was adjudged vicariously responsible for Marsten's [sic] wrongful acts." Opinion, WD 68672, at 1.
>
> * * *
>
> "In Verdict B, the jury apportioned 100% of the fault to Marsten [sic], finding Fast 0% at fault. The trial court entered a judgment against Fast, the appellant here, finding him vicariously liable for the fult of Marsten [sic], the respondent here; and St. Joseph OB-GYN vicariously liable for Fast's imputed liability, jointly and severally, for $223,000." *Id*. at 3.
>
> * * *
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> "Verdict B indicates that the jury did not find Fast personally culpable for the injury as the jury apportioned him 0% fault. Fast's only liability, then, was his vicarious responsibility for Marsten's [sic] negligence." *Id*. at 7.
>
> * * *

"Fast was adjudged vicariously liable for Marsten's [sic] wrongful acts. Fast is only liable by imputation of law because of his relationship with Marsten [sic]." *Id*. at 10.

Dr. Marston alternatively argues that Verdict B cannot be seen as a basis for an argument that Fast's liability is solely derivative. Yet, Dr. Marston fails to explain how a defendant, who is assessed 0% fault, can have any liability unless such liability is purely, completely and solely derivative. Such position is also inconsistent with Dr. Marston's response to uncontroverted facts in Dr. Fast's summary judgment motion admitting that Dr. Fast was apportioned 0% fault. [L.F. 13 and 43 (subpoint 11)]. Moreover, it should be noted that Judge Howard was a member of both Court of Appeals' panels which decided *Black* and *Fast v. Marston*. For Dr. Marston to now claim that the basis for Dr. Fast's liability was "his own negligent acts," is to ascribe an inherent inconsistency to Judge Howard's decisions in light of the above quoted opinion excerpts.

Dr. Marston also contends that § 537.060 does not apply because there was "no legal relationship between Fast and Marston" that would support vicarious liability. Plaintiff Black alleged and attempted to prove that Dr. Fast committed his own negligent acts, in addition to the claim that Dr. Fast was vicariously liable for Dr. Marston's negligence under a joint venture theory. ***Crump v. Piper,*** 425 S.W.2d 924, 928 (Mo. 1968). Thus, plaintiff Black's purported vicarious liability theory was based on a "legal

relationship."[3] Moreover, even Dr. Marston argued in his response to plaintiff's motion for summary judgment below that Drs. Fast and Marston "*acted jointly in the case to accomplish a common* goal; thus Dr. Fast is vicariously liable for the negligence of Dr. Marston." [L.F. 52 (emphasis in original)] Dr. Marston may not take a different position on appeal. ***Williams v. St. Louis Pub. Serv. Co.***, 253 S.W.2d 97, 104 (Mo. 1952).

But again it is important to realize that the underlying basis of Dr. Marston's argument is "heads I win, tails you lose." ***Crump*** was decided when Missouri recognized joint and several liability in medical malpractice cases – a concept abrogated in 1986 by the enactment of § 538.230. Over Dr. Fast's objections, the trial court in *Black* ruled that § 538.230 did not apply to plaintiff's ***Crump v. Piper*** claim, and further submitted Instruction No. 7, the verdict director, which *presumed* a joint venture and instructed that if Dr. Marston was negligent, that Dr. Fast was also negligent as a matter of law. As can be seen, the jury received no instructions in the verdict director on the elements of a joint venture:

> Your verdict must be for plaintiff and against both defendants if you believe:

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[3] The unique holding in ***Crump*** was based on "principles of joint venture or other species of joint tort-feasance." ***Sall v. Ellfeldt***, 662 S.W.2d 517, 526 (Mo.App. W.D. 1983); ***Mincey v. Blando***, 655 S.W.2d 609, 612 (Mo.App. W.D. 1983) (history omitted). "A joint venture is a species of partnership." ***Firestone v. VanHolt,*** 186 S.W.3d 319, 324 (Mo.App. W.D. 2005).

> First, Dr. Marston selected defendant Fast to assist him in performing an operation on the plaintiff and defendant Fast consented and undertook to assist Dr. Marston in the operation, and
>
> Second, either:
>
> defendant Fast or Dr. Marston left a laparotomy tape in plaintiff's abdomen after performing the operation, or
>
> defendant Fast saw or in the exercise of ordinary care could have seen Dr. Marston leave the laparotomy tape in plaintiff's abdomen, and
>
> Third, either defendant Fast or Dr. Marston was thereby negligent in any one or more of the respects submitted in paragraph Second, and
>
> Fourth, as a direct result of such negligence plaintiff sustained damage….

Plfs'/Apps' Sugg. in Opp. to Application for Transfer, at 6.

Yet, if "either defendant Fast *or Dr. Marston* left a laparotomy tape in plaintiff's abdomen after performing the operation … [and] either defendant Fast or Dr. Marston was thereby negligent**,"** as the verdict director instructed, apportionment was mandatory under R.S.Mo. (1986) § 538.230. *See* ***Thurman v. St. Andrews Management Serv., Inc.***, No. ED 90781, 2008 WL 4402456, at *9 (Mo.App. E.D. Sept. 30), *transfer denied* (Nov. 13, 2008). The *Black* trial court's refusal to apply § 538.230 to plaintiff's ***Crump***

claim resulted in the (erroneous)[4] splitting of the verdict forms, with the fault apportionment occurring on Verdict B, and with the ***Crump*** claim being submitted without any § 538.230 claim reduction and (over Dr. Fast's objections) with the elements of a joint venture being presumed in the verdict director. Dr. Marston cannot now argue that § 538.230 protects him from liability for indemnity for the vicarious liability imposed on Dr. Fast for Dr. Marston's fault by reason of the nature of the *Black* verdict forms, when the verdict forms are the direct result of trial court error in refusing to apply § 538.230 in the first instance. Contrary to Dr. Marston's contention, the verdicts do not show any direct negligence by Dr. Fast. The verdicts simply reflect the trial court's inconsistency in applying part of § 538.230 to bar an indemnity claim against Dr. Marston after having refused to apply § 538.230 to the *Black* case and perform the required statutory claim reduction.

Had this appeal and the *Black* appeal been consolidated as requested, both Dr. Fast and Dr. Marston would have argued that § 538.230 applied and that plaintiff Black's claim against Dr. Fast should have been reduced by the 100% share of fault attributed to Dr. Marston. Dr. Fast then should have received no liability (in accordance with his 0% of fault), and this indemnity appeal would have been rendered moot. But since the Court of Appeals opted to decide the *Black* appeal in isolation, and thereby presumably deprive itself of the opportunity to see the big picture with the inherent inconsistencies, that result

[4] ***Pickel v. Gaskin***, 202 S.W.3d 630, 635 (Mo.App. E.D.), *rehrg and/or transfer denied* (Aug. 31) *and transfer denied* (Oct. 31, 2006).

is no longer available as Dr. Fast has already been forced to pay a $223,000 judgment, plus costs and interest, though he was unanimously adjudged by a jury to be free of negligence.

The question now before the Court is does Dr. Fast have a remedy? Or, is Missouri law such that Dr. Fast, an innocent party, has to pay for another's fault with no avenue of reimbursement? Was due process served when the trial court inconsistently ruled that Dr. Fast's motion for summary judgment was premature but that Dr. Marston's cross motion for summary judgment was ripe?

CONCLUSION

Summary judgment below was based on an inconsistent application of § 538.230; therefore, it was error. The continued denial of Dr. Fast's rights under the statute – first in *Black*, then again below – should not be condoned or perpetuated. Instead, this Court should order, as did the Court of Appeals, that summary judgment be entered in Dr. Fast's favor, so that he can be indemnified for the liability foisted upon him. However, unlike the Court of Appeals, this Court should not order a "credit" against Dr. Fast's indemnification for sums Dr. Marston paid Ms. Black in settlement. No other result would ensure that Dr. Fast remains totally free from liability as the jury intended.

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RULE 84.06(c) CERTIFICATION

Pursuant to Mo.R.Civ.P. 84.06(c), I certify 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 4,219 words, as calculated by the Microsoft Word software used to prepare this brief.

CERTIFICATE OF SERVICE

I further certify that on this 17th day of March, 2009, a printed and diskette copy (WORD format) of this brief, scanned and determined to be virus-free, was mailed to:

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