SC 89734

IN THE SUPREME COURT OF MISSOURI

ROBERT E. FAST, M.D.
Appellants/Plaintiffs,

vs.

F. JAMES MARSTON, M.D. and ST. JOSEPH OB-GYN, INC.
Respondent/Defendant.

RESPONDENT'S SUBSTITUTE BRIEF

Appeal from the Circuit Court of Buchanan County, Missouri
5th Judicial Circuit, Division 2
Honorable Weldon C. Judah, Circuit Judge
Circuit Court Case Number 06BU-CV03808

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STATEMENT OF FACTS

In *Black v. Heartland Health, et. al.*, Buchanan County Case 04CV74478 (*"Black I"*), Kimberly Black ("Black") alleged that both Dr. Robert Fast ("Fast") and Dr. F. James Marston ("Marston") were negligent in performing surgery by leaving a laparotomy sponge inside her abdominal cavity. (L.F. 1, 20). Marston subsequently entered into a settlement with Black. Black executed a "Release of All Claims" in favor of Marston for

> 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, 1997.

(L.F. 2, 175, 186). The Release also released St. Joseph OB-GYN from any liability premised on the vicarious liability of Marston, but reserved rights based upon vicarious liability against Fast. (L.F. 2, 175-6, 186-7).

Fast opted to proceed to trial. At trial, Black presented her evidence. After presentation of Black's case, Fast moved for a directed verdict, which was overruled. (L.F. 1, 33-34). Fast then presented his evidence and again moved for directed verdict, which was again overruled. (L.F. 1, 34). The case proceeded to the jury. The jury found against Fast and awarded $223,000 in damages on Verdict A. (L.F. 1, 30-31, 34). The jury was instructed to apportion fault in Verdict B and apportioned one hundred ("100") percent to Marston and zero ("0") percent to Fast. (L.F. 1, 32, 34). Fast appealed the judgment which

was affirmed in *Black v. Fast*, WD #67377 (March 25, 2008).

Fast proceeded to bring a suit for indemnity against Marston shortly after the jury verdict. (L.F. 1, 5-7). Marston answered asserting among other things that he was "discharged from all liability for contribution or indemnity to any person by operation of § 538.230.3 and/or § 537.060 RSMo. when he entered into a written settlement agreement with Kimberly Black." (L.F. 1, 9). Both parties then filed motions for summary judgment in the case. (L.F. 1, 12-41; L.F. 2, 174-210). The Circuit Court granted Marston's motion for summary judgment and denied Fast's motion for summary judgment. (L.F. 2, 253-4).

Fast filed a timely notice of appeal. (L.F. 2, 255). The Court of Appeals reversed *Fast v. Marston*, WD #68672 (August 26, 2008) and this Court granted Marston's application to transfer on January 27, 2009.

POINTS RELIED ON

I. The trial court did not error in granting Marston's Motion for Summary Judgment because the claim for indemnity was ripe in that there was a judgment arising from a jury verdict entered into against Fast.

II. The trial court did not error in granting Marston's Motion for Summary Judgment because the uncontroverted facts establish that Marston was entitled to judgment as a matter of law in that Marston discharged from all liability for contribution or indemnity by operation of § 538.230.3 when he entered into a valid and enforceable written settlement agreement with Kimberly Black prior to trial.

ARGUMENT

I. Standard of Review

An Appellate court's review of the grant of summary judgment is *de novo. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The record is reviewed in the light most favorable to the party against whom judgment was entered, and the non-movant is given the benefit of all reasonable inferences from the record. *Id.* Appellate Courts will affirm a grant of summary judgment if the decision is correct "under any theory supported by the record developed below and presented on appeal." *Victory Hills Ltd. Partnership I v. NationsBank, N.A.*, 28 S.W.3d 322, 327 (Mo. App. 2000). "If the trial court's judgment does not specify the basis upon which summary judgment was granted, we will uphold the decision if it was appropriate under any theory." *Horneyer v. City of Springfield*, 98 S.W.3d 637, 639 (Mo.App. 2003).

II. The trial court did not error in granting Marston's Motion for Summary Judgment because the claim for indemnity was ripe in that there was a judgment arising from a jury verdict entered into against Fast.

In this matter, Fast has asserted the trial court erred in ruling that his motion for summary judgment was not ripe. (Appellant's Brief, pg. 15). However, the record established that the trial court did not rule that the motion for summary judgment was not ripe, but instead denied the motion on its merits. It is also clear from the record that this matter was ripe and could be properly ruled upon by the trial court.

The trial court's order stated that it was "unable to find that there are no genuine

issues as to any material fact" and summary judgment was denied. (L.F. 2, 254). The trial court clearly expressed concerns about ripeness, but did not state it could not rule on the motion because it believed the matter was not ripe. Instead, despite its concerns, the trial court ruled on the merits of the motion. (L.F. 2, 254).

Further, the matter was ripe. It is well-settled law that when a judgment is entered, a claim for indemnity is ripe. *Hemme v. Bharti,* 183 S.W.3d 593, 598 (Mo. Banc 2006). The trial court ruled on the merits of the summary judgments and the issue is properly before this Court.

III. The trial court did not error in granting Marston's Motion for Summary Judgment because the uncontroverted facts establish that Marston was entitled to judgment as a matter of law in that Marston discharged from all liability for contribution or indemnity by operation of § 538.230.3 when he entered into a valid and enforceable written settlement agreement with Kimberly Black prior to trial.

A. Marston has "bought his peace" and Fast has no right to indemnity after he opted to proceed to trial. (Response to Appellant's Point 2, part A)

In this case, Marston "bought his peace." Fast, however, opted to take the risk and proceeded to trial. That trial ended poorly for Fast and he now seeks indemnity for the entirety of the judgment from Marston. Marston is shielded by RSMo. § 538.230.3 from any claim of indemnity and Fast is liable for the verdict.

RSMo. § 538.230.3 states in part:

> 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.[1]

The statute is clear and unequivocal that parties are released from all liability for contribution or indemnity. The statute is "to encourage settlements between tort-feasors and injured claimants-with the incentive being a settling tortfeasor can put the incident to rest and will not be subject to a later action for contribution." *State ex rel. Curators of Mo. v. Moorehouse*, 181 S.W.3d 621, 624 (Mo. App. 2006) (quoting *State ex rel. Sharma v. Meyers*, 803 S.W.2d 65, 67 (Mo. App. 1990)). This coincides with the strong public policy in Missouri to encourage settlements. *Lowe v. Norfolk and Western Ry. Co.*, 753 S.W.2d 891, 894-5 (Mo. 1988). As the *Lowe* case noted, "[a] defendant settles to obtain peace and repose. If these are not available, there will be no settlement. . . . . Settlements are surely impeded if any one defendant may effectively prevent others from settling." *Lowe*, 753 S.W.2d at 895. The Court in *Lowe* went on to state that the

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[1]Section 538.230 was repealed by H.B. 393, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005), but the law did not take effect until August 28, 2005. As Black's underlying petition was filed before the effective date, section 538.230 is still applicable for this action. (L.F. 1, 16)

"advantages of promoting settlement outweigh the possible disadvantage to those who settle late, or who do not settle at all and stand trial." *Lowe,* 753 S.W.2d at 895.

Here, Fast asserts because he was found zero ("0") percent fault, he should not be saddled with the verdict. However, his position is contrary to the clear language of the statute, the policy of Missouri in promoting settlements and would impede settlements with multiple defendants. Fast chose to go to trial and should not now be allowed to shift liability to Marston who opted to settle his claims.

B. Fast's complaints regarding the trial court's actions in Black I are not proper arguments in this case. (Response to Appellant's Point 2, part B, C and D).

Fast spends considerable time in his brief addressing the errors he believes the trial court committed in *Black I*. Specifically, he alleges the trial court misapplied RSMo. 538.230, should have applied it to reduce Fast's liability to zero, misinterpreted the release and failed to apportion fault to the nurses. However, even assuming error in the *Black I* trial, the settlement reached between Marston and Black should not be undone due to the trial court's errors.

As stated above, Missouri recognizes a strong public policy to encourage settlements. *Lowe,* 753 S.W.2d at 895. Here, the settlement between Marston and Black to settle her claims against Marston was done in good faith. Fast's argument essentially makes *any* settlement contingent on the trial court correctly applying the law. Further, the possibility of error, or avoiding error, is completely outside of the control of the settling

party as he or she is no longer a party to the case. Decisions made at trial would be made in the absence of the settling party, but yet could be used to undue the settlement agreement. As this case highlights, the issues regarding the jury instructions that Fast takes issue with were decided without any input from Marston as he had settled his claims. However, Fast seeks to use those alleged trial errors to invalidate the settlement agreement between Marston and Black. This would strongly discourage defendants from settling their cases.

Any errors at trial cannot be used to undermine the settlement entered into by Marston. To do so would undermine settlements and contravene the policy that encourages settlements in Missouri. Further, any argument regarding the trial court's alleged errors is for a different forum, notably the appeal in *Black I*. This appeal cannot be used by Fast as an avenue to correct errors he perceives occurred in *Black I*.[2]

C. Neither RSMo. § 537.060 or Glidewell v. S.C. Management, Inc., 923 S.W.2d 940 (Mo. App. 1996) control this case. It is controlled by RSMo. 538.230 and Marston is protected from liability. (Response to Point 2, part E).

Both RSMo. § 537.060 and RSMo. § 538.230 apply to settlements and their effect

[2]On appeal in *Black I*, the Court of Appeals found that Verdict B should not have been given because Fast failed to submit a verdict director applicable to Marston. *Black v. Fast*, WD #67377, pg. 15 (March 25, 2008).

on claims for contribution and indemnity. However, RSMo. § 538.230 applies specifically to claims of medical malpractice. It specifically states it applies in actions "against a health care provider for damages for personal injury." RSMo. § 538.230.1. On the other hand, RSMo. § 537.060 is a general statute. As noted by *Hewlett v. Lattinville*, 967 S.W.2d 149, 151 (Mo. App. 1998), RSMo. 538.230 "applies only to actions against health care providers. Settlements in other civil actions are governed by the provisions of Sec. 537.060." As a result, RSMo. 538.230 applies in this case as "[t]he provisions of a more specific statute should be applied rather than the provisions of a more general statute." *City of Ellisville v. Lohman,* 972 S.W.2d 527, 534 (Mo. App. 1998) (citing *State ex rel. Chicago, Rock Island & Pacific Railroad Co. v. Public Service Commission,* 441 S.W.2d 742, 746 (Mo. App. 1969). As Marston's settlement is controlled by RSMo. 538.230, he is entitled to the protections it affords against claims of indemnity or contribution brought by Fast as stated above.

The fact that the jury apportioned all fault to Marston does not somehow operate to make RSMo. § 538.230 inapplicable. The Court in *Glidewell,* 923 S.W.2d at 946-7 stated that "apportionment is ill-suited for cases where a party's liability for negligence is solely derivative." It went on to find that the claim of indemnity was then controlled by RSMo. 537.060 and the hospital in that case could seek indemnity based upon its employer-employee relationship with the defendant doctors. *Glidewell,* 923 S.W.2d at 946-7.

However, *Glidewell* involved a situation where a hospital (as an employer) had liability solely through its agents, the defendant doctors. *Glidewell,* 923 S.W.2d at 946-7,

959-60. The hospital's liability could only and did only come from its legal relationship with the physicians, i.e. employer-employee. Fast's liability was not solely derivative. In the underlying medical malpractice suit, Black alleged that Fast had independent liability. (L.F. 1, 19-20, ¶¶ 10-11, 13). Marston testified that Fast actively participated in the operation and that nurses had the responsibility for counting sponges as they were placed and removed. (L.F. 1, pg. 133, lns. 3-8; pg. 136, lns. 1-24; pg. 143, lns. 21-25; pg. 144, lns. 1-10). Issues of liability were clearly contested between those involved in the surgery. Liability for Fast was not solely arising out of his legal relationship with Marston. Rather, Fast's alleged liability arose out of his own acts distinguishing this matter from *Glidewell*.

Verdict B cannot be seen as a basis for an argument that Fast's liability is solely derivative. First, Verdict A established liability on the part of Fast. (L.F. 1, 30). Second, Marston did not present his arguments to the jury. (L.F. 1, 33-35). Only Black and Fast had that opportunity. As Marston was no longer a party, he could not intervene or appear to give his own testimony and present his own witnesses, to defend himself against Fast's accusations, to cross-examine witnesses, or to argue his cause to the jury. Given those circumstances, the apportionment found by the jury is far from surprising.

That finding in Verdict B, given the circumstances, does not end the inquiry and does not retroactively place this case within the provisions of RSMo. § 537.060. Rather, the question is whether there was a basis for apportionment. Given the allegations regarding Fast and Marston, there was a basis for apportionment unlike *Glidewell*. As

there was a basis for apportionment, RSMo. § 538.230 applies and protects Marston from any claim of indemnity.

Even if this case falls under RSMo. § 537.060, Marston is protected from liability. RSMo. § 537.060 states:

> Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tort-feasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tort-feasor. The term "noncontractual indemnity" as used in this section refers to indemnity between joint tort-feasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

Where liability is based upon a legal relationship, like employer-employee, settling

defendants are not afforded the protections of RSMo. § 537.060. *See Glidewell,* 923 S.W.2d at 946-7; *Manar v. Park Lane Medical Center,* 753 S.W.2d 310 (Mo. App. 1988). Fast's and Marston's relationship; however, was not based upon such a legal relationship. As stated above, Fast's negligence was based upon his independent acts. (L.F. 1, 19-20, ¶¶ 10-11, 13). When each party is chargeable with active or affirmative negligence contributing to the injury neither party is entitled to indemnity from the other. *Lewis v. Amchem Products, Inc.*, 510 S.W.2d 46, 48 (Mo. App. 1974). In *Campbell v. Preston*, 379 S.W.2d 557 (Mo. 1964), the Court addressed the right of indemnity between defendants. That case arose from a claim that plaintiff's wife died from a negligently prescribed drug. They sued the physician among other hospital employees. *Campbell*, 379 S.W.2d at 558. The physician filed a cross-claim for indemnity, which was dismissed. *Id.* On appeal, the dismissal was upheld as the defendants were alleged to be in *pari delicto* and as he was "charged with active and concurrent negligence," it cannot be said he was charged with "liability solely by imputation of law." *Id.* at 562.

There was no legal relationship between Fast and Marston to exclude the settlement from the protections of RSMo. § 537.060. Rather, the basis for negligence against Fast was based on his own negligent acts. Black from the outset asserted Fast was negligent in his performance of the surgery. (L.F. 1, 19-20, ¶¶ 10-11, 13). As a result, Fast's negligence did not arise solely due to a legal relationship and the settlement falls within the general rule in RSMo. § 537.060 that protects settling defendants from claims of non-contractual liability.

CONCLUSION

For the foregoing reasons, the Circuit Court did not error in granting Marston's Motion for Summary Judgment as the uncontroverted facts established he was entitled to judgment as a matter of law. This Court should reverse the opinion of the Court of Appeals and affirm the Circuit Court's entry of summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c) AND 84.06(g)

COMES NOW Peter Maharry, counsel of record for Respondent F. James Marston, M.D., and being of lawful age and having been first duly sworn, states upon his oath that this Brief complies with the limitations contained within Supreme Court Rule 84.06(c). I further state this Brief contains 3,825 words (exclusive of the cover page), and that this Brief was prepared with and formatted in Word Perfect 5.X or higher. I further state this Brief is in Times New Roman type, 13 font. I further state that a CD-ROM containing this Brief is being filed herewith and said disk has been scanned for viruses and is virus free.

_____

PETER MAHARRY

CERTIFICATE OF SERVICE

I hereby certify that two copies of the above and foregoing, and a copy of the CD-ROM submitted to the Supreme Court, was mailed, via U.S. Mail, postage prepaid, this ____ day of March, 2009, to:

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APPENDIX

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