THE SUPREME COURT OF MISSOURI

SANDRA BACH, Appellant/ Cross Respondent	)	SC NO. 89001
vs.	)	
WINFIELD FOLEY FIRE PROTECTION DISTRICT, Respondent/ Cross Appellant	)	

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI

The Honorable Dan Dildine,
Circuit Judge

SUBSTITUTE REPLY AND RESPONDENT BRIEF OF APPELLANT/CROSS RESPONDENT

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SUPPLEMENTAL STATEMENT OF FACTS

Clarifications, Corrections, and Additions to Respondent/Cross Appellant's Statement of Facts

Sandy first saw the fire truck when Sam came up over the dip in the road. (T.R. 21). The impact then occurred "within seconds." (T.R. 14; 22).

Sandy did not testify that her husband had driven her through the intersection of Route Y and EE "several times a month for over thirty years" or that she knew where the sun would be positioned at 5:28 p.m. (T.R. 20). Rather, she testified that she had driven with her husband, generally, for thirty years at least several times a month and that when she left her home with Sam the day of the collision, she knew at that time where the sun was positioned. (T.R. 20).

Prior to reaching the crest of the hill, neither Sam nor Sandy had any indication that a fire truck was parked in their lane of traffic; nor did they see a helicopter or any people. (T.R. 2, 7, 14).

Sandy does not believe that paragraph three of page 4 of the District's Substitute Brief bears any significance to the issues before this Court. Therefore, Sandy offers no Supplemental Statement of Facts in response to them, nor does she vouch for their accuracy.

During the trial court's Instruction Conference, Plaintiff objected to the submission of Instruction No. 7, the Verdict Director, as follows:

"I would object to that Verdict Director because I don't believe that comparitive (sic) fault is pertinent to this case.

The only reason it would be is if there was a valid cause of action or affirmative defense or joint venture. I don't believe the fourth element of joint venture has been met in that (sic) case, and that is the [e]quality (sic) in determining the direction of the enterprise. That's been defined by various case law as the mutual right to control.

In this situation, there's no evidence that Mrs. Bach had the right to control the vehicle because she never learned how to drive and in fact could not drive an automobile.

For that reason, comparitive (sic) fault should not be submitted in this case. Further, comparitive (sic) fault should not be submitted in the case because there's no evidence that Sam Madden failed to keep a careful lookout and he stated that when he came, before coming to that crest, there was nothing to distract him.

> There was (sic) no people in the road. There was nothing to that effect.
>
> ….I'm just objecting to the whole comparitive (sic) fault aspect of it……He…also testified that the first time he saw the fire truck is when he came to the crest.
>
> So for those reasons, I would….object to having any comparitive (sic) fault given to the jury in this." (T.R. 43).

Plaintiff renewed his objections to the submission of Instructions 8, 9, 10, and Verdict A, all of which included comparative fault language. (T.R. 43-44). Sandy offered alternative Instructions which did not submit or include comparative fault, but all were refused. (T.R. 43-44). The trial court ruled that Sandy's ownership of the automobile with Sam driving at her request established an agency relationship as a matter of law. (T.R. 8).

Clarifications, Corrections, and Additions to Respondent/Cross Appellant's Cross Appeal Statement of Facts

A Stipulation for Dismissal of Samuel Madden was filed on February 26, 2006, or about five months before trial. (S.L.F. 1). On July 3, 2006, Defendant hand delivered Sandy's attorney with a Request for Admission, asking Sandy to admit that she had received the sum of $25,000 "paid by the insurer of Samuel Madden, which payment is attributable to the accident and injuries referred to in

the Petition." (L.F. 7; S.L.F. 3, 6). Two days later, Sandy mailed her admission to the District's attorney's office at 4925 Lindell Boulevard, St. Louis, Missouri, 63108, which stated, "Plaintiff admits she settled her case against Samuel E. Madden for $25,000.00." (S.L.F. 2). Said Admission was received and file stamped by the Lincoln County clerk on July 6, 2006. (S.L.F. 2). On July 7, 2006, the Court granted Plaintiff leave to file a Second Amended Petition. (L.F. 7). Plaintiff's Second Amended Petition was filed on July 7, 2006 and removed Samuel Madden as a Defendant. (L.F. 10-12). On July 17, 2006, the District filed its Answer to Plaintiff's Second Amended Petition. (L.F. 13-17). The District did not plead any claim for setoff in its Answer. (L.F. 13-17).

In its offer of proof regarding medical bills from St. John's Medical Center, the District alleged that twenty-six thousand nine hundred eighty four dollars and forty cents ($26,984.40) was not collected by the hospital where Sandy treated due to "Medicare hav[ing] an agreement that when [Medicare] pay[s] the charges that were incurred, then the provider of the services has to write off the remainder." (T.R. 8-9). The District offered Exhibits B and L as the only evidence for this allegation and did not question Sandy, any representative of the billing department at the hospital, or any Medicare representative outside the presence of the jury. (T.R. 8-9).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBERS 7, 8, 9, 10, AND VERDICT A AND REFUSING INSTRUCTIONS B, C, AND "REFUSED" VERDICT A, AND IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF LIABILITY AS A RESULT BECAUSE THE EVIDENCE DID NOT SUPPORT THE SUBMISSION OF COMPARATIVE FAULT AS TO PLAINTIFF IN THAT ANY NEGLIGENCE OF DRIVER SAMUEL MADDEN CANNOT BE IMPUTED TO HER SINCE PLAINTIFF WAS A PASSENGER IN THE MOTOR VEHICLE, AND SHE DID NOT HAVE A MUTUAL RIGHT TO CONTROL THE DIRECTION OF THE CAR RIDE SINCE SHE NEVER LEARNED HOW TO DRIVE AN AUTOMOBILE.

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II. THE TRIAL COURT DID NOT ERR AND DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO PERMIT THE DISTRICT TO AMEND ITS ANSWER AND ASSERT RIGHT OF SET OFF FOR SETTLEMENT PAYMENT BY DEFENDANT MADDEN, AND WHEN IT REFUSED TO OFFSET THE AMOUNT OF $25,000 AGAINST THE JUDGMENT ENTERED IN THE CASE BECAUSE THE COURT'S REFUSAL WAS NOT CLEARLY AGAINST THE LOGIC OF THE CIRCUMSTANCES NOR SO ARBITRARY AND UNREASONABLE AS TO SHOCK THE SENSE OF JUSTICE AND INDICATE A LACK OF CAREFUL CONSIDERATION IN THAT THE DISTRICT FAILED TO PLEAD SET OFF IN ITS ANSWER AS REQUIRED BY RULE 55.08; THE DISTRICT KNEW ABOUT THE SETTLEMENT AS WELL AS ITS AMOUNT PRIOR TO TRIAL; AND HAD AT LEAST FOUR DIFFERENT OPPORTUNITIES TO AMEND ITS ANSWER AND ASSERT THE RIGHT OF SET OFF, BUT FAILED TO DO SO.

[This Point Relied On Responds to Respondent/Cross Appellant District's Point Relied On II]

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[This Point Relied On Responds to Respondent/Cross Appellant District's Point Relied On III]

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ARGUMENT

I. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBERS 7, 8, 9, 10, AND VERDICT A AND REFUSING INSTRUCTIONS B, C, AND "REFUSED" VERDICT A, AND IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF LIABILITY AS A RESULT BECAUSE THE EVIDENCE DID NOT SUPPORT THE SUBMISSION OF COMPARATIVE FAULT AS TO PLAINTIFF IN THAT ANY NEGLIGENCE OF DRIVER SAMUEL MADDEN CANNOT BE IMPUTED TO HER SINCE PLAINTIFF WAS A PASSENGER IN THE MOTOR VEHICLE, AND SHE DID NOT HAVE A MUTUAL RIGHT TO CONTROL THE DIRECTION OF THE CAR RIDE SINCE SHE NEVER LEARNED HOW TO DRIVE AN AUTOMOBILE.

A. Sandy Has Preserved Her Objection to the Question of Agency Because She Specifically Objected to Her Right to Control the Vehicle

The District spends a considerable amount of time arguing that Sandy has not preserved her objection to the question of whether an agency existed between Sam and Sandy. *See* Substitute Brief of Respondent/Cross Appellant, pages 16-17; 21-25; 29). Curiously, in the Court of Appeals, the District made no such argument. Regardless, Sandy has preserved her objections.

The dialogue surrounding Sandy's objections to the jury instructions which allowed for the imputation of any fault of Sam to Sandy can be found on pages 5-7 of Sandy's Supplemental Facts of this Brief. As a review of this dialogue reveals, Sandy specifically objected to the giving of Instructions 7, 8, 9,10, and Verdict A on the grounds that comparative fault did not apply to the case because Sandy's "right to control" had not been established. (T.R. 43). Sandy stated this objection within the context of the affirmative defense that had been pled by the District, that of a joint venture, stating that one of the necessary elements of such a relationship had not been established, again, that of "right to control."

As the District admits and as Sandy argues in her Substitute Brief, the liability of joint venturers to third parties for negligence is governed by the principles of partnership and agency law. *See* Swindell v. J.A. Tobin Construction Co, 629 S.W.2d 536, 542 (Mo. App. 1981). In order to establish an agency *or* joint venture, the "right of control" must be established. *See* Gardner v. Simmons, 370 S.W.2d 359, 362 (Mo. 1963) and McSorley v. Hauck, 883 S.W.2d 562, 566 (Mo. App. 1994). Stated simply, if there is no right to control, there is neither a joint venture nor agency and any fault of Sam cannot be imputed to Sandy. Thus, the element of "right to control" is common to both agency and joint venture and it is the right of control to which Sandy specifically objected during the Instruction conference. (T.R. 43-44).

The District argues that Sandy presented no facts to rebut Sandy's right to control. However, as part of her objections during the Instruction conference, the

facts that Sandy never learned how to drive an automobile and did not possess the capability to drive were clearly stated. (T.R. 43). The District goes on to state that once Sandy had admitted that the car trip was entirely for her benefit, there was very little evidence that she could offer to rebut agency. It should be noted that Sandy never admitted that the trip was "entirely for her benefit." Nonetheless, Sandy testified that there was no agreement to share money for gas or other expenses of the trip and there was no expectation that she would share any of the driving responsibilities since she did not know how to drive. (T.R. 3; 13).

The District places much emphasis on a so called "presumption" of agency, which Sandy assumes is based upon the decisions prior to Stover v. Patrick which stated that the driver of an automobile in which the owner was riding was presumed to be the agent of the owner. However, as stated, Stover rejected that analysis in holding that the mere ownership of an automobile bears no significance to the right to control a vehicle.

The District states that the ruling of the trial court which allowed Sam's fault to be imputed to Sandy within the jury instructions submitted was based upon factors unrelated to the presumption of agency. Sandy assumes that the District argues that the trial court based its ruling upon other factors besides the fact that Sandy owned the car. On the contrary, the trial court ruled as a matter of law that Sandy's ownership of the automobile with Sam driving at her request, established an agency relationship. (T.R. 8). The District goes on to say that since Sandy did not request a jury determination of agency, that if the case is remanded this

question should not be submitted to the jury. While it is true that no request was made for a jury determination on this issue, this very issue was specifically withdrawn from the jury by the trial court's ruling. The District acknowledges that this issue can be withdrawn in its next point.

On page 22 of the District's Substitute Brief, five cases are cited for the holding that when the facts in a case establish agency as a matter of law, there is no error in withdrawing this issue from the jury. In the first of these cases, Cline v. Carthage Crushed Limestone Company, the company presented no evidence at trial to rebut the existence of an employee-employer relationship. *See* Id. at 112. ("The transcript does not bear out appellant's contention that agency was a live issue."). In the second case, Hanser v. Lerner, 153 S.W.2d 806 (Mo. App. 1941), the Court reviewed the record and found no dispute that the company sought to be found liable for the negligence of its driver owned the truck being driven at the time of the accident, and that the driver was the company's employee and was acting within the scope of his employment at the time of the accident. Id. at 808. (It should be noted that this case predates the Stover decision, which found ownership bears no significance in deciding whether an agency exists.) The other cases cited by the District reach the same result under similar reasoning. Sandy fails to understand the significance of the District's argument here, as Sandy presented testimony to rebut her ability or right to control the vehicle Sam was driving, unlike the cases mentioned here. Therefore, she has preserved her objections.

B. Under *Stover v. Patrick*, Mere Ownership of a Vehicle Bears No Significance to the Right to Control[1]

The District states that the issue of imputed negligence in Stover v. Patrick is framed in terms of whether joint ownership standing alone is sufficient to impute negligence as a matter of law. This is partially true, as the Court also set out to decide whether a co-owner passenger had an equal right to possession and control of the vehicle during the time of its operation. *See* Id. at 399. District then cites Parker v. McCartney, 338 P.2d 371 (Ore. 1959), an Oregon Supreme Court case which was quoted by the Stover Court, for the premise that co-ownership itself refutes agency.

In holding that the negligence of a spouse-driver cannot be imputed to a passenger-spouse of a jointly owned automobile, both the Stover and Parker Courts criticize the realities of a passenger's right to wrest the wheel from the driver while on a public street or highway. Of notable significance to the instant case, the Parker Court categorized the passenger's right to control the car in that

[1] On Page 34 of Sandy's Substitute Brief ("Summary"), she states the Manley decision's holding as being that mere ownership of a car does not automatically entitle the owner-passenger to control the vehicle, and the Stover decision as holding the opposite. As explained in Sandy's Substitute Brief Section AI and AIV, pages 13-14 and 23-27, the opposite is true. Sandy simply mistakenly inverted the names of the two cases in her Summary and she regrets the error.

case as "sheer mockery" since he did not know how to drive. Id. at 373. The Stover Court acknowledges that prior cases finding a spouse-passenger's right to control were based on summary reasoning with no real inquiry of the underlying realities of a passenger's ability to control the car in each case. Id. at 401. While the Stover Court reaches the right result in finding no imputation of negligence, the holding is limited to the joint ownership context, as District suggests. However, stated a bit differently, the Stover Court found that the mere ownership of an automobile bears *no significance* to the right to control a vehicle. *See* Stover at 401.

In analyzing a non-owner passenger's right to control a vehicle, the Manley Court notes that whether the passenger gives driving directions is not important in itself; rather, it is the understanding between the driver and passenger that the passenger has the right to have his wishes respected *to the same extent* as the driver. Manley v. Horton, 414 S.W.2d 254, 260 (Mo. 1967). The Court goes on to state that the essential question is whether the parties have agreed to an *equal voice in the management* of the vehicle. Id. While Stover and Manley are contradictory in their holdings, Stover at least answers the question of whether ownership automatically translates into an equal voice in the management of the car. While the District places much significance on the fact that the passenger was asleep at the time of the accident, and the Court's belief that this did not necessarily negate the right to control, Sandy agrees that under a "Fact" analysis,

this evidence alone would not necessarily defeat imputation of negligence. *See* Discussion at Section D.

Rather than round out "an instructive trilogy" as the District suggests, the Western District decision in Campbell v. Fry and its progeny would further muddy the waters if its holding had not been overruled. District is correct to state that this decision recognizes a presumption that when a person is riding as a passenger in his own car, the driver is the agent of the owner. However, this Court's decision in Stover post dates this decision and overrules the very premise upon which it is based; i.e., that ownership of a vehicle is synonymous with a right to control. This case does present a good example of why an "automatic" right to control a vehicle should not be recognized for a passenger-owner given the kidnapping involved.

The District cites two chauffer cases that also predate the Stover decision. These cases start with the same presumption and conflict with Stover for identical reasons. Furthermore, contrary to what the District asserts, under these decisions the presumption of control can be rebutted, whereas the Eastern District in this case and the Manley Court suggest that it cannot. The Eastern District decision in Perricone v. DeBlaze, 655 S.W.2d 724 (Mo. App. 1983) is based upon the same faulty premise, that of a presumption of agency and control. Hill v. St. Louis Public Service, Co., 64 S.W.2d 633 (Mo. 1933) fails under the same faulty logic as Manley with its finding that the negligence of a driver is imputable to the owner present in his own car as a matter of law.

As Stover and Manley highlight, the current state of Missouri law regarding an owner passenger's right to control a motor vehicle and the imputation of his driver's negligence to him is in a state of contradiction and the law surrounding this issue must be clarified.

C. In a Non Employee-Employer Agency Relationship, the Principal is not Vicariously Liable for the Negligence of Her Agent

On page 27 of the District's Substitute Brief, the District argues that Sandy is attempting to create a conflict in the Missouri law of agency where no conflict exists. Further, the District argues that the law of agency in Missouri "is not what Sandy contends it to be." As explained in Sandy's Substitute Brief, there is a critical difference between an agency relationship and that of a master-servant. Since this Court has adopted the Restatement definition of agency, Sandy defers to the Restatement for an explanation. *See* State ex rel Ford Motor Co. v. Bacon, 63 S.W.3d 641, 642 (Mo. 2002).

Under the Restatement, a principal is subject to vicarious liability for an agent's conduct towards a third party *if* the agent is an *employee* who commits a tort during the scope of his employment; i.e., under a master-servant relationship. Restatement (Third) of Agency, § 7.03 (2)(a). Stated another way, "respondeat superior is inapplicable when a principal does not have the right to control the actions of the agent." *See* Restatement (Third) of Agency, Comment b § 2.04. The Restatement view represents the view espoused in Sandy's Substitute Brief and herein.

The District argues that there is no significant difference between the use of the terms "principal-agent" and "master-servant." As stated in Part A, Section II of Sandy's Substitute Brief, there is in fact a critical difference, that of the degree of "control." In a master-servant relationship, the servant remains entirely under the control of her master, while in an agency relationship, the agent maintains control over the physical details of his conduct. *See* Part A, Section II of Sandy's Substitute Brief. The District even admits in its Substitute Brief that the ultimate test in Missouri for determining the liability of a principal for the acts of an agent is the right to control the details of the agent's work. *See* Substitute Brief of Respondent and Cross Appellant, page 18, *citing* Gardner v. Simmons, 370 S.W.2d 359, 362 (Mo. 1963) and page 28 ("The physical activities of agents…are usually not subject to the right of control by their principal") *citing* Nagels v. Christy, 330 S.W.2d 754, 757 (Mo. 1959). Sandy will admit that various Missouri cases often use the terms "agent" or "servant" or "agency"/ "master-servant" interchangeably, and in most cases this is perfectly appropriate since a master-servant relationship is a species of agency, but as Sandy's discussion makes clear, when analyzing the "right of control," the terms must be used carefully.

The District cites the Scott and Hodges decisions as support for its argument, but each can be distinguished on its own facts. Hodges v. City of St. Louis, 217 S.W.3d 278 (Mo. 2007) (en banc) does not delve into the degree of control element since agency was established as a matter of law per a state statute dictating that police officers were agents of the City of St. Louis. *See* Hodges at

281. Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560 (Mo. App. 2002) recognizes the "control" element of agency, but lists a series of some fifteen facts that established a hospital's control over a physician in that case. *See* Scott at 567. This case was also limited to a discussion of whether the physician was a servant or independent contractor of the hospital.

D. Missouri Should Analyze a Passenger's Right to Control a Motor Vehicle as a Question of Fact and Any Presumption that an Owner Has Such a Right to Control should be Eliminated

The District cites the Supreme Court of Pennsylvania's decision in Smalich v. Westfall as a case cited by Sandy as representative of the "Question of Fact" test, which she believes this Court should adopt. Sandy supplies no such endorsement of this case as falling under this category; nor does Sandy adopt Smalich's approach to the issue before this Court. *See* Sandy's Substitute Brief, page 19-21. Rather, this case is representative of "View 2" ("An Owner-Passenger's Right to Control Cannot Exist in the Absence of a Joint Venture, Master-Servant, or Principal Agent Relationship"), as stated in Sandy's Substitute Brief. While this case conducts an excellent analysis and comparison of the relationships of agency versus that of master-servant and reaches the correct result under the facts of that case (no imputation of negligence to passenger-owner), Sandy believes the better rule is to make a passenger's right to control a motor vehicle a question of fact. Therefore, Sandy limits her discussion of Smalich since its method of analysis of the issue before this Court is not based upon the

"Question of Fact" test that Sandy espouses as the best solution to the problem, although it is one approach that the Court may wish to consider.

While Smalich recognizes the true distinction between the relationships of agency and master-servant (as opposed to a "whole new doctrine of agency," as the District argues), in holding that a principal maintains no control over the *physical details* of the work of his agent, while a master *does maintain such control*, the Court incorrectly concludes that a finding of joint enterprise or joint venture will automatically justify the imputation of a driver's negligence to that of a passenger. *See* Smalich at 481. Before reaching this conclusion, the Court holds, correctly, that a principal is not vicariously liable for the negligent physical details of the agent's work, while a master is so liable for the negligence of his servant. Id. However, in the end, in ruling that a finding of joint venture can allow for the imputation of a driver's negligence to that of the passenger, the Court failed to address or recognize that a joint venture is a species of agency, which would defeat vicarious liability. *See* Discussion at Section C.

Sandy would suggest that creating hard and fast rules that allow for the imputation of negligence only under certain legal relationships (such as that of a joint venture or master-servant), runs the risk of putting the cart before the horse and will create thoughtless attempts to impute negligence simply as a function of the relationship of the parties, rather than upon a careful study of the underlying facts bearing on the right to control.

The District cites the Maryland case of Slutter v. Homer, 223 A.2d 141 (Md. 1966) as expressing the law of Missouri has it should be. It is Sandy's belief that the presumption portion of the Maryland rule complicates matters and is difficult to apply unlike the "Question of Fact" test. In Maryland, each case is analyzed under two theories; that of imputed negligence alone, and that of agency. Id. at 145. The Court admits that the imputation of a driver's negligence to a passenger *standing alone*, i.e., not based upon any legal relationship, such as agency, is governed by the underlying facts bearing on right to control; while the imputation of negligence based upon the legal relationship itself; e.g., agency, applies regardless of the underlying facts. Id.

Sandy explains the fallacy involved in imputing negligence in an automobile case simply due to the legal relationship involved in the preceding paragraph. Yet, despite this fallacy, Maryland still applies the presumption of agency when the owner is present in the vehicle, as the District states. As explained in Section B of this Brief, Missouri specifically rejected the notion that ownership bears any significance to the right to control a motor vehicle in Stover v. Patrick. Hence, the presumption test doesn't fit. The much simpler and consistent rule to apply is the other portion of the Maryland test which analyzes the right to control based upon the underlying facts.

As Sandy explains in Section AIII of her Substitute Brief (pages 18-23), states have addressed a passenger-owner's right to control an automobile in several ways. Missouri should recognize the criticisms that attach to any

presumption of control over an automobile by the passenger in the modern day of the automobile where, factually, a passenger's right to control a car is premised largely upon a legal fiction that a passenger has any ability to control a vehicle and when any attempt to wrest the wheel from the driver would normally result in dangerous backseat driving. On the other hand, a "blanket" rule that a passenger never has the ability to control a vehicle ignores those instances where such control may exist. Sandy would suggest that the "compromise" between these two views would simply be to make the determination of control a question of fact. In Section AIII(a) of her Substitute Brief (page 19), Sandy has cited several states that use such a test.

Missouri has already recognized that certain factors can undermine an owner-passenger's right of control over a vehicle. *See* Campbell v. Fry, 439 S.W.2d 545 (Mo. App. 1969) (kidnapping); Manley v. Horton, 414 S.W.2d 254 (Mo. 1967) (passenger asleep); and Stevens v. Westport Laundry Co., 25 S.W.2d 491, 498 (whether a passenger knows how to drive). In the instant case, Sandy never learned how to operate a motor vehicle and did not possess a Missouri driver's license. (T.R. 3, 13). As the Stevens decision suggests, at minimum this should certainly be a factor in determining whether Sandy had a right to control the vehicle. On the other hand, *any* recognition of a non-licensed driver to control a motor vehicle is contrary to Missouri law, as Mo. Rev. Stat. § 302.020 makes clear.

Other factors can certainly undermine an owner-passenger's right to control. An intoxicated owner-passenger who has taken the responsible action of handing over his keys to a sober driver has relinquished control over his vehicle. An owner-passenger who has chosen to take a nap or read a book likewise has relinquished control. Other examples can certainly be devised and appreciated.

This Honorable Court should adopt the Question of Fact Test, which allows a passenger's right to control a motor vehicle to be carefully analyzed on a case by case basis, and hold as a matter of law that a driver who does not know how to drive or operate a motor vehicle or who does not possess a valid Missouri driver's license does not have the right to control a motor vehicle. Furthermore, any cases holding that mere ownership of an automobile automatically entitles the owner of the vehicle to the right to control the vehicle, including Manley v.Horton and its progeny should be overruled.

II. THE TRIAL COURT DID NOT ERR AND DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO PERMIT THE DISTRICT TO AMEND ITS ANSWER AND ASSERT RIGHT OF SET OFF FOR SETTLEMENT PAYMENT BY DEFENDANT MADDEN, AND WHEN IT REFUSED TO OFFSET THE AMOUNT OF $25,000 AGAINST THE JUDGMENT ENTERED IN THE CASE BECAUSE THE COURT'S REFUSAL WAS NOT CLEARLY AGAINST THE LOGIC OF THE CIRCUMSTANCES NOR SO ARBITRARY AND UNREASONABLE AS TO SHOCK THE SENSE OF JUSTICE AND INDICATE A LACK OF

CAREFUL CONSIDERATION IN THAT THE DISTRICT FAILED TO PLEAD SET OFF IN ITS ANSWER AS REQUIRED BY RULE 55.08; THE DISTRICT KNEW ABOUT THE SETTLEMENT AS WELL AS ITS AMOUNT PRIOR TO TRIAL; AND HAD AT LEAST FOUR DIFFERENT OPPORTUNITIES TO AMEND ITS ANSWER AND ASSERT THE RIGHT OF SET OFF, BUT FAILED TO DO SO.

[This Point Relied On Responds to Respondent Cross Appellant District's Point Relied On II]

Preliminary Statement

In the District's original Reply Brief filed with the Eastern District, District argued in its Point Relied On "that the matter and amount of the [Samuel Madden] settlement was tried by consent" as the reason for the trial court's error on this issue. *See* Cross-Appellant's Reply Brief, page 2. However, in the District's current Point Relied On before this Honorable Court, it cites the reason "that the matter and amount of the settlement was a matter for determination by the trial court without intervention of the jury." *See* Substitute Brief of Respondent and Cross-Appellant, page 35. Pursuant to Missouri Supreme Court Rule 83.08(b), substitute briefs "shall not alter the basis of any claim that was raised in the court of appeals brief." For this reason, the District's Point II should be denied. Should this Honorable Court decide to address the error alleged by the District, Sandy's response follows.

A. Rule 55.08 Required the District to Plead Set Off in its Answer

Rule 55.08 provides:

> "In pleading to a preceding pleading, a party *shall* set forth all applicable affirmative defenses and avoidances…" (emphasis added).

A reduction or set off of a verdict under Mo. Rev. Stat. Section 537.060 must be pleaded and proved as an affirmative defense. Norman v. Wright, 153 S.W.3d 305, 306 (Mo. 2005) (en banc) ("Norman II").

In Norman, family members sued two doctors and a hospital. Id. at 305. One year before trial, the family reached a settlement of $100,000 with the hospital and one of the doctors. Id. The case proceeded to trial against the remaining doctor. Id. After the jury returned a verdict for the family, the doctor moved to reduce the verdict by $100,000, citing Section 537.060. Id. The trial court granted the motion and reduced the verdict by $100,000. Id. An appeal followed and the Missouri Supreme Court granted transfer. Id. The Supreme Court reversed the trial court's judgment and ordered that the case be remanded for entry of the full jury verdict without a reduction for the settlement amount. Id. at 307. In reaching its decision, the Court noted that the partial settlement had occurred a year before trial and that the issue of reduction was not raised by the pleadings and was tried without any reference to Section 537.060. Id. at 306. The Court held that a reduction under Section 537.060 must be pleaded and proved as an affirmative defense. Id. at 306.

As in Norman, the issue of reduction was not pleaded as an affirmative defense in the instant case, despite the District having at least four separate opportunities over five months to do so. The issue of reduction was first mentioned by the District after the jury returned its verdict (T.R. 46) and no evidence was ever presented on the issue during the trial. Plaintiff's counsel cannot prove the exact moment when the Fire District's attorney first became aware of the Madden settlement, as Plaintiff's counsel does not have access to the correspondence between Madden's attorney and the District, nor has such correspondence been made a part of the Record on Appeal. However, the Stipulation for Dismissal of Samuel Madden was filed on February 26, 2006, some five months before trial. (S.L.F. 001). While the District claims it never received this from Madden's attorney, any pleadings in the file are of public record. Hence, the District had at least five months to learn of the settlement. Reviewing the court file was the District's first opportunity to amend its answer and claim a set off.

Even if the District failed to review the court file, and even if it claims it did not learn of the settlement until later, the District certainly knew of the settlement with Samuel Madden and its amount at least sixteen (16) days before trial, as it hand delivered to Plaintiff's counsel a Request for Admission on July 3, 2006, in which reference is made to the $25,000 settlement. (L.F. 7; S.L.F. 003, 006). This was the District's second opportunity to amend its answer and claim a set off. Two days later, Sandy mailed her admission to the District's attorney's

office at 4925 Lindell Boulevard, St. Louis, Missouri, 63108, which stated, "Plaintiff admits she settled her case against Samuel E. Madden for $25,000.00." (S.L.F. 002). Said Admission was received and file stamped by the Lincoln County clerk on July 6, 2006. (S.L.F. 002). This was the District's third opportunity to amend its answer and claim a set off.

On July 7, 2006, the Court granted Plaintiff leave to file a Second Amended Petition (L.F. 7), which provided the District a fourth opportunity to file an affirmative defense of set off in its Answer to the Second Amended Petition. However, when the District filed its Answer on July 17, 2006 (two days before trial), no claim for set off was made. (L.F. 13-17). The District acknowledges in its Substitute Brief that it had the opportunity to set forth this affirmative defense in its Answer, but unfortunately failed to do so.

B. The Hoover Decision is Factually Inapposite

The District points to the Hoover decision for support that the trial court in the instant case abused its discretion in not granting the District leave to amend its Answer to include set off and that a court abuses is discretion if the denial of a motion to amend a pleading is solely based upon the timing of the request. In reaching its result, the Hoover court can very easily be distinguished from the instant matter.

In determining whether to permit an amendment to a pleading, there are five factors that courts analyze. Hoover v. Brundage-Bone Concrete, 193 S.W.3d 867, 872 (Mo. App. 2006). The Hoover court reached its conclusion by applying

these five factors to the facts of that case and holding that all five factors weighed in favor of allowing the defendants to amend their Answer. Id. The facts of Hoover are as follows: seventeen days before trial, the plaintiffs settled with three of the defendants for $30,000, signing a release to that effect. Id. at 869. The remaining defendants did not learn of the settlement until *after* the jury verdict was reached. Id. (emphasis added). Two weeks after the trial against the two remaining defendants and after learning of the settlement, these defendants filed a Motion to File a Second Amended Answer to raise as an affirmative defense a set off of $30,000. Id. at 869-870. Before the trial began, the plaintiffs had failed to supplement an interrogatory answer concerning any settlement monies received by plaintiffs. Id. at 870. Defendants argued that they could not have made a good faith allegation requesting set off or reduction until after the trial, since that was the first time they were made aware of the settlement with the other defendants. Id. at 871. Furthermore, by failing to supplement their interrogatory regarding settlements, the plaintiffs denied them a reasonable opportunity to learn of the settlement through discovery. Id.

Unlike the defendants in Hoover, the District *knew at least sixteen days before trial* not only that Defendant Madden had settled with Plaintiff, but for what amount, as it hand delivered Plaintiff's counsel a Request for Admission on July 3, 2006, referencing the $25,000 settlement. (S.L.F. 005-006). Furthermore, unlike the plaintiffs in Hoover who did not supplement their interrogatory answer, Sandy promptly answered the Request for Admission two days later,

acknowledging the $25,000 settlement with Defendant Madden. (S.L.F. 002). As laid out in Part A, above, the District had *at least* four different opportunities to amend its Answer and claim a reduction, but failed to do so.

For these reasons, Hoover is factually inapposite to the instant matter. Norman, where the defendant, like the District, knew about the settlement prior to trial but failed to move to amend its Answer claiming a set off until after the trial was over, aligns factually here. The Hoover court even explains the critical difference between the facts of the two cases, pointing out that in Norman, the settlement had occurred some time before trial and the defendant's pretrial pleadings showed that he knew about the settlement prior to trial, as in the instant case. *See* Hoover, note five at 873.

C. A Claim for Set Off Must be Pleaded and Proved as an Affirmative Defense

The District cites the Eastern District CADCO decision as following Norman II and for good reason, as the facts in that case are almost identical to the facts in the instant matter.

In that case, Plaintiff CADCO settled with one of two defendants and filed a Stipulation for Dismissal three days before trial, acknowledging that it would dismiss its claims against the defendant (Coachman) with prejudice in return for a confidential settlement. CADCO v. Fleetwood Enterprises, Inc., 220 S.W.3d 426, 440 (Mo. App. 2007). The trial court then immediately entered an order dismissing defendant Coachman from the case. Id. The Plaintiff and remaining

defendant proceeded to trial three days later, with the jury ultimately finding for Plaintiff. Id. As in the instant case, the remaining defendant did not seek to amend its pleadings to include an offset until *after trial, but before judgment was entered.* Id. The trial court then entered judgment which included an offset for the amount of the settlement with the prior dismissed defendant. The Eastern District held this offset as error, recognizing as this Court held in Norman, that a reduction under Section 537.060 must be pleaded and proved as an affirmative defense, which had not been done. Id. at 441.

The District attempts to create a conflict where none exists in stating that the Eastern and Southern Districts are applying different standards. Despite different outcomes based entirely on different facts, the Hoover and CADCO decisions are consistent and follow the same reasoning as Norman. Contrary to what the District states, the defendant in CADCO did not move to amend its pleadings to allege a set off after judgment was entered. Rather, such leave was sought *before* judgment was entered, but *after* the jury had returned its verdict, just like the instant case. Unfortunately, given the numerous opportunities that exist to amend an Answer before and during trial, this is too late.

The District next asserts that this Court's holding in Norman II has had "unintended consequences" and that a party's failure to make a settlement known to the other party should be discouraged, as in Hoover. Sandy agrees that such behavior should be discouraged and the Hoover court did just that in reaching the right result given the facts of that case. However, any further discussion of

Hoover becomes irrelevant because Sandy clearly made her settlement with Samuel Madden known to the District prior to trial. Any argument by the District that it sought leave to amend its Answer as soon as it learned of the Madden settlement is disingenuous, as the District knew of the settlement at least sixteen days before trial, as discussed.

The District concludes its argument by stating that failure to find an abuse of discretion in the trial court's refusal to allow the District to amend its Answer to claim a set off will encourage delay in the announcement of settlements and "accomplishes no purpose of any use to the administration of justice." Sandy disagrees. If the courts allow parties to amend their pleadings to add allegations or affirmative defenses *after* trial when those parties know of facts and evidence to support those allegations or defenses *prior* to trial, the rules of pleading will be meaningless with little power or effect. Per Rule 55.08, "in pleading to a preceding pleading, a party *shall* set forth all applicable affirmative defenses and avoidances…" (emphasis added). If this Court begins to allow parties to plead defenses after trial when all necessary information and evidence pertaining to those defenses has been made known before trial, we shall begin to set forth on a very slippery slope indeed.

For these reasons, the trial court did not err and did not abuse its discretion when it refused to permit the District to amend its Answer and assert a right of set off and refused to offset the amount of $25,000 against the judgment entered because the trial court's refusal was not clearly against the logic of the

circumstances nor so arbitrary and unreasonable as to shock the sense of justice because the District was required by Rule 55.08 to plead a set off in its Answer, knew about the settlement and its amount prior to trial, and had at least four different opportunities to amend its Answer, but failed to do so.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT PURPORTED EVIDENCE OF MEDICARE WRITE OFFS OF SANDY'S MEDICAL BILLS BECAUSE THE TRIAL COURT'S REFUSAL WAS NOT CLEARLY AGAINST THE LOGIC OF THE CIRCUMSTANCES NOR SO ARBITRARY AND UNREASONABLE AS TO SHOCK THE SENSE OF JUSTICE AND INDICATE A LACK OF CAREFUL CONSIDERATION IN THAT THE DISTRICT'S OFFER OF PROOF WAS INSUFFICIENT AND PRESERVED NOTHING FOR REVIEW BY NOT SHOWING EACH FACT ESSENTIAL TO ESTABLISHING THE ADMISSIBILITY OF ANY WRITE OFFS AND, IN THE ALTERNATIVE, DISCOUNTED OR WRITTEN OFF MEDICAL EXPENSES BETWEEN A MEDICAL PROVIDER AND MEDICARE ARE COLLATERAL SOURCES, WHICH ARE INADMISSIBLE.

[This Point Relied On Responds to Respondent/Cross Appellant District's Point Relied On III]

A. The District's Offer of Proof was Insufficient and Preserved Nothing for Review

In order to preserve for appeal the issue of exclusion of evidence, offers of proof must be made at trial to show why the evidence is relevant and admissible. State v. Tisius, 92 S.W.3d 751, 767-768 (Mo. 2002) (en banc). To suffice, an offer of proof must show three things: 1) what the evidence will be; 2) the purpose and object of the evidence; and 3) each fact essential to establishing the admissibility of the evidence. Id. Where proffered evidence is excluded, relevancy and materiality must be shown by specific facts which are sufficient to establish admissibility in order to preserve the matter for review. Id. The purposes of an offer of proof are twofold: 1) to preserve the evidence so that the appellate court understands the scope and effect of the questions and proposed answers in considering whether the trial court's ruling was proper; and 2) to allow the trial judge to further consider the claim for admissibility. Id.

The preferred method for making an offer of proof is by asking the proposed witness questions outside of the jury's presence. Terry v. Mossie, 59 S.W.3d 611, 612 (Mo. App. 2001). Narrative offers of proof are occasionally adequate, but the offer must be more than a mere statement of the conclusions of counsel. Id. at 612-13.

The District's offer of proof can be found at pages 8-9 of the Transcript. (T.R. 8-9). In its offer, the District alleged that twenty-six thousand nine hundred eighty four dollars and forty cents ($26,984.40) was not collected by the hospital

where Sandy treated due to "Medicare hav[ing] an agreement that when [Medicare] pay[s] the charges that were incurred, then the provider of the services has to write off the remainder." (T.R. 8-9). The District offered Exhibits B and L as the only evidence for this allegation and did not question Sandy, any representative of the billing department at the hospital, or any Medicare representative outside the presence of the jury as support for this allegation. (T.R. 8-9).

Sandy does not dispute that the District explained what its purported evidence would be (an agreement between Medicare and the hospital to write off a portion of their bill) and the purpose and object of the evidence (to show that the hospital would not expect full payment from Sandy). However, the District failed to establish each fact essential to the admissibility of this evidence. Exhibits B and L use the terms "Medicare adjustments." However, no representative of either the hospital or Medicare was offered to testify as to the significance and meaning of an "adjustment," nor was any Medicare "agreement" produced. Furthermore, "Insurance Information" on Exhibit B notes that "[Sandy is] responsible for any co-payments, deductibles, and non-covered services." (S.L.F. 020). Exhibit L notes (at the bottom of the billing statement) that:

> "Amounts indicated to be paid by third parties are estimated by the hospital. However, the patient and/or responsible party have personally guaranteed payment and are responsible for the *total charges* on this statement." (S.L.F. 022). (emphasis

added).

However, Sandy was never questioned outside the jury's presence whether she was aware of any further payment obligations or liabilities for the hospital bill. If Sandy had been questioned, she may have testified that she had received notices from the hospital requiring additional payment. She may also have testified that Medicare was requiring her to reimburse a portion of what was paid out. The answers to these questions go to the relevancy of the proffered exhibits and bear directly on the admissibility of the issue of write offs and adjustments.

As in Terry, where the Court held that a narrative offer of proof in which no witnesses were questioned outside of the jury's presence and which consisted of counsel's conclusions, was insufficient, here, too, the District has failed to establish each fact essential to establishing the admissibility of the proffered evidence. Terry at 613. *See also* Porter v. Toys 'R Us-Delaware, Inc., 152 S.W.3d 310 (Mo. App. 2004), which is discussed further below, wherein it was held that the Defendant failed to preserve the issue of write offs and fee adjustments for appeal by failing to make a sufficient offer of proof. Id. at 322. In that case, counsel failed to question the plaintiff or outline what her testimony would be as to "what in fact happened with [her] bills," as in the instant case. Id. For these reasons, this matter should not be remanded for a new trial as to damages, as the District has failed to preserve this issue for appeal.

B. Discounted or "Written Off" Medical Expenses are Subject to the Collateral Source Rule and Inadmissible

Should the Court deem the District's offer of proof sufficient, the District's request for a new trial on the issue of damages should still be denied, since discounted or written off medical expenses are collateral sources and inadmissible in Missouri.

The collateral source rule is an exception to the general rule that damages in tort should be compensatory only. Porter v. Toys 'R Us-Delaware, Inc., 152 S.W.3d 310, 319 (Mo. App. 2004). This rule prevents a reduction of a tortfeasor's liability to an injured person by proving that payments were made from another source. Id. The theory behind this rule is that a wrongdoer should not be entitled to have the damages for which he or she is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, entirely independent of him or her. Id. at 319-320.

Medical insurance purchased by plaintiff and governmental benefits contingent upon a plaintiff's financial need, such as Medicare and Medicaid, are independent sources subject to the collateral source rule. Id. at 320. A defendant may not inform the jury of such sources. Id. Discounted or written off medical expenses pursuant to a contract or agreement between the medical provider and Medicare are not materially different from expenses paid by private insurance or another source. Id.

The District points to Farmer-Cummings for the holding that a plaintiff cannot benefit from and claim as damages write offs of medical bills for which the plaintiff has no obligation. However, as the Court notes in its decision and as the District even acknowledges in its Brief, that holding is restricted to *workers compensation cases only*, and the interpretation of two workers compensation statutes, specifically the phrase "fees and charges" under Section 287.140.3 and "savings" under Section 287.270. *See* Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818, 821-822 (Mo. 2003). The Western District Court of Appeals in Porter reaffirms this in dicta in its decision. *See* Porter at 321. And contrary to the District's assertions, there is nothing in Porter indicating that the Western District was ready to apply the holding of Farmer-Cummings to civil cases.

The District cites two cases from Ohio and Illinois, respectively, as support for its assertion that a Medicare write off is not a collateral source. First, it must be noted that the most persuasive authority for this Court on this issue is the Western District decision of Brown v. Van Noy, 879 S.W.2d 667, 676 (Mo. App. 1994), in which the Court held that expenses written off by Medicare are not materially different from expenses paid by private insurance or another source, and, hence, they too are subject to the collateral source rule. Id.

The logic expressed in Brown makes sense because both transactions (that between Medicare and a medical provider and that between a private insurance company and a medical provider) are *negotiated settlements* that do not reduce or

diminish the reasonableness of the original amount of the bill. If an individual does not have Medicare or private insurance (no collateral source), he or she would be expected to make full payment of the original bill. And a tortfeasor should not have to pay less on a claim simply because the victim of his negligence has collateral sources of payment available to him. In the end, whether a bill is written off or reduced, *someone* has to pay in the end, whether it is other patients who encounter more expensive hospital bills due to non payment on others, or the federal government, which will pass on its "losses" to the taxpayers. However, shouldn't the tortfeasor himself, the one who created the wrong, bear the burden of this cost? The answer is a resounding "yes." For these reasons, the established law in Missouri on collateral sources should continue to be followed and the opinions of Ohio in Robinson v. Bates, N.E.2d 1195 (Ohio 2006) and Illinois in Arther v. Catour, 833 N.E.2d 847 (Ill. 2005) should not be adopted.

The trial court did not err in refusing to admit purported evidence of write offs of Sandy's medical bills because the trial court's refusal was not clearly against the logic of the circumstances nor so arbitrary and unreasonable as to indicate a lack of careful consideration because pursuant to Missouri law, discounted or written off medical expenses between a medical provider and Medicare are collateral sources, which are inadmissible as a matter of law.

CONCLUSION

Plaintiff/Appellant/Cross-Respondent ("Sandy") respectfully requests this Honorable Court to rule as follows:

That the judgment of the trial court as to liability be reversed as to Sandy, and that judgment be entered in Sandy's favor for $100,000, plus interest, or in the alternative, that the case be remanded for another trial on the issue of liability only, and that instructions be given to bar the submission of comparative fault as to Plaintiff as a matter of law.

Furthermore, the trial court's ruling refusing to grant leave to the District to amend its Answer to plead Section 537.060 or set off, as well as its ruling refusing to offset $25,000 against the judgment should be AFFIRMED and the District's request for a new trial on the issue of damages should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

An original and ten copies of the foregoing and a floppy disc complying with Rule 84.06 (g) were mailed, via Federal Express overnight mail, this ___ day of March, 2008 to: The Clerk of the Missouri Supreme Court, 207 West High Street, Jefferson City, MO 65101 and two copies and a floppy disc were mailed by first class mail, proper postage prepaid, to: Mr. Gregory Wolk, 4925 Lindell Blvd., St. Louis, MO 63108.

Ryan R. Cox

RULE 84.06(b) and (c) CERTIFICATION

1. Appellant-Cross Respondent's brief contains the information required by Rule 55.03.

2. Appellant-Cross Respondent brief complies with the limitations contained in Rule 84.06(b) and contains 9,655 words.

Ryan R. Cox

RULE 84.06(g) CERTIFICATION

Pursuant to Rule 84.06(g), Appellant-Cross Respondent certifies that the floppy disk containing this brief has been scanned for viruses and that it is virus-free.

Ryan R. Cox

THE SUPREME COURT OF MISSOURI

SANDRA BACH,	)	
	)	
Appellant/	)	
Cross Respondent	)	
	)	SC NO. 89001
	)	
	)	
	)	
vs.	)	
	)	
WINFIELD FOLEY	)	
FIRE PROTECTION DISTRICT,	)	
	)	
Respondent/	)	
Cross Appellant	)	

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI

The Honorable Dan Dildine, Circuit Judge

APPENDIX TO SUBSTITUTE REPLY AND RESPONDENT BRIEF OF APPELLANT/CROSS RESPONDENT

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§ 537.060 R.S.Mo. (2007)

§ 537.060. Contribution between tort-feasors--release of one or more, effect

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.

Mo. Sup. Ct. R. 55.08 (2007)

55.08. Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense. A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation.