IN THE MISSOURI SUPREME COURT

No. SC 89001

SANDRA BACH,
Plaintiff/Appellant and Cross-Respondent,

vs.

WINFIELD-FOLEY FIRE PROTECTION DISTRICT,
Defendant/Respondent and Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI

The Honorable Dan Dildine, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENT AND CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Missouri Supreme Court Cases **Pages**

Other Missouri Cases **Pages**

Missouri Statutes and Rules **Pages**

Other Authorities **Pages**

Jurisdictional Statement Relating to Cross-Appeal

This appeal arises out of an action for personal injury in which a motor vehicle in which the Plaintiff was a passenger collided with a fire truck of the Defendant. After a trial, the jury returned a verdict of $100,000 in damages, assessing 85% fault to Plaintiff and 15% fault to Defendant, resulting in a judgment in favor of Plaintiff for $15,000. Both parties filed post-trial motions, including Defendant's Motion To Apply Settlement Amount To Reduce Judgment, Motion For Judgment Notwithstanding the Verdict, and Motion For New Trial To Damages Only. Each motion was denied, and Defendant appeals from the Judgment and denial of each post-trial motion. Jurisdiction of the Missouri Court of Appeals was founded upon Article V, Section 3 of the Missouri Constitution, by which Court of Appeals retains general appellate jurisdiction over those matters not within the original jurisdiction of the Supreme Court. Jurisdiction is in the Missouri Supreme Court by virtue of Missouri Supreme Court Rule 83.04 and the transfer of this appeal by Order of the Supreme Court.

S T A T E M E N T O F F A C T S

Respondent and Cross-Appellant Winfield-Foley Fire Protection District is herein referred to as "District." For the other parties, District adopts the nomenclature utilized in Appellant's Substitute Brief, to-wit: "Sandy" is the Appellant and Cross-Respondent Sandra Bach, who was the passenger in her automobile driven by her nephew "Sam."

District has filed a supplemental Legal File which contains pleadings and exhibits pertinent to its Cross Appeal, which were not included in Appellant's Legal File. District's supplemental Legal File is designated "SLF", followed by the number of the referenced page. Appellant's legal file is designated "L.F."

Statement of Facts Pertinent to Appeal in Chief:

In view of the scope of the issue presented by Sandy in her Brief, District believes the Court will benefit by a recitation of all of the facts of record that bear upon the question presented. To the extent the statement is in conflict with Sandy's Statement of Facts, District contends that Sandy's Statement is erroneous or incomplete.

Sam is the son of Sandy's sister. For some time prior to the accident, Sam lived with his mother and Sandy at Sandy's home in Lincoln County (TR. 04). Sandy had never learned to drive an automobile, and was never licensed to operate one (TR. 14, 20); However, she owned a Chevrolet Lumina which her husband drove before he died in 2001 (TR.20). Sam learned to drive in the Lumina (TR. 20); At the time of the accident he was 16 years and nine months old, having been a licensed driver for approximately nine months (TR. 04, 20).

Sandy's home is in eastern Lincoln County, approximately 15 minutes east, northeast of Troy, Missouri (TR. 04). The route from her home to Troy was partially along Route Y, westbound, and on this route Route Y intersected with another road, Route EE, that entered from the south. While her husband was alive, generally he drove her to Troy to go to dinner or so she could go shopping (TR. 20). She drove this route with her husband several times a month for over thirty years, and usually he drove her to Troy in the evening, when he was finished with work (TR. 20). She knew where the sun would be at 5:28 p.m. on May 3, 2004 (TR. 20).

On May 3, 2004, Sandy asked Sam to take her to a club meeting in Troy (TR. 13). On that date, according to Sam, Sam and Sandy had an agreement that Sandy would pay for the gas and whatever other expenses there would be for the trip (TR. 03). In any event, Sam and Sandy had a general arrangement or trade-off: Neither Sam nor his mother owned a car, and when Sandy needed to go somewhere or wanted to go somewhere, Sam would take her (TR. 04, 20). In exchange, Sam was allowed to drive the Lumina to school and when he went out with his friends (TR. 04). Sandy agreed that this was the arrangement, except she noted that when Sam was unable to take her where she needed to go, her sister would do so (TR. 20).

There had been an automobile accident east of the intersection of Route Y and Route EE sometime before the accident involving Sam and Sandy (TR. 10,11). District's emergency crews responded to that accident, and a helicopter was dispatched to evacuate a victim of the first accident (TR. 10). A field at the southwest corner of the intersection

of Routes Y and EE was chosen as the helicopter landing site, and the helicopter landed there about 10 or 15 minutes before the accident that is in issue in this case (TR. 53).

On the date in question, Sam drove westbound on Route Y and approached the intersection of Route EE. There is a 90 degree turn in Route Y approximately 1/3 mile east of this intersection (TR. 01). As Sam cleared this turn, he accelerated the Lumina to the speed limit, which was 55 miles per hour (TR.02). From a distance of 1/3 mile, Sam could see that there was a white vehicle parked on EE (TR. 05), and also from this distance he knew that the vehicle was an emergency vehicle, although he claimed that the emergency lights were not flashing (TR. 05). He could see from 1/3 of a mile that the white vehicle had a red light on it, although the light was not flashing (TR. 05). Sam conceded in cross-examination that if he could see from a distance of 1/3 of a mile a vehicle with a red light that was not flashing, the angle of the sun did not to any great extent affect his ability to see a fire truck that had its lights flashing (TR. 06). Sam's testimony, however, was that he did not see the District's fire truck until he emerged from a "dip" in the road immediately east of the EE intersection (TR. 06). Sam testified that he did not remember if he did or did not see the helicopter in the field to the left of him (TR. 06). During the 1/3 mile Sam traversed after seeing the white vehicle, Sam did not decrease his speed from 55 miles an hour, except while he was ascending a hill he "lost a couple miles an hour" (TR. 05). Then he slammed the brakes just east of the collision point (TR. 02). The Lumina rear-ended District's fire truck that was parked partially in the westbound lane of Route Y, west of EE (TR. 07).

Sandy held the view before May, 2004 that the intersection of Y and EE was a dangerous intersection (TR. 20). She conceded that there was nothing blinding about the sun at the time of the accident (TR. 20). She testified that she saw the helicopter before the collision and did not bring this to Sam's attention (TR. 21).

The pilot of the helicopter testified by way of deposition that in the interval of time after he landed and before the accident, there was a sheriff's vehicle, with its emergency lights flashing, on Route Y just east of the EE intersection (TR. 37-38).

District's fire truck was parked on Route Y to assist in establishing a landing zone for the helicopter (TR. 22). The emergency lighting on the fire truck, consists of a light bar across the roof, with two rotating lights, one on each side (TR. 40). There were also two flashing lights underneath the light bar (TR. 40). The topmost emergency lights at the rear of the fire truck stood 10 feet off the ground (TR. 40). The emergency lights were engaged the entire time the fire truck was parked on Route Y (TR. 113). District's Deputy Chief Ron Lawson testified that he arrived at the scene 10 or 15 minutes after the accident involving Sandy and Sam (TR. 40). He arrived from the east, from the scene of the first accident, and traversed the same route Sam did (TR. 40). The flashing lights of the fire truck were visible from the east at a distance of roughly 600 or 700 yards (TR. 40).

District has an additional comment regarding Sandy's Statement of Facts:

Sandy states at page 7 of her Substitute Brief that District asserted an affirmative defense the she and Sam "were engaged in a joint venture." District in fact pleaded the defense that "Plaintiff and Samuel Madden were engaged in a joint venture *or joint*

journey at the time and place of the incident referred to in the Petition, and Plaintiff as owner of the vehicle rendered Samuel Madden her agent for such joint undertaking . . ." (L.F. 15).

Additional Procedural Issues Pertinent to Appeal in Chief:

District notes that Sandy's Substitute Brief does not raise the Issue that was covered in Point Relied Upon Number II in her Brief in the Court of Appeals, which alleged error in the form of verdict director submitted by the Trial Court. The alleged error was unrelated to agency or joint undertaking. Likewise, Sandy has not briefed the argument that Sam, because of his minority, could not enter an agreement of joint venture. According to Missouri Supreme Court Rule 83.08(b) these matters are deemed abandoned, and District shall not address them in this Brief.

Statement of Facts Pertinent to Cross-Appeal:

For purposes of District's Cross-Appeal, District adopts all of the contents of the Statement of Facts of Appellant and those stated by it above. District also states the following as facts relating the issues presented in its Cross-Appeal.

District's co-defendant, Sam, was dismissed from the case on or about February 28, 2006, presumably because he had settled, although it was not until later that District learned officially that the settlement amount was $25,000 (SLF 002). District had not at this point alleged as a Defense that it was entitled to set-off in the event of a settlement with its co-defendant, although District might have added this Defense at any time in the proceedings. On July 17, 2006, District filed Answer to the Second Amended Petition,

which the Court had allowed Sandy to file just before trial (L.F. 06). District failed to add Defense of set-off at that time. Two days after District answered the Second Amended Petition, the jury trial commenced.

At the end of the trial proceedings, after the jury returned a verdict but prior to the Court entering its judgment, District orally moved to amend its Answer to include the defense of set-off in the amount of Sam's settlement. (TR. 46). The Trial Court denied the motion and entered its judgment of $15,000 in favor of Sandy. (TR. 46). District's Post-Trial Motion to Apply Settlement Amount (SLF 027) was also overruled by the Trial Court (L.F. 33).

During the course of the trial, District offered to prove that the amount of $26,984.40 was "written off" by St. John's Medical Center, one of the health care providers that treated Sandy, pursuant to federal Medicare regulations. Fire District offered Exhibit B (SLF 043), and Exhibit L (SLF 045), which are summaries of medical bills of St John's Medical Center. Fire District offered these exhibits as relevant to the reasonable value of the medical treatments for Sandy's injuries. The Trial Court declined to allow their admission in evidence and refused Fire District's offer of proof of these exhibits (TR. 8).

P O I N T S R E L I E D O N

I.

THE TRIAL COURT DID NOT ERR IN WITHDRAWING THE ISSUE OF JOINT JOURNEY FROM THE JURY'S CONSIDERATION AND SUBMITTING THE CASE BY INSTRUCTION NO. 7 ATTRIBUTING FAULT OF THE DRIVER TO PLAINTIFF FOR PURPOSES OF A DETERMINATION OF PLAINTIFF'S RELATIVE FAULT, FOR THE REASON(S) THAT (1) AS A MATTER OF LAW THE EVIDENCE ESTABLISHED THAT THE DRIVER WAS PLAINTIFF'S AGENT WHILE SHE WAS PRESENT AS A PASSENGER IN HER OWN VEHICLE, AND (2) PLAINTIFF IS NOT AS A MATTER OF LAW ABSOLVED FROM RESPONSIBILITY FOR HER DRIVER'S NEGLIGENCE AND PLAINTIFF HAS NOT PRESERVED FOR REVIEW ISSUES OF LIABILITY TRIABLE BY JURY.

[This Point Relied On Responds to Appellant's Point Relied On]

Primary Authorities:

Brucker v. Gambaro, 9 S.W.2d 918 (Mo. 1928)

Catanzaro v. McKay, 277 S.W.2d 566 (Mo. 1955)

Cline v. Carthage Crushed Limestone Company, 504 S.W.2d 102 (Mo. 1973)

Gardner v. Simmons, 370 S.W.2d 359 (Mo. 1963)

II.

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED AND REFUSED TO PERMIT DEFENDANT TO AMEND ITS ANSWER AND ASSERT RIGHT OF SET-OFF FOR SETTLEMENT PAYMENT BY A JOINT TORTFEASOR, AND WHEN IT FAILED AND REFUSED TO OFFSET THE AMOUNT OF $25,000.00 AGAINST THE JUDGMENT THAT THE TRIAL COURT ENTERED IN THIS CASE, FOR THE REASON(S) THAT THE MATTER AND AMOUNT OF THE SETTLEMENT WAS A MATTER FOR DETERMINATION BY THE TRIAL COURT WITHOUT INTERVENTION OF THE JURY AND THERE IS NO REASON EXCEPT FOR THE TIMING OF DEFENDANT'S REQUEST FOR LEAVE TO AMEND THAT WEIGHS AGAINST THE OFFSET OF THE ADMITTED SETTLEMENT AMOUNT.

Primary Authorities:

Hoover v. Brundage-Bone Concrete, 193 S.W.3d 867 (Mo.App. S.D. 2006)

III.

IN THE EVENT OF REVERSAL OF THE JUDGMENT ON APPEAL AT THE BEHEST OF PLAINTIFF AND IF PLAINTIFF'S CLAIM IS REMANDED FOR A NEW TRIAL AS TO LIABILITY, THE CAUSE SHOULD BE REMANDED FOR NEW TRIAL AS TO DAMAGES ALSO, FOR THE REASON(S) THAT THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF WRITE-OFFS OF MEDICAL BILLS DICTATED BY MEDICARE AND ERRED IN DENYING DEFENDANT'S OFFER OF PROOF TO SHOW THAT PLAINTIFF HAD NO LEGAL OBLIGATION TO PAY A MATERIAL PORTION OF THE MEDICAL BILLS SOUGHT TO BE RECOVERED.

Primary Authorities:

Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo. en banc 2003)

Porter v. Toys 'R Us-Delaware, Inc., 152 S.W.3d 310 (Mo.App. W.D. 2004)

Robinson v. Bates, N.E.2d 1195 (Ohio 2006)

A R G U M E N T

I.

THE TRIAL COURT DID NOT ERR IN WITHDRAWING THE ISSUE OF JOINT JOURNEY FROM THE JURY'S CONSIDERATION AND SUBMITTING THE CASE BY INSTRUCTION NO. 7 ATTRIBUTING FAULT OF THE DRIVER TO PLAINTIFF FOR PURPOSES OF A DETERMINATION OF PLAINTIFF'S RELATIVE FAULT, FOR THE REASON(S) THAT (1) AS A MATTER OF LAW THE EVIDENCE ESTABLISHED THAT THE DRIVER WAS PLAINTIFF'S AGENT WHILE SHE WAS PRESENT AS A PASSENGER IN HER OWN VEHICLE, AND (2) PLAINTIFF IS NOT AS A MATTER OF LAW ABSOLVED FROM RESPONSIBILITY FOR HER DRIVER'S NEGLIGENCE AND PLAINTIFF HAS NOT PRESERVED FOR REVIEW ISSUES OF LIABILITY TRIABLE BY JURY.

A. FACTS THAT BEAR UPON THE EXISTENCE OF AGENCY OR JOINT JOURNEY IN THIS CASE:

The evidence upon which District relies to impute Sam's negligence to Sandy was introduced through the cross-examinations of Sam and Sandy, except for the most important bit of evidence. Sandy testified in her own case in response to her own attorney's question, as follows:

"Q. Now how did the trip come about? What was the plan?

A. *I asked my nephew to take me*, and we left around quarter to six . . ."

(TR. 13). Sam was the first witness called in Sandy's case, and his testimony was less direct and definite in this regard than was Sandy's, the purported principal on this trip (TR. 04-05). There is no question that the purpose of the trip was for Sandy to attend a meeting of a Widow and Widower's Club in Troy (TR. 04, 13). This was also Sandy's testimony in her own case (TR. 13). Sam had no plans for what to do while he waited for his aunt to finish, and he thought he would probably have gone to Wal-Mart (TR. 05).

It is undisputed that Sandy did not have a driver's license and did not know how to operate an automobile (TR. 03, 20). It is also undisputed that Sandy was the sole owner of the Lumina that was involved in the accident.

As is set forth in the Statement of Facts, there was testimony regarding a relationship of mutual convenience that permitted Sam to have use of Sandy's automobile in exchange for transporting her where she needed to go (TR. 20). There was a disagreement between Sam and Sandy as to whether there was a financial arrangement specific to this trip (TR. 03, 14).[1]

Sandy presented no evidence that would suggest that she was prevented from observing the progress of the trip, or Sam's operation of the vehicle. Based on Sam's testimony, it appears Sandy was awake and alert during the trip (TR. 05).

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[1] At trial, the parties were concentrating on issues of joint undertaking, and there was a difference of opinion as to whether this was a trip purely for pleasure ("Joint Journey") or one that involved economic interests ("Joint Venture"). For reasons explained in this Brief, this is not an issue in this case that is significant to the outcome of this Appeal.

B. THE LEGAL ISSUE PRESENTED BY APPELLANT'S APPEAL TO THE SUPREME COURT:

Sandy claims that the Court of Appeals in this case, in an Opinion filed on October 16, 2007,[2] erred in finding that ownership of a car "automatically" gives a passenger a right to control the car. Sandy urges that this Court re-evaluate the law of Missouri pertaining to the imputation of fault by a driver of an automobile that is owned by a passenger in the vehicle who is present at the time of the casualty. This case involves the imputation of negligence to reduce recovery by an injured passenger, but it appears that the parties are in agreement that the law under consideration applies as well to the existence of liability of an owner-passenger when a third party involved in an accident sues the owner-passenger.

District wishes to emphasize that its view of the case on appeal is very much different than the view espoused by Sandy. In District's view, the instructions of the Trial Court that directed the jury to find that Sandy was responsible for the negligence of Sam was not so much a product of the application of a body of substantive or evidentiary law, as it was a type of run-of-the-mill decision often cast upon trial judges when facts do not permit reasonable dispute.

THE CURRENT STATE OF MISSOURI LAW

In 1970, the Missouri Supreme Court overruled a line of cases that had acknowledged the imputation of negligence of a spouse-driver to his or her spouse-

[2] Currently reported at 2007 WL 2990530.

passenger, when the spouse-passenger jointly owned the vehicle that was involved in an accident. *Stover v. Patrick*, 459 S.W.2d 393 (Mo. en banc 1970). In *Stover v. Patrick*, the unusual procedural facts were these: Lewis Stover was the driver of an automobile in which his wife, Ruby Stover, was a passenger. Lewis and Ruby both sued the driver of another vehicle with which the Stover automobile collided. The jury returned a verdict for Defendant, and the trial court granted a new trial in favor of the Stovers on the basis of error in the instructions. The Supreme Court agreed that there was reversible error in the instructions, but ruled that Lewis Stover was not entitled to a new trial because the jury found against him on a counterclaim for injury to the Defendant. *Id.* at 397. Because the verdict on the counterclaim was *res judicata* as to Lewis, the Supreme Court held that he was contributorily negligent as a matter of law. *Id.*

The Defendant in *Stover v. Patrick* contended that Ruby Stover should also be barred by Lewis' contributory negligence, because she co-owned the vehicle in which she was a passenger. The Supreme Court framed the issue in terms of whether joint ownership *standing alone* was sufficient to impute negligence as a matter of law: "Certainly in the case now under consideration the record before us would not justify imputing negligence of Lewis Stover if we eliminate the factor of joint title to the automobile." *Stover v. Patrick*, supra at 398. The Supreme Court reviewed cases from a number of jurisdictions, and held that mere joint ownership of an automobile was not sufficient to impute negligence to a spouse-passenger. *Id.* at 401. Significantly, as shall be explained, the *Stover* Court quoted an Oregon case: "Co-ownership is actually the

antithesis of an employer-employee or principal and agent relationship." *Id.* at 400, *quoting Parker v. McCartney*, 338 P.2d 371 (Ore. 1959).

In *Manley v. Horton*, 414 S.W.2d 254 (Mo. 1967), Division 2 of this Court distinguished a line of cases when it held that a defendant passenger who was not the owner of the automobile in question was not entitled to a directed verdict in his favor. *Id.* at 260-61. The Supreme Court stated: "Most of the Missouri cases involving this theory of imputed negligence have been based primarily upon the fact that the passenger was the owner of the car and *thus automatically entitled to a right of control*." *Id.* at 260 (emphasis added). The *Manley* case is readily distinguishable from the case now on appeal – most particularly because negligence was sought to be attributed to a mere passenger. The Court in *Manley* examined the law of "joint enterprise" and found that while there was a close question, a jury ought to determine if the guest passenger was in a joint enterprise and therefore might have a right to control the vehicle. *Id.* at 260. This was despite the fact that the passenger, by all available evidence, *was asleep at the time of the accident*. *Id.* at 260.

Although it is a decision of the Missouri Court of Appeals, the Opinion in *Campbell v. Fry*, 439 S.W.2d 545 (Mo.App. W.D. 1969) is relatively contemporaneous to *Stover* and *Manley*, and it might be said that the case rounds out an instructive trilogy. In *Campbell*, the party sought to be charged with imputed negligence was a passenger in an automobile that he owned. The Plaintiff attempted to impute negligence to him as a matter of law, relying upon a presumption that the law indulges, that when the owner of a vehicle "is riding in it apparently acquiescing in the operation, the presumption arises that

the driver is the agent of the owner and operating within the scope of his agency." *Id.* at 547-48. The Court of Appeals noted that according to the law of presumptions, when the opponent produces substantial evidence as to the facts that would otherwise be presumed, the "presumption vanishes." *Id.* at 548. The Court reversed the trial court's order overruling the owner-passenger's motion for directed verdict, finding that the case rested only on a presumption that had vanished by virtue of the evidence presented by the passenger. *Id*. at 549. The passenger's evidence, and the only evidence in the case bearing on agency, was that *he was the victim of a kidnapping*.

Other Supreme Court cases of note include *Brucker v. Gambaro*, 9 S.W.2d 918 (Mo. 1928), which involved a collision by a chauffeur. In that case, the Court examined a number of authorities in Missouri and elsewhere and concluded that the owner of an automobile who is present as a passenger is charged with the presumption that the driver was his agent and was, at the time of the accident, acting within the scope and course of his agency. *Id.* at 922. This presumption is sufficient to carry the case to a jury even if there is rebutting evidence regarding right of control. *Id*. Another case, distinguished by the *Brucker* Court because the owner was not present, is *Guthrie v. Holmes*, 198 S. W. 854 (Mo. en banc 1917). Examination of the *Guthrie* and *Brucker* decisions reveals the true significance of an owner's presence in a vehicle at the time of an accident, then as now: The owner present in the automobile cannot effectively rebut the presumption that the driver was on his principal's business when the accident occurred. *Id*. at 858-59.

In *Hill v. St. Louis Public Service Co.*, 64 S.W.2d 633, 635 (Mo. 1933), the Supreme Court found that contributory negligence there existed as a matter of law, and

charged the owner-passenger with the negligence of his driver, also, it appears, as a matter of law.

Perricone v. DeBlaze, 655 S.W.2d 724 (Mo.App. E.D. 1983) is the only case thus far discussed that was decided after *Gustafson v. Benda*, 661 S. W.2d 11 (Mo. en banc 1983), and furthermore the parties occupied the same positions as the parties in the instant Appeal. Although the Court of Appeals cites *Campbell v. Fry*, supra, it is clear that the *Perricone* case is the legitimate progeny of this Court's pronouncement in *Brucker v. Gambaro*, supra, as it states:

> "Under Missouri law, when one operates the automobile of another while the owner is a passenger, acquiescing in the operation, a presumption arises that the driver is the agent of the owner and within the scope of his agency."

Perricone v. DeBlaze, supra at 724.

This is the governing law of *presumption* applicable to the instant appeal, but it is not the determining factor that dictates affirmance in this case. Sandy offered no evidence to dispute the fact or scope of Sam's agency. Indeed, her own evidence *made* a case for agency. The law of presumption dictates that District was at least entitled to a jury determination as to whether Sam was or was not the agent of Sandy. *Brucker v. Gambaro*, supra. As set forth below, in section "C" of this Point, Sandy has created an insurmountable hurdle for herself because at the instruction stage and thereafter *she did not preserve objection to the Trial Court's ruling that agency was established as a matter of law*. What has not been discussed to this point, not in District's Brief and not in the entirety of Sandy's Substitute Brief, is: what is the consequence when the evidence is that

that a driver *is* an agent and *is* operating within the scope and course of his agency, and such evidence is left unrebutted by the party that opposes imputation of the driver's negligence? This is the principal issue involved in the instant Appeal.

"Semantics" create an opportunity for confusion in this case, particularly with reference to cases in other jurisdictions. Under modern Missouri practice it appears that there is no meaningful difference in the use of the terms "principal-agent" and "master-servant". "Fundamentally, there is no distinction to be drawn between the liability of a principal for the tortious act of his agent, and the liability of an employer ("master") for the tortious act of his employee ("servant")." *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567, fn. 8 (Mo.App. E.D. 2002). This principle was recently confirmed by this Court, in a case involving the liability of the City of St. Louis for torts of police officers. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. *en banc* 2007) (describing the relationship as one of agency).

The Trial Court in this case ruled the issue now considered on appeal by describing his views thusly: ". . . the plaintiff owned the automobile, the trip was on her behalf at her request, and the driver . . . was her agent for transportation." (TR. 08). District herein refers to the issue as one of "agency," consistent with the Trial Court's reasoning, but particularly in older cases the same issue might be described as one involving the master-servant relationship. It is noteworthy, too, that District went to trial on an affirmative defense called "Joint Journey," which is a species of agency, but as the trial unfolded and as the Trial Court realized, it is not necessary to evaluate the case

based upon this doctrine, or its cousin, the doctrine of joint venture.[3] The decision of the Trial Court now under scrutiny is most readily understood in the context of the ordinary rules of agency.

District did plead the defense of "Joint Journey," but that doctrine has a good deal more meaning and importance when the subject is the potential liability or imputation of fault to a passenger who is *not* the owner of the vehicle. If, for instance, it was Sam who owned the Lumina, and Sandy was present as a passenger, then it would be necessary to establish a joint journey to impute fault to Sandy. In this case, however, the only agency that is of importance is the agency of Sam for Sandy.

In Missouri, the ultimate test for determining liability of a principal for acts of an agent is "the right to control" the details of the agent's work. *Gardner v. Simmons*, 370 S.W.2d 359, 362 (Mo. 1963).[4] Significantly, however, "the question is not whether an

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[3] *See, Perricone v. DeBlaze*, supra at 725. Perricone is one of the cases that point out that a joint undertaking that does not involve a community of pecuniary interests will still exposed participants to liability. Sandy nevertheless persists in suggesting that District had to establish the elements of "joint venture," which includes the requirement of showing joint pecuniary interests in a car trip (Appellant's Substitute Brief, page 16).

[4] District believes that the rules of imputation should be the same whether the question involves a passenger seeking to be compensated by a third party, or a third party seeking to be compensated by the passenger. This Court appears to agree. *Manley v. Horton*, supra at 260 (". . . we see no legal reason why it should not operate both ways").

employer did exercise control over the details of an employee's work but whether the employer had the right to do so." *Id.* In the particular context of vehicular accidents, it is of course not necessary that a principal (or employer or master) be physically present in the automobile in order to be liable to some third party injured by the negligence of a driver in his or her employ. *Id.*; *Catanzaro v. McKay*, 277 S.W.2d 566, 571-72 (Mo. 1955); *Hammonds v. Haven*, 280 S.W.2d 814, 818 (Mo. 1955). All of Sandy's arguments regarding the supposed necessity that an owner-passenger physically control the acts of the driver while he or she is driving must be viewed with an eye to this basic fact. Logically, if Sandy's position is correct, there could be no liability of an agent-driver who is on his principal's business when the principal is absent.

When the principal is in the car as a passenger, it is likewise unnecessary to show that the principal directed the operation of the vehicle. ". . .while it is not shown that [uncle] specifically issued orders to [nephew] as to what streets he was to take, and in what manner the automobile was to be driven or operated, yet he, as owner of the car, *had such right to control and direct it*." *Roland v. Anderson*, 282 S.W. 752, 754 (Mo.App. E.D. 1926)(emphasis added).

A party relying upon the principles of agency to impose liability on a principal or master has the burden to prove only the fact of agency, and has no burden to disprove independent contractor status. *Gardner v. Simmons*, supra at 360.

District asserts, of course, that according to the undisputed facts in evidence Sandy appointed Sam her agent to drive her to Troy, and as a matter of law she is therefore responsible for his negligence.

THE ISSUE AS PRESENTED BY COURTS OF OTHER JURISDICTIONS

Sandy devotes a portion of her Substitute Brief (pages 18-23) to a recitation of views of the matter under consideration, by Supreme Courts of other states. District does not believe that the cases fit into the four "pigeon holes" described by Sandy, and in fact the 17 cases cited by Sandy represent perhaps fifteen different points of view, when one considers exceptions and legal nuances recognized by the various Courts. There is certainly a category of states that have accepted a view that there is *no* significance to be attached when a sole owner is a passenger in his or her own vehicle that is involved in a collision, typified by the decision of the New York Court of Appeals in *Kalechman v. Drew Auto Rental, Inc.*, 308 N.E.2d 886 (N.Y. 1973). No explanation is provided in Sandy's Brief as to why this category is described as the "modern" blanket rule (Appellant's Substitute Brief, p. 22). There are three cases listed in this category, decided in 1973, 1988 and 1993, which is far from a trend, much less a modern one.

In any case, it is Sandy's position that Missouri should abandon its system for allocating fault in favor of the so-called "Question of Fact" test (Appellant's Substitute Brief, page 23). Because this is Sandy's preferred theory, District discusses it and the principal case that espouses it, in section "E" of this Point.

Sandy has treated the various cases in summary fashion, and District sees no reason to discuss each case in detail. Many of the states do impose liability when facts establishing and agency or master-servant relationship is shown ("View No. 2," Appellant's Substitute Brief, p. 19), and under the circumstances of the instant case those cases might be cited in support of District's position.

In Section "E" of this Brief, District will contrast two cases that are among those listed by Sandy. One is the "Question of Fact" case of *Smalich v. Westfall*, 269 A.2d 476 (Pa. 1970), and the second is a decision by Maryland's highest court, *Slutter v. Homer*, 223 A.2d 141 (Md. 1966). Maryland follows the same rules that have been the law of Missouri since at least 1928.

C. THIS CASE IS NOT AN APPROPRIATE CASE TO CONSIDER A CHANGE IN MISSOURI LAW:

It has been thirty-five years since this Court decided *Stover v. Patrick*, supra, 459 S.W.2d 393, and in that space of time no dispute has arisen that pits the holding of that case against the long existing presumption of agency when a sole owner of an automobile allows someone else to drive. Nevertheless, if the Court is prone to re-examine the law in this area, there are many reasons why the issue should be addressed in a future case, and not in the case of Sandra Bach v. Winfield-Foley Fire Protection District.

PRESUMPTION PLAYED NO PART IN THE RULING BELOW

The evidence from Sandy's mouth established all of the facts necessary for a fact-finder to determine that Sam was Sandy's agent for the purpose of transporting her to Troy, as the Trial Court found. The ruling of the Trial Court by which the Court withdrew this issue from the jury's consideration – which incidentally is not the ruling that Sandy appeals – was based on factors wholly unrelated to the presumption of agency that is under attack. Sandy offered no evidence of *facts* that rebutted the actual evidence

of agency that District presented in support of its defense.

In *Cline v. Carthage Crushed Limestone Company*, 504 S.W.2d 102, 112 (Mo. 1973) the issue of agency was contested, in a manner of speaking, because the employer there tried to contend that the employees whose acts subjected the company to liability could not be commanded by their supervisor. The Court held that on this record the agency of the employees "may fairly be taken as an undisputed fact." *Id*. at 112. The Court rejected objection to a verdict directing instruction on the ground that it assumed agency, stating: "When agency is not a contested issue a verdict-directing instruction need not contain a requirement of a finding of agency." *Id*. In *Hanser v. Lerner*, 153 S.W.2d 806 (Mo.App. E.D. 1941), there was much evidence as to whether the defendant company had purchased another company that employed a driver, but as to the question of the driver's employment the only evidence from the alleged employer/principal was that his duties "consisted of driving a truck." *Id*. at 809. This was substantial evidence that the driver was the defendant's agent. *Id*. at 810; *See also*, *Catanzaro v. McKay*, supra. The Court of Appeals in *Hanser* found that "there was no real dispute" about the fact of the driver's negligence, and found no reversible error because the trial court assumed agency in the giving of instructions. *Hanser v. Lerner*, supra at 812. To the same effect are *Rusk Farms, Inc. v. Ralston Purina Co.*, 689 S.W.2d 671, 679 (Mo. App. E.D. 1985) and *Miller v. Gillespie*, 853 S.W.2d 342, 346 (Mo.App. E.D. 1993).

Once Sandy had admitted that the trip that produced this accident was one undertaken entirely for her benefit, there was little in the way of facts Sandy *could* offer that would create a jury issue concerning agency. Judging by the sampling of cases noted

above, perhaps if Sandy was asleep it would have been appropriate to require the jury to determine if she had the right of control, but District would contend otherwise and note that in a situation of injury to a third party, a sleeping principal stands in no better position than an absent one. District concedes that an automobile owner who is kidnapped has no responsibility for an ensuing accident, regardless of who is the Plaintiff, but those are not the facts here.

Certainly, when the evidence of agency is as strong as it was here, most cases that require a jury determination will be decided on the question of whether an agent was operating the vehicle for the principal or on his or her own account. When the owner is riding in the vehicle, this defense just does not "fit."

As set forth in the following section of this Brief, in fairness Sandy does not assert herein that a jury should have made a determination of agency; She contends *as a matter of law* that she was not subject to imputation of Sam's relative fault. Nevertheless, the Trial Court was not required to employ a presumption to determine, under traditional principles of agency law, that there was no real dispute as to the facts and that according to the undisputed facts Sam was Sandy's agent. Whether or not the Court changes the law, the result in this case is the same.

SANDY DID NOT REQUEST A JURY DETERMINATION OF AGENCY

As to the issue she raises in this Appeal, Sandy's position has been consistent throughout. Before the Trial Court, before the Court of Appeals, and before this Court, she has contended only that the Court cannot assign any part of Sam's fault to her. In the

instruction conference in this case, her objection was not to the fact that the Trial Court had directed that Sam's relative fault be assigned to her, or that the verdict director failed to include directions to the jury based upon agency or joint undertaking. The objection was simply that "I don't believe that comparitive (sic) fault is pertinent to this case," and "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." (TR. 43). Sandy offered an alternative verdict director, but did not offer one that submitted the question of agency or joint undertaking (TR. 44).

In the last pages of her Substitute Brief (pages 33-35), Sandy states not less than five times that the relief she seeks is based on the proposition that control or right to control *cannot* as a matter of law be found where the owner of an automobile is not licensed to drive and does not know how to drive. Sandy's sole Point Relied On in her Substitute Brief states only that the negligence of Sam *cannot* be imputed to her for the reason that she never learned to drive an automobile.

It is District's position that in view of the nature of Sandy's objections at trial, [5] there can be no further issue in this case that depends upon a jury finding of the elements

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[5] Specific error in the giving of a jury instruction must be raised in the Trial Court and this same error must be included in a motion for new trial, or else the error is waived. *Hertz Corp. v. Raks Hospitality, Inc.*, 196 S.W.3d 536, 546 (Mo.App. E.D. 2006). A party may not complain of omission of any proposition of law unless an instruction has been requested. *Miller v. Gillespie*, supra at 345.

of control exercised by Sandy. The Trial Court might well have given an instruction on joint journey or agency had Sandy requested it. District would strenuously object therefore to a remand that involves submission of any question of agency or joint undertaking to a jury. Sandy states that as a matter of law she cannot be charged with Sam's negligence. District states that as a matter of law she must be charged with Sam's negligence, as the Trial Court found. This is the extent of the issue before the Court.

This Court does not need to revolutionize the law of presumptions or the law of agency in order to accommodate Sandy's request for relief. The Court should move directly to the issue Sandy seeks to have resolved.

Under no cognizable law could it be true as a matter of law, that a person who cannot drive an automobile will not (on this account) bear the consequence of negligence committed by an agent or servant engaged to transport the non-driver to fulfill the non-driver's interests. District's research reveals no pertinent authorities. Sandy cites none.

D. MISSOURI APPELLATE DECISIONS ARE NOT IN A STATE OF CONFLICT:

Sandy claims that there is a conflict between the decisions of the Supreme Court in *Stover v. Patrick,* supra and *Manley v. Horton,* supra, and that the Court of Appeals in this case erred by following the principals set forth in *Manley v. Horton* (Appellant's Substitute Brief, pages 13-14). Sandy finds support for this proposition in an Order of the United States District Court for the Western District of Missouri that was issued just after the decision of the Court of Appeals in the instant case. *Littleton v. McNeely*, 2007

WL 3027578 (W.D.Mo. 2007).

As has been discussed, *Stover v. Patrick* had a specific procedural history: The only issue before the Court was whether a spouse who co-owned a vehicle was guilty of contributory negligence as a matter of law. *Id*. at 398. There is no indication that the defendant in that case offered to prove or did prove that the driving spouse was actually acting as an agent for the other. As recognized by a number of Courts (including those cited in *Stover v. Patrick*, supra), the fact that a co-owning spouse is present in an automobile while both are on their way to a social or family occasion cannot be said to call out for recognition of an agency. Co-ownership, again as pointed out by this Court in *Stover*, is actually "the antithesis" of a relationship of principal and agent. *Id*. at 400. Similarly, it has long been held that the marriage relation, standing alone, is not indicative of an agency relationship. *Branson Land Co. v. Guilliams*, 926 S.W.2d 524, 527 (Mo.App. S.D. 1996).

Manley v. Horton did not hold that there is an "automatic" right of control when a sole owner is a passenger in his or her vehicle; The Supreme Court in distinguishing the facts of that case simply acknowledged that there was a long line of authority that recognizes that there is a presumption of agency in this circumstance. The cases that so hold are legion, as noted above. *See, i.e., Brucker v. Gambaro*, supra. We are again in the realm of "semantics."

As has been discussed herein, there are issues that distinguish the instant Appeal from the aforementioned cases. Addressing only the issue of the purported conflict between *Stover v. Patrick*, supra, and *Manley v. Horton*, supra, however, there is nothing

inconsistent with the acknowledgement of an evidentiary presumption of agency in the circumstance that one permits a stranger to drive one's automobile, while denying the presumption when a spouse and co-owner does the driving.

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Commencing at page 28 of her Substitute Brief, Sandy attempts to create a conflict in the Missouri law of agency, where no conflict exists or needs to exist. District charges that this argument alludes to the reasoning of the Pennsylvania Court in *Smalich v. Westfall*, supra, and is a disingenuous attempt to suggest that Missouri already follows a brand of the law of agency accepted by the Pennsylvania Court. See discussion in section "E" of this Point.

Sandy cites *Archer v. Outboard Marine Corp.*, 908 S.W.2d 701 (Mo. App. W.D. 1995) and *Reiling v. Missouri Insurance Co.*, 153 S.W.2d 79, 83 (Mo. App. W.D. 1941) for the proposition that an agent retains the right to control details of his own physical conduct, contrary to a servant. *Archer* addresses the question of whether of sponsor of a fishing tournament can be held liable on principles of *respondeat superior*, and is a rather typical exposition of the difference that exists between master-servant and independent contractor relationships. *Reiling* involved the status of an "agent" – a traveling insurance operative who used his own car to collect premiums from policyholders. The Court there did draw a distinction between inferences available depending upon whether the employed party was a servant or agent. *Id*. at 85. Nevertheless, it was a significant fact in the case that the automobile did *not* belong to the insurance company, and of course the "agent" was not hired *to drive*. In *Smith v. Fine*, 175 S.W.2d 761, 766 (Mo. 1943),

the Supreme Court looked at facts almost identical to those in *Reiling*, and the Court confirmed that it is the *right* to control that determines whether *respondeat superior* applies. The Court furthermore disapproved "[o]bservations subject to being considered out of harmony herewith in Reiling v. Missouri Ins. Co. . . ." The *Smith v. Fine* Court also merged the terms servant and agent: "It is not the fact of actual interference with control, but the right to interfere that marks the difference between and independent contractor and *an agent or servant*." *Id*. at 766 (emphasis added), *quoting Riggs v. Higgins*, 106 S.W.2d 1, 3 (Mo en banc 1937).

Of course, the terms "servant" and "agent" are not always used with precision, but by common usage most of us know the term "agent" to be a generic description of a status that includes both employees and servants. If there is any legitimate distinction between a mere servant and an agent it is the distinction noted in *Nagels v. Christy*, 330 S.W.2d 754, 757 (Mo. 1959):

> "A master is a species of principal and a servant is a species of agent whose physical conduct is controlled or is subject to the right of control by the master. The physical activities of agents of a higher grade, such as brokers and factors, are usually not subject to the right of control by their principal, and such special agents, with respect to their physical activities in the conduct of their business, are generally independent contractors."

That is to say, this Court in *Nagels v. Christy* again confirmed what was noted above, that for purposes of applying the doctrine of *respondeat superior* there are two categories that are meaningful in Missouri: One is an "independent contractor" and the other is a person

that is variously described as a "master," an "employee" or an "agent." *Scott v. SSM Healthcare St. Louis*, supra. The law of agency in Missouri is not what Sandy contends it to be.

E. THE EXISTING LAW OF MISSOURI SHOULD BE RE-AFFIRMED:

There is a consequence to this case, albeit a minor one, if the Court upholds the existing law of imputation of negligence. A party who must *rely* on the presumption that a sole owner of a vehicle who is a passenger has appointed the driver as agent, acting within the scope of the driver's employment, is entitled to have his or her case go to the jury irrespective of rebutting evidence presented by his opponent. *Brucker v. Gambaro*, supra at 922. In this case, since Sandy did not rebut either a presumption of agency or the evidence of agency, the question boils down to whether a jury should have considered the question of agency or joint journey. This question is answered in Section "C" of this Point: For entirely different reasons, in this case there was no issue for the jury to decide.

Nevertheless, a serious issue has been raised as to whether Missouri's law should be re-examined, and accordingly District discusses the experience of two states, Pennsylvania and Maryland.

The decision of the Supreme Court of Pennsylvania in *Smalich v. Westfall*, 269 A.2d 476 (Pa. 1970) is cited by Sandy as a so-called "Question of Fact" case. The case involved the death of a passenger in an automobile, owned by her, and a verdict for her estate and her minor son that was lost when the trial court granted post-trial motions

based on principles of imputed negligence. *Id*. at 479. The driver was, evidently, a boyfriend, although the opinion does not reveal what was the relation and what was the purpose of the trip. According to what appears to have been the practice in Pennsylvania at the time, the jury was instructed that if the jury found that the passenger had "relinquished her right to control" the vehicle to the driver, then negligence of her driver would not affect her right of recovery. *Id*. at 483. The simple holding of the case, which appears to have been dictated by the jury's verdict based upon prior precedent,[6] was that in view of the jury's verdict based on this instruction the post-trial orders could not stand. *Id*. at 483.

The *Smalich* Court entered into a lengthy examination of the law of agency, presumably only because its prior precedent stated that the presumption of right to control by an owner-passenger could be based either on a relationship of master-servant or one of principal-agent *Id*. at 480.

The *Smalich* Court's analysis is based on a premise that only a master-servant relationship imparted a degree of control that justified the imputation of contributory negligence of a driver to an owner-passenger. *Id*. at 481. In the view of the Pennsylvania Court, in a typical scenario one who permits another to drive his or her car is mostly interested in arriving at a destination, and relies on the driver to "use care and skill to accomplish [this] result". *Id*. at 482. This sounded to the Court like something an agent does, but not a servant. Accordingly, the Pennsylvania Court determined that in Pennsylvania an agent is something that is different *in kind* than a servant, relying on

[6] *Beam v. Pittsburgh Railways Co.*, 77 A.2d 634 (Pa. 1951).

nothing more substantial than prefatory sections of the Restatement (2nd) of Agency. *Id*. at 480-81.[7] The Court allowed that Pennsylvania law would recognize imputation of fault if "joint enterprise" was proved, but the Court stated that it examined the record and found no basis on which the jury could have found the elements of joint enterprise. *Id*. at 481-82. It was also speculated that in some situations the driver might actually be a servant, such as when the driver is inexperienced. *Id*. at 482, fn. 4.

The *Smalich* decision has only been cited twice by courts sitting in Pennsylvania, and both distinguished the case on its facts.

We contrast the experience of Maryland, which Sandy characterizes as a "Presumption" state. The Opinion of the Maryland Court in *Slutter v. Homer*, 223 A.2d 141 (Md. 1966) involved an automobile owned by Ms. Slutter that was being driven by her daughter with Slutter as a passenger, when it was involved in a collision returning from a trip for groceries. The trial court imputed daughter's negligence to the owner, and since the daughter was deemed contributorily negligent as a matter of law, the court directed a verdict denying damages to Slutter. The Court of Appeals affirmed.

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[7] The definition of agent in these prefatory sections refers to contractual agents, and (as quoted by the *Smalich* Court) speak of such agents as "fiduciaries." Sandy curiously cites *State ex rel. Ford Motor Co. v. Bacon,* 63 S.W.3d 641 (Mo. 2002) (Appellant's Substitute Brief, page 15). This case describes agency in the contractual sense (it involved appointment of an agent for venue purposes) and the discussion draws upon one of the same sources as *Smalich* (Restatement (2nd) of Agency, § 1).

The Maryland Court acknowledged criticisms leveled by Professor Prosser regarding supposed "fictions" inherent in the traditional doctrine of imputed negligence, criticisms that figured prominently in the *Smalich* case. On the other hand, the Maryland Court cited Comment j to Section 491 of the Restatement (2nd) of Agency, which states that when one drives the owner of a vehicle for purposes that are for the benefit of the owner, under principles of agency the owner may be regarded as the master. *Id.* at 145. The Court noted:

> "The doctrine of imputed negligence rests on the presumption that the non-driving owner had the right to control the vehicle. That presumption . . . is rebuttable; the presumption is based, not on the actual exercise of control, but on the right to exercise it. The agency doctrine, on the other hand, rests on the relationship of the parties and the nature of the expedition during which the accident occurred. Imputed negligence, like agency, is based on the relationship, but turns on the facts in respect to the right of control, whereas the agency theory applies, where it is pertinent, irrespective of the momentary right of physical control. In short, the agency doctrine is predicated on a status rather on inference of fact."

Id. The Court did not find it necessary on these facts to determine if the doctrine of imputed negligence was viable in Maryland, as it held that the driver's negligence barred recovery by the owner-passenger under *either* that doctrine or "the law of agency." *Id.*

To this day, Maryland Courts maintain the two doctrines in parallel. When the owner is present in the vehicle, the presumption of agency is applied; When the owner is not present, examination of the relationship of the owner and driver is undertaken under

traditional principles of agency law. *See, Mackey v. Dorsey*, 655 A.2d 1333, 1339-40 (Md. App. 1995). In some cases, the owner-passenger offers evidence sufficient to rebut the presumption. *See, i.e., Williams v. Wheeler*, 249 A.2d 104 (Md. 1969)(Stepfather had "passed out" in rear seat of car, stepson took key from a hiding place and drove without stepfather's knowledge).

In Maryland, co-ownership by husband and wife does not produce a presumption of agency, and this is not felt to conflict with general principles of imputed liability of owner-passengers. *Nationwide Mut. Ins. Co. v. Stroh*, 550 A.2d 373 (Md. 1988).

It is clear that Maryland's view of the law is the correct one, and that Pennsylvania has taken a "detour" that is both unwarranted and dangerous.

As has been mentioned, the Pennsylvania Supreme Court in *Smalich v. Westfall*, supra, created a whole new doctrine of agency in order to accomplish the result it sought to achieve there. Following the reasoning of *Smalich* literally, a chauffeur who was about his master's business without the master present could not expose the master to *respondeat superior* liability because there would be no opportunity to control every physical action of the chauffeur, our even his or her route of travel. The chauffeur on a mission for the master would be free to "use care and skill to accomplish [this] result." *Smalich v. Westfall*, supra at 482. Incongruently, by definition the chauffeur would be an "agent" and therefore a fiduciary. The point is that the analysis of the Pennsylvania Court is entirely circular, and it is wrong.

Most disturbing is the formula of proof that was produced by reasoning such as this. According to the Court in Pennsylvania *Smalich*:

> "All that we now hold is that the character of the relationship created by the parties must be determined from their express agreement or from the circumstances, which may be disclosed at trial."

Id., 269 A.2d at 482. Automobile owners and their drivers in this day and age are most likely bound by ties of family or friendship, and the formulation produced by the Pennsylvania Court is unworkable and unfair. To take one example, why would a father and son testify to terms of an express agreement that would expose *both* to liability or to relative fault, when the agreement might as well be remembered so only one would be exposed? Presumptions were created to discourage this sort of collaboration, when an opposing party has no access to proof necessary to present a *prima facie* case.

F. SUMMARY AND CONCLUSION:

This is a case that was decided by an experienced trial judge based on Sandy's own evidence that established as a matter of law that she had appointed her nephew as her agent or servant to transport her in her automobile. The doctrine of imputed negligence, while it is the law in Missouri and ought to remain so, played no part in the decision of the Trial Court that Sandy raises here.

Sandy is not entitled to judgment as a matter of law declaring that Sam's negligence cannot be imputed to her, and she has waived any claim that the issue of agency should be determined by a jury.

For the above stated reasons, District prays that the Court affirm the judgment of the Trial Court to the extent such judgment is based upon the imputation of relative fault to Sandy, and that it dismiss, as moot, Point III of District's Cross Appeal. Point II of District's Cross Appeal should be considered and determined.

C R O S S A P P E A L

II.

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED AND REFUSED TO PERMIT DEFENDANT TO AMEND ITS ANSWER AND ASSERT RIGHT OF SET-OFF FOR SETTLEMENT PAYMENT BY A JOINT TORTFEASOR, AND WHEN IT FAILED AND REFUSED TO OFFSET THE AMOUNT OF $25,000.00 AGAINST THE JUDGMENT THAT THE TRIAL COURT ENTERED IN THIS CASE, FOR THE REASON(S) THAT THE MATTER AND AMOUNT OF THE SETTLEMENT WAS A MATTER FOR DETERMINATION BY THE TRIAL COURT WITHOUT INTERVENTION OF THE JURY AND THERE IS NO REASON EXCEPT FOR THE TIMING OF DEFENDANT'S REQUEST FOR LEAVE TO AMEND THAT WEIGHS AGAINST THE OFFSET OF THE ADMITTED SETTLEMENT AMOUNT.

Standard of Review

The standard of review for this Point is whether the Trial Court abused its discretion in failing and refusing to grant leave for Fire District to amend its Answer. *See, Hoover v. Brundage-Bone Concrete,* 193 S.W.3d 867 (Mo.App. S.D. 2006).

The chronology of Sandy's settlement with Sam Madden is set forth in the Statement of Facts. The issue here presented is whether Missouri trial judges lack discretion in performing the ministerial act of setting off settlements of joint tortfeasors, so long as the defendant seeking set-off raises the fact and amount of settlement by appropriate pleading before judgment is entered.

This Court should clarify its holding in *Norman v. Wright*, 153 S.W.3d 305 (Mo. en banc 2005)("*Norman II*"). That was an unusual case, brought about because a defendant in the case attempted to raise set-off solely by way of a post-trial motion. *See*, *Norman v. Wright*, 100 S.W.3d 783 (Mo. 2003) ("*Norman I*"). In *Norman I*, this Court abrogated a decision of the Missouri Court of Appeals, Eastern District, which had permitted this practice. *Julien v. St. Louis University*, 10 S.W.3d 150 (Mo.App. E.D. 1999).

When the case returned to the Supreme Court in *Norman II*, the trial court upon remand had permitted amendment of the pleading to allege set-off and once again set off the settlement amount. The Supreme Court explained why it reversed the set-off a second time:

> "In a footnote to this holding, this Court [in *Norman I*] said that it need not 'decide how late a trial court may permit amendment of the pleadings in order to request a reduction under section 537.060.' This part of the footnote should not have been read to undercut this Court's holding by allowing an amendment to the answer in this case to assert an affirmative defense years after trial."

Id. at 306.

The ruling in *Norman II* has been applied by two Districts of the Court of Appeals, in three decisions (including the decision now on Appeal). In *Hoover v. Brundage-Bone Concrete Pumping, Inc.*, 193 S.W.3d 867, 871 (Mo.App. S.D. 2006) the Court distinguished *Norman II*, because in *Hoover* there was affirmative evidence that the parties "hid" the settlement, despite discovery answers that should have been supplemented. *Id*. at 870. The Court of Appeals reversed the decision of the trial court refusing to permit amendment to allege set-off which was presented after trial but before entry of judgment on the jury's verdict. As the Court in *Hoover* noted, ". . . a court abuses its discretion if it denies a motion to amend when the record shows the only reason for the denial was the timing of the request." *Id*. at 871.

The Eastern District, in *CADCO Inc. v. Fleetwood Enterprises, Inc.*, 220 S.W.3d 426, 440 (Mo.App. E.D. 2007), distinguished *Hoover* and followed *Norman II* in a case where motion to amend to allege right of set-off was not presented until after judgment was entered on a jury's verdict.

In the Opinion of the Eastern District in the instant case, the Court relied solely on *Norman II* in holding that District ". . . failed to plead and prove the affirmative defense of set-off, and was not entitled to have the $25,000 settlement applied toward the judgment against Winfield" (Opinion, page 14). The Court then distinguished *Hoover* on the ground that in *Hoover* the settlement was unknown at the time of trial. (Opinion, page 14-15). The Court found that the ruling of the Trial Court "was not clearly erroneous" (Opinion, page 14).

It is evident that the Eastern District and the Southern District of the Court

of Appeals are applying different standards for gauging the discretion available to a trial court when ruling upon requests for leave to amend to assert set-off that are presented before judgment is entered. The Southern District applies a five-part test, along with the presumption of abuse of discretion when the only reason for denial of leave is the timing of the request. *Hoover* v *Brundage-Bone Concrete Pumping, Inc.*, supra at 872. The Eastern District Court applied a blanket rule in the present case, finding that *Norman II* dictated denial of the District's request to amend its answer even though the request for leave preceded judgment. The Opinion below may have engrafted on to *Norman II* a test of "excusable neglect."

However, it is also evident that this Court's ruling in *Norman II*, which simply held that a Section 537.060 offset is not to be the subject of a post-trial motion, has had unintended consequences. While pleading of the right of off-set should be encouraged at the earliest possible time, a mere neglect of this obligation by counsel should not be allowed to encourage activities such as were evident in the *Hoover* case. After all, the party who is placed on notice by the assertion of this defense invariably knows of the settlement and its amount before the pleader does.

The Court of Appeals in the instant case is critical of counsel for District, and criticism is not unwarranted. Nevertheless, it is to be noted that defense counsel in the instant case and in *Hoover* shared one inadvertence: Neither filed a Section 537.060 defense as part of an original answer, but rather both waited for knowledge of the settlement before seeking leave to amend. It does appear that in

Hoover, there was no indication by way of dismissal that any settlement had occurred, whereas in the instant case there was knowledge of a settlement, but no provable evidence of the amount thereof until 13 days before trial commenced. Of course, had counsel filed a Defense at the beginning to the case, as he should have, or if counsel had acted promptly when a provable amount of set-off was obtained on July 6, 2006, this cross-appeal would be unnecessary. *Culpae poenae par esto.*

When applied to a case such as the instant case, a strict interpretation of the rules of pleading encourages delay in the announcement of settlements and accomplishes no purpose of any use to the administration of justice. The Trial Court abused his discretion when it refused to permit amendment, after trial but before entry of judgment. The only reason that can justify the overruling of a pre-judgment assertion of a Section 537.060 defense, which is by its nature known to the party who has entered a settlement, is the timing of the request. This is not a sufficient basis upon which a trial court can rest its discretion.

District prays that this Court find error in the Trial Court's refusal to off-set the amount of the Madden settlement, and in view of the disposition of other aspects of this Appeal, direct that judgment be entered in favor of Plaintiff-Appellant in the amount of NO damages, with costs to be paid by District.

III.

IN THE EVENT OF REVERSAL OF THE JUDGMENT ON APPEAL AT THE BEHEST OF PLAINTIFF AND IF PLAINTIFF'S CLAIM IS REMANDED FOR A NEW TRIAL AS TO LIABILITY, THE CAUSE SHOULD BE REMANDED FOR NEW TRIAL AS TO DAMAGES ALSO, FOR THE REASON(S) THAT THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF WRITE-OFFS OF MEDICAL BILLS DICTATED BY MEDICARE AND ERRED IN DENYING DEFENDANT'S OFFER OF PROOF TO SHOW THAT PLAINTIFF HAD NO LEGAL OBLIGATION TO PAY A MATERIAL PORTION OF THE MEDICAL BILLS SOUGHT TO BE RECOVERED.

Standard of Review

This Point III pertains to Fire District's cross-appeal, and deals with an issue pertinent to the admission of evidence. The admission or exclusion of evidence lies within the sound discretion of the Trial Court and will not be disturbed absent abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601 (Mo. en banc 2000).

The issues in this Point III are pursued only in the event that Sandy obtains a new trial on the issue of liability. As has been set forth above, because of the nature of the relief sought by Sandy in this Appeal, there should be no retrial available to Sandy regardless of the outcome of her appeal.

Although District chose to present this issue to the Trial Court via an offer of proof, the issue that is presented is one of law. This issue relates to the question of

whether "write offs" required by law under federal medical assistance programs may be recovered as part of a plaintiff's reasonable medical expenses, or, more precisely in the context of the instant case: Whether *the defendant* is allowed to introduce evidence for the jury's consideration of the amount of medical expense that plaintiff was not obligated to pay.

As set forth in the Statement of Facts, above, District offered in evidence two exhibits by which it sought to show that St. John's Medical Center, as required by Medicare regulations, "wrote off" the sum of $26,984.40, out of a total amount of medical bills offered by Sandy of $31,746.95.

Courts in Missouri's sister states have developed three ways of approaching the question presented: (1) Some courts permit recovery of the full amount of the charges and forbid evidence of write-offs; (2) Some courts prohibit recovery of the "written off" portion of the bills; and (3) Some courts take a middle view, and admit both the billed amount and the amount of the write-offs, as a means of permitting the jury to gauge the reasonable value of the medical treatments.[8] District requested that the Trial Court adopt this middle ground in this case ("option 3").

There is one Missouri decision, to District's knowledge, that rejects options 2 and 3: *Brown v. Van Noy*, 879 S.W.2d 667, 676 (Mo.App. W.D. 1994). Nevertheless, in 2003

[8] *See*, Natalie J. Kussart, "Paid Bills v. Charged Bills: Insurance and the Collateral Source Rule Arthur v. Catour, 833 N.E.2d 847 (2005)," 31 S. ILL. U. L.J. 151, 152-56, (2006), and *see*, Robinson v. Bates, 857 N.E.2d 1195, 1200 (Ohio 2006).

the Missouri Supreme Court en banc found that "option 2" represented the law of Missouri in worker's compensation cases. *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818, 823 (Mo. en banc 2003). That ruling now puts the holding of *Brown v. Van Noy* in doubt. In *Farmer-Cummings*, the Court held that the Plaintiff in a worker's compensation case cannot benefit from and claim as damages write-offs of medical bills to which the Plaintiff had no obligation. The Court stated, "Although the write-offs and fee adjustments constitute a reduction in cost, this reduction was not effected by any act of [Plaintiff]. [Plaintiff] incurred no expense or effort, nor did she economize by foregoing any privilege." *Id*. at 822.

In *Porter v. Toys 'R Us-Delaware, Inc.*, 152 S.W.3d 310, 321 (Mo.App. W.D. 2004), the Western District Court of Appeals signaled that it was ready to consider applying the Supreme Court's reasoning in *Farmer-Cummings* in civil cases, though it declined to do so in *Porter* simply because the issue had not been preserved for review. *Id*. at 321.

It seems only appropriate that a jury charged with determining whether charges for medical treatments are reasonable should hear evidence not only as to what the charges were, but also what amount of the charges the party was actually, legally obligated to pay. The amount of the Medicare write-off at issue in this case is not a "collateral source." Other jurisdictions have recently ruled on the same issue, including Ohio, whose Supreme Court adopted "option 3" in *Robinson v. Bates*, supra, 857 N.E.2d at 1200. Because no one pays the negotiated reduction, admitting evidence of write-offs

does not violate the purpose behind the collateral source rule. *Id*.; *See also*, *Arthur v Catour*, 833 N.E.2d 847, 853-54 (Ill. 2005).

As such, the write-offs of St. John's Medical Center were not benefits under the collateral source rule and it was error to exclude them as evidence of the fair and reasonable value of Sandy's medical bills. If this case is remanded for a new trial, for any reason, District prays that the Court order that there be a new trial on the issue of damages, consistent with a ruling of the Supreme Court that District's offered exhibits are admissible.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate copies of Respondent and Cross-Appellant's Substitute Brief and one floppy disk containing of Respondent and Cross-Appellant's Substitute Brief were mailed this _____ day of February, 2008, to:

Mr. Ryan Cox
320 North Fifth Street
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Attorney for Appellant/Cross-Respondent

_____
Gregory H. Wolk

CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Respondent and Cross-Appellant and, pursuant to Rule 84.06 of the Missouri Rules of Civil Procedure and Rules of this Court, certifies the following:

1. Respondent and Cross-Appellant's Brief contains the information required by Rule 55.03;

2. Respondent and Cross-Appellant's Brief complies with the limitations contained in Rule 84.06(b);

3. The number of words in Respondent and Cross-Appellant's Brief is 12,340, calculated in compliance with the Missouri Supreme Court Rules and Local Rules of this Court;

4. The word processing software used to prepare Respondent and Cross-Appellant's Brief was Microsoft Word for Windows, Version 2003; and

5. The attached floppy disk contains Respondent and Cross-Appellant's Brief and the Appendix. The Appendix consists of images saved in Adobe pdf. Format. This floppy disk has been scanned by the virus program Avira Antivir Antivirus and was found to be free of any viruses.

_____

Gregory H. Wolk