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 REPLY BRIEF OF CROSS-APPELLANT

GREGORY H. WOLK, # 24750

Berg Borgmann Wilson & Wolk, LLC
4925 Lindell Blvd.
St. Louis, Missouri 63108
Tel: (314) 361-4925
Fax: (314) 361-9001

Attorneys for Respondent and Cross-Appellant

TABLE OF CONTENTS

Page

Appendix (follows page 12 of this Brief)

Missouri Supreme Court Rule 55.33

TABLE OF AUTHORITIES

Missouri Cases **Pages**

Missouri Statutes and Rules

STATEMENT OF FACTS

Cross-Appellant (herein referred to as "Fire District"), makes no further comment regarding the parties' statement of facts relative to the cross-appeal. This Brief refers to the Appellant as "Sandy."

This Brief is confined to Points II and III set out in Fire District's Substitute Brief, which are the Points that describe the matters Fire District is cross-appealing.

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

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).

Missouri Supreme Court Rule 55.33

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:

State v. Williams, 724 S.W.2d 652 (Mo.App. E.D. 1986).

Eltiste v. Ford Motor Co., 167 S.W.3d 742 (Mo.App. E.D. 2005).

Russell v. Dir. of Revenue, 35 S.W.3d 507 (Mo.App. E.D. 2001).

A R G U M E N T

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.

Sandy contends in her Substitute Reply Brief (page 26) that Fire District has changed the basis for the cross-appeal of this Point, because in the Court of Appeals Fire District originally contended that the issue of set-off was tried by consent. Here is what happened: Fire District made this argument in its opening Brief, based upon an assertion that the Trial Court was advised of the settlement during a pretrial conference. In presenting this argument, Fire District nevertheless said "Inasmuch as the act of offsetting is a purely judicial function . . ." (Brief of Respondent and Cross-Appellant Winfield-Foley Fire Protection District, page 21). Sandy objected on the ground that the

pretrial conference was not recorded, and in its final Brief in the Court of Appeals Fire District stated:

> "Sandy notes, properly, that Fire District cannot rely upon occurrences in an unreported Court conference, and states that her counsel does not recall the discussion cited in Fire District's Brief. Fire District will not therefore rely upon the conference. However, what the record makes clear is that the settlement and the amount of it was admitted by Sandy just prior to trial. (S.L.F. 2, 36). The issue was to be administered by the Trial Court as a pure issue of law based upon undisputed facts."

(Cross-Appellant's Reply Brief, page 5).

Fire District's position in this Court is the same position that it urged in the Court of Appeals. Fire District relies only on the fact that a Trial Court's off-set of an admitted amount of settlement is a judicial act that does not require the intervention of a jury. The rationale for requiring a pleading before a case is tried to a jury does not apply to the question under consideration.

Sandy claims that the decision of the Court of Appeals, Eastern District, in *CADCO Inc. v. Fleetwood Enterprises, Inc.*, 220 S.W.3d 426 (Mo.App. E.D. 2007) involved a request for set-off of a settlement that occurred before entry of judgment. A reading of the case reveals that it is not clear if this is the case or not. Fire District has contended that the request came after judgment, because the Opinion in *CADCO* states that "The trial court entered an ***amended*** final judgment awarding CADCO a total amount of $1,700,352.18." *Id*. at 432-433 (emphasis added). Later in the Opinion, the Court does

state that two weeks after the jury trial, the trial court there still had not entered a judgment, but that it did so based upon a letter from counsel that raised the settlement. *Id*. at 440-41. It is not clear if the judgment that was entered that contained the set-off was the first judgment or the amended judgment.

The principal holding of the *CADCO* decision was that the settlement which the defendant sought to set off was of a claim that was not based on the same facts as the claim decided by the verdict. *Id*. at 441. Counsel for defendant, furthermore, never made a request to amend its defenses. *Id*.

Whatever *CADCO* holds, the case demonstrates that the Court of Appeals, Eastern District, is enforcing this Court's pronouncement in *Norman v. Wright*, 153 S.W.3d 305 (Mo. en banc 2005) utilizing standards that are entirely at odds with the decision of the Southern District in *Hoover v. Brundage-Bone Concrete*, 193 S.W.3d 867 (Mo.App. S.D. 2006). *CADCO* would be the case that illustrates in the present context the potential unfairness of overly restrictive rules of pleading, if in fact the matter of amending a pleading was necessary to the result in that case. In *CADCO*, a settlement by the co-defendant was announced three days before trial. *CADCO Inc. v. Fleetwood Enterprises, Inc.*, supra at 440. The Opinion does not reveal that the defendant who tried the case was advised of the *amount* of settlement before or during the trial, and one would suspect that this crucial bit of information was not shared at that time. What the recited facts suggest is that the Trial Court there entertained a request for set-off presented by counsel's letter and withheld entry of judgment until the matter of the amount was determined, and under the presumed circumstances it is difficult to imagine how else the Trial Court could have

been fair to the non-settling defendant. Of course, when counsel for the non-settling defendant wrote the Court he should have requested leave to amend his answer. On the other hand, this would appear to be a needless formality under the facts of that case. In any event, as has been noted, the outcome in *CADCO* would have been the same no matter what counsel did.

Sandy in her Substitute Reply Brief distinguishes the case of *Hoover v. Brundage-Bone Concrete Pumping, Inc.*, supra. The grounds for distinguishing *Hoover* is, first, that the defendant there did not learn of the settlement until after the jury trial, and second, that the Plaintiff did not in a timely fashion supplement an answer to interrogatory addressed to settlements.

In the *Hoover* case, it does appear that the Trial Court delayed the entering of a judgment for some weeks after trial, and that the defendant there did not know the fact or amount of settlement until after trial. This was because the settlement was with parties who had not been joined in the same action. *Id*. at 869. It is not clear that these facts ought to improve the position of the defendant there over the position of Fire District in the instant case. Fire District requested leave to amend its Answer immediately upon announcement of the verdict and before the Trial Court had even an opportunity to render a judgment based thereon.

As to the second point, this Court's Rules provide that for amendments to pleadings, ". . . leave shall be freely given when justice so requires." Missouri Supreme Court Rule 55.33(a). Whether "justice requires" has never been made to depend upon whether the party seeking leave can point to violations of discovery or other court rules

by his or her opponent. The *Hoover* case is not distinguishable. And while the Court in *Hoover* discusses a variety of factors that bear on the exercise of a court's discretion when leave to amend has been asserted, it is clear that under the circumstances of the instant Appeal the factors will *never* weigh against a defendant who seeks leave to amend to assert what his opponent already knows – that a case against a jointly liable party has been settled. It will *always* be the case under the *Hoover* rule that only the timing of the request for leave can justify denial of leave, and it is an abuse of discretion when a trial court denies leave when it has nothing else. *Hoover v. Brundage-Bone Concrete Pumping, Inc.*, supra at 871.

Counsel for Fire District acknowledges a mistake, and it acknowledges that it knew sixteen days before trial that there was a settlement of $25,000 with Mr. Madden. Fire District does note that the record shows that the dismissal of Madden was not served on Fire District (S.L.F. 001), but in any case it has been admitted that Fire District could and should have amended its Answer before trial. Nevertheless, Sandy does not address the issue raised by Fire District's cross-appeal Point II, which is whether this Court should acknowledge that a rule of "excusable neglect" should or need be applied when interpreting Rule 55.33(a). If the Supreme Court determines that such a rule exists, only then does the Court need to judge counsel's neglect against the standard that the Court adopts.

As has been argued, the precise issue presented by this Point involves the pleading of a fact that by its nature is known to the person who is to be noticed by amended pleading, and there is not and ought not be a requirement that the pleader's attorney

defend himself or herself against a charge of neglect so long as motion for leave is presented before judgment. Only the timing of the request weighs against the grant of leave in these circumstances, and a trial court may not on that basis deny the requested leave. *Hoover v. Brundage-Bone Concrete Pumping, Inc.*, supra.

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.

Sandy claims that Fire District made an inadequate offer of proof to show the relevance of medical records of Medicaid "write-offs." The offer of proof was an offer of *records* admissible through a business records affidavit (S.L.F. 21). As shown by the transcript (Tr. 8), the offer was made at the Trial Court's invitation, after the Court had ruled *in limine* on the issue against Fire District. Fire District counsel noted as part of his offer that the Court had forbidden counsel to cross-examine Sandy on the subject of the

disputed exhibits, and "I had cited some cases," referring to the argument on the motion *in limine* (Tr. 8). The Trial Court then stated that he was rejecting Fire District's principal case because it was a Workers Compensation case (Tr. 9). The record makes clear that the parties and the Trial Court were fully aware that Fire District was presenting the evidence to support a legal argument, and that the objection was not to the admissibility of these *particular* documents, but to the admission of any evidence at all of Medicare write-offs.

There are two exceptions to the rule relied upon by Sandy regarding offers of proof, which when applicable obviate the need for *any* offer of proof. In the first place, offers are not generally required when a party seeks to elicit evidence on cross examination. *State v. Williams*, 724 S.W.2d 652, 656 (Mo.App. E.D. 1986). Secondly, when the objection to evidence is "to a category of evidence rather than to specific testimony," and it is clear from the record that there is an understanding of the evidence and that its admission would aid its proponent, no formal offer is required. *Eltiste v. Ford Motor Co.*, 167 S.W.3d 742, 749 (Mo.App. E.D. 2005); *Russell v. Dir. of Revenue*, 35 S.W.3d 507, 509 (Mo.App. E.D. 2001).

But in fact, Fire District made an offer of proof in this case. The offer, in a narrative form, was more than sufficient, particularly considering that admissible business records contained the relevant information. *See, Stipp v. Tsutomi Karasawa,* 318 S.W.2d 172, 175 (Mo. 1958). It is certain in view of the record that the Trial Court and counsel understood Fire District's argument and the relevance and materiality of the evidence of write-offs to a legal theory that the Trial Court rejected.

Fire District has already emphasized that this Point is a contingent point, and it is pursued only in the event that Sandy obtains a new trial on the issue of liability. Sandy in her Brief pointedly seeks new trial only on the issue of liability. Sandy is pleased with the award of damages, but displeased with the jury's finding of relative fault. Fire District requires its Point III only because of this effort to restrict the scope of any re-trial. In comparative fault cases, it should be a rare case indeed when on retrial a jury would not consider both liability and damages. *Brown v. Lanrich*, 950 S.W.2d 235, 237 (Mo.App. E.D. 1997); *McCormack v. Capital Elec. Constr. Co.*, 35 S.W.3d 410 (Mo.App. W.D. 2000).

This Court should address the question posed: should Missouri follow a new course of law (not heretofore clarified by our courts) pertinent to the admissibility of write-offs that are required by government aid programs. If the Court determines that the Trial Court utilized the wrong standard for determining admissibility, then of course this Court should not hesitate to remand the case for a new determination of damages also. The adequacy of Fire District's offer of proof in the first trial would be moot in a re-trial based upon the concept that the amount of Medicaid write-offs is relevant to the determination of the value of medical services, as well such evidence should be. Nevertheless, as has been noted this issue need not be addressed if the Court finds, as it should, that Sandy is not entitled to relief on her Appeal.

C O N C L U S I O N

For all of the reasons set forth in its Brief and in this Reply Brief, your Cross-

Appellant prays that the Court rule as follows:

The judgment of the Trial Court should be affirmed in this case, except that this Court should reverse the Trial Court's ruling denying leave to amend Cross-Appellant's Answer, and the Court should enter judgment for NO damages.

If this Court reverses the judgment as to liability and relative fault, then the Court should remand the case for new trial on the issues of liability and damages. Cross-Appellant prays in that event that the Court determine and find that evidence that a medical provider has written-off medical charges in accordance with Medicaid regulatory requirements is admissible evidence on the question of the reasonableness of the medical charges sought.

Respectfully Submitted,

GREGORY H. WOLK, # 24750
Berg Borgmann Wilson & Wolk, LLC
4925 Lindell Blvd.
St. Louis, Missouri 63108
Tel: (314) 361-4925
Fax: (314) 361-9001

Attorneys for Respondent and Cross-Appellant.

CERTIFICATE OF SERVICE

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

Mr. Ryan Cox
320 North Fifth Street
St. Charles, MO 63301
Attorney for Appellant/Cross-Respondent

_____
Gregory H. Wolk

CERTIFICATE OF COMPLIANCE

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

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

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

3. The number of words in Cross-Appellant's Substitute Reply Brief is 3080, calculated in compliance with the Missouri Supreme Court Rules and Local Rules of this Court;

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

5. The attached floppy disk contains Cross-Appellant's Substitute Reply Brief and the Appendix. 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