IN THE SUPREME COURT OF MISSOURI

CASE NO. SC 91492

RONALD SANDERS

Appellant/Cross-Respondent,

v.

IFTEKHAR AHMED, M.D. and DR. IFTEKHAR AHMED, P.A.

Respondents/Cross-Appellants.

RESPONDENTS/CROSS-APPELLANTS IFTEKHAR AHMED, M.D. AND DR. IFTEKHAR AHMED, P.A.'S REPLY BRIEF

Appeal from the Sixteenth Judicial Circuit Court
County of Jackson, State of Missouri, Division No. 15
Case No. 0516-CV12867

The Honorable Robert M. Schieber

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REPLY ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR REDUCTION PURSUANT TO MO. REV. STAT. § 537.060 (2000), BECAUSE THE STATUTE REQUIRES THE COURT TO REDUCE THE CLAIM WHEN AN AGREEMENT IS ENTERED BETWEEN ONE OR MORE PERSONS LIABLE FOR THE SAME WRONGFUL DEATH, IN THAT MR. SANDERS, PRIOR TO TRIAL, ENTERED INTO AGREEMENTS WITH SEVERAL JOINT TORT-FEASORS WHICH REDUCED THE CLAIM AND DR. AHMED TIMELY REQUESTED RELIEF UNDER THE STATUTE.

Reply Argument:

In his response, Appellant/Cross-Respondent Ronald Sanders ("Mr. Sanders") asserts that Respondents/Cross-Appellants Iftekhar Ahmed, M.D. and Dr. Iftekhar Ahmed, P.A. ("Dr. Ahmed") failed to comply with the requirements of MO. REV. STAT § 537.060. Mr. Sanders' assertion is without merit. The undisputed facts demonstrate that Dr. Ahmed properly requested and demonstrated his right relief pursuant to § 537.060.

A § 537.060 setoff (sometimes referred to as a reduction) is an affirmative defense that must be plead and proven. *Norman v. Wright,* 100 S.W.3d 783 (Mo.banc 2003). Dr. Ahmed pled setoff in his Answer to Plaintiff's Third Amended Petition for Damages. (LF 95-99). Following plaintiff's settlement with every other defendant, Dr. Ahmed also filed a Motion for Setoff. (LF 150-

151). In that motion, he set forth facts to support his affirmative defense. Specifically, he stated in relevant part: "[p]laintiff has settled with all other defendants for monetary consideration." (LF 150). Settlement by joint tortfeasors was further demonstrated through the Stipulation between Mr. Sanders and Dr. Ahmed. (LF 222).

Dr. Ahmed does not dispute the plain meaning of § 537.060, which states in relevant part: "[w]hen 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 reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater." However, contrary to Mr. Sanders' assertion, it does not state that the party requesting relief must prove the settling defendants' liability or fault at trial. Moreover, Mr. Sanders' own pleadings clearly provide a proper foundation for Dr. Ahmed's request for setoff.

In his Third Amended Petition for Damages Mr. Sanders alleged negligence against defendants Midwest Division – MCI, LLC (the hospital where Paulette Sanders received care) and its employees K. Hunt, R.N.; Kent Jones, R.N.; Carol E. Kirila, D.O., her employer Kansas City University of Medicine and Biosciences and her resident Nathan Knackstedt, D.O.; Iftekhar Ahmed, M.D.; and Dr. Iftekhar Ahmed, P.A. (LF 80-94). Among other things, Mr. Sanders alleged that "Dr. Kirila acted jointly with Dr. Iftekhar Ahmed and Dr. Knackstedt to treat

Paulette Sanders' medical and neurological conditions." (LF 82 ¶ 3). Mr. Sanders also alleged:

> "[a]s a direct and proximate consequence of the acts, omissions and conduct of the defendants as set out herein, Paulette Sanders developed an elevation in her serum ammonia level, deteriorated into coma, suffered aspiration pneumonia, became hypoxic, and suffered permanent brain damage which in turn caused here to become bedridden, physically disabled and mentally incapacitated, the complications of which ultimately directly cause or directly contributed to cause her death on August 24, 2005."

(LF 91-92 ¶ 24). In his prayer for relief, Mr. Sanders sought damages "against these defendants jointly and severally." (LF 93). Clearly, Mr. Sanders' own pleadings demonstrate that the settling defendants fall within the circumstances contemplated by § 537.060. Mr. Sanders has already received payment from the settling defendants based upon the allegations set forth in his pleadings. Under the circumstances, it is disingenuous for Mr. Sanders to assert that Dr. Ahmed is not entitled to a setoff/reduction equal to the amount of the consideration paid by the settling defendants. Moreover, to deny Dr. Ahmed the benefit of § 537.060 would render the statute meaningless and abrogate long-standing common law. *See e.g.*, *Page v. Freeman*, 19 Mo. 421, 422 (1854).

"[T]he predicate condition to application of section 537.060 is established when an injury is caused by joint tortfeasors, referring to defendants whose

alleged tortious conduct causes injury to the plaintiff in the same transaction of facts." *Stevenson v. Aquila Foreign Qualifications Corp.*, 326 S.W.3d 920, 925 (Mo. App. 2010) (*citing Teeter v. Mo. Highway & Transp. Comm'n*, 891 S.W.2d 817, 820 (Mo. banc 1995) (two defendants sued for wrongful death arising from the same automobile collision); *Elsie v. Firemaster Apparatus*, 759 S.W.2d 305, 307 (Mo. App. 1988) (three defendants liable for personal injuries sustained in the same automobile collision). "These cases demonstrate that 'same injury' refers to a scenario where the same transaction of facts causes an injury that is 'indivisible' with respect to the relative culpability of the multiple tortfeasors contributing to same. *Id.* "'Same injury' is, therefore, synonymous with 'indivisible injury.'" *Id.*

In his brief, Mr. Sanders asserts that Dr. Ahmed must "plead and prove a medical malpractice action against every former defendant for whose payment they claimed a credit or setoff." (Appellant's Second brief at p. 49). Neither § 537.060, nor case law applying it, require him to prove at trial that his former co-defendants committed medical malpractice. A review of the case law cited in support of Mr. Sanders' argument reveals that Missouri courts do not require such a level of proof. *See Norman*, 100 S.W.3d 783; *Stevenson* 326 S.W.3d 920; *State ex rel. Normandy Orthopedics, Inc. v. Crandall*, 581 S.W.2d 829 (Mo.banc 1979); *Walihan v. St. Louis-Clayton Orthopedic Grp., Inc.*, 849 S.W.2d 177 (Mo. App. 1993).

In *Stevenson*, defendant sought, and was denied, application of § 537.060. *Stevenson*, 326 S.W.3d at 923-4. The facts of that case, which counsel for Mr.

Sanders is no doubt very familiar with as they were counsel for the plaintiff in *Stevenson*, demonstrate that plaintiff suffered injuries as a result of an automobile accident with an employee of defendant. *Id.* at 923. Plaintiff suffered injuries three years later from another, and independent, automobile accident. *Id.* In affirming the trial court's denial of relief pursuant to § 537.060, the court noted that:

> "Section 537.060 does not alter, but rather implements the common law rule that a plaintiff is entitled to only one satisfaction for the same wrong. Accordingly, the receipt of full satisfaction from either tortfeasor for the wrong for which both are liable would bar plaintiff's recovery from the other for the same injury. Further, when the injured plaintiff settles with one of the tortfeasors for a portion of the wrong for which each is liable, 'the injured person still retains her cause of action against the other tort-feasors and recovery may be had for the balance of the injury.'"

Id. at 925 (*citing Walihan* 849 S.W.2d at 180) (emphasis in original). The injuries suffered by plaintiff in *Stevenson* were independent acts of negligence occurring with three years separating the events.

In *Normandy*, plaintiff suffered injuries in an automobile accident requiring surgical stabilization of his left femur. *Normandy*, 581 S.W.2d at 830. Plaintiff sued the defendant automobile driver for injuries sustained in the accident and settled. *Id.* Subsequent to settling with the defendant driver, plaintiff filed suit

against defendant surgeons for negligent repair of his femur. *Id.* The defendant surgeons then filed dispositive motions alleging that plaintiff's previous execution of a "Release in Full" necessarily included them and their negligent actions in relation to their repair of plaintiff's femur. *Id.* The defendant physicians attempted to disclaim all negligence under § 537.060 not merely a setoff for what was paid by the defendant driver in the prior suit.

In *Walihan*, plaintiffs filed a wrongful death case after the death of James Walihan subsequent to a back surgery performed by the defendant. *Walihan*, 849 S.W.2d 179. The back surgery was necessitated by a work injury sustained by Mr. Walihan. *Id.* Plaintiffs filed suit in Illinois as a result of the work injuries and ultimately settled the same. *Id.* Plaintiff separately brought suit in Missouri for the alleged medical malpractice by defendant. *Id.* After a trial, the court entered judgment in favor of the plaintiff after reducing the jury's award by the amount of settlement received by the plaintiffs from the Illinois lawsuit. *Id.* The Court of Appeals ultimately reversed the trial court's decision because "[r]elief pursuant to § 537.060 is not appropriate, however, when the injuries involved are not the same." *Walihan* 849 S.W.2d at 180.

The *Stevenson*, *Normandy* and *Walihan* cases cited in Mr. Sanders' brief do not support his assertion that Dr. Ahmed had to plead and prove a medical malpractice case against all of the settling defendants in order to receive a setoff for amounts paid to Mr. Sanders to settle the claims asserted by him in this lawsuit. Moreover, Mr. Sanders' assertion actually contemplates a different

procedure that had been previously available to non-settling defendants. MO. REV. STAT. § 538.230 (2000)(repealed in 2005). Specifically, if a non-settling defendant wished to receive a "percentage credit" for the conduct of a settling defendant that party would be required to prove the case against the settling defendant at trial and place their name on the verdict form for consideration by the jury pursuant to § 538.230. Clearly, that is not the procedure contemplated by § 537.060. Rather, § 537.060 is designed to prevent a double recovery when a plaintiff has received a settlement and later obtained a judgment against the remaining defendants at trial.

Dr. Ahmed timely and properly requested setoff pursuant to § 537.060. He also pled and proved the existence of the settlement and the amount of the settlement with his former co-defendants. The trial court's denial of application of § 537.060 was an error of law requiring this Court to remand for amendment of the Judgment.

2. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR PERIODIC PAYMENTS PURSUANT TO MO. REV. STAT. § 538.220.2 (1986) BECAUSE THE STATUTE REQUIRES THE COURT TO GRANT A MOTION BY EITHER PARTY, IN THAT DR. AHMED REQUESTED RELIEF UNDER THE STATUTE AND MR. SANDERS WAS AWARDED IN EXCESS OF ONE HUNDRED THOUSAND DOLLARS WHICH INCLUDED FUTURE DAMAGES.

Reply Argument:

In his brief, Mr. Sanders challenges the constitutionality of MO. REV. STAT. § 538.220.2. Similar to his assertion that MO. REV. STAT. § 538.210 violates the Missouri Constitution, Mr. Sanders does not establish why this Court should revisit its ruling in *Adams v. Children's Mercy Hospital,* which determined that § 538.220.2 was constitutional. 832 S.W.2d 898 (Mo.banc 1992). Absent a showing that the Court was incorrect in upholding the constitutionality of § 538.220 in 1992, *stare decisis* would require that this Court uphold the prior decision in *Adams. S.W. Bell Yellow Pages, Inc. v. Dir. Of Revenue,* 94 S.W.3d 388, 390 (Mo. 2002).

Pursuant to § 538.220.2, when damages are awarded in excess of $100,000 a party may request that future damages be paid in periodic or installment payments. The constitutionality of this statute was challenged in 1992 and upheld. *Adams,* 832 S.W. 898. This Court, in *Adams*, stated "§ 538.220 is rationally related to the general goal of preserving adequate, affordable health care for all

Missourians." *Id. at 904-5*. "It permits defendants to satisfy a judgment for future damages in periodic or installment payments. By permitting installment payments, the legislature could reason that spreading future judgment payments over a period of time would reduce costs to insurance companies and reduce insurance premiums, lowering insurance premiums and making medical services less expensive and more available than would otherwise be the case." *Id.* at 905. The *Adams* decision remains good law and should not be overruled or altered by this Court.

Mr. Sanders asserts that § 538.220.2 is unconstitutional for four reasons: 1) it violates a right to trial by jury; 2) violates separation of powers; 3) is a taking of private property, for public use, without just compensation; and 4) is a special law changing methods for collection of debts or enforcing judgments. Dr. Ahmed fully addressed the fact § 538.210 does not violate a right to trial by jury nor violates the separation of powers in his response to Mr. Sanders' Points Relied On. Rather than restate that analysis here, Dr. Ahmed incorporates the constitutional analysis set forth in his first brief in support of the constitutionality of § 538.210. That same constitutional analysis applies equally to Mr. Sanders' claims regarding § 538.220. To the extent Mr. Sanders' arguments were not previously addressed, Dr. Ahmed briefly addresses them below.

Mr. Sanders asserts that § 538.220 constitutes a taking of private property for public use without just compensation. However, he fails to cite any case in support of his assertion which addresses the precise circumstances presented in

this case. While Mr. Sanders generally references case law and the Missouri Constitution which prohibit the taking of private property, for public use, without just compensation, he fails to demonstrate how § 538.220 violates either. In support of his argument, Mr. Sanders cites *State ex rel. N.W. Elec. Power Co-op., Inc. v. Waggoner*, 319 S.W.2d 930, 934 (Mo. App. 1959). However, Mr. Sanders fails to inform this Court that the case centered on a private utility condemning land for construction of public utilities. *Id.* at 934. The facts of *N.W. Elec. Power Co-op* are in not analogous to the circumstances presented to the Court in this case.

Mr. Sanders has also failed to present this Court with any Missouri precedent that would require this Court to find that a statutorily authorized delay in payment of future damages in any way equates to a taking of private property without just compensation for a public purpose. Section 538.220 contemplates making payments for future damages over time as the need for such payments arise at a future date. Moreover, the statute requires the payment of interest on any future payments until such time as those payments are made to the plaintiff. Under such circumstances, it is clear that § 538.220 does not constitute a taking of property from Mr. Sanders for a public use without just compensation. For this additional reason, the Court should continue to uphold the constitutionality of § 538.220.

Mr. Sanders asserts that § 538.220 is a special law changing the methods for collection of debts or enforcing judgments. Mr. Sanders cites several cases in

an attempt to conclude that § 538.220 violates MO. CONST. ART. III, §40(4). None of the cases cited in support of his argument address ART. III, §40(4). A review of the case law that has focused on ART. III, §40 demonstrates that § 538.220 is not a special law. "This Court has long recognized that a general law is a 'statute which relates to persons or things as a class.'" *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. 2006) (*quoting Reals v. Courson*, 164 S.W.2d 306, 307 (1942)). Conversely, "a statute which relates to particular persons or things of a class is special." *Reals*, 164 S.W.2d at 307–08. "The vice in special laws is that they do not embrace all of the class to which they are naturally related." *Id*. at 308. "Thus, the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply." *City of Springfield*, 203 S.W.3d at 184.

"Whether a law is general or special can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic." *Id.* "Laws that are not open-ended usually single out one or more groupings by certain permanent characteristics." *Id.* "Classifications based on historical facts, geography, or constitutional status focus on immutable characteristics and are therefore facially special laws." *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 65 (Mo. 1994). Based upon what courts in this State have held regarding differentiating special from general laws, § 538.220 could only be considered a general law. Nothing in its language focuses on historical facts, geography or constitutional status of any person or persons.

Therefore, for this additional reason, this Court should uphold § 538.220 as constitutional as it first did in 1992.

Mr. Sanders alternatively argues that the trial court properly exercised its discretion in refusing to apply § 538.220.2. However, under the circumstances, the trial court had no discretion in applying § 538.220.2. The plain language of the statute requires the Court to order future payments when properly and timely requested.

Finally, Mr. Sanders asserts that the trial court actually did apply § 538.220.2 in its Amended Judgment. However, a review the trial court's order of January 18, 2011 demonstrates that Mr. Sanders' assertion is incorrect. In its order, the trial court stated: "Defendants' motion for application of RSMo § 538.220, filed with the Court on September 21, 2010, should be and is hereby, **DENIED**." (LF 145). While creative, Mr. Sanders' argument that Dr. Ahmed did receive the benefit of § 538.220 is not supported by the record.

Dr. Ahmed was denied the benefit of § 538.220.2. The trial court, in denying relief under the statute made an error of law such that this Court should remand the Judgment to the trial court for correction consistent with § 538.220.2.

3. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR DIRECTED VERDICT AND/OR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE MR. SANDERS FAILED TO MAKE A SUBMISSIBLE CASE IN THAT HE FAILED TO PROVE THAT THE ALLEGED NEGLIGENCE OF DR. AHMED CAUSED THE CLAIMED INJURY TO MR. SANDERS.

Reply Argument:

Mr. Sanders asserts that Dr. Ahmed failed to properly preserve his argument that the plaintiff failed to make a submissible case because he failed to file a motion for directed verdict at the close of plaintiff's evidence. In support of his assertion, he relies on *Goede v. Aerojet Gen. Corp.* and *Frisella v. Reserve Life Ins. Co. of Dallas, Tx.* 143 S.W.3d 14 (Mo. App. 2004); 583 S.W.2d 728 (Mo. App. 1979). However, Mr. Sanders fails to address a subsequent decision addressing this same point. *See Pope v. Pope* 179 S.W. 3d 442 (Mo. App. 2005). Specifically, in addressing this point the *Pope* court stated in relevant part:

> "[t]o preserve the question of submissibility for appellate review in a jury-tried case, a motion for directed verdict must be filed at the close of all the evidence and, in the event of an adverse verdict, an after-trial motion for a new trial or to set aside a verdict must assign as error the trial court's failure to have directed such a verdict. Failure to move for a directed verdict at the close of all the evidence waives any contention that plaintiff failed to prove a submissible

> case. Similarly, a motion for directed verdict that does not comply with the requirements of Rule 72.01(a) neither presents a basis for relief in the trial court nor preserves the issue in the appellate court.

179 S.W.3d at 451. Furthermore, the plain language of Rule 72.01(a) does not require a party to move for directed verdict both at the close of plaintiff's evidence and again at the close of all evidence. Although not required to do so, Dr. Ahmed did move for directed verdict at the close or Mr. Sanders' evidence and again at the close of all of the evidence. Dr. Ahmed's motion complied with Mo. R. Civ. Pro. 72.01(a) in that it "stated, with specificity, the grounds therefor."

Dr. Ahmed's directed verdict motion challenged the submissibility of the case on the issues causation and damages. (TR 346). Dr. Ahmed properly preserved this argument such that the Court should consider whether sufficient evidence was adduced to support the jury's verdict.

CONCLUSION

Respondent/Cross-Appellants Iftekhar Ahmed, M.D. and Dr. Iftekhar Ahmed, P.A. pray that this Court deny Appellant/Cross-Respondents appeal and rule in favor of the constitutionality of MO. REV. STAT. § 538.210 (1986), and further to rule in favor of Respondent/Cross-Appellants on their appeal and enter Judgment Notwithstanding the Verdict or, alternatively, to reverse the amended judgment of the trial court and remand the matter for new trial on all issues or, alternatively, to remand to the trial court for correction of its amended judgment with instructions to apply MO. REV. STAT. § 537.060 (2000) and MO. REV. STAT. § 538.220 (1986).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, this certificate and the signature block contains 3,630 words (as determined by Microsoft Word 2007 software); and

(2) That the CD-Rom filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That a true and correct copies of the brief and a copy of the CD-ROM containing a copy of the brief, were mailed via U.S. Mail and sent via electronic mail, this 25th day of August, 2011, to:

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