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STATEMENT OF FACTS

Dr. Wright has supplemented the statement of facts. He points out certain parts of the pretrial release which expressed the intent of the parties to carefully restrict its effect such

that it benefits only the parties to the release, which did not include Dr. Wright. He also supplemented facts regarding the release which clearly expressed the intent of the parties to that transaction that the Normans were retaining all their claims for "ALL DAMAGES AGAINST ANDY WRIGHT, M.D."

Dr. Wright does not supplement the statement of facts with anything in the release which expressed any intent by those parties to create any reduction of any remaining claim against him in any fashion, nor any intent to create any direct or indirect benefit to Dr. Wright. With this clarification to those facts, the Normans agree with Dr. Wright's supplementation in this regard.

REPLY TO DR. WRIGHT'S POINTS RELIED ON

I.

THE TRIAL COURT DID ERR IN REDUCING THE JUDGMENT BY THE AMOUNT RECEIVED BY THE NORMANS IN THEIR PARTIAL SETTLEMENT BECAUSE:

1. NOTHING IN SECTION 537.060 R.S.MO. RELATES TO REDUCING THE NUMBER OF DEFENDANTS TO ONE; AND
2. THE RIGHT TO HAVE THE JURY APPORTION FAULT IN THEIR VERDICT MAY BE WAIVED BY THE PARTIES PRIOR TO TRIAL;

IN THAT, SUCH PRETRIAL DEVELOPMENTS DID NOT REQUIRE THE TRIAL COURT TO REDUCE THE JUDGMENT, AS A MATTER OF LAW PURSUANT TO SECTION 537.060 R.S.MO., AND THE JUDGMENT MUST BE REVERSED AND JUDGMENT ENTERED UPON THE ORIGINAL VERDICT.

Glidewell v. S. C. Management, Inc., 923 S.W.2d 940 (Mo. App. 1996)

Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560 (Mo. App. 2000)

Hampton v. Safeway Sanitation Services, Inc., 725 S.W.2d 605 (Mo. App. 1987)

Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App. 1999)

Section 537.060 R.S.Mo.

II.

THE TRIAL COURT DID ERR IN REDUCING THE JUDGMENT BY THE AMOUNT RECEIVED IN THE PARTIAL SETTLEMENT AS A MATTER OF LAW, BECAUSE ANY QUESTION REGARDING THE SCOPE AND EXTENT OF A RELEASE REQUIRES A FACTUAL DETERMINATION TO BE MADE ACCORDING TO WHAT MAY FAIRLY BE SAID TO HAVE BEEN WITHIN THE CONTEMPLATION OF THE PARTIES AT THE TIME THE RELEASE WAS GIVEN, WHICH, IN TURN, IS TO BE RESOLVED IN THE LIGHT OF ALL THE SURROUNDING FACTS AND CIRCUMSTANCES UNDER WHICH THE PARTIES ACTED, AND THE CLAIMS OF ACCORD, SATISFACTION, AND RELEASE ARE AFFIRMATIVE DEFENSES WHICH MUST BE PROVED BY THE DEFENDANT SEEKING TO BENEFIT FROM THE PAYMENT MADE UNDER THE RELEASE,

IN THAT, THE TRIAL COURT HERE FAILED TO REQUIRE ANY SUCH AFFIRMATIVE DEFENSE, AND FAILED TO REQUIRE DR. WRIGHT TO MEET HIS BURDEN OF PROOF AS TO THE PROPER INTERPRETATION OF THE RELEASE BASED UPON THE GOVERNING INTENTION OF THE PARTIES TO SUCH RELEASE.

State ex rel. Normandy Orthopedics, Inc. v. Crandall, 581 S.W.2d 829 (Mo. banc 1971)

Section 537.060 R.S.Mo.

ARGUMENT

PRELIMINARY MATTERS

IMPROPER POINTS RELIED ON

Dr. Wright's two points relied on do not comply with Rule 84.04(d). Compliance with Rule 84.04 is mandatory. Thummel v. King, 570 S.W.2d 679 (Mo. banc 1978). The Normans should not be required to rewrite his points in order to make them comprehensible. Although Dr. Wright's points do, at least, identify the challenged ruling of the trial court, they neither clearly state the legal reasons upon which he claims such ruling was not erroneous, nor does he explain in summary fashion why, in the context of this case, he claims that those legal reasons support his position. Rule 84.04(d)(1). As Dr. Wright's points are presented in his brief, it is very difficult for the Normans to reply in cogent fashion. For example, subparts one and two of his first point are purely tautological. In similar fashion, the assertion attempted in the third sub-point merely alleges that the tautologies in the preceding sub-points "required" the court's ruling, and is thus doubly ineffective as stated. Even under the most imaginative construction of his first point, comparing it to his argument is even more befuddling than revealing; none of the cases he cites under this first point in any way relate to: reducing the number of defendants to one; waiving the right to apportionment of fault; nor to such pretrial developments requiring the court to reduce the judgment pursuant to 537.060 R.S.Mo.

Dr. Wright's second point simply fails to contain any supporting legal reason whatsoever, and only contains vague factual assertions from which the Normans are left to

their own inferences as to what Dr. Wright is really trying to argue before this Court.

Such is not the proper format for points relied on, and the rubric of Rule 84.04 is not merely form over substance, but rather the purpose is to finitely frame the issues on appeal. Grimes v. Bagwell, 837 S.W.2d 554. Tautological contentions assert nothing, prove less, and wholly fail to advance the orderly analysis and resolution of the pending questions. Failure to abide by Rule 84.04's requirements is proper grounds for this Court to completely ignore his argument. Schneider v. Schneider, 824 S.W.2d 942 (Mo. App. 1992). The Normans should not be required to reconstruct their opponent's points. They should be excused from, rather than cast into, the uncertainties and burdens of their own inferences. Thus, this Court should either order Dr. Wright to submit a new brief with properly constructed points relied on, or simply strike his brief entirely. Nonetheless, without waiving their objections to these deficiencies or their requests for relief, the Normans will attempt their best reply under these circumstances.

REPLY TO DR. WRIGHT'S FIRST POINT

THE TRIAL COURT DID ERR IN REDUCING THE JUDGMENT BY THE AMOUNT RECEIVED BY THE NORMANS IN THEIR PARTIAL SETTLEMENT BECAUSE:

1. NOTHING IN SECTION 537.060 R.S.MO. RELATES TO REDUCING THE NUMBER OF DEFENDANTS TO ONE; AND
2. THE RIGHT TO HAVE THE JURY APPORTION FAULT IN THEIR VERDICT MAY BE WAIVED BY THE PARTIES PRIOR TO TRIAL;

IN THAT, SUCH PRETRIAL DEVELOPMENTS DID NOT REQUIRE THE TRIAL COURT TO REDUCE THE JUDGMENT AS A MATTER OF LAW PURSUANT TO SECTION 537.060 R.S.MO., AND THE JUDGMENT MUST BE REVERSED AND JUDGMENT ENTERED UPON THE ORIGINAL VERDICT.

Dr. Wright's argument under this point begins with the repetition of a number of undisputed facts intermixed with conclusions wholly unsupported by any case law. After this, he refers to four cases, none of which, alone or in combination, support his contention under this point.

Following his unconnected factual recitations that neither party requested apportionment of fault at trial, and that the pretrial settlement had to be and was approved in a hearing before the trial court, Dr. Wright shifts his argument to the intent of the parties to the release. He correctly, but with significant incompleteness, identifies the language in the release that some part of Section 537.060

R.S.Mo. would apply to the settlement. By sheer implication rather than express argument, he appears to contend that all the provisions of that statute were intended to be incorporated into the release without any specific language suggesting such a conclusion. There are a number of other provisions in Section 537.060 R.S.Mo. which are in no way referenced or even alluded to within the terms of this release. The only operative provision of this statute which is clearly, expressly, and repeatedly referred to is the combination of the full and absolute release of the settling parties and the consonant reservation of the full and absolute claims of the Normans against Dr. Wright. About this, there can be absolutely no dispute, and in fact Dr. Wright makes none. Instead, with reasonable guessing, it appears that Dr. Wright now argues that by mere reference to and incorporation of a selected portion of Section 537.060 R.S.Mo., that through no effort on his own and without any supporting language in the release to suggest such intent of the parties to the release, he now enjoys the full benefit of other provisions from that statute which include the dollar-for-dollar offset against the ultimate verdict. If such is his proposition, then this Court cannot possibly accept it as valid as it would have the effect of adding a new type of "stealth" interpretation of contractual documents, in addition to bizarre pleading strategies in terms of both timing and content, never before envisioned by the notions of fairness and justice under either law or equity. The bottom line is that Dr. Wright appears to be arguing an interpretation from the clear terms of this release which is nowhere expressed within the four corners of that document, nor for which he ever filed any pleadings nor offered any proof in the court below. The law clearly requires, and the Normans definitely deserve, the same. Absent such, Dr. Wright's supposed proposition must fail.

Having just asserted that the reliance upon one part of Section 537.060 R.S.Mo. in the pretrial release somehow automatically made all the provisions of the full statute binding and

controlling over all aspects of this case, in the very next paragraph in the middle of page eight of his brief, Dr. Wright inconsistently shifts his argument that "When Section 538.230 essentially dropped out of the case, Section 537.060 entered it." He offers absolutely no reasoning, analysis, nor legal authority to support this bald conclusion. For some unexplained reason he contends that this statement is true because the case "thereupon became a tort action for damages against a sole defendant", again, an assertion devoid of any support. Id. In his final sentence of that same paragraph, Dr. Wright then incongruously claims that the fact that this was a medical negligence case uniquely governed by certain sections of Chapter 538 instead of a general negligence claim, is now "an insignificant difference". With consistent aplomb, Dr. Wright ignores any further analysis or legal support for this supposed distinction, and thus, his entire argument in this regard is without merit.

Dr. Wright next argues in typical tautological fashion that Section 538.230 R.S.Mo., which in part addresses apportionment of fault in medical negligence cases, only applies where fault is apportioned, citing Glidewell v. S.C. Management, Inc., 923 S.W.2d 940, 947 (Mo. App. 1996). Respondent's Brief, page 8. Although Dr. Wright omits any discussion or analysis of the facts or legal reasoning contained in Glidewell; the same demonstrates that this case is quoted out of context, both legally and factually. Many diverse issues were raised in Glidewell, the ones pertinent here all hinged on the fact that plaintiff alleged, and the jury agreed, that the defendant doctor and defendant hospital were in an agency relationship. The legal issue relevant to Dr. Wright's citation of this case was whether apportionment of fault would apply as between an employer and employee, and the court there held that "when a claim is based on vicarious liability, there is no basis for apportionment of fault between the principal and agent". Id at 946. Thus, the court properly concluded as between

the master and servant, the only basis for any claim was that for indemnity. Id at 947. Apportionment of fault under Section 538.230 R.S.Mo. was never an option between those parties. At no time did the court consider the interaction between Sections 537.060 and 538.230 R.S.Mo. as those statutes relate to the claims existing between the plaintiffs and the defendants, as they do in this case. Likewise, from a factual prospective, the dispute there was between two defendants and not between plaintiffs and defendants. Furthermore, apportionment of fault was requested but rejected by the trial court. Thus, not only were the legal issues different, but the factual issues were different as well. Because of their legal relationship, as to the plaintiffs, the doctor and the hospital in Glidewell were but only two parts of a single party responsible for the damages awarded. In contrast, here there were three totally separate and independently liable parties, two of which elected before trial to settle their own liability for the damages which they caused, and the remaining defendant, Dr. Wright, who chose to proceed to a verdict based upon his separate liability for the damages he caused. The pretrial settlement in Glidewell was effectively no different than a partial payment under Section 490.710.2 R.S.Mo. and was properly credited against the final verdict. Glidewell at 944. Such is distinctly different than the facts and legal relationships between our parties in the court below. The bottom line is that the court in Glidewell did not hold that Section 537.060 R.S.Mo. applies in the absence of apportionment of fault under Section 538.230 R.S.Mo. as Dr. Wright improperly implies. Therefore, Glidewell supports neither Dr. Wright's argument nor the trial court's judgment.

In identical fashion, completely ignoring the important details of the case, Dr. Wright now cites Scott, et al. v. SSM Healthcare St. Louis, et al., 70S.W. 3d 560 (Mo. App. 2002) for the same improper conclusion that Section 537.060 R.S.Mo. must therefore automatically apply here to reduce

the verdict on a "dollar-for-dollar basis". Respondent's Brief, pages 8-9. As in Glidewell, the plaintiff in Scott alleged and proved, and the jury found, that the defendant doctors were both agents of the hospital, thus, the "Hospital is completely liable for the negligence of both of its agent", and the set-off from the settlement was obviously proper. Scott at 569. Both Glidewell and Scott shared similar but slightly different facts, nonetheless the underlying legal principles were the same: apportionment of fault does not lie between a principal and agent. In Scott, Section 538.230 R.S.Mo. failed to apply, not because of the effect of any particular release language, rather, it did not apply purely due to a basic characteristic of the legal relationship of the various defendants to each other. Therefore, neither Glidewell nor Scott offer any support to Dr. Wright's arguments under this point, nor the trial court's judgment.

Dr. Wright next cites Hampton v. Safeway Sanitation Service, Inc., 725 S.W.2d 605 (Mo. App. 1987) solely because that case had a "similar result". Respondent's Brief, page 9. There the facts and legal issues were totally different from our case. The pretrial settlement exceeded the verdict and appellate court reduced the verdict to zero. Id at 607. This was a terribly tragic wrongful death case brought by the mother and father who lost their little five year old daughter when a trash dumpster on uneven ground fell over and struck her. Id at 606. The parents obtained a verdict against the remaining defendant for less than the amount of a pretrial settlement. At page 9 of his brief, referring to the Hampton decision, Dr. Wright makes the unsupported claim that: "It is significant that no distinction was made in that case between cases involving medical negligence and other types of tort cases." A simple reading of Hampton reveals that it is perhaps even more significant that no such distinction was ever presented, thus any claim of such "significance" is rather empty. Since Hampton involved absolutely no possible connection to a medical negligence claim nor

any provision within Chapter 538 of our statutes, it really should not be very surprising that the court there failed to entertain or discuss any such distinction. Furthermore, since Hampton did not involve any of the same issues as presented here, any reliance thereon is totally inapposite and should be ignored. Dr. Wright draws no other conclusion from Hampton, and merely ends his analysis. There is nothing about Hampton which either advances his argument before this Court nor supports the lower court's judgment.

The final of four cases cited by Dr. Wright under this first point is Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App. 1999) which has been thoroughly discussed and distinguished in the Normans' substitute brief filed in this Court, which will not be duplicated here. Appellants' Substitute Brief, page 40-43.

Dr. Wright cites Julien for two meager contentions: (1) a Section 537.060 R.S.Mo. motion for satisfaction of judgment may be filed, considered, and ruled at any time after the entry of judgment; and (2) there was no medical tort/general tort distinction drawn by the court.

First, the issue as to the delinquent timing of the request for a set off has been thoroughly covered in the Normans' substitute brief as noted above, and Dr. Wright in his brief provides no rationale nor meritorious policy to be advanced in support of the rule he advocates. Nor does Dr. Wright contest, much less address, the arguments and fundamental policy problems such a rule would promote if it was adopted in medical negligence cases. These perspectives were thoroughly addressed in the Normans' substitute brief and appear to be completely ignored by Dr. Wright in his brief. Extending the result of Julien to medical

negligence cases would subjugate their processing to havoc and chaos, and their parties to unlimited uncertainty and injustice. Such is not the goal of this Court. The holding in Julien should not be extended to medical negligence cases, as advocated by Dr. Wright in this instance.

Second, again, Dr. Wright claims the lack of a "distinction between independent tort and other tort cases", without recognizing that no such distinction was ever presented in any fashion in Julien. Thus, circular contentions that a distinction was not made because the distinction was not pertinent rings hollow and is without merit.

With that said, Dr. Wright abruptly ends his analysis of Julien, and his argument under his first point.

In conclusion, Dr. Wright has totally ignored and failed to address any of the serious problems and valuable policy issues raised by the Normans in their substitute brief, and has wholly failed to offer any competing policy benefits or meritorious rationale supporting his contentions or the trial court's judgment in this case. Nor can any support for the same be found in any of the four cases he cites in his brief. Therefore, the judgment entered by the trial court below was erroneous and must be reversed with a new judgment entered upon the original jury's verdict.

REPLY TO DR. WRIGHT'S SECOND POINT

THE TRIAL COURT DID ERR IN REDUCING THE JUDGMENT BY THE AMOUNT RECEIVED IN THE PARTIAL SETTLEMENT AS A MATTER OF LAW BECAUSE ANY QUESTION REGARDING THE SCOPE AND EXTENT OF A RELEASE REQUIRES A FACTUAL DETERMINATION TO BE MADE ACCORDING TO WHAT MAY FAIRLY BE SAID TO HAVE BEEN WITHIN THE CONTEMPLATION OF THE PARTIES AT THE TIME THE RELEASE WAS GIVEN, WHICH, IN TURN, IS TO BE RESOLVED IN THE LIGHT OF ALL THE SURROUNDING FACTS AND CIRCUMSTANCES UNDER WHICH THE PARTIES ACTED, AND THE CLAIMS OF ACCORD, SATISFACTION, AND RELEASE ARE AFFIRMATIVE DEFENSES WHICH MUST BE PROVED BY THE DEFENDANT SEEKING TO BENEFIT FROM THE PAYMENT MADE UNDER THE RELEASE,

IN THAT, THE TRIAL COURT HERE FAILED TO REQUIRE ANY SUCH AFFIRMATIVE DEFENSE, AND FAILED TO REQUIRE DR. WRIGHT TO MEET HIS BURDEN OF PROOF AS TO THE PROPER INTERPRETATION OF THE RELEASE BASED UPON THE GOVERNING INTENTION OF THE PARTIES TO SUCH RELEASE.

For his second point, Dr. Wright grossly overstates his position: "It is clear beyond

cavil that the intention of Appellants as to construction of their release was that Section 537.60[sic] should apply to it." Respondent's Brief, page 11. Furthermore, the only case he cites purportedly in favor of this proposition actually defeats his argument and soundly demonstrates why the judgment of the trial court must be reversed and a new judgment entered on the jury's full verdict.

This Court in State ex rel. Normandy Orthopedics, Inc. v. Crandall, 581 S.W.2d 829 (Mo. banc 1971) considered a situation in which the plaintiffs settled with non-medical defendants before trial and proceeded with the case against medical defendants, however, they met with a motion to dismiss and motion for summary judgment based upon the claim that a general release given in the settlement also acted to release them from all pending claims. Just like in our present case, the defendants there raised the contention that a plaintiff may recover only once for his injuries and therefore such a release would operate as a matter of law to automatically extinguish the claims against the remaining defendants. Id at 831. This Court ruled that such a release does not necessarily operate as a matter of law, but rather it presents a question of fact which must be resolved by the trial court. Id at 832-833. The controlling principle is that the intention of the parties to the release shall govern its effect. Id at 833. It remains a question of fact regarding the scope and extent of a release which must be determined according to what may fairly be said to have been within the contemplation of the parties at the time the release was given, which, in turn, is to be resolved in the light of all the surrounding facts and circumstances under which the parties to the release acted. Id . Therefore, the trial court below was obligated to conduct sufficient

evidentiary investigation to enable it to discern the intent of the parties to this release. None was conducted. Such an issue is not properly subject to a ruling as a matter of law as the lower court ruled. Furthermore, the burden of showing the parties intentions rests in the first instance with the defendant who is offering the release and asserting the defense of satisfaction. Id at 834. In the same fashion, such a defense of accord, satisfaction, or release is in the form of an affirmative defense which must be affirmatively asserted in the pleadings in advance of such a determination. Again, Dr. Wright neglected these obligations and the trial court failed to properly hold him to the same. Just as in Normandy Orthopedics, Dr. Wright here was nowhere listed by his name in the provisions of this release and it is him who now seeks inclusion within its terms solely on the basis of his strained interpretation of its language. Id. However, regardless of the competing nature of the interpretations of the release offered by the Normans or by Dr. Wright, the ultimate fact remains that Dr. Wright failed to timely and properly preserve his claims for any benefit in the nature of a affirmative defense under the release and the same must now be finally denied. In the same fashion as this Court denied similar benefits requested by the defendants in Normandy Orthopedics. Id.

In conclusion, the trial court had absolutely no basis in law to enter the judgment as it did, and based upon Dr. Wright's lack of appropriate and timely pleadings, it had no choice but to enter its judgment for the full amount of the original jury's verdict which is what this Court must now do.

CONCLUSION

Dr. Wright's points are not in proper form and should either be ignored or he should be allowed leave to submit a new brief.

The trial court had no basis upon which to issue its ruling as a matter of law and enter the judgment as it did in light of Dr. Wright's decision to not assert any affirmative defenses in a timely fashion. Dr. Wright cannot now claim any unfairness as a result of his own neglect or delay as he had more than ample opportunity to affirmatively request some type of an offset by one or more methods.

All matters of justice, fundamental fairness and the best public policies guide this Court's decision in favor of the Normans. Dr. Wright has totally failed to address such matters which were raised in the Normans' substitute brief, and has similarly failed to offer any competing suggestions in his own favor.

Simply put, the jury in this case did exactly as they were told to do; they were not requested to consider or decide any award of damages caused by the fault of the settling parties, but rather they awarded damages which they felt were caused by Dr. Wright's negligence. As the standard damage instruction teaches us, the jury was required to award the Normans the damages they sustained "as a direct result of the occurrence mentioned in the evidence". M.A.I. 4.01[1980 Revision] Damages-Personal and Property. Dr. Wright offered nothing in either the pleadings or his proof suggesting otherwise thus "the occurrence mentioned in the evidence" was limited exclusively to those damages for which Dr. Wright was responsible. The record is totally devoid of any allegation or any evidence to support

any reasonable conclusion, much less raw inference, that the jury's verdict also included any damages attributable in any way with the money paid in the pretrial settlement. Upon these pleadings and this record, to conclude otherwise is pure fiction and simply unjust.

Nowhere in his brief does Dr. Wright address "the bigger picture": how is the outcome he proposes fair to not only the Normans but to all similar parties statewide; what rationale or legal principle supports a party withholding an off-set request until after the jury is sent home; and what hardship would fall upon a defendant to justify requiring advance affirmative pleading for relief under Section 538.230 R.S.Mo. but no such requirement under Section 537.060 R.S.Mo.?

The holding advocated here will only add to and seriously compound the confusion, the injustice, and the number of cases appealed instead of reducing the same. Dr. Wright has abandoned and totally failed to address any of these principles of policy. Dr. Wright has ignored all issues regarding the requirement of advance affirmative pleading, and has offered no explanation for his election or neglect to file the same. In similar fashion, Dr. Wright has totally abandoned any argument that there should be any distinction between tort and contract cases when it comes to advance affirmative defense pleading requirements to gain the benefit of an off-set. There should be no distinction in this state between tort and contract claims in this regard. The salutary purposes served by requiring advance notice for all affirmative pleadings requesting the satisfaction of a pretrial set-off are every bit as compelling, if not even more so, in a claim for the wrongful death of a first born child, as they are in a suit for breach of contract to supply widgets.

The judgment of the trial court must be reversed and a new judgment entered for the full amount of the jury's verdict.

Respectfully Submitted,

_____

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned certifies that on this 16th day of October, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were hand delivered to the office of:

Mr. Bruce Hunt
Attorney at Law
Burkart & Hunt, P.C.
242 S. National Ave.
Springfield MO 65802-3419

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains _____ words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

_____
David W. Ransin