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IN THE SUPREME COURT OF MISSOURI

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No. SC84650

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JERRY & KIMBERLY NORMAN, individually and as husband and wife, and JERRY NORMAN, as plaintiff ad litem for KENNETH NORMAN, a deceased minor,
Appellants

vs.

ANDY J. WRIGHT, M.D.,
Respondent

_____

Appeal from the Circuit Court of Greene County, Missouri
Honorable J. Miles Sweeney, Judge

_____

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal is brought by the plaintiffs in a wrongful death civil action filed in and tried before the Circuit Court of Greene County, Missouri, from the trial court's ruling and judgment "as a matter of law pursuant to Sec. 537.060 R.S.Mo." which reduced the total dollar amount of the verdict awarded by the jury in favor of plaintiffs by the sum of $100,000.00, representing the amount previously paid to plaintiffs in a pre-trial settlement with other defendants, despite the defendant's failure to request such reduction in any affirmative pleading in his answer or in any other motion or request before the return of the verdict.

This action does not involve the construction of the Constitution of the United States or of this State, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the Revenue Laws of this State, title to any office under this State, or a criminal offense involving a sentence of death or life imprisonment. Plaintiffs' Application for Transfer under Rule 83.04 was granted by this Court, and thus, this appeal is within the proper jurisdiction of this Court pursuant to V.A.M.S. Const. Art. V, Sec. 10.

STATEMENT OF FACTS

I. OVERVIEW

This is an appeal limited to a review of the trial court's post-trial reduction of the jury's verdict by the amount of a pre-trial settlement "as a matter of law pursuant to Sec. 537.060 R.S.Mo." despite the lack of any affirmative pleading in defendant's answer or any other motion or request filed by him before the return of the verdict. None of the fundamental procedural facts of the underlying trial are in dispute, and any evidentiary facts which were in dispute at trial have no bearing on any issue in this appeal. There are no issues presented related to any evidence, jury instructions, nor trial procedure. Thus, there is no need for a transcript nor any detailed review of the evidence presented during, or of the procedures of, the trial itself. A transcript, or even depositions of the parties or witnesses, would only add unnecessary volumes of paper to this Court's file and unduly increase the expense of this appeal to the parties. All the pertinent factual information necessary for this appeal is contained in the Legal File and Supplemental Legal File, and such will be described in greater detail below. For simplicity and clarity, the plaintiffs-appellants, Mr. and Mrs. Norman, will be referred to as "the Normans", and the defendant-respondent, Andy J. Wright, M.D., will be referred to as Dr. Wright; no disrespect is intended.

The underlying medical negligence suit was brought by the surviving parents claiming that the wrongful death of their first child was directly caused by the improper delay of his delivery by Dr. Wright, the attending obstetrician, and contributed to be caused by other doctors and the hospital staff. Due to a settlement and a dismissal, the trial proceeded against Dr. Wright only. The jury returned its verdict against Dr. Wright and in favor of the Normans

in the total amount of $308,855.35. Dr. Wright later filed an after-trial motion which the court sustained reducing the jury's verdict by $100,000.00, representing the total sum of a pre-trial settlement with two other defendants. The trial court then entered its judgment for the net amount of $208,855.35 plus costs and post-judgment interest. This appeal is limited to the propriety of that reduction and the entry of the judgment thereon, requesting that the judgment be reversed, and that the trial court be ordered to enter a new judgment in the full amount of the jury's verdict.

II. EVIDENTIARY FACTS IN THE UNDERLYING SUIT

The following general background facts are not in dispute, however, a very brief and limited description is offered as a courtesy to aid this Court to more quickly understand the material facts and parties in relevant context to the legal issues.

In 1995, Kim and Jerry Norman were expecting the birth of their first child, a boy named Kenneth, with an anticipated due date of around April 15, 1995. L.F. 26, tab # 2. Defendant Dr. Wright, was the attending obstetrician for Mrs. Norman and Kenneth.

On the evening of February 16, 1995, Mrs. Norman presented to the labor and delivery department of St. John's Hospital in Springfield, Missouri, reporting that she had not been feeling the normal amount and type of movement of her child as she had previously experienced. Id. Dr. Wright was not available at that time, however, his partner, Dr. Johnson, was providing "call coverage" for Dr. Wright, and Dr. Johnson provided care to Mrs. Norman and her baby that evening. Id.

Upon Mrs. Norman's arrival at the hospital, throughout that night, and until Kenneth's delivery, the nurses used fetal heart monitoring equipment to record his heart rate and general condition. Dr. Johnson was in contact with the nurses several times by telephone that evening and discussed Mrs. Norman and her baby, but at no time did Dr. Johnson ever come into the hospital to see them. Id. at 26-27. At 6:00 a.m. the next morning, the hospital's labor and delivery nurses paged Dr. Wright and informed him that Mrs. Norman and her baby had been in the hospital all night, and he soon thereafter came to the hospital to see his patients. Id. at 28.

Several hours later, at 10:46 a.m., Dr. Wright ordered an emergency C-section. Kenneth was born at 11:10 a.m. with his umbilical cord wrapped approximately five times around his neck, and he suffered extensive brain damage directly causing multiple devastating disabilities and his death five months later on July 21, 1995. Id. at 29, 34.

III. PROCEDURAL FACTS MATERIAL TO THIS APPEAL

The following procedural facts are not disputed. The Normans originally filed suit for wrongful death against Drs. Johnson, Wright and Dix alleging they negligently delayed the delivery of their son, and against St. John's Hospital alleging negligent nursing treatment by its employees contributing to that delay. L.F. 22-37, tab # 2. On September 13, 1999, Dr. Dix was dismissed without prejudice from the case, and she was never brought back in as a party. L.F. 8, tab # 1. On November 30, 1999, this case was scheduled for trial to begin on October 30, 2000. L.F. 8, tab # 1. The Normans disclosed several doctors and a nurse as expert

witnesses whom they expected to call at trial to testify that each of the remaining defendants were negligent, and that such negligence directly caused or directly contributed to cause Kenneth's injuries and death. Supp. L.F. 156-163, 164-169, tabs # 24, 25.

On July 26, 2000, by judgment and order of the trial court, the Normans jointly settled their claims with both the hospital and Dr. Johnson, and those defendants were voluntarily dismissed from the case with prejudice. L.F. 38-41, 57, tabs # 3, 4, and 9. Counsel for Dr. Wright did not appear at the hearing for the circuit court's approval of the settlement, nor at any time did Dr. Wright ever make or file any objection regarding the proceedings of this settlement. L.F. 10-19, tab # 1.

The settling defendants jointly paid the single sum of $100,000 to the Normans without requesting that the court make any allocation of the amount of the payment between the two settling defendants, nor any allocation of that amount among the various categories of damages alleged by the Normans and set forth in 538.215 R.S.Mo., nor any apportionment of any fault among any parties. L.F. 10, 34-35, 40-41, 82-83, tabs # 1, 2, 4, 15. At no time did Dr. Wright ever request that the trial court make any of the above allocations of the money paid in the settlement. L.F. 10-19, tab # 1.

The intent of the parties to the release was expressed on several different topics in the release. The settlement expressly released only Dr. Johnson and St. John's Hospital, and expressly reserved to the Normans the right to proceed on all their claims against Dr. Wright pursuant to Section 537.060 R.S.Mo. L.F. 82-83, tab # 15. Dr. Wright was not a party to that release. Id. The release did not contain any express language stating that any of the parties

expected or had any intent to confer any benefit to Dr. Wright as a result of the money paid by the settling defendants. Id.

There was significant disagreement between the Normans and Dr. Wright regarding Dr. Wright's request for apportionment of fault which is very pertinent to the issues on this appeal. The Normans' petition was amended several times prior to trial. Two years before the settlement, on July 21, 1998, the Normans requested leave to amend their Petition by interlineation, leave for which was granted, and their Amended Petition by Interlineation was shown filed on December 4, 1998. L.F. 7, tab # 1. In response, on December 16, 1998, Dr. Wright filed his motions attacking the amended petition. Id. The day before the settlement hearing described above, Dr. Wright's motions were essentially overruled and he agreed to file his answer by August 7, 2000. L.F. 10, tab # 1.

About two weeks after the court approved the settlement and dismissed the other defendants, Dr. Wright filed his Answer to the amended petition on August 8, 2000, noting in the caption of his Answer that he was now the only remaining defendant in the case. L.F. 42-45, tab # 5 .

In paragraphs 9, 13, and 17 of his new Answer, for the very first time in the case, Dr. Wright asserted his right to have the jury make an apportionment of fault at trial: "In accordance with Section 538.230 R.S.Mo., defendant requests the trier of fact to apportion fault between defendant and the former settling defendants to this action." L.F. 43-45, tab # 5. However, Dr. Wright did not state any general factual basis to support his allegations of such fault. Id.

In response to Dr. Wright's request for apportionment, the Normans filed their Motion to Strike Defendant's Request for Apportionment attacking Dr. Wright's request for apportionment as factually and legally insufficient. L.F. 46-49, tab # 6.

Dr. Wright then filed his suggestions in opposition to the Norman's motion to strike in which he acknowledged various things including the following:

1. "Comparative fault is an affirmative defense which must [be] pleaded. Id. [citing Adams by Ridgell v. Children's Mercy Hosp., 848 S.W.2d 535 (Mo. App. W.D. 1993)] The reason for such a rule is to give notice to the opposing parties so that they may adequately prepare the issues. Id. Defendant has put plaintiffs on notice by specifically requesting apportionment of fault, pursuant to section 538.230 R.S.Mo. in his answer." L.F. 53, tab # 7, (emphasis added).

2. Citing Hewlett v. Lattinville, 967 S.W.2d 149 (Mo. App. E.D. 1998), in medical negligence cases, "...'[s]ection 538.230 indeed changes the common law in important respects.' Id. at 152. It [Hewlett] pointed out that a defendant's liability is capped at his proportionate share, plus the share of any defendant whose percentage was lesser. Id. Furthermore, the offset for payments is not measured in terms of the amount of settlement, but instead by the settling defendant's equitable share, based on the jury verdict. Id." Id. at 51, (emphasis added).

3. "MAI provides that the burden of proof and the responsibility to tender such a verdict director [against the settling parties] is on the party seeking an assessment of a percentage of fault to a released party. See MAI 36.22, Notes on Use (1998 New), p.

690. Thus at trial, defendant must adduce proof supporting apportionment and tender the appropriate verdict director and form of verdict." Id. at 53.

4. (Citing the Adams case again), where "...the fault of the non-parties had already been extensively developed through deposition testimony, and since the experts sought to be added were originally designated as plaintiffs' experts..." it would not be an abuse of discretion for the trial court to allow a party to amend its pleadings and discovery to add a claim for apportionment under 538.230 R.S.Mo. immediately before trial. Id. at 52.

The Norman's motion to strike was considered by the court along with Dr. Wright's opposing suggestions, and on August 22, 2000, the court entered this order:

> Plaintiffs' Motion to Strike Defendant's Request for Apportionment is accepted as a Motion Requesting a More Definite Statement, and as such is hereby sustained and Defendant Wright is ordered within 20 days, due on or before September 11, 2000, to amend his answer so as to include a short and plain statement of facts for each allegation of negligence and/or fault asserted against any separate settling defendant, namely Joseph C. Johnson, Jr., M.D. and/or St. John's regional Health Center, for which Defendant Wright requests Apportionment of Fault pursuant to Section 538.230 R.S.Mo.

L.F. 55-56, tab # 8.

Dr. Wright did not file any amendment to his answer within the time permitted. L.F. 11, tab # 1.

On September 15, 2000, the Normans moved the court for leave to file their Second Amended Petition which contained the same allegations against Dr. Wright, but which eliminated all claims previously set forth against the settling defendants, Dr. Johnson and St. John's Hospital. L.F. 58-59, 62-71, tabs # 10, 12. On the same date, the Normans again moved to strike Dr. Wright's request for apportionment. L.F. 60-61, tab # 11. The Second Amended Petition was ordered filed by leave of court on September 26, 2000. L.F. 12, tab # 1.

In response to the filing of the Normans' Second Amended Petition, Dr. Wright moved to dismiss the same, and at the same time he filed his Alternative Answer. L.F. 74-77, tab # 13. In paragraph # 3 of all three counts of his Alternative Answer, with nearly identical language as he used previously, Dr. Wright again asserted his right to apportionment of fault under the same statute, but this time he added language to his request stating that the prior defendants were released pursuant to Section 538.230.3 R.S.Mo.:

> 3. In accordance with Section 538.230 R.S.MO, defendant requests the trier of fact to apportion fault between defendant and former defendants St. John's Regional Health Center and Joseph C. Johnson, Jr., M.D., which former defendants have been released pursuant to Section 538.230.3.

L.F. 75-76, tab # 13, (emphasis added).

On October 10, 2000, the court sustained the Norman's motion to strike "insofar as it alleges contribution", striking that part of Dr. Wright's answer "in 2 days if no specific

allegations pled." L.F. 12-13, tab # 1. Dr. Wright did not file any "specific allegations" by the court's deadline. L.F. 13, tab # 1.

Shortly thereafter, this case was continued from its trial setting of October 30, 2000, and was set for trial to begin on July 23, 2001. L.F. 13, tab # 1. Just prior to the commencement of trial, the Normans again attacked Dr. Wright's continued assertion of apportionment of fault under Section 538.230 R.S.Mo., and through his counsel, Dr. Wright openly announced his waiver and withdrawal of such assertion. L.F. 90, 122, tabs # 16, 19.

At that time, Dr. Wright did not move to amend his answer to substitute an affirmative request for any "offset" or "credit" under Section 537.060 R.S.Mo. in place of his withdrawn request for affirmative relief under 538.230 R.S.Mo. L.F. 17, tab # 1.

The trial commenced on the existing pleadings without any affirmative request from Dr. Wright that either the jury or the court should apportion any fault or allocate any "offset" or "credit" under either statute. L.F. 17-18, tab # 1.

After the completion of trial, on July 31, 2001, the jury returned its verdict in favor of the Normans and against Dr. Wright in the total sum of $308,855.35. L.F. 18, 78, tabs # 1, 14.

At no time during the trial and prior to the return of such verdict did Dr. Wright make any request for any affirmative relief under Section 537.060 R.S.Mo. L.F. 17-18, tab # 1. The trial court reviewed the jury's verdict and approved it as being in appropriate form, duly noted it as filed, and discharged the jury without any objection nor any further request for any type

of relief from Dr. Wright. L.F. 18, tab # 1. Dr. Wright did not request that the jury be ordered to return to deliberations and determine any "offset" or "credit" under any statute. Id.

About a week after the verdict, for the first time in the case, Dr. Wright filed his motion asking the trial court for affirmative relief in the form of a reduction of the jury's verdict by $100,000, representing the amount of the prior joint settlement with Dr. Johnson and St. John's Hospital based on Section 537.060 R.S.Mo. L.F. 79-89, tab # 15.

The Normans opposed Dr. Wright's new request as untimely and improper as Dr. Wright's own pleadings before the commencement of trial failed to plead the affirmative request. L.F. 94-114, tab # 17. Dr. Wright filed suggestions in reply to the Normans' opposing suggestions. L.F. 115-120, tab # 18.

After the Normans pointed out in their opposing suggestions that Dr. Wright was not entitled to any such reduction of the jury's verdict since he had elected to not set forth any such affirmative request in his Alternative Answer, Dr. Wright moved the court for leave to amend his answer after the verdict and before entry of the formal judgment to add the omitted request. L.F. 121-138, tab # 19. The court denied leave to amend, and Dr. Wright has not appealed that ruling. L.F. 19-20, tab # 1.

Nonetheless, on August 29, 2001, the court sustained Dr. Wright's motion to reduce the verdict and ruled "on the basis that deft is entitled to such offset or credit as a matter of law pursuant to section 537.060 R.S.MO.", thus reducing the verdict the jury returned in their favor originally for the total amount of $308,855.35, by $100,000 down to the sum of $208,855.35. L.F. 20, 145, tabs # 1, 21.

On August 30, 2000, the court entered judgment for the reduced amount. L.F. 145-147, tab # 21. The next day the Normans timely filed their motion for new trial, and alternative motion to amend the judgment opposing the reduction of the jury's verdict, which the court overruled on October 2, 2001. L.F. 20, 148-150, tabs # 1, 22. Later that same morning the Normans timely filed this appeal. L.F. 20, 151-154, tabs # 1, 23.

After a complete briefing process and oral arguments, the Missouri Court of Appeals for the Southern District issued its opinion on June 18, 2002, affirming the trial court's ruling and upholding the reduction of the jury's verdict. The Normans timely filed their Application for Transfer to this Court pursuant to Rule 83.02 which was denied by the Southern District on July 10, 2002. On August 27, 2002, the Normans' timely-filed Application for Transfer to this Court pursuant to Rule 83.04 was granted.

POINT RELIED ON

THE TRIAL COURT ERRED TO THE NORMANS' PREJUDICE IN SUSTAINING DR. WRIGHT'S MOTION FOR REDUCTION OF THE JURY VERDICT BY THE AMOUNT OF $100,000 "AS A MATTER OF LAW PURSUANT TO SECTION 537.060 R.S.Mo." ABSENT ANY PLEADING AFFIRMATIVELY REQUESTING THE SAME BEFORE TRIAL, AND THEREUPON ENTERING ITS JUDGMENT FOR A DOLLAR AMOUNT $100,000 LESS THAN THE JURY'S VERDICT,

BECAUSE, A PARTY'S RIGHT UNDER EITHER SECTIONS 538.230 R.S.Mo. OR 537.060 R.S.Mo. TO GAIN A DIRECT BENEFIT IN THE FORM OF AN OFFSET OR CREDIT AGAINST A JURY VERDICT FROM MONEY PAID BY OTHER PARTIES IN A PRIOR SETTLEMENT IS A DEFENSIVE CLAIM REQUESTING AFFIRMATIVE RELIEF FROM THE COURT WHICH MUST BE SET FORTH IN THE PLEADINGS AS AN AFFIRMATIVE DEFENSE UNDER SECTIONS 509.050 AND 509.090 R.S.Mo., AND RULES 55.05 AND 55.08, IN ORDER TO FAIRLY PUT THE OPPOSING PARTY ON NOTICE AND FAIRLY DELINEATE THE ISSUES FOR TRIAL,

IN THAT, DR. WRIGHT ABANDONED AND WAIVED ALL HIS RIGHTS UNDER EITHER SECTIONS 538.230 R.S.Mo. OR 537.060 R.S.Mo. TO BENEFIT FROM ANY OFFSET OR CREDIT AGAINST THE JURY'S VERDICT AS A RESULT OF THE PRIOR SETTLEMENT MONEY PAID BY OTHER PARTIES WHEN HE:

5. **WITHDREW HIS AFFIRMATIVE REQUEST UNDER SECTION 538.230 R.S.Mo. FOR APPORTIONMENT OR ALLOCATION OF FAULT FROM HIS ANSWER PRIOR TO COMMENCEMENT OF TRIAL, AND/OR**
2. **ALLOWED THE TRIAL TO PROCEED TO A JURY VERDICT WHILE FAILING TO ASSERT ANY**

AFFIRMATIVE REQUEST UNDER SECTION 537.060 R.S.Mo. FOR ANY SUCH OFFSET OR CREDIT,

THEREFORE, EITHER SUCH JUDGMENT MUST BE REVERSED AND THE TRIAL COURT ORDERED TO SHOW THE CORRECT JUDGMENT ENTERED FOR THE FULL AMOUNT OF THE JURY'S VERDICT WITHOUT ANY SUCH REDUCTION, OR IN THE ALTERNATIVE, PURSUANT TO RULE 84.14 THIS COURT MUST REVERSE SUCH JUDGMENT AND ENTER THE CORRECT JUDGMENT AS THE TRIAL COURT SHOULD HAVE ENTERED FOR THE FULL AMOUNT OF THE JURY'S VERDICT WITHOUT ANY SUCH REDUCTION, AND IN EITHER EVENT, SUCH JUDGMENT MUST BE SHOWN AS BEING EFFECTIVE FOR ALL PURPOSES AS OF THE DATE THE ORIGINAL JUDGMENT WAS ENTERED BY THE TRIAL COURT, AUGUST 30, 2000.

Walihan v. St. Louis-Clayton Orthopedic Group, Inc., 849 S.W.2d 177 (Mo. App. 1993).

Brown v. Kneibert Clinic, 871 S.W.2d 2 (Mo. App. 1993).

Titan Construction Company v. Mark Twain Kansas City Bank, 887 S.W.2d 454 (Mo. App. 1994).

Coleman and Richardson v. Mantia, 25 S.W.3d 675 (Mo. App. 2000).

I. STANDARD OF REVIEW

The sole issue presented in this appeal is purely a matter of law and does not involve any review of the trial court's discretion, nor any assessment of factual disputes. The trial court's ruling below involved the interpretation and application of certain statutes to known and established facts. As such, this court's standard of review is a de novo determination of a legal issue, and the only question before this court is whether the trial court drew the proper legal conclusions from the undisputed record. Schroeder v. Horack, 592 S.W.2d 742, 744 (Mo. 1979); Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. 1985); Cottey v. Schmitter, 24 S.W.3d 126, 128 (Mo. 2000). Also, the present appeal is very similar to a court's ruling as a matter of law on a summary judgment motion. Thus, this court should view the record in a light most favorable to the non-movant Normans. "On appeal from an order granting summary judgment, this court views the evidence in a light most favorable to the non-movant". ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo. banc 1993).

II. ARGUMENT

A. OVERVIEW

The sole issue on appeal may be concisely stated: Is the right provided by Section 537.060 R.S.Mo. to benefit from another party's settlement payment totally automatic, or is such right subject to waiver, and thus must such right be preserved by asserting it in the pleadings thereby giving fair and timely notice to all?

The Normans deserved the right to not have the "rules" changed after the "game". Very strong policy reasons support the requirement of affirmatively pleading any request for an offset in medical negligence cases; and no such policy reasons exist, nor any hardship on the party desiring the offset, to justify or excuse the lack of such affirmative pleading before the commencement of a medical negligence trial.

The Normans readily agree that if he had properly requested such in his pleadings under either Section 538.230, or possibly under Section 537.060 R.S.Mo., Dr. Wright would have had a right to some sort of credit or offset against the jury verdict in this case as a consequence of the $100,000 paid to the Normans in a pretrial settlement with two settling defendants. As a health care provider, Dr. Wright's statutory right of election was uniquely available to him under Section 538.230 R.S.Mo. However, Dr. Wright first chose to plead, then to drop, his claim for apportionment of fault under Section 538.230 R.S.Mo., and then he failed to make any further pleading until after trial. Thus he never gave notice to the Normans, nor preserve his rights as he was required to in his pleadings in a timely fashion. The principles of notice

and fairness underlying the age-old requirement that parties must expressly plead all requests for affirmative relief in the form of offsets or credits, especially those created solely by statute, consistently ring true regardless of whether the matter at issue arises in contract or tort. The Normans doggedly opposed Dr. Wright's every attempt to request the benefit of an offset or credit before trial, and he elected to withdraw his request under 538.230 R.S.Mo. without substituting any other similar request under 537.060 R.S.Mo. Therefore, now that trial is complete, the jury verdict is accepted, the jury is discharged, and his pleadings cannot be amended after the fact, Dr. Wright's failure to properly notify the Normans of such a choice in a timely fashion and to affirmatively assert it on the record constitutes a complete waiver of any such statutory rights under either statute.

As he was solely in control of his pleadings, having elected to proceed to trial making no affirmative request whatsoever, Dr. Wright cannot ignore, and is now bound by, his waiver. In fact, Dr. Wright has never offered any explanation for his failure to include an affirmative request for an offset in his pleadings prior to the verdict. We still do not know whether this had a strategic basis or was a simple oversight. Nonetheless, his motion to reduce the verdict was without any legal merit and the trial court was required as a matter of law to deny Dr. Wright's motion and should have entered its judgment on the full verdict returned by the jury.

What effect did this cause? The practical implications of timely asserting the right to affirmative relief under either, or neither, statute is critical and substantial. The Normans went into trial relying on the state of the pleadings to formulate their strategy and their presentation of evidence. They deserve to not have the rules changed after the game. The course of the

entire trial would have been altered had Dr. Wright raised his request under Section 537.060 R.S.Mo. before rather than after trial. Different evidence would have been presented regarding the fault and causal consequences of the other parties; additional expert witnesses and expert testimony would have been presented; arguments of counsel would have been altered; different jury instructions would have been submitted to and considered by the jury; and, finally, most likely, the net payment by Dr. Wright to the Normans would have been greater. Thus, not only was there error, but there was severe prejudice as well.

B. THE ELECTION: SECTION 538.230 -or SECTION 537.060 ?

1. WHAT'S THE DIFFERENCE?

These two statutes have much in common but differ in some very significant ways, thus a quick review of these statutes is required.

SECTION 537.060 R.S.Mo.: The "traditional" common law principle of joint and several liability was modified slightly by Section 537.060 R.S.Mo. in that a "settling defendant" could now completely buy his peace and forever avoid all fear of any future contribution action against him by a "trial defendant". And, if the trial defendant wisely requested the benefits of this statute in his pleadings, then such settlement agreement would benefit the trial defendant by reducing "the claim [of the plaintiff] by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater." Section 537.060 R.S.Mo. [**Note**: This clause will be referred to as the "060 reduction" clause, and contrasted with the "230 reduction" clause] This benefit is available in all general, non-medical

negligence, tort actions, and amounts to a simple "dollar-for-dollar" offset. That section in full provides:

> Contribution between tort-feasors--release of one or more, effect.
>
> 537.060. Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tort-feasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tort-feasor. The term "noncontractual indemnity" as used in this section refers to indemnity between joint tort-feasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

SECTION 538.230 R.S.Mo.: In 1986, our legislature carved out new exceptions exclusively for health care providers by enacting Chapter 538 "Tort Actions Based on Improper Health Care", which more significantly modified Missouri's common/statutory law of joint and several liability beyond that set up by Section 537.060 R.S.Mo., and it included a new

scheme for calculating how pretrial settlements may, or may not, affect verdicts. The three subsections of Section 538.230 R.S.Mo. duplicated some existing law, and created some completely new rules. That statute provides:

> Apportionment of fault authorized--defendants jointly and severally liable, when--release of one defendant, effect.
>
> 538.230. 1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services where fault is apportioned among the parties and persons released pursuant to subsection 3 of this section, the court, unless otherwise agreed by all the parties, shall instruct the jury to apportion fault among such persons and parties, or the court, if there is no jury, shall make findings, indicating the percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability under subsection 3 of this section.
>
> 2. The court shall determine the award of damages to each plaintiff in accordance with the findings, subject to any reduction under subsection 3 of this section and enter judgment against each party liable on the basis of the rules of joint and several liability. However, notwithstanding the provisions of this subsection, any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant.

3. Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity but it does not discharge other persons or entities liable upon such claim unless it so provides. However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release.

The **first** subsection of Section 538.230 R.S.Mo. tells us that, **"unless otherwise agreed by all the parties"**, the jury must be instructed to apportion the "percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability **under subsection 3 of this section**." Section 538.230.1 R.S.Mo**.** (emphasis added). Therefore, it is very clear that if the trial defendant does not request apportionment of fault and the plaintiff agrees, then the court does **not** instruct the jury to determine any apportionment of fault of any party, including that of any settling defendant; and, on the other hand, if the defendant does not request apportionment, the plaintiff is equally entitled to force it upon the defendant simply by requesting it in plaintiff's pleadings. Thus, the practical effect is that absent an agreement, either side has carte blanche power to force

the court to submit apportionment to the jury simply by proper pleading, proof, and submission of jury instructions.

The **second** subsection of Section 538.230 R.S.Mo. further modifies our tort rules of joint and several liability but only as to claims against health care providers on a "big, medium, and small tortfeasor" basis. Since this provision only applies to situations in which an apportionment of fault determination has been requested by the parties and made by the jury, which was not done in the present case, this provision does not apply here.

An understanding of the **third** subsection of Section 538.230 R.S.Mo., and a comparison to Section 537.060 R.S.Mo., is critical for the proper analysis of the present case. Section 538.230.3 R.S.Mo. consists of only two sentences; whereas Section 537.060 R.S.Mo. contains four sentences:

(1) Regarding the "discharge" effect of any settlement, the **first** sentence of Section 538.230.3 R.S.Mo. tracks and essentially duplicates the terms of the first half of the second sentence, and all of the third sentence, of Section 537.060 R.S.Mo.

(A) Section 538.230.3 R.S.Mo.: "Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity

but it does not discharge other persons or entities liable upon such claim unless it so provides."

(B) Section 537.060 R.S.Mo.: "When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; . . . The Agreement shall discharge the tort-feasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tort-feasor."

In other words, this clearly establishes that Section 538.230 R.S.Mo. and Section 537.060 R.S.Mo. operate independently of each other, otherwise the legislature would have simply included within Section 538.230 R.S.Mo. a direct reference to the same provisions in Section 537.060 R.S.Mo., without repeating virtually identical language. These two sections do not apply simultaneously in medical negligence cases. It is also very important to note at this point that Section 538.300 R.S.Mo. specifically excludes 13 other statutes from applying to any 538 action, along with Sections 537.067 and 537.068 R.S.Mo., but **does not** exclude Section 537.060 R.S.Mo. Thus, before trial begins, it is very clear that a party in a medical negligence trial has two, and possibly three choices:

(1) make his request under Section 538.230 R.S.Mo., or

(2) he may choose to ignore the benefits of Section 538.230 R.S.Mo. entirely, or

(3) (argued here in the alternative by the Normans) he may elect to request the dollar-for-dollar offset from the pretrial settlement under Section 537.060 R.S.Mo.

(2) The **second** sentence of Section 538.230.3 R.S.Mo. "tracks" but very significantly deviates from the second half of the second sentence of Section 537.060 R.S.Mo., or the "060 reduction" clause described above, thus creating the functional difference between the "dollar-for-dollar" versus the "percentage" offsets.

(A) Section 538.230.3 R.S.Mo.: "However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release." (emphasis added)

(B) Section 537.060 R.S.Mo.: "however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater."

This second sentence of Section 538.230.3 R.S.Mo. is the "230 reduction" clause which allows a trial defendant health care provider a very unique and critically strategic option to potentially leverage pretrial settlements well above the "dollar-for-

dollar" benefit as provided by Section 537.060 R.S.Mo. In contrast with the "dollar-for-dollar" offset provided in the "060 reduction" clause, the "230 reduction" is based first on an "equitable share" determined by the jury, which is then converted to a dollar offset by multiplying the verdict by the settling defendant's percentage of allocated fault. Section 538.230.3 R.S.Mo. An "equitable share" of zero fault provides no offset.

2. HOW THE ELECTION IS MADE:

AFFIRMATIVE REQUEST IS REQUIRED

Regardless of whether the party to a medical negligence trial elects to request an offset under either Section 537.060 R.S.Mo. or Section 538.230 R.S.Mo., both are clearly an effort to gain the benefit of a right derived directly from a statute, and thus, such request must be properly pleaded as an affirmative request pursuant to Rule 55.21(a). In addition, Rule 55.08 requires all affirmative defenses, including but not limited to the offset of accord and satisfaction and comparative fault, to be affirmatively set forth in the pleadings or they will be waived. Also, the same Rule requires that all such affirmative defenses or avoidances must contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. Similarly, Rule 55.05 lays out the same requirement of "a short and plain statement of the facts showing that the pleader is entitled to relief". This was precisely the basis on which the trial court sustained the Normans' motion to strike Dr. Wright's request for apportionment well before trial. L.F. 55-56, tab #8. The fundamental fairness of notice to opposing parties of requests for affirmative relief which directly affect both the process of trial and the outcome cannot be denied. In fact, Dr. Wright has conceded the same. L.F. 53, tab #7. Such is exactly why plain statements in the open on paper are required by the above Rules which have also been codified in Sections 509.050, 509.090 and 509.220 R.S.Mo.

The above principles are true for all claims for any offset arising under the common law. While it is also true that the subject claims for an offset arise solely by virtue of the

applicable statutes, the same principles and requirements should apply with equal force and effect. There is no valid way to reconcile the opposing contentions that what fairness and justice require to be contained in pleadings to assert a claim based on common law, that the same notions of fairness and justice would not require the same contents of pleadings simply because the claim originates by statute. Dr. Wright has never explained, and cannot explain, why he would be required to affirmatively plead the benefit of one statute, but would not be required to so plead the very similar benefit of a different statute. Nor has he ever offered any policy reason to support his delay in presenting his claim to an offset. Furthermore, Dr. Wright has never suggested that he was under any hardship or in any way unable to have simply amended his answer before trial to include the relief he now seeks.

In our present case, a proper request by Dr. Wright for any offsetting benefits under Section 537.060 R.S.Mo. was required at a minimum to have included at least a reference to that statute and some supporting facts about the prior settlement and the amount of the settlement along with an express request for the offset to be applied to any verdict. Going into trial, he was in exclusive control of this option yet Dr. Wright chose not to file any such request. A flawed trial strategy cannot be remedied by his post-trial motion to reduce the verdict.

Similarly, under Section 538.230 R.S.Mo., a proper pleading by Dr. Wright in his answer must include not only a reference to the statute and a request for the apportionment, but also an affirmative defense allegation identifying those who Dr. Wright believes are also

at fault, and some supporting factual allegations informing the Normans of the essence of why it is believed such settling parties are at fault. The trial court agreed and struck Dr. Wright's claims under Section 538.230. L.F. 12-13, tab # 1. At trial, Dr. Wright bore the burden of proving such allegations not only with ordinary proof of necessary facts, but also with competent expert witness testimony. L.F. 53, tab # 7. At the conclusion of trial, Dr. Wright would have also had the responsibility of submitting a proper verdict director consistent with such allegations and proof. Id.

3. THE STRATEGIC LEVERAGE ADVANTAGE:

A SIMPLIFIED EXAMPLE

This dispute is very much substantive and not purely procedural. These choices bore a significant impact on trial strategies and decisions regarding the presentation of witnesses and evidence, and they ultimately cost the Normans a large portion of their verdict, and allowed Dr. Wright to use perfect hindsight to reap a large windfall by escaping one-third of the verdict the jury said he owed to the Normans.

Using the example of a pretrial settlement of $100,000, and a verdict of $300,000, the significant leveraging advantages between the two different statutory offset options available to a health care provider trial defendant, as compared to an "ordinary" tort trial defendant, may be demonstrated as follows.

1. **Ordinary trial defendant:** Under Section 537.060 R.S.Mo., so long as the trial defendant pleaded and proved to the court that he was entitled to the benefit from the settlement under this statute, then the trial court would automatically make a "dollar-for-dollar" deduction of the $100,000 settlement from the verdict, for a net judgment of $200,000, regardless of who was how much at fault. However, if the verdict was successfully held to $100,000 or less, then the trial defendant would pay nothing, again, regardless of fault allocations. Therefore, for the trial defendant, the primary objective, and the primary risk, would be to simply to hold the dollar amount of the verdict as low as possible.

2. **Health care provider trial defendant**: Here, assuming the same $100,000 settlement, there is a matrix of four possibilities, each with attendant risks, stated in terms of verdict dollars and the amount of fault assessed to the settling defendant: high verdict/high fault; high verdict/low fault; low verdict/high fault; and low verdict/low fault. For demonstration purposes, the extremes of verdicts, $5,000,000, and $100,000, and of fault assessed to the settling defendant, 95%, and 5%, will be assumed.

A. **High verdict/high fault**: ($5,000,000/95%) - Here, the effect of the $100,000 settlement will be greatly magnified so that the trial defendant will get an offset of $4,750,000, forty-seven and a half times the actual dollars paid by the settling defendant; plaintiff, on the other hand, nets only a total of $350,000 on a five **million** dollar verdict.

B. **High verdict/low fault:** ($5,000,000/5%) - Despite "losing" the battle over fault, the trial defendant will still get an offset of $250,000, or two and a half times the

actual dollar amount paid by the settling defendant; whereas, plaintiff will still net less than the full verdict, or a total of $4.85 million.

C. **Low verdict/high fault**: ($100,000/95%) - With this result, the trial defendant "wins" his battle of fault, and still maintains 95% of the insulating effect of the pretrial settlement, and pays only $5,000; for the trial defendant, a big help; for plaintiff, a big gamble, but a very small "win".

D. **Low verdict/low fault**: ($100,000/5%) - This is the only one out of the four results in which the defendant loses his gamble, and pays $95,000; still a big gamble for plaintiff, with a reasonable "win", yet still not even "doubling his money" in return for the cost and risk of trial.

In conclusion of this example, it is easy to see how the health care provider trial defendant has much more strategy to consider before going to trial after a settlement by other defendants than that faced by the "ordinary" trial defendant, and he will want to carefully weigh his options before plotting his course and "placing his bet" based on the particular facts of his case and his predictions of the results. At the same time, the plaintiff must consider the same strategies, and must stand ready to play off of the defendant's moves.

This matrix-analysis is far more complicated if after a pre-trial settlement the case proceeds to trial against two or more defendants. Thus, the havoc and confusion will expand and compound exponentially if parties are allowed to assert rights to offsets from settlements for the first time after medical negligence trials.

Furthermore, it is anticipated that Dr. Wright may assert a claim of "fairness" to support his argument, that is, asserting that it is unfair for the Normans to keep the full benefit of the risky bargain they struck with the settling defendants such that their total gross payments should not be allowed to exceed the verdict. At first blush this sounds logical, but the argument fails in further analysis. For example, first, as demonstrated above, the prospect that a partial settlement may easily result in the Normans getting substantially less than the full verdict is a result Dr. Wright would doubtfully call "unfair". Secondly, if the verdict had come back at only $50,000, for example, Dr. Wright may or may not get an offset depending on the other facts, but in no event would the Normans be required to pay back any portion of the settlement funds so that their total gross payments equal the verdict. Settling plaintiffs are bound by a "bad settlement" just as they are entitled to the full benefit of a "good settlement". There is no reason that the same should remain equally true for defendants. Such an argument that the Normans are only entitled to "a single satisfaction" is not valid, unless the defendant affirmatively takes available steps to counter such a result.

4. TORT AND CONTRACT:

THE RULES SHOULD BE THE SAME

The basic rule of affirmative pleading before trial should apply with equal force in a contract case as in a tort case.

An important case that Dr. Wright did not bring to the attention of the trial court is Titan Construction Company v. Mark Twain Kansas City Bank, 887 S.W.2d 454 (Mo. App. 1994). Although it involved an offset in a contract matter, the Titan court cited Walihan with approval, and holds for the proposition that any settlement credit or "set-off", as the court called it, has to be pleaded to be effectively preserved or it may be waived.

> The common law defense of prior, full satisfaction is an affirmative defense which must be pleaded and proven. See Walihan v. St. Louis-Clayton Orthopedic Group, Inc., 849 S.W.2d 177, 180 (Mo. App. 1993). An affirmative defense must be pleaded to give the plaintiff notice, and failure to plead it generally results in waiver. Lucas v. Enkvetchakul, 812 S.W.2d 256, 263 (Mo. App. 1991).

Id. at 458. The Titan court went on in footnotes to clarify that such matters must be raised and preserved before, or at least during, trial; raising them for the very first time in post-trial motions is not effective. Id. at fn 1, 458. A similar ruling was reached in Booker v. Kansas City Gas Company, 96 S.W.2d 919, 923 (Mo. App. 1936).

The proposition advanced by the Normans remains undisputed that an affirmative pleading of some kind is required in advance of trial in order to provide fair notice of and to preserve a party's right to such an offset after trial, and such requirement is not in any way dependent on the tort/contract nature of the claim as Dr. Wright asserts. Titan, at 457-458.

The court in Titan did not make nor even suggest such a distinction, and in fact, it established exactly the opposite:

> "Mark Twain settled with Travelers in May 1990, nearly three years before the trial. Titan did not plead the issue of prior satisfaction or the settlement agreement as an affirmative defense to Mark Twain's counterclaim. (fn 1) Titan's failure to raise this matter as an affirmative defense constituted a waiver. Even had Titan properly pleaded the issue, it did not present competent evidence to support such a defense. (fn 2)
>
> - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -
>
> fn 1 Titan purported to raise this issue in its motion for remittitur, motion for judgement n.o.v. and motion for set-off, but a motion for remittitur is not an appropriate means of raising an affirmative defense. See Hall v. Superior Chem. & Fert., Inc, 819 S.W.2d 422, 426 (Mo. App. 1991). Nor could Titan raise the issue in its motion for j.n.o.v. because it did not raise the issue in its motion for directed verdict. A claim for a "set-off" is an independent action which may be raised as a counterclaim. See Walihan, 849 S.W.2d at 179 n.2 (citing Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 129 (Mo. banc 1985))."

Titan, at 457-458, (footnote 2 omitted).

It must be noted that the Hall case was a negligence action and the Western District there correctly affirmed the full jury verdict and reversed the trial court's remittitur since the

party claiming the setoff neither pleaded the claim nor raised it during the trial and offered no evidence in support of the claim. Hall, at 426-27. This was true despite the assertions that the jury's verdict exceeded the fair and reasonable compensation for the plaintiff's injuries and damages. Id.

The Titan court also specifically removed any contract/tort distinction when it cited the Eastern District case of Walihan v. St. Louis-Clayton Orthopedic Group, Inc., 849 S.W.2d 177, 180 (Mo. App. 1993) in support of its announced proposition that a credit from a settlement must be pleaded or it is waived. Titan, at 457-458. The Walihan case was a medical negligence wrongful death case against a doctor and a hospital, as was the instant case presented by the Normans. Titan cited Walihan with approval, and correctly holds for the proposition that any settlement credit or "set-off", as the court called it, has to be pleaded to be effectively preserved or it may be waived. "The common law defense of prior, full satisfaction is an affirmative defense which must be pleaded and proven. See Walihan v. St. Louis-Clayton Orthopedic Group, Inc., 849 S.W.2d 177, 180 (Mo. App. 1993). An affirmative defense must be pleaded to give the plaintiff notice, and failure to plead it generally results in waiver. Lucas v. Enkvetchakul, 812 S.W.2d 256, 263 (Mo. App. 1991)." Walihan, at 458. The Titan court went on to state in footnote 1 that such matters must be raised and preserved before, or at least during, trial; and that raising them for the very first time in post-trial motions is not effective. Titan, at 458. It is important to note that even the Lucas case cited by Titan relied on a negligence case, among other cases, for the same proposition, and that negligence case was

the Southern District case of Young v. Kansas City Power and Light Co., 773 S.W.2d 120 (Mo.App. 1989). Lucas, at 263.

5. TIMING OF THE REQUEST:

JULIEN DISTINGUISHED

The holding in Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App.1999) might be argued by Dr. Wright to allow his motion after the verdict, and if so, such would be extending proper concepts well beyond the permissible scope of that opinion. The present case has absolutely nothing in common. In Julien, the issue centered around whether the motion for a set off was a proper after trial motion; such was not an issue in the case below. Julien was not a medical negligence case and thus the parties and the claims there were not subject to the specialized provisions of Section 537.230 R.S.Mo., no issue of pleading and notice were raised or decided, and no option of selecting the benefits of, or deciding the sequence of applying, either Section 537.060 R.S.Mo./Section 537.230 R.S.Mo. existed for any of the parties. The Julien court was not confronted with nor did it address any interpretation of the application of Section 537.060 R.S.Mo. in light of Section 537.230 R.S.Mo., nor the prejudice and effects on the trial or the litigants from lack of notice or affirmative pleading. Extrapolating a concept from one type of case with completely different controlling statutes and totally unrelated facts, to another case nothing like the first one, invites making bad law and ignores any consideration of the important issues found only in medical negligence cases.

Under the trial court's ruling, any medical negligence party, plaintiff or defendant, may now submit apportionment of fault under Section 537.230 R.S.Mo., finish the trial, and if pure hindsight proves that the better alternative for him would have been the dollar-for-dollar credit rather than the equitable share credit, then he is free to reverse course, completely ignore the percentage of fault findings by the jury, and file his after trial motion under Section 537.060 R.S.Mo.

And, vice versa. There would be nothing to stop any party from going to trial pleading a Section 538.060 R.S.Mo. credit, or even from making no such pleading at all, and after trial filing his motion requesting a finding of fact by the trial court for an apportionment of fault under Section 537.230 R.S.Mo. The provisions of Section 537.060 R.S.Mo. and Section 537.230 R.S.Mo. regarding settlement credits are very similar; they just use different schemes: dollar-for-dollar versus equitable share. If absolutely no pretrial pleading is required in a medical negligence case to preserve the right to the dollar-for-dollar credit, and since a Section 537.060 R.S.Mo. motion would be deemed to be a proper motion in a medical negligence case after the verdict, then why would a Section 537.230 R.S.Mo. motion not be equally permissible for the first time after a verdict seeking a credit based on an equitable share?

Most medical negligence cases involve multiple defendants at trial, and applying this decision to such cases clearly illustrates the incredible problems this decision will likely cause litigants around the state. Depending on the relative dollar amounts in terms of the

pretrial settlement and the verdict, and accounting for the percentages of fault allocated by the jury, it is not hard to imagine a scenario where one defendant after trial prefers the dollar-for-dollar credit but another defendant insists on paying only his equitable share! And, again, or vice versa.

Finally, since this is not just a plaintiff or a defendant issue, what would prevent a plaintiff from sandbagging until after the trial and submitting his own request under a different statute to gain a better net verdict? Nothing if the trial court's ruling is upheld here. There is simply nothing in any of the case law nor either of the statutes that says one statute automatically applies to the exclusion of the other if one is elected by any party.

How much additional collateral litigation and appeals might this spawn? How much sandbagging, surprise, and unfairness will this cause? Certainly this is a serious and important question that requires reversal of the trial court's ruling.

Medical negligence litigants, both plaintiff and defendant, deserve to be free of the uncertainty, inconsistency, and sandbagging that this ruling will create. Such are the fundamental goals of the longstanding public policy requiring affirmative pleadings, and to avoid such chaos and collateral litigation. For litigants going into an expensive and complex trial, when there are two very similar statutes that might apply to a verdict but each with different results, all the litigants in the case should be able to know before trial begins and be able to confidently rely on which statutory credit scheme, if either, will still be "in the case" after verdict is returned and the jury is excused; anything less invites unfairness and sharp

practice of counsel by effectively changing the rules after the game is finished. This can hardly be called justice.

6. THE IMPORTANCE OF TIMING:

A PREJUDGMENT INTEREST ANALOGY

While researching and drafting this substitute brief, counsel encountered a case which at first blush appears to negate the Normans' arguments, but counsel is nonetheless obligated to disclose this case to the Court and opposing counsel. The case is Call v. Heard, 925 S.W.2d 840 (Mo. banc 1996), and holds that a party does not have to affirmatively plead the benefits of Section 408.040 R.S.Mo. before the commencement of trial in order to secure and obtain the addition of prejudgment interest to a judgment; the request can come after the verdict.

However, this holding is not dispositive of the issue here, and it is completely distinguishable on very significant grounds. The prejudgment interest statute applicable to tort actions, Section 408.040 R.S.Mo., does require some formal written documents to be exchanged between the parties ultimately seeking to obtain the interest and those who might have to pay the interest, but does not expressly require any particular pleading, thus, the court in Call held that the absence of such advance affirmative pleadings will not prevent the requesting party from getting the interest if the claim is raised for the first time after the verdict. The following are the important distinctions preventing that case from supporting the

trial court's ruling in this case; facts, alterations of the parties' presentation at trial and other situations far different than those in our instant case below.

First, in a prejudgment situation, there is no action to be taken or avoided regarding the interest until there is a verdict. None of the evidence, testimony or jury instructions would be altered. Calculation of any interest is a moot point without a verdict. Such calculation is purely administerial, and of no consequence to the parties if not requested until after a verdict is rendered.

Notice to the potential payor of interest has been accomplished well in advance of trial, and duplicating the same in an affirmative pleading would accomplish nothing. There can be no surprise claimed by any party after the verdict is returned.

Timing of a claim for prejudgment interest affects nothing. The rule proposed by the Normans' here will promote judicial economy and reduce the prospect for needless appeals by preventing a party from sandbagging by waiting until the outcome of the trial is known before determining whether to raise the issue under Section 537.060 R.S.Mo. Another reason, which also promotes judicial economy, is to give the opponent a fair chance to address the issue, and to give the trial court an opportunity to rule on the issue in a timely fashion relative to the other issues in the case. None of this is pertinent or prejudicial regarding prejudgment interest claims.

Only a single statute is involved, and the possible outcomes are readily ascertainable as there are no choices or elections to be made among various forms of relief.

Absolutely no prejudice is placed on the potential payor due to any lack of such affirmative pleadings; no difference in the amount of money paid as it is purely a matter of mathematics applied to the facts; no strategy is implicated at any point.

The relationship and control of the dollar amounts is directly between the parties to whom and from whom the interest will be paid; here, a third party, the settling defendant, plays a role in determining the settlement amount, and the trial defendant does not.

Therefore, it is easy to understand the rationale and purpose served by the holding in Call, and why that holding is not directly applicable by analogy to the issues in this case. There are significant compelling policy reasons why medical negligence cases have different applicable statutes and require a result different that that in the Call case.

C. THE PLEADING HISTORY IN THIS CASE

The Normans did everything they could to plan ahead and protect their interests based on the state of the pleadings, yet the ruling of the trial court weeks after the jury was released allowed the rules to be changed and the outcome altered dramatically.

Initially, Dr. Wright asserted bare allegations and requests for an offset under Section 538.230 R.S.Mo., but he never presented nor preserved any right or benefit under Section 537.060 R.S.Mo. L.F. 42-49, tab # 5.

The Normans consistently and repeatedly attacked the sufficiency of Dr. Wright's request for an offset under Section 538.230 R.S.Mo., and eventually, just before trial, Dr. Wright decided and announced in open court that he affirmatively withdrew those allegations and waived any benefit of any offset under Section 538.230 R.S.Mo. L.F. 90, 122, tabs # 16, 19. Before trial commenced, Dr. Wright never amended his pleadings under either statute to include any short and plain statement of any facts supporting any claim for an offset nor any apportionment of fault against any settling defendants. As such, during trial Dr. Wright never made any record or offered any evidence to the court of any kind relating to the release or settlement, or suggesting that any settling defendant was at fault in any way for the Normans' damages, nor did Dr. Wright ever offer any competent expert testimony on such issues. After trial, Dr. Wright never offered any apportionment of fault jury instructions pursuant to Section 538.230 R.S.Mo.

For the very first time in the history of this entire case, spanning more than four years from filing to conclusion, involving many very contested hearings on many different issues, it was only after trial was completed and the jury was sent home, and after the court's acceptance of the jury's verdict, that Dr. Wright raised an affirmative defense and an

affirmative request for relief under a specific statute, Section 537.060 R.S.Mo. The pleadings history of this matter is essentially as follows:

12/04/98 Plaintiffs' Motion to Amend by Interlineation is Granted. L.F. 7, tab # 1.

12/16/98 Motion of Defendant Andy Wright for a More Definite Statement of Petition as amended by interlineation filed. Id.

7/25/00 By agreement, Defendant's Motion to Dismiss and Motion to Strike overruled over Defendant's objections. Defendant's Motion for More Definite Statement overruled except paragraph 20(c) stricken. Defendant to file answer by 8/7/00. L.F. 10, tab # 1.

7/26/00 Petition for Approval of Proposed Settlement filed. Plaintiffs in person and by attorney Ransin. Defendant St. John's by attorney Schrock; Defendant Johnson by Attorney Bellm. Jury waived, testimony taken. Court approves settlement per Judgment and Order Approving Settlement entered and filed. This is a partial settlement and case remains pending as to Defendant Andy Wright. L.F. 38-41, 57, tabs # 3, 4, and 9.

8/8/00 Answer of Defendant Andy J. Wright, M.D. to Plaintiffs' Amended Petition by Interlineation filed. L.F. 43-45, tab # 5.

[**Note**: Dr. Wright's request for apportionment was limited to: "In accordance with Section 538.230, R.S.Mo., defendant requests the trier

of facts to apportion fault between defendant and the former settling defendants to this action."]

8/10/00 Plaintiffs' Motion to Strike Defendant's Request for Apportionment filed, Notice of Hearing set for 8/17/00. L.F. 10, tab # 1.

8/21/00 Defendant's Suggestions in Opposition to Plaintiffs' Motion to Strike Defendant's Request for Apportionment filed. L.F. 11, tab # 1.

8/22/00 Order Regarding Interrogatory Objections and Pleading of Apportionment of Fault entered and filed. Plaintiffs' Motion to Strike Defendant's Request for Apportionment is accepted as a Motion Requesting A More Definite Statement, and as such is hereby sustained and Defendant Wright is ordered within 20 days, due on or before September 11, 2000, to amend his answer so as to include a short and plain statement of facts for each allegation of negligence and/or fault asserted against any separate settling defendant, namely Joseph C. Johnson, Jr., M.D. and/or St. John's Regional Health Center, for which Defendant Wright requests Apportionment of Fault pursuant to Section 538.230 RSMo. L.F. 55-56, tab # 8.

9/15/00 Plaintiffs' Motion for Leave to Amend Petition; Motion to Strike Defendant's Request for Apportionment and Notice of Hearing on 9/21/00 filed. L.F. 11, tab # 1.

9/26/00 Order granting leave to file Amended Petition entered and filed. Amended Petition filed. L.F. 12, tab # 1.

9/29/00 Defendant files his "alternative answer." L.F. 73-77, tab #13.

[**Note**: Dr. Wright's request for apportionment was modified slightly: "In accordance with Section 538.230 R.S.Mo., defendant requests the trier of fact to apportion fault between defendant and former defendants St. John's Regional Health Center and Joseph C. Johnson, Jr., M.D., which former defendants have been released pursuant to Section 538.230.3."]

10/02/00 Defendant's Motion to Dismiss Second Amended Petition filed. L.F. 12, tab # 1.

10/10/00 Defendant's Motion to Dismiss Plaintiffs' Second Amended Petition is overruled. Alternative Motion to Dismiss for Failure to State a Claim overruled. Defendant's Alternative Motion to Strike overruled. Motion to Strike Answer Insofar as it Alleges Contribution sustained in 2 days if no specific allegations pled. L.F. 12-13, tab # 1.

11/6/00 By agreement (Ransin and Malkmus). This case is set for trial (#1) by jury at 9:30 a.m., July 23, 2001. L.F. 13, tab # 1.

7/23/01 Prior to trial, the Normans again attacked Dr. Wright's blanket assertions of the right to apportionment under Section 538.230 R.S.Mo., and

ultimately defendant conceded by withdrawing all such allegations. L.F. 90, 122, tabs # 16, 19.

8/7/01 After the verdict, for the first time in the case, Dr. Wright filed his motion asking the trial court for affirmative relief of a reduction of the jury's verdict by $100,000, representing the amount of the prior settlement with Dr. Johnson and St. John's Hospital based on Section 537.060 R.S.Mo. L.F. 79-89, tab # 15.

8/20/01 The Normans opposed such request as untimely and improper as Dr. Wright's own pleadings failed to plead the affirmative request. L.F. 94-114, tab # 17.

8/22/01 Dr. Wright filed suggestions in reply to the Norman's opposing suggestions. L.F. 115-120, tab # 18.

8/22/01 After the Normans pointed out in their suggestions that Dr. Wright was not entitled to any reduction since none had been set forth in his answer, Dr. Wright moved the court for leave to amend his answer after the verdict and before entry of the formal judgment. L.F. 121-138, tab # 19.

8/29/01 The court denied leave to amend, and Dr. Wright has not appealed that ruling. L.F. 19-20, tab # 1. The court sustained Dr. Wright's motion to reduce the verdict and ruled "on the basis that deft is entitled to such

offset or credit as a matter of law pursuant to section 537.060 RSMO." L.F. 20, 145, tabs # 1, 21.

8/30/01 The court entered judgment for the reduced amount. L.F. 145-147, tab # 21.

8/31/01 The Normans timely filed their motion for new trial, and alternative motion to amend the judgment opposing the reduction of the jury's verdict, which the court overruled on October 2, 2001. L.F. 20, 148-150, tabs # 1, 22. Later that same morning the Normans timely filed this appeal. L.F. 20, 151-154, tabs # 1, 23.

1. THE STRATEGIC IMPACT:

HARM TO THE NORMANS

The strategic implications of which method of offset is chosen, if any, and by whom, was extremely important in this case. The Normans anticipated Dr. Wright's options and were fully prepared with supporting expert witnesses to either focus only on Dr. Wright's fault at

trial, or to include all the health care providers in a full apportionment of fault, laying most of the blame on Dr. Wright. Supp. L.F. 156-169, tabs # 24, 25.

As noted earlier, the election to request apportionment under Section 538.230 R.S.Mo. is bilateral and is not limited in availability to only the defendant in a case. If either side requests it, the court must submit the issue to the jury for determination. There will be no apportionment submitted only when all parties agree that such issue will not be submitted. Therefore, in this case, right before the commencement of trial, when Dr. Wright openly waived his request under Section 538.230 R.S.Mo., if he had then moved to amend his pleadings to affirmatively switch his request for an offset in the format offered by Section 537.060 R.S.Mo., since this is an action specifically controlled by Chapter 538, the Normans could have, and were fully prepared to, immediately "trump" Dr. Wright's "537.060 request" with their own motion to amend their pleadings to add their affirmative request for apportionment of the released defendants under Section 538.230 R.S.Mo. Dr. Wright has conceded that the Normans could have easily amended their pleadings right before trial began to restore the allegations of fault of the settling defendants. L.F. 52, tab # 7.

Under that course of events, neither Dr. Wright nor the trial court would have had any choice but to submit apportionment. Such claims of fault would have caused neither prejudice nor surprise to Dr. Wright since all of the Normans' previously disclosed experts had been thoroughly deposed well before trial and they were critical of all the defendants but placed most of the fault on Dr. Wright. Such allegations of fault had been presented years before

beginning with the original petition. And, Dr. Wright concedes that under these circumstances, the well-known admonition of Rule 55.33(a) reminds us, leave to amend shall be freely given when justice so requires. L.F. 52, tab # 7. Finally, since Dr. Wright believed his motion to amend to add an entirely new claim long after the verdict was valid, he would be hard-pressed to argue that such a motion by the Normans to renew their allegations of the fault of the other parties back into the case would not have been granted, even on the first day of trial.

Therefore, Dr. Wright cannot now claim that this is all just an "automatic" operation of law, that his failure to affirmatively plead his request under Section 537.060 R.S.Mo. is just a hyper-technicality, or that even had it been in his pleadings that such would have not changed the trial or the Normans' trial strategy. In fact, as pointed out earlier in the matrix of "examples" with different verdicts and settlements, it is quite obvious that the Normans held a very critical, vested interest in knowing before trial began exactly what the post-trial calculations would be under various different possible outcomes if apportionment was submitted and since this was not expected to be a multi-million dollar case, the relatively large size of the settlement compared to the projected verdict indicated it would be a wise strategy for the Normans to place most of the blame on Dr. Wright and minimize any fault of the other health care providers. On the other hand, if Dr. Wright had affirmatively requested relief under Section 537.060 R.S.Mo. before trial, considering an estimated verdict of $300,000 to $500,000, it is obvious that the Normans stood to lose a far greater portion of their total recovery under that "dollar-for-dollar" offset scheme than what they might sacrifice with a

small amount of fault allocated against the other health care providers under the "equitable share" percentage calculations mandated by Section 538.230 R.S.Mo.

The Normans were, and we confidently submit that Dr. Wright was as well, fully aware that for Dr. Wright to stay his course going into trial requesting apportionment as he had affirmatively pleaded in his answer, he would have been forced to "point the finger" of fault at his fellow local health care providers, a predictably rare event indeed. Thus, it was safe for the Normans to bet that Dr. Wright would maintain his apportionment bluff up to a certain point, and then ultimately drop that request. However, it was equally anticipated by the Normans that at the last minute Dr. Wright would immediately switch from one type of offset to the one which strategically stood to produce the greatest dollar offset benefit to him with the least effort or embarrassment. To their complete surprise, Dr. Wright elected to proceed with the trial without affirmatively asserting <u>any</u> request for <u>any</u> offset or credit or apportionment under any statute. Thus, it was not necessary for the Normans to take any action or file any motion to amend as they confidently and reasonably relied on the state of the pleadings as they existed at that time under which all rights to any such offset or credit benefit in favor of Dr. Wright had been fully abandoned and waived. Therefore, the course of the Normans trial strategy, their evidence, expert witnesses, and jury instructions were dramatically altered.

Justice and fairness, plain and simple, require that the Normans should be entitled to rely on the notice provided to them as was stated in the pleadings in order to give meaning to their substantive rights to make their trial strategy decisions relevant to the various statutes,

and to evaluate relative settlement options. Trial in a medical negligence case carries inherently big risk for both sides; each must make difficult predictions and decisions well before the outcome is determined. Dr. Wright should not be privileged to sandbag his pleadings, intentionally or accidentally, until after the verdict is final, and delay making his strategic decisions and elections of remedy until after the implications are irreversible. Certainly we would be hearing a loud hue and cry from Dr. Wright if the tables were turned. One can easily imagine the fundamental unfairness if the situation were such that the Normans had elected to submit apportionment, received a multi-million dollar verdict with the largest amount of fault still on Dr. Wright, but with the net effect of "costing" them millions of dollars in offsets, instead of being limited to a reduction of only $100,000. The Normans do not believe for a second that this court would allow them, after the verdict, to reverse their election so they could instead proceed under a different statute just because its format calculated a better net dollar advantage in their favor. The simple truth remains, Dr. Wright's election was finalized when the verdict was accepted and the jury was discharged, and that election was to not seek any affirmative relief from the trial court in the form of any offset or credit under any statute. He cannot now change that fateful decision with after trial motions.

2. DR. WRIGHT'S MOTION AND CONTENTIONS

According to Dr. Wright, the offset granted by the trial court is absolute and "unwaivable" by him. To the contrary, it is axiomatic in our law that any right created solely

by statute may very well be waived through a party's inaction if it is not timely and correctly preserved by the one seeking to obtain its benefits. If so preserved, then and only then would he be entitled to its benefits "as a matter of law".

Dr. Wright's motion is largely devoted to a recitation of undisputed facts. L.F. 79-89, tab #15. The Normans have no dispute regarding, and thus offer no opposition to, any of the facts in paragraphs 1 through 6 of Dr. Wright's motion. However, there are important facts to note which Dr. Wright has not recited.

When the pretrial settlement was presented to the court, Dr. Wright chose to neither intervene in any way, nor to appear at the hearing, or file any pleading, to assert any rights to any offset under any statutory scheme. L.F. 10, tab # 1.

Furthermore, Dr. Wright chose to not request that the court assess and determine how much of the $100,000 settlement should be allocated among the several itemized categories of damages as set forth in Section 538.215 R.S.Mo. and by M.A.I. 21.05. Such a timely request would have anticipated and prepared the case for possible resolution of the current issue in Dr. Wright's favor, particularly if the "damage cap" came into play under Section 538.215. Such an itemization would permit the court to properly offset the correct parts of a settlement against the correct parts of a subsequent verdict. Apparently Dr. Wright did not feel a verdict in favor of the Normans was likely enough to worry about any later possible offset issues. Despite his repeated pleadings under Section 538.230, Dr. Wright has never explained or contended in the trial court that his post-verdict request for an offset under

Section 537.060 was either unknown or overlooked in his various pleadings during all the years preceding trial.

In his suggestions, Dr. Wright delineated three parts of his argument: (1) that because he waived his right to any offset under Section 538.230 R.S.Mo., that somehow "the law is clear that the remaining defendant is then entitled to a credit against the jury's verdict of the amount of settlement with the former defendants", citing only one case; (2) that after such waiver, then it is clear that the courts have consistently recognized that Section 537.060 R.S.Mo. applies to grant the requested reduction, citing three cases; and (3) that the trial court had "judicial notice" of the pretrial settlement in the amount of $100,000 in this case. Since the third point is not in dispute, it need not be discussed here.

Dr. Wright's first point: Dr. Wright openly admits that he "waived" all rights to any offset under Section 538.230 R.S.Mo. L.F. 81, tab # 15. He also admits that the Normans agreed that no apportionment of fault was to be submitted to the jury, and none was submitted. L.F. 90, tab # 16.

Dr. Wright cited the case of Vincent by Vincent v. Johnson, 833 S.W.2d 859 (Mo. banc 1992), impliedly for the proposition that upon waiver of the Section 538.230 R.S.Mo. offset, then all such trial defendants are automatically entitled to the full "dollar-for-dollar" offset under Section 537.060 R.S.Mo. without doing anything more. An examination of the Vincent case, and other applicable case law, conclusively demonstrates that Dr. Wright's reliance on Vincent, and his argument is without merit, and his motion should have been denied.

First, the result in Vincent was not mandated "automatically" under Section 537.060 R.S.Mo., as Dr. Wright implied in his motion, but rather the application of the offset was the product of **an agreement of all the parties under Section 538.230 R.S.Mo.** Under the heading: "III. Apportionment of the Settlement of the NME Hospitals to the Judgment under Secs. 538.210, 538.230", subpart A., the court expressly stated: "The provisions of Section 538.230.3 dictate reducing a verdict by the equitable share of the total obligation attributable to a party that settled. The remaining provisions of Section 538.230 make apportionment by the jury automatic 'unless otherwise agreed by all the parties.' See Section 538.230.1. All remaining parties in this case agreed to waive apportionment and to have the circuit court credit the settlement against the verdict." Vincent, at 862-63 (footnote 2 omitted). Therefore, if all the parties agree to the waiver of submitting apportionment of fault under Section 538.230 R.S.Mo., and if they all agree to have the trial court credit the dollar amount of settlement against the verdict under Section 537.060 R.S.Mo., then, of course, that offset process will be "automatic", but without such an agreement, Vincent does not support Dr. Wright's contention nor his request in this case for a "dollar-for-dollar" offset under Section 537.060 R.S.Mo.

The Vincent case is also instructive in another very important aspect on this issue. As also noted above, if the trial defendant intends to request an offset of a settlement against any future verdict, there is planning and preparation that he must attend to in terms of the "itemization of damages" required by Section 538.215 R.S.Mo. In order for the trial court to know how much of the settlement should be offset against what part of any verdict, the

settlement must also be itemized. Vincent, at 863. This would be particularly important to the trial defendant in the event of a large verdict.

Certainly, this responsibility of itemizing the settlement falls squarely on the defendant's shoulders, not those of plaintiffs. Of course, plaintiffs would not want any offset, thus they would not bear any responsibility for assisting the defendant in his efforts to obtain the same. If Dr. Wright in this case was serious about his rights to a future offset, then his duty to act began in the summer of 2000 at the time of the settlement and the court approval hearing. He had full notice of the settlement, the terms, the amounts, and the hearing. All of this was and remains public record. His waiver of his right to any offset under Section 538.230 R.S.Mo. actually began in July and August of 2000 with his choice to take absolutely no action at the time of the pretrial settlement, and was finished when the jury was discharged on July 31, 2001.

Dr. Wright's second point: As stated above, the Normans agree that if properly pleaded, Section 537.060 R.S.Mo. may apply to medical negligence cases. However, what Dr. Wright fails to recognize is that the application of Section 537.060 R.S.Mo. in such instances is not simply "automatic".

The first of three cases Dr. Wright cited in his motion is Brown v. Kneibert Clinic, 871 S.W.2d 2 (Mo. App. 1993). Again, not only does this case not support Dr. Wright's argument or motion, but it actually lends support to the contrary.

Brown involved both a medical negligence action, and a products liability action which obviously falls under Section 537.060 R.S.Mo. Id. The non-health care provider defendant settled the products liability claims before trial . Id. at 3. Clearly, there could be no way that any pretrial settlement with the "ordinary" (non-health care provider) settling defendant would invoke the provisions of Section 538.230 R.S.Mo. Such is why at page 4 of the opinion the court expressly reached the finding that the provisions of Section 538.230 R.S.Mo. did not apply. However, the settlement in our case was with health care defendants. Since the facts in Brown are quite different from those in the present case, it is easily distinguishable on the facts alone. Nonetheless, it is quite apparent from a reading of the full opinion that the parties effectively had an agreement and acquiesced to the application of Section 537.060 R.S.Mo. instead of Section 538.230 R.S.Mo. There clearly was no such agreement in the present case.

Also, in the final full paragraph of Brown, the court dismissed the plaintiff's very belated attempt to revoke any such acquiescence previously established that the controlling statute was Section 537.060 R.S.Mo. in that case. Brown, at 4. As such, except for the poor timing, it appears from the court's manner in dealing with that issue that if plaintiff had raised his contest to the applicability of Section 537.060 R.S.Mo. in a timely fashion, then it would have been effective. In contrast to our present case, plaintiffs here have continuously and aggressively attacked the applicability of both Section 537.060 R.S.Mo. and Section 538.230 R.S.Mo. in timely fashion, thus this dicta in Brown works to aid plaintiffs' argument, and detracts from Dr. Wright's.

Walihan v. St. Louis-Clayton Orthopedic Group, Inc., 849 S.W.2d 177 (Mo. App. 1993), is the second case Dr. Wright cited in his motion. At least this case involved two medical malpractice defendants, in contrast with the Brown case, however, it is also easily distinguishable on the law and the facts. It appears that Dr. Wright relied on Walihan by implication for his proposition that the terms of Section 537.060 R.S.Mo. are always and automatically available to all trial defendants. Not only is this not true, the Walihan court plainly says so. The plaintiff there argued that Section 537.060 R.S.Mo. did not apply since the defendant failed to offer a jury instruction regarding the offset. The problem with the plaintiff's argument was that it failed to recognize that if the defendant properly presented and preserved the right to an offset by pleading and proof, there was no jury instruction required under Section 537.060 R.S.Mo. In direct contrast to Dr. Wright's inactions, the defendant in Walihan did properly and timely present and preserve his right to the requested offset. "Defendants pleaded their right to an offset and pursued it at trial." Walihan, at 14. Therefore, Walihan instructs us very clearly that the right to the offset is not automatic, and it is Dr. Wright's to either preserve or to waive. Walihan firmly establishes that Dr. Wright failed to properly plead and pursue any right to an offset under Section 537.060 R.S.Mo., and thus, his motion should have been denied.

While discussing the Walihan opinion in his suggestions, Dr. Wright analogized the procedural operation of his right to an offset under the common law principles of "satisfaction". Once again, the availability of the right itself is not the issue; the salient issue is whether Dr. Wright properly preserved his right to any offset under a specific statute. As

noted earlier, Rule 55.08 requires an affirmative pleading to preserve and avoid waiver of any defense of satisfaction or avoidance. The requirement of affirmatively pleading any right to a reduction of any verdict, whether in a contract or a tort action, is "as old as the hills", and citation to such firmly-entrenched case law would only unnecessarily lengthen this brief. However, the point remains that Dr. Wright's argument thus acknowledges his burden to protect such rights, and his subsequent total failure to do so.

The third case Dr. Wright cited in his argument was Brickner v. Normandy Osteopathic Hospital, Inc., 746 S.W.2d 108 (Mo. App. 1988), ostensibly for his proposition that the right to an offset is an irretrievably automatic right. Dr. Wright's presentation of the Brickner case was limited to a single sentence, part of which was a quote from the opinion. That quote does say, and the Normans agree that the statement, out of context, in a vacuum, is correct, that a defendant is "entitled" to a credit from prior settlements. But the analysis cannot end abruptly right there. Dr. Wright simply did not take the proper actions to give them notice, and to present and preserve that "entitlement". Dr. Wright's citation to the Brickner opinion does nothing to buttress his motion. Nothing in Brickner in any fashion dealt with either Section 537.060 R.S.Mo., nor Section 538.230 R.S.Mo. Those statutes appear nowhere in the 13 pages of the court's opinion. The Brickner opinion, just like the offset provisions in Section 537.060 R.S.Mo., do not provide any offset to Dr. Wright in this case since he chose not to avail himself of such benefits.

In summary, the Normans agree that Dr. Wright had the right to an offset under at least Section 538.230 R.S.Mo., and possibly Section 537.060 R.S.Mo., or neither statute. Dr. Wright affirmatively waived all of his rights under Section 538.230 R.S.Mo. There is nothing in Section 537.060 R.S.Mo. which makes such rights automatic or self-enforcing; the defendant still has to take certain, very simple, steps to preserve those rights, either by agreement, or by pleading and proof. Likewise, there is absolutely nothing in Section 538.230 R.S.Mo. even suggesting that if that specific statute does not apply, that the parties must apply Section 537.060 R.S.Mo., and certainly nothing making such application mandatory and automatic. Failing to take such steps in a timely and effective manner waives all rights under Section 537.060 R.S.Mo. Therefore, through his own affirmative waiver, followed by his own inaction, Dr. Wright here preserved no right to any offset, and his motion should have been denied.

D. THE NORMANS' POSITION

This is neither a "plaintiff's issue" nor a "defendant's issue"; either party can request specific relief and has no excuse for not doing so before the commencement of trial, and we should be very cautious before creating a double standard. There can be no argument that Dr. Wright did not know and did not fully realize it was his very important obligation to affirmatively assert any right to an offset in his pleadings, and the significant purpose thereof. In his suggestions opposing the Normans' efforts to strike his request under Section 538.230

R.S.Mo. which they filed on August 18, 2000 very shortly after the settlement, on page 4, Dr. Wright stated: "Comparative fault is an affirmative defense which must be pleaded. Id. The reason for such a rule is to give notice to the opposing parties so that they may adequately prepare the issues. Id. Dr. Wright has put plaintiffs on notice by specifically requesting apportionment of fault, pursuant to Section 538.230 R.S.MO. in his answer." L.F. 53, tab # 7. Dr. Wright just never took the same simple measures to protect any rights which might have been available to him under Section 537.060 R.S.Mo., nor to notify the Normans of his intent to assert the same. The Normans should not thus be unilaterally denied their substantive rights to make strategic settlement and subsequent trial decisions based on the options otherwise available to them under these statutes and the state of the pleadings at the commencement of trial.

A strong argument can be made that the offset in Section 537.060 R.S.Mo. is not available to a party in a medical negligence suit. Section 538.230 R.S.Mo. is a special statute uniquely applying to medical negligence cases, and Section 537.060 R.S.Mo. is a general statute enacted much earlier in time and applicable to tort claims in general. Statutes must be read in harmony with one another, and statute which deals with subject in general terms will yield to second statute dealing with same subject in more detailed fashion. State ex rel. Nat. Super Markets, Inc. v. Sweeney, 949 S.W.2d 289 (Mo.App. 1997). Chronologically later statute, which functions in particular way, will prevail over earlier statute of more general nature, and latter statute will be regarded as exception to or qualification of earlier general statute. Lett v. City of St. Louis, 948 S.W.2d 614 (Mo.App. 1996). Statutory construction is

clearly a question of law. Burns v. Elk River Ambulance, 55 S.W.3d 466, 484 (Mo.App. 2001). "The primary rule of statutory interpretation requires this [c]ourt to ascertain the intent of the legislature by considering the language used while giving the words used in the statute their plain and ordinary meaning." Benoit v. Missouri Highway and Transp. Comm'n, 33 S.W.3d 663, 673 (Mo.App. 2000). "Only when language is ambiguous, or when it leads to an illogical result, may courts look past the plain and ordinary meaning of the statute." Carmack v. Missouri Dept. of Agric., 31 S.W.3d 40, 46 (Mo.App. 2000).

The result Dr. Wright urges this Court to adopt would have this court substantially re-write Section 538.230 as follows:

> 538.230.1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services where fault is apportioned among the parties and persons released pursuant to subsection 3 of this section, the court, unless otherwise agreed by all the parties **in which event the provisions of Section 537.060 shall automatically apply in lieu of this section**, shall instruct the jury to apportion fault among such persons and parties, or the court, if there is no jury, shall make findings, indicating the percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability under subsection 3 of this section.
>
> 2. The court shall determine the award of damages to each plaintiff in accordance with the findings, subject to any reduction under **either** subsection 3 of this

section **or under Section 537.060**, and enter judgment against each party liable on the basis of the rules of joint and several liability. However, notwithstanding the provisions of this subsection, any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant.

3. Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity but it does not discharge other persons or entities liable upon such claim unless it so provides. However, the claim of the releasing person against other persons or entities is reduced by **either** the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section, **or by the appropriate dollar amount calculated under Section 537.060 if no such apportionment of fault is determined**, as though there had been no release. (emphasized portions added.)

This court must be very hesitant against re-writing any statutes which are otherwise very clear on their face. This section does not contain any indication that the legislature intended to allow a defendant like Dr. Wright here to pick and chose a verdict-credit remedy after the verdict is returned. The provisions of Chapter 538 expressly control all aspects addressed

therein of any cause of action asserted "against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services". Sec. 538.230.1 R.S.Mo. That section contains its own version of how we should address pretrial settlements which mirrors but which is somewhat different than those of Section 537.060 R.S.Mo. In lieu of any provisions expressly to the contrary as suggested in the example above, such provisions of Section 538.230 must supercede any other general statute to the contrary, including Section 537.060 R.S.Mo. Dr. Wright fails to point us to any statutory provision reflecting any legislative intent or interpretation to suggest that if the terms of Section 538.230 R.S.Mo. are not to apply to a particular case, that the different "offset scheme" contained in Section 537.060 R.S.Mo. will apply automatically without any need for affirmative request or other notice to the parties in any pleadings.

Further analysis of Dr. Wright' argument that Section 537.060 R.S.Mo. completely and automatically replaces Section 538.230 R.S.Mo. if no apportionment of fault is submitted by either party demonstrates that such is not valid. If such an automatic "reversion" to Section 537.060 R.S.Mo. occurs, then the health care provider would instantly lose the benefit of the modified joint and several liability specially designed for them in Section 537.230.2 R.S.Mo. If Dr. Wright's analysis holds, then the mere reference to Section 537.060 R.S.Mo. in the release automatically would control and, without any specific language in the release or any involvement by Dr. Wright himself, the ordinary rules of joint and several liability under Section 537.060 R.S.Mo. would apply in this case. The Normans seriously doubt Dr. Wright intends such a result, and thus his true analysis is not valid, but only "result motivated".

An offset claim is essentially one for contribution, which is a defensive claim for specific affirmative relief, and mere presumptive "notice" that an opponents' potential interest in such a claim is available but which the opponent chooses to never affirmatively assert will not preserve those rights. After the fact, Dr. Wright wishes to gain a direct benefit from money paid separately by other parties under a contract to which he was neither a party nor an intended beneficiary, and such claims to any benefit must be affirmatively pleaded to provide the Normans with a full and fair opportunity "so that they may adequately prepare the issues" for trial. Dr. Wright now wants to ignore his own legal responsibility and still get the full benefits not intended for him without making the requisite pleading or proof, but his waiver prevents that result.

As stated above with the supporting quote from his own suggestions to the trial court, Dr. Wright admits he is required to affirmatively plead the benefit of Section 538.230 R.S.Mo. in order to fairly put the Normans on notice of the same. Why would he not be equally required to affirmatively plead the benefit of Section 537.060 R.S.Mo., and put the Normans on notice in the same fashion? He has failed to suggest any reason why he would be "automatically entitled" to any offset or credit under one statute absent any notice or pleading whatsoever, yet not so under a very similar and related statute. In analyzing this issue, this court must invoke the procedural aspects as well as the applicable notions of fairness and justice equally to both statutes. Dr. Wright's own filings after trial reveal the falsity of his argument; why else would he deem it necessary for him to so belatedly move the trial court for leave to amend his answer to add the exact missing element of which the Normans contend was

required by the law and fairness? L.F. 121-138, tab # 19. Such actions and his present argument are inherently contradictory, self-defeating, and unsupported in the law.

As it stands, the trial court's ruling and judgment clearly and unjustly denies the Normans their rights to rely on the state of the pleadings in preparing for trial, and denies them their substantive rights to strategically opt to override any such "dollar for dollar" benefit to Dr. Wright, if timely and properly asserted by him under 537.060 R.S.Mo., by instead themselves affirmatively asserting the "percentage offset" and requesting that the jury apportion fault of all responsible parties under Section 538.230 R.S.Mo. If Dr. Wright's position is upheld here and the Normans' position is denied, then the fundamental requirement inherent in Section 538.230.1 R.S.Mo. will be completely usurped and nullified. That subsection obligates the court to instruct the jury to apportion fault "unless otherwise agreed by all the parties"; here, although there may have been an "agreement by default or silence" that no such apportionment was affirmatively requested by either party, it cannot be denied that there was absolutely no agreement that Dr. Wright was affirmatively entitled to, asking for, or gave fair notice to the Normans that he expected any offset or credit under 537.060 R.S.Mo. Thus, under Dr. Wright's argument, by his waiver of such apportionment rights, any similarly situated trial defendant would almost always compel the plaintiff to request apportionment, thereby effectively denying the plaintiff the equal right of any choice between the two statutes. Such a result contradicts the true meaning and legal concept of an "agreement", and could never amount to any type of "agreement" as that word was explicitly chosen by the legislature, and would deny such plaintiffs of a fair trial.

Some issues may be tried by consent, but the issue of an offset or credit was not tried by consent in this case. To the extent that this reduction comes from other defendants, the end benefit Dr. Wright seeks is effectively akin to contribution and comparative fault. Such claims are for affirmative relief and must be expressly contained in the pleadings to secure that relief. Coleman and Richardson v. Mantia, 25 S.W.3d 675, 676-677 (Mo App. 2000). The purpose of express pleadings is to obtain fairness and avoid surprise so the opposing parties may adequately prepare the issues for trial. Adams v. Children's Mercy Hospital, 848 S.W.2d 531, 539 (Mo. App. 1993).

The resulting prejudice and fundamental unfairness to the Normans in this instance can be only described as simply "tremendous", ranging from about $70,000 to $100,000. Assuming 10% fault had been apportioned to the lesser-liable settling defendants, the net effect of any offset or credit would equal a little more than $30,000; if the jury determined their fault to be 0%, there would have been no offset at all. Any apportionment to those settling defendants totaling less than about 30% would have benefitted the Normans substantially better than the "dollar for dollar" offset. At trial, the issues, the witnesses called to testify, the medical and legal arguments, the type and nature of the evidence, and even the jury instructions would all have been dramatically different if the Normans had been alerted to Dr. Wright's ".060 offset" request. Then, in response, they themselves could have opted to submit apportionment of fault to the jury to "trump" the "dollar for dollar" offset, if such had been openly and affirmatively requested by Dr. Wright. There is no just reason to not require, nor would there be any hardship imposed on Dr. Wright by requiring him to affirmatively

notify the Normans before trial in his pleadings that he intended to rely on Section 537.060 R.S.Mo. for any post-verdict offset.

III. CONCLUSION

In conclusion, Dr. Wright apparently did not want to "point the finger" at other local health care providers which would have been required if he maintained his request for apportionment, therefore he decided to affirmatively waive his right to any offset under Section 538.230 R.S.Mo. Dr. Wright also apparently was not all too worried about a significant verdict against him, and he elected through his inaction to waive and to not pursue the "dollar-for-dollar" offset otherwise available under Section 537.060 R.S.Mo. In essence, Dr. Wright put all his eggs in a single basket, gambled, and lost. After the fact, Dr. Wright sought to reverse all that; to change his "bet" after the trial. Such is neither just, nor contemplated anywhere, in either statute or case law. The options available to Dr. Wright were very clear: plead and prove a right under either one of the applicable statutes, or do nothing. He chose to do nothing, and that is exactly what the law provides him in response to his motion. The action taken by the trial court allowing this post-hoc reduction severely prejudiced the Normans by completely denying them their substantive rights to rely on the pleadings, to fair notice of competing claims for affirmative relief, and to decide and arrange their settlement and trial strategies accordingly. Dr. Wright's motion was clearly without any merit, and should have been denied as a matter of law and consistent with the pleadings at the

conclusion of trial judgment should have been entered for the full amount of the jury's verdict without any reduction, fully effective as of the original date of entry, which this court must now do.

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 13th day of September, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid to:

Mr. Bruce Hunt
Attorney at Law
Burkart & Hunt, P.C.
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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 17,743 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