IN THE SUPREME COURT OF MISSOURI

No. SC84650

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 RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

Respondent supplements the Statement Of Facts in Appellants' Substitute Brief with the following additional facts:

The release given by Appellants at the time of the partial settlement contained the following capitalized preamble (L.F. 82):

> THIS IS A LIMITED RELEASE UNDER 537.060 RSMo; IT BEING THE INTENT OF THE PARTIES NOT ONLY TO SET AT REST FOREVER THE DIFFERENCES BETWEEN THEM, BUT ALSO TO PERMIT THE UNDERSIGNED TO RETAIN ALL CLAIMS ONLY AGAINST THOSE NOT RELEASED HEREIN.

Some additional parts of the release were in smaller type, but the following language is also contained in the body thereof in capital letters (L.F. 82):

> IT IS AND IS HEREBY EXPRESSED TO BE THE INTENT OF THE UNDERSIGNED WITH RESPECT TO THE RELEASE OF ONLY ALL THOSE PERSONS, FIRMS AND CORPORATIONS RELEASED HEREIN TO AFFIRMATIVELY NOT RELEASE BUT TO RETAIN THEIR CLAIMS FOR ALL DAMAGES AGAINST ANDY WRIGHT, M.D. AND PATRICIA M. DIX, M.D., PURSUANT TO SECTION 537.060 RSMo., THE TERMS OF WHICH ARE INCORPORATED HEREIN BY REFERENCE.

The release was signed on July 26, 2000, by the three Plaintiffs-Appellants and their attorney (L.F. 83).

Both Appellants and Respondent waived apportionment of fault by the jury before the trial (L.F. 90). The jury accordingly did not apportion fault among the settling and nonsettling parties (L.F. 78).

POINTS RELIED ON

I

The trial court did not err in reducing the judgment by the amount received by Appellants in their partial settlement since Section 537.060 so required because:

1. In that the partial settlement of this medical tort case reduced the number of defendants to one; and

2. In that prior to trial the parties waived the right to have the jury apportion fault in their verdict; and

3. In that such pretrial developments required the court to reduce the judgment pursuant to Section 537.060 R.S.Mo.

Section 537.060, R.S.Mo.

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

Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560 (Mo. App. E.D. 2002).

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

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

II

The trial court did not err in reducing the judgment by the amount received in the partial settlement because the release they executed at that time indicated

their intention that the terms of Section 537.060 R.S.Mo., would govern the settlement and in that such indication gave Appellants notice of the effect of the statute on the ultimate judgment.

Section 537.060 R.S.Mo.

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

ARGUMENT

I

The trial court did not err in reducing the judgment by the amount received by Appellants in their partial settlement since Section 537.060 so required because:

1. In that the partial settlement of this medical tort case reduced the number of defendants to one; and

2. In that prior to trial the parties waived the right to have the jury apportion fault in their verdict; and

3. In that such pretrial developments required the court to reduce the judgment pursuant to Section 537.060 R.S.Mo.

All parties having waived their rights to have the jury apportion fault before the trial began (L.F. 78) clearly Section 538.230 R.S.Mo., no longer thereafter controlled how the case was to be tried, and it thereafter became simply a medical negligence wrongful death claim solely against the one remaining defendant, Dr. Wright. It seems clear that the repeated references in Appellant's briefs to Section 538.230 do not apply because that statute by the time of trial, had, by waiver of the parties, dropped out of the case.

However, also before trial, the Appellants made a partial settlement with other parties who had previously been sued. Because the action was one to recover damages for wrongful death, the proposed settlement to be valid, must have been approved as it was by the circuit court, as required by Section 537.095 R.S.Mo.

Circuit court approval of the partial settlement was accordingly spread upon the record and became a part of the record in the case at bench (L.F. 10, under date of 7/26/00).

The release by the provisions of which appellants released the settling parties appears at pages 82 and 83 of the Legal File. The instrument reflects in bold type, apparently for emphasis, that it was a limited release "under 537.060" and that it further expressed the intent of the Appellants who had signed it that Section 537.060 R.S.Mo., would apply to the settlement, the terms of the statute being incorporated in the release by reference (L.F. 82). It is difficult to believe that Appellants' intentions regarding the applicability of the statute could have been more clearly expressed.

Appellants apparently contend that because during its pendency the case at bench could have involved apportionment of fault, it should be treated differently by the trial court than a tort case against only one defendant. However, that should not make a difference. When Section 538.230 essentially dropped out of the case, Section 537.060 entered it. This is true because it thereupon became a tort action for damages against a sole defendant. The fact that the sole defendant was charged with medical negligence instead of other negligence was an insignificant difference.

Prior case law has given some guidance in this regard. With Section 538.230 having departed from the case, it has been said that it applies "only where fault is apportioned" *Glidewell v. S.C. Management, Inc.,* 923 S.W.2d 940, 947 (Mo. App. S.D. 1996). Likewise, in *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. E. D. 2002) wherein apportionment of fault was improperly submitted, and where there was but

one liable defendant; Section 537.060 was properly applied to reduce the judgment on a dollar-for-dollar basis in the amount paid in partial settlement.

Another case with a similar result is *Hampton v. Safeway Sanitation Services, Inc.*, 725 S.W.2d 605 (Mo. App. E.D. 1987), a suit in tort originally brought against several defendants whose contributory fault was assessed against them, but with one such defendant having previously settled its liability for an amount which exceeded the judgment. Error was assigned by plaintiff to a finding that the judgment against the nonsettling defendant was satisfied by the amount paid by the settling defendant. At 725 S.W.2d l.c. 609 it was said concerning Section 537.060:

> This statute, we believe, is part and parcel of the comprehensive, modern and changing scheme relating to the substantive law of torts designed to achieve a fair system of justice. Undoubtedly, our statute is based upon the philosophy and policy found in and derived from the express language embodied in the Uniform Contribution Among Tortfeasors Act adopted by the Commissioners on Uniform State Laws.
>
> We believe that the plain meaning of the words of Sec. 537.060, and the intent of the General Assembly requires us to conclude that when a settlement made by the plaintiffs with one alleged joint tortfeasor exceeds the verdict the 'claim' of the plaintiff is 'reduced' to zero or to a negative number so that a verdict rendered against the non-settling defendant is thereupon satisfied.

It is significant that no distinction was made in that case between cases involving medical negligence and other types of tort cases.

Another case of interest is *Julien v. St. Louis University*, 10 S.W.3d 150 (Mo. App. E.D. 1999), a tort action tried against a single defendant because prior defendants had previously settled. Plaintiff on appeal complained of the post-judgment reduction of the judgment by the amount paid to plaintiff by the parties who had settled. This was the procedure used by the court in the case at bench. At 10 S.W.3d l.c. 152 it was said:

> A Section 537.060 motion for satisfaction of judgment may be filed, considered and ruled at any time after the entry of judgment.

Again, as in the *Hampton* case, no distinction between medical tort cases and other tort cases was made.

In view of the foregoing it is urged that the action of the trial court in reducing the judgment in the instant case was not erroneous so it should accordingly be affirmed.

II

The trial court did not err in reducing the judgment by the amount received in the partial settlement because the release they executed at that time indicated their intention that the terms of Section 537.060 R.S.Mo., would govern the settlement and in that such indication gave Appellants notice of the effect of the statute on the ultimate judgment.

Appellants argue that they should have been afforded a pretrial notice by the pleading of Respondent that Respondent would be applying for a reduction of any judgment in favor of Appellants because of Section 537.060.

The first problem with Appellants' position is that prior to trial such a motion would be premature because at that point there would be no judgment to reduce. Moreover, no Missouri case has been found which would require such a pretrial pleading as a setoff or counterclaim.

However, the most glaring deficiency in Appellants' claim of lack of notice is the clear and undisputed fact that Appellants were fully aware and had notice of the applicability of the statute when they specifically referred to it and incorporated its terms in the release they signed when the partial settlement was approved by the court (L.F. 82).

It has been stated many times that a release is to be construed as other contracts are construed by determining the intentions of the parties from the words expressed.

For example, the following language in *State ex rel. Normandy Orthopedics v. Crandall*, 581 S.W.2d 829, 833 (Mo. banc 1979) is instructional:

> As with any other contract, the lodestar of construction should be 'that the intention of the parties shall govern' *Williams v. Riley*, 243 S.W.2d 122 (Mo. App. 1951) and as to releases in particular.

It is clear beyond cavil that the intention of Appellants as to construction of their release was that Section 537.60 should apply to it. They said precisely that in the document itself. It begs the imagination how they can now belatedly contend that they should have received any notice in addition to what they already knew. Their own words make their position as to lack of notice untenable.

The court below properly reduced the judgment pursuant to Respondent's post-trial motion.

CONCLUSION

When Appellants sought court approval of their pretrial partial settlement with other parties they indicated in their signed release that it was their intention that Section 537.060 R.S.Mo. be applied to the settlement.

At a later time and before trial both parties waived the apportionment of fault as to which Section 538.230 governed trial and post-trial procedure. This development simply left the case as an alleged medical tort against a sole remaining defendant.

Tort cases in that posture wherein a partial settlement is achieved fall within the provisions of Section 537.060 which requires a reduction of the judgment by the amount paid in partial settlement. Appellants well knew of the probability of such a reduction when they stated their intention in their release that Section 537.060 should apply to the partial settlement. This the trial court properly did in reducing the judgment on a dollar-for-dollar basis.

No error appearing, affirmance of the judgment below is respectfully urged.

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Certificate Of Service and Compliance with Rule 84.06 (b) and (c).

The undersigned certifies that on this _____ day of _____, 2002, one true and correct copy of the foregoing brief and disk containing the foregoing brief were mailed postage prepaid to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06 (b), and that the brief contains 2,011 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.

_____
Glenn A. Burkart