IN THE SUPREME COURT OF MISSOURI

RONALD FENNEWALD, AS BROTHER OF THOMAS FENNEWALD, DECEASED, Relator, vs. THE HONORABLE PATRICIA S. JOYCE, PRESIDING JUDGE OF THE CIRCUIT COURT OF COLE COUNTY, MISSOURI Respondent.	)	Case No. SC96219

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
THE HONORABLE PATRICIA S. JOYCE, CIRCUIT JUDGE
CASE NO. 16AC-CC00256
WESTERN DISTRICT COURT OF APPEALS NO. WD80433

BRIEF OF RELATOR

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(A) Such Order invades the physician/patient privilege of Relator's decedent; and

(B) Such Order is unlimited in scope, is not tailored to reflect the issues raised by Relator's petition, is not directed to any specific health care provider and, if not prohibited, will result in irreparable prejudice to Relator and Relator's decedent. 11

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JURISDICTIONAL STATEMENT

This case is an original action of prohibition before this Honorable Court. The Honorable Patricia S. Joyce, in her official capacity as Circuit Judge of the Circuit Court of the County of Cole, is the Respondent. Because a circuit court is the Respondent, adequate relief in prohibition cannot be afforded by application to any other circuit court. Supreme Court Rule 84.22(a).

Relator previously filed his petition for writ of prohibition before the Missouri Court of Appeals, Western District. The court of appeals denied Relator's petition without opinion on February 3, 2017. A denial of writ petition without opinion is not appealable. Accordingly, Relator filed a new petition for writ of prohibition in this Court to prohibit Judge Joyce's Order of January 26, 2017 "Authorizing the Release of Medical Records."

On May 2, 2017, this Court entered its Preliminary Writ of Prohibition. Relator seeks that this Court make permanent its Preliminary Writ. The Court has jurisdiction pursuant to Article V, Section 4, of the Missouri Constitution and Supreme Court Rules 84.22, 84.23, 84.24 and 97.01.

STATEMENT OF FACTS

Thomas Fennewald died from metastatic colon cancer on January 11, 2016, at which time he was unmarried, without issue, and having been predeceased by his natural parents. Ronald Fennewald, as the surviving brother of Thomas Fennewald, brought this action pursuant to the Missouri Wrongful Death Act, alleging that Thomas Fennewald's death was caused or contributed to by the negligence of the Defendants. *See* Petition attached hereto as **Appendix A4**.

In such action, Relator has alleged that the Defendants were negligent in one or more of the following respects:

(a) by failing to prescribe a colonoscopy for Tom during the course of his treatment of him;

(b) by failing to inform Tom of the need for screening colonoscopy;

(c) by failing to perform and/or failing to properly perform appropriate physical examinations of Tom so as to discover the presence of his colon cancer;

(d) by failing to timely detect the signs and symptoms of colon cancer and distal metastasis in Tom; and

(e) by failing to refer Tom to appropriate diagnostic specialties including but not limited to gastroenterology. *See* **Appendix A4**.

Relator further alleged that as a direct and proximate result of one or more of the above-referenced negligent acts or omissions, the following damages were incurred:

(a) development of preventable colon cancer;

(b) delayed diagnosis of his colon cancer resulting in distal metastatic disease;

(c) pain, anguish, disfigurement, and disability associated with his metastatic colon cancer as well as all attendant medical care and treatment;

(d) loss of earnings and loss of earning capacity;

(e) the cost of past medical care, treatment and cure;

(f) loss of enjoyment of life during his final years;

(g) emotional distress, fear and terror associated with the preventable development of colon cancer, the delayed diagnosis of his cancer, imminent morbidity and mortality, the uncertainty of his prognosis, and the reality of his daily existence and his fear and anxiety regarding leaving his loved ones without his emotional and financial and other support;

(h) the pain of his death;

(i) the cost of the funeral and administrative expenses attendant to his death; and/or

(j) for all the damages available under the Missouri Wrongful Death Act including but not limited to the loss of care, nurture, guidance, love and affection suffered by the Decedent's survivors. *See* Petition, **Appendix A4**.

In the course of discovery, Defendants filed "Defendants Jefferson City Medical Group, P.C., Dr. Thomas Schneider and Dr. Christopher Case's Motion for an Order Authorizing the Release of Medical Records" which included a proposed "Order Authorizing the Release of Medical Records." *See* **Appendix A13**.

On or about September 29, 2016, Defendants filed their "Notice [of Hearing]" setting Defendants' "Motion for an Order Authorizing the Release of Medical Records" for hearing before the Honorable Judge Patricia Joyce on October 31, 2016. *See* **Appendix A27**.

Subsequently, on October 4, 2016, Defendants filed their "Amended Notice[of Hearing]" setting argument on their "Motion for an Order Authorizing the Release of Medical Records" for November 21, 2016. *See* **Appendix A29**.

On or about October 18, 2016, prior to the date set for the hearing on such motion, and prior to the time for Relator to file a memorandum in opposition to such motion, Respondent executed the prepared Order submitted by the Defendant. *See* **Appendix A31**.

On or about October 31, 2016, Relator appeared before Respondent and made an oral motion to set aside the Order Authorizing the Release of Medical Records, which motion was granted by the court and the Order dated October 18, 2016 was set aside. *See* **Appendix A34**. Subsequently, on December 14, 2016, Relator filed his "Reply in Opposition to Defendants' Motion for an Order Authorizing the Release of Medical Records." *See* **Appendix A35**. On December 19, 2016, oral argument was held on Defendants' Motion and Plaintiff's Opposition.

Subsequent to oral argument before the Respondent, defense counsel engaged in an *ex parte* communication with the court purportedly in support of their motion (*see* **Appendix A40**) to which the Relator responded by correspondence (*see* **Appendix A44**).

Subsequently, on or about January 26, 2017, Respondent, the Circuit Court of Cole County, Missouri, the Honorable Patricia S. Joyce presiding, executed Defendants' proposed Order without modification. *See* **Appendix A1**.

On or about February 1, 2017, Relator filed a Petition for Writ of Prohibition in the Missouri Court of Appeals, Western District, to prohibit Judge Joyce's Order of January 26, 2017. The Missouri Court of Appeals, Western District, denied Relator's Writ on February 3, 2017. Accordingly, Relator filed a new Petition for Writ of Prohibition in this Court to prohibit Judge Joyce's January 26, 2017 "Order Authorizing the Release of Medical Records." On May 2, 2017, this Court issued its Preliminary Writ of Prohibition. On June 1, 2017, Respondent filed her Answer to the Preliminary Writ in Prohibition with this Court.

POINT RELIED ON

I. Relator is entitled to a Permanent Writ prohibiting the enforcement of Respondent's Order of January 26, 2017 and/or rescinding, revoking or nullifying such Order and prohibiting any further proceedings taken pursuant thereto because Respondent exceeded her authority as a matter of law in that:

(A) Such Order invades the physician/patient privilege of Relator's decedent; and

(B) Such Order is unlimited in scope, is not tailored to reflect the issues raised by Relator's petition, is not directed to any specific health care provider and, if not prohibited, will result in irreparable prejudice to Relator and Relator's decedent.

State ex rel. Stecher v. Dowd, 912 S.W.2d 462 (Mo. banc 1995)

State ex rel. Justice v. O'Malley, 36 S.W.3d 9 (Mo. App. W.D. 2000)

Thompson v. Ish, 99 Mo. 160, 12 S.W. 510 (Mo. 1889)

State ex rel. Jones v. Syler, 936 S.W.2d 805 (Mo. banc 1997)

ARGUMENT

I. Relator is entitled to a Permanent Writ prohibiting the enforcement of Respondent's Order of January 26, 2017 and/or rescinding, revoking or nullifying such Order and prohibiting any further proceedings taken pursuant thereto because Respondent exceeded her authority as a matter of law in that:

(A) Such Order invades the physician/patient privilege of Relator's decedent; and

(B) Such Order is unlimited in scope, is not tailored to reflect the issues raised by Relator's petition, is not directed to any specific health care provider and, if not prohibited, will result in irreparable prejudice to Relator and Relator's decedent.

Standard of Review

The question presented by this original proceeding in prohibition is whether Respondent exceeded her authority and/or abused her discretion in authorizing the unlimited release of Relator's decedent's health care information. Relator requests this Court make permanent its Preliminary Writ of Prohibition because the January 26, 2017 Order of Respondent invades the physician/patient privilege of the decedent, as represented by Relator, is beyond the scope of the Respondent's jurisdiction, is contrary to the uniform law of this state, and would subject the decedent, by and through Relator, to irreparable injury.

Prohibition is an appropriate remedy when a party is ordered to produce material that is protected from discovery by some privilege. State ex rel. Rogers v. Cohen, 262 S.W.3d 648, 650 (Mo. banc 2008). "Prohibition is the proper means to contest the enforcement of discovery of allegedly privileged information." State ex rel. Wilfong v.

Schaeperkoetter, 933 S.W.2d 407, 408 (Mo. banc 1996), *see also* State ex rel. Phillips v. Hackett, 469 S.W.3d 506 (Mo. App. S.D. 2015), State ex rel. Stinson v. House, 316 S.W.3d 915, 918 (Mo. banc 2010), State ex rel. Allison v. Mouton, 278 S.W.3d 737, 741 (Mo. App. S.D. 2009). Furthermore, if the privilege asserted pertains to medical records, prohibition is the appropriate remedy because "if the medical records at issue are privileged, production of those records during discovery will cause severe and irreparable damage that cannot be repaired on appeal." State ex rel. Wilfong v. Schaeperkoetter, *supra* at 408, *see also* State ex rel. Boone Retirement Ctr., Inc. v. Hamilton, 946 S.W.2d 740, 741 (Mo. banc 1977), Stinson v. House, *supra* at 918. Writ relief is appropriate in the case of medical privilege because "the damage to the party against whom discovery is sought is irreparable; once the privileged material is produced, there is no way to undo the disclosure on appeal." State ex rel. Boone Retirement Center, Inc. v. Hamilton, *supra* at 741. *See also*, State ex rel. Phillips v. Hackett, 469 S.W.3d 506, 508 (Mo. App. S.D. 2015).

Here, Respondent has no jurisdiction to order the release of medical records of the decedent in the form of the Order of January 26, 2017. Relator requests a Permanent Writ of Prohibition because based on the pleadings, the law of the State of Missouri and the wording of Respondent's Order of January 26, 2017, such Order would subject the Relator to irreparable harm. Relator seeks prohibition to prohibit Respondent from doing anything other than vacating the Order of January 26, 2017.

The January 26, 2017 Order Would Invade the Physician/Patient Privilege of Relator's Decedent and Must be Prohibited

Twice, once without affording Relator the opportunity to be heard on the topic despite a hearing date having been set for such purpose (on October 18, 2016), and again after oral argument on January 26, 2017, the court executed an Order presented to it by defense counsel without modification. Such Order contains a page and one-half of preamble, but the actual Order itself states as follows:

> THEREFORE, IT IS ORDERED AND ADJUDGED that any health care provider, employer, or other entity possessing records of decedent, Thomas Fennewald (born 1/24/1949; SSN# 498-50-0180), is hereby ordered, upon production or receipt of this Order: that you disclose said protected records and/or medical information in any form (including oral, written and electronic) dating from August 1, 1987, to present to: GIBBS POOL AND TURNER, P.C.; that GIBBS POOL AND TURNER, P.C. [sic]; that you shall be authorized to re-disclose this data and information to consultants, experts, agents, and/or other counsel; that all covered entities under HIPAA disclose full and completed protected health information regarding Decedent Thomas Fennewald, including, but not limited to, the following:

• All medical records, including, but not limited to: inpatient, outpatient & emergency room treatment; all clinical charts, reports, documents, correspondence, test results, statements, questionnaires/histories, office and doctors handwritten notes; and records received from other physicians or health care providers;

• All autopsy, laboratory, histology, cytology, pathology, radiology, CT scan, MRI, echocardiogram & cardiac catheterization reports;

• All radiology films, mammograms, myelograms, CT scans, MRI, photographs, bone scans, pathology, cytology, histology, autopsy, immune-histo-chemistry specimens, cardiac catheterization videos/CDs/films/reels, and echocardiogram videos;

• All pharmacy prescription records, including, but not limited to: NDC numbers and drug information handouts/monographs;

• All billing records, including, but not limited to: all statements, itemized bills and insurance records; and

• All documents related to amendment of any record request;

that this Order shall also pertain to any and all records, data, notes, reports, and/or any other documents and information

relating to substance abuse (alcohol/drug), mental health (includes psychological testing), and HIV-related information (AIDS related testing); and that this Order does not authorize re-disclosure of medical information beyond the limits of this consent.

SO ORDERED.

The propriety of this Order and whether the court exceeded its authority and discretion in so ordering is the only issue before this Court. Such Order is directed to "any health care provider, employer, or other entity possessing records of decedent, Thomas Fennewald."

Such Order states that all such health care providers, employers, or other entities possessing records of the decedent Thomas Fennewald may "re-disclose this data and information to consultants, experts, agents, and/or other counsel."

Such Order mandates the release of "all medical records," "all pharmacy prescription records" and specifically mandates the disclosure of substance abuse, mental health, and HIV-related information.

Such Order does not limit the medical or other health information regarding the decedent with regard to any condition, with regard to the allegations of the petition, with regard to the claims made by Relator, with regard to allegations of negligence, or with regard to allegations of damages. Such Order is absolutely and totally unlimited in scope. The only limitation imposed by such Order is that medical records or information prior to

August 1, 1987 (30 years ago!) be protected. Such Order is not addressed to any particular provider, but is rather a "world at large order."

Limited Waiver of Physician/Patient Privilege

Missouri recognizes that when a person undergoes medical treatment, a physician-patient privilege arises which protects the disclosure of medical records without the consent of the patient. *See* Brandt v. Medical Defense Associates, 856 S.W.2d 667 (Mo. banc 1993).

This Court has defined the scope of, and limitations on, a plaintiff's waiver of physician/patient privilege. For example, it has stated:

> Medical records are subject to the physician-patient testimonial privilege codified under §491.060(5), RSMo 1994. Brandt v. Pelican, 856 S.W.2d 658, 661 (Mo. banc 1993). Under the statute, any information a physician may have acquired from a patient while attending the patient and which was necessary to enable the physician to provide treatment is considered privileged." State ex rel. Stecher v. Dowd, 912 S.W.2d 462, 464 (Mo. banc 1995).

The Missouri Supreme Court in Stecher went on to state:

> However, this Court has held that once plaintiffs put the matter of their physical condition in issue under the pleadings, they waive the physician-patient privilege insofar as information from doctors or medical and hospital records

bears on the issue. State ex rel. McNutt v. Keet, 432 S.W.2d 597, 601 (Mo. banc 1968). *It must be emphasized that under this rule, defendants are not entitled to any and all medical records, but only those medical records that relate to the physical conditions at issue under the pleadings. It follows that medical authorizations must be tailored to the pleadings, and this can only be achieved on a case-by-case basis* (emphasis added).

In this case, Stecher maintains that the only injury alleged is to his heart, and therefore the authorizations should be limited to records concerning his heart. Defendants, on the other hand, assert that Stecher's petition puts virtually his entire body into issue, and therefore the broad medical authorizations accurately reflect the scope of the injuries pleaded.

We agree that Stecher's pleaded injuries are not narrowly limited to his heart; and instead, the allegations include risk of skin rash, cancer, adverse consequences regarding fertility, and potential exposure to HIV or hepatitis, to name but a few. However, broad allegations of injuries do not automatically entitle defendants to an essentially unlimited medical authorization. The McNutt

> *case instructs that the trial court has the power to limit production of medical records 'to those which reasonably relate to the injuries and aggravations claimed by the plaintiffs in the present suit.' Id*. at 602. State ex rel. Stecher v. Dowd, *supra* at 464 (emphasis added).

The Defendant in the Stecher case requested that the plaintiff sign *unlimited* authorizations, not limited in time or limited to any specific provider, and the Supreme Court in State ex rel. Stecher v. Dowd, *supra*, ruled that that was inappropriately broad.

Similarly, in State ex rel. Justice v. O'Malley, 36 S.W.3d 9 (Mo. App. W.D. 2000), citing both State ex rel. Jones v. Syler, 936 S.W.2d 805, 807 (Mo. banc 1997) and State ex rel. Stecher v. Dowd, *supra*, the Court pointed out:

> [D]efendants are not entitled to any and all medical records, but *only those medical records that relate to the physical conditions at issue under the pleadings*. It follows that medical authorizations must be tailored to the pleadings, and this can only be achieved on a case-by-case basis. *Id*. at 11 (italics in original).

As the O'Malley Court stated, despite the fact that "Plaintiff/Relator Justice's petition asserts that defendant Psaltis misdiagnosed his appendicitis resulting in plaintiff's appendix rupturing and sepsis which caused severe, permanent and progressive injury to his heart, lungs and kidneys," (*Id*. at 12) the defendants were *not* entitled to an unlimited release and that such discovery "exceeds the parameters of Plaintiff/Relator's pleadings

and, therefore, the attendant waiver of the Physician/Patient privilege codified as section 491.060(5)." *Id.* at 13.

The limited nature of a plaintiff's waiver of physician-patient privilege was extended to discovery by means of interrogatories in the case of State ex rel. Brown v. Dickerson, 136 S.W.3d 539 (Mo. App. W.D. 2004) where the Court held:

> Defendant will not be permitted to discover, by interrogatory, medical information that it is prohibited from obtaining through an overly broad medical authorization. The same great risk regarding overly broad medical authorizations, as recognized in Stecher, exists with these open-ended interrogatories. In other words, just as a medical authorization permitted under Rule 56.01 must be limited in time and tailored to the physical conditions at issue under the pleadings on a case-by-case basis, so, to, must interrogatories. *Id.* at 545.

An additional restriction on the Court's discretion to authorize the release of medical records is discussed in State ex rel. Jones v. Syler, 936 S.W.2d 805 (Mo. banc 1997) where the Court held "that authorizations that are not addressed to any particular doctor, or 'world-wide' authorizations, are overly broad." *Id.* at 808. The Syler Court specifically stated that a medical authorization which is addressed to "any hospital, physician or other person who has attended [plaintiff] or examined [plaintiff]" is overbroad and an abuse of discretion. *Id.* at 808.

Decedent's Physician/Patient Privilege Belongs to Relator

The Supreme Court of Missouri has acknowledged since at least 1889 that the physician/patient privilege of a deceased person survives that person's death, and is controlled by those who represent him after his death.

> If the patient may waive his right or privilege for the purpose of protecting his rights in a litigated cause, we see no substantial reason why it may not be done by those who represent him after his death, for the purpose of protecting rights acquired under him. Thompson v. Ish, 99 Mo. 160, 12 S.W. 510, 514 (Mo. 1889).

In this action, the Relator has alleged damages arising from the Defendants' alleged failure to appropriately prevent, diagnose and treat the decedent's colon cancer. Metastatic colon cancer and the consequential damages arising therefrom are the only injuries complained of by Relator in this action.

Pursuant to the well-established law in Missouri, the only waiver of physician/patient privilege that decedent has made, by and through "those who represent him after his death," Thompson v. Ish, *supra* at 514, relates to his colon cancer, its diagnosis, and the damages incurred as a direct and proximate result of the failure to prevent and/or diagnose or treat his colon cancer.

The Respondent's Order is addressed to "any health care provider, employer, or other entity possessing records of the decedent, Thomas Fennewald…" Such "world-wide" authorization by itself mandates this Court's action rescinding such Order or

prohibiting its enforcement in that such language is by definition overbroad and exceeds the discretion and jurisdiction of the trial court as expressly stated in State ex rel. Jones v. Syler, *supra* at 808.

Moreover, the body of such order provides for the unlimited release of "all medical records" including substance abuse records, mental health records, HIV-related information and "all documents related to amendment of any record request" (whatever that may mean). Such unlimited authorization is not supported by or derived from the issues raised in Relator's petition, is not directed to any specific provider, is not tailored to the facts of this case and constitutes a violation of the physician/patient privilege of the decedent as now possessed by the Relator, all in excess of the discretion and jurisdiction of the Respondent.

Since an order commanding the unlimited release of all of Relator's medical records of whatsoever nature issued to the "world at large" would not be appropriate under any circumstances and would exceed the discretion and jurisdiction of Respondent under *any* circumstance, Relator would respectfully suggest that such Order must be prohibited regardless of the facts of the case or the wording of plaintiff's petition. However, out of an abundance of caution, Relator will address certain aspects of the Order which make such Order inappropriate under the specific facts of this case.

Relator has alleged in his petition that decedent suffered from "pain [and] anguish… associated with his metastatic colon cancer…as well as emotional distress, fear and terror associated with the preventable development of colon cancer, the delayed diagnosis of his cancer, imminent morbidity and mortality, the uncertainty of his

prognosis, and the reality of his daily existence and his fear and anxiety regarding leaving his loved ones without his emotional and financial and other support." *See* Petition attached at **Appendix A4**.

Relator has not alleged that decedent suffered from any medically diagnosable psychiatric disease or injury as a result of the negligence of the Defendants, but has rather alleged merely "garden variety" pain, suffering and emotional distress.

This Court has held that "where a party has not alleged psychological injury (beyond 'garden variety' emotional distress), the party's psychological records are not relevant to the issue of damages and are not discoverable." State ex rel. Phillips v. Hackett, *supra* at 510, citing State ex rel. Dean v. Cunningham, 182 S.W.3d 561 (Mo. banc 2006). Consequently, to the extent that Respondent's Order of January 26, 2017 authorizes the release of psychiatric records and/or psychological records, such records are not discoverable.

Respondent's Answer Addresses Topics Not at Issue

Respondent in her Answer to the Preliminary Writ raises a number of issues which are irrelevant to issues presently before this Court.

Respondent raises the issue of Relator's Answers to Defendant's Interrogatories and Responses to Request for Production of Documents. Respondent mentions numerous times that Relator has failed to produce a death certificate to Defendants. There is no issue before this Court regarding Relator's Answers to Defendant's Interrogatories or Reply to Requests for Production of Documents. Relator would merely say in response that Defendants' Interrogatories and Requests for Production of Documents similarly ask

for release of any and all medical records of the decedent and the identity of any and all medical treatment of the decedent for 20 years prior to the occurrence made the subject of Relator's Petition. Such requests were once again "to the world" and not limited in any way to the allegations of Relator's Petition.

Respondent also argues in her Answer to the Preliminary Writ that the medical records of the decedent would be relevant on the issue of decedent's comparative fault, his life expectancy but for colon cancer, and other issues related to damages.

This Court is reminded that Defendants were decedent's primary care physicians for eight years prior to his demise. Defendants had eight years to discover any past medical history of the decedent that they thought might be relevant to the decedent's care and treatment. Defendants never sought, in connection with their care and treatment of the decedent, *even after Defendants diagnosed the decedent with his terminal cancer, and not even while administering treatment for such terminal cancer*, the unlimited medical records of the decedent, which Respondent has currently ordered. Defendants never thought that decedent's past medical records were relevant to diagnosing and treating decedent, even at the time that his diagnosis was terminal, but eagerly seek such information in order to defend the litigation which has been brought against them.

However, the issue of relevance is irrelevant.

Relevance is Irrelevant to this Argument

As stated by many courts in the cases cited hereinabove, an individual, and after his death, his representatives, has a physician/patient privilege which protects their health care records from disclosure in discovery except to the extent that there has been a waiver

of that privilege as the result of allegations made in a petition. To the extent the decedent's medical records may be relevant to the defense raised by the Defendants or may be relevant to the determination of the facts of this case in the minds of the jury, they are nonetheless protected from discovery regardless of the mechanism employed by the Defendants.

As this Court has stated:

> The mere fact that the privileged medical records may be relevant [to plaintiff's claim] does not mean that the medical records are discoverable. The very nature of an evidentiary privilege is that it removes evidence that is otherwise relevant and discoverable from the scope of discovery. *See* Rule 56.01(b)(1). Therefore, the fact that the medical records might be relevant [to plaintiff's claim] does not alter the conclusion that the records are undiscoverable. State ex rel. Stinson v. House, 316 S.W.3d 915, 919 (Mo. banc 2010).

This Court has stated numerous times that defendants are not entitled to unlimited medical records of the plaintiff, nor are they entitled to medical record releases directed to the "world at large." Any and all record of medical care and treatment of the decedent which exceed the waiver created by the filing of this action are privileged, and must be protected against discovery, by whatever means, or the decedent, and now the Relator, will be irreparably prejudiced.

In her Answer to the Preliminary Writ, Respondent cites cases that to the effect that in a wrongful death action the Relator must prove that the decedent's death was caused or contributed to by the negligence of the defendants. While such proof is, of course, required in a wrongful death action, the issue of death relates to decedent's death as the result of the medical condition out of which these allegations of negligence arose.

We all die eventually. The question in a wrongful death action is not whether the decedent is dead, because we all die. The question in a wrongful death case is whether the death of the decedent was caused or contributed to by the negligence of the defendant. While there may be a wide variety of factors which might affect a given individual's life expectancy (*e.g.* life in a high crime neighborhood, recreational motorcycle riding, lightening strike, etc.), such issues are not relevant to the issue of whether defendants' negligence caused or contributed to the decedent's demise. *See* Mickels v. Danrad, M.D., 486 S.W.3d 327 (Mo. 2016).

In her Answer to the Preliminary Writ, Respondent also discusses the relevance of obtaining the unlimited medical record of the decedent for the purposes of assessing third party liability. However, since the 2005 amendments to the medical negligence act, repealing Section 538.230 (1991, repealed 2005), the defendants are no longer allowed to submit the negligence of nonparties under *any* circumstances. *See* Adams by Ridgell v. Children's Mercy Hospital, 848 S.W.2d 535 (Mo. App. W.D. 1993).

Even if the Defendants were to make a submissible case for the decedent's comparative fault, the only names in the verdict form would be the decedent and the

Defendants. Any negligence of nonparties will never be considered by the jury in this matter and therefore would be completely irrelevant and inadmissible.

CONCLUSION

WHEREFORE, for the foregoing reasons, Relator prays that this Honorable Court make its Preliminary Writ permanent, for costs expended herein and for all such other relief the Court deems just and proper.

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By: */s/ Mark T. McCloskey*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on **June 30, 2017** electronically with the Clerk of Court. A true and correct copy was emailed to **Scott R. Pool**, pool@gptlaw.com, Gibbs Pool and Turner, P.C., 3225 Emerald Lane, Suite A, Jefferson City, MO 65109-6864, Attorneys for Defendants Jefferson City Medical Group, P.C., Dr. Thomas Schneider and Dr. Christopher Case and sent by Federal Express to **The Honorable Patricia S. Joyce**, Presiding Judge of the Circuit Court of Cole County, Missouri, Cole County Courthouse, 19th Judicial Circuit, 301 East High Street, Jefferson City, MO 65101.

/s/ Mark T. McCloskey
Mark T. McCloskey, #36144

CERTIFICATE OF COMPLIANCE

As required by the Missouri Supreme Court Rule 84.06, I hereby certify that this Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and states the number of words in the brief, as follows:

This brief is prepared using Microsoft Word, is proportionally spaced, and contains 5,092 words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Mark T. McCloskey
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