NO. SC98362

MISSOURI COURT SUPREME COURT

LINDSEY SETZER AND MICHAEL SETZER,

Plaintiffs – Respondents/Cross-Appellants

vs.

SSM HEALTH CARE ST. LOUIS,

Defendant – Appellant/Cross-Respondent.

Appeal from the Circuit Court of the County of St. Louis

Circuit Court No. 16SL-CC03273

Hon. Michael T. Jamison

RESPONDENTS' SUBSTITUTE CROSS-APPEAL

REPLY BRIEF

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THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION TO AMEND JUDGMENT ON COUNT I OF PLAINTIFFS' PETITION TO INCLUDE WRONGFUL DEATH DAMAGES CONTAINED IN §537.090, RSMO SETTING THE PRESUMPTIVE ANNUAL PECUNIARY LOSS FOR THE DEATH OF A MINOR AS THE AVERAGE OF THE PARENTS' ANNUAL INCOME BECAUSE THE STATUTORY PRESUMPTION WAS NOT PROPERLY REBUTTED IN THAT DEFENDANT'S EXPERT ATTEMPTED TO REBUT THE PRESUMPTION ON AN INCORRECT BASIS

ARGUMENT

The Setzers' cross appeal concerns the application of §537.090, RSMo. (2005) to the death of their unborn son. The issue regards application of a rebuttable presumption added in the 2005 amendment to the wrongful death statute, which reads as follows:

> If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

§537,090, RSMo.

This Court has not had occasion to construe the 2005 amendment. The recent history of §537.090, RSMo reveals it has been amended twice in the past forty-two years. In each amendment, the legislature amplified and enlarged damages recoverable for wrongful death. This history reveals a legislative intent to provide suitable damages encompassing the breadth of harm caused by a wrongful death.

"Wrongful death is a purely statutory cause of action that did not exist at common law." ***Dodson v. Ferrara***, 491 S.W.3d 542, 554 (Mo. 2016), as modified (May 24, 2016)(citing ***Sanders v. Ahmed***, 364 S.W.3d 195, 203 (Mo.banc 2012). "As a result, 'the

legislature has the authority to choose what remedies will be permitted' because it created the cause of action." ***Id.*** (quoting ***Sanders,*** 364 S.W.3d at 203).

§537.090, RSMo sets forth the damages recoverable by the Setzers for the wrongful death of their unborn child. The damages prescribed by the statute read:

> [S]uch damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss.

Id.

The legislature has mandated a broad scope of recoverable damages. It excluded "damages for grief and bereavement by reason of the death," but otherwise permits all other "fair and just" damages occasioned by the death of the decedent. ***Id.***

This Court has found that the wrongful death statute gives the jury "an extraordinarily wide discretion in determining the amount of recovery in such wrongful death cases." ***Cobb v. State Sec. Ins. Co***., 576 S.W.2d 726, 739 (Mo. 1979). It has further found the legislative intent "to give the jury a broad discretion in computing damages for wrongful death, within the limit prescribed, based upon the pecuniary loss of every kind and character which, under all the circumstances of the particular case, would necessarily result from the death, to those entitled to recover." ***Hertz v. McDowell***, 358 Mo. 383, 390, 214 S.W.2d 546, 550 (1948)(emphasis in original).

In examining the 1978 amendment to the wrongful death statute, this Court determined a legislative intent to broaden the both the scope of the wrongful death statute and the recoverable damages. In ***O'Grady v. Brown***, 654 S.W.2d 904 (Mo.banc 1983), the Court held that the scope of the amended wrongful death statute included compensation for the death of an unborn child. In doing so, the Court relied on the legislative intent to supply an expanded and comprehensive remedy to the class of person's who suffer loss due to wrongful death of another. The Court found that the "manifest purpose of our statute is clearly to provide, for a limited class of plaintiffs, . . . compensation for the loss . . . of one who could have been alive but for the defendants' wrong." ***Id.*** at 908. The legislature's amendment greatly expanded the recoverable damages to allow more than pecuniary losses but to also include other aspects of loss: "The new statute explicitly declares the legislature's intention that damages in wrongful death actions should include compensation for the loss of 'consortium, companionship, comfort, instruction, guidance, counsel, training and support.'" ***Id***. at 907 (quoting §537.090, RSMo 1978 (1982 Supp.)).

This Court has noted that the wrongful death of a minor presents unique difficulties with respect to proof of damages. The minor has been denied the opportunity to mature and live a full life. Without resorting to pure speculation and conjecture, the surviving parents cannot demonstrate the minor's potential pecuniary contributions. The wrongdoers own tortious conduct has rendered certainty in proof impossible. As this Court noted regarding a prior iteration of the wrongful death statute: "The measure of damages and the amount of the verdict in an action for wrongful death of a minor

inherently involves some element of speculation and intangibles . . . In cases of this kind the award of damages can rest only on considerations of the most general character and much must be left to the common sense of the jury." ***Cobb,*** 576 S.W.2d at 738–39. With respect to construing a Missouri wrongful death statute, it has been held that "we are cognizant that such pecuniary loss embraces not only the monetary contribution, if any, of the deceased but also such elements of pecuniary value as enter into the domestic relationship of parent and child." ***Hines v. Sweet***, 567 S.W.2d 435, 439 (Mo. App. 1978).

In ***Acton v. Shields***, 386 S.W.2d 363 (Mo. 1965), the Court denied recovery for the wrongful death of a fetus on the ground that the plaintiffs in that case (who were grandparents, aunts and uncles of the unborn child) were unable to show a reasonable probability of pecuniary benefit from the continued life of the child. ***Id.*** at 366.

Since ***Cobb*** and ***Acton***, the legislature has stepped in to prevent a tortfeasor from benefitting from its own tortious conduct and to provide a more satisfactory compensation to the survivors of a wrongfully killed minor. In 2005, the legislature adopted the rebuttable presumption that is at issue in this point on appeal.

By the plain language of the 2005 amendment to the statute, the presumption establishes the "annual pecuniary losses." The term "pecuniary losses" is the exact same phrase used previously in the statute to describe an element of recoverable damage. ***Id.*** ("[S]uch damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death")(emphasis added).

The 2005 amendment of §537.090, RSMo which adds a rebuttable presumption of the amount of pecuniary loss is a continuation of the trend by the legislature to secure greater and more adequate remedies for the victims of wrongful death. ***See O'Grady*, *supra.*** It first expanded the remedy to include the value of "consortium, companionship, comfort, instruction, guidance, counsel, training and support" lost by reason of the wrongful death. The 2005 amendment put in place the rebuttable presumption to address the unfair difficulty of proving pecuniary loss in circumstances where the tortfeasor's wrongful conduct renders such proof difficult or impossible.

SSM incorrectly contends that the rebuttable presumption contained in the statute approximates a deceased minor's earning potential. According to SSM, the presumption serves as a mere reference point. The jury must determine the pecuniary loss occasioned by the death of the minor even where the presumption is not rebutted. In its own words, SSM argues:

> The rebuttable presumption in RSMO § 537.090 merely operates to set a framework for estimating the deceased child's earning potential, but the statute still requires the jury to determine how much of that loss the a [sic] plaintiff has "suffered by reason of the death."

SSM's Substitute Reply Brief and Cross-Appeal Response, p. 63.

SSM's entire analysis rests on the assumption that the statutory presumption approximates the earning potential of the deceased minor. From that starting point, SSM has persisted that it is specious to believe that a minor child would contribute his life's earning potential to his parents.

SSM's attempted rebuttal of the presumption followed this same logic. SSM's counsel repeatedly asked Professor Summary to base her opinions on the assumption that the statutory presumption amount represented the deceased child's earning capacity. ***See e.g***. Tr.387-88 ("If we are going to assume that the child is going to earn the average income of $21,577, . . .); ***see also*** Tr.384; 385-86; 390.

Professor Summary's opinions attacking the statutory presumption were based on this same assumption. She first attacked the proposition that a minor child's earning potential can be estimated by the earnings of the parents. ***See e.g.*** Tr.384 ("Well, if we are talking about a financial loss here, to base a child's income upon their parent's income, there is no evidence in economic literature that there is any relationship there."). She then argued that a child's earning potential would have to be reduced by personal consumption expenses. Id. at 385-85. Finally, she argued based on two studies that children generally do not contribute their earnings to their parents. ***Id.*** at 388-89 ("[B]oth of those studies show that in the United States, at least, there isn't a financial flow from child to parent. In other words, children don't, as a general rule, give money to their parents."); ***also*** Tr.390-91.

SSM's analysis of §537.090, RSMo, is fundamentally flawed. Its underlying assumption that the presumptive amount represents the deceased child's annual income is incorrect. SSM's assumption conflicts with both the plain language of the statute and Missouri precedent.

One thing the plain language of the statute makes certain -- the presumption is not an estimate of the deceased minor's earning capacity. A decedent's "earning capacity" is

not referenced anywhere in the statute. ***See generally*** §537.090, RSMo. The statute does not state or imply a minor decedent's earning capacity is even a consideration in determining the pecuniary loss. ***Id.*** By the plain and direct language of the statute, the presumption fixes the "annual pecuniary loss" occasioned by the death of a minor. ***Id.***

SSM's underlying assumption that the statutory presumption estimates the deceased minor's earning capacity is unsupported and unsupportable. The presumption is as it says – a presumption of "pecuniary losses", an explicitly recoverable damage under the statute.

The Setzers were entitled to the "pecuniary loss" damages prescribed by the legislature. SSM did not rebut the presumption. It rebutted a fiction that the statutory presumption was an estimate of the decedent's lost earning capacity.

There was no issue of fact for the jury to decide with respect to the Setzers' pecuniary losses. The Court erred in not amending the judgment to include this award.

SSM further complains that Respondents' counsel presented the statutory loss calculation to present value "without expert support". (SSM Reply Brief, p. 65) But this Court has held that present value is sufficiently well understood by laymen that evidence of present value computations is not necessary for the jury to render a verdict for damages reduced to present value. ***Anglim v. Missouri Pacific R.Co.,*** 832 S.W.2d 298 (Mo. 1992). "[T]here is no authority to support [the defendants] argument that the [plaintiffs] are obligated to present evidence as to present value." ***Klotz v. St. Anthony's Med. Ctr***., 311 S.W.3d 752, 762 (Mo. 2010), as modified (May 25, 2010).

The Setzers utilized the formula for present value, used in Microsoft Excel, to make the calculation based upon the variables admitted into evidence. The discount rate and other variables were presented through SSM's economist Rebecca Summary. (Tr.403-404) The present value calculation of $646,455.26 represents the present value of the statutory calculation. The judgment on Count I should be amended to include this amount.

The 2005 amendment does not provide any guidance concerning the presentation of the rebuttable presumption to a jury. In practice, presentation of the presumption is a difficult issue for two reasons. First, it is error for counsel to read the statute to the jury. ***Lasky v. Union Elec. Co.,*** 936 S.W.2d 797, 802 (Mo. 1997). Accordingly, the jury does not know the basis of the statutory calculation.

Second, "numerous Missouri cases have held that the giving of a rebuttable presumption instruction in a civil case is prejudicial error." ***Kansas City v. Cone***, 433 S.W.2d 88, 93 (Mo. App. 1968). This Court has stated that presumptions in civil cases are for the court, not the jury. ***See State v. Martin***, 364 Mo. 258, 265, 260 S.W.2d 536, 541 (1953) – "[I]n civil cases, we condemn instructions as confusing and misleading which tell the jury what is 'presumed'. And hold that presumptions are for the court, not the jury." The trial court erred in not applying §537.090, RSMo and awarding the Setzers the presumptive amount.

CONCLUSION

For the reasons stated above, the Court erred in failing to apply the rebuttable presumption in §537.090, RSMo. The judgment on Count I should be amended to include this amount the present value $646,455.26 as required by the statute.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief was completed in compliance with Rule 84.06 and Local Rule 360 and using Microsoft Word, Office 365, in Times New Roman size 13-point font, double-spaced, with margins of 1 inch. Excluding the cover page, the brief contains 2,556 words (as determined by the "word count" function of the Microsoft Word software).

By____/S/**Gregory G. Fenlon**_____

CERTIFICATE OF SERVICE

The undersigned hereby that this brief was electronically filed on this 6th day of August, 2020, using the Missouri Court's electronic filing system. The reply brief was filed in .pdf format. Service of the reply brief on counsel for SSM Health Care is made through, and pursuant to, the electronic filing system.

By____/S/**Gregory G. Fenlon**_____