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I Can't Get No Satisfaction: Missouri Requires Non-Settling Defendants to Plead and Prove Prior Settlements as an Affirmative Defense

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I Can't Get No Satisfaction: Missouri Requires Non-settling Defendants to Plead and Prove Prior Settlements as an Affirmative Defense

Norman v. Wright[1]

I. INTRODUCTION

The 1983 revision of Section 537.060 of the Missouri Revised Statutes includes a phrase reducing any judgment against a non-settling joint tortfeasor by the amount of the agreement between the plaintiff(s) and any settling joint tortfeasors.[2] In medical malpractice cases, a 1986 addition to the Missouri statutes codified in Section 538.230 gives plaintiffs and defendants an opportunity to apportion fault among the parties.[3] If those parties agree between themselves not to apportion fault, then the court must look to the reduction statute to determine the effect of a settlement on the judgment.[4] In *Norman v. Wright* (hereinafter "*Norman II*"), the Missouri Supreme Court held that to obtain the credit afforded by Section 537.060, a defendant must plead the existence of a settlement as an affirmative defense.[5]

This holding is contrary to both common sense and, in the case of medical malpractice, to the Missouri Supreme Court's own prior directive. The precedent relied on for such a holding is inapposite, circular, and anachronistic. This note examines the decision in *Norman II* in light of Sections 538.230 and 537.060.

II. FACTS AND HOLDING

Jerry and Kimberly Norman's ("the Normans") son Kenneth Norman ("Kenneth") died during childbirth from severe brain damage.[6] The Normans subsequently brought a wrongful death lawsuit against Dr. Andy J. Wright

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1. 100 S.W.3d 783 (Mo. 2003) (en banc).

2. Act of June 22, 1983, Nos. 135 & 194, § 1, 1983 Mo. Laws 914, 914-15 (codified as amended at MO. REV. STAT. § 537.060 (2000)).

3. Act of Feb. 3, 1986, No. 663, § A, § 9, 1986 Mo. Laws 879, 884-85 (codified at MO. REV. STAT. § 538.230 (2000)).

4. *Norman*, 100 S.W.3d at 785.

5. *Id.* at 785-86.

6. Norman v. Wright, No. 24524, 2002 WL 1315413, at *1 (Mo. Ct. App. June 18, 2002), *rev'd*, 100 S.W.3d 783 (Mo. 2003) (en banc).

("Wright"), two other doctors, and a hospital.[7] Prior to trial, the Normans settled their claims with the hospital and one of the other doctors for the joint sum of $100,000.[8] The third doctor was dismissed from the suit prior to trial.[9]

On July 23, 2001, the adjudication of the Normans' claim against Wright began.[10] A jury returned a verdict for the Normans, awarding damages in the amount of $308,855.35 against Wright.[11] About one week after the verdict, Wright filed a motion pursuant to Section 537.060 of the Missouri Revised Statutes, requesting that the trial court reduce the amount of the jury award by $100,000—the amount of the pre-trial settlement reached between the Normans, the hospital, and the second doctor.[12] The Normans opposed the motion as untimely, claiming that Wright had failed to request such an offset in his pleadings.[13] The trial court sustained Wright's motion and reduced the verdict to $221,818.56.[14] The Normans appealed the judgment, claiming that "the trial court erroneously reduced the jury award pursuant to [Section] 537.060."[15]

On appeal, the Normans claimed that Wright waived any credit or offset of the settlement amount against the jury verdict because he had not pleaded such credit as an affirmative defense.[16] The Normans further argued that Wright was not entitled to any credit pursuant to Section 538.230 of the Missouri Revised Statutes, a statute specifically "addressing the effect of settlement by one of several defendants in a medical malpractice case."[17] The

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7. *Id.* The other three defendants were Dr. Joseph C. Johnson, Jr., St. John's Health Systems, and another unnamed doctor. *Id.*

8. *Id.* The settlement included no allocation or apportionment of fault. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* Section 537.060 of the Revised Missouri Statutes states:

> 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.

MO. REV. STAT. § 537.060 (2000).

13. *Norman*, 2002 WL 1315413, at *1.

14. *Id.* The final amount of the verdict represented the original verdict minus the pretrial settlement, plus all costs assessed against Wright. *Id.*

15. *Id.*

16. *Id.* The Normans conceded that Wright would have been entitled to such a credit or offset if he had properly requested it in his pleadings. *Id.*

17. *Id.* In a footnote, the court of appeals described this argument as "superfluous" because Wright "sought no credit based upon [Section] 538.230 and the statute had no bearing on the trial court's judgment." *Id.* at *1 n.2. The court stated that the

Missouri Court of Appeals for the Southern District found that Section 537.060 "permits a non-settling defendant's liability to be reduced by the settlement amounts of other tort-feasors on a dollar-for-dollar basis."[18] The Normans cited *Titan Construction Co. v. Mark Twain Kansas City Bank*[19] for "the proposition that a defendant must plead [Section] 537.060 as an affirmative defense in order to be entitled to a settlement credit under the statute."[20] The court of appeals disposed of this argument by reasoning that *Titan* dealt only with a claim for credit in a contract matter, and that Section 537.060 applies exclusively to tort claims; *Titan's* lack of a discussion of Section 537.060 distinguished it from the case at bar.[21]

Rather than applying *Titan*, the court of appeals looked to *Julien v. St. Louis University*.[22] Seizing on the *Julien* court's holding that a Section 537.060 motion was "an authorized post-judgment motion"[23] which was "for satisfaction of judgment,"[24] and which could "be filed, considered and ruled at any time after the entry of a judgment,"[25] the *Norman* (hereinafter "*Norman I*") court held that Wright had complied with proper procedure.[26] In so holding, the court found that the "[Normans] [had] failed to carry their burden

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statute only applied "in those cases where fault is apportioned" and that "[n]o fault was apportioned in this case because neither side made such a request." *Id.*

18. *Id.* at *2 (citing Teeter v. Mo. Highway & Transp. Comm'n, 891 S.W.2d 817, 820 (Mo. 1995) (en banc)).

19. 887 S.W.2d 454, 458 (Mo. Ct. App. 1994).

20. *Norman*, 2002 WL 1315413, at *2.

21. *Id.* The first sentence of the statute states "[d]efendants 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." MO. REV. STAT. § 537.060 (2000). The court of appeals apparently determined that the subsequent section of the statute, "reduc[ing] the claim by the stipulated amount of the agreement," was limited by its specific reference to liability "in tort" for "injury or wrongful death." *Norman*, 2002 WL 1315413, at *2. This appears to be the more appropriate interpretation. *See infra* Part V.

22. Norman, 2002 WL 1315413, at *2 (citing Julien v. St. Louis Univ., 10 S.W.3d 150 (Mo. Ct. App. 1999), *abrogated by* Norman v. Wright, 100 S.W.3d 783 (Mo. 2003) (en banc)). In *Julien*, the plaintiff sued five defendants, but settled with three of them for $5,000. *Julien*, 10 S.W.3d at 151. A jury returned a verdict against the remaining two defendants for $5,000. *Id.* Approximately two weeks after the verdict, those two defendants filed a motion for setoff and credit of the $5,000 from the settlement. *Id.* The trial court granted the full setoff, bringing the verdict to $0. *Id.* The court of appeals determined that the request for setoff was a motion pursuant to Section 537.060 and affirmed. *Id.* at 152-53.

23. *Julien*, 10 S.W.3d at 152.

24. *Id.*

25. *Id.*

26. *Norman*, 2002 WL 1315413, at *2.

of showing that [Wright] waived any benefit under [Section] 537.060 by failing to plead the effect of the statute as an affirmative defense."[27]

The court of appeals issued its opinion in *Norman I* in June of 2002, and the case was transferred to the Missouri Supreme Court on August 27, 2002.[28] Ultimately the supreme court reversed.[29]

In *Norman II*, the Missouri Supreme Court held that when the parties in a medical malpractice suit waive their opportunity to apportion fault under Section 538.230, any claim for reduction of the verdict by the amount of a pre-trial settlement must be made under Section 537.060.[30] However, in order to make a request for reduction under Section 537.060, a defendant must have pleaded and proven that reduction as an affirmative defense.[31]

III. LEGAL BACKGROUND

A. Waiver of Apportionment Under Section 538.230

Section 538.230 of the Missouri Revised Statutes was originally enacted as part of a concord of legislation aimed at resolving a "crisis" in the area of medical malpractice.[32] As the court of appeals has noted

> Chapter 538 was enacted in 1986 as a "legislative response to the public concern over the increased cost of health care and the continued integrity of that system of essential services." The intended effect of the statutes was to eliminate meritless and frivolous suits for negligence damages against health care providers.[33]

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27. *Id.* at *3. The Normans' appeal also included an assertion that they had no notice of any potential reduction of the jury verdict "upon the operation of [Section] 537.060." *Id.* The court noted, though, that the Normans' releases and stipulations with the hospital and second doctor specifically and expressly retained the Normans' claims against Wright "pursuant to Section 537.060." *Id.* "The language in both of [the] documents indicate[d] that [the Normans] anticipated the potential application of [Section] 537.060 to any jury verdict against [Wright]." *Id.* The court found this argument by the Normans to be "disingenuous." *Id.*

28. *Id.* at *1.

29. Norman v. Wright, 100 S.W.3d 783 (Mo. 2003) (en banc).

30. *Id.* at 785.

31. *Id.* at 785-86.

32. Nicolas P. Terry, *Missouri's Malpractice Concord*, 51 MO. L. REV. 457, 457-58 (1986). The very title of Chapter 538 is "Tort Actions Based on Improper Health Care."

33. Mulligan v. Truman Med. Ctr., 950 S.W.2d 576, 580 (Mo. Ct. App. 1997), *overruled on other grounds by* Budding v. SSM Healthcare Sys., 19 S.W.3d 678 (Mo. 2000) (en banc) (quoting Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 507 (Mo. 1991) (en banc)).

Section 538.230 allows for apportionment of fault among the parties, and, like 537.060, allows reduction of a damage award according to the settlement; however, under 538.230 the reduction is based on the allocated percentages and is not a dollar-for-dollar reduction.[34]

Under Section 538.230, the parties can agree not to apportion fault.[35] This issue figured prominently for the Missouri Supreme Court in *Vincent v. Johnson*.[36] In *Vincent*, a medical malpractice case, the plaintiffs settled with a defendant hospital, leaving two defendant doctors still in the suit.[37] After the settlement, the remaining parties all "agreed at that time that, rather than the jury apportioning the fault of [the hospital], an 'appropriate' reduction could be made from any judgment."[38] However, they did not agree *how* to credit the settlement against any verdict.[39] The defendants' attorneys demanded that the entire settlement be credited against a verdict, while the plaintiffs' attorneys agreed to have a verdict reduced by "any payments by a 'concurrent tort feasor.'"[40] The court found that

> [g]iven the insistence of the defendants that the verdict would be reduced by the entire [settlement], the plaintiffs had the duty to clarify the terms of the agreement if they disagreed with such clear terms and, if an agreement could not be reached on the exact terms, to get a ruling from the trial judge on the issue of jury apportionment.[41]

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34. Apportionment is "[d]ivision into proportionate shares." BLACK'S LAW DICTIONARY 96 (7th ed. 1999). According to the statute, the parties in a medical malpractice case can request the jury apportion fault among the defendants, including those who have already settled with the plaintiff. MO. REV. STAT. § 538.230 (2000). However, if the jury does apportion fault, the total award for plaintiff is reduced not by the value of any settlement, but by the proportion of fault allocated to the released defendants. *Id.* So, for example, had the jury in *Norman v. Wright* apportioned 50 percent fault to Wright and 50 percent to the hospital and second doctor, the $308,000 verdict would have been reduced not by the $100,000 settlement, but by 50 percent, or $154,000.

The impact of apportionment is found in trial strategy, as evidenced by the Normans' argument that they altered their own strategy after Wright supposedly waived apportionment, by not seeking it themselves. *Norman*, 100 S.W.3d at 786 n.2 ("'If apportionment had been submitted to the jury and a low percentage such as 10% had been allocated against the settling defendants, then the offset or verdict reduction would have only amounted to approximately $30,000 and plaintiffs' total recovery would have exceeded $370,000 under that example.'").

35. MO. REV. STAT. § 538.230.1.

36. 833 S.W.2d 859 (Mo. 1992) (en banc).

37. *Id.* at 861.

38. *Id.*

39. *Id.* at 863.

40. *Id.*

41. *Id.*

The court also directed that "[i]n the future, to avoid [such problems], a court shall not accept such a partial agreement as a valid waiver of apportionment, but rather shall require agreement on all details of the credit, including the effect of different potential verdicts."[42]

B. Pleading a Settlement Under Section 537.060 as an Affirmative Defense

The current language of Section 537.060 of the Missouri Revised Statutes was enacted in 1983 "to clarify the effect of settlements with respect to the settling tortfeasor's liability for contribution to the non-settling tortfeasor."[43] The clarifying effect of the statute is to "discharge the tort-feasor to whom [a settlement agreement] is given from all liability for contribution."[44] Prior to the 1983 amendment, the statute merely stated that a claimant could settle with a party and still "demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrongdoers against whom such person or persons has such claim or cause of action, and not so released."[45] Essentially, Section 537.060 provides "that a settling tortfeasor who has obtained a release from the claimant cannot be held liable for contribution in an action brought by a joint tortfeasor."[46] Additionally, in reducing a damages award by the amount of the settlement, the current version of the statute "implements the common law rule that a plaintiff is entitled to only one satisfaction for the same wrong."[47]

The *Norman II* court held that "reduction under [S]ection 537.060 is a satisfaction of an amount owed,"[48] and for that proposition cited specifically to *Walihan v. St. Louis-Clayton Orthopedic Group, Inc.*,[49] and generally to *Titan*.[50] *Walihan* involved a man who was injured while working in Illinois

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42. *Id.*

43. David A. Fischer, *The New Settlement Statute: Its History and Effect*, 40 J. MO. B. 13, 13 (1984). Contribution is "[a] tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." BLACK'S LAW DICTIONARY 329 (7th ed. 1999).

44. MO. REV. STAT. § 537.060 (2000).

45. MO. REV. STAT. § 537.060 (1978).

46. Fischer, *supra* note 43, at 13.

47. Walihan v. St. Louis-Clayton Orthopedic Group, Inc., 849 S.W.2d 177, 180 (Mo. Ct. App. 1993); *see also* State *ex rel.* Normandy Orthopedics v. Crandall, 581 S.W.2d 829, 832 n.1 (Mo. 1979) (en banc).

48. Norman v. Wright, 100 S.W.3d 783, 785 (Mo. 2003) (en banc).

49. 849 S.W.2d 177 (Mo. Ct. App. 1993).

50. *Id.* (citing Titan Constr. Co. v. Mark Twain Kansas City Bank, 887 S.W.2d 454, 457-58 (Mo. Ct. App. 1994); *Walihan*, 849 S.W.2d at 180).

and died following subsequent surgery in Missouri.[51] The man's wife filed suit in Illinois against several entities that she alleged were responsible for the man's work-related injuries, and filed a second suit in Missouri against the surgeon, his orthopedic group, and a hospital for medical malpractice in treating those injuries.[52] The wife settled the Illinois lawsuit for $300,000, and later settled with the hospital in the Missouri suit for $40,000.[53] A jury in the Missouri suit returned a verdict and damages award against the remaining Missouri defendants, from which the trial judge subtracted both the amount of the Illinois settlement and the Missouri settlement.[54] In discussing the defendants' ability to reduce the verdict by the amount of the Illinois settlement, the Missouri Court of Appeals for the Eastern District held that "reduction under [Section] 537.060 is similar in nature to the common law defense of satisfaction. In order to obtain the statutory relief sought, defendant must both plead and prove the matter as an affirmative defense."[55] The *Walihan* court cited *State ex rel. Normandy Orthopedics v. Crandall*[56] for this holding.

Crandall involved a guest in a vehicle who settled a lawsuit against the driver of the car in which the guest was injured.[57] The settlement was for $9,000.[58] As a result of his injury, the passenger sought medical treatment from an osteopathic physicians group, against whom he later filed a suit for medical malpractice.[59] The passenger had already executed a written "Release in Full" with the driver, releasing "any and all other persons, firms, and/or corporations . . . from any and all liability now accrued or hereafter to accrue."[60] The document also "recited that the case had been 'fully and satisfactorily compromised and settled.'"[61] One issue before the Missouri Supreme Court in *Crandall* was whether the language of the release created a "legal presumption of full satisfaction," and therefore released the doctors from any liability.[62] In holding that the release did not create any such presumption, the court noted that "we start from the principle that in Missouri, accord and satisfaction, release, prior full satisfaction and the like are affirma-

51. *Walihan*, 849 S.W.2d at 179.

52. *Id.* In their answer, the doctor and group pleaded "setoff," which the court noted was discussed in the context of reduction under Section 537.060 rather than the common law action which would constitute a counterclaim. *Id.* at 179 n.2 (citing Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 129 (Mo. 1985) (en banc)).

53. *Id.* at 179.

54. *Id.*

55. *Id.* at 180 (citing State *ex rel.* Normandy Orthopedics v. Crandall, 581 S.W.2d 829, 834 (Mo. 1979) (en banc)).

56. 581 S.W.2d 829 (Mo. 1979) (en banc).

57. *Crandall*, 581 S.W.2d at 830.

58. *Id.*

59. *Id.*

60. *Id.* at 831.

61. *Id.* at 834 (Finch, J., dissenting).

62. *Id.*

tive defenses to be proved by the defendant."[63] This is the precedent relied upon by *Walihan* (and subsequently *Norman II*) for the assertion that satisfaction must be pleaded and proven as an affirmative defense.

Finally, the *Norman II* court relied on *Titan* for its holding that reduction under Section 537.060 must be pleaded as an affirmative defense.[64] *Titan* involved a contract between a bank and Titan Construction Company ("Titan") for the building of an apartment complex.[65] After the bank determined that Titan's work was unacceptable, the bank notified Titan that it was in default on the contract and, after a second notice, the bank terminated the contract.[66] Titan sued the bank for breach of contract and the bank counterclaimed for breach of contract and fraud. The bank also brought a third-party claim against Titan's insurance company for refusing to honor a performance bond issued for the project.[67] The bank settled with Titan's insurance company for $1.2 million prior to trial.[68] At trial, Titan lost on both its own claim and the bank's counterclaim, and made a post-trial motion for a credit and set-off of the $1.2 million settlement, which the trial court denied.[69] On appeal, the Missouri Court of Appeals for the Western District held that Titan had not pleaded the issue of prior satisfaction or the settlement agreement as an affirmative defense (to the bank's counterclaim) and that "[t]he common law defense of prior, full satisfaction is an affirmative defense which must be pleaded and proven."[70]

Indeed, Missouri court rules require that "[i]n pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction . . . payment, [and] release."[71] Generally, though, these affirmative defenses are raised in contract actions, by a particular party to the contract.[72]

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63. *Id.* (citing Jenkins v. Simmons, 472 S.W.2d 417, 420 (Mo. 1971)).

64. *See* Norman v. Wright, 100 S.W.3d 783, 785 (Mo. 2003) (en banc).

65. Titan Constr. Co. v. Mark Twain Kansas City Bank, 887 S.W.2d 454, 456 (Mo. Ct. App. 1994).

66. *Id.* at 457.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 458 (citing Walihan v. St. Louis-Clayton Orthopedic Group, Inc., 849 S.W.2d 177, 180 (Mo. Ct. App. 1993) (citing State *ex rel.* Normandy Orthopedics v. Crandall, 581 S.W.2d 829, 834 (Mo. 1979) (en banc)). For this proposition, the court of appeals cited to the same portion of *Walihan* as did the Missouri Supreme Court in *Norman II*, which, again, cites right back to *Crandall*.

71. MO. SUP. CT. R. 55.08.

72. Accord and Satisfaction:

> "An accord and satisfaction is the result of an agreement founded upon a legal consideration . . . which, like any other contractual agreement, must be consummated by the assent or the meeting of the minds of the parties to the agreement. The agreement constituting the accord is that the debtor

The Restatements of Torts, however, do not require that a joint tortfeasor plead reduction by the amount of a settlement with another joint tortfeasor. The Restatement (Second) of Torts states that "[a] payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made."[73] The Restatement (Third) of Torts takes a position of apportionment only: damages are to be "reduced by the comparative share of damages attributable to a settling tortfeasor."[74] "The settling tortfeasor's comparative share of damages is the percentage of comparative responsibility assigned to the settling tortfeasor . . . ."[75] In cases where a settlement occurs after a judgment has already been entered, the Restatement (Third) of Torts defers to the Restatement (Second) of Judgments,[76] which provides that "[a]ny consideration received by the judgment creditor in payment of the judgment debtor's obligation discharges, to the extent of the amount of value received, the liability to the judgment creditor of all other persons liable for the loss."[77] In any event, the Restatements of the Law of Torts make no explicit connection between reduction of damage awards by settlements and common law affirmative defenses. Although not expressly addressing the issue of pleadings, other Missouri cases prior to *Norman II* are consistent with the Restatement (Second) of Torts view, holding that "Section 537.060

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pay, and the creditor receive, a different consideration or a certain sum less than the whole amount of the debt in satisfaction of the larger sum."

Am. Samax Co. v. Cliff Packer Chevrolet, Inc., 588 S.W.2d 529, 530 (Mo. Ct. App. 1979) (citation omitted) (alteration in original); *see generally id.* (defendant withheld portion of payment to plaintiff as credit for amount plaintiff still owed defendant).

Payment: *See generally* Sebree v. Rosen, 374 S.W.2d 132 (Mo. 1964) (payment on promissory note and option contract); Household Fin. Co. v. Watson, 522 S.W.2d 111 (Mo. Ct. App. 1975) (payment of outstanding promissory note); Madison v. Dodson, 412 S.W.2d 552 (Mo. Ct. App. 1967) (same).

Release: *See* Stahly Cartage Co. v. State Farm Mut. Auto. Ins. Co., 475 S.W.2d 438, 441 (Mo. Ct. App. 1971) ("A document termed a release is in essence a written contract of compromise and settlement.") (citing Foster v. Aetna Life Ins. Co., 176 S.W.2d 482 (Mo. 1943); *see generally* Lewis v. Snow Creek, Inc., 6 S.W.3d 388 (Mo. Ct. App. 1999) (ski resort "Rental Form" operating as release).

73. RESTATEMENT (SECOND) OF TORTS § 885(3) (1979).

74. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 16 (2000).

75. *Id.* The Restatement's rationale for moving to a system of apportionment is that "[f]airness in loss allocation . . . requires that nonsettling tortfeasors receive a credit against the judgment for the settling tortfeasor's share of responsibility" and because of advantages in administrability. *Id.* § 16 cmt. c.

76. *Id.* § 24 cmt. h.

77. RESTATEMENT (SECOND) OF JUDGMENTS § 50(2) (1982).

permits the defendant's liability to be reduced by the amounts of settlements by joint tortfeasors."[78]

IV. THE INSTANT DECISION

In *Norman II*, the Missouri Supreme Court held that Wright was not entitled to any credit for the amount of the pre-trial settlement because he had not pleaded any reduction as an affirmative defense.[79] First, the court determined that Wright *had* requested apportionment among the defendants under Section 538.230, but after the Normans successfully struck that request from the pleadings[80] Wright never amended his answer.[81] Furthermore, the court determined that Wright orally waived apportionment under Section 538.230 during a pre-trial conference.[82] The court found that Wright's failure to amend his answer, and his apparent oral waiver, constituted an agreement among the parties *not* to apportion fault under the statute.[83] Because the parties otherwise agreed, there could be no apportionment in this case under Section 538.230.[84] The court noted that Section 538.300 lists several statutes which do not apply to "improper health care" actions under Chapter 538, and that Section 537.060 is not among them.[85] Since Section 537.060 was not barred from application to a tort claim based on improper health care, it serves as a sort of default to 538.230.[86] Thus, the court said that "if all the parties agree not to apportion fault under [S]ection 538.230, [S]ection 537.060 applies."[87]

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78. Teeter v. Mo. Highway & Transp. Comm'n, 891 S.W.2d 817, 820 (Mo. 1995) (en banc); *see also* Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560, 568 (Mo. Ct. App. 2002) ("[Section] 537.060, the settlement statute that applies generally in tort cases, provides that a non-settling defendant is entitled only to a dollar-for-dollar set-off for amounts paid by a settling defendant."); Browning v. White, 940 S.W.2d 914 (Mo. Ct. App. 1997), (award against police officer on 42 U.S.C. § 1983 and conversion claims reduced by amount of co-defendant's settlement with plaintiff on conversion claim), *overruled on other grounds by* Amick v. Pattonville-Bridgeton Terrace Fire Prot. Dist., 91 S.W.3d 603 (Mo. 2002) (en banc).

79. Norman v. Wright, 100 S.W.3d 783, 786 (Mo. 2003) (en banc).

80. *Id.* at 784 ("The judge sustained [the Normans'] motion, citing a lack of specific allegations.").

81. *Id.*

82. *Id.*

83. *Id.* The court relied on the language within the statute stating that the judge will direct the jury to apportion fault "unless otherwise agreed by all the parties." MO. REV. STAT. § 538.230 (2000).

84. *Norman*, 100 S.W.3d at 784.

85. *See id.* at 785 (citing MO. REV. STAT. § 538.300).

86. *See id.*

87. *Id.*

Examining the case under 537.060, the court found that "[a] reduction under [S]ection 537.060 is a satisfaction of an amount owed,"[88] that "[s]atisfaction is an affirmative defense,"[89] and that "[a]ffirmative defenses must be pleaded and proved."[90] Confronting Wright's assertion that *Titan*'s requirement of pleading a settlement credit under Section 537.060 was inapposite because it dealt solely with a contract action, the court responded that "[b]y its terms, [S]ection 537.060 states that tort defendants are subject to 'all other consequences of such [tort] judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract.'"[91]

The court next turned to the lower court's reliance on *Julien* for the proposition that a motion for reduction under Section 537.060 could be filed, considered, and ruled on at any time after the entry of judgment.[92] Because *Julien* did not specifically address the *pleading* requirements for reduction under Section 537.060, the court held that it should not have been followed by the lower court, and should no longer be followed in any way inconsistent with *Norman II*.[93]

Wright argued that the Normans had impliedly consented to try the reduction issue[94] pursuant to Missouri Supreme Court Rule 55.33(b).[95] Wright's argument again relied on the Normans' reference to Section 537.060 in both the release and stipulation documents.[96] The court, however, found that the Normans' references to the statute, taken in context, were made only to retain all of their claims against Wright,[97] and "[t]he Normans did not consent to try the issue of reduction."[98] Consequently, Wright was not entitled to any reduction of the verdict against him based on the pretrial settlement.

V. COMMENT

Whether its decision is analyzed under Section 538.230 or Section 537.060, the Missouri Supreme Court erred when it ruled that Wright was

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88. *Id.* (citation omitted).

89. *Id.* (citing MO. SUP. CT. R. 55.08).

90. *Id.* at 785 (citing MO. SUP. CT. R. 55.01).

91. *Id.* (quoting MO. REV. STAT. § 537.060 (2000)) (third alteration in original).

92. *Id.*

93. *Id.*

94. *Id.* at 785-86.

95. MO. SUP. CT. R. 55.33(b). The Rule states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." *Id.*

96. *Norman*, 100 S.W.3d at 785-86; *see also supra* note 27.

97. *Norman*, 100 S.W.3d at 786. "[S]uch agreement shall not discharge any of the other tort-feasors for . . . damage[s] unless the terms of the agreement so provide . . . ." MO. REV. STAT. § 537.060 (2000).

98. *Norman*, 100 S.W.3d at 786.

required to plead and prove reduction of the settlement amount as an affirmative defense.

The Normans' claim was based on medical malpractice which apparently caused the death of their son. As a tort case involving improper health care, the court appeared to have properly reviewed the case under Chapter 538 of the Missouri Revised Statutes. Wright, however, was the lone remaining defendant after the hospital and the other doctor settled with the Normans, and there is no indication that somehow the Normans themselves were contributorily negligent in causing their own injury. It stands to reason, then, that the only parties between whom fault could have been apportioned under Section 538.230 were Wright and the two settling defendants. Even operating under the assumption that the settling hospital's only liability was vicarious through Wright, the other doctor would still have been included in the apportionment equation. So Wright's agreement not to apportion fault between himself and the other doctor caused the court to assume that either Wright's attorney was negligent in not pleading reduction as an affirmative defense under Section 537.060, or that Wright was agreeing to bear full responsibility not only for his own fault, but for the complete injury as determined by the jury—even knowing that the Normans had already accepted some compensation for that very injury.

The former assumption seems unfair, placing on Wright's attorney the burden of discerning a rule that defies a common sense reading of Section 537.060, and that not even the court of appeals recognized. Likewise, the court's assumption means that Wright's attorney fell below the appropriate level of care required when he saw that the Normans' settlement refered to Section 537.060 outright. Apparently, he would have been required to know that such an expression impliedly referred to only a single sentence out of the statute. Not recognizing this hardly seems unreasonable on the attorney's part, and the court's explanation of "context" fails to make it reasonable.

The latter assumption likewise begs the question, what sane defendant would agree not to diminish his own liability when the only other option is to bear 100 percent of it? In other words, why would Wright agree to pay a $300,000 judgment when he could pay a $200,000 judgment instead?

Clearly, in waiving apportionment under Section 538.230, Wright was making a strategic choice between taking a $100,000 reduction and the chance that a jury would find his percentage of fault to be less than two-thirds.[99] The Normans' willingness to take the same gamble is irrelevant to

99. Assume the hospital's liability was vicarious through Wright, so apportionment would have been between Wright and the settling doctor. Had Wright chosen apportionment and the jury found the other doctor's percentage of fault to be greater than one-third, then Wright would have chosen wisely. For example, had the jury determined that fault was evenly split between the two, Wright would only have been responsible for $150,000 of the judgment. Conversely, had the jury determined Wright was far more at fault, say 90 percent, then Wright would have chosen poorly and would have been responsible for $270,000.

what Wright is or is not entitled to, and to believe that Wright was choosing full responsibility for any judgment is absurd.

Furthermore, the disparity between the court of appeals' review of the facts surrounding the apportionment issue and the supreme court's subsequent review indicates at the very least that the effects of waiving apportionment were by no means fully clarified among the parties. According to the supreme court's directive in *Vincent*, such an unclarified agreement should never have been accepted by the trial court. Rather, the court should have recognized that there was no "agreement on all details of the credit, including the effect of different potential verdicts."[100] The trial judge, upon the alleged waiver, should have initially made sure all parties understood exactly what they were agreeing to. The supreme court, then, should have either remanded the case for a new trial or simply credited the judgment with the dollar-for-dollar reduction, and should never have even reached the Section 537.060 question.

The court did reach the question, however.[101] Citing *Titan*, the Normans argued to the court of appeals that reduction under Section 537.060 had to be pleaded as an affirmative defense.[102] The supreme court agreed and, looking to the language of the statute's first sentence,[103] found *Titan* to be relevant and also cited to *Walihan* and *Crandall*.[104]

The court's reliance on these cases is misplaced. *Walihan* itself simply cites generally to *Crandall*.[105] Furthermore, the specific issue addressed in the *Walihan* opinion was whether the defendants should have received credit for the settlement in the *Illinois* lawsuit.[106] In fact, in a footnote the court of appeals specifically stated that "[b]ecause the cause of action brought against [the Missouri defendants] was for decedent's wrongful death, i.e., the medical malpractice, and the Missouri defendants were jointly liable, a credit in the amount settled by [the hospital] was proper."[107]

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100. Vincent v. Johnson, 833 S.W.2d 859, 863 (Mo. 1992) (en banc).

101. *Norman*, 100 S.W.3d at 786.

102. Norman v. Wright, No. 24524, 2002 WL 1315413, at *2 (Mo. Ct. App. June 18, 2002), *rev'd*, 100 S.W.3d 783 (Mo. 2003) (en banc).

103. "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." MO. REV. STAT. § 537.060 (2000).

104. *Norman*, 100 S.W.3d at 785. Apparently "context" only works in one direction for the court—against Wright—as the court was unwilling to focus only on a single sentence of the statute in this instance.

105. Walihan v. St. Louis-Clayton Orthopedic Group, Inc., 849 S.W.2d 177, 180 (Mo. Ct. App. 1993).

106. *Id.* at 179-80.

107. *Id.* at 179 n.3 (citing MO. REV. STAT. § 537.060). Recall that the Missouri defendants had pleaded "setoff." *Id.* at 179.

In *Crandall*, a case decided four years before the language of Section 537.060 was changed to its current form, the supreme court decided who had the burden of showing the intention of the parties when making a release that purported to constitute full satisfaction for any injuries which might arise out of the original injury.[108] The Missouri Supreme Court, agreeing with a Kansas Supreme Court decision, held that

> "[w]hen a general release . . . has been given to named releasees who denied liability but made payment by way of . . . settlement, then . . . other alleged wrongdoers who were not parties to the release and made no payment toward satisfaction can [f]airly be called upon to show that either the release . . . was intended to discharge them or that the releasor has received full compensation."[109]

Wright neither claimed that the settlement released him nor that the Normans' claims had already been fully satisfied. And in any event, the change to Section 537.060 in 1983 made *Crandall*'s holding moot when applied to a case like *Norman II*. Consequently, the court's citation to *Walihan* (and thereby to *Crandall*) is now outdated and inapposite.

Finally, in *Titan*, the court of appeals agreed that "[t]he common law defense of prior, full satisfaction is an affirmative defense which must be pleaded and proven."[110] But the settlement between the bank and the insurance company was for an injury separate from the bank's claim against Titan.[111] The claims in *Titan* were purely contract actions, having no connection to and making no mention of Section 537.060, a statute applying to tort actions. Section 537.060's reduction provision requires that the reduction come when there has been a settlement given to "two or more persons liable in tort for the *same* injury or wrongful death."[112] But satisfaction of a contract action and settlement of a tort claim are two different things. Satisfaction of a contract action involves events occurring between the parties to the contract.[113] Settlement of a tort claim, (more specifically, the credit to a nonsettling defendant flowing therefrom), involves events occurring between

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108. State *ex rel.* Normandy Orthopedics v. Crandall, 581 S.W.2d 829, 834 (Mo. 1979) (en banc).

109. *Id.* (quoting Fieser v. St. Francis Hosp. & Sch. of Nursing, Inc., 510 P.2d 145, 151 (Kan. 1973)).

110. Titan Constr. Co. v. Mark Twain Kansas City Bank, 887 S.W.2d 454, 458 (Mo. Ct. App. 1994). Unsurprisingly, the court there cited to *Walihan* for the proposition. *Id.*

111. *Id.* at 457. The bank's claim against Titan was for breaching the construction contract, while the bank's claim against the insurer was for failure to honor a performance bond—a different breach and a different injury. *See id.*

112. MO. REV. STAT. § 537.060 (2000) (emphasis added).

113. *See supra* note 72.

contracting parties, on the one hand, and a party with *no* contractual relationship to those settling parties on the other. The supreme court dismissed this distinction by relying on the first sentence of the statute,[114] that "[d]efendants 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."[115] Yet the "consequences" of a "judgment" are by definition those things that occur *after* a judgment has been entered, not such things as pleadings that must occur before any judgment is entered.

Further, if the first sentence of 537.060 requires defendants to plead other people's settlement contracts as affirmative defenses in tort claims, then the *next* sentence of the statute, calling for a dollar-for-dollar reduction according to a settlement, is pointless.

The court, though, may not interpret portions of legislation as pointless. Statutory terms are to be given their plain meanings.[116] The court "must presume that every word of a statute was included for a purpose and has meaning."[117] Statutes should not be interpreted "in a way which will render some of their phrases to be mere surplusage."[118] "In such circumstances, the plain meaning of the words of [Section] 537.060 must be applied. The statute mandates that the settlement 'shall' 'reduce' the 'claim' by the amount of the settlement."[119] If the legislature had only intended this provision to take effect upon a party's pleading a contractual affirmative defense, for a contract to which that defendant was never a party, then why include it in the language of the statute? The legislature seemed to intend that a dollar-for-dollar reduction occur whenever a tortfeasor, jointly liable with any remaining defendants for the same injury, entered a settlement agreement with the plaintiffs. This is consistent with the court of appeals' first review of the current language of Section 537.060.[120]

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114. Norman v. Wright, 100 S.W.3d 783, 785 (Mo. 2003) (en banc).

115. MO. REV. STAT. § 537.060.

116. Kieffer v. Kieffer, 590 S.W.2d 915, 918 (Mo. 1979) (en banc).

117. Comm. on Legislative Research of Mo. Gen. Assembly v. Mitchell, 886 S.W.2d 662, 664 (Mo. Ct. App. 1994).

118. *Id.*

119. Hampton v. Safeway Sanitation Servs., Inc., 725 S.W.2d 605, 610 (Mo. Ct. App. 1987).

120. The court stated:

> The usual situation occurs when one defendant settles and a subsequent judgment is entered in favor of the plaintiff for an amount in excess of any settlement with the settling tortfeasor. In such situation, the court as a matter of law, will take into consideration the settlement and will credit any settlement on the damages assessed by the jury's verdict.

Id. at 609.

Missouri adheres to the notion that "[a] party is entitled to only one satisfaction for the same wrong."[121] The court of appeals in *Norman I* stated that this "prevents a plaintiff from recovering more than the amount of damages incurred."[122] Such excessive recovery has sometimes been characterized as a "windfall,"[123] and Section 537.060, absent a strategic choice to apportion, seems to ensure that non-settling defendants receive the benefit of settling defendants' payments.

The Missouri Supreme Court, upon a determination that Section 537.060 controlled, should have upheld the decision of the court of appeals and awarded the dollar-for-dollar reduction of the judgment by the amount of the settlement.

VI. CONCLUSION

The Missouri Supreme Court's holding in *Norman II*—that to receive credit for a settlement agreement entered into between the plaintiff and one or more tortfeasors for the very same injury, the non-settling defendant must plead statutory reduction as an affirmative defense—is contrary to the clear intention of the Missouri legislature. In any case in which more than one defendant is sued for a concurrent injury, the court has created an unnecessary but mandatory affirmative defense. Defendants will routinely need to include in their answers a claim that any past or future settlement must be credited to any future judgment, and will now have to petition trial courts to amend their answers when a settlement occurs during or even after trial. This is inconsistent with the Restatements of Torts and Judgments. Such a requirement is based on outdated precedent and constitutes a waste of judicial time and defendants' money. The idea that a defendant in a tort action who is not privy to the settlement contract must plead that contract in his own defense presents an opportunity for plaintiffs to receive windfalls from defendants who simply don't know of a completed settlement. The court in *Norman II* should not have required the defendant to plead and prove reduction as an affirmative defense.

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121. Slankard v. Thomas, 912 S.W.2d 619, 624 (Mo. Ct. App. 1995); *see* Liberty v. J.A. Tobin Constr. Co., 512 S.W.2d 886, 889-90 (Mo. Ct. App. 1974).

122. Norman v. Wright, No. 24524, 2002 WL 1315413, at *2 (Mo. Ct. App. June 18, 2002), *rev'd*, 100 S.W.3d 783 (Mo. 2003) (en banc).

123. Though the term "windfall" is sometimes used, it bears stating that the plaintiffs here did not win any lottery. The Normans' claim is based entirely on the death of their child. However, their subsequent use of the court system must be viewed as their assent to have a jury-determined valuation of their recovery. The emotionally based argument that one cannot truly put a dollar figure on a human life must give way to the notion that the jury's decision represents a determination of just that.