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## NOTE

# Immunity from Wrongful Death Liability: How *Mickels* Fails to Compensate

*Mickels v. Danrad*, 486 S.W.3d 327 (Mo. 2016) (en banc)

Kevin Buchanan\*

### I. INTRODUCTION

Wrongful death statutes originated out of a need to compensate the family of a decedent “whose life was wrongfully taken.”<sup>1</sup> Closely related to wrongful death statutes are survivorship statutes, which allow for the transmission of tort claims after the death of one or more of the parties.<sup>2</sup> These statutes help address the once common maxim that it’s cheaper to kill a man than to maim him.<sup>3</sup> Today, all fifty states have both wrongful death and survivorship statutes.<sup>4</sup>

In *Mickels v. Danrad*, the Supreme Court of Missouri declined to allow wrongful death claims where a defendant’s negligence accelerates the death of a terminally ill decedent.<sup>5</sup> However, the court determined that a decedent’s family may have a survivorship claim for personal injuries not resulting in death.<sup>6</sup> In doing so, the court perpetuated a trend that fails to accomplish the intended goal of wrongful death statutes: to compensate a decedent’s family.<sup>7</sup>

Part II of this Note looks at the facts and holding of *Mickels*. Part III examines the wrongful death and survivorship claims as well as the past precedent of such claims in the context of medical malpractice and improper diagnoses. Part IV then introduces the wrongful death and survivorship issues presented in *Mickels*. Finally, Part V distinguishes *Mickels* from precedent and argues in favor of the dissent.

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1. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1044 (1965).

2. *Id.*

3. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127 (5th ed. 1984).

4. Jonathan James, Comment, *Denial of Recovery to Nonresident Beneficiaries Under Washington’s Wrongful Death and Survival Statutes: Is It Really Cheaper to Kill a Man Than to Maim Him*, 29 SEATTLE U. L. REV. 663, 666 (2006).

5. *Mickels v. Danrad*, 486 S.W.3d 327, 331 (Mo. 2016) (en banc).

6. *Id.*

7. *Id.* at 332 (Teitelman, J., dissenting).

## II. FACTS AND HOLDING

Joseph Mickels, Sr., visited the Hannibal Clinic in Hannibal, Missouri, on December 8, 2008, “complaining of numbness and tingling in his left arm and leg, blurred vision, and headaches.”<sup>8</sup> An MRI<sup>9</sup> was conducted on Mr. Mickels’s brain.<sup>10</sup> Raman Danrad, a radiologist and the defendant in the instant case, reviewed the results of the MRI on December 12.<sup>11</sup> Dr. Danrad concluded that Mr. Mickels’s MRI indicated no signs warranting a medical diagnosis.<sup>12</sup>

On February 17, 2009, Mr. Mickels went to Hannibal Regional Hospital suffering from what was only described as an “altered mental status.”<sup>13</sup> That same day, a computed tomography (“CT”) scan<sup>14</sup> was conducted on Mr. Mickels’s brain.<sup>15</sup> Again, Dr. Danrad reviewed the results of this scan.<sup>16</sup> Based on the CT scan, Dr. Danrad diagnosed Mr. Mickels with a terminal and incurable brain tumor.<sup>17</sup> On June 12, 2009, Mr. Mickels died as a result of this tumor, despite having undergone immediate treatment following his diagnosis.<sup>18</sup>

On June 7, 2012, Ruth Mickels, Joseph Mickels, Jr., Billy Joe Mickels, Brittany Mickels, and Jennifer Unglesbee (“Appellants”) filed suit against Dr. Danrad pursuant to Missouri’s wrongful death statute, Missouri Revised Statutes section 537.080.<sup>19</sup>

Appellants alleged that, although “Mr. Mickels certainly would have died . . . with or without Dr. Danrad’s alleged negligence,” Mr. Mickels would not have died on June 12, 2009, had Dr. Danrad properly diagnosed the brain tumor

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8. *Mickels v. Danrad*, ED 101147, 2014 WL 7344250, at \*1 (Mo. Ct. App. Dec. 23, 2014), *vacated en banc*, 486 S.W.3d 327 (Mo. 2016).

9. “MRI” is the common name for “Magnetic Resonance Imaging,” which “is a non-invasive imaging technology that produces three dimensional detailed anatomical images without the use of damaging radiation. It is often used for disease detection, diagnosis, and treatment monitoring.” *Magnetic Resonance Imaging (MRI)*, NAT’L INST. OF BIOMEDICAL IMAGING & BIOENGINEERING, <https://www.nibib.nih.gov/science-education/science-topics/magnetic-resonance-imaging-mri> (last visited Aug. 26, 2017).

10. *Mickels*, 486 S.W.3d at 328.

11. *Id.*

12. *Id.*

13. *Id.*

14. A “CT Scan” is “a computerized x-ray imaging procedure in which a narrow beam of x-rays is aimed at a patient and quickly rotated around the body, producing signals that are processed by the machine’s computer to generate cross-sectional images – or ‘slices’ – of the body.” *Computed Tomography (CT)*, NAT’L INST. BIOMEDICAL IMAGING & BIOENGINEERING, <https://www.nibib.nih.gov/science-education/science-topics/computed-tomography-ct> (last visited Aug. 26, 2017).

15. *Mickels*, 486 S.W.3d at 328.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*; MO. REV. STAT. § 537.080 (2016).

following the initial MRI on December 8, 2008.<sup>20</sup> Mr. Mickels's treating oncologist testified that while the tumor "was incurable when it was found and it would have been incurable at the time" of the initial MRI on December 8, 2008, it was "more likely than not that if [the tumor] had been discovered earlier . . . [Mr. Mickels] would have lived an additional six months on average."<sup>21</sup>

The trial court granted summary judgment in Dr. Danrad's favor and dismissed Appellants' petition. The court found that Appellants could not establish that Dr. Danrad's negligence caused Mr. Mickels's death in accordance with section 537.080.1.<sup>22</sup> Appellants appealed the trial court's judgment.<sup>23</sup> The appeal was transferred to the Supreme Court of Missouri under article V, section 10 of the Missouri Constitution.<sup>24</sup>

The Supreme Court of Missouri vacated the trial court's grant of summary judgment and remanded the case.<sup>25</sup> In doing so, the court held that because Dr. Danrad's failure to diagnose Mr. Mickels's incurable brain tumor was not the cause of Mr. Mickels's death, Appellants did not have a cause of action against Dr. Danrad for wrongful death under section 537.080.1.<sup>26</sup> However, the court held that Appellants *did* have a cause of action against Dr. Danrad under Missouri's personal injury survivorship statute, Missouri Revised Statutes section 537.020.<sup>27</sup>

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20. *Mickels*, 486 S.W.3d at 328.

21. *Id.* (alterations in original).

22. *Id.* Section 537.080.1 provides:

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who . . . would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured . . . .

§ 537.080.1.

23. *Mickels v. Danrad*, ED 101147, 2014 WL 7344250, at \*1 (Mo. Ct. App. Dec. 23, 2014), *vacated en banc*, 486 S.W.3d 327 (Mo. 2016). In an opinion that was later vacated, the Missouri Court of Appeals, Eastern District, affirmed the trial court's judgment. *Id.*; *see also* MO. CONST. art. V, § 10 ("The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.").

24. *Mickels*, 486 S.W.3d at 328.

25. *Id.*

26. *Id.* at 331.

27. *Id.* at 329; *see* MO. REV. STAT. § 537.020.1 (2016) ("Causes of action for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death . . . .").

## III. LEGAL BACKGROUND

A. *Wrongful Death and Survivorship*

Historically, common law tort actions involving death suffered from two primary limitations that led to major reform.<sup>28</sup> First, common law tort actions were said to “die with the person of either the plaintiff or the defendant.”<sup>29</sup> Such a policy prevented “a deceased tort victim’s own existing cause of action . . . [or] a deceased wrongdoer’s once existing liability” from transferring “to the personal representative of either of them.”<sup>30</sup> Survivorship statutes that allowed for “the transmission of tort claims or tort liability at death” were enacted to address this limitation.<sup>31</sup>

The second limitation was that “the death of a human being was not regarded as giving rise to any cause of action at common law on behalf of a living person who was injured by reason of the death.”<sup>32</sup> Due to this limitation, a plaintiff had few rights “against another living person for having caused the death of a third party whose life was of value to the plaintiff.”<sup>33</sup> For example, if a defendant caused a person’s death, the decedent’s family could not make a claim against the defendant.<sup>34</sup> Wrongful death statutes sought to address this limitation by “establishing a separate cause of action for the benefit of designated members of the family of a person whose life was wrongfully taken.”<sup>35</sup> Additionally, such statutes solved the problem of “the much-criticized rule of the common law which made it ‘more profitable for the defendant to kill the plaintiff than to scratch him’” by preventing defendants from escaping liability after the death of a plaintiff.<sup>36</sup>

All fifty states now have survivorship and wrongful death statutes, although their forms vary.<sup>37</sup> In Missouri, “the survivorship statute and the wrongful death statute are mutually antagonistic.”<sup>38</sup> “[W]hen the injury alleged did *not* cause death,” Missouri’s survivorship statute, section 537.020 applies.<sup>39</sup> Section 537.080, Missouri’s wrongful death statute, “applies when the injury did cause death.”<sup>40</sup>

28. Malone, *supra* note 1, at 1044.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.*

36. O’Grady v. Brown, 654 S.W.2d 904, 909 (Mo. 1983) (en banc) (quoting WILLIAM PROSSER, LAW OF TORTS § 127 (4th ed. 1971)).

37. *See* William A. Gage, Jr., Casenote, Yowell v. Piper Aircraft Corp., 703 S.W.2d 630 (Tex. 1986), 18 SAINT MARY’S L.J. 1091, 1094–95 (1987).

38. Wollen v. DePaul Health Ctr., 828 S.W.2d 681, 685 (Mo. 1992) (en banc).

39. *Id.*; *see* MO. REV. STAT. § 537.020 (2016).

40. Wollen, 828 S.W.2d at 685; *see* MO. REV. STAT. § 537.080 (2016).

Missouri's current survivorship statute provides that upon the death of a party to an action for personal injury, a cause of action for personal injury transfers to the personal representatives of the deceased.<sup>41</sup> In other words, if a plaintiff has a personal injury claim but dies before the matter is resolved, the plaintiff's personal representatives may go forward with the claim under the survivorship statute.<sup>42</sup> Missouri's current wrongful death statute provides that when a person's death results from the acts of a defendant, the defendant is liable for damages.<sup>43</sup>

Damages arising under the survivorship statute are not defined.<sup>44</sup> For claims arising under Missouri's survivorship statute, courts have held that plaintiffs are "entitled to recover only such damages as accrued *before* [the decedent's] death and which he could have recovered had he survived."<sup>45</sup> This recovery may "includ[e] damages for physical and mental pain and suffering; loss of wages, if any, from the [event] until his death; and medical and hospital expenses resulting from the injuries sustained."<sup>46</sup>

Under section 537.090, wrongful death claims under section 537.080 may seek "such damages as the trier of the facts may deem fair and just."<sup>47</sup> In addition to "pecuniary losses suffered by reason of the death," claimants may also be awarded "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."<sup>48</sup>

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41. § 537.020.

42. *Id.*

43. § 537.080. Section 537.080 further provides that damages may be sued for:

(1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;

(2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;

(3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action.

*Id.*

44. *See* § 537.020.

45. *Grizzell v. United States*, 612 F. Supp. 2d 1000, 1007–08 (S.D. Ill. 2009) (considering § 537.020) (emphasis added); *see also Adelsberger v. Sheehy*, 79 S.W.2d 109, 114 (Mo. 1934) (noting that the plaintiff administrator is entitled to recover "only such damages as accrued antecedent to the death" of the decedent that the decedent could have recovered had he lived).

46. *Grizzell*, 612 F. Supp. 2d at 1008.

47. MO. REV. STAT. § 537.090 (2016).

48. *Id.*

Damages under Missouri's wrongful death statute are consistent with the "pecuniary loss rule," which is the majority rule for damages for wrongful death.<sup>49</sup> A problem exists with the pecuniary loss rule in that it "effectively values human life solely in terms of the monetary benefits the decedent could have been expected to bestow upon his or her dependents" while "attach[ing] no monetary value to life itself" by not accounting for the decedent's lost life.<sup>50</sup> In doing so, "[t]he pecuniary loss rule views humans as economic units, not as sentient beings who live for purpose and pleasure."<sup>51</sup> Furthermore, Missouri courts, along with courts in twenty-seven other states, have rejected awarding damages for grief and mental anguish in wrongful death cases.<sup>52</sup>

In *O'Grady v. Brown*, the Supreme Court of Missouri described three underlying goals of Missouri's wrongful death statute.<sup>53</sup> The first of these goals is "to provide compensation to bereaved plaintiffs for their loss."<sup>54</sup> Second, the wrongful death statute should "ensure that tortfeasors pay for the consequences of their actions."<sup>55</sup> Finally, the statute should serve "generally to deter harmful conduct which might lead to death."<sup>56</sup>

### B. Medical Malpractice

There are three categories of malignant diseases that are commonly encountered in medical malpractice actions.<sup>57</sup>

In the first category, a "cure is probable at the outset, but, as a result of negligence, the chance of eradicating the disease has been lost."<sup>58</sup> For example, in *Mezrah v. Bevis*, a physician failed to diagnose a plaintiff's breast cancer.<sup>59</sup> The court found for the plaintiff because expert testimony demonstrated that, if properly diagnosed, the "plaintiff's breast cancer 'more likely than not' would have been completely cured."<sup>60</sup>

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49. Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 6 (2005).

50. *Id.*

51. *Id.* at 6–7.

52. *Id.* at 28.

53. *O'Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. 1983) (en banc).

54. *Id.*; see *Price v. Schnitker*, 239 S.W.2d 296, 300 (Mo. 1951) (interpreting section 537.090 as not allowing the jury to "take into consideration or award any damages on account of the pain, anguish or bereavement which may have been suffered by the parents or surviving sister").

55. *O'Grady*, 654 S.W.2d at 909.

56. *Id.*

57. Cyril Toker, *The Impact of Gooding on Actions for Malpractice in the Treatment of Malignant Disease*, 74 FLA. B.J. 61, 62 (2000).

58. *Id.*

59. *Mezrah v. Bevis*, 593 So. 2d 1214, 1214 (Fla. Dist. Ct. App. 1992).

60. *Id.* (citing *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984)).

In the second category, while the patient is living with an incurable disease, the patient's "life expectancy, already shortened by the disease, has been reduced even further through negligence."<sup>61</sup> For example, in *Noor v. Continental Casualty Co.*, a physician delayed a biopsy of the plaintiff's breast lump for approximately seven months and then made a diagnosis of breast cancer.<sup>62</sup> The plaintiff sued the physician for "negligent diminution in life expectancy."<sup>63</sup> Her claim was dismissed because the plaintiff was "unable to present any non-speculative evidence as to what extent, if any, [the physician's] failure to immediately diagnose [the plaintiff's] disease added to [the plaintiff's] decreased life expectancy."<sup>64</sup> This category is known as "[r]eduction in [l]ife [e]xpectancy from [n]egligence."<sup>65</sup>

In the third category, the cure for the disease is improbable and "the patient has died prematurely as a result of negligence."<sup>66</sup> This last category is the typical wrongful death case.<sup>67</sup> In an ordinary wrongful death case, when a terminally ill patient prematurely dies as a result of a negligent diagnosis, "the outcome . . . may depend upon the anticipated length of survival in the absence of negligence."<sup>68</sup> If the anticipated survival period "would have been short even with proper treatment, recovery appears to be unlikely."<sup>69</sup> However, if the survival period "might have been prolonged" with a proper diagnosis, "recovery is possible even though, ultimately, a fatal outcome was expected."<sup>70</sup>

In Missouri, plaintiffs must establish three elements for a prima facie medical malpractice case.<sup>71</sup> First, a plaintiff must prove "that an act or omission . . . of the defendant failed to meet the requisite medical standard of care."<sup>72</sup> Second, a plaintiff must show "that the act or omission was performed negligently."<sup>73</sup> Finally, a plaintiff must establish "a causal connection between the act or omission and the plaintiff's injury."<sup>74</sup>

Furthermore, under Missouri Revised Statutes section 538.215, there are five categories of damages available in medical malpractice cases: "(1) [p]ast economic damages; (2) [p]ast noneconomic damages; (3) [f]uture medical damages; (4) [f]uture economic damages, excluding future medical damages;

61. Toker, *supra* note 57, at 62.

62. *Noor v. Cont'l. Cas. Co.*, 508 So. 2d 363, 364 (Fla. Dist. Ct. App. 1987).

63. Toker, *supra* note 57, at 63.

64. *Noor*, 508 So. 2d at 365.

65. Toker, *supra* note 57, at 62.

66. *Id.*; see generally *Williams v. Bay Hosp., Inc.*, 471 So. 2d 626 (Fla. Dist. Ct. App. 1985); *Tappan v. Fla. Med. Ctr., Inc.*, 488 So. 2d 630 (Fla. Dist. Ct. App. 1986); *Green v. Goldberg*, 557 So. 2d 589 (Fla. Dist. Ct. App. 1989) (per curiam).

67. Toker, *supra* note 57, at 62.

68. *Id.* at 63.

69. *Id.*

70. *Id.*

71. *Wilson v. Lockwood*, 711 S.W.2d 545, 550 (Mo. Ct. App. 1986).

72. *Id.*

73. *Id.*

74. *Id.*



and (5) [f]uture noneconomic damages.”<sup>75</sup> Additionally, Missouri Revised Statutes section 538.210 creates a cap on noneconomic damages for medical malpractice.<sup>76</sup> In *Watts v. Lester E. Cox Medical Centers*, the Supreme Court of Missouri found this cap to be “unconstitutional to the extent that it infringes on the jury’s constitutionally protected purpose of determining the amount of damages sustained by an injured party.”<sup>77</sup> The court reasoned that “[s]uch a limitation was not permitted at common law when Missouri’s constitution first was adopted in 1820 and, therefore, violates the right to trial by jury guaranteed by article I, section 22(a) of the Missouri Constitution.”<sup>78</sup>

However, in *Dodson v. Ferrara*, when applying the statutory damage cap to medical malpractice resulting in death, the Supreme Court of Missouri determined the cap was constitutional because “Missouri does not recognize a common law wrongful death claim.”<sup>79</sup> Therefore, because wrongful death actions in Missouri are “statutory creation[s]” rather than common law actions, such actions are “subject to statutory caps and limitations.”<sup>80</sup>

The *Dodson* court reasoned that there was a public interest in capping wrongful death damages in order “to reduce perceived rising medical malpractice premiums and prevent physicians from leaving ‘high risk’ medical fields.”<sup>81</sup> Nonetheless, by protecting doctors in this way, not only are plaintiffs in medical malpractice cases not properly compensated, but attorneys have a decreased incentive to take medical malpractice cases.<sup>82</sup> This potentially makes it more difficult for injured plaintiffs to get into court.

While the *Dodson* court noted that “the legislature created the damages cap in an effort to reduce perceived rising medical malpractice premiums and prevent physicians from leaving ‘high risk’ medical fields,” it did not “evaluate

75. MO. REV. STAT. § 538.215 (2016). “Economic damages” are defined as “damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages and lost earning capacity.” MO. REV. STAT. § 538.205(2) (2016). “Medical damages” are defined as “damages arising from reasonable expenses for necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial and other health and rehabilitative services.” § 538.205(7). “Noneconomic damages” are defined as “damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages.” § 538.205(8).

76. MO. REV. STAT. § 538.210 (2016).

77. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 636 (Mo. 2012) (en banc).

78. *Id.*

79. *Dodson v. Ferrara*, 491 S.W.3d 542, 558 (Mo. 2016) (en banc).

80. *Id.* at 550.

81. *Id.* at 561.

82. Carol J. Miller & Joseph Weidhaas, *Medical Malpractice Noneconomic Caps Unconstitutional*, 69 J. MO. B. 344, 350 (2013) (“Where out-of-pocket costs are low, there is a disincentive for attorneys to take cases, especially when noneconomic damages and punitive damages are capped.”).

the wisdom or desirability of the policy decisions made by the legislature when it passed section 538.210.”<sup>83</sup>

### *C. Past Precedent Regarding Failure to Diagnose*

Prior to 2016, the highest courts of Florida, Ohio, and Iowa addressed the issue of wrongful death claims arising from medical malpractice due to a failure to diagnose conditions that would have resulted in death even if properly diagnosed.<sup>84</sup> In all three of these cases discussed below,<sup>85</sup> the courts determined that the plaintiffs failed to establish a causal connection between the act and the plaintiff’s death.

In *Gooding v. University Hospital Building, Inc.*, the Florida Supreme Court addressed this issue.<sup>86</sup> In *Gooding*, the decedent’s family brought suit against a hospital after the hospital’s emergency room staff failed to check the decedent’s medical history or to examine the decedent upon his arrival to the emergency room with lower abdominal pain.<sup>87</sup> The staff failed to examine the patient because they were waiting for the doctor who had neglected to respond to repeated paging.<sup>88</sup> The decedent went into cardiac arrest and died forty-five minutes after arriving at the hospital.<sup>89</sup> It was later determined that the decedent “died from a ruptured abdominal aortic aneurysm which caused massive internal bleeding.”<sup>90</sup>

The court concluded that “a jury could not reasonably find that but for the negligent failure to properly diagnose and treat [the decedent] he would not have died” because the plaintiff’s testimony failed to prove “that immediate diagnosis and surgery more likely than not would have enabled [the decedent] to survive.”<sup>91</sup> Subsequently, the court found that the plaintiff did not show that the defendant could have delayed death.<sup>92</sup> The court further held “that a plaintiff in a medical malpractice action must show more than a decreased chance of survival because of a defendant’s conduct.”<sup>93</sup> Hence, “the plaintiff must show that what was done or failed to be done probably would have affected the outcome.”<sup>94</sup>

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83. *Dodson*, 491 S.W.3d at 561.

84. *Mickels v. Danrad*, 486 S.W.3d 327, 329 (Mo. 2016) (en banc).

85. *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015 (Fla. 1984); *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E.2d 97 (Ohio 1971), *overruled by Roberts v. Ohio Permanente Med. Grp., Inc.*, 668 N.E.2d 480 (Ohio 1996); *Thompson v. Anderson*, 252 N.W. 117 (Iowa 1934).

86. *Gooding*, 445 So. 2d at 1018.

87. *Id.* at 1017.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1017–18.

92. *See id.* at 1018.

93. *Id.* at 1020.

94. *Id.*

In *Cooper v. Sisters of Charity of Cincinnati, Inc.*, the Supreme Court of Ohio also addressed this issue.<sup>95</sup> In *Cooper*, the court held that the plaintiff did not have a claim for medical malpractice against a doctor who failed to properly diagnose the decedent, who died later in the day after being sent home by the doctor whom he visited after being hit by a truck.<sup>96</sup> The court concluded that “the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery the patient probably would have survived.”<sup>97</sup> Such evidence of extended survival was not presented.<sup>98</sup>

In *Thompson v. Anderson*, the Iowa Supreme Court addressed this issue.<sup>99</sup> In *Thompson*, the decedent’s husband sued a doctor after the doctor failed to diagnose the decedent with tetanus but instead told her that if she continued to experience symptoms the next day, she should go to the hospital.<sup>100</sup> The decedent continued to experience the symptoms, and she went to the hospital where she was immediately diagnosed with tetanus and treated.<sup>101</sup> She died the following day, two days after the doctor failed to diagnose her condition.<sup>102</sup>

The court reasoned that the plaintiff’s expert witness testimony “fail[ed] to show any probability that the death . . . would not have resulted from tetanus, regardless of any negligence or malpractice on the part of the [doctor].”<sup>103</sup> Furthermore, the court determined “that any attempt to show that such death was caused by any act or omission to act on the part of [the doctor], instead of by the disease from which she was suffering, would be pure speculation.”<sup>104</sup> Therefore, the court held that the plaintiff lacked a claim for wrongful death.<sup>105</sup>

*Tappan v. Florida Medical Center, Inc.*<sup>106</sup> and *Williams v. Bay Hospital, Inc.*,<sup>107</sup> both Florida District Court of Appeals cases, precluded wrongful death actions but allowed the claims to proceed as survivorship actions.<sup>108</sup>

95. *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E.2d 97, 104 (Ohio 1971), *overruled by* *Roberts v. Ohio Permanente Med. Grp.*, 668 N.E.2d 480 (Ohio 1996).

96. *Id.* at 99, 104.

97. *Id.* at 98.

98. *Id.* at 104. *Cooper* was later overruled by *Roberts v. Ohio Permanente Medical Group*, which instead recognized the loss-of-chance theory and followed the approach of Section 323 of the Restatement (Second) of Torts. *Roberts*, 668 N.E.2d at 488.

99. *Thompson v. Anderson*, 252 N.W. 117, 120–21 (Iowa 1934).

100. *Id.* at 118.

101. *Id.*

102. *Id.*

103. *Id.* at 121.

104. *Id.*

105. *Id.*

106. *Tappan v. Fla. Med. Ctr., Inc.*, 488 So. 2d 630 (Fla. Dist. Ct. App. 1986).

107. *Williams v. Bay Hosp., Inc.*, 471 So. 2d 626 (Fla. Dist. Ct. App. 1985).

108. *See id.* at 629; *see Tappan*, 488 So. 2d at 631.

In *Tappan*, the decedent's wife sued a chiropractor, "alleging medical malpractice because of [the chiropractor's] failure to diagnose the [decedent's incurable] cancer during the period of time he was treating [the decedent] for 'back and other pain.'"<sup>109</sup> Relying on *Gooding*, the Florida court held that the decedent's wife did not have a cause for wrongful death because the chiropractor's "alleged negligence in failing to diagnose the lung cancer was not a cause-in-fact of the death" and, therefore, it could not be proven "that with proper diagnosis and treatment it was 'more likely than not' that [the decedent] would have survived."<sup>110</sup> Nevertheless, the court allowed the claim to move forward as a survivorship action.<sup>111</sup>

In *Williams*, the court again relied on *Gooding* in precluding a wrongful death action when the results of a chest x-ray showing abnormalities were allegedly not reported to the decedent.<sup>112</sup> The decedent was diagnosed with incurable lung cancer one year after the exam.<sup>113</sup> The plaintiff's expert testified that early treatment would have, "within reasonable medical probability . . . extended her life several months."<sup>114</sup> The court reasoned that a wrongful death claim did not exist because the defendant's "alleged negligence did not 'more likely than not' ultimately cause [the decedent's] death."<sup>115</sup> As in *Tappan*, the *Williams* court allowed the claim to move forward as a survivorship action.<sup>116</sup> In its reasoning, the *Williams* court cited to *Martin v. United Security Services, Inc.*,<sup>117</sup> which found a "wrongful death statute eliminating claims for pain and suffering of the decedent" to be constitutional "because the act provided a suitable alternative to recovery of damages for such claims by substituting therefor the right of close relatives to recover for *their own* pain and suffering occasioned by loss of a loved one."<sup>118</sup>

However, in *Green v. Goldberg*, another Florida District Court of Appeals case, the court found that the requirements of *Gooding* were met when testimony showed that the plaintiff would have survived an additional ten years if she had been properly diagnosed with breast cancer.<sup>119</sup>

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109. *Tappan*, 488 So. 2d at 630.

110. *Id.* at 631 (citing *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015 (Fla. 1984)).

111. *Id.*

112. *Williams*, 471 So. 2d at 628, 630.

113. *Id.* at 628.

114. *Id.*

115. *Id.* at 630.

116. *Id.*

117. *Id.* at 629 (citing *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765 (Fla. 1975)).

118. *Id.* (citing *Martin*, 314 So. 2d at 769).

119. *Green v. Goldberg*, 557 So. 2d 589, 590 (Fla. Dist. Ct. App. 1989) (per curiam).

In 2016, the Supreme Court of Missouri addressed the issues of wrongful death and survivorship in a claim arising from a failure to diagnose in the instant case, *Mickels v. Danrad*.<sup>120</sup>

#### IV. INSTANT DECISION

In a majority opinion written by Judge Paul C. Wilson, the Supreme Court of Missouri held in the instant case that Appellants' wrongful death claim under section 537.080.1 failed because Mr. Mickels's death was not caused by Dr. Danrad's alleged negligence.<sup>121</sup> Nevertheless, the court found that Appellants did have a survivorship cause of action for negligence arising from Mr. Mickels's personal injuries under section 537.020.<sup>122</sup>

##### A. *The Majority Opinion*

In determining that Appellants' wrongful death claim failed under section 537.080.1, the court reasoned that, while Dr. Danrad's alleged failure to diagnose Mr. Mickels's brain tumor "certainly injured" Mr. Mickels, "it just as certainly did not kill him" because the tumor was incurable and terminal.<sup>123</sup> The court concluded that Appellants failed to prove that Mr. Mickels's premature death resulted from Dr. Danrad's negligence as required by section 537.080.1, and, therefore, Appellants could not sue for wrongful death.<sup>124</sup> The court further noted that "[e]very state supreme court to address this issue ha[d] reached the same conclusion."<sup>125</sup>

The court concluded that, although Appellants did not have a wrongful death claim, a claim existed against Dr. Danrad for personal injury under "[s]ection 537.020 [which] provides: 'Causes of action for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death.'<sup>126</sup> The court reasoned that, while "[a]n action for personal injuries that result in death

120. *Mickels v. Danrad*, 486 S.W.3d 327, 331 (Mo. 2016) (en banc).

121. *Id.* at 329.

122. *Id.* at 329–30. The court further noted that "Mr. Mickels [had] no claim for 'lost chance survival' . . . because all parties concede he could not have survived his brain tumor regardless of whether Dr. Danrad was negligent in reviewing Mr. Mickels' first MRI." *Id.* at 329 n.3.

123. *Id.* at 329.

124. *Id.*; see MO. REV. STAT. § 537.080.1 (2016) ("Whenever the death of a person results from any act . . .").

125. *Mickels*, 486 S.W.3d at 329 (citing *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984)); see also *Cooper v. Sisters of Charity of Cincinnati*, 272 N.E.2d 97, 104 (Ohio 1971); *Thompson v. Anderson*, 252 N.W. 117, 120–21 (Iowa 1934).

126. *Mickels*, 486 S.W.3d at 329 (quoting MO. REV. STAT. § 537.020 (2000)).

may only be brought under [section 537.080] . . . actions ‘other than those resulting in death’ may be brought under” section 537.020.<sup>127</sup> As a result, Mr. Mickels could have filed a personal injury claim against Dr. Danrad before he died.<sup>128</sup> Under section 537.020, this personal injury claim passed on to Mr. Mickels’s personal representatives after his death.<sup>129</sup>

Therefore, the court determined that a personal injury claim against Dr. Danrad could be made by Mr. Mickels’s personal representatives.<sup>130</sup> This was the same approach taken in the two previously mentioned Florida cases, *Tappan*<sup>131</sup> and *Williams*.<sup>132</sup>

Additionally, the court determined that allowing Appellants’ wrongful death claim would be “contrary to [the Supreme Court of Missouri’s] precedent and the language of the wrongful death statute.”<sup>133</sup> Furthermore, the court reasoned that allowing the wrongful death claim could cause unintended consequences in future wrongful death claims.<sup>134</sup> The court noted that, among such consequences, the precedent created by allowing Appellants’ wrongful death claim would create a “new element of proof for wrongful death plaintiffs (i.e., that ‘but for’ the defendant’s negligence the decedent would not have died on the specific time and date).”<sup>135</sup>

The court emphasized that this new element would allow defendants in future wrongful death claims to “argue that, even when his or her negligence caused the decedent’s death, some [other] conduct . . . either accelerated or delayed that death and, therefore, that conduct – not the defendant’s negligence – was the ‘but for’ cause of the decedent’s specific date and time of death.”<sup>136</sup> The court concluded that allowing a survivorship personal injury claim under section 537.020 avoids the potential problems by eliminating the requirement of proving causation at the time of the decedent’s death.<sup>137</sup> The court determined that the time of the decedent’s death should only be considered in the damages analysis.<sup>138</sup> Therefore, the court vacated the trial court’s judgment and remanded the case.<sup>139</sup>

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127. *Id.* (quoting § 537.020).

128. *Id.* at 329–30.

129. *Id.* at 330.

130. *Id.* at 331.

131. *Tappan v. Fla. Med. Ctr., Inc.*, 488 So. 2d 630, 631 (Fla. Dist. Ct. App. 1986).

132. *Williams v. Bay Hosp., Inc.*, 471 So. 2d 626, 629 (Fla. Dist. Ct. App. 1985).

133. *Mickels*, 486 S.W.3d at 331.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

### B. *The Dissenting Opinion*

Judge Richard B. Teitelman authored a dissenting opinion joined by Judge Laura Denvir Stith and Judge George W. Draper, III.<sup>140</sup> In reasoning that a reversal of the trial court's judgment was proper, the dissent emphasized that but for Dr. Danrad's negligence, Mr. Mickels would have lived up to six months longer.<sup>141</sup> Therefore, the dissent concluded that the majority failed to consider "that what results from the loss of an opportunity to delay death is death."<sup>142</sup>

They wrote that the majority erred in holding that section 537.080 requires the alleged negligence to be "the sole and exclusive cause of the death."<sup>143</sup> The dissent further stressed that "[t]here is nothing in the plain language of section 537.080 that compels the conclusion that a physician who negligently causes the premature death of a patient is immunized from wrongful death liability because, by a stroke of perverse luck, the patient also suffers from a terminal illness."<sup>144</sup> Furthermore, they pointed out that, under the majority's interpretation of section 537.080, tortfeasors are immune "from wrongful death liability when they kill the terminally ill."<sup>145</sup> Such an immunity is inconsistent with the purpose of the wrongful death statute.<sup>146</sup> Finally, the dissent stressed that the Florida, Ohio, and Iowa cases relied on by the majority were "decided between 30 and 83 years ago [and] should not be conclusive with respect to interpretation of the language in Missouri's wrongful death statute."<sup>147</sup>

Ultimately, the dissent concluded that it would be proper to reverse the judgment and remand the case.<sup>148</sup>

## V. COMMENT

Under the majority's decision in *Mickels*, the Supreme Court of Missouri essentially granted immunity to healthcare providers who negligently treat terminally ill patients. This Part first distinguishes *Mickels* from the previous cases on which the court's decision relied. Next, this Part argues that the majority's decision is inconsistent with the purpose of Missouri's wrongful death statute.

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140. *Id.* (Teitelman, J., dissenting).

141. *Id.* at 332.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

### A. Relation to Past Precedent

The majority's decision relied on cases from Florida, Ohio, and Iowa.<sup>149</sup> All three of these cases were decided over thirty years before *Mickels*, and none of them are mandatory authority in Missouri.<sup>150</sup> Moreover, the cases are not entirely analogous to the situation in the instant case.

In *Thompson*, the Iowa Supreme Court denied recovery because there was no evidence that the decedent would have lived any longer even if she had been properly diagnosed with tetanus.<sup>151</sup> The court stated that, while it is not necessary that "the causal connection between the alleged acts of malpractice and the death of appellant's decedent . . . be shown by direct and positive evidence," there must be evidence that the causation theory be "reasonably probable . . . and more probable than any other hypothesis based on such evidence."<sup>152</sup> The court found that any argument that the decedent would have lived longer "would be pure speculation and conjecture."<sup>153</sup>

Like in *Thompson*, the Supreme Court of Ohio in *Cooper* denied recovery because there was not sufficient evidence that it was probable that the decedent would have survived treatment and surgery for his injuries arising from being hit by a truck.<sup>154</sup> In *Gooding*, the Florida Supreme Court relied on *Cooper*, finding that there was no "evidence of a greater than even chance of survival . . . in the absence of negligence."<sup>155</sup>

*Mickels*, however, is different from these three cases. In these cases, the plaintiffs failed to show that the defendants could have delayed the decedents' deaths if the decedents had been treated competently.<sup>156</sup> On the other hand, in *Mickels*, there was direct evidence that Mr. Mickels would have survived longer if treated competently.<sup>157</sup> There was direct evidence that Dr. Danrad could have delayed Mr. Mickels's death.<sup>158</sup>

In *Thompson*, *Cooper*, and *Gooding*, the time of death for all three decedents would not have significantly changed but for the alleged negligence.<sup>159</sup> That was not the case in *Mickels*.<sup>160</sup> While there was no evidence of the dece-

149. *Id.* at 329 (majority opinion).

150. *See id.*

151. *Thompson v. Anderson*, 252 N.W. 117, 121 (Iowa 1934).

152. *Id.* (quoting *Ramberg v. Morgan*, 218 N.W. 492, 497 (Iowa 1928)).

153. *Id.*

154. *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E.2d 97, 99, 104 (Ohio 1971), *overruled by Roberts v. Ohio Permanente Med. Grp., Inc.*, 668 N.E.2d 480 (Ohio 1996).

155. *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1020 (Fla. 1984).

156. *Id.*; *Cooper*, 272 N.E.2d at 104; *Thompson*, 252 N.W. at 121.

157. *Mickels v. Danrad*, 486 S.W.3d 327, 328 (Mo. 2016) (en banc).

158. *Id.*

159. *Thompson*, 252 N.W. at 121; *Cooper*, 272 N.E.2d at 104; *Gooding*, 445 So. 2d at 1020.

160. *See Mickels*, 486 S.W.3d at 328.



dents' probable survival in *Thompson*, *Cooper*, and *Gooding*, there was evidence of Mr. Mickels's probable survival for a longer period of time had Dr. Danrad correctly diagnosed his tumor.<sup>161</sup> Mr. Mickels's treating oncologist testified that, but for Dr. Danrad's failure to diagnose the brain tumor on December 12, 2008, it was "more likely than not that . . . [Mr. Mickels] would have lived an additional six months on average."<sup>162</sup> Even though Mr. Mickels would have died from his brain tumor regardless of when it was diagnosed, he was still deprived of several months of his life.<sup>163</sup> Obviously, six months is significantly longer than the expected survival of the decedents in *Thompson* and *Cooper* – who died the day after the alleged negligence – or the decedent in *Gooding*, who died forty-five minutes after the alleged negligence.<sup>164</sup>

As noted in Judge Teitelman's dissent, section 537.080 does not require that a defendant's negligence be the sole and exclusive cause of a decedent's death.<sup>165</sup> While "'the death of a person results from' medical negligence when the decedent would not have died 'but for' the alleged negligence," the same can be said when "a terminally ill person would not have died prematurely but for the alleged negligence."<sup>166</sup> Section 537.080 allows wrongful death actions "when death 'results from' negligence."<sup>167</sup> Mr. Mickels's death on June 12, 2009, resulted from Dr. Danrad's failure to diagnose his brain tumor.<sup>168</sup>

Although this survival period is less than the ten-year survival period found to be sufficient in *Green*,<sup>169</sup> six months is still a significant amount of time that he could have lived.<sup>170</sup> Life should not be "devalued . . . when the days remaining are few."<sup>171</sup> Instead, "the law . . . should hold that very commodity to be more, rather than less, dear."<sup>172</sup> Even though he would have eventually died from the terminal brain tumor, there is certainly value in the six months of life Mr. Mickels lost. In a survivorship action, the value of these six months would be lost because damages would be limited to those accrued before Mr. Mickels's death.<sup>173</sup>

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161. *Id.*

162. *Id.* (alteration in original).

163. *Id.*

164. *Thompson*, 252 N.W. at 118; *Cooper*, 272 N.E.2d at 99, 104; *Gooding*, 445 So. 2d at 1017.

165. *Mickels*, 486 S.W.3d at 332 (Teitelman, J., dissenting).

166. *Id.* (quoting MO. REV. STAT. § 537.080 (2000)).

167. *Id.*

168. *Id.* at 328 (majority opinion).

169. See *Green v. Goldberg*, 557 So. 2d 589, 590 (Fla. Dist. Ct. App. 1989) (per curiam).

170. See *Toker*, *supra* note 57, at 63.

171. *Id.*

172. *Id.*

173. See *Grizzell v. United States*, 612 F. Supp. 2d 1000, 1007–08 (S.D. Ill. 2009); see also *infra* Part V.B.

### B. *The Purpose of Missouri's Wrongful Death Statute*

As indicated above, there are three main purposes of wrongful death claims under section 537.080.<sup>174</sup> First, wrongful death claims “provide compensation to bereaved plaintiffs for their loss.”<sup>175</sup> Second, wrongful death claims “ensure that tortfeasors pay for the consequences of their actions.”<sup>176</sup> Finally, wrongful death claims “deter negligent acts that may lead to death.”<sup>177</sup> As noted by Judge Teitelman in his dissenting opinion, barring the wrongful death claim in *Mickels* “certainly does not advance [any of these] statutory purposes.”<sup>178</sup>

Wrongful death claims allow for damages including “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.”<sup>179</sup> Survivorship claims only allow for the “damages as accrued before [the decedent’s] death and which he could have recovered had he survived, including damages for physical and mental pain and suffering; loss of wages, if any, from the [event] until his death; and medical and hospital expenses resulting from the injuries.”<sup>180</sup>

While permitting Mr. Mickels’s family to recover personal injury damages under the survivorship statute allows the family some financial compensation, this compensation cannot take into account injuries like loss of consortium or loss of companionship.<sup>181</sup> In denying such damages, the majority neglects to consider the value of Mr. Mickels’s life. Although many people may “consider life priceless, . . . we [should not] treat it as worthless.”<sup>182</sup> The six months of life Mr. Mickels lost had value. Even though Mr. Mickels would have only survived an additional six months, compensation for his lost life is appropriate. Because Mr. Mickels lost a portion of his life due to Dr. Danrad’s negligence, the damages recoverable in a survivorship claim are not adequate. Because damages like loss of consortium are not recoverable, a survivorship claim under section 537.020 fails to “provide compensation to bereaved plaintiffs for their loss.”<sup>183</sup>

Furthermore, the majority decision fails to ensure tortfeasors pay for the consequences of their actions because it “immuniz[es] tortfeasors from wrongful death liability when they kill the terminally ill.”<sup>184</sup>

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174. *See supra* Part III.A.

175. *Mickels v. Danrad*, 486 S.W.3d 327, 332 (Mo. 2016) (en banc) (Teitelman, J., dissenting).

176. *Id.*

177. *Id.*

178. *Id.*

179. MO. REV. STAT. § 537.090 (2016).

180. *Grizzell v. United States*, 612 F. Supp. 2d 1000, 1007–08 (S.D. Ill. 2009).

181. *See id.*

182. McClurg, *supra* note 49, at 6.

183. *Mickels*, 486 S.W.3d at 332 (Teitelman, J., dissenting).

184. *Id.*

The majority argues that Dr. Danrad could not be liable under a wrongful death claim because Mr. Mickels would have died regardless of Dr. Danrad's negligence, and, therefore, Dr. Danrad's negligence was not the cause of Mr. Mickels's death.<sup>185</sup> But it is important to remember that everyone will die eventually. Wrongful death claims are about accelerating the date of death. For purposes of wrongful death claims, an act is tortious and causal if it hastens death.<sup>186</sup>

Furthermore, in *Callahan v. Cardinal Glennon Hospital*, the Supreme Court of Missouri held that to satisfy the requirement of proximate causation, "the injury must be a reasonable and probable consequence of the act or omission of the defendant."<sup>187</sup> Additionally, "[t]o the extent the damages are surprising, unexpected, or freakish, they may not be the natural and probable consequences of a defendant's actions."<sup>188</sup> Here, even though Mr. Mickels was experiencing "numbness, blurred vision, and headaches" on December 8, 2008, Dr. Danrad failed to make any diagnosis upon viewing Mr. Mickels's MRI results.<sup>189</sup> A serious health concern going undetected was certainly a reasonable consequence of Dr. Danrad's failure to make a diagnosis. Such consequences are not so "surprising, unexpected, or freakish" as to cut off Dr. Danrad's liability.<sup>190</sup>

Because Dr. Danrad caused Mr. Mickels's premature death, the majority's decision fails to ensure that tortfeasors pay for the consequences of their actions.<sup>191</sup> By only being liable for a survivorship claim, Dr. Danrad is not being held fully accountable for his negligence.<sup>192</sup>

Moreover, the majority's decision fails to pursue the statute's objective of deterring negligent acts.<sup>193</sup> Arguably, the decision has the opposite effect. Providing such immunity from wrongful death liability could potentially encourage doctors and other healthcare providers to behave negligently when dealing with terminally ill patients. The majority narrowly interprets section 537.080 in declaring that "Appellants cannot sue for wrongful death . . . because Dr. Danrad's alleged negligence did not cause Mr. Mickels' death."<sup>194</sup> Such a narrow interpretation "exemplif[ies] and perpetuate[s] the very evils to be remedied" by the wrongful death statute.<sup>195</sup> By failing to deter negligent

185. *Id.* at 329 (majority opinion).

186. *See* *Collins v. Hertenstein*, 90 S.W.3d 87, 96 (Mo. Ct. App. 2002) ("[A]n act which accelerates death . . . causes death.") (quoting *In re Estate of Eliassen*, 668 P.2d 110, 120 (Idaho 1983)).

187. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 865 (Mo. 1993) (en banc).

188. *Id.*

189. *Mickels*, 486 S.W.3d at 328.

190. *Callahan*, 863 S.W.2d at 865.

191. *Mickels*, 486 S.W.3d at 332 (Teitelman, J., dissenting).

192. *Id.*

193. *Id.*

194. *Id.* at 331 (majority opinion).

195. *Van Beeck v. Sabine Towing Co., Inc.*, 300 U.S. 342, 350–51 (1937).

acts, this interpretation is inconsistent with the “legislative policy which is itself a source of law.”<sup>196</sup>

Meeting these statutory objectives far outweighs the potential consequence of creating precedent requiring wrongful death plaintiffs to prove “that ‘but for’ the defendant’s negligence the decedent would not have died on the specific time and date.”<sup>197</sup> However, because death is always inevitable, this is implied in all wrongful death cases.

While the majority finds this new element of proof to have potentially “serious and far-reaching consequences,” such consequences pale in comparison to the ramifications of granting immunity from wrongful death liability.<sup>198</sup> The majority notes that this element of proof would allow defendants to “argue that, even when his . . . negligence caused the decedent’s death, some conduct of the decedent (or even a third person) either accelerated or delayed that death and, therefore, that conduct – not the defendant’s negligence – was the ‘but for’ cause of the decedent’s specific date and time of death.”<sup>199</sup> But defendants use this defense without the supposed new element of proof whenever the facts will support such an argument.

That is not the situation in the instant case. No conduct by Mr. Mickels accelerated his death.<sup>200</sup> No conduct by any other third person accelerated his death.<sup>201</sup> Mr. Mickels died on June 12, 2009, and his death was accelerated by six months due to Dr. Danrad’s negligence.<sup>202</sup>

## VI. CONCLUSION

In *Mickels v. Danrad*, the Supreme Court of Missouri failed to account for an important fact that distinguishes Mr. Mickels’s case from other wrongful death cases: the date of Mr. Mickels’s death was hastened due to Dr. Danrad’s negligence. In this decision, the court failed to accomplish the three main objectives of wrongful death claims. First, the Appellants were not appropriately compensated for their loss. Second, Dr. Danrad was not held fully liable for the consequences of his actions. Finally, the court essentially set a precedent of immunizing doctors and other health care providers who cause the premature death of terminally ill patients from liability arising from their actions. The majority’s ruling is inconsistent with the legislative intent of the wrongful death statute. The decision in *Mickels* evinces a desire to protect health care providers in Missouri at the expense of their patients.<sup>203</sup>

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196. *Id.* at 351.

197. *Mickels*, 486 S.W.3d at 331.

198. *Id.*

199. *Id.*

200. *Id.* at 328.

201. *Id.*

202. *Id.*

203. *See, e.g.*, *Dodson v. Ferrara*, 491 S.W.3d 542, 561 (Mo. 2016) (en banc) (finding that there is a public interest in capping wrongful death damages).

