

SC93836

IN THE SUPREME COURT OF MISSOURI

ZACH MCGUIRE, *et al.*,

Respondents,

vs.

KENOMA, LLC, *et al.*,

Appellants.

On Appeal from the 27th Circuit Court of Henry County, Missouri
The Honorable James K. Journey
Case No. 09HE-CC00036

**SUBSTITUTE BRIEF OF APPELLANTS
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JURISDICTIONAL STATEMENT

Defendants-Appellants Kenoma, LLC and Synergy, LLC (collectively “Synergy”) appeal from the circuit court’s November 7, 2012 Nunc Pro Tunc Journal Entry (LF:126-128; A:15-17)¹ and December 31, 2012 Nunc Pro Tunc Journal Entry and Judgment (LF:129-30; A:18-19), which purport to amend the circuit court’s May 10, 2011 final judgment and thereby retroactively award Plaintiffs-Respondents (collectively “Plaintiffs”) \$76,859 in post-judgment interest per year.

An appeal is proper under this Court’s supervisory jurisdiction. *See In re Estate of Shaw*, 256 S.W.3d 72, 77 (Mo. 2008). The *nunc pro tunc* orders are also appealable because they are “special order[s] after final judgment.” RSMo § 512.020(5); *see also Earhart v. A. O. Thompson Lumber Co.*, 140 S.W.2d 750, 754 (Mo. Ct. App. 1940); *State v. Woerner*, 294 S.W. 423, 425-26 (Mo. Ct. App. 1927).

Finally, this appeal follows an October 15, 2013 opinion from the court of appeals (WD75873), which affirmed the *nunc pro tunc* amendment at issue. The court of appeals denied Synergy’s application for transfer on November 26, 2013. On February 4, 2014, this Court granted Synergy’s application for transfer and now has jurisdiction pursuant to Rule 83.04 and Mo. Const. Art. V, § 10.

¹ Synergy cites the legal file (“LF”), transcript (“T”) and appendix items (“A”) by page number.

STATEMENT OF FACTS

This appeal asks whether a circuit court may amend, via a *nunc pro tunc* order, a final judgment and thereby award a plaintiff post-judgment interest in a tort action where there is no prior record of a request for interest or the applicable interest rate. Accordingly, a full recitation of the facts is unnecessary.²

On May 10, 2011, following a jury verdict that awarded Plaintiffs damages on their nuisance claims, the circuit judge entered its judgment. A:1-13; LF:34-46. The judgment does not award post-judgment interest, nor does it state the applicable interest rate as prescribed in RSMo § 408.040. A:1-13; LF:34-46; *see also* A:20-21. The judgment was final no later than 90 days after Synergy filed its motion for new trial on June 9, 2011. LF:30; *see also* Rules 78.04, 78.06 and 81.05. Plaintiffs did not file a motion pursuant to Rule 78.07(c) challenging the form or language of the judgment, nor did they file any other timely post-trial motion. *See* LF:30-33.

After an appeal by Synergy, the court of appeals issued its June 26, 2012 opinion in *McGuire I*, which affirmed the judgment in part and reversed it in part. Plaintiffs did not cross-appeal. The error in the May 10, 2011 judgment was corrected on appeal without the need for remand. *See McGuire I*, 375 S.W.3d at 179. On September 27, 2012, after the court of appeals and this Court (SC92768) denied

² The facts that led to the May 10, 2011 final judgment were summarized by the court of appeals in *McGuire v. Kenoma, LLC*, WD74022, 375 S.W.3d 157 (Mo. Ct. App. 2012) (referred to herein as “*McGuire I*”).

Synergy's post-opinion motions in *McGuire I*, the court of appeals issued its mandate. *See* A:14; LF:47.

On October 2, 2012, Plaintiffs filed in the circuit court their Motion to Set Judgment Interest Rate and Affix Plaintiffs' Costs, which requested an amendment *nunc pro tunc* of the final judgment so they could receive post-judgment interest, at the rate of 5.09 percent on a principal sum of \$1,510,000, retroactive to May 10, 2011. LF:100-101. This motion was the first time that Plaintiffs had requested post-judgment interest in any pleading or motion, and the first time the circuit court was provided with the requested interest rate. *See* LF:1-33, 100-101.

Synergy submitted an opposition to Plaintiffs' motion on October 5, 2012. LF:104-110. The circuit court held a hearing on October 24, 2012, wherein it orally granted Plaintiffs' motion. TR:1-22. The oral ruling was followed by a docket entry summarizing the circuit court's decision. LF:33.³

On November 7, 2012, the circuit court entered its "Nunc Pro Tunc Journal Entry" purporting to retroactively amend the May 10, 2011 judgment and award Plaintiffs the interest they had requested. LF:126-128; A:15-17. Synergy filed a notice of appeal within ten days of the circuit court's ruling. LF:162-66. Subsequently, the circuit court purported to enter another judgment entitled "Journal

³ As part of the post-*McGuire I* proceedings, the circuit court determined the amount of Plaintiffs' recoverable costs. Synergy does not contest the circuit court's award of costs because costs were awarded in the May 10, 2011 judgment.

Entry of Nunc Pro Tunc and Judgment,” which was signed by the circuit judge and dated December 31, 2012. A:18-19; LF:129-30. The Journal Entry of Nunc Pro Tunc and Judgment followed a December 17, 2012 letter from the court of appeals that: (1) questioned the existence of a final, appealable judgment, and (2) questioned the propriety of the circuit court’s award of interest via a *nunc pro tunc* order.

The case proceeded to an appeal, with the court of appeals issuing its October 15, 2013 opinion (WD75873, hereafter “*McGuire II*”) that affirmed the *nunc pro tunc* ruling below. This Court accepted transfer post-opinion.

POINTS RELIED ON

- I. The circuit court erred in entering its November 7, 2012 and December 31, 2012 *nunc pro tunc* orders to retroactively amend its final judgment and award Plaintiffs post-judgment interest because a *nunc pro tunc* order may only be used to correct clerical errors in the recording of what was “actually done” in that no request or award of post-judgment interest was “actually done” until after the judgment below was final, which made the failure to award interest a substantive error, not a clerical error, that the circuit court had no jurisdiction to correct after its judgment became final.**

Pirtle v. Cook, 956 S.W.2d 235 (Mo. 1997);

City of Ferguson v. Nelson, 438 S.W.2d 249 (Mo. 1969);

State ex rel. State Highway Comm’n v. Galloway,

292 S.W.2d 904 (Mo. Ct. App. 1956); and

Rule 78.07(c).

ARGUMENT

POINT I: The circuit court erred in entering its November 7, 2012 and December 31, 2012 *nunc pro tunc* orders to retroactively amend its final judgment and award Plaintiffs post-judgment interest because a *nunc pro tunc* order may only be used to correct clerical errors in the recording of what was “actually done” in that no award or request of post-judgment interest was “actually done” until after the judgment below was final, which made the failure to award interest a substantive error, not a clerical error, that the circuit court had no jurisdiction to correct after its judgment became final.

A. Introduction

This appeal raises a single point with one core question: May a circuit court retroactively amend, via a purported *nunc pro tunc* order, a final judgment to award post-judgment interest on a tort damages award when there is no prior record of a request for interest or the applicable rate? The answer is “No” and is fully supported by settled Missouri law.

The *numerous* Missouri decisions involving the misuse of *nunc pro tunc* jurisdiction reveal persistent efforts by parties, lawyers and even judges to continue to litigate cases after they should be complete. However, for purposes of finality, there must be a point in time—a song from a certain proverbial singer—when the dispute is finally over. Here, that final note was sung in the circuit court no later than September 7, 2011, which was 90 days after the filing of Synergy’s motion for new trial. At that

point, the circuit court lost its jurisdiction to make substantive changes to its *final* judgment. The court of appeals then obtained jurisdiction, but it, too, surrendered its power to make substantive changes when it issued its mandate in *McGuire I*, and thus proclaimed the end of the dispute. The only continuing jurisdiction was the circuit court's power of *nunc pro tunc*, which was strictly limited to making *clerical* corrections based on a record *previously* made. Only through the circuit court's misuse of this power was the band allowed to play on.

This Court has held that the powers of *nunc pro tunc* threaten the finality of judgments, which is why those powers are strictly limited. *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. 1997). After a scholarly and historical analysis, *Pirtle* succinctly stated that the “*only true function* of a *nunc pro tunc* order is to correct some error or inadvertence in the recording of that which was *actually done*, but which, because of that error or omission was not properly recorded[.]” *Id.* (emphasis added; quoting *City of Ferguson v. Nelson*, 438 S.W.2d 249 (Mo. 1969)). In fact, “*no principle is more firmly established in* [Missouri] than that, after a judgment has become final, an order of correction *nunc pro tunc* cannot be made unless it is supported by and based on some entry, minute or notation in the record, or some paper on file in the case.” *In re Marriage of Rea*, 773 S.W.2d 230, 232 (Mo. Ct. App. 1989) (internal quotations omitted).

Here, there was not a single note or record of post-judgment interest until *after* the judgment became final, and *after* the first appellate process had ended. As such, there was no basis for the circuit court's exercise of its *nunc pro tunc* powers.

Nevertheless, the circuit court accepted Plaintiffs' argument that a statute—the post-judgment interest provisions in RSMo § 408.040—mandated a “correction” of language in the final judgment so that Plaintiffs could recover \$77,000 in post-judgment interest per year.

But this Court has already held that allegedly “mandatory” statutes provide no basis for exercising the powers of *nunc pro tunc* unless a pre-existing record supports the requested correction. *See City of Ferguson*, 438 S.W.2d at 254. Moreover, this Court attempted to rid Missouri courts of belated challenges to the form or language of *final* judgments when, in 2005, it adopted Rule 78.07(c). Significantly, the core, older cases relied on by the court of appeals (in *McGuire II*) to affirm the *nunc pro tunc* rulings below all *pre-date* the 2005 amendment of Rule 78.07(c) and are inconsistent with this Court's more recent decision in *Pirtle*.

While the rules of *nunc pro tunc* are abundantly clear and solidly settled, they did not stop the circuit court from amending its judgment. Nor did these rules prevent the court of appeals (in its now-vacated *McGuire II* opinion) from affirming the amendment based on a superseded “presumed error” rule. As a result, Synergy requests that this Court use its inherent supervisory jurisdiction to instruct the circuit court that it had no authority to modify a *final* judgment via an order *nunc pro tunc*, and to reiterate that *nunc pro tunc* powers are strictly limited to *clerical* corrections based on a record *previously* made. Finally, this Court should declare that that the “presumed error” cases relied on by the court of appeals should no longer be followed after this Court's opinion in *Pirtle* and its amendment of Rule 78.07(c) in 2005.

B. Standard of Review

Review is limited to: (1) whether the circuit court amended its judgment, which is improper and in excess of the circuit court's jurisdiction; or (2) whether it merely corrected a clerical mistake or omission in its judgment so that the corrected judgment accurately recorded what was "actually done." *See, e.g., Pirtle*, 956 S.W.2d at 241 (Mo. 1997); *Metropolitan St. Louis Sewer Dist. v. St. Ann Plaza, Inc.*, 371 S.W.3d 40, 48-49 (Mo. Ct. App. 2012). In reviewing the ruling below, a "presumption exists that there are no clerical errors in judgments." *Pirtle*, 956 S.W.2d at 243. Accordingly, Plaintiffs, as the party seeking affirmance of a *nunc pro tunc* order, have the burden of proving "that a record sufficient to support a corrective entry [is] evidenced by some entry in the judge's minutes, the clerk's entries, or some other paper in the case showing facts which authorize a correction [to the language of the judgment]." *Pfeifer v. Pfeifer*, 788 S.W.2d 780, 781 (Mo. Ct. App. 1990). "Without such a showing the Nunc Pro Tunc Order is invalid." *Id.*

Finally, review must be conducted within the narrow confines of *nunc pro tunc* jurisdiction: "In cases where the trial court has exceeded its authority in entering an order or judgment, [an appellate court] cannot consider the merits of the appeal, but [it has] the jurisdiction to confine a trial court to its authority." *Bureaus Inv. Grp. v. Williams*, 310 S.W.3d 297, 300 (Mo. Ct. App. 2010) (citing *In re Estate of Shaw*, 256 S.W.3d at 73).

C. Principal Argument

1. Procedural history and application of RSMo § 408.040.

Plaintiffs recovered \$1,510,000 in damages on their nuisance claims. Because Plaintiffs' claim was in tort, the post-judgment interest provisions in RSMo § 408.040.2 presumably applied to the damage award. RSMo § 408.040.2; A:20-21. The circuit court's May 10, 2011 judgment nowhere mentions post-judgment interest or the applicable interest rate. A:1-13; LF:34-46. Despite this omission, which could have entitled Plaintiffs to nearly \$77,000 in interest per year,⁴ Plaintiffs never requested interest in any timely post-trial motion, nor did they attempt to appeal the circuit court's failure to award them interest. Instead, Plaintiffs waited until the appellate process had concluded before moving the circuit court to amend its judgment via the *nunc pro tunc* procedures set forth in Rule 74.06(a).

From a factual standpoint, this Court's task is remarkably straightforward because there is no record in the Legal File that would support the purported "clerical" correction at issue. Plaintiffs have also stipulated that the abbreviated Legal File contains the "relevant pleadings and other portions of the trial and appellate record previously reduced to written form[.]" *See* Stipulation for the Record on Appeal (immediately following LF:185). Thus, Plaintiffs concede that no pleading or record relating to post-judgment interest existed until roughly a year *after* the judgment below

⁴ Applying simple interest at 5.09 percent on a principal sum of \$1,510,000 amounts to \$76,859 per year.

was final, and after the first appellate process had ended. *See* Statement of Facts, *supra*.

From a legal standpoint, this Court’s task is guided by the *numerous* decisions that repeatedly define the proper and *only* function of the powers of *nunc pro tunc*. Synergy sets forth below: (1) the Missouri law defining the limits on a circuit court’s substantive jurisdiction; (2) the Missouri law defining the scope of *nunc pro tunc* powers; and (3) the specific Missouri cases that have rejected attempts to award post-judgment interest via the use of *nunc pro tunc* powers.

2. A circuit court has limited jurisdiction following a final judgment.

Once the May 10, 2011 judgment became final, the circuit court lost jurisdiction to amend it. *State ex rel. Abdullah v. Roldan*, 207 S.W.3d 642, 646-47 (Mo. Ct. App. 2006). This is because a final judgment “resolves all issues in a case, leaving nothing for future determination.” *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. 1997) (emphasis added). Missouri law imposes tight controls on a circuit court’s ability to amend its judgment “[b]ecause a court’s power to change its judgment threatens the finality of the judgment and, consequently, slows the litigation process[.]” *Pirtle*, 956 S.W.2d at 240.

The rules for final judgments dovetail with jurisdictional rules relating to the notice of appeal and the appellate mandate. For example, a circuit court loses “almost all” jurisdiction after the filing of a notice of appeal. *Huber ex rel. Boothe v. Huber*, 204 S.W.3d 364, 368 (Mo. Ct. App. 2006). “The remaining jurisdiction of a trial court is sharply constrained, with few exceptions.” *Id.* (internal quotations omitted). In

addition, when an appellate court issues its mandate, limited jurisdiction is re-vested in the lower court so that it may perform the acts directed by the mandate. *Id.*; *see also Pope v. Ray*, 298 S.W.3d 53, 57 (Mo. Ct. App. 2009) (“the scope of the trial court’s jurisdiction is defined by the appellate court’s mandate”). Notably, the court of appeals’ mandate in *McGuire I* contained no instructions to the circuit court regarding the award of interest. A:14; LF:47.

In short, when the May 10, 2011 judgment became final, the circuit court lost its authority to make any substantive changes to that judgment. The only permissible changes to the judgment were those permitted under the powers of *nunc pro tunc*, which Synergy discusses next.

3. *Nunc pro tunc* powers may only be used to correct errors in the recording of what was “actually done.”

There is a sharp distinction between: (1) a circuit court’s jurisdiction to amend its judgment, which expires once a judgment is final; and (2) a circuit court’s jurisdiction *over its records*, which is also known as the power of *nunc pro tunc*. *Pirtle*, 956 S.W.2d at 240. “The court’s power over its records ... exists so that the court can cause its records to represent accurately what *occurred previously*.” *Id.* (emphasis added). “The correction of the record can be made at any time regardless of whether the court has jurisdiction over its cause.” *Id.* However, the power of *nunc pro tunc* is “no more than the power to make the record conform to the judgment *already rendered*; it cannot change the judgment itself.” *Id.* (emphasis added).

Missouri law uniformly holds that the proper use of a *nunc pro tunc* order is limited to correcting mistakes or omissions in the court’s record that result from a *clerical*, rather than a *legal*, error in the recording of what was “actually done.”

It is universally held that the only true function of a *nunc pro tunc* order is to correct some error or inadvertence in the recording of that which was *actually done*, but which, because of that error or omission *was not properly recorded*; and, that it may not be used to order that which was *not* actually done, or to change or modify the action which was taken. In other words, it is intended to correct *a scrivener’s error* or some other error in *properly recording what the judge actually did*—it is *not permitted to be used to change a judgment that actually was entered but was entered erroneously*.

State ex rel. Poucher v. Vincent, 258 S.W.3d 62, 65 (Mo. 2008) (internal citations, quotations omitted; emphasis added). This Court recently repeated the same rule in *Soehlke v. Soehlke*, 398 S.W.3d 10, 22 (Mo. 2013) (citing *Pirtle*, 956 S.W.2d at 240, which was quoting *City of Ferguson v. Nelson*, 438 S.W.2d at 253 (Mo. 1969)).

In short, for at least 44 years—from *City of Ferguson* in 1969 to *Soehlke* in 2013—this Court has “universally held” that a *nunc pro tunc* order is strictly limited to correcting clerical errors in recording what was “actually done” by a court. As argued in Synergy’s application for transfer, the court of appeals never mentioned the “actually done” test in its opinion. Had it applied this test, the opinion would have necessarily been different because it is undisputed that neither Plaintiffs’ request for

interest, nor any assertion by them of the applicable interest rate, was “actually done” until more than a year after the May 10, 2011 judgment was final. Thus, the purported *nunc pro tunc* amendment here must be vacated because it was impermissibly “used to order that which was *not* actually done” and “to change or modify the action which was taken.” *Pirtle*, 956 S.W.2d at 240. Simply put, “the court purported to enter orders after it had lost the ability to do so. As such, those orders are invalid.” *In re Estate of Shaw*, 256 S.W.3d at 77 (remanding with directions to vacate invalid orders).

4. Missouri courts have specifically rejected the use of a *nunc pro tunc* order to award interest on a judgment.

In addition to the general rules of *nunc pro tunc* discussed above, Missouri courts have specifically held that a *nunc pro tunc* amendment may not be used to correct a judicial error in failing to award interest to a prevailing party.

First, in *Arkansas-Missouri Power Co. v. Hamlin*, 288 S.W.2d 14, 20 (Mo. Ct. App. 1956), the circuit court’s judgment awarded the condemnee-landowner net damages of \$12,400, which was the difference between the original award by the commissioners and the damages award by the jury. The circuit court’s judgment did not, however, award the landowner any interest on the damages. The court of appeals held that the failure to award interest was not an error that the circuit court had authority to correct via a *nunc pro tunc* order.

[T]he [circuit] court quite properly *could* have entered judgment for the amount of the interest, and had his attention been called to it *should* have entered such judgment. It seems more probable to us that the failure to

enter judgment for interest was either judicial error or simply an oversight, neither of which is the subject of correction by judgment nunc pro tunc. * * * The failure to add interest was not an error in calculation, it was a failure to *make* the calculation and addition; and so it would seem that the judgment entry so written and now sought to be amended was not only the judgment actually entered but was also the judgment which the court intended to enter. Such being the case, it is not susceptible of amendment nunc pro tunc and the court was not in error for refusing to make the amendment. For this reason we believe the judgment must be affirmed, and it so ordered.

Id. at 20 (emphasis in original).

Similarly, in *State ex rel. State Highway Commission v. Galloway*, 292 S.W.2d 904, 912 (Mo. Ct. App. 1956), the court of appeals found that landowners in a condemnation were entitled to interest on their damages award, but held that the circuit court erred when it amended its final judgment, via a *nunc pro tunc* order, to award interest. The court of appeals instructed that the proper time to seek interest on a damages award is by motion *before* the judgment becomes final and appealable.

Id. at 912.

Under the procedure in Missouri the *only method* that could be followed in allowing interest for delayed payment of the award ... would be to allow the court, upon motion of [the landowners] and *within the time the court is empowered to act*, to amend the judgment by adding to the

amount of the award of the jury such interest or to amend the verdict of the jury so as to allow interest on the amount so found at the legal rate. This was not done by [the landowners] and it is the judgment of this court that, while [the landowners] were legally entitled to interest as prayed for in their motion and as awarded by the trial court, *they waived that right by not presenting it to the trial court in proper time.*

Id. (emphasis added).

Hamlin and *Galloway* are just two examples of settled and longstanding Missouri law that *nunc pro tunc* orders may not be used to amend a judgment to award interest on damages. See, e.g., *Evans v. Fisher*, 26 Mo. App. 541, 548 (1887) (*nunc pro tunc* cannot be used to correct *erroneous judgment that failed to include statutorily-required post-judgment interest*); accord *Van Noy v. Huston*, 448 S.W.2d 622, 625 (Mo. Ct. App. 1969) (“[j]udicial errors in awarding or withholding prejudgment interest, are like other judicial errors which are not amendable by *nunc pro tunc* entries.”) (collecting cases). Thus, the circuit court’s rulings below not only violated the general rules defining *nunc pro tunc* powers, they also violated Missouri case law specifically precluding the use of *nunc pro tunc* powers to award interest.

5. Plaintiffs’ failure to timely request interest.

If Plaintiffs desired interest, or believed the circuit court erred in failing to award them interest or in applying the interest statute, they had ample opportunity to raise these issues *before* the May 10, 2011 judgment became final or in a timely appeal. For example, within the 30-day period after judgment was entered, Plaintiffs

could have filed a motion requesting the interest that was “allowed” to them under RSMo § 408.040. If they believed the judgment was erroneous, Plaintiffs could have also timely filed a motion to modify or amend the judgment pursuant to Rule 75.01. Alternatively, Plaintiffs could have filed, and were actually *required* to file, a Rule 78.07(c) motion raising the circuit court’s omission of a statutorily-required finding in its judgment. Plaintiffs filed no such motions.

By not filing a timely post-trial motion, Plaintiffs would have been barred by Rule 78.07(c) from cross-appealing in *McGuire I* the circuit court’s failure to include interest language in its judgment, as prescribed by RSMo § 408.040.2. But even without a timely post-trial motion, Plaintiffs could have attempted to cross-appeal the judgment for its plain error⁵ in failing to award interest. *See City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 629 (Mo. Ct. App. 2009) (granting plain error review and remanding case after circuit court’s judgment failed to state proper post-judgment interest rate under RSMo § 408.040). Plaintiffs filed no such appeal.

Missouri law permitted the circuit court to amend its *records* to reflect actions *previously* and “actually done,” but mistakenly omitted in the recording of the judgment. *See Pirtle*, 956 S.W.2d at 240. However, the circuit court had no authority to amend its *judgment* and thereby award Plaintiffs the *substantive* relief they belatedly

⁵This theoretical plain error challenge would have been untenable without any evidence of the applicable interest rate. *See* Section C (3), *infra*.

requested, especially when the interest issue was never raised at any time *before* the judgment became final. *Galloway*, 292 S.W.2d at 912 (“while respondents were legally entitled to interest as prayed for in their motion and as awarded by the trial court, they waived that right by not presenting it to the trial court in proper time.”).

Simply put, Plaintiffs cannot carry their burden of establishing that the circuit court’s *nunc pro tunc* orders were proper because there is no prior record to support any alleged *clerical* mistake in the recording of the judgment. A *nunc pro tunc* procedure “does not authorize the entry of an order which ought to have been made, but only those which were actually made, the evidence of which is preserved by some minute made or paper filed at the time.” *Gordon v. Gordon*, 390 S.W.2d 583, 586 (Mo. Ct. App. 1965) (quoting *Williams v. Walton*, 84 Mo. Ct. App. 433, 441 (1900)).

Furthermore, Missouri law permits a circuit court to enter a *nunc pro tunc* order at any time. *See Pirtle*, 956 S.W.2d at 241. Perpetual authority to award interest without a pre-existing record would result in uncertainty and thereby defeat the purpose of a *final* judgment, because the exact amount required to satisfy judgment would always be subject to change or dispute. It should be noted that Synergy has already paid to Plaintiffs the principal sum of the damage award and their costs. It has thus satisfied the original May 10, 2011 judgment, but cannot receive a satisfaction of the purported amended version of that judgment because of the dispute over the propriety of post-judgment interest. The circuit court’s purported *nunc pro tunc* orders are invalid and must be vacated.

D. Improper Attempts to Broaden or Evade the Limited Confines of *Nunc Pro Tunc* Jurisdiction.

As noted in the Introduction, the rules of *nunc pro tunc* could be the most clearly defined in Missouri law. See *In re Marriage of Rea*, 773 S.W.2d at 232. Nonetheless, Plaintiffs (and the court of appeals in *McGuire II*) attempted to end-run well-settled rules by arguing (and holding) that RSMo § 408.040.2 is a “mandatory” statute requiring the circuit court to conform its judgment to legislative demands. The attempt to expand *nunc pro tunc* powers fails because: (1) the circuit court’s omission of “mandatory” language from its judgment was a judicial error—not a clerical error; (2) Rule 78.07(c) does not permit untimely challenges to the form or language of a judgment; and (3) the circuit court’s amendment required it to act in a judicial, rather than a clerical, capacity, which is a forbidden use of *nunc pro tunc* power.

1. The failure to include “mandatory” language in the judgment was a judicial error, not a clerical error.

Section 408.040.2 purports to dictate the form or language of a judgment by stating that “[t]he judgment shall state the applicable interest rate, which shall not vary once entered.” Plaintiffs argued in the circuit court and court of appeals that this “mandatory” language required the *nunc pro tunc* orders at issue. The court of appeals accepted this argument in *McGuire II* by holding that the “failure of a court’s judgment to conform to a statute is an omission that may be properly corrected by a

nunc pro tunc order.” Slip Op. at 5 (emphasis added).⁶ This conclusion cannot be reconciled with this Court’s holding in *City of Ferguson*, 438 S.W.2d at 255.

In *City of Ferguson*, the circuit court’s judgments imposed fines against defendants who were guilty of violating a city ordinance, but the judgments did not contain any language regarding imprisonment. On appeal, the City argued that a *nunc pro tunc* amendment of the judgments was *required* because a statute made imprisonment a *mandatory* element of the judgments. *Id.* at 254. This Court rejected the City’s argument because, even if the statute *required* imprisonment as an element of the judgments, “the failure of the [circuit] court to include a provision for imprisonment in the judgments would be *mere error, which is not to be corrected by nunc pro tunc proceedings.*” *Id.* at 255 (emphasis added). Notably, the *McGuire II* opinion nowhere mentioned *City of Ferguson*, which has been repeatedly cited with approval by this Court. *See, e.g., Soehlke*, 398 S.W.3d at 22; *Vincent*, 258 S.W.3d at 65; *Pirtle*, 956 S.W.2d at 240.

⁶ The rationale in *McGuire II* would surrender judicial authority to the legislative branch by permitting the latter to compel the alteration of judicial records and dictate the content of judgments in violation of the separation of powers doctrine. *See* Mo. Const. Art. II, § 1; *see also Chastain v. Chastain*, 932 S.W.2d 396, 399 (Mo. 1996) (holding that it is the function of the judicial branch to “decide issues and *pronounce and enforce judgments*”) (emphasis added).

Moreover, the application of a statute—even if merely to perform mathematical calculations—is an act requiring *judicial discretion*, which cannot be exercised under the *nunc pro tunc* powers. For example, in *Sullivan v. Miner*, 180 S.W.3d 531 (Mo. Ct. App. 2006), the court of appeals rejected a circuit court’s use of the *nunc pro tunc* powers to modify a mandatory Form 14 calculation in determining the amount of child support. Specifically, in *Sullivan*, the circuit court had previously ordered the father to pay \$745 per month in child support to the mother. *Id.* at 532. Four years later, the mother filed a motion seeking a *nunc pro tunc* increase in the amount of child support award on the grounds that the original judgment contained mathematical errors in its Form 14 calculations. *Id.* The circuit court granted the motion and, after fixing the math error in Form 14, awarded the mother \$1,065 per month in child support. *Id.*

The court of appeals, after finding no record to support the circuit court’s amendment, vacated the *nunc pro tunc* order. *Id.* at 534. Significantly, the court held that the circuit court’s correction of this mathematical error resulted in a substantive change:

The court awarded mother \$745.00 per month in child support. The court’s award of child support was the result of the *exercise of its discretion*, regardless of any *potential mathematical error*. This amount cannot properly be corrected by a *nunc pro tunc* order because it constitutes a change to the original judgment.

Id. (emphasis added).⁷

Thus, *Sullivan*, like *City of Ferguson*, holds that a circuit court’s failure to properly apply a “mandatory” rule or statute—even when the application involves only basic math—is an act of judicial discretion that is outside the scope of a court’s *nunc pro tunc* jurisdiction. Here, the circuit court’s alleged failure to apply the “mandatory” language of RSMo § 408.040 was a judicial error—not a clerical error—and thus could *not* be corrected via the powers of *nunc pro tunc*.

2. Rule 78.07(c) does not permit untimely challenges to the form or language of a judgment.

In *McGuire II*, the court of appeals held that the failure of a judgment to conform to the mandates of a statute is a *presumed* clerical error that may be properly corrected at any time by a *nunc pro tunc* order. Slip Op. at 5-6. In support of this holding, the court of appeals relied on five opinions: (1) *State ex rel. Mo. Highway & Transp. Comm’n v. Roth*, 735 S.W.2d 19 (Mo. Ct. App. 1987); (2) *Korman v. Lefholz*, 890 S.W.2d 771 (Mo. Ct. App. 1995); (3) *In re Marriage of Ray*, 820 S.W.2d 341 (Mo. Ct. App. 1991); (4) *Newberry v. State*, 812 S.W.2d 210 (Mo. Ct. App. 1991); and (5) *Hassler v. State*, 789 S.W.2d 132 (Mo. Ct. App. 1990). The court of appeals’ reliance on these opinions was wholly misplaced because they have been superseded by Rule 78.07(c) and implicitly overruled by subsequent decisions from this Court.

⁷ The improper “substantive” change in *Sullivan* amounted to a meager \$320 per month. In comparison, Plaintiffs seek to recover \$76,859 in interest per year.

First, these five opinions all *pre-date* this Court's 1997 decision in *Pirtle*. As a result, the holding in *McGuire II* (and the decisions it relied on) that a judgment may be *presumed* to contain clerical errors clashes with the following precedent from this Court:

In Missouri, the determination of whether an order corrects the record or amends the judgment is not made on a level playing field. A *presumption exists that there are no clerical errors in judgments*. If the presumption is not rebutted, then any order that changes the record is *presumed to change the judgment* as well.

Pirtle, 956 S.W.2d at 243 (emphasis added; internal citation omitted). In other words, final judgments are *presumed to be accurate* and amendments thereto are *presumed to be improper*.

Second, after this Court's adoption of Rule 78.07(c) in 2005, Missouri courts can no longer presume that a judgment is erroneous because "of error relating to the form or language of the judgment, including the failure to make statutorily required findings[.]" Rule 78.07(c). Instead, such allegations of error "must be raised in a motion to amend the judgment in order to be preserved for appellate review." *Id.* At least one Missouri court has recognized that the Rule 78.07(c) amendment "was intended to reduce and discourage appeals and subsequent technical reversals for errors in the form of judgments that could easily be corrected by bringing them to the attention of the trial judge." *Wilson-Trice v. Trice*, 191 S.W.3d 70, 72 (Mo. Ct. App. 2006).

Moreover, the “presumed error” discussed in *McGuire II* and the pre-2005 decisions in *Roth*, *Korman*, *In re Marriage of Ray*, *Newberry*, and *Hassler*, cannot be squared with case law applying Rule 78.07(c). For example, RSMo § 452.375.6, like RSMo § 408.040, prescribes the contents of a judgment by stating that a “court shall include a written finding in the judgment” outlining the particular factors that make a custody arrangement in the best interests of a child. However, an alleged failure to include mandatory language in a judgment *must* be raised in a timely post-trial motion—non-compliance with this rule results in a waiver of challenges to the form or language of the judgment. *See, e.g., In re Marriage of Wood*, 262 S.W.3d 267, 276 (Mo. Ct. App. 2008); *see also Gerlt v. State*, 339 S.W.3d 578, 584 (Mo. Ct. App. 2011) (alleged failure by court to include findings of fact and conclusions of law mandated by rule and statute was waived because the alleged error was not raised in a timely post-trial motion).

In short, if Plaintiffs believe the circuit court’s judgment improperly omitted statutorily-required language, then they should have timely filed a Rule 78.07(c) motion. There is no question that Plaintiffs filed no such motion. Instead, Plaintiffs asked the circuit court to end-run Rule 78.07(c) by granting a *nunc pro tunc* amendment based on a “mandatory” statute. This Court should not approve of the circuit court’s ruling below, which rewarded Plaintiffs’ disregard of Rule 78.07(c) with a second bite at the apple via the powers of *nunc pro tunc*.

3. **The circuit court’s amendment was the result of it acting in a judicial, rather than a clerical, capacity, which is a forbidden use of *nunc pro tunc* jurisdiction.**

In *Pirtle*, this Court held that a *nunc pro tunc* amendment cannot be used to “correct anything that resulted from the exercise of judicial discretion because any such change constitutes a change in the court’s judgment.” 956 S.W.2d at 243. Likewise, the powers of *nunc pro tunc* also cannot be used to make a “substantive change” to the judgment. *Id.* In other words, the powers of *nunc pro tunc* only permit a judge to act as a clerk—the judge has no power to act as a judge. Nevertheless, the circuit judge here went far beyond mere clerical duties—he entertained briefing, held a hearing, applied a statute, accepted facts under the doctrine of judicial notice, made a new record, entered a *new* judgment to reflect the *new* record, and then retroactively penalized Synergy with more than \$77,000 in interest per year. These acts were not a proper use of *nunc pro tunc* powers.

First, timely raising the post-judgment interest issue was necessary because a court needs *evidence* to determine the intended federal funds rate for the particular date a judgment was entered. RSMo § 408.040; A:20-21. Specifically, § 408.040.2 states that post-judgment interest in tort actions is “a per annum interest rate equal to the *intended* Federal Funds Rate, as established by the Federal Reserve Board, plus five percent[.]” (emphasis added). However, the *intended* federal funds rate has been a

range of 0 to 0.25 percent since December 16, 2008.⁸ As a result, the determination of the applicable rate *within that range* requires the judge to exercise a *judicial* function.

Notably, the court of appeals did not apply the “intended” federal funds rate in *McGuire II*. It instead held the interest rate should be based on the “effective” funds rate. *See* Slip Op. at 8 n.5.⁹ But the effective and intended federal funds rates *are not the same*. It is possible that the General Assembly, when it adopted RSMo § 408.040, overlooked that the “intended federal funds” rate would someday become a range of rates. It may also be proper for this Court, in a future case, to hold that using the “effective” funds rate is appropriate during times when the “intended” funds rate is a range. However, the powers of *nunc pro tunc* did not permit the circuit court (or the court of appeals) to interpret language in § 408.040.2 and hold that the “effective Federal Funds Rate” is a valid substitute for “intended Federal Funds Rate.” Such an interpretation can only come about via a substantive judicial act, which is not a permitted use of *nunc pro tunc* powers.¹⁰

⁸ <http://www.federalreserve.gov/monetarypolicy/openmarket.htm>.

⁹ *McGuire II* relied on a daily report from the Board of Governors of the Federal Reserve System. <http://www.federalreserve.gov/releases/h15/update/default.htm>. This report provides the “effective federal funds rate” based on a “weighted average of rates on brokered trades.” (see webpage at footnote 1).

¹⁰ By engaging in statutory construction, the court of appeals exceeded the limits of its jurisdiction by considering the merits of the appeal rather than solely determining

Second, Synergy’s counsel was willing to avoid a dispute about fluctuations of interest rates within the “range” of the intended federal funds rate by agreeing that “*had* the Court ordered interest at the time that the judgment was made final, then the applicable interest rate *would have been* 5.09 [percent.]” TR:8:11-14 (emphasis added). But since there was no evidence of the intended or effective federal funds rate, the circuit court necessarily took judicial notice of the 5.09 percent interest rate. This was improper because a court’s acceptance of a fact by use of judicial notice requires the exercise of judicial discretion, which *Pirtle* held was not within the scope of *nunc pro tunc* powers. *See State v. Kelly*, 539 S.W.2d 106, 110 (Mo. 1976) (the doctrine of judicial notice “must be tempered by judicial discretion, the Court not being bound to take judicial notice of matters of fact; and whether [it] will do so or not being dependent on the nature of the subject, the issue involved and the justice of the case”) (internal quotations omitted). As a result, the circuit court had no jurisdiction to engage in the *judicial* act of accepting 5.09 percent as the applicable rate.

Third, the circuit court’s amended judgment was improper because the award of post-judgment interest resulted in a substantive change. For example, in upholding Plaintiffs’ receipt of post-judgment interest, the *McGuire II* opinion cited *Lindquist v. Mid-Am. Orthopaedic Surgery, Inc.*, 325 S.W.3d 461, 465 (Mo. Ct. App. 2010) to

whether the circuit court’s actions fell within the confines of its limited *nunc pro tunc* jurisdiction. *Bureaus Inv. Group*, 310 S.W.3d at 300; *see also In re Estate of Shaw*, 256 S.W.3d at 73.

promote the policy that “[i]t is almost an axiom of American jurisprudence that he who has the use of another’s money, or money he ought to pay, should pay interest on it.” Slip Op. at 4. However, the *Lindquist* opinion also held that post-judgment interest “is a penalty for delayed payment of the judgment.” 325 S.W.3d at 465 (emphasis added). This Court has held that penalties are a matter of *substantive* law, and therefore *may not be imposed* on a party via a *nunc pro tunc* order. See *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. 2007) (“Laws that provide for penalties where none existed before ... are substantive and ‘are always given only prospective application.’”). Accordingly, it is improper—if not unconstitutional¹¹—to use *nunc pro tunc* powers to amend a judgment and add a retroactive penalty against Synergy when no such penalty existed before.

CONCLUSION

Appellants Kenoma, LLC and Synergy, LLC request that this Court vacate the circuit court’s amended judgment awarding Plaintiffs post-judgment interest.

¹¹ Mo. Const. Art. I, § 13 (prohibiting ex post facto laws and laws retrospective in their operation).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. The brief includes the information required by Rule 55.03;
2. The brief complies with the limitations contained in Rule 84.06(b);
3. According to the word count function of counsel's word processing software (Microsoft® Word), the brief, excluding those portions as defined by Rule 84.06(b) contains 7,795 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 3, 2014, a copy of the foregoing Substitute Brief of Appellants, together with the Certificate of Compliance and this Certificate of Service, was served via the Court’s electronic filing system on the counsel of record below who have registered with Missouri’s electronic filing system:

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