

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 RESPONDENTS

Edward D. Robertson, Jr., # 27183
Mary Doerhoff Winter # 38328
Anthony L. DeWitt # 41612
BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454
(573) 659-4460 Fax

Charles F. Speer # 40713
Peter B. Bieri # 58061
Speer Law Firm, P.A.
104 West 9th Street, Suite 400
Kansas City, Missouri 64105
Telephone: (816) 472-3560
Telecopier: (816) 421-2150
cspeer@speerlawfirm.com
bbieri@speerlawfirm.com

ATTORNEYS FOR RESPONDENTS

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JURISDICTIONAL STATEMENT

Respondents disagreed with the Jurisdictional Statement of Appellants, before the Court of Appeals (see Western District Docket). This Court's jurisdiction is based on the Court's transfer of the underlying case and Respondents do not challenge this Court's assumption of jurisdiction. However, see Subsection M, *infra*, regarding the way in which Appellants secured jurisdiction in the Court of Appeals.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY APPLIED RULE 74.06(a) AS WRITTEN IN ENTERING ITS NOVEMBER 7, 2012, AND DECEMBER 31, 2012, ORDERS *NUNC PRO TUNC* BECAUSE THE TRIAL COURT PROPERLY APPLIED THE LANGUAGE OF THE RULE. THE TRIAL COURT RECOGNIZED IT COMMITTED A CLERICAL ERROR BY OMITTING THE INTEREST RATE REQUIRED BY STATUTE, AND CONFORMED THAT JUDGMENT TO THE STATUTE BY PROPER ORDER. THE TRIAL COURT DID NOT EXERCISE ANY JUDICIAL FUNCTION WHILE DOING SO SUCH THAT ITS ORDER WAS PROPER UNDER BOTH RULE 74.06(a) AS WELL AS UNDER THE COMMON LAW.

A. INTRODUCTION TO THE ARGUMENT

Appellants never mention the plain language of Rule 74.06(a) – they only mention the case law – and this underscores the issue in this case. At the heart of this case is the failure, by Missouri Courts since 1988, to properly address the changes in civil procedure that resulted from changing from a common-law-based standard for orders *nunc pro tunc* to a rule-based standard under Rule 74.06(a). Even modern cases continue to cite the common law rule instead of the plain language of Rule 74.06. Because the plain language of the Rule supports the actions of the trial court here, that should be the end of the inquiry. However, even under a common-law approach the trial court’s action was proper. The trial court merely corrected the record to conform the judgment to the

statutory mandate by including the interest rate that the statute required, and that had been omitted by judicial inadvertence. This action did not require the exercise of judicial discretion, and was in fact a ministerial act.

Appellants begin their discussion of orders *nunc pro tunc* at the back end, assessing the validity of orders by going back through case law that predates Rule 74.06(a). They recite the oft-used common law phrasing that an order must only correct “what was actually done.” App. Br. at 6. In so doing Appellants reject the plain language of Rule 74.06 in favor of a case-based phraseology that aids their argument at the expense of the plain language of the Rule. Respondents, on the other hand, start with an analysis of the text of Rule 74.06(a). Based on the language of the Rule, the requirements of the statute, and the absence of the use of judicial discretion, the order was correct.

The trial court had the right to correct by an order *nunc pro tunc* a clerical omission of the interest rate in its original entry because it was merely conforming the judgment to the statute. *State ex rel. Mo. Highway and Transp. Comm’n v. Roth*, 735 S.W.2d 19, 22 (Mo. App. W.D. 1987).

Appellants must agree that the trial court had this same power because Appellants, *ex parte*, also had the trial court judge issue the order *nunc pro tunc* on December 31, 2012¹ (the order appealed from) in an attempt to invoke the jurisdiction of the Western

¹ Appellants phrase this as “Subsequently, the circuit court *purported* to enter another judgment entitled “Journal Entry of Nunc Pro Tunc and Judgment...” App. Br.

District Court of Appeals. The order they obtained added the word “judgment,” which like the interest rate at issue here, had been omitted from the order.

Appellants frankly seem hung up on the fact that the Plaintiffs here did not request post-judgment interest phrasing their inquiry as: “May a circuit court retroactively amend....a final judgment When there is no prior record of a request for interest or the applicable rate?” App. Br. at 6. As this Court knows, if you ask the wrong question, you get the wrong answer.

This question is a red herring, because the statute, § 408.040 R.S.Mo. (2012) does not require any party make a request – it is automatic in operation. Both parties agree that the post-judgment interest provisions in § 408.040.2 should be applied to the damage award and agree that the appropriate interest computation is 5.09%. *See* TR:4 – 20-21; TR:8 – 11-14.

Appellants stood silent on the issue of post-judgment interest until they lost the appeal, and then simply refused to pay interest. Appellants do not show that the Court exercised any discretion in setting the statutorily-mandated interest rate. Appellants’ basic argument can be summarized as: “Ha ha! Gotcha!”

The *nunc pro tunc* orders in this case merely corrected the lower court’s omission of the applicable interest rate in its original judgment. In doing so it made reference to a

at 4. (emphasis added) Nowhere do Appellants mention that this second order – the one actually appealed from – was at their insistence.

statutory scheme that made the entry a simple ministerial duty and nothing more. Appellants' "gotcha" argument is unworthy of serious consideration. This is what the rule teaches.

Rule 74.06(a) provides a means for Courts to correct errors arising out of judicial oversight. § 408.040 R.S.Mo. (2012) requires that the statutory interest rate be included in every judgment, and that it not be altered once set. It speaks in mandatory language, not in terms of judicial discretion.

In the briefing that follows, Respondents illustrate the differences between the common-law understanding of orders *nunc pro tunc*, rooted firmly in the history of the court system of Missouri, and then show that the common law was altered by Missouri Supreme Court Rule 74.06(a). Applying the language of the rule, the Appellants' arguments all fail.

The briefing also demonstrates that Appellants rely only on the most outrageous of *nunc pro tunc* cases, and on none of the cases embracing a rule-based approach. Appellants invited the error in this case, and to the extent that their arguments are correct then they lack jurisdiction for this appeal. The brief concludes with argument that equity and justice require that this Court uphold the order *nunc pro tunc* as a proper application of the rule.

B. STANDARD OF REVIEW

a. *Standard of Review for Orders Nunc Pro Tunc*

Missouri case law does not provide a clear definition of how orders *nunc pro tunc* are reviewed at the appellate level. None of the sentinel cases on orders *nunc pro tunc*, including *Soehlke v. Soehlke*, 398 S.W.3d 10, 21-22 (Mo. banc 2013); *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. banc 1997); *Gordon v. Gordon*, 390 S.W.2d 583, 586–87 (Mo. App.1965); *Pfeifer v. Pfeifer*, 788 S.W.2d 780, 781 (Mo. App. 1990); *Lockett v. Musterman*, 854 S.W.2d 831 (Mo. App. 1993); *McMilian v. McMilian*, 215 S.W.3d 313, 319 (Mo. App. W.D. 2007); *City of Ferguson v. Nelson*, 438 S.W.2d 249, 253 (Mo. 1969); *Hyde v. Curling & Robertson*, 10 Mo. 359, 362–63 (1847); *Loring v. Groomer*, 110 Mo. 632, 639, 19 S.W. 950, 951 (1892); *Warren v. Drake*, 570 S.W.2d 803, 806 (Mo. App. 1978); or *Abbott v. Seamon*, 217 S.W.2d 580, 587 (Mo. App. 1949), ever spell out the appropriate standard of review as either *de novo*, abuse of discretion, or something else.

However, an analysis of the cases seems to indicate that the appellate court reviews the record of the trial court and the texts of the judgments and applies what is essentially a *de novo* standard of review to a mixed question of fact and law in the issues before it. A similar analytical framework as used in *Pirtle*, 956 S.W.2d 235, would be appropriate here, adjusting for the application of the plain language of Rule 74.06(a) rather than applying common law rules. The standard of review adopted by the Court of Appeals in this case is likewise proper.

b. Standard of Review for Statutory Interpretation

This Court reviews the interpretation of a statute *de novo* as a question of law. *In re Care and Treatment of Coffman*, 225 S.W.3d 439 (Mo. banc 2007). The plain language of the statute controls. § 1.010 R.S.Mo. (2012).

c. Standard of Review for Supreme Court Rules

Courts interpret Supreme Court Rules by applying principles similar to those used for state statutes. *State ex rel. Vee-Jay Contracting v. Neill*, 89 S.W.3d 470 (Mo. banc 2002) (citing *In re A.S.O. v. R.L.O.*, 75 S.W.3d 905, 910 (Mo. App. W.D. 2002)); *Hanks v. Rees*, 943 S.W.2d 1, 4 (Mo. App. S.D. 1997); *Engine Masters, Inc. v. Kirn's, Inc.*, 872 S.W.2d 644, 646 (Mo. App. E.D. 1994). This Court's intent is determined by considering the plain and ordinary meaning of the words in the Rule. *See Jones v. Director of Revenue*, 832 S.W.2d 516, 517 (Mo. banc 1992). The term "shall" is mandatory. *See Dreer v. Public School Retirement System of St. Louis*, 519 S.W.2d 290, 296 (Mo. banc 1975); *McKittrick v. Wymore*, 343 Mo. 98, 119 S.W.2d 941, 944 (1938).

C. RULE 74.06(a) & § 408.040 R.S.MO. (2012)

The power to enter a *nunc pro tunc* order was a common law power derived from a court's jurisdiction over its records. William Blackstone, 3 Commentaries * 407; *Pirtle*, 956 S.W.2d at 240. A court is considered to have continuing jurisdiction over its records. *Id.* This jurisdiction existed independently from the court's jurisdiction over its cause or its judgment. *Id.* This was why, at common law, a court was authorized to make *nunc*

pro tunc (now for then) orders. *Pirtle*, 956 S.W.2d at 240.

This common law power was changed and codified by the Supreme Court when it adopted Rule 74.06(a), in 1987 (effective January 1, 1988). From that point forward the plain language of the Rule, and not the prior common law, dictated the use of *nunc pro tunc*. This is because:

Missouri “did not adopt the English common law as a substantive statute but rather as decisional law” of which this Court is custodian, with authority to alter or abrogate a common law doctrine absent contrary statutory direction by our legislature.

Townsend v. Townsend, 708 S.W.2d 646, 649-50 (Mo. banc 1986) (rejecting interspousal immunity). This Court’s intent is determined by considering the plain and ordinary meaning of the words in the Rule. See *Jones v. Director of Revenue*, 832 S.W.2d 516, 517 (Mo. banc 1992). There has been no contrary statutory direction with regard to orders *nunc pro tunc*, thus this Court’s plain language set out in the rule is what controls.

a. The Plain Language of Rule 74.06(a)

- (a) Clerical Mistakes - Procedure. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

Rule 74.06(a).

The plain language of the rule provides that clerical mistakes and errors arising from omissions may be corrected by the Court through *nunc pro tunc*.² This Court interprets the intent of the rules from their plain language. *Vee-Jay Contracting*, 89 S.W.3d at 472. The rule does not require, by its plain language, that the *nunc pro tunc* order record “what was actually done,” and this is a creature of the case law written before the rule was amended that does not reflect the language of the rule.

Rather, the Rule provides a mechanism to correct omissions in judgments, so long as those omissions result from oversights. Although not stated in the rule, the common law requirement that the circuit court not exercise judicial discretion appears to be read into the rule even though not expressly stated.

b. The Plain Language of § 408.040 R.S.Mo. (2012)

The post-judgment interest statute provides in relevant part:

[I]n tort actions, interest shall be allowed on all money due upon any judgment or order of any court from the date of judgment is entered by the trial court until full satisfaction. All such judgments and orders for money

² It is worth noting that the rule does not speak in terms of *nunc pro tunc*, but rather, in terms of a court order issued under the Rule. Although not mentioning the Latin term as such, courts generally interpret orders entered under this rule as orders *nunc pro tunc*. See, e.g., *Soehlke v. Soehlke*, 398 S.W.3d 10, 21-22 (Mo. banc 2013); *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. banc 1997).

shall bear a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus five percent, until full satisfaction is made. The judgment shall state the applicable interest rate, which shall not vary once entered.

§ 408.040.2 R.S.Mo. (2012). The statute mandates that a circuit court enter the interest rate on the judgment. The statute does not assign to either party the duty to request interest: it is automatic.

D. THE HISTORY OF THE *NUNC PRO TUNC* ORDER

a. *The History of the Common Law Order*

In *DeKalb County v. Hixon*, 44 Mo. 341 (1869), the Supreme Court stated the historical jurisdictional basis for entering *nunc pro tunc* orders: “The court had lost its jurisdiction of the case, but not of its records. It had authority, as well after as before the appeal, to amend its records according to the truth, so that they should accurately express the history of the proceedings which actually occurred prior to the appeal.” *Id.* at 342.

An order *nunc pro tunc* at common law was a threat to the finality of judgments. *Pirtle*, 956 S.W.2d at 240. For that reason, it could not be used to correct the failure of a court to perform a discretionary act, because any such change constitutes a change in the court’s judgment. *Id.* If the error or omission is patent in the record, and if the correction does not hinge on the exercise of the Court’s discretion, then an order *nunc pro tunc* was considered proper. *Id.*

While the root of Rule 74.06(a) may well be the common law, the rule, and its

plain language, replaced and superseded the common law on January 1, 1988, when the rule took effect. Unfortunately, because this Court has routinely looked to the common law to determine the propriety of an order *nunc pro tunc*, rather than to the plain language of its Rule, cases tend to recite the language of the common law rather than the plain language of the rule in applying the rule. Just as this Court set the record straight on the use of the word “jurisdiction” in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), it should distill in this case a rule-based approach to orders *nunc pro tunc*.

The case that seems to be at the root of many of the misunderstandings about orders *nunc pro tunc* under Rule 74.06(a) is *City of Ferguson v. Nelson*, 438 S.W.2d 249, 253 (Mo. 1969). That case, decided under the common law and not under the language of the Rule, applied a much stricter common law understanding of the purposes of the rule than is evidenced by the broader language of Rule 74.06(a):

“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.”

Id. (emphasis added). At the time it was decided, *Ferguson* properly applied the common law. After the adoption of Rule 74.06(a), the plain language of the Rule, and not the common law should have controlled the disposition of cases. But because the cases since have all relied on *Ferguson* for this expression of how the rule works, they

have relied on the common law not the plain language of the rule and have thereby induced decisional error, resulting in a muddying of the way the plain language of the rule should be applied.

b. Reconciling the Common Law Interpretation with Rule 74.06(a)

This Court should have adopted and embraced the plain language of the Rule when it decided *Pirtle v. Cook*, 956 S.W.2d 235 (Mo. banc 1997). It did not. It continued, inexplicably, to apply the common law rather than the plain language of the Rule.

Pirtle, like *In re Marriage of Royall*, 569 S.W.2d 369, 371 (Mo. App. 1978), before it, dealt with a typing error in a decree of dissolution. The original decree was entered on September 10, 1984, and corrected by *nunc pro tunc* on September 24, 1984, within the 30 days that the Court had jurisdiction over the decree. A motion to revive the judgment was filed on September 22, 1994. The issue was whether the original date of the judgment or the date of the amended judgment controlled for purposes of revival of judgment.

Because the correction was made without notice and opportunity for hearing under Rule 75.01, this Court held that the order was entered under Rule 74.06(a) and not under Rule 75.01 and the revival was untimely. In reaching that result Judge Covington, the author of the opinion, reviewed the historical use of orders *nunc pro tunc*.

Pirtle undertakes this history lesson by revisiting the use of “terms of court.” During the earliest years of the state courts sat in terms. Cases were not considered

finally decided until the end of the term. As a result the trial court's judgment could be changed at any time during the term. When terms were eliminated the rules changed:

When terms of court were abolished in Missouri, the court's power over its judgments was embodied in statutes and supreme court rules that authorized the trial court to retain jurisdiction over its judgment for a limited period. *See Wooten*, 355 Mo. at 763, 198 S.W.2d at 5. These statutes and rules were eventually combined into Rule 75.01. Comment, *Procedure—Setting Aside Final Judgments in Missouri*, 28 Mo. L. Rev. 281, 281 (1963).

Pirtle, 956 S.W.2d 240. The case analyzes the different history of orders *nunc pro tunc*, without noting that after 1988 the rules of decision were being supplied by Rule 74.06 rather than the common law. *Pirtle* said in relevant part:

Nunc pro tunc orders have a different history. The power to enter a *nunc pro tunc* order is a common law power derived from a court's jurisdiction over its records. William Blackstone, 3 Commentaries * 407. A court is considered to have continuing jurisdiction over its records. This jurisdiction exists independently from the court's jurisdiction over its cause or its judgment. In *DeKalb County v. Hixon*, 44 Mo. 341 (1869), this Court discussed the jurisdictional basis for entering *nunc pro tunc* orders: "The court had lost its jurisdiction of the case, but not of its records. It had authority, as well after as before the appeal, to amend its records according

to the truth, so that they should accurately express the history of the proceedings which actually occurred prior to the appeal.” *Id.* at 342.

The court’s power over its records, therefore, exists so that the court can cause its records to represent accurately what occurred previously. This power is one to enter *nunc pro tunc* (now for then) an accurate record entry of a judgment previously rendered. “No question can exist as to the power of the [c]ourt to make *nunc pro tunc* entries, for the furtherance of justice, and thus to place on the records the action of the [c]ourt, had on a former day of the term, or at a previous term, and which the clerk had omitted to enter at the time.” *Hyde v. Curling & Robertson*, 10 Mo. 359, 362–63 (1847).

The correction of the record can be made at any time regardless of whether the court has jurisdiction over its cause. *DeKalb County*, 44 Mo. at 342. “The power ... to correct clerical mistakes and misprisions is of daily occurrence, and it seems that no limit in point of time has ever been placed upon its exercise....” *Loring v. Groomer*, 110 Mo. 632, 639, 19 S.W. 950, 951 (1892). “During the progress of a cause and before final judgment, or after final judgment during the same term, *nunc pro tunc* entries may be made in furtherance of justice to conform the entries to the truth.” *Saxton v. Smith*, 50 Mo. 490, 491 (1872). “That a court has a right, at a term subsequent to one at which a judgment is rendered, to correct by an order

nunc pro tunc, a clerical error or omission in the original entry, is indisputable.” *Allen v. Sales*, 56 Mo. 28, 34–35 (1874).

The power to issue *nunc pro tunc* orders, however, constitutes no more than the power to make the record conform to the judgment already rendered; it cannot change the judgment itself. *Warren v. Drake*, 570 S.W.2d 803, 806 (Mo. App. 1978). “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.” *City of Ferguson v. Nelson*, 438 S.W.2d 249, 253 (Mo. 1969) (emphasis in original).

Id. at 240. Thus *Pirtle* illustrates continuing confusion about the status of *nunc pro tunc* orders. *Pirtle* at one point says that clerical errors or omissions may be corrected citing to *Allen v. Sales*, 56 Mo. 28, 34–35 (1874). It then backtracks and picks up the dated language from *City of Ferguson* and carried it over past the point when it had ceased being relevant. This is because *City of Ferguson* did not address the plain language of Rule 74.06(a) because the rule did not exist at that point. *Pirtle*, without analysis of the text of the rule, instead imported this common law understanding of the *nunc pro tunc* order into its decisional matrix, and applied the common law instead of the plain language of the Rule.

Worse, *Pirtle* relied on a law review article interpreting the common law (Comment, Procedure—Setting Aside Final Judgments in Missouri, 28 Mo. L.Rev. 281, 281–82 (1963)), for its analysis of what constituted conforming a judgment and altering one. And *Pirtle* noted that when characterizing a court’s order it “is necessary to determine whether an order changes the original judgment or only the record.” Rule 74.06(a) contains no language that would support such an analysis.

Noting, as Appellants do here, that judgments are presumed correct, this Court in *Pirtle* said:

The party seeking to show that an order is an order *nunc pro tunc* must show that the original judgment entry did not accurately reflect the court’s actual judgment and that the subsequent order merely caused the record to conform to the true judicial determination of the parties’ rights.

Id. at 243. Again, this applied the common law, and not the plain language of the rule to a situation that involved a transposition of the names of the petitioner and the respondent. Doubtless the result would have been the same under Rule 74.06, but the *Ferguson* “clerical error” and “actually done” *dicta* imported into *Pirtle* has been used by Appellants here to distort the plain language and true purpose of the rule. For purposes of this case, while the common law remains a guide at the outside edges of Rule 74.06(a): it is the plain language of the Rule that controls. The plain language allows an error resulting from an omission to be corrected. When viewed in the context of the statute at issue, § 408.040, the trial court’s actions were correct.

E. RULE 74.06(a) ADOPTED BY THE SUPREME COURT IN 1988 CHANGED THE BASIC FRAMEWORK OF *NUNC PRO TUNC* ORDERS SO AS TO ALLOW THE CORRECTION OF JUDICIAL OMISSIONS AND OVERSIGHTS THAT WERE NOT PROPER SUBJECTS OF *NUNC PRO TUNC* ORDERS UNDER COMMON LAW

Rule 74.06(a) provides for two kinds of corrections via order. First, the rule permits the reform of “Clerical mistakes in judgments, orders or other parts of the record...” *Id.* This broad language encompasses the traditional means by which the transposition of names that was patent on the record in *Pirtle* could be remedied. This is because the case law taught the term “clerical” is not interpreted in a narrow sense. “A mistake can be clerical whether made by the clerk, the judge, the jury, a party or an attorney.” *In re Marriage of Royall*, 569 S.W.2d 369, 371 (Mo. App. 1978).

The second kind of correction found in the rule is for “errors therein arising from oversight or omission...” *Id.* This was a clear modification of the common law brought about by this Court’s efforts to modernize the rules of civil procedure and give Courts power to do justice. An examination of the case law demonstrates why this is a change, and that the Courts of Missouri have been slow to give it effect.

We begin with *In re Marriage of Royall*, 569 S.W.2d 369 (Mo. App. 1978). In *Royall* the decree transposed the names of petitioner and respondent, and allowed the party without custody of the minor children to receive child support in direct contravention of the parties’ stipulation. The court, quoting the common law in place at the time, held that “[i]t is not proper to amend a decree *nunc pro tunc* to correct judicial

inadvertence, omission, oversight or error, or to show what the court might or should have done as distinguished from what it actually did, or to conform to what the court intended to do but did not do.” *Id.* at 371.

Because the error could be traced to drafting in the decree done by the attorneys, the Petitioner in *Royall* concluded it was not a “clerical error” in much the same way that Appellants here allege that the omission of the interest rate was not a “clerical error.” The Eastern District disagreed and found that the *nunc pro tunc* order was proper. Importantly, *Royall* and all the cases it relied upon were common law cases and did not interpret Rule 74.06.

Rule 74.06(a) became effective in 1988, but this Court and other appellate courts continued to interpret orders *nunc pro tunc* within the framework of the common law, and not under the plain language of the Rule. This is the only explanation for the distance between what the Rule actually says, and what cases have consistently held. Compare the text of Rule 74.06(a) adopted in 1987: “errors ... arising from oversight or omission may be corrected...” with the common law language imported into cases analyzing under Rule 74.06(a) after its effective date in 1988.

Meek v. Pizza Inn, 903 S.W.2d 541 (Mo. Ct. App. W.D. 1995), is a good example. It picks up *Royall*’s language: “[i]t is not proper to amend a decree *nunc pro tunc* to correct judicial inadvertence, omission, oversight or error, or to show what the court might or should have done as distinguished from what it actually did, or to conform to what the court intended to do but did not do.” Although, *Meek* is a 1995 case and should

have been decided under the plain language of the rule, it relies on the common law phrasing from *Royall*, 569 S.W.2d at 371. *Meek* applied the common law, not the plain language of the Rule. That is what the Appellants seek to have this Court do: ignore the plain language of the Rule, and instead apply the antiquated holdings of cases interpreting Rule 74.06(a) through the lens of the common law.

Indeed some of the cases decided after Rule 74.06(a) took effect continue to refer to orders *nunc pro tunc* as arising from the common law. Indeed, from a historical point of view, that is correct. But they are no longer governed by the common law. They are governed by the Rule. A comparison of this Court's decision in *Soehlke v. Soehlke*, 398 S.W.3d 10 (Mo. banc 2013), and *Pirtle v. Cook*, 956 S.W.2d 235 (Mo. banc 1997), illustrates the confusion inherent in these cases, particularly where a trial court's order may be viewed under either Rule 75.01 or Rule 74.06(a).

It is worthy of note that *Pirtle* starts off on the wrong foot. It says "[t]he power to enter a *nunc pro tunc* order is a common law power derived from a court's jurisdiction over its records." *Id.*, 956 S.W.2d at 240. At the time of *Pirtle*'s decision in 1997, orders *nunc pro tunc* had been rule-based orders for 11 years. Yet *Pirtle* overlooks this throughout its otherwise lucid explanation of the rights of the parties.

In *Pirtle* the amendatory language of the *nunc pro tunc* order changing the transposition of names occurred within the 30 day period and as noted *supra*, the decision turned on whether the order was an actual amendment under Rule 75.01 or an order *nunc pro tunc* under Rule 74.06(a). This Court held the latter specifically because an

amendment under Rule 75.01 requires notice and hearing and there had been none. Therefore the order was held to be *nunc pro tunc*.

In *Soehlke* the amended judgment was held to be an amended judgment under Rule 75.01 because it occurred within thirty days of the original judgment and in clarifying the parenting plan did much more than correct a clerical error. Yet, Casenet shows that the order held to be a Rule 75.01 amended order and judgment in *Soehlke* was entered without notice or hearing on October 7, after the motion was filed on October 5. Thus the holding of *Pirtle* would appear to cast doubt on this Court's holding in *Soehlke*. This is not meant as criticism of this Court's decision in *Soehlke*, because a "clarification" of an order would of necessity require the use of judicial discretion and, as Judge Wilson wrote, the amended order in *Soehlke* did not even purport to fix a clerical error even though it was sought under Rule 74.06(a).

Instead, this discussion is meant to illuminate the confusion that results from interpreting a rule with respect to something other than its plain language, and continuing to rely on case law rooted in the common law. *Soehlke* cited both *Pirtle* and *City of Ferguson* as authority, and both rely on the common law rather than the plain language of the Rule.

Having demonstrated that the plain language of the Rule, and not the antiquated understanding of these orders rooted in the common law controls, the issue is whether the order at issue in this case fixed an error arising from an omission or oversight. The unmistakable conclusion is that it did.

F. THE *NUNC PRO TUNC* ORDER HERE CORRECTS AN OMISSION FROM A JUDICIAL RECORD (JUDGMENT) THAT AROSE AS A RESULT OF OVERSIGHT

a. *The Proper Judgment Interest Rate Is Not in Dispute*

As the trial judge acknowledged during the hearing on this issue, the question of interest “was not a matter of exercise of discretion” and that “Supreme Court rule 704.06 [*sic*] is broad enough to allow this court to *nunc pro tunc*, modify [the original judgment].” TR:19-18-23. It must strike this Court as somewhat odd to have the parties agree that the post-judgment interest provisions in § 408.040.2 R.S.Mo. (2012) should be applied to the damage award and agree on the interest computation of 5.09% (*See* TR:4 – 20-21; TR:8 – 11-14), but to have one party take the position that the omission of the interest rate from the judgment is a fatal trial court error that should have been appealed.

In this case it is undisputed that the Circuit Court omitted the statutorily mandated language setting the post-judgment interest rate. Thus the omission that was sought to be corrected by the *nunc pro tunc* order is itself not subject to any factual or legal dispute, and does not rest on trial court discretion.

b. *Facts Show This Was the Correction of an Omission*

It is undisputed that § 408.040 R.S.Mo. (2012) required the trial Court to enter the judgment interest rate on the day that it entered judgment. It is not disputed that the original judgment did not contain the interest rate. No language in the statute requires either party to ask for the inclusion of the judgment interest rate. No court rule requires that either party ask for the inclusion of the interest rate.

The sole issue then, in this appeal, is whether the plain language of Rule 74.06(a) providing that “[c]lerical mistakes in judgments, ... and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party” permitted the trial Court to enter the agreed-upon interest rate in the judgment. If the plain language of the rule is applied, Appellants’ arguments fail.

An examination of the issues here reveals (1) the *nunc pro tunc* order corrected a clerical/ministerial omission of the judgment interest rate set by statute and required to be a part of the judgment; (2) the *nunc pro tunc* order did not require the exercise of judicial discretion because the interest rate is fixed by reference to the federal funds rate through legislative command; and (3) the omission of the judgment interest rate is patent on the judgment (and is thus discernible from the record). And because the judgment rate is indexed to the published Federal Funds Rate, the proper interest rate is easily discerned from standardized sources, thus the Court need apply no discretion to the task.

In *Dobson v. Riedel Survey & Engineering Co., Inc.*, 973 S.W.2d 918 (Mo. Ct. App. W.D. 1998), the Western District examined a situation where the judgment rendered by the court, in favor of one party and against another, was sought to be corrected by an order *nunc pro tunc*. Apparently the Court checked the wrong boxes on a pre-printed form, giving judgment to one party and against another. In no other place was the Court’s judgment recorded.

Seven months later, upon motion of one of the parties calling attention to the fact that the Court had entered judgment erroneously, the trial court set out to fix the error by

changing the judgment and reversing the parties, and did so with a judgment *nunc pro tunc*. The Court of Appeals would not permit the order to stand because it changed the substance of the judgment.

The problem for the proponent of the order in *Dobson* was that there were no notes, no records, and nothing to substantiate the fact of an incorrect judgment other than the judge's memory. Because there was no record evidence memorializing the error, the Court held the *nunc pro tunc* order was error. *Id.* at 922-23; *see also, Brunton v. Floyd Withers Inc.*, 716 S.W.2d 823 (Mo. Ct. App. E.D. 1986). The concern of the appellate court in that case can be traced to the lack of any record that supported the trial court's memory. That is not the situation before this Court.

Here the original judgment clearly omits the statutorily mandated interest rate from its plain language. There is no dispute on this point. Unlike *Dobson*, however, in addition to having the omission obvious from the record, there is a benchmark – a legislatively-supplied index as to what the proper amount of the interest rate should be – that supports the correction of the omission in the record. § 408.040 R.S.Mo. (2012). For any day, going back to the effective date of the statute, a person can find the judgment date, and by reference to multiple published sources locate the federal funds rate on that date, and know with certitude that this rate plus five percent (5%) is what the interest rate should be for any specific tort judgment. § 408.040 R.S.Mo. The legislative scheme is brilliantly simple and eliminates gamesmanship.

Thus, unlike the proponent of the order in *Dobson*, Plaintiffs here can show not

only what was not done (that being obvious from the judgment), but can also show what was required by statute to be done by the trial court (that being obvious from published accounts of federal fund rates). Moreover, because the statute is so clear and speaks so pointedly about how the rate is to be recorded on the judgment, and because the interest rate was agreed upon by the parties, there is no real dispute: this is a ministerial, as opposed to discretionary function.

Unterreiner v. Estate of Unterreiner, 899 S.W.2d 596 (Mo. Ct. App. E.D. 1995), like *Dobson*, decided the issue of the propriety of the *nunc pro tunc* order on the language of oral stipulations entered into on the record at trial. The issue was whether maintenance terminated on death. The decree was silent, but the record indicated that the payments of maintenance were to continue for five years regardless of any change in circumstances. Even though the parties never discussed death, the gestalt of the record convinced the Court that the *nunc pro tunc* order was appropriate. *Unterreiner* appears to go outside the teaching of *Dobson* and other cases that talk about changes in the substance of the judgment since it interprets “change in circumstance” to include death of a party³. Yet a review of the case suggests that the Court of Appeals allowed the trial court to effect the intention of the parties as embodied in their oral stipulations at trial.

It is thus consistent with the teachings of *Pirtle*, *Dobson*, and *Unterreiner* to allow

³ Arguably *Unterreiner* is an outlier in that the Court of Appeals had to exercise discretion to determine that a change in circumstances included death. It can be seen as the Court trying to do justice in a situation no one expected.

the *nunc pro tunc* order to stand here. The failure of the lower court to specify the statutorily-mandated interest rate in the original judgment must surely qualify as an error of omission, capable of being corrected by an order *nunc pro tunc*, without the exercise of any discretion, and in furtherance of justice.

Said differently, where Missouri courts have been reluctant to let *nunc pro tunc* orders stand, it has been where the order changes the basic character of the judgment rendered without any basis in fact or standard of reference. In other words, what was being changed was something that went to the core functions of judicial discretion in the entry of the order.

In *Dobson*, for example, the court had discretion to enter judgment for one side or the other, and did so. When asked to change this, and without a record upon which to rely showing that it had actually intended a different result, the appellate court set aside the change because there was no record to support the change.

The rationale from the cases seems clear: when the change implicates the court's discretion to act in favor of one party or the other, a change without clear evidence of a clerical mistake is not permissible. While Missouri courts have not always been clear in articulating the policy behind the language of the rule and the rationale for *nunc pro tunc* orders, the mischief these decisions seek to prevent is changes in the basic character of the judgment or order such that the trial court has to exercise its discretion past the point where it no longer has authority to act. This is what *Pirtle* meant when it said that orders *nunc pro tunc* are a threat to the finality of judgments.

Contrast the cases discussed above with the facts in this case. All parties agree as to what the interest rate should be, how it should be calculated. It is apparent the Court did not have to exercise discretion to enter the order. Appellants simply argue that having failed to appeal the court's omission, Respondents are without recourse. It cannot be that easy to make a fool of Missouri law.

G. APPELLANTS SEEK THE IMPOSITION OF AN AFFIRMATIVE DUTY TO REQUEST INTEREST IN THE ABSENCE OF A STATUTE THAT REQUIRES IT.

Appellants seek an opinion from this Court placing a duty on the Plaintiffs and the Plaintiffs alone to request that the Circuit Court comply with nondiscretionary duties mandated by statute or risk the loss of post-judgment interest. Had the Legislature intended that failure to request interest waived it, the statute would have said so. *See, e.g.*, TR0018-19. Appellants' position seems to be that if the Court omits this mandatory duty, it is somehow the fault of the Plaintiffs for not asking the Circuit Court to comply with its duties. This argument not only goes against the plain language of the statute, it would defeat the carefully-crafted legislative scheme inherent in the statute.

To be clear, nothing in the statute places a burden on either party to take any action to comply with its plain language. Rather, the statute places this burden on the Court. And the argument that if it is not in the order, that this somehow waives interest, was dealt with pretty succinctly by the trial judge at the hearing. There Judge Journey said:

18 But at any rate, there's a couple of things that

19 have come to mind. One is, if it was to be a waiver,
20 why didn't the Legislature say that, if it wasn't in
21 there it was waived, because it said shall be done. And
22 it doesn't say if it's not, it's waived. Which to me,
23 evidence is some legislative intent that there be
24 interest, and certainly prior to the tort reform it was
25 the law that it didn't have to state interest at all.

1 It just said, here's the judgment. In the statute then
2 said, there'll be interest on that judgment at the rate
3 at nine percent. I think that's the way it's always
4 been prior to tort reform on tort cases. I don't
5 believe the legislators intended that it be waived.

6 The other question that becomes kind of
7 interesting here, and I suppose it's rhetorical now, why
8 didn't the Appellate Court say this was not a final
9 judgment and send it back on remand to make a final
10 judgment, because they seem very ready to do that in
11 most cases but they didn't do had it here.

12 And, apparently, the Defendant didn't raise that
13 objection that it wasn't a final judgment, because no
14 stated interest was in the judgment. I don't know why
15 they did or they didn't, but it didn't happen. So it's

16 kind of interesting though.
17 I believe, and it's my finding today, that
18 Supreme Court Rule 704.06 [sic] is broad enough to allow this
19 court to *nunc pro tunc*, modify, do whatever you want to
20 call it, but it is broad enough to allow this court
21 jurisdiction to do something that was mandatory under
22 this statute, was not -- was not a matter of exercise of
23 discretion and I am going to grant the motion to set the
24 interest at 5.09 percent on so much of the judgment as
25 was finalized by the Western District at the time of the
1 rendition of the judgment, which was what, May the 10th
2 2010?

Tr.0018-20.

As the Court notes, the Defendants never objected to the omission of the interest rate, and never complained of it on appeal. Judge Journey noted that the statutory scheme prior to the enactment of § 408.040 R.S.Mo. (2012) was that post-judgment interest was automatic at nine percent, and that under the new statute, no request is necessary. As Judge Journey notes, there is no specification in the statute that failure to request interest waives it. Interest is automatic, is a task required of the trial judge, and is indexed to a set rate. All of these findings by the learned trial court argue against the Appellants' position that failing to request or appeal the failure to make the entry is fatal, and instead, argue in favor of allowing a correction to the record by *nunc pro tunc*.

H. APPELLANTS' CASES INTERPRETING ORDERS *NUNC PRO TUNC* RELY ON OUTLIERS AND ANTIQUATED CASES INTERPRETING THE COMMON LAW THAT PREDATED RULE 74.06(a)

Appellants rely on the most extreme cases interpreting improper *nunc pro tunc* orders as authority for their position. Notably, none of those cases deals with an omission. Appellants open with *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62 (Mo. banc 2008), which is about as far afield from the case *sub judice* as Saturn is from Mercury. There is simply no basis to compare that case to this one.

Poucher was a criminal case. That alone is noteworthy. This Court is far more protective of procedural due process protections in the criminal law context. *Poucher* arose from a drunk driving conviction. In assessing punishment the trial judge imposed consecutive seven and three year sentences and then ordered them suspended pending a treatment program. Upon completion of the treatment program, Poucher was placed on a five-year probation. Later that same year Poucher violated his probation. He confessed this and the trial court, in the probation revocation hearing, ordered the previously imposed sentences to run, but changed them from consecutive sentences to concurrent sentences. *Id.* at 64. This cut Poucher's maximum jail time from ten years to seven years. *Id.* The court announced this change on the record and memorialized it in writing. *Id.*

Thirty-nine days later, the Court issued a *nunc pro tunc* order changing the amended sentence. Instead of running the sentences concurrently, as it had said in open

court, and as it had written in the judgment of revocation, the trial court amended the sentences to run consecutively, effectively increasing the amount of time Poucher would be required to serve back to ten years. It did so outside the window of the thirty days it had control of the judgment, and more importantly, it imposed conditions different than the record reflected at the time of the judgment. *Id.*

This Court issued mandamus to the Court to vacate its order *nunc pro tunc*, and cited *City of Ferguson v. Nelson*, 438 S.W.2d 249, 253 (Mo.1969), for the proposition that *nunc pro tunc* orders only 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. As this language is non-essential to the Supreme Court's holding, it is *dicta*, and given that it cites to cases decided before Rule 74.06(A), it is of questionable precedential value.

More importantly, the case can be understood to again draw the distinction between issues that are committed to the trial court's discretion (whether to run sentences consecutively or concurrently), *see, e.g., State v. Scott*, 348 S.W.3d 788 (Mo. App. SD 2011); *State v. Loewe*, 756 S.W.2d 177 (Mo. App. ED 1988), and issues that are non-discretionary (the mandatory language of Chapter 408) and merely ministerial. Here the court freely noted it did not have to exercise any discretion to enter the *nunc pro tunc* order. Tr. 19:23. This is because the rate of interest is set by reference to the statute and the federal funds rate.

As Appellants note in their brief, the Court of Appeals' opinion relies on the

language of the Rule and its common sense understanding and does not mention “the ‘actually done’ test...” App. Br. at 13. This is a confession, of sorts, by Appellants that they prefer the common law holdings of *City of Ferguson* and those sections of the modern cases that cite to the common law basis for the Rule. They recognize, even if they do not give voice to the fact, that they cannot prevail if this Court construes and applies the plain language of the Rule. In fact, by falling back on criminal law cases like *Poucher* and *City of Ferguson* the fact is that they must rely only on the most extreme outliers to make their point.

Like *Poucher*, *City of Ferguson* involved a *nunc pro tunc* order in a criminal case. Defendants there were convicted of ordinance violations related to fencing and were ordered to pay fines. Later, by *nunc pro tunc* order, the defendants were ordered to pay fines or face jail time. *Id.* at 250. At no point prior to the *nunc pro tunc* were the defendants sentenced to serve jail time.

As pointed out above, *City of Ferguson* addressed the propriety of the court’s orders under the common law and not under the Rule, because the Rule had not yet come into existence. Thus *City of Ferguson* included in its opinion numerous phrases helpful to Appellants here, but not vital to the judgment there, including the statement that “a *nunc pro tunc* order may not be made ‘to supply a judicial omission, oversight or error, or to show and set forth what the court might or should have done, as distinguished from what it actually did.’” *Id.* at 253. This Court overturned the order based on the common law even though a Missouri statute arguably provided a basis for imprisonment should

finer not be paid. *Id.* at 254. This Court found that an ordinance violation is treated as a civil action for a penalty and is not criminal. Nevertheless, the order *nunc pro tunc* could not stand because there was nothing in the original order imposing sentence that provided for a term of imprisonment. This Court found the order void and dismissed the appeal.

Perhaps more importantly, when this Court adopted the language of the current Rule 74.06(a) it specifically permitted what was denied in *City of Ferguson* in that it allowed an error arising from omission or oversight to be corrected via reforming order. Rule 74.06(a).

In Re Estate of Shaw, 256 S.W.3d 72 (Mo. banc 2008), deals with an estate distribution order that was modified outside the thirty day window permitted by Rule 75.01 and an appeal of a subsequent distribution plan entered later that was void. The appeal was taken from the void order, and as such, this Court did not reach the merits of the appeal. While *Shaw* mentions orders *nunc pro tunc*, it does not apply any analysis that aids either party here, especially given the unique procedural posture of that case.

Appellant also cites to *In Re Marriage of Rea*, 773 S.W.2d 230 (Mo. Ct. App. S.D. 1989). *Rea* involved the insertion of the word “equal” into a dissolution decree fifteen months after the decree was signed. The wife petitioned for the change and the husband opposed it saying there was no scrivener’s error. Although accomplished after the 1988 adoption of Rule 74.06(a), the rule is not mentioned in the case. Instead *Rea* cites to a 1954 case interpreting the common law power to correct court records. It also cites to *Royall* as authority for its common-law based holding. *Id.* at 232. Nowhere does *Rea*

recite the language of the Rule nor apply it. In fact, it states that an “order correcting a judgment *nunc pro tunc* can be made only upon evidence furnished by the papers and files in the cause, or in the clerk’s minute book, or on the judge’s docket.” *Id.* at 234 citing *Ackley v. Ackley*, 257 S.W.2d 401, 403 (Mo. App. 1953). It is this refusal of modern cases to address the language of the Rule that results in the Rule being given no effect.

Appellant relies on *Gordon v. Gordon*, 390 S.W.2d 583 (Mo. App. E.D. 1965), another common law case again without noting that the tenets of the common law expressed in *Gordon*, *Rea*, *Ackley* and the other pre-Rule cases do not conform to the plain language of the Rule as it now exists. Even cases like *Sullivan v. Minor*, 180 S.W.3d 531 (Mo. App. E.D. 2006), that cite Rule 74.06(a) do not discuss its plain language and derive the contours of the doctrine of *nunc pro tunc* solely from cases either decided prior to the adoption of the rule (*City of Ferguson*) or decided after but that import the language of the common law cases and do not address the plain language of the Rule. (*e.g.*, *Pirtle v. Cook*).

I. APPELLANTS’ POST-JUDGMENT INTEREST CASES ARE ALL DISTINGUISHABLE IN THAT THEY ARE BASED ON ANTIQUATED STATUTES THAT PREDATED § 408.040 R.S.MO.

Appellants suggest that entries *nunc pro tunc* have consistently been disallowed in cases dealing with post-judgment interest. They open with *Arkansas-Missouri Power Co. v. Hamlin*, 288 S.W.2d 14, 20 (Mo. Ct. App. 1956), a case from 1956, long before Rule

74.06(a) codified a court's power to fix clerical errors. The case simply sets out the law as it regarded post-judgment interest on condemnation actions in 1956. It was also overruled by this Court in *State ex rel. Highway Comm'n v. Green*, 305 S.W.2d 688 (Mo. 1957), albeit on other grounds. Like all the cases cited before the adoption of Rule 74.06(a), it cites to the common law basis for orders *nunc pro tunc*, not to the Rule. The case does not involve a statute that sets the interest rate, says it "shall" be awarded, and fixes the interest rate by reference to a specific index (the Federal Funds Rate). Instead, it interpreted the statutory mechanism at the time to require a party to request the trial court award the interest.⁴ Appellant having failed to make the request, the appellate court refused to convict the trial court of error. It is not on all fours with this case. It dealt with a non-tort legal issue. It applied standards then existing that no longer exist today, and it is not of any precedential value.

Similarly, *State ex rel. State Highway Commission v. Galloway*, 292 S.W.2d 904, 912 (Mo. Ct. App. 1956), another 57 year old case dealing with condemnation, does no more than set out the fact that under the statutes and case law at that time, post-judgment interest had to be requested in order to be awarded. Like *Hamlin*, it was overruled by this Court in *Green*. This case is not a condemnation case, and for the reasons set out in the

⁴ One of the issues in *Hamlin* was whether the Court should fix interest by mathematical computation (as advised by *dicta* in *Hamlin*) or whether it should be part of the jury's verdict. *Green*, which overruled *Hamlin*, held that the jury should award interest.

discussion of *Hamlin*, is not of precedential value.

J. THE RULE 78.07 ARGUMENT IS A RED HERRING IN THAT THE FAILURE OF A COURT ORDER TO CONFORM TO A STATUTE MAY BE CORRECTED BY ORDER *NUNC PRO TUNC*

a. *Rule 78.07 Applies to Motions for a New Trial*

Appellants also suggest, in passing, that Rule 78.07 required that Respondents here raise the failure to make factual findings prior to appeal, and that the failure to do so is fatal to *nunc pro tunc* correction. But of course, nothing in Rule 74.06(a) ties back to Rule 78.07(c) and case law suggests just the opposite.

Rule 78.07 governs motions for new trial and the preservation of error for appeal. Sections (a) and (b) of the rule discuss preservation of error for appeal within the context of a motion for a new trial. By its clear terms it applies when a jury verdict aggrieves a party, and that party seeks to overturn the jury verdict by first addressing claims of error to the trial court. The requirement to preserve error in this manner allows a trial court to reconsider its rulings at trial and grant relief in the form of a new trial if it agrees with the movant, thus avoiding the expense of an appeal. *Bowman v. Burlington Northern, Inc.*, 645 S.W.2d 9 (Mo. App. E.D. 1982).

Respondents did not file a motion for a new trial because they were not aggrieved by the judgment. They noted the omission of the statutory interest rate only much later when Kenoma and Synergy refused to pay what was lawfully owed and debuted their “gotcha!” argument. The context of Rule 78.07(c) shows that it applies only when a

party is required to file a motion for new trial to preserve error. Here Respondents sought to uphold the judgment, not attack it!

Rule 78.07(c) requires “(c) In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review.” (emphasis added). Where a party is supporting the judgment, as opposed to attacking it, there is no duty to preserve error. Cases citing the rule apply this to findings of fact, not statutorily required elements of the judgment. Every one of the cases interpreting this rule has arisen out of the failure of the trial court to make findings of fact that were required by statute or rule. *See, e.g., Crow v. Crow*, 300 S.W.3d 561, 564 (Mo. App. E.D. 2009) (failure to make factual findings regarding child support amount under Rule 88.01); *Stuart v. Ford*, 292 S.W.3d 508, 517 (Mo. App. S.D. 2009) (lack of factual finding regarding party’s current ability to pay judgment of contempt); *In re M.D.D., Jr.*, 219 S.W.3d 873, 875 (Mo. App. S.D. 2007) (failure to make statutorily required factual findings regarding termination of parental rights); *Wilson–Trice v. Trice*, 191 S.W.3d 70, 72 (Mo. App. W.D. 2006) (failure to make statutorily required factual findings to support custody award); *Wills v. State*, 321 S.W.3d 375, 387 n. 7 (Mo. App. W.D. 2010)(failure of fact finding in post-conviction relief); *Hollingshead v. State*, 324 S.W.3d 779 (Mo. App. W.D. 2010) (same). No case has held this rule applies to post-judgment interest that is required to be part of the judgment. Certainly there is a difference between preserving a point for appellate review, and the correction of an omission through Rule

74.06(a).

*b. An Order That Fails To Comply With A Statute Is Presumed To Arise From
A Clerical Error, Permitting Reformation Through Rule 74.06(a)*

As the Court of Appeals pointed out in its opinion, correction of a judgment to conform to a statutory mandate is a proper use of a *nunc pro tunc* order for two reasons: (a) judgments must conform to the dictates of governing statutes, and, (b) the failure of an order to comply with a statute is presumed to arise from clerical error. In *State ex rel Missouri Highway and Transp. Comm'n v. Roth*, 735 S.W.2d 19, 22 (Mo. App. E.D. 1987), the court noted that Missouri law has always required judgments to conform to the dictates of the governing statutes:

The law is that where upon the trial of a cause, a judgment is shown to have been rendered for one of the parties, and a statute directs what that judgment shall be, it is presumed that the judgment rendered by the court was such a judgment as only could have been rendered, and anything short of that will be attributed to the mistake or misprision of the clerk. *State ex rel. Grant v. Juden*, 50 S.W.2d 702, 703–4 (Mo. App. 1932). That an error is made by a judge rather than a clerk does not prevent it from being classified as a clerical error. *Gordon v. Gordon*, 390 S.W.2d 583, 587 (Mo. App. 1965).

Id. Appellants claim that the amended version of Rule 78.07 overruled the line of cases beginning with *Roth*, *In re Marriage of Ray*, 820 S.W.2d 341, 344 (Mo. App. 1991) and

ending with *Korman v. Lefholz*, 890 S.W.2d 771, 773 (Mo. App. 1995). But this makes no sense for several reasons. First, no case has ever held that Rule 78.07 applying to motions for a new trial overruled, directly or indirectly, any of these cases, and the plain language of the Rule cannot be read that way. Second, Rule 78.07 speaks in terms of preserving judicial error for appellate review rather than cutting off the right of the Court to make clerical corrections to a judgment under Rule 74.06(a). Nothing in Rule 78.07⁵ precludes a Rule 74.06(a) correction.

The rule that a judgment must conform to an underlying statute was clearly expressed in the context of a medical malpractice affidavit dismissal in *Korman v. Lefholz*, 890 S.W.2d 771 (Mo. App. E.D. 1995). The statute at issue there, § 538.225 R.S.Mo., provided for dismissal without prejudice. *Fields v. Curators of the Univ. of Missouri*, 848 S.W.2d 589 (Mo. App. W.D. 1993). The trial court dismissed with prejudice and the Eastern District cited *Roth* as authority for conforming the judgment to the statute:

⁵ Had Respondents requested that the trial court award post-judgment interest in the order, and the trial court openly refused – in the order – to award interest based on a misunderstanding of the law, then arguably Respondents would have been aggrieved and would have been required to file a motion to amend the judgment under Rule 78.07. This is because the refusal to apply the statute, openly and directly, would have constituted judicial error rather than clerical error. Omissions are clerical errors, as set out in *Roth*, *infra*.

Where a statute directs what the judgment shall be, “it is presumed that the judgment rendered by the court was such a judgment as only could have been rendered,” and any omission or deviation is classified as clerical error correctable by *nunc pro tunc*. *Missouri Hwy. & Transp. Com’n v. Roth*, 735 S.W.2d 19, 21–22 (Mo. App. 1987). “If a statute directs that a judgment contain certain language or provisions, then the omission of such language or provisions in the judgment will be attributed to clerical error which may be corrected by a *nunc pro tunc* order.”

Id. at 773 (citing *In re Marriage of Ray*, 820 S.W.2d 341, 344 (Mo. App. 1991)). *Ray* involved a similar omission from a decree of language required to be there by statute⁶ -- on omission the Court of Appeals found proper to remedy by order *nunc pro tunc*, even while reciting the common law rule that a “*nunc pro tunc* entry cannot be used to correct judicial mistakes or oversights⁷....”

⁶ The language required to be there by statute in *Ray* was language regarding removal of the children from the state. It was not a “factual finding” that was omitted. Thus even if 78.07 applied to factual findings in *Ray*, it did not apply to reformation of the judgment to include requirements imposed by statute. The same applies here. § 408.040 makes no provisions for required factual findings, only inclusion of the mandated interest rate as set by reference to the federal funds rate.

⁷ As noted, *supra*, the plain language of Rule 74.06(a) clearly permits corrections of omissions and oversights.

Newberry v. State, 812 S.W.2d 210, 212 (Mo. App. W.D. 1991), is similar. In *Newberry* a convicted murderer complained in a post-conviction relief setting that the trial court, which changed his sentence from life in prison to life without the possibility of parole violated his due process and equal protection rights by effecting the change through *nunc pro tunc* orders entered without notice or hearing. The Western District summarily dispatched this claim.

The statute at issue in *Newberry*, § 559.011 R.S.Mo., imposed sentences of life in prison without the possibility of parole until fifty years of the sentence had been served. The original sentence imposed life in prison, but made no mention of parole. The trial court corrected the sentence under Rule 29.12 (the criminal procedure counterpart to Rule 74.06(A)).

Newberry said this:

The judgment entered of “life imprisonment” simply failed to comply with the mandate of law. Such a failure is deemed to be a clerical error, even though in fact the fault of the judge. *State ex rel. Missouri Highway and Transportation Commission v. Roth*, 735 S.W.2d 19, 22 (Mo. App. 1987); *Hassler v. State*, 789 S.W.2d 132, 134 (Mo. App. 1990).

Id. at 212. *Hassler* incorporated substantially the same language. The policy behind the rule as announced in *Roth*, *Hassler*, *Newberry*, *Korman* and *Ray* is a sound rule of public policy. A court must not be permitted to avoid a statutory mandate by mistake or indirection and thereby evade the plain language of the law. *Hillside Securities v. Minter*,

300 Mo. 380, 254 S.W. 188 (Mo. 1923) (upholding contract would allow county to do indirectly what it was forbidden from doing directly and allow for ready evasion of the law, and thus could not be sanctioned).

K. THE “VARYING FEDERAL FUNDS RATE” ARGUMENT IS UNWORTHY OF
SERIOUS CONSIDERATION

Appellant argues that the trial court needed to hear evidence in order to set the interest rate. This argument is foreclosed by the statute, logic, common sense and judicial notice.

“The term *judicial notice* is broadly used to denote ‘both judicial knowledge (which courts possess) and common knowledge (which every informed individual possesses); and matters of common knowledge may be declared applicable to the case without proof.’” *Carr v. Grimes*, 852 S.W.2d 345, 351 (Mo. App. 1993) (quoting *Bone v. General Motors Corp.*, 322 S.W.2d 916, 924 (Mo. 1959)(emphasis in *Carr*)). The doctrine of judicial notice is left to the court's discretion ““depending primarily upon the nature of the subject, the issues involved, and the apparent justice of the case.”” *Id.* (quoting *Buhrkuhl v. F.T. O'Dell Constr. Co.*, 232 Mo. App. 967, 95 S.W.2d 843, 846 (1936)). Missouri courts may also take judicial notice of rules and regulations promulgated pursuant to federal statutes. *Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 821 (Mo. banc 2000), *cert. denied*, 532 U.S. 990, 121 S.Ct. 1644, 149 L.Ed.2d 502 (2001). Certainly where a statute directs a court to a specific reference, it may incorporate it by judicial notice.

§ 408.040.2 requires in applicable part:

2. ... All such judgments and orders for money shall bear a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus five percent, until full satisfaction is made.

§ 408.040 R.S.Mo. (2013) (emphasis added).

The Appellant makes an argument that the Court of Appeals rejected and that, frankly, borders on the frivolous: that the federal funds rate varies by each Federal Reserve Bank. The fact is the Federal Reserve publishes not only a daily weighted average effective federal funds rate, but also a historical document that shows what the federal funds rate has been every day since 1954.⁸

Further making this argument frivolous is Appellants open admission in front of Judge Journey at the hearing on the order *nunc pro tunc*:

THE COURT: Mr. Bradshaw, the first question I have, just to make sure that there is a stipulation, is that if there is any interest it would accrue at the rate of 5.09 percent?

MR. BRADSHAW: Judge, I think had the Court ordered interest at the time that the judgment was made final, then the applicable interest would have been 5.09, yes.

(TR0008, 7:14)

⁸ See, e.g., <http://www.federalreserve.gov/releases/h15/data.htm>

Since Missouri law has always permitted courts to take judicial notice of federally-published regulations and since the statute directs the Court to the express reference it requires be used, the idea that the Court had to exercise judicial discretion in setting the rate is not worthy of consideration. Judge Journey did not get to roam freely through the Federal Reserve rate list and exercise discretion about what rate to use or what date the judgment was entered. Perhaps more importantly, this argument fails for want of reason given what is in the transcript. Appellants agreed that the federal funds rate as established by the Federal Reserve Board was 0.09% on May 10, 2011, when the judgment was entered. *See* TR:4 – 20-21; TR:8 – 7-14.

Given that the court was conforming the judgment to that which was required by the statute, read the plain language of the rule to permit him to do exactly what he did, and did nothing more than fix an omission arising from judicial oversight in the process, the trial court's actions in this regard were correct.

L. THE CIRCUMSTANCES OF THIS CASE SUPPORT THE TRIAL COURT'S
AMENDMENT OF THE JUDGMENT TO INCLUDE THE JUDGMENT INTEREST RATE

In *State ex. rel. Castillo v. Clark*, 881 S.W.2d 627 (Mo. banc 1994), Judge Price said that discovery was not meant to be a battleground where victory goes to the most clever or combative adversary. At its core, this entire appeal is about being the most clever and combative adversary. Doubtless Appellants have likely spent more in legal fees to get to this point than they would have paid if they had simply paid the tab! Plaintiffs in this action, through no fault of their own or of their counsel, have been

denied full compensation on the basis of what amounts to a “gotcha.” The trial court neglected to enter the judgment interest rate, and the Appellants never mentioned it until they refused to pay the judgment interest due in this case. Is this really the kind of lawyering that this Court wishes to encourage? The Court of Appeals certainly did not think so.

The post-judgment interest statute is clear. It mandates that post-judgment interest be paid. It required a non-discretionary act that the Court neglected to perform, but that it performed by *nunc pro tunc* order when requested. That is what Courts are supposed to do. They are supposed to protect the rights of litigants. The Appellants’ you-can’t-catch-me-I’m-the-gingerbread-man argument smacks more of clever nitpicking than substantive law. It elevates the art of sandbagging and prefers form over substance. It should be disregarded for that reason.

M. APPELLANTS ARE COMPLAINING OF INVITED ERROR AND HAVE UNCLEAN HANDS

Thus far Respondents here have argued the law and the policy with regard to judgments, and the legislative scheme embodied in the statute setting post-judgment interest rates. Frankly, it is on this battlefield that Respondents should either win or lose.

But there is one additional issue that this Court must address if it determines the *nunc pro tunc* order is inappropriate in this case, because it affects jurisdiction. Appellants sought their own *nunc pro tunc* order to correct an omission in this case. Appellants requested the order in this case to secure jurisdiction for this appeal.

Appellants are not appealing the order entered by Judge Journey fixing the interest rate at 5.09%, but rather, are appealing the second *nunc pro tunc* order obtained *ex parte* by Appellants on December 31, 2012, to perfect jurisdiction.⁹

The November 7, 2012, journal entry (LF0126) is not denominated a judgment and is not the order appealed from in this case. Appellants took an appeal from that order, and in response the Western District, *sua sponte*, questioned its jurisdiction in a letter to the parties.

In their statement in support of appellate jurisdiction in this case, the Appellants noted that “[s]ubsequently, the circuit court purported¹⁰ to enter another judgment titled

⁹ It has become standard practice in many appeals, even those arising under § 435.440 R.S.Mo. (2013), (where the statute makes an *order* appealable as if it were a final judgment) to have non-final judicial orders designed as “judgments” in order for the magic words to appear and create appellate jurisdiction. This Court has the power to put an end to that practice, because the definition of a judgment is a matter of law. Had the trial court refused to issue a second order denominating it as a judgment, the Western District or this Court could still have reviewed it by writ. *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. banc 1997).

¹⁰ Given that the order was entered at their specific request, the Appellants use of the word “purported” is disturbing. Purport is a transitive verb defined as “to convey, imply, or profess outwardly (as meaning, intention, or true character): have the often specious appearance of being, intending, claiming (something implied or inferred)” Webster's

‘Journal Entry of *Nunc pro tunc* and Judgment,’ which was signed by the circuit court judge and dated December 31, 2012.” Appellants helpfully appended the document to their response to the Western District as Exhibit A, and it appears in the Legal File at page 129. However, Appellants failed to note that the December 31, 2012, order came about as a result of a request by Appellants to denominate the journal entry as a judgment.¹¹

Thus if there is error in the order, Appellants have invited that error by themselves asking the Court to do that which it purportedly did not have the power to do. This violates both the invited error rule and the doctrine of clean hands.

“The general rule of law is that a party may not invite error and then complain on appeal that the error invited was in fact made.” *Lau v. Pugh*, 299 S.W.3d 740, 757 (Mo. App. 2009) (quoting *Rosencrans v. Rosencrans*, 87 S.W.3d 429, 432 (Mo. App. 2002)).

Why does this invited error matter? Because it underscores a bald hypocrisy in Appellants’ analytical framework. The first *nunc pro tunc* journal entry (*see* LF0126) omitted the word “judgment,” in much the same way that the original judgment omitted the statutory interest rate. Because Appellants were concerned about the issue of

Third New International Dictionary, Unabridged, s.v. “purport,” accessed March 19, 2014, <http://unabridged.merriam-webster.com>.

¹¹ Appellants did not formally request a new order by written motion, but rather, by *ex parte* phone call from one of the appellate lawyers to the Circuit Clerk’s office. Respondents expect that Appellants will admit as much.

jurisdiction, and needed to file a response to the Court of Appeals, Appellants asked for a *nunc pro tunc* entry denominating the journal entry as a judgment so that it could be appealed. Thus the very order being appealed came about not as a result of anything that Plaintiffs/Respondents did, but rather, because of what the Appellants did to create appellate jurisdiction. This is classic invited error. “It is axiomatic that a ‘party cannot lead a trial court into error and then’ lodge a complaint about the action.” *In re Berg*, 342 S.W.3d 374, 384 (Mo. App. 2011)(quoting *Schluemer v. Elrod*, 916 S.W.2d 371, 378 (Mo.App.1996)). The trial court was entitled to rely on the statements by Appellants’ counsel when they asked for the very order they now complain about on appeal.

In re Berg is instructive. On appeal the sexually violent predator complained about the introduction of facts related to fifty other victims. 342 S.W.3d at 384. The only mention of these victims occurred when appellant’s counsel was cross-examining the state’s witness. *Id.* This was invited error. *Id.* Here the proponent of the order appealed from is the appellant. The doctrine of invited error applies.

To be clear, Respondents herein do not believe the December 31, 2012, order was error. The Trial Court’s original *nunc pro tunc* order fixed an omission in the order related to interest. The December order omitted the word “judgment.” The trial court retained jurisdiction over its records to correct a clerical omission – the word “judgment” in much the same way that it retained jurisdiction to fix the omission of the interest rate and conform the judgment to the dictates of the statute. There is no logical or principled difference: both orders addressed omissions. Therefore, what’s sauce for the goose

should be sauce for the gander, and Appellants cannot have it both ways.

Either the correction of an omission is proper under Rule 74.06(a), or it is not. If it is proper, then the Appellants' quest to avoid interest fails. If it is not proper, then this Court must dismiss for want of jurisdiction. Or more succinctly, either invited error or the doctrine of clean hands forecloses Appellants' argument because they asked the trial court to do exactly what Respondents did: fix an omission.

CONCLUSION

In this case the trial court made an unfortunate omission. Its order of May 10, 2011 giving judgment for the Plaintiffs did not provide the required language set out in § 408.040 R.S.Mo. (2012). The failure of an order to contain language mandated by a statute is presumed to arise by judicial oversight and inadvertence, and is presumed to be a clerical error. *State ex rel. Missouri Highway and Transportation Commission v. Roth*, 735 S.W.2d 19, 22 (Mo.App.1987). Correction of this clerical error is deemed proper by *nunc pro tunc* order. *Id.* But even if this case law did not exist, because the legislature carefully set the standards for post-judgment interest, provided a "gold standard" reference for setting interest rate, and because the rate was agreed to by Appellants, there is no issue here that required the Court to exercise its discretion. Here the court did no more than correct an omission. When it did so by *nunc pro tunc* order, it did so properly. Respondents request this Court affirm the judgment of the trial court in all respects.

Respectfully submitted,

SPEER LAW FIRM, P.A.

Charles F. Speer # 40713
Peter B. Bieri # 58061
104 West 9th Street, Suite 400
Kansas City, Missouri 64105
Telephone: (816) 472-3560
Telecopier: (816) 421-2150
cspeer@speerlawfirm.com
bbieri@speerlawfirm.com

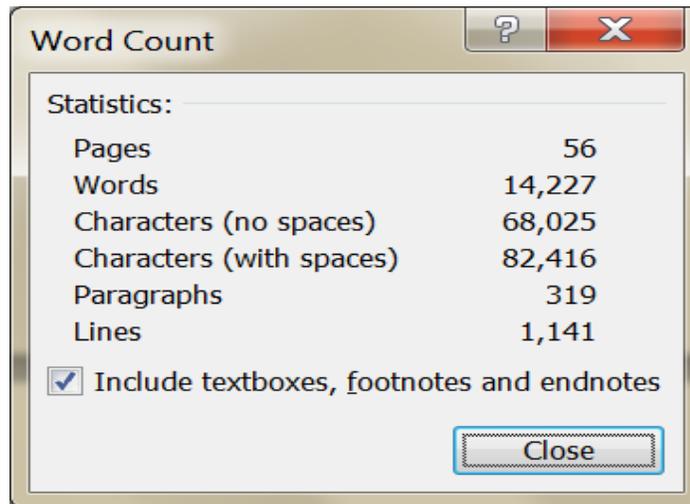
/s/ Charles F. Speer

Edward D. Robertson, Jr. #27183
Mary D. Winter # 38328
Anthony L. DeWitt # 41612
BARTIMUS, FRICKLETON, ROBERTSON &
GORNLY, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454 (office)
(573) 659-4460 (fax)

Attorneys for Respondents

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that the brief contains 14,227 words as counted in compliance with the Rule. The word count was derived from Microsoft Word as shown below.



The electronic copy of the brief has been scanned for viruses and is virus free.

/s/ Charles F. Speer

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that one printed copy of the above and foregoing was served via U.S. Mail and one electronic copy was served via the Court's electronic filing system this 21st day of March, 2014, to the following:

LATHROP & GAGE LLP
Jean Paul Bradshaw II MO #31800
Mara H. Cohara MO #51051
Chad E. Blomberg MO #59784
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108
Telephone: 816-292-2000
Fax: 816-292-2001
jbradshaw@lathropgage.com
mcohara@lathropgage.com
cblomberg@lathropgage.com

ATTORNEYS FOR APPELLANTS

George D. Nichols
Nichols & Nichols
120 W. 10th Street
Lamar, MO 64759
georgednichols@att.net

ATTORNEY FOR DEFENDANT PAUL STEFAN

/s/ Charles F. Speer
Attorney for Respondents