

IN THE SUPREME COURT OF MISSOURI

WILLIAM DIESER,)	
)	Supreme Court No. SC95022
Plaintiff/Appellant/Cross-Respondent,)	
)	Circuit Court No. 12SL-CC03428
vs.)	
)	Circuit Court for St. Louis County
ST. ANTHONY'S MEDICAL CENTER,)	
)	
Defendant/Respondent/Cross-Appellant.)	

APPELLANT'S BRIEF

Respectfully Submitted,

COFFEY & NICHOLS

Mary Coffey, #30919
Genevieve Nichols, #48730
Adam Henningsen, #64905
Attorneys for Plaintiff/Appellant/Cross-Respondent
6200 Columbia Ave.
St. Louis, MO 63139
Phone: 314-647-0033
Fax: 314-647-8231
E mail: mc@coffeynichols.com
gn@coffeynichols.com
ah@coffeynichols.com

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JURISDICTIONAL STATEMENT

The Supreme Court has exclusive appellate jurisdiction over constitutional challenges to state statutes. Mo. Const. art. V, sec. 3. This appeal includes a challenge under the Missouri Constitution to section 538.300¹ which, as applied by the trial court, denies plaintiffs in medical negligence cases their right to post-judgment interest under section 408.040.1. Specifically, the judgment entered in this case denying Dieser post-judgment interest violates his rights under the Missouri Constitution to: Equal Protection, Art. I, section 2; to Open Courts And Certain Remedies, Art I, section 14; and Trial By Jury, Art. I, section 22(a).

The constitutional validity of the denial of post-judgment interest in medical negligence cases through the application of section 538.300 and section 408.040 has not been addressed by this Court. The constitutional issues involved in this appeal are, therefore, real, substantial, made in good faith, and within the exclusive jurisdiction of this Court. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 52 (Mo. banc. 1999). The Western District Court of Appeals in *Mackey v. Smith*, 438 S.W.3d 465, 481-482 (Mo. App. 2014) addressed the application of an earlier version of section 408.040 (2005) in

¹ All statutory references are to RSMo. All references to section 408.040 are to the 2014 non-cumulative supplement unless otherwise indicated. All references to 538.300 are to the 2013 cumulative supplement. Both section 538.300 and the 2014 and the 2005 versions of section 408.040 are in the Appendix and can be found at <http://www.moga.mo.gov/mostatutes/stathtml/40800000401.html>.

holding that the denial of post-judgment interest in medical negligence cases did not violate the right to a jury trial, and, did not address any of the other constitutional challenges raised here.

In addition to their constitutional arguments, Dieser argues that the trial court misconstrued the relevant statutes and that a proper construction of section 408.040.1 and section 538.300 allows for post-judgment interest in medical negligence claims. Because the Supreme Court abstains from determining constitutional questions that are unnecessary to a disposition of a case, *Chicago, B. & Q. R. Co. v. North Kansas City*, 367 S.W.2d 561, 568 (Mo. 1963), Dieser's constitutional challenge will not be reached unless this Court construes the statutes as denying post-judgment interest. By denying post-judgment interest, the trial court necessarily reached the constitutional issues raised. As this Court said in *State ex rel. State Highway Comm'n v. Wiggins*, 454 S.W.2d 899, 901-902 (Mo. 1970): "It may be that this appeal can be decided without reaching the constitutional issue, but jurisdiction once acquired is not lost because the appeal may be disposed of on other grounds." *Id.*

Even without the constitutional issues, the interpretation and application of the post-judgment interest statute in medical negligence cases is a question of general interest as it affects a large number of personal injury litigants and is an important question of first impression. Thus, this Court has discretion to take jurisdiction prior to opinion by the Eastern District Court of Appeals. Mo. Const. art. V, sec. 10; Rule 83.06. *See e.g. Kelly v. Hanson*, 959 S.W.2d 107 (Mo. 1997) (accepting transfer of case prior to decision by Court Of Appeals to determine proper application of Hancock Amendment because of

general interest and importance in the issue); *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. 1999) (accepting transfer of case involving tort law issues stating that even without the constitutional challenges they were of general interest and importance); *Department of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327 (Mo. 1985) (accepting transfer prior to an opinion by the Court Of Appeals when the question involved the construction and application of a state regulation); *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986) (transfer prior to opinion by the Court Of Appeals on issue of tort law, ultimately abolishing spousal immunity as a bar to claim of intentional tort, because of the general interest and importance of the case).

St. Anthony's appeal filed in the Eastern District was transferred and consolidated with Dieser's direct appeal by this Courts order of June 30, 2015. St. Anthony's is expected to challenge various evidentiary rulings as well as the amount of the jury's verdict. The good faith constitutional issues raised here confer jurisdiction of all other issues raised in both appeals. *See Beatty v. Metropolitan St. Louis Sewer District*, 700 S.W.2d 831, 834 (Mo. 1985) (good faith constitutional issues confer jurisdiction of all issues raised in the case); Rule 83.01; Rule 83.02.

Dieser is authorized to appeal as a "party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited...." RSMo sec. 512.020 (2013 cum. supp.). The value of Dieser's jury award against St. Anthony's will be meaningfully reduced over the course of any appeals or refusals to pay because no interest is running on the debt. The lack of post-judgment interest effectively allows St. Anthony's to avoid liability by delay.

Dieser's appeal concerns the April 23, 2015, judgment of the trial court which is a "judgment" within the meaning of Missouri Supreme Court Rule 74.01 in that it is a writing denominated "judgment" that is signed by the trial judge and disposes of all the claims of all the parties on the merits. *Legal File, Vol. 2, p. 296; Appendix p. A1.* Finality of the April 23, 2015, judgment was suspended by operation of Missouri Supreme Court Rule 81.05(a) by timely filed after trial motions under Missouri Supreme Court Rules 72.01(b) and 78. *Legal File, Vol. 2, p. 243.* Dieser's motion to amend the judgment to provide for post-judgment interest was denied on April 30, 2015. *Legal File, Vol. 2, p. 329.* St. Anthony's post-trial motions were denied on May 7, 2015. *Legal File, Vol. 2, p. 331.* Dieser's notice of appeal to the Supreme Court was filed on May 15, 2015, within ten days of the trial court's last ruling on the after trial motions, and thus was timely under Missouri Supreme Court Rules 81.04(a) and 81.05(a)(2)(B). *Legal File, Vol. 2, p. 337.*

Jurisdiction over all issues is, therefore, appropriate in this Court.

STATEMENT OF FACTS

This is a medical negligence case tried to a jury for five days in Division 16, Judge Michael Burton, of the 21st Judicial Circuit. *Legal File, Vol. 1, p. 1.* On February 27, 2015, the jury found in favor of Dieser and against St. Anthony's and assessed Dieser's total damages at \$883,000.00. *Legal File, Vol. 2, p. 203.* On March 12, 2015, Dieser filed a motion for entry of judgment which included a request for post-judgment interest pursuant to section 408.040.1. *Legal File, Vol. 2, p. 211; 214.* Dieser argued that a denial of post-judgment interest would violate provisions of the Missouri Constitution, specifically, the right to equal protection under Article I section 2, the prohibition against special laws under Article III section 40, the open courts and certain remedy provision of Article I section 14 and the right to trial by jury provided by Article I section 22. *Legal File, Vol. 2, p. 211; 214.* St. Anthony's opposed post-judgment interest, arguing that under section 538.300, there is no post-judgment interest for medical negligence cases. The trial court entered its judgment without post-judgment interest on April 23, 2015. *Legal File, Vol. 2, p. 296; Appendix p. A1.* Dieser filed a Motion to Amend the Judgment to allow for post-judgment interest raising the same statutory construction and constitutional issues he had raised before the judgment. *Legal File, Vol. 2, p. 297.* This was denied on April 30, 2015. *Legal File, Vol. 2, p. 329.* Dieser filed a direct appeal to the Supreme Court on May 15, 2015. *Legal File, Vol. 2, p. 337.*

POINTS RELIED ON

1. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE SUB-SECTION ONE OF 408.040 REQUIRES POST-JUDGMENT INTEREST ON ALL JUDGMENTS AND THAT REQUIREMENT IS NOT AFFECTED BY SECTION 538.300.

2. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES DIESER'S FUNDAMENTAL PROPERTY RIGHTS AS PROTECTED BY ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION.

3. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES DIESER'S RIGHTS AS GUARANTEED BY THE OPEN COURTS AND CERTAIN REMEDY PROVISIONS OF ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION.

4. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES DIESER'S RIGHTS TO TRIAL BY JURY AS

GUARANTEED BY ARTICLE I, SECTION 22(A) OF THE MISSOURI
CONSTITUTION.

ARGUMENT

1. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE SUB-SECTION ONE OF 408.040 REQUIRES POST-JUDGMENT INTEREST ON ALL JUDGMENTS AND THAT REQUIREMENT IS NOT AFFECTED BY SECTION 538.300.

Standard of Review

Questions of statutory interpretation are reviewed *de novo*. *In re Brockmire*, 424 S.W.3d 445, 446–47 (Mo. banc 2014).

Rules of Statutory Construction

The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue. *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009); *see also State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 479 (Mo. banc 2013) (“‘[W]ords should be given their plain and ordinary meaning whenever possible.’”). Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result that defeats the purpose of the legislation. *Id.* at 479. Courts should be “guided by what the legislature says, and not by what we may think it meant to say.” *Missouri Public Service Co. v. Platte–Clay Elec. Co-op., Inc.*, 407 S.W.2d 883, 891 (Mo. 1966).

Dieser's Right To Post-Judgment Interest Pursuant To Section 408.040.1

The 2014 version of section 408.040 in effect currently and at the time of judgment provides (with emphasis added):

1. *Judgments shall accrue interest on the judgment balance as set forth in this section. The "judgment balance" is defined as the total amount of the judgment awarded on the day judgment is entered including, but not limited to, principal, prejudgment interest, and all costs and fees. Post-judgment payments or credits shall be applied first to post-judgment costs, then to post-judgment interest, and then to the judgment balance.*

2. In all nontort actions....

3. Notwithstanding the provisions of subsection 2 of this section, in tort actions, interest shall be allowed on all money due upon any judgment or order of any court from the date judgment is entered by the trial court until full satisfaction. 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. The judgment shall state the applicable interest rate, which shall not vary once entered. ...

RSMo sec. 408.040 (2014 supp.) (emphasis added).

Section 538.300, which was relied on by the trial court to deny post-judgment interest, provides:

The provisions of ... subsections 2 and 3 of section 408.040 shall not apply to actions under sections 538.205 to 538.230.

RSMo sec. 538.300 (2013 cum. supp.).

It is true that sections 538.205 to 538.230 apply to medical negligence cases like this one based on improper health care. *See e.g.* RSMo secs. 538.210.1, 538.215.1, 538.225.1. However, whatever the effect of the language that “subsections 2 and 3 of section 408.040 shall not apply,” section 538.300 says nothing to bar the application of subsection 1 of section 408.040. “Where a statute provides that interest ‘shall’ be paid or received, a court has no discretion to refuse to award interest as directed by the statute.” *Baird v. Baird*, 843 S.W.2d 388, 390 (Mo. App. 1992); *See also Bohac v. Akbani*, 29 S.W.3d 407, 414 (Mo. App. 2000). Because section 538.300 leaves untouched section 408.040.1’s mandate that “judgments shall accrue interest on the judgment balance ... defined as the total amount of the judgment ... including ... principal,” this Court should reverse the trial court and “give such judgment as the court ought to give.” Rule 84.14; *see, e.g., Independence Flying Serv., Inc. v. Ailshire*, 409 S.W.2d 628, 632 (Mo. 1966) (Supreme Court modifies judgment to include post-judgment interest).

Mackey v. Smith Does Not Apply

In the trial court, St. Anthony's relied on *Mackey v. Smith*, 438 S.W.3d 465, 481-482 (Mo. App. 2014) for its position that post-judgment interest was not authorized by virtue of section 538.300's statement that sections two and three of section 408.040 did not apply to cases brought under the medical malpractice statutes. The *Mackey* Court, however, was working with the 2005 version of section 408.040 which contained a critical difference. At the time of the trial court's judgment in *Mackey*, subsection one of section 408.040, granted post-judgment interest only in "nontort" actions:

1. In all nontort actions, interest shall be allowed on all money due upon any judgment or order of any court from the date judgment is entered by the trial court until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than nine percent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear nine percent per annum until satisfaction made as aforesaid.

2. Notwithstanding the provisions of subsection 1 of this section, in 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 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.[provisions re prejudgment interest omitted].

3. In tort actions, a judgment for prejudgment interest awarded pursuant to this subsection should bear interest at a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus three percent. The judgment shall state the applicable interest rate, which shall not vary once entered.

RSMo sec. 408.040 (2013 cum. sup.), *Appendix p. A4*.

Because it found subsections two and three of section 408.040 had no application for medical negligence cases by operation of section 538.300, and, because section one of section 408.040 granted post-judgment interest only in “nontort” cases, the *Mackey* Court was left with no statutory authority for post-judgment interest. *Mackey*, 438 S.W.3d at 481-482.

In August, 2014, that statutory situation changed. After the trial court’s judgment in *Mackey* and well before the judgment in this case in April, 2015, subsection one of section 408.040 was amended and specifically changed from providing for post-judgment interest in “nontort cases” to providing that “judgments shall accrue interest...” without restriction to the type of case. By this 2014 amendment, the legislature clearly stated that

post-judgment interest applies to all judgments, including Dieser's.

The Rate at Which Post-judgment Interest Should Run

Rates for both pre and post-judgment interest are provided in section three of 408.040. If this rate set for post-judgment interest were applied to the judgment of April 23, 2015, Dieser would be entitled to post-judgment interest at the rate of 5.13%.²

Section 538.300 does say that subsection three of section 408.040 shall not apply to actions “brought under” sections section 538.205 to 538.230. To the extent this action is considered as one “brought under” the statutes affecting medical negligence claims, then there is no statutorily prescribed rate for the post-judgment interest mandated by section 408.040.1.³

² Section 408.040.3 sets post-judgment interest at “the intended Federal Funds Rate, as established by the Federal Reserve Board, plus five percent, until full satisfaction is made.” The Federal Funds rate for April 23, 2015 was 0.13%. <http://www.federalreserve.gov/releases/h15/20150427/> and *Appendix p. A7*.

³ The argument that section 538.300 does not apply because malpractice actions are “brought under” the common law and not section 538.205 to section 538.230 was rejected by the Court in *Mackey*, 438 S.W.3d at 482, which reasoned that “brought under” must be construed to mean “limited by” or “governed by” if the statute was to have any meaning. Dieser respectfully suggests that *Mackey* was wrongfully decided on this point, and that the Court should not graft language onto the statute that does not exist.

In other situations where interest was statutorily required but a rate not specified, courts have been directed to use their discretion to establish a reasonable rate. *See Leggett v. Missouri State Life Insurance Company*, 342 S.W.2d 833, 931 (Mo. 1960) (“In the absence of a governing statute designating the rate of interest a court of equity may exercise its discretion in the allowance of interest, depending on the facts surrounding each case”); *Vincent by Vincent v. Johnson*, 833 S.W.2d 859, 867 (Mo. 1992) (in determining the appropriate rate of interest under section 538.220 for future damage payments, the court should consider what would constitute prudent investment, beginning with the rate of return on equivalent long-term investments, in light of the security provided for future payments) *overruled on other grounds by Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633 (Mo. 2012). Dieser accepts that the legislative rate of 5.13% in section 408.040.3 is reasonable, and asks this Court to amend the judgment to provide for post-judgment interest at this rate from April 23, 2015.

For all these reasons, Dieser asks the Court to find that section 538.300 leaves untouched the mandate of section 408.040.1 that “judgments shall accrue interest on the judgment balance ... defined as the total amount of the judgment ... including ... principal ... and costs.” Dieser also asks the Court to enter a new judgment providing for judgment against Defendant in the amount of \$883,000.00, with post-judgment simple interest at the rate of 5.13% running from April 23, 2015, and taxable costs.

Medical negligence cases are brought under the common law. *See Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 638 (Mo. banc 2011).

2. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES APPELLANT'S FUNDAMENTAL PROPERTY RIGHTS AS PROTECTED BY ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION.

Standard of Review

The standard of review for constitutional challenges to a statute is *de novo*, and statutes are presumed to be constitutional. *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 135 (Mo. 2013). The Supreme Court will not invalidate a statute unless it clearly and undoubtedly violates a constitutional provision. *Id.* The party challenging the validity of a statute bears the burden of proving the statute clearly and undoubtedly violates the constitution. *Id.*

Equal Protection And Fundamental Property Rights

Article I, section 2 of the Missouri Constitution's Bill of Rights Provides:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when

government does not confer this security, it fails in its chief design.

Mo. Const. art. I, sec. 2.

The question is whether a legislative prohibition of interest on a court judgment to victims of medical negligence is a violation of this provision.

There are two steps to an Article I, section 2 equal protection analysis. *Amick v. Director of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014). The first step requires a court to identify the classification at issue to ascertain the appropriate level of scrutiny. *Id.* If the challenged law draws a distinction on the basis of a suspect classification or curtails the exercise of a fundamental right, then strict scrutiny applies. *Id.* If there is no suspect classification or fundamental right at issue, a court will apply rational-basis review to determine whether the challenged law is rationally related to some legitimate end. *Id.*

This Court has held that victims of medical negligence are not a suspect class. *Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 912 (Mo. 2015). However, the law must still withstand strict scrutiny under Article I, section 2 if the legislation “impinges upon a fundamental right explicitly or implicitly protected by the constitution.” *Id.* As explained below in Points Relied on Nos. Three and Four, Dieser asserts that a legislative denial of post-judgment interest unreasonably impinges on the right to open courts and a certain remedy pursuant to Article I section 14, and, the right to a jury trial under Article I, section 22(a) of the Missouri Constitution.

In this Point Relied on, Dieser asserts that the denial of post-judgment interest violates his fundamental, constitutional property right in his court judgment. It is without doubt that individuals have a fundamental Missouri constitutional right to use and enjoy property free from arbitrary governmental interference. *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 332 (Mo. 2015). It is also true that the state can directly confiscate private property for public use as long as the taking is shown to “substantially advance[s] a legitimate state interest. *Id.* (quoting *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987)).

The United States Supreme Court has recognized post-judgment interest as part of the “just compensation” guarantee of the US Constitution for government takings of private property. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306, (1923) (“It is obvious that the owner’s right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right.”). Similarly, although not on constitutional grounds, the Missouri Court of Appeals for the Southern District has held that post-judgment interest is recoverable against the State above the caps in the sovereign immunity statute. *See Benoit v. Missouri Highway & Transp. Comm’n*, 33 S.W.3d 663, 676 (Mo. App. 2000). These cases impliedly recognize the fundamental nature of a litigant’s property interest in a court judgment and acknowledge that when a government entity becomes a judgment debtor, it should be treated as all similarly situated judgment debtors. The same analysis should apply when the judgment debtor is a health care provider.

Dieser's interest in his judgment is more than the normal interest in other property. A judgment arises from a citizen's successful pursuit of his rights in state court under state law. It should be protected as a fundamental property right under Article I, section 2, and legislation impinging on the full value of a court judgment should be strictly scrutinized.

538.300's Relationship To Reducing Malpractice Costs

But even if a prohibition against post-judgment interest need only bear a rational relation to legitimate legislative goals, allowing health care providers to benefit from delaying payment on judgments has no rational basis. The law does not substantially advance a legitimate state interest as required for governmental interference with property rights. *Labrayere*, 458 S.W.3d at 332. Delayed payment without interest effectively allows health care providers and their insurers to pay less than the just compensation provided in the judgment. Section 538.300, as construed by the trial court, rewards delaying tactics, including frivolous appeals. Medical providers can delay payment during appeal without penalty. They can benefit further by avoiding payment after appeal, earning interest on the victim's money until forced to pay through collection proceedings. Denying post-judgment interest irrationally purports to reduce costs by encouraging delay in satisfaction of Court judgments, creating more litigation in its place and thereby increasing malpractice costs.

For these reasons, Dieser asks the Court, in the event it construes section 538.300 to prohibit post-judgment interest in medical negligence cases, to declare the statute an unreasonable and irrational restriction on Dieser's fundamental property right in the

judgment as protected by the equal protection clauses of Article I, section 2 of the Missouri Constitution.

3. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES DIESER'S RIGHTS AS GUARANTEED BY THE OPEN COURTS AND CERTAIN REMEDY PROVISIONS OF ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION.

Standard of Review

The standard of review for constitutional challenges to a statute is de novo, and statutes are presumed to be constitutional. *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 135 (Mo. 2013). The Supreme Court will not invalidate a statute unless it clearly and undoubtedly violates a constitutional provision. *Id.* The party challenging the validity of a statute bears the burden of proving the statute clearly and undoubtedly violates the constitution. *Id.*

Open Courts and Certain Remedy

Article I section 14 of the Missouri Constitution provides:

That the Courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character, and that right and justice shall be administered without sale, denial or delay.

Mo. Const. art. I, sec. 14.

In *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), the Court reviewed its recent precedent and:

distilled . . . a coherent line of reasoning that . . . will ensure that article I, section 14 retains its vitality while permitting proper deference to legislative enactments. Put most simply, article I, section 14 “prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury.”

Id. at 549 (quoting *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. banc 1997) (Holstein, C.J., dissenting) (emphasis in *Kilmer*).

An open courts violation is established on a showing that: “(1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.” *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. 2009). The constitutional requirement that a certain remedy be afforded for every injury was designed to protect the use of the courts for the enforcement of recognized rights. *State ex rel National Refining Co. v. Seehorn*, 127 S.W.2d 418, 424 (Mo. 1939). Unwarranted interference with the function of the courts is prohibited by this section. *See Ex parte French*, 285 S.W. 513, 515 (Mo. 1926) (holding statute forbidding bank commissioner to divulge information in civil cases violated the open courts provision).

Medical negligence cases are a creature of the common law and were brought in Missouri before the 1820 Constitution. *Watts*, 376 S.W.3d at 636, 638. No matter how long St. Anthony’s decides to wait to pay, the denial of post-judgment interest to Dieser is a clear restriction on the judgment and the cause of action he prevailed on in a Missouri

court. Legislative permission to health care providers, and their insurance companies, to benefit by frivolously appealing or delaying payment of valid court judgments is an obvious restriction on the constitutional right of “every person ... to justice ... without delay.” Mo. Const. art. I, sec. 14. The restriction is an arbitrary and unreasonable interference with the value of the courts’ judgment because “[t]he fact that a dollar today is not the same thing as a dollar payable some years from now ... is the matter of plainest fact.” *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298, 308 (Mo. 1992).

In *State ex rel. Cardinal Glennon Mem’l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 109–10 (Mo. banc 1979), this Court found that artificial barriers, such as the requirement that one appear before a medical review board prior to filing suit, violates the open courts and certain remedy provision which allows for access to the courts without just delay. In *Strahler v. St. Luke’s Hospital*, 706 S.W.2d 7 (Mo. banc 1986), the Court struck down Missouri’s two-year statute of limitations on medical negligence actions as applied to a 15-year old minor on the ground that the limitations period was “too severe an interference with a minor’s state constitutionally enumerated right of access to the courts” under article I, section 14. *Id.* at 12. And more recently, in *Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 911 (Mo. 2015) this Court held that a statute of repose for foreign objects left in patients did not violate the open courts and certain remedies provision because the cause of action, unlike *Dieser’s*, had never accrued and therefore the statute of repose was not a restriction on an authorized claim. The *Ambers-Phillips* Court commented that a denial of a right to bring suit for personal injury would implicate constitutional concerns. *Id.* And in *Mayes v. Saint*

Luke's Hosp. of Kansas City, 430 S.W.3d 260, 270, and footnote 15 (Mo. 2014), this Court noted that a real and substantial open courts issue was raised by a challenge to the current version of the affidavit of merit statute section 538.225, which deprives the court of discretion on whether to dismiss an action for failure to comply with the statute.⁴

In contrast, this Court has held that damage caps do not violate the open courts and certain remedy provision on the reasoning that caps on non-economic damage caps were not an impermissible procedural bar to access to the Courts. *Adams By & Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 905 (Mo. 1992), *overruled on other grounds by Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633 (Mo. 2012). In *Fisher* the caps in the sovereign immunity statute were held permissible because suits against the State involved a legislatively created cause of action. *Fisher v. State Highway Com'n of Mo.*, 948 S.W.2d 607 (Mo. 1997).

When it comes to open courts, the issue of the availability of post-judgment interest to victims of medical negligence is more like an unreasonably short statute of limitations, or a requirement for a review board, or an affidavit requirement with no court discretion, than a damage cap on an existing cause of action. A judgment from the court in a litigant's favor is the physical manifestation of the litigant's successful access to the courts. To allow the judgment debtor to dilute the value of that judgment by delaying

⁴ The constitutionality of the affidavit of merit statute is under submission to this Court in *Lang v. Goldsworthy*, SC94814, argued and submitted 9/2/15.

<https://www.courts.mo.gov/casenet/cases/searchDockets.do>

payment is a denial of true and meaningful access to the courts that is unreasonable and arbitrary. If the idea behind precluding post-judgment interest against health care providers is to reduce malpractice costs, then the legislature is doing so by encouraging health care providers to delay satisfaction of judgments against them and by diluting the Court's and the litigant's power to enforce the judgment.

For these reasons, Dieser asks the Court, in the event it construes section 538.300 to prohibit post-judgment interest in malpractice cases, to declare the statute an arbitrary and unreasonable restriction on Dieser's access to the courts as protected by article I, section 14 of the Missouri Constitution.

4. THE TRIAL COURT ERRED TO THE PREJUDICE OF DIESER IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES DIESER’S RIGHTS TO TRIAL BY JURY AS GUARANTEED BY ARTICLE I, SECTION 22(A) OF THE MISSOURI CONSTITUTION.

Standard of Review

The standard of review for constitutional challenges to a statute is *de novo*, and statutes are presumed to be constitutional. *St. Louis County v. River Bend Estates Homeowners’ Ass’n*, 408 S.W.3d 116, 135 (Mo. 2013). The Supreme Court will not invalidate a statute unless it clearly and undoubtedly violates a constitutional provision. *Id.* The party challenging the validity of statute bears the burden of proving the statute clearly and undoubtedly violates the constitution. *Id.*

Trial by Jury

Article I, section 22(a) of the Missouri Constitution provides “That the right of trial by jury as heretofore enjoyed shall remain inviolate.” In *Mackey v. Smith*, 438 S.W.3d 465, 482 (Mo. App. 2014) the Court rejected the plaintiff’s argument under *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 641 (Mo. banc 2012), that section 538.300’s provision against post-judgment interest in malpractice cases violated the Missouri Constitution’s guarantee of right to trial. The *Mackey* Court reasoned that because the denial of post-judgment interest does not limit the damages the jury can award, and because post-judgment interest “is, and has always been, a statutory right and

not a common law or constitutional right,” there was no infringement. *Mackey*, 438 S.W.3d at 482.

Dieser respectfully suggests that *Mackey* was wrongfully decided on this point. The complete denial of post-judgment interest to prevailing victims of medical negligence is a *de facto* limit on the jury’s award. “The fact that a dollar today is not the same thing as a dollar payable some years from now ... is the matter of plainest fact.” *Anglim v. Missouri Pacific R. Co.* 832 S.W.2d 298, 308 (Mo. 1992). This Court recognized in *Watts* that juries before 1820 decided damages in medical negligence cases, and that the Constitution’s preservation of the right to trial by jury “as heretofore enjoyed” protected both the jury’s decision on liability and damages in malpractice cases. *Watts*, 376 S.W.3d at 636, 638. The Court further recognized that once the right to a trial by jury attaches, the Missouri Constitution gives the plaintiff the full benefit of that right free from the reach of hostile legislation. *Watts*, 376 S.W.3d at 640. In fact, the opinion in *Watts* implicitly recognized that an unreasonably low statutory interest rate on future payments does indeed deprive a prevailing medical negligence victim the benefit of the jury’s award. *Watts*, 376 S.W.3d at 648 (reversing the trial courts’ judgment regarding future payments and their interest rate to ensure that the victim receive the full benefit of the jury’s award). If a low interest rate denies a plaintiff the full benefit of the jury’s award, allowing no interest at all must be stricken for the same reason.

For these reasons, Dieser asks this Court, in the event it construes section 538.300 to prohibit post-judgment interest in malpractice cases, to declare the statute an impermissible restriction on the jury’s verdict as reflected in the judgment and violative

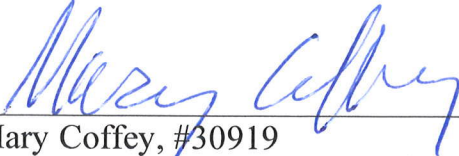
of Dieser's right to trial by jury as guaranteed by Article I, section 22(a) of the Missouri Constitution.

CONCLUSION

For all of the foregoing reasons, this Court should apply the plain language of section 538.300 as leaving untouched the plain language mandate for post-judgment interest in all cases provided by section 408.040.1. In the event it finds that the section 538.300 prohibits post-judgment interest in medical negligence cases, the Court should declare the statute an impermissible restriction on Dieser's rights under the Missouri Constitution to: equal protection, Art. I, section 2; the right to open courts and certain remedies, Art I, section 14; and trial by jury, Art. I, section 22(a). If the Court finds that section 408.040.1 provides for post-judgment interest in this case, or that section 538.300 is unconstitutional, it should reverse the judgment of the trial court and issue a new judgment against Defendant in the amount of \$883,000.00, with post-judgment simple interest at the rate of 5.13% running from April 23, 2015, and taxable trial and appellate costs.

Respectfully Submitted,

COFFEY & NICHOLS



 Mary Coffey, #30919

Genevieve Nichols, #48730

Adam Henningsen, #64905

Attorneys for Plaintiff/Appellant/Cross-Respondent

6200 Columbia Ave.

St. Louis, MO 63139

Phone: 314-647-0033

Fax: 314-647-8231

E mail: mc@coffeynichols.com

gn@coffeynichols.com

ah@coffeynichols.com

IN THE SUPREME COURT OF MISSOURI

WILLIAM DIESER,)
) Supreme Court No. SC95022
Plaintiff/Appellant/Cross-Respondent,)
) Circuit Court No. 12SL-CC03428
vs.)
) Circuit Court for St. Louis County
ST. ANTHONY'S MEDICAL CENTER,)
)
Defendant/Respondent/Cross-Appellant.)

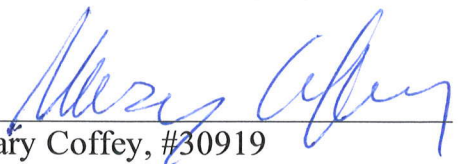
RULE 84.06(c) CERTIFICATION

COMES NOW Plaintiff-Appellant William Dieser, and pursuant to Missouri Supreme Court Rule 84.06(c), submits his Appellant's Brief and certifies the following:

1. The brief complies with the limitations contained in Rule 84.06(b);
2. The brief is 6,534 words in length;
3. The brief is contains 634 lines of type.

Respectfully Submitted,

COFFEY & NICHOLS


 Mary Coffey, #30919
 Genevieve Nichols, #48730
 Adam Henningsen, #64905
 Attorneys for Plaintiff/Appellant/Cross-Respondent
 6200 Columbia Ave.
 St. Louis, MO 63139
 Phone: 314-647-0033
 Fax: 314-647-8231
 E mail: mc@coffeynichols.com
gn@coffeynichols.com
ah@coffeynichols.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed and sent to those attorneys of record registered for this case in this Court's Electronic Filing System, and via email, this 22 day of Sept, 2015, to:

Paul N. Venker

Nathan D. Leming

Lisa Larkin

WILLIAMS VENKER & SANDERS, LLC

Attorneys for Defendant/Respondent/Cross-Appellant

Bank of America Tower

100 North Broadway, 21st Floor

St. Louis, MO 63102

Phone: 345-5000

Fax: 345-5055

E mail: pvenker@wvslaw.com

nleming@wvslaw.com

llarkin@wvslaw.com