IN THE MISSOURI SUPREME COURT

SC95022

WILLIAM DIESER,

Plaintiff/Appellant/Cross-Respondent,

v.

ST. ANTHONY'S MEDICAL CENTER,

Defendant/Respondent/Cross-Appellant

Appeal from the Circuit Court of St. Louis County, Missouri
Case No. 12SL-CC03428
The Honorable Michael D. Burton

BRIEF OF DEFENDANT/RESPONDENT/CROSS-APPELLANT ST. ANTHONY'S MEDICAL CENTER

WILLIAMS VENKER & SANDERS LLC

Paul N. Venker, #28768
Lisa A. Larkin, #46796
100 North Broadway, 21st Floor
St. Louis, MO 63102
(314) 345-5000
(314) 345-5055 (facsimile)
pvenker@wvslaw.com
llarkin@wvslaw.com

ATTORNEYS FOR DEFENDANT/RESPONDENT/
CROSS-APPELLANT ST. ANTHONY'S
MEDICAL CENTER

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant/Cross-Respondent William Dieser seeks damages against Defendant/Respondent/Cross-Appellant St. Anthony's Medical Center arising out of a skin wound or pressure wound in the sacral and buttock area. (L.F. 44). Defendant denies all allegations. (L.F. 129-133).

In February 2015, the parties tried this case to a jury, and in closing argument, his counsel asked the jury to award $633,000.00 in damages. (L.F. 203, Tr. 1182:20-22, A43). Plaintiff had $33,000 in medical bills and no lost wages as part of his claim. (Tr. 1185:18-20, A44; L.F. 203). The jury returned a verdict in Plaintiff's favor on all claims and awarded damages in the amount of $883,000.00. (L.F. 203, Verdict).

All parties timely filed post-trial Motions, including Plaintiff's Motion for Entry of Judgment Which Includes Post Judgment Interest. (L.F. 204-243; 291-295). On April 23, 2015, the trial court entered judgment in the amount of $883,000.00 in accordance with the jury's verdict. (L.F. 296). On May 7, 2015, the trial court denied all of Defendant's timely-filed post-trial motions. (L.F. 331).

On May 15, 2015, Defendant timely filed a Notice of Appeal to the Court of Appeals for the Eastern District. (L.F. 656). Also on May 15, 2015, Plaintiff timely filed a Notice of Appeal to this Court. (L.F. 337). On June 30, 2015, this Court, on its own Motion, ordered Defendant's appeal in the Eastern District transferred to this Court. (SC95022, Order of June 30, 2015).

There is no basis for jurisdiction in the Missouri Supreme Court. The Court of Appeals for the Eastern District has jurisdiction over both Plaintiff's appeal and

Defendant's cross-appeal pursuant to Article V, section 3, of the Missouri Constitution. For the reasons that follow, this case does not involve the validity of a treaty or statute of the United States or of a statute or provision of the Missouri Constitution, the construction of Missouri's revenue laws, the title to any state office, or the imposition of the death penalty. The Circuit Court of the Twenty-First Judicial Circuit (St. Louis County) is within the territorial jurisdiction of the Eastern District. Section 477.050, RSMo 2000.

Plaintiff's appeal is not within this Court's original jurisdiction.

Plaintiff's appeal is not within this Court's original jurisdiction because Plaintiff waived his constitutional challenges to Section 538.300, RSMo 2005 by not asserting them until his post-trial Motion, even though Plaintiff's first opportunity to do so was in reply to Defendant's pleading of the statute and others in Chapter 538 in its February 2013 Answer to the First Amended Petition. (L.F. 17-23).

1. Plaintiff's constitutional challenge is untimely.

Plaintiff did not even attempt to assert any constitutional challenge until on March 12, 2015, when he filed his *post-trial* "Motion for Entry of Judgment Which Includes Post Judgment Interest." (L.F.211-212). As a matter of law, Plaintiff's first notice of Defendant's intent to rely on the statutory proscription against post-judgment interest came in February 2013, with the filing of Defendant's Answer (with a specific statement of reliance on the provisions of Chapter 538), to the First Amended Petition. (L.F. 20); *McGrath v. Meyers*, 107 S.W.2d 792, 794 (Mo. 1937). Plaintiff's post-trial constitutional challenges, therefore, are untimely and waived.

Myriad Missouri cases make clear that constitutional challenges must be raised at the earliest possible opportunity that good pleading and orderly procedure will permit, given the circumstances. *Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635, 654 (Mo.App. E.D. 2005). Generally, a constitutional challenge made for the first time in a post-trial Motion is not preserved for appellate review. *Willits v. Peabody Coal Co., LLC*, 400 S.W.3d 442, 452 (Mo.App. E.D. 2013).

A constitutional challenge to a statute is considered to be of such dignity and importance that it must be raised at the earliest opportunity and not as an afterthought in a post-trial Motion or on appeal. *Land Clearance for Redevelopment Authority of Kansas City, Missouri v. Kansas University Endowment Ass'n*, 805 S.W.2d 173, 176 (Mo. banc 1991). Time and time again this Court has stated that constitutional challenges must be asserted at the pleading stage, if that is the first opportunity to do so. "If the cause of action be founded upon a pleaded ordinance, then the answer would be the first open door. If the defense in its answer relies upon a pleaded ordinance, then the reply would be the first open door." *McGrath v. Meyers*, 107 S.W.2d 792, 794 (Mo. 1937). "The rule which the cases have established is that if a defense is based on a statute or an ordinance, the plaintiff must determine whether there is any ground for challenging its validity and if he desires to make such a challenge, assert it in his reply…or it is waived." *Id.* Even if the challenger has raised a challenge early enough, the challenge must be of the requisite specificity and must be kept alive throughout the proceeding. *See Mayes v. Saint Luke's Hospital of Kansas City,* 430 S.W.3d 260, 266-67 (Mo. banc 2014).

At least one court has already rejected the argument that the first opportunity to challenge the validity of a statute authorizing interest on a judgment arises only after the jury verdict for plaintiff. *E.g., McCormack v. Capital Elec. Const. Co., Inc.*, 159 S.W.3d 387, 404 (Mo.App. W.D. 2005)(holding defendant waived constitutional challenge to pre-judgment interest statute where Petition specifically prayed for pre-judgment interest, but defendant did not raise constitutional claim until filing of a post-trial Motion to amend judgment; since prayer cited to pre-judgment interest statute, defendant had ample notice that plaintiff intended to seek pre-judgment interest on his verdict). This Court has consistently held that a constitutional challenge to a statute or ordinance pled in an Answer must be raised at the earliest opportunity in direct response thereto. *McGrath, supra,* 107 S.W.2d at 794 ("[I]f a defense is based on a statute or ordinance, the plaintiff must determine whether there is any ground for challenging its validity and if he desires to make such a challenge, assert it in his reply…"). *Id.*

Another example is *Land Clearance for Redevelopment Authority of Kansas City, supra.* There the defendant property owner was awarded judgment pursuant to a jury verdict in a condemnation proceeding. The judgment included interest at the rate of 6% per annum pursuant to Section 523.045, RSMo 1986. 805 S.W.2d at 174. The defendant property owner filed a post-trial Motion to Amend the judgment, arguing Section 523.045 violated the Missouri and United States Constitutions and that the higher interest rate of Section 408.040 (then 9% per annum) should apply. *Id.* The trial court denied the Motion to Amend the judgment and the property owner appealed. *Id.*

On appeal, the property owner argued, as Plaintiff Dieser does here, that the constitutional questions presented themselves only after trial and verdict when judgment was to be entered and, therefore, a constitutional challenge could be properly raised for the first time in a post-trial Motion. *Id.* at 175. This Court disagreed, holding that the defendant property owner had waived the right to raise the constitutional issues by failing to give timely notice of its intent to assert those issues. *Id.* at 176. "An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Id.* (citing *City of St. Louis v. Butler Co.*, 219 S.W.2d 372, 376 (Mo. banc 1949).

Similarly, in *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. banc 1996), this Court held constitutional challenges to the joint and several liability statute were waived because they were not raised until after verdict and judgment. In that case, plaintiff brought a personal injury claim against defendants VanPool and Brewer. In its verdict for plaintiff, the jury apportioned liability between VanPool and Brewer. *Id.* at 683. In his Motion for New Trial, VanPool, for the first time, raised constitutional challenges to the joint and several liability statute. *Id.* He argued that the constitutional issues or questions arose only after the verdict and judgment were rendered. *Id.* at 684. The Court disagreed, noting that when more than one defendant is named in a tort action for damages, the joint and several liability statute applies, so VanPool could hardly argue, post-verdict, that its application was a surprise. *Id.* (citing *Land Clearance*, 805 S.W.2d at 175). Thus, "[t]he

appropriate time to raise the constitutional issue would have been in answer to the tort Petition, which named more than one defendant." *Id.*

Here, Plaintiff Dieser's earliest opportunity to challenge the constitutionality of Section 538.300 came after Defendant's Answer to the First Amended Petition (filed in 2/2013) mentioned and asserted application of Chapter 538, which would include Section 538.300. (L.F. 20). Thus, the earliest opportunity to raise a constitutional challenge to this statute, or any other section of Chapter 538, came long before the post-trial Motion stage. Consequently, this Court must follow its own long-standing and well-reasoned precedent and hold that Plaintiff's post-trial constitutional challenges are waived and cannot be pursued.

2. Plaintiff's Constitutional Challenges to the Validity of Section 538.300 Are Not Real and Substantial, but Merely Colorable.

Plaintiff's challenge to Section 538.300 excluding the application of Section 408.040 (2) and (3) to judgments in medical negligence cases is neither an issue of first impression, nor one of constitutional dimension. This Court has already heard many challenges to sections of Chapter 538 as being constitutionally infirm because they apply only to medical negligence actions and plaintiffs and found they were without merit. *E.g., Adams v. Children's Mercy Hosp.* 832 S.W.2d 898, 903-905 (Mo. banc 1992), overruled in part by *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012)(a number of its sections specifically found valid); *Mahoney v. Doerhoff Surgical Services, Inc.,* 807 S.W.2d 503, 507-509 (Mo. banc 1991)(Section 538.225 held not to violate right to jury trial for medical malpractice plaintiffs). Plaintiff Dieser has failed to produce or

generate any evidence in the trial court below to show that there is no rational basis for the General Assembly's decision to enact Section 538.300, RSMo, including its preclusion of post-judgment interest set forth in Section 408.040.

Missouri cases make clear that interest on judgments is available only by statute or contractual provision. *Boyle v. Crimm*, 253 S.W.2d 149, 157 [11, 12] (Mo. 1952). There is no constitutional right involved. "Post-judgment interest is, and has always been, a statutory right and not a common law or constitutional right." *Mackey v. Smith,* 438 S.W.3d 465, 482 (Mo. App. W.D. 2014); *Boyle,* 253 S.W.2d at 157. The reasoning of this Court in other, numerous cases is that if the legislature created post-judgment interest, it can also direct its application. *E.g., Sanders v. Ahmed,* 364 S.W.3d 195, 203 (Mo. banc 2012). Even if interest on a judgment was available at common law, this Court has held that the legislature can actually eradicate non-economic damages which had been part of the common law cause of action and still not violate the equal protection clause. *Id.*

Here, there is no basis upon which to find a real and substantial, and not merely colorable, constitutional challenge exists. As such, original jurisdiction does not lie with this Court, rather it is with the Court of Appeals. (Mo. Const. Article V, Section 3.)

STATEMENT OF FACTS

A. Overview

Plaintiff William Dieser asserts a claim for medical negligence involving health care provided to him at St. Anthony's Medical Center (hereafter also "SAMC") from January 28, 2008, through February 7, 2008. (L.F. 44, Petition). Plaintiff alleges that on January 30, 2008, a skin wound or pressure injury was discovered on his sacral and buttock area. (L.F. 44, ¶2-3). Plaintiff further alleges that by February 6, 2008, the pressure injury extended between the skin, through deeper tissues, and all the way to the bone. (L.F. 44, ¶4). Plaintiff asserts Defendant was negligent in: (1) allowing Plaintiff's body to be subjected to sufficient pressure for long enough to cause such an injury; (2) failing to adequately protect him from pressure and shearing forces through the use of various means; and, (3) failing to follow its own policies, procedures and protocols with regard to pressure injury prevention. (L.F. 44-45, ¶5). Defendant denies all allegations. (L.F. 17-23; 129-133, Answers).

The jury trial began on February 23, 2015. (Tr. 7, A7). On February 27, 2015, the jury returned a verdict in Plaintiff's favor and awarded damages in the total amount of $883,000.00, broken out as follows:

For past economic damages including past medical damages:	$33,000.00
For past non-economic damages:	$750,000.00
For future non-economic damages:	$100,000.00

(Tr. 1221, A45; L.F. 203). All parties timely filed post-trial Motions. Defendant SAMC filed a Motion to Apply Sections of Chapter 538 of the Missouri Revised Statutes (L.F.

204-210) and a Motion for Judgment Notwithstanding the Verdict and in Accordance with its Motions for Directed Verdict; or in the Alternative, Motion for New Trial; or in the Alternative, Motion to Amend Judgment or for Remittitur. (L.F. 243-289). Plaintiff filed a Motion for Entry of Judgment which Includes Post Judgment Interest. (L.F. 211-213). The trial court entered judgment in favor of Plaintiff for $883,000, denied Plaintiff's post-trial Motion for post-judgment interest, and, on May 7, 2015, denied all of Defendant's post-trial Motions. (L.F. 296, 329, 331).

On May 15, 2015, Defendant timely appealed the Judgment entered against it to the Missouri Court of Appeals for the Eastern District. (L.F. 332). Also on May 15, 2015, Plaintiff timely appealed to this Court, both asserting trial error in denying post-judgment interest and contesting the constitutionality of Section 538.300, RSMo. (L.F. 337).

B. Background Facts and Damages Evidence

William Dieser was medically treated for pancreatic issues at St. Anthony's Medical Center in the fall of 2007. (Tr. 801:18-802:17, A21). His condition progressed to the point where exploratory surgery revealed what is called a pancreatic pseudocyst. (Tr. 376:10-377:3, A10). It was hoped the cyst would respond to treatment, but his doctors and surgeon decided it had grown too large and should be surgically removed. (Tr. 802:10-803:6, A21). He underwent surgery on January 28, 2008, at St. Anthony's Medical Center. (*Id.*) The surgery was lengthy and during it, Mr. Dieser was appropriately padded to help prevent any skin wounds, including what are often referred to as pressure ulcers. (Tr. 778:9-17, A17).

A pressure wound was discovered on January 31, 2008, while Plaintiff Dieser remained in the hospital. (Tr. 693:18-21,A14). He ultimately underwent two plastic surgeries on the wound. (Tr. 693:13-17, A14; 699:8-12, A15; 708:18-709:7, A16). Plaintiff's wife testified that she dressed the wound for close to a year, at times doing three dressing changes a day. (Tr. 699:8-12, A15; 706:23-707:1, A16). She also testified that he underwent some in-office procedures to slice with a scalpel a small flap of skin that remained across the wound. (Tr. 709:15-19, A16).

As to the pressure wound, Plaintiff Dieser stopped seeing his treating physician for this issue in February 2009. (Tr. 830:2-5, A22; 840:19-25, A23). He testified that currently his only remaining issue with the wound is that when he sits down he still feels some tightness and pain in a scar in that area. (Tr. 900:24-901:12, A25). He can still drive a car and mow his lawn using a riding lawn mower. (Tr. 907:3-22, A26). When asked about his concerns for the future in terms of this wound, he identified only a fear of going to the hospital. (Tr. 901:13-15, A25).

Plaintiff Dieser testified he was 58 years old at the time of the health care at issue in 2008. (Tr. 788:3-5, A18). In 2000, he had stopped working after suffering a massive heart attack. (Tr. 790:20-23, A18). His pre-existing conditions included Type 2 diabetes, for which he generally took three insulin shots per day (Tr. 791:5-792:9, A18-19), neuropathy in his hands and feet (Tr. 792:10-23, A19); sleep apnea (Tr. 793:21-794:11, A19); three lower spinal surgeries dating back to the 1970s with back pain continuing to the present (Tr. 795:12-796:13, A19); and an inability to walk without a cane (Tr. 1161:2-5, A41).

Plaintiff presented evidence of $33,000.00 in total economic damages, consisting entirely of past medical bills. (Tr. 1185:18-20; A44; L.F. 203). He suffered no past lost wages and there was no evidence presented as to any future economic damages. During closing argument, Plaintiff's counsel suggested $633,000.00 would be a "reasonable verdict" as compensation for Plaintiff's injuries. (Tr. 1182:20-22, A43).

C. Additional Trial Testimony Relevant to Defendant's Points Relied On

1. Testimony and References to Medicare Payment Guidelines and So-Called "Never Events"

Defendant filed a pre-trial Motion in Limine asking that Plaintiff's counsel, Plaintiff, and his witnesses be precluded from referencing Plaintiff's ulcer or skin wound as a "never event" or a "serious reportable event" under Medicare's payment guidelines because Plaintiff's counsel indicated she intended to refer to these payment guidelines. (L.F. 115-116). On February 19, 2015, the trial court heard all parties' Motions in Limine and preliminarily denied Defendant's Motion, but further ruled that "never event" and "serious reportable event" were not to be mentioned in jury selection or opening statements. (L.F. 142). On February 23, 2015, Defendant submitted a Supplemental Motion in Limine again asserting that Plaintiff's counsel, Plaintiff, and his witnesses should be prohibited from introducing or referencing Medicare regulations or payment guidelines or referencing the deep tissue injury as a so-called "never event" or a "serious reportable event." (L.F. 134-139).

On February 25, 2015, the third day of trial, the trial court sustained Defendant's objection raised during the direct examination of Plaintiff's expert, Dr. Lige Rushing,

regarding testimony about whether any regulatory body agreed with his contention that this type of pressure injury should not have happened in the hospital. (Tr. 610:5-617:2, A11-12). Outside the presence of the jury, Plaintiff's counsel stated that she intended to discuss Medicare regulations with Dr. Rushing in support of the doctor's opinion that Stage III and IV pressure ulcers are "entirely preventable." (Tr. 613:1-17, A11). She said she intended to present the doctor with the "regulation" which said that such pressure ulcers are not reimbursable because "they are preventable by good hospital care." (Tr. 614:15-21, A12). Defendant's counsel asserted that the regulation did not say that. (Tr. 614:19-23, A12). The trial court then asked to see the record and the "exact language" upon which Plaintiff's counsel relied. (Tr. 614:24-615:6, A12). Rather than presenting a regulation, Plaintiff's counsel then presented to the court the letter marked as Plaintiff's Exhibit 34 (L.F. 157) and pointed out language in that letter allegedly supporting Plaintiff's position. (Tr. 615:7-616:9, A12). In response, Defendant's counsel argued that the letter related to reimbursement practices, and did not define a "never event." (Tr. 616:11-617:1, A12).

Thereafter, Plaintiff's counsel presented an offer of proof outside the hearing of the jury, during which Dr. Rushing testified, in part, that "it's the medicare regulatory body that says this shouldn't happen. As you said, it is a never event which means an event that shouldn't occur. It is preventable almost always." (Tr. 617:15-25, A12; *see generally* Offer of Proof, Tr. 617:15-619:10, A12-13). The trial court again sustained the objection. (Tr. 619, A13). Plaintiff's Exhibit 34 was never received into evidence.

On February 26, 2015, the fourth day of trial, Plaintiff presented an Offer of Proof as to certain testimony from a nurse, Gail Lupien, who was a skin would nurse at SAMC when Plaintiff received his healthcare at SAMC in 2008. (Tr. 985:5-995:8, A27-29). During the Offer of Proof, which plaintiff's counsel represented to be regarding pressure ulcer data and was conducted outside the hearing of the jury, Plaintiff's counsel asked Ms. Lupien about so-called "never events." (Tr. 988:11-990:9, A28). Nurse Lupien testified that she is aware that a hospital-acquired Stage III or IV pressure ulcer is considered a "never event," which is one of a number of conditions the Centers for Medicare and Medicaid Services says should never happen. (Tr. 988:11-989:6, A28). The trial court again sustained the objection. (Tr. 995, A29).

On the final day of trial, during the direct examination of Defendant's nursing expert, Dr. Diane Krasner, she was asked if the National Pressure Ulcer Advisory Panel ("NPAUP"), a think-tank organization which develops guidelines and staging recommendations for pressure ulcer care, has a definition for "unavoidable ulcers." (Tr. 1013:17-1014:5, A30; 1047:1-3, A33). She responded that it did and that "[i]t first published its definition in 2010, which was a refinement of the definition that was put out by the Centers for Medicare and Medicaid in 2004." (Tr. 1047:1-7, A33).

During cross-examination, Plaintiff's counsel began to ask Dr. Krasner, "You indicated in your direct examination that the NP – NP – part of their 2010 classifications were based on an opinion from CMS back in 2004; is that correct?" (Tr. 1098:19-22, A34). At that point, Defendant's counsel interjected and asked for a sidebar conference. (Tr. 1098:24, A34). Outside the hearing of the jury, Defendant's counsel objected to any

reference to the Centers for Medicare & Medicaid Services and the phrase "never event" and renewed the objections which the trial court sustained during the direct testimony of Dr. Rushing. (Tr. 1099:3-13; A34). Plaintiff argued that the witness Krasner opened the door to questioning about the Centers for Medicare & Medicaid Services regulatory provisions which indicated in 2008 that a Stage III or IV pressure ulcer in the hospital is a "never event," i.e., should never happen. (Tr. 1099:15-20, A34; 1101:20-1106:24, A35-36; 1137:5-1140:17, A37-38). The trial court asked Plaintiff's counsel what she intended to ask, and counsel replied:

> I'm intending to ask her about the 2008 regulatory provisions from the Centers for Medicare & Medicaid Services, which indicate that Stage III and IV pressure ulcers acquired in the hospital are preventable, that they are entitled never events; and in connection with that quote in her book and with this stuff, and that she is well aware of it, that the wound community knows all about it. And that this was, in fact, a Stage III or IV pressure ulcer acquired in the hospital.

(Tr. 1106:13-22, A36).

Defendant's counsel argued in part the CMS regulation the Plaintiff wanted to inquire of the witness was not effective until after the health care at issue, and that the CMS regulation dealt with reimbursement, not standard of care. (Tr. 1103:15-1104:12, A35-36; 1137:17-1138:1, A37). Defendant's counsel also argued that Dr. Krasner had said nothing specific enough in her direct examination to open the door to questioning regarding CMS and so-called "never events." (Tr. 1137:16, A37). The trial court allowed

Plaintiff's counsel, over Defendant's objections (1098:19-1106:24; 1137:5-1141:4), to question Dr. Krasner regarding the Centers for Medicare & Medicaid Services billing guidelines and the so-called "never events." (Tr. 1145:9-1151:2, A39-40).

Over Defendant's objections as outlined above, Plaintiff's cross-examination of Dr. Krasner proceeded as follows:

> Q. Let's do it this way: Would you agree with me, ma'am, that regulatory issues have enormous impact on the quality of care as well as the outcome, actual outcomes, of care delivered?
>
> MR. VENKER: Your Honor, just to make sure, we have made our objection and it has been ruled upon, correct?
>
> THE COURT: Absolutely. Objection is overruled.
>
> A. I agree.
>
> Q. And as a matter of fact, many groups and organizations look at pressure ulcers as a quality indicator; isn't that correct?
>
> A. Yes.
>
> Q. And when you were on direct exam and you were explaining to this jury the basis for your opinion that this ulcer was not preventable, you mentioned the 2010 regulations -- or not regulations, consensus statement?

A. Correct, consensus statement.

Q. Were based on a 2004 statement by the Centers for Medicare and Medicare Services. Isn't that what you said, ma'am?

A. No. I said that they included the definition that came from CMS for unavoidable.

Q. Right. And what you left out, ma'am, is that in 2007 or 2008, the Centers for Medicaid Services declared that Stage III or IV pressure ulcers acquired in the hospital are to be considered never events; isn't that correct?

A. No. That's -- that's not correct.

Q. What's wrong with it?

A. Well, it's complicated.

Q. Answer me this one: Is a Stage III or IV hospital acquired pressure ulcer a never event?

MR. VENKER: I object to that, Your Honor, because of the phrasing of the question. It is not time specific.

THE COURT: Sustained.

BY MS. NICHOLS:

Q. Was it ever a never event?

A. So it was a -- pressure ulcers were in 2001 by the National Quality Forum called never events. That's a not-for-profit think tank group.

In 2005, when congress passed the deficit reduction act --

Q. Uh-huh.

A. And I'm no legislator, but I will try to give this to you the best I can.

Q. Okay. Go ahead.

A. They identified eight conditions that they would not, beginning in 2008, pay for if they happened in an acute care facility.

Q. Uh-huh.

A. Of those eight, in the first rule, three were considered -- were called never events. And those were surgery on the wrong person, surgery on the wrong site, and a blood transfusion to the wrong patient. Pressure ulcers Stage III and IV were in there as conditions they wouldn't pay for. In the final rule, when CMS issued its final rule, that never event language disappeared. And to my understanding, the National Quality Forum at some point in time, and I don't know the exact

year, also rescinded the language of never events and called it something else that I can't remember right now. It is a different word.

So as of now, that language "never event" is out of our vocabulary, but it never applied to pressure ulcers, but they weren't being reimbursed.

Q. How about in 2007, the classification --

MR. VENKER: May we --

THE COURT: Hold on one second.

MR. VENKER: May we approach, Your Honor?

THE COURT: Yes.

(Proceedings were held at sidebar, outside the hearing of the jury.)

MR. VENKER: Your Honor, at this point, based on the testimony, I'm going to ask that this line of questioning be cut off. Nurse Krasner has answered the question. Now we've injected the phrase "never event" into the case and plaintiff's counsel has done it, and Nurse Krasner has under oath said it never applied to pressure ulcers. And now we're stuck defending the case dealing with that phrase being out there. And there is no way to predict how the jury is seeing it and if it

should apply or not. So I object. I ask that this line of questioning be shut down at this point and put an end to this at this point and that the questioning go to some another topic if there is any other questions.

THE COURT: Your response?

MS. NICHOLS: She has an article that she produced to us at her deposition in which it states in 2007 the classification by the CMS of full thickness pressure ulcer Stage III and IV as never events for what happened. My intention was to ask her if she agrees with that, and I don't believe I'm done with the whole thing.

THE COURT: Objection is overruled.

MR. VENKER: Is this her article?

MS. NICHOLS: That she provided to us.

(Whereupon, the following proceedings transpired in open court within the hearing of the jury:)

THE COURT: Hold on one second. Please proceed.

Q. What's that?

A. Serious reportable event.

Q. Do you disagree that in 2007 the classification

by the CMS, that is the Center for Medicare Services, correct?

A. Centers for Medicare and Medicaid Services.

Q. 2007, the classification by the CMS of full thickness pressure ulcers, Stage III and Stage IV, correct, as never events? That is, "Ulcers should never occur or are reasonably preventable, again, raise the issues of which patients and wet conditions make unavoidable pressure ulcer development likely". Do you disagree with this?

A. Well, with a lot of misunderstanding, I would refer you to Dr. Jeffrey Levine's protocol and try to piece it all out. There was a lot of misunderstanding through the years about who was calling it a never event, what it meant, and what -- what it meant in terms of reimbursement. But the bottom line is that these -- the deficit reduction out of 2005 and the present on admission rule is a payment issue.

Q. But do you understand, ma'am, that what they are saying is, we are not going to pay for it because it should never happen, right? Isn't that the basis of the rule, the rationale?

A. Well, that is congress's rationale, correct.

Q. Not yours?

A. Correct.

Q. You believe that if a patient is just so sick then he's just going to get a pressure sore and there is nothing that anybody could do?

A. I believe that you do everything humanly possible, you develop a plan of care, you update that plan of care, you assess the patient, use the best technology that you have available. And then if, in spite of doing all of those things that we have in our toolkit, the person still gets a pressure ulcer, then it meets CMS's definition of unavoidable. Yes, I believe that.

(Tr. 1145:9-1150:24, A39-40).

In closing argument, Plaintiff again discussed "never events". (Tr. 1174, A39). Specifically, Plaintiff's counsel argued that what Plaintiff suffered was a Stage IV pressure ulcer and "[t]hat is what is known as a never event or a serious reportable event, and that's what happened here." (Tr. 1174:14-19, A42).

2. Plaintiff's Counsel's Statements and Questioning During Jury Selection

During jury selection, Plaintiff's counsel made the following statements and posed the following questions to the venire:

> MS. COFFEY: Well, in a civil case, the jury can go back and talk about what is more likely true than not true, which side is more likely true than not true. Just more likely, just a little bit more likely.
>
> If you believe what we're telling you is 51 percent more likely true and they are, you know, 49 or 52, you know, under the law, that's enough for us to win.
>
> All the jury has to believe, and for us to win, is that it's more likely true than not true that Mr. Dieser sustained this pressure injury in the hospital under circumstances that – with standard care, the injury would have been prevented or lessened.
>
> So you don't have to be 90 percent convinced what we're saying is true or 80 percent convinced or 70 or 60, just 51 percent more likely true than not true.
>
> Is there anybody in the box who thinks that that is just not – that that is just a little too easy for us? That 51 percent ought to be – you know, it ought to be more like 60, 70, 80 percent in order to hold the hospital responsible for the injury that happened to this patient? Anybody believe it is too easy, 51 percent? I saw maybe some nods.

PANELIST VANCE: I just thought it was funny, your characterization of it being too easy.

MS. COFFEY: Do you have any problem with that? The idea – could you base a verdict for the patient if you believed that we were – what we were saying is only a little more likely true than not true?

MR. VENKER: Your Honor, may we approach?

THE COURT: Let's approach.

(Proceedings were held at sidebar, outside the hearing of the jury.)

MR. VENKER: Okay. I object to the characterization of this. I let it go for quite a while, but Ms. Coffey keeps pursuing this. I think the problem is now that we're sounding like we're getting into a difference of if you just believe one percent more in this case for the plaintiff than the defendant than (sic) we win.

The problem is, she is not talking about the fact that they have the burden of proof. So I object to percentages, splitting all of this.

She correctly stating (sic) in the beginning it would be more likely than not. That is the correct standard. It is up to the Court to explain – for the Court to explain to the jury what the law is. I have let it go this far. I now ask that the objection be sustained.

THE COURT: Your response?

MS. COFFEY: I have correctly stated the burden of proof. I get to find out if the jurors are going to have a problem with more likely true than not true. That

is where I'm going. Is anybody going to have trouble basing a verdict on more likely true than not true.

THE COURT: I'm going to sustain the objection and just ask that you specifically refer to the language that comes right out of the statute.

MS. COFFEY: The jury instruction?

THE COURT: Correct. Out of the jury instruction, correct.

MR. VENKER: At this point, Your Honor, I think Ms. Coffey explained it. She hasn't gotten answers, and now she is going to talk with individuals. So I think really the question that she has asked is either not responded to as not having any problems. I think the line inquiry should be over. I object to anything further.

THE COURT: That objection is overruled. Let's proceed.

MS. COFFEY: Thank you, Judge.

(Proceedings were held in open court, within the hearing of the jury.)

MS. COFFEY: I anticipate that the Judge is going to give you an instruction at the end of this case that tells you that if you believe certain propositions that will be submitted to you by A, B, C and D are -- if you believe that such propositions that we submit in support of our case are more likely to be true than not true, then you can find in favor of the plaintiff.

What I'm trying to ask is if anybody would have a problem finding in favor of the patient if all they believe was what we said was more likely true than not true? Would anybody hold us to a higher standard than that, that you would need to be 80, 90 percent sure? Anybody in the box?

MR. VENKER: Your Honor, I'm just going to object, again, to this reference about 80 to 90 percent sure. I think that gets into percentages which I think is confusing. I object on those grounds and ask that the jury be instructed to disregard that.

THE COURT: Objection overruled.

(Tr. 127:11-131:2, A8-9).

MS. COFFEY: I anticipate – You know, I anticipate that if you're on the jury that the Court will give you an instruction at the end that will say things like – to the effect of, your verdict must be for plaintiff if you believe A, B, C is more likely true than not true. And what I'm trying to understand, more likely true, you know, like a scale. You know, more likely true. It could be like this, and I think we will show you more like this.

MR. VENKER: Your honor – I'm sorry, Ms. Coffey. I really don't mean to interrupt. But I think demonstrating about – you know, could we approach, Your Honor?

THE COURT: You can.

(Proceedings were held at sidebar, outside the hearing of the jury.)

MR. VENKER: Your Honor, I want to object. Now we're gesturing about the scales of justice and how even those are, whatever they are, plates might be. I think again that really is confusing, and it is not taking into account the burden of proof that plaintiff has. I think a reference, a physical reference, to the scales of justice is not being on equal footing. That is not what the law is. I don't think it is

an appropriate way in any event to try to explain the burden of proof, so I object on those grounds.

THE COURT: Your response?

MS. COFFEY: Exactly. It is – the burden of proof is more likely true than not true. You have to show a little more, and that's the way everybody does it all the time.

MR. VENKER: Well –

THE COURT: I'm going to overrule the objection; however, when you are getting into the percentages, it does create an issue that causes me some concern, because it is not asking the jurors to follow the specific language that is in the instruction. That is my concern. So I'm going to overrule the last objection, but make sure you are using the language right out of the instruction.

(Tr. 131:15-133:4, A9).

3. Plaintiff's testimony of betrayal, deception, and anger and references to St. Anthony's Medical Center as a Catholic or Religious Institution

During Plaintiff's counsel's direct examination of Plaintiff William Dieser, certain testimony was elicited, over objection, regarding Defendant as a Catholic institution:

Q. Bill, I wanted to talk about, you know, the impact of this wound on you. I guess I want to ask if it affected you emotionally?

A. Oh, it has.

Q. Can you explain that a little bit?

A. I felt betrayed. I'm a Catholic. St. Anthony's is a Catholic institution.

MR. VENKER: Your Honor, may we approach?

THE COURT: You may.

(Proceedings were held at sidebar, outside the hearing of the jury.)

MR. VENKER: I have to say this is new one on me to inject religion into a case, but I object to it. I think it is a pretty standard thing to object to religious [comments] on a case. There has been no discovery on religion on St. Anthony's being a Catholic institution. I object to this as being prejudicial to interjecting religion into the case.

MS. COFFEY: I wanted him to tell the emotional impact on him and explain it to the jury. He gets to do that.

MR. VENKER: I agree with that part.

MS. COFFEY: Okay. So maybe you don't like what – how it impacts him. Maybe it is – you know, but that is how it is.

MR. VENKER: You know, Judge, this is – I don't know what the religious background of the jury is. Now, we are in a position – and I don't think it takes a rocket scientist to figure out that Ms. Coffey and I are both Catholics. For example, not [every]body is happy about the Catholic church and people now days are not happy with organized religion and now we're stirring this up. This is not what this case is supposed to be decided about or decided on, so I object for those reasons.

THE COURT: The objection is overruled.

(Proceedings were held in open court, within the hearing of the jury.)

BY MS. COFFEY:

Q. Okay. You can go ahead, Bill. You were saying – I was asking you about – You were saying that you felt betrayed and you were explaining that.

A. I was in a Catholic institution. I am a Catholic. I felt deceived. I have never really found out about what was really going on. I felt like I didn't have a real participation with my nursing case. And then as I find out some of these things, I feel like St. Anthony's wants to cast me off to the side and say it's your fault, you deal with it. Yes, I am angry.

(Tr. 892:4-894:1, A24).

4. Plaintiff's Counsel's Comments and Statements During Closing Argument That The Jury Will Be Telling the Community What The Standard of Health Care Is

During closing arguments, Plaintiff's counsel, over Defendant's objections, was allowed to make the following statements to the jury regarding the jury's role:

[BY MS. COFFEY:] I had thought the hospital admitted that this was a pressure injury sustained in the hospital, a Stage III or Stage IV crater in his backside all the way down to the wound sustained in St. Anthony's Hospital in the course of three days. That, ladies and gentleman, is not acceptable medical care in this community, and that's what your verdict will say. Your verdict becomes

a legal document.

MR. VENKER: Your Honor, may we approach?

THE COURT: You may.

MS. COFFEY: Does my time run during these things?

THE BAILIFF: I will take care of it.

(Whereupon, the following proceedings transpired at sidebar outside the hearing of the jury.)

MR. VENKER: Your Honor, I object to this being an inappropriate reference to the community at large. This is very upsetting, and in response [to] yesterday about sending a message to the community. The kind of statement that Ms. Coffey just made to this jury about telling the community, so I think I object on those grounds that the jury be instructed to disregard her comment about that.

THE COURT: Your response?

MS. COFFEY: I said that their verdict becomes a legal document, saying whether the care provided to Mr. Dieser was acceptable in this community. That is what it is. The jury is always told that they are the conscience of the community.

THE COURT: I didn't hear the argument the way you

did. I'm going to overrule the objection. Let's proceed.

MS. COFFEY: Thank you.

(Tr. 1172:24-1174:5, A42).

ST. ANTHONY'S MEDICAL CENTER'S ARGUMENTS IN RESPONSE TO PLAINTIFF/APPELLANT'S POINTS RELIED ON

I

The Trial Court Did Not Err in Denying Plaintiff's Motion for Post-Judgment Interest Because Section 408.040(1) Does Not Mandate an Award of Post-Judgment Interest in Any Case and Section 538.300 Precludes it in a Medical Negligence Case.

II

In Denying Plaintiff's Motion for Post-Judgment Interest, the Trial Court Did Not Err and Did Not Violate Any Equal Protection Rights of Plaintiff Dieser Because There is a Rational Basis for the Legislature's Use of Section 538.300 to Preclude the Application of Sections 408.040(2) and (3), as Part of Chapter 538 on Medical Negligence Actions, which this Court has Consistently Acknowledged has a Rational Basis Since *Adams v. Children's Mercy Hospital.*

III

The Trial Court Did Not Violate Plaintiff Dieser's Rights Under the Open Court's and Certain Remedy Provision of the Missouri Constitution Because the Court's Denial of Plaintiff's Post-Trial Motion for Post-Judgment Interest Did Not Bar or Deny Him Access to Bring a Substantive Cause of Action, In That Post-Judgment Interest is Not a "Cause of Action" Protected by this Provision.

IV

The Trial Court Did Not Violate Plaintiff's Right to Trial by Jury Under Article I, Section 22(a) of the Missouri Constitution in Denying His Post-Trial Motion for

Post-Judgment Interest Because Post-Judgment Interest was Beyond the Function and Scope of a Jury's Role as Finder of Fact During a Trial.

ARGUMENT IN RESPONSE

I. The Trial Court Did Not Err in Denying Plaintiff's Motion for Post-Judgment Interest Because Section 408.040(1) Does Not Mandate an Award of Post-Judgment Interest in Any Case and Section 538.300 Precludes it in a Medical Negligence Case.

A. Summary of Argument

Plaintiff/Appellant's arguments that current 408.040(1) by-passes or nullifies the preclusive effect of 538.300 as to post-judgment interest are fatally flawed because: **a)** the 2014 amendment to section 408.040, RSMo, added a new section (1) which is merely an instructional section which defines "judgment balance"; **b)** section 538.300 still states that 408.040(2) and (3) does not apply to actions under sections 538.205 to 538.230, which still maintains the preclusion of post-judgment interest on judgments in medical negligence cases.

B. Standard of Review

Interpretation of a statute and its application to a given set of facts are questions of law, which this Court reviews *de novo*. *In re Brockmire*, 424 S.W.3d 445, 446-447 (Mo. banc 2014)(citing *Crockett v. Polen*, 225 S.W.3d 419,420 (Mo. banc 2007)).

C. The Plain Language of the Prior Version of Section 408.040 and Its Current Version

Section 408.040, RSMo, before January 15, 2015, provided in pertinent part:

> 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. In tort actions, if a claimant has made a demand for payment of a claim or any offer of settlement of a claim, to the party, parties or their representatives, and to such party's liability insurer if known to the claimant, and the amount of the judgment or order exceeds the demand for payment or offer of settlement, then prejudgment interests shall be awarded, . . .

* * *

Section 408.040, currently and effective January 15, 2015, provides in pertinent part:

> 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. Postjudgment payments or credits shall be applied first to postjudgment costs, then to postjudgment interest, and then to judgment balance.
>
> 2. In all nontort actions, . . .
>
> 3. Nothwithstanding 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. In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives, and to such party's liability insurer if known to the claimant, and the amount of the judgment or order

exceeds the damage for payment or offer of settlement, then prejudgment interest shall be awarded, . . .

* * *

D. Applicable Principles of Statutory Construction

Where statutory interpretation is necessary, the statutory language is considered in context and in comparison with other sections to determine its meaning. *St. Louis County v. Prestige Travel, Inc.,* 344 S.W.3d 708, 714 (Mo. banc 2011). When construing a statute, courts consider statutes involving similar or related subject matter when the statutes illuminate the meaning of the statute being construed. *State ex rel. Rothermich v. Gallagher,* 816 S.W.2d 194, 200 (Mo. banc 1991); *In re DeBrodie*, 400 S.W.3d 881, 886 (Mo. App. W.D. 2013). Statutes are to be interpreted and construed "*in pari materia*" when they relate to the same matter or subject. The rule of construction in such instances proceeds upon the supposition that the statutes in question are intended to be read consistently and harmoniously in their several parts and provisions. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). The legislature is presumed to be knowledgeable of its own statutes. *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 567 (Mo. banc 2012). Further, the legislature is presumed not to have undertaken a meaningless act. *State v. Liberty*, 370 S.W.3d 537, 552 (Mo. banc 2012). The words and language of statutes are to be given their plain meaning as ordinarily understood. *Lewis v. Gibbons*, 80 S.W.3d 461, 465 (Mo. banc 2002).

E. Plaintiff is not entitled to post-judgment interest because Section 408.040(1) does not mandate such an award and Section 538.300 precludes it in medical negligence cases.

1. The legislative intent of current subjection 408.040(1) is clear from its plain language.

The plain language of current subsection (1) of 408.040, makes clear its purpose. In fact, its first sentence refutes Plaintiff's fatally flawed, lengthy argument because it sets forth what this new subsection is about. That first sentence states: "*Judgments shall accrue interest on the judgment balance as set forth in this section.*" The next sentence defines "judgment balance." The third and final sentence lays out the order in which post-judgment payments or credits shall be paid. Nothing in this subsection (1) states or mandates anything new about which judgments shall bear interest or how much interest any judgment is to bear.

The 2014 amendment to Section 408.040(1) originated in the Missouri Legislature as Senate Bill No. 621. A copy of the original bill summary can be found at L.F. 237-242. That summary states in part that, with respect to Section 408.040(1), Senate Bill No. 621 "provides a definition for the term 'judgment balance'" and lays out the order of payments: "that post-judgment payments shall be applied first to post-judgment costs, then to interest, and then to judgment balance (408.040)." (L.F. 238). As clearly illustrated by the bill summary, the legislative intent of the 2014 amendment was to define "judgment balance." It was not to award post-judgment interest in all tort actions, and certainly not to repeal or annul any statute, specifically Section 538.300.

The new subsection (1) is clearly directive and could just as easily have said, in pertinent part: "*...as explained in this section.*" It is also clear that this subsection is applicable to judgments which, do in fact, accrue interest. The third sentence merely tells how it is to be done. It seems only logical there is some difference in the interest owed if there is a certain order to the payments on the components of a judgment debt. This new subsection also spells out the payment order to make clear how payments are to be made. For example, post-judgment costs are to be paid first.

It is also worth noting that legislatures often decide to define words, terms, or phrases. So much so, that there is a maxim of statutory construction on this very legislative conduct. The legislature has a right to define terms of a statute. *ITT Canteen Corp. v. Spradling*, 526 S.W.2d 11, 16 (Mo. 1975). When a statute defines a term, that definition is to be given effect. *American Nat. Life Ins. Co. of Texas v. Director of Revenue*, 269 S.W.3d 19, 21 (Mo. banc 2008).

This routine and legitimate activity by the General Assembly in deciding to define "judgment balance" in subsection (1) is a far cry from Plaintiff's theory of either a dramatic mistake or even an intentional change in the law. Of course, the first assessment of this conduct must be chosen, as opposed to plaintiff's theories, in order to carry out the legislature's intent. Courts are not to interpret statutes to bring about an absurd result. *Budding v. SSM Healthcare System*, 19 S.W. 3d 678, 681 (Mo. banc 2000). Also, a legislature is presumed to know the applicable law, as opposed to being ignorant of it, when it enacts legislation. *Suffian v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000).

2. Plaintiff's interpretation all but ignores the language and intent of Section 538.300 and Chapter 538 in general.

Plaintiff's approach ignores that the legislature has left in place Chapter 538 on medical negligence claims and that this Court has worked to try to give that chapter its full import and efficacy. We have seen this in cases from the early 1990's on through to as recently as 2014, when this Court in *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 271 (Mo. banc 2014), upheld the requirement of a health care reviewer's affidavit in Section 538.225, RSMo.

As a practical matter, the General Assembly's insertion of a new subsection (1) into 408.040, merely "slid" the post-judgment interest section interaction with Section 538.300 to occur at a subsection now numbered as "(3)" instead of "(2)". There is no change to the language of that subsection, other than its subsection number designation; otherwise it is identical.

So, just as subsection (2) is now designated as (3), what was subsection (3) is now designated as (4). The language of that former subsection (3) also remains identical, other than its numbering or designation. It deals with the rate of interest on a judgment. It certainly seems reasonable to deduce that the legislature believed this subsection to be superfluous to medical negligence judgments, because no post-judgment interest is to be imposed on them. Therefore, the rate of any interest on a judgment was/is irrelevant, and need not be referred to by the 2014 amendment of Section 408.040.

Plaintiff incorrectly seizes on the new subsection (1) has being either missed by the reach of Section 538.300, or that it somehow by-passes it. Yet, its language clearly

states its purpose, which is not to impose post-judgment interest on any judgment. Statutory language is to be given its plain and ordinary meaning. *Lewis*, 80 S.W.3d at 465. Statutory construction need not be resorted to if the language is clear and plainly understandable. *Ross v. Director of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010).

Plaintiff's specific argument is that the phrase "[j]udgments shall accrue interest…" in the new subsection (1) as proof that it operates to impose post-judgment interest, including that it either escapes the reach of Section 538.300, or somehow nullifies it. Of course, statutes must be read and construed as they were meant to be by their enactors. *See Budding v. SSM Healthcare System*, 19 S.W. 3d 678, 680 (Mo. banc 2000). Also, one cannot be allowed to rely on only one portion of a statute or to read mere snippets of sentences or phrases; the statute must be read in its pertinent entirety. Every word of a statute should be given meaning and not be considered a needless repetition. *Estate of Williams v. Williams*, 12 S.W.3d 302, 306, fn3 (Mo. banc 2000). Nor will a court interpret a statute to bring about a result inconsistent with legislative intent; all canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with legislative intent. *Budding, supra*, at 682.

Plaintiff's related argument is that any statute which states that interest "shall" be paid must mean that the trial court has no discretion to deny awarding interest. (Appellant's brief, p. 10). The cases Plaintiff cites are inapposite to the current fact pattern and legal issue. *Baird v. Baird* involved mandatory interest on delinquent child support payments, such that the trial court which did not impose that interest was held to

have committed error. *Baird v. Baird*, 843 S.W.2d 388, 390 (Mo.App E.D. 2007). *Bohac v. Akbani* involved both a judgment which properly should have drawn interest pursuant to 408.040.1 (the version in effect in 2000) and delinquent child support payments, which also drew interest. *Bohac v. Akbani,* 29 S.W.3d 407, 414 (Mo.App. E.D. 2000). Plaintiff also cites to *Independence Flying Service, Inc., v. Alshire*, 409 S.W. 2d 628 (Mo. 1966) for further support. However, *Alshire* is distinguishable because it involves a conversion claim, in which interest on the converted item from the date of its theft is an element of damages, which the jury could decide. *Id.* at 632. That is quite different from post-judgment interest, which is clearly imposed only after a judgment is entered.

The case of *Mackey v. Smith* 438 S.W.2d 465 (Mo. App. W. D. 2014), is also instructive on this and other issues which Plaintiff raises herein. Not surprisingly, *Mackey* clearly held that Section 538.300 precluded the post-judgment interest provision from applying to medical negligence judgments. *Id.* at 481. At that earlier time, as we have already seen, it was subsection (2) of 408.040, which contained the directive that any tort judgment "shall" be subject to interest until paid. Plaintiff Dieser does not attempt to make all the same arguments on this point as did the plaintiffs in *Mackey*. *See id.* at 481.

As to the point under consideration, Plaintiff erroneously claims that *Mackey* is no longer on point because of the 2014 amendment of 408.040 with its addition of a new subsection (1). (Appellant's brief, pp. 11-13). Plaintiff wrongly claims, as has already been illustrated above, that new subsection (1) escapes Section 538.300. (*e.g.*, *supra*, at p. 51). Plaintiff seems to reluctantly concede that the *Mackey* court decided that Section 538.300 correctly precluded post-judgment interest in 408.040 being applied to the

medical negligence judgment, but only because the pre-2014 version of Section 408.040 was involved. (*See* Appellant's brief, p. 13).

Respondent will not brief Plaintiff's arguments of what the proper interest rate would be on his judgment herein because it is clear that Section 538.300 prevents any post-judgment interest.

The history of the 2014 amendment to Section 408.040(1) clearly shows the Missouri legislature did not intend to annul Section 538.300. "Legislative intent can be determined by tracing the "historical development of the legislation" and examining the purpose, objective and policy behind the statute. *State ex rel. Lebeau v. Kelly,* 697 S.W.2d 312, 314–15 (Mo.App. E.D.1985).

II. In Denying Plaintiff's Motion for Post-Judgment Interest, the Trial Court Did Not Err and Did Not Violate Any Equal Protection Rights of Plaintiff Dieser Because There is a Rational Basis for the Legislature's Use of Section 538.300 to Preclude the Application of Sections 408.040(2) and (3), as Part of Chapter 538 on Medical Negligence Actions, which this Court has Consistently Acknowledged has a Rational Basis Since *Adams v. Children's Mercy Hospital.*

A. Summary of Argument

Plaintiff Dieser is neither in a suspect class nor pursuing a fundamental right recognized as protectable under the Missouri Constitution, and therefore, Plaintiff must prove that Section 538.300, RSMo is arbitrary and completely irrational. Many similar arguments have been refuted by this Court for more than 20 years, since *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), overruled in part and on other grounds by *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012).

B. Standard of Review

Plaintiff's constitutional challenge to the validity of Section 538.300 is subject to *de novo* review. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 637 (Mo. banc 2012). A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). Plaintiffs have the burden of proving that the statute "clearly and undoubtedly" violates the constitution. *Id.* The Court will resolve all doubt in favor of the

statute's validity. *Ambers-Phillips v. SSM DePaul Health Center*, 459 S.W.3d 901, 905 (Mo. banc 2015).

C. The Equal Protection Clause is Inapplicable Because a Fundamental Right Is Not Involved

The equal protection clause of the Missouri Constitution provides that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. I, § 2. In considering whether a statute violates the clause, this Court first determines whether the statute contains a classification that "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *In re Marriage of Kohring*, 999 S.W.2d 228, 231-32 (Mo. banc 1999). In most other instances, the statute is presumed constitutional and Missouri courts will apply a rational basis test under which "the statute will be [held] valid as long as it bears a reasonable relationship to a legitimate statue purpose." *Id.*; accord *State v. Pike*, 162 S.W.3d 464, 470 (Mo. banc 2005). Rational basis scrutiny requires the challenger to show that the law is wholly irrational. *Amick v. Director of Revenue*, 428 S.W.3d 638 (Mo. banc 2014). This test is a rigorous one; the challenger must show the two classes are similarly situated in all relevant aspects. *Coyne v. Edwards*, 395 S.W.3d 509, 519 (Mo. banc 2013).

Appellant Dieser is unable to support his argument that the right to obtain post-judgment interest on a judgment in a medical malpractice action is fundamental. To the contrary, fundamental rights normally include free speech, freedom of travel, the right to personal privacy, and other rights that are "objectively, deeply rooted in the nation's

history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006). That is why this Court previously has rejected nearly identical arguments that the right to sue for medical malpractice can fit within this narrow category of fundamental rights.

This has been this Court's position since the early 1990's. For example, in *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), overruled in part by *Watts v. Lester Cox Medical Centers*, 376 S.W.3d 633, 645-46 (Mo. banc 2012), (overruling unrelated portion of *Adams* approving such direct caps), this Court rejected the argument that the open courts provision guarantees victims of medical malpractice an unlimited time to sue. That aspect of *Adams* was essentially reaffirmed by this Court in *Ambers-Phillips v. SSM DePaul Health Center*, 459 S.W.3d 901 (Mo. banc 2015), which involved a statute of repose applicable to medical negligence cases where a foreign object was left behind in a patient. The plaintiff there argued, in part, that she had a fundamental right to pursue her medical negligence claim and that the statute of repose infringed upon that right. *Ambers-Phillips, supra,* at 903.

This Court turned away the plaintiff's argument by relying on its own earlier case of *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 898 (Mo. banc 1996), which rejected the plaintiff's argument that strict scrutiny should be applied to the statute of limitations that otherwise barred her claims, because the statute did not "impinge upon Ms. Batek's fundamental rights" in that those rights include "only basic liberties explicitly or implicitly guaranteed by the United States Constitution." (citations omitted).

Ambers-Phillips, supra, at 911. The list of those fundamental rights include: the right to free speech, to vote, freedom of interstate travel, the right to personal privacy and other basic liberties. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991).

In the case at bar, Plaintiff does not appear to argue that plaintiffs with medical negligence claims are a suspect class and actually points to this Court's decision in *Ambers-Phillips v. SSM Depaul Health Center,* 459 S.W.3d 901, 912 (Mo. banc 2015) which is to the contrary. (Appellant's Brief , p. 16). Rather, Plaintiff argues that a strict scrutiny level of examination is required if the legislation impinges upon a fundamental right either explicitly or implicitly protected by the Constitution, and tries to rely on *Ambers-Phillips* for such a statement. Plaintiff, in essence then, argues that the denial of post-judgment interest violates his fundamental, constitutional property right in his court judgment. (Appellant's Brief, p. 17). Plaintiff has failed to show that strict scrutiny must be applied.

D. Plaintiff has failed to point to any support for there being no rational basis for Section 538.300's preclusion of post-judgment interest on judgments in medical negligence cases.

This Court has recognized, since the early 1990's that Chapter 538 has had a rational basis in the legislature's goal of reducing medical malpractice insurance costs, and in promoting the continuing availability of high risk medical procedures for Missouri citizens. E.g., *Adams,* 832 S.W.2d at 904-05.

The court has repeated this time and again through an unbroken line of cases. *E.g., Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 508-513 (Mo. banc 1991); *Bateck v. Curators of University of Missouri*, 920 S.W.2d 895, 898 (Mo. banc 1996). This has continued on through with a statement as recently as this Court's defense in *Watts* of Section 538.220 (the periodic payment statute), in rejecting a plaintiff's claim the statute violated equal protection rights and that it did not have a rational basis. Also, this Court even more recently in *Ambers-Phillips v. SSM,* supported the rational basis under the statute of repose for medical negligence foreign objects cases examined there. *Ambers-Phillips*, 459 S.W.3d at 910-913.

Plaintiff Dieser has not attempted to put in the record hereinbelow any information to even consider as possibly showing Section 538.300 to be "wholly irrational." Therefore, the statute's constitutional validity must be upheld based on the rational basis this Court has held continues to exist to support Chapter 538.

III. The Trial Court Did Not Violate Plaintiff Dieser's Rights Under the Open Court's and Certain Remedy Provision of the Missouri Constitution Because the Court's Denial of Plaintiff's Post-Trial Motion for Post-Judgment Interest Did Not Bar or Deny Him Access to Bring a Substantive Cause of Action, In That Post-Judgment Interest is Not a "Cause of Action" Protected by this Provision.

A. Summary of Argument

Plaintiff Dieser's claim of denial of post-judgment interest pursuant to Section 538.300, RSMo does not fall within the protection of the open courts and certain remedy provision of the Missouri Constitution because it is not a substantive cause of action and because post-judgment interest being unavailable does not prevent a person from bringing a cause of action in court.

B. Standard of Review

Plaintiff's constitutional challenge to the validity of Section 538.300 is subject to *de novo* review. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 637 (Mo. banc 2012). A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). Plaintiffs have the burden of proving that the statute "clearly and undoubtedly" violates the constitution. *Id.* The Court will resolve all doubt in favor of the statute's validity. *Ambers-Phillips v. SSM DePaul Health Center*, 459 S.W.3d 901, 905 (Mo. banc 2015).

C. The Open Courts Provision is Inapplicable Because No Substantive Cause of Action is Involved.

Plaintiff Dieser asks this Court to apply strict scrutiny to the application of Section 408.040, to him, even though he does not fall within any traditional suspect class, nor does he assert a right this Court previously has recognized as fundamental. In acknowledgement of his predicament, he argues that what this Court has held as constituting a fundamental right deserving "open courts" protection must be expanded to reach him.

The open courts provision of the Missouri Constitution guarantees 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, § 14. It is well-settled that "[a]n open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) … the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable." *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006). In other words, as this Court held in *Harrell v. Total Health Care, Inc.,* 781 S.W.2d 58, 62 (Mo. banc 1989), the right of access to the courts set out in the open courts provision of the Missouri Constitution means simply "the right to pursue in the courts the causes of action the substantive law recognizes." *Harrell,* at 62.

The principles set out in these cases apply to Plaintiff Dieser's claim. As this Court has stated, the open courts guarantee applies only to recognized causes of action.

Ambers-Phillips v. SSM DePaul Health Center, 459 S.W.3d 901, 909-910 (Mo. banc 2015).

In stark contrast, in this case, Plaintiff Dieser does not complain – nor could he – that he was prevented from bringing his claim and enforcing it in a Missouri court. Rather, his complaint is that an ancillary aspect of the Judgment in this case is dealt with differently than Judgments held by non-medical negligence plaintiffs. Such an assertion simply does not fall within the protection of the open courts provision of the Missouri Constitution. *State ex rel. National Refining Co. v. Seehorn*, 127 S.W.2d 418, 424 (Mo. 1939) (open courts provision cannot be used to create or expand causes of action; only to protect recognized, substantive causes of action).

IV. The Trial Court Did Not Violate Plaintiff's Right to Trial by Jury Under Article I, Section 22(a) of the Missouri Constitution in Denying His Post-Trial Motion for Post-Judgment Interest Because Post-Judgment Interest was Beyond the Function and Scope of a Jury's Role as Finder of Fact During a Trial.

A. Summary of Argument

Plaintiff's right to jury trial was not impacted by the denial of post-judgment interest because: **a)** it did not involve the jury's function of serving as trier of fact during a trial; and, **b)** such interest is not a substantive cause of action.

B. Standard of Review

Plaintiff's constitutional challenge to the validity of Section 538.300 is subject to *de novo* review. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 637 (Mo. banc 2012). A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). Plaintiffs have the burden of proving that the statute "clearly and undoubtedly" violates the constitution. *Id.* The Court will resolve all doubt in favor of the statute's validity. *Ambers-Phillips v. SSM DePaul Health Center*, 459 S.W.3d 901, 905 (Mo. banc 2015).

C. The right to jury trial protected by the Missouri Constitution does not reach beyond the jury's role as trier of fact.

The right to jury trial guaranteed by article I, section 22(a) of the Missouri Constitution is that "[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was

adopted" in 1820. *Watts v. Lester Cox Medical Centers*, 376 S.W.3d 633, 637-638 (Mo. banc 2012). Plaintiff Dieser argues that the reach of *Watts's* ruling about the profile of the right to jury trial goes beyond the scope of the role of jury as fact finder, to somehow also reach post-judgment interest. (Appellant's Brief, p. 26). This is simply not supported by *Watts,* or any other Missouri case.

Plaintiff Dieser is not the first claimant to argue that Section 538.300, RSMo infringed upon their constitutional right to jury trial. In *Mackey v. Smith*, 438 S.W.3d 465, 482 (Mo.App. W.D. 2014), the plaintiff cross appealed and argued, like Plaintiff Dieser does here, that Section 538.300 impaired their full right to a jury trial. The court of appeals rejected that argument, including plaintiff's claim that *Watts* supported their argument, as follows: "...*Watts*, however, does not expressly address post-judgment interest for payments due upon judgment. And Section 538.300 does not limit the damages that the jury may assess in any case- indeed, the jury does not assess post-judgment interest at all." *Id.*

D. Post-judgment interest is not a substantive cause of action, and under Missouri law, is only allowed pursuant to statute or contract.

A pivotal misperception Plaintiff Dieser clings to herein is that he has some legal right to post-judgment interest, beyond any such provided him by statute; some kind of cause of action. However, Missouri law is clear that "[t]he imposition of any interest from the date of judgment until payment is fixed and determined by statute." *Peterson v. Discover Property & Casualty Ins. Co.*, 460 S.W.3d 393, 412 (Mo.App. W.D. 2015), citing *Kelly v. Bass Pro Outdoor World, LLC,* 426 S.W.3d 675, 678 (Mo.App. E.D.

2013); *Lindquist v. Mid-America Orthopaedic Surgery, Inc.* 325 S.W.3d 461, 464 (Mo. App. E.D. 2010), citing *Robinson v. St. Louis Bd. of Police Com'rs*, 212 S.W.3d 165, 167 (Mo.App. E.D.2006).

There is no question that post-judgment interest was not something to which a litigant had a right at common law, but rather it is a creature of statute. In *Boyle v. Crimm* this Court stated that "an allowance of interest must be based upon either a statute or a contract, express or implied…" *Boyle v. Crimm*, 363 Mo. 731, 742 (1952) citing 47 C.J.S., Interest, §§ 3, 6, 7 and 8, pp. 13, 17, 19, 20; 30 Am.Jur., Interest, § 4, p. 8. 47 C.J.S. §9 entitled Statutory Origin of Awards of Interest on Civil Judgments, further addresses the statutory origins of interest on judgments:

> Interest on a judgment is generally of purely statutory origin. The purpose for the enactment of statutory interest provisions was generally to clarify and simplify the existing law. An award of interest usually depends entirely on statute because at common law there was no right to interest on any type of damages. Thus, the right to interest has been recognized to be in derogation of the common law and no right to recover interest in a civil action exists unless a statute provides for interest.

47 C.J.S. §9 (emphasis added).

E. As a creature of statute, the legislature controls whether and under what circumstances post-judgment interest will be available.

As discussed above, post-judgment interest has always been a statutory right and not a common law or constitutional right. *Mackey,* 438 S.W.3d at 482. It is a statutory remedy which the court imposes on a jury's verdict after it becomes a judgment. *Id.* Since this right to interest is created by the legislature and codified, the legislature can also restrict it or limit its availability. As stated by the *Mackey* court:

> Post-judgment interest is, and has always been, a statutory right and not a common law or constitutional right. And it is a statutory right that the court imposes upon the jury's verdict if and when the verdict becomes the judgment; therefore, the reasoning behind [*Watts*] would suggest that because ***post-judgment interest is created by statute (and not the Constitution or the common law, which the Constitution preserves), it may also be restricted by statute. The present statutory restriction does not impact the Mackeys' constitutional right to a jury trial.***

Id. at 482 (emphasis added).

Missouri courts have held that post-judgment interest is a statutory creation, properly controlled by the legislature, and the denial of post-judgment interest in no way restricts the jury's duties as fact finder. The trial court's denial of Plaintiff Dieser's request for post-judgment in no way infringes on Plaintiff's constitutional right to a jury trial.

POINTS RELIED ON OF DEFENDANT/CROSS-APPELLANT

ST. ANTHONY'S MEDICAL CENTER

I. The trial court erred in overruling Defendant's objections to Plaintiff's cross-examination of Defendant's expert Dr. Diane Krasner about "never events" and purported Medicare regulations, including Plaintiff's counsel's unfounded assertion in the presence of the jury that the Centers for Medicare Services [the "CMS"] had declared in 2007 or 2008 that Stage III or IV pressure ulcers acquired in the hospital are to be considered "never events," because such examination was without factual foundation, misstated the law, distorted the applicable standard of care, and injected irrelevant and inflammatory testimony, in that: (a) there was no evidence of the alleged existence of Medicare "never events" regulations; (b) the use of the term "never event" incorrectly and prejudicially told the jury that CMS had determined that Stage III and IV pressure ulcers cannot happen absent negligence; (c) the CMS regulatory action to which counsel referred occurred only after Plaintiff's hospitalization, related only to reimbursement, and did not create a standard of care applicable to Plaintiff's treatment; and, (d) the examination injected the irrelevant, prejudicial subject of Medicare "findings" and reimbursement of hospital costs.

State v. Tisius, 92 S.W.3d 751 (Mo. banc 2002)

Secrist v. Treadstone LLC, 356 S.W.3d 276 (Mo.App. W.D. 2011)

Iseminger v. Holden, 544 S.W.2d 550 (Mo. 1976)

Adkins v. Hontz, 337 S.W.3d 711 (Mo.App. W.D. 2011)

II. The trial court erred in allowing Plaintiff's counsel, over objection, during jury selection to make statements and question the venire as to the burden of proof because such statements and questions misstated the burden of proof in that it conveyed to the jury that the burden of proof was a matter of percentages; that the Plaintiff and Defendant are on equal footing; that Defendant had a burden of proof equal to that of the Plaintiff; and, that the jury needed only believe Plaintiff's evidence 51% for him to win.

State v. Smith, 422 S.W.2d 50 (Mo. banc 1967)

State v. Nickels, 390 S.W.2d 578 (Mo.App. 1965)

Duensing v. Huscher, 431 S.W.2d 169 (Mo. 1968)

State v. Hines, 567 S.W.2d 740 (Mo.App. 1978)

III. The trial court erred in denying Defendant's Motion for New Trial because the trial court abused its discretion in permitting Plaintiff to testify to St. Anthony's Medical Center being a "Catholic institution" and to his feeling "betrayed," "deceived," and angry as a Catholic in that the religious affiliation of the defendant hospital and Plaintiff's alleged sense of betrayal as a Catholic was prejudicial and irrelevant and encouraged the jury to believe the defendant hospital was somehow to be held to some higher standard of care due to its religious affiliation.

Fleshner v. Pepose Vision Institute, 304 S.W.3d 81 (Mo. banc 2010)

State v. Cavener, 202 S.W.2d 869 (Mo. 1947)

Ward v. Kansas City Southern Ry. Co., 157 S.W.3d 696 (Mo.App. W.D. 2004)

IV. The trial court erred in allowing Plaintiff's counsel, over objection, to state to the jury during closing argument that they will be telling the community what constitutes acceptable medical practice because such argument was improper and prejudicial in that it constituted a "send a message" argument in a case where Plaintiff alleged no punitive or exemplary damages.

Smith v Courtner, 531 S.W.2d 743 (Mo. 1976)

Fisher v. McIlroy, 739 S.W.2d 577 (Mo.App. E.D. 1987)

V. The trial court erred in denying Defendant's Motion for New Trial because the jury's verdict was excessive in that it was the result of passion and prejudice fueled by the aforementioned trial court errors and exceeded fair and reasonable compensation for Plaintiff's injuries, particularly in the absence of competent evidence of any significant or chronic physical injury to the Plaintiff and its gross disproportionality to Plaintiff's economic damages.

McCormack v. Capital Elec Const. Co., 159 S.W.3d 387 (Mo.App. W.D. 2004)

Alcorn v. Union Pacific R. Co., 50 S.W.3d 226 (Mo. banc 2001) (overruled by Badahman v. Catering St. Louis, 395 S.W.3d 24 (Mo. banc 2013), as to the stated standard of care.

ARGUMENT OF DEFENDANT/CROSS-APPELLANT

ON ITS CROSS-APPEAL

I. The trial court erred in overruling Defendant's objections to Plaintiff's cross-examination of Defendant's expert Dr. Diane Krasner about "never events" and purported Medicare regulations, including Plaintiff's counsel's unfounded assertion in the presence of the jury that the Centers for Medicare Services [the CMS]" had declared in 2007 or 2008 that Stage III or IV pressure ulcers acquired in the hospital are to be considered "never events," because such examination was without factual foundation, misstated the law, distorted the applicable standard of care, and injected irrelevant and inflammatory testimony, in that: (a) there was no evidence of the alleged existence of Medicare "never events" regulations; (b) the use of the term "never event" incorrectly and prejudicially told the jury that CMS had determined that Stage III and IV pressure ulcers cannot happen absent negligence; (c) the CMS regulatory action to which counsel referred occurred only after Plaintiff's hospitalization, related only to reimbursement, and did not create a standard of care applicable to Plaintiff's treatment; and, (d) the examination injected the irrelevant, prejudicial subject of Medicare "findings" and reimbursement of hospital costs.

A. Summary of Argument

It is clear that from the outset, plaintiff's counsel was determined to try to get into evidence what they represented was a liability-imposing Medicare "never event" regulation on the standard of care. There are myriad flaws in this position,

including: the absence of any such regulation; the irrelevance and inadmissibility of any Medicare regulation, (including any on reimbursement) in this civil medical negligence litigation; and, its powerfully prejudicial impact on the jury that a federal health services agency and said plaintiff's pressure ulcer should never have happened.

B. Standard of Review

Trial court rulings on the scope of cross-examination and the admission of evidence are reviewed under an abuse of discretion standard. *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000). The trial court's discretionary control of the scope and extent of cross-examination is subject to review for abuse. *Dent v. Monarch Life Ins. Co.*, 98 S.W.2d 123 (Mo.App. 1936); *Dietz v. Southern Pac. R. Co.*, 28 S.W.2d 395 (Mo.App. 1930).

Cross-examination may not encompass incompetent, irrelevant or immaterial matters. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 766 (Mo. banc 2011). It is an abuse of discretion to permit cross-examination on prejudicial or immaterial matter, and then to not grant a new trial. *E.g. Wiener v. Mutual Life Ins. Co. of N. Y.*, 179 S.W.2d 39 (Mo. 1944).

C. Argument

On the afternoon of the last day of trial, in the course of cross-examining Dr. Krasner (the last witness in the case), Plaintiffs' counsel incorrectly asserted in front of the jury that "in 2007 or 2008, the Centers for Medicaid Services declared that Stage III

or IV pressure ulcers acquired in the hospital are to be considered never events" (Tr. 1146, A39), and that this meant "we are not going to pay for it because it should never happen." (Tr. 1150, A40). Plaintiffs' examination of Dr. Krasner on the subject of "never events" continued through almost five pages of transcript and the "never event" phrase was mentioned seven times.(Tr. 1145-1150, A39-40)(*See* Statement of Facts, *supra*, p. 22-32). Plaintiff's counsel returned to this theme in closing argument:

> And so when you deliberate, that's the big question you are answering as a group, as 12 random people off the streets of St. Louis County, was the care given this patient who sustained, I believe, well, it is almost -- sometimes they admit it, sometimes they don't, but a Stage IV all the way down to the bone pressure ulcer in their hospital while he's recovering from surgery and in the ICU, when his body is in their hands. That's what happened here, and that is not acceptable. *That is what is known as a* ***never event*** *or a serious reportable event, and that's what happened here.*

(Tr. 1174, A42)(Emphasis supplied).

This cross-examination and closing argument, including counsel's repeated references to the highly charged term "never event" and to Medicare policies related to reimbursement for costs of treatment, prejudicially misled the jury. Understanding why requires a brief review of the history and meaning of the term "never event" and Medicare reimbursement rules; a recounting of the trial court's initial, correct rulings forbidding questioning on these subjects and its ultimate ruling permitting it; a demonstration that admitting the testimony was both erroneous and prejudicial; and a

refutation of Plaintiff's argument, accepted by the trial court, that Dr. Krasner had "opened the door" to this otherwise inadmissible evidence by one brief, general statement she made in the course of direct examination.

1. Never events, reporting and Medicare reimbursement should never have been a part of this trial.

Never Events

The term "never event" is a highly controversial one, in the literature of both law and medicine. Legal authors have described in detail the origin and use of the term. *E.g. see,* J. Crist, *Never Say Never: "Never Events" in Medicare*, 20 Health Matrix 437, 438 (2010); D. Schindler, *Never Events, Defensive Medicine and the Continued Federalization of Malpractice*, 12 Quinnipiac Health L.J. 209, 213-14 (2008-2009); *see also,* Editorial Staff, *A National Survey of Medical Error Reporting Laws*, 9 Yale J. Health Pol'y L. & Ethics 201, 205-206, 218 (2008). Writers in medical journals have done so as well. *See* A. Milstein, *Ending Extra Payment for "Never Events" — Stronger Incentives for Patients' Safety*, N Engl J Med, 2009; 360:2388-2390 (June 4, 2009).

The phrase "never event" was first used to refer to requirements that health care providers report certain adverse health events that occurred during the course of treatment. Those who coined the phrase believed that imposing reporting requirements on providers about certain adverse events was likely to reduce the incidence of those events by giving providers an incentive to avoid them.

Dr. Kenneth Kizer, who at the time was chair of the National Quality Forum, is credited with coining the phrase "never event". He said that the choice of the words

"never event" was deliberate and that the NQF used the term because of its "extra psychological charge." *E.g., see,* A. Milstein, New England Journal of Medicine, *supra*, 2390; A10. The term "never event" meant that they were events that "should never happen" in a hospital. (*Id.*) In 2002, the National Quality Forum (the NQF), a "not-for-profit think tank group" (Krasner Testimony, Tr. 1146, A39), developed a list of twenty-seven adverse events that it believed should be subject to reporting for this purpose. D. Schindler, Quinnipiac Health L.J., *supra*, at 210. Stage III and IV pressure ulcers arising during hospital admissions were on the list that the NQF developed. The NQF officially used the term "serious reportable events" for the items on its list. *Id.*

Although it eventually applied the charged term "never event" to the twenty-seven conditions it selected, in choosing those conditions "[i]n reality NQF applied a lower than 'never' standard - stating that the conditions need be [only] 'largely preventable, and very serious.'" J. Crist, *supra*, at 444, A48. The NQF has since ceased any use of the term "never event" to describe the events it believes should be reported. (Krasner Testimony, Tr. 1147, A39); instead, the NQF list now uses only the term "serious reportable event."[1] In a recent NQF publication, that organization made clear it does not use the "never event" phrase:

"Never events

This informal term is often used in place of serious reportable event. Eliminating

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[1] *See* List of Serious Reportable Events at the following internet location: http://www.qualityforum.org/topics/SREs/List_of_SREs.aspx (visited 12/3/2015)

harm completely is important but difficult to do. Because of this, NQF uses *serious reportable event* instead of *never event*."

From NATIONAL QUALITY FORUM PHRASEBOOK, a plain language guide to NQF jargon, page 25 (dated 2011)(*see* Appendix 97-126 for a copy of this document).

Medicare Reimbursement Regulations

In addition to mandatory reporting, policy makers have sought to use lower provider cost reimbursement as an incentive to reduce events adversely affecting patient health. In 2005-2006, Congress decided to reduce Medicare reimbursement to hospitals for certain medical conditions that arose during the course of treatment. Deficit Reduction Act of 2005 P.L. 109-171, February 8, 2006, 120 Stat. 4. The policy judgment underlying the statute was that reducing reimbursement for treatment of certain hospital-acquired conditions would increase the incentives for hospitals to lower the incidence of such conditions and reduce reimbursements.

The Deficit Reduction Act of 2005 did not use the term "never event." Nor does the term appear in any Medicare rule, regulation or guideline. Plaintiff Dieser has advanced no such rule, regulation or guideline using the term. It is undisputed that the changes to reimbursement for the conditions covered by the 2005 Deficit Reduction Act were to take effect on or after October 1, 2008. In anticipation of that date, the Centers for Medicare and Medicaid Services, which administers reimbursement under the Medicare program, published lists of "Hospital Acquired Conditions" for which reimbursement would be reduced. The lists of conditions affected, as published in CMS's final orders of rulemaking, did not use the term "never event." *See*, J. Crist, 20 Health

Matrix 437, 440. Rather, CMS used the term "Hospital Acquired Conditions" for this purpose and Stage III and IV pressure ulcers were among the conditions listed. *Id.*

At trial, Plaintiffs sought to introduce Plaintiff's Ex. 34, which purports to be a letter dated July 31, 2008, addressed to "Dear State Medicaid Director," and bearing the typed signature of "Herb B. Kuhn, Deputy Administrator, Acting Director, Center for Medicaid and State Operations." (L.F. 157). The letter, which was not published as a rule under the federal Administrative Procedure Act, refers to the NFQ's "List of Serious Reported Events (commonly referred to as 'Never Events')". The letter uses the term "never events" elsewhere as well. The main purpose of the letter appears to be to ask state Medicaid directors to coordinate their reimbursement policies with federal Medicare policy. There can be no doubt that this letter it has nothing to do with setting the standard of care in medical negligence cases.

2. The initial trial court rulings excluding this evidence were proper.

Prior to trial, Defendant anticipated that Plaintiffs would seek to introduce evidence about the alleged treatment of Stage III and IV pressure ulcers as "never events" or "serious reportable events." As noted in the Statement of Facts, Defendant included this subject in its pretrial motions *in limine*. On February 19, 2015, the trial court heard all parties' Motions in Limine and preliminarily denied Defendant's Motion as to referring to the ulcer or skin wound as a "never event," but further ruled that same was not to be mentioned in jury selection or opening statements. (L.F. 142).

On February 23, 2015, Defendant submitted a Supplemental Motion in Limine again asserting that Plaintiff and his witnesses should be prohibited from introducing or referencing Medicare payment guidelines or referencing the deep tissue injury as a so-called "never event" or a "serious reportable event." (L.F. 134-139). The bases for the Motion included that the evidence would needlessly inject collateral source payments; that the CMS payment guidelines that Plaintiff sought to introduce did not exist until October 2008, which post-dated the time of the early 2008 treatment; that the terms "never event" and "serious reportable event" are not actually in Medicare or CMS regulations, rules or guidelines; that they are improper, colloquial terms and use of either would be prejudicial to defendant, and that Medicare reimbursement guidelines could not define the standard of care in this case. (L.F. 134-139).

The issue arose at trial during the direct examination of Plaintiff's physician expert witness, Dr. Rushing. Outside the presence of the jury, Plaintiff's counsel stated that she intended to discuss Medicare regulations and determination with Dr. Rushing in support of the doctor's standard of care opinion that Stage III and IV pressure ulcers are "entirely preventable." (Tr. 613, A14) She said she intended to present the doctor with the "regulation" which said that such pressure ulcers are not reimbursable because "they are preventable by good hospital care." (Tr. 614, A12) Defendant's counsel asserted that the regulation did not say that. (Id.) The Court asked to see the record, and to see the "exact language" of the regulation that Plaintiff intended to quote.

In response, plaintiff's counsel then showed the Court not any Medicare regulation, but rather the letter which is Plaintiff's Exhibit 34, (L.F. 157), and attempted

to point out supportive language therein. In response, defense counsel argued that the letter related to reimbursement practices, and did not even come close to defining a "never event." The court sustained Defendant's objection. (Tr. 615, A12). Plaintiff's Exhibit 34 was never received into evidence.

Following Dr. Rushing's testimony, Plaintiff made an offer of proof outside the presence of the jury (Tr. 617-619, A12-13); the trial court sustained Defendant's objection (Tr. 619, A13). Plaintiff's offer of proof with Dr. Rushing is instructive on plaintiff's motive in attempting to get the "never event" phrase before the jury. Dr. Rushing testified that Medicare regulations of the "never event" showed the pressure ulcer was preventable with good hospital care. This would be clearly using the purported Medicare regulation to establish a standard of care. Thus, it would constitute an attempt to substitute Medicare's reimbursement regulation as the standard of care in a medical negligence case.

On February 26, 2015, the fourth day of trial, Plaintiff presented another offer of proof as to certain testimony from a nurse, Gail Lupien, who participated in the health care Plaintiff received at SAMC. (Tr. 985:5-995:8, A27-29). The court sustained Defendant's objection to this proof as well.

Through the testimony of Dr. Rushing and Nurse Lupien, then, the trial court's rulings on this subject were unquestionably correct. As of that point in time, the jury still had not heard the intentionally charged, inflammatory, and absolute term, "never event." The Court had not allowed Plaintiff improperly to introduce a concept that would, in essence, make this a strict liability case: testimony about some imagined finding of a

regulatory agency that, absent negligence, Stage III and IV pressure ulcers should never happen in hospitals. However, the trial judge changed his ruling during the course of cross-examination of defendant's witness, Dr. Diane Krasner.

3. The Court's overruling of defendant's objections allowed the impermissible cross-examination.

Dr. Krasner is a registered nurse with a Ph.D. in nursing. She offered a number of opinions about Plaintiff's care at the hospital. She is an expert on the prevention and care of pressure ulcers, having served as a member of the National Pressure Ulcer Prevention Advisory Panel ("NPUAP"), a think tank concerned with the issue of pressure ulcer prevention. One of Dr. Krasner's opinions was that Mr. Dieser's pressure ulcers were unavoidable, given Mr. Dieser's unavoidable risk factors and co-morbidities. She explained to the jury, in detail, her reasoning for that opinion. (Tr. 1036-1047, A37-39). She told the jury that NPUAP – which is not a governmental agency – had studied the issue for years and, in 2010, had come to a consensus, based on review of 257 literature references, that for some persons risk factors made pressure ulcers unavoidable. (Tr. 1037, A31).

As Dr. Krasner finished her testimony about this opinion, Defendant's counsel asked her a question about the timing of NPUAP's use of the term "unavoidable ulcers:"

Q. Okay. And does the NPUAP have a definition for unavoidable ulcers?

A. It does.

Q. Okay. How long has it had that definition?

A. It published its definition in 2010, which was a refinement of the definition that was put out by the Centers for Medicare and Medicaid in 2004.

(Tr. 1047, A33).

Defense counsel then moved on to other subjects, and did not return to the subject of Medicare, Medicaid or CMS.

In the course of cross-examining Dr. Krasner, Plaintiffs' counsel argued outside the jury's presence that the above exchange had opened the door for two items the Court had repeatedly excluded: a) presentation of all the evidence about "never events"; and, b) the Medicare regulations which plaintiff's counsel asserted existed. (Tr. 1098-1106, A34-36; Tr. 1137-1143, A37-38). The Court asked Plaintiff's counsel what she intended to ask, and counsel replied:

> I'm intending to ask her about the 2008 regulatory provisions from the Centers for Medicare & Medicaid Services, which indicate that Stage III and IV pressure ulcers acquired in the hospital are preventable, that they are entitled never events; and in connection with that quote in her book and with this stuff, and that she is well aware of it, that the wound community knows all about it. And that this was, in fact, a Stage III or IV pressure ulcer acquired in the hospital. (emphasis added).

(Tr. 1106, A36).

Defense counsel repeated the many arguments previously made on the subject, including that there was no foundation for the examination on this subject, that the alleged regulation took effect only after the care in question, and that the examination

would interject the subject of Medicare reimbursement. (Tr. 1103-1104, A35-36). Counsel also contended that the very narrow answer that Dr. Krasner had given did not open the door to the full examination on the subject that Plaintiff counsel stated she intended to pursue. (*Id.*). After hearing the parties at length, the trial court said, "I am letting it in." (Tr. 1140, A38).

After the jury returned, counsel resumed her cross-examination of Dr. Krasner. After her first question related to the subjects that had been argued outside the jury's presence, Defense counsel stated,

MR. VENKER: Your Honor, just to make sure, we have made our objection and it has been ruled upon, correct?

THE COURT: Absolutely. Objection is overruled.

(Tr. 1145, A39).

Plaintiffs' counsel than proceeded to ask the questions that the Court had said it would allow, and the following exchange between Plaintiff's counsel and Dr. Krasner occurred:

Q. And when you were on direct exam and you were explaining to this jury the basis for your opinion that this ulcer was not preventable, you mentioned the 2010 regulations -- or not regulations, consensus statement?

A. Correct, consensus statement.

Q. Were based on a 2004 statement by the Centers for Medicare and Medicare Services. Isn't that what you said, ma'am?

A. No. I said that they included the definition that came from CMS for unavoidable.

Q. Right. And what you left out, ma'am, is that in 2007 or 2008, the Centers for Medicaid Services declared that Stage III or IV pressure ulcers acquired in the hospital are to be considered never events; isn't that correct? (Emphasis supplied)

A. No. That's -- that's not correct.

Q. What's wrong with it?

A. Well, it's complicated.

Q. Answer me this one: Is a Stage III or IV hospital acquired pressure ulcer a never event?

MR. VENKER: I object to that, Your Honor, because of the phrasing of the question. It is not time specific.

THE COURT: Sustained.

BY MS. NICHOLS:

Q. Was it ever a never event?

A. So it was a -- pressure ulcers were in 2001 by the National Quality Forum called never events. That's a not-for-profit think tank group.

In 2005, when congress passed the deficit reduction act --

Q. Uh-huh.

A. And I'm no legislator, but I will try to give this to you the best I can.

Q. Okay. Go ahead.

A. They identified eight conditions that they would not, beginning in 2008, pay for if they happened in an acute care facility.

Q. Uh-huh.

A. Of those eight, in the first rule, three were considered -- were called never events. And those were surgery on the wrong person, surgery on the wrong site, and a blood transfusion to the wrong patient. Pressure ulcers Stage III and IV were in there as conditions they wouldn't pay for. In the final rule, when CMS issued its final rule, that never event language disappeared.

And to my understanding, the National Quality Forum at some point in time, and I don't know the exact year, also rescinded the language of never events and called it something else that I can't remember right now. It is a different word. So as of now, that language "never event" is out of our vocabulary, but it never applied to pressure ulcers, but they weren't being reimbursed.

(Tr. 1145-1147, A39)(emphasis added).

Plaintiff continued the cross-examination, over further objection by Defendant. Counsel again asserted, reading from a publication, that CMS had characterized pressure ulcers as "never events." (Tr. 1149, A40). The examination on this subject finally came to an end; plaintiff's counsel use the term "never event" again in closing. (Tr. 1174, A42).

4. It is clear that the error in allowing cross-examination on "never events" was prejudicial.

Permitting this examination constituted prejudicial error, which warrants reversal and a new trial.

The scope of permissible cross-examination is broad, but it is not unlimited. In this case, counsel was allowed to make an assertion about Medicare regulations, in the presence of the jury, that was incorrect, without foundation and inflammatory. Counsel told the jury that in 2007 or 2008, "the Centers for Medicaid Services declared that Stage III or IV pressure ulcers acquired in the hospital are to be considered never events." (Tr. 1146, A39).

As the history set out above shows, what Plaintiff's counsel told the jury is more than just an incorrect statement of what happened. The term "never events" was not in the 2008 regulatory provisions, as plaintiff's counsel had incorrectly represented (Tr. 1106, A36). Rather, it was coined by a non-governmental organization, the National Quality Forum for its "psychological charge"; it was used as part of a plan to incentivize providers to reduce the incidence of events adversely affecting patient health, by applying the term "never events" to them. However, saying that events "should never happen" in a hospital does not mean that they cannot happen absent negligence. In any event, even the NQF's use of "never event" was not intended to be or set the standard of care in medical negligence actions.

Furthermore, as has also been shown, while the term "never event" was at one time that of the NQF, it was never formally used by CMS in any rule or regulation. Plaintiffs failed to lay a foundation that CMS, by regulation, ever defined or applied the term "never events" to hospital acquired Stage III and IV ulcers; the only proof they offered, the letter that is plaintiff's Ex. 34, was without foundation and was never received into evidence.

The "Never Event" Has No Logical Relevance In This Case

Even if, contrary to fact, CMS had issued a regulation applying the term "never events" to sores of the type that Plaintiff suffered, that fact would not be either logically [or legally] relevant to any issue in this case. CMS regulations deal with reimbursement of health care expenses, not the standard of care for negligence purposes in civil litigation.

This Court has explained that:

> Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case.

State v. Tisius, 92 S.W.3d 751, 760 (Mo. banc 2002), *cert denied*, 639 U.S. 920, 123 S.Ct. 2287, 156 I.Ed.2d 140 (2003) (quoting *State v. Mathews*, 33 S.W.3d 658, 661 (Mo.App. S.D. 2000))." See also, *State v. Smith*, 32 S.W.3d 532, 546.

The key factual dispute in this case is whether Plaintiff suffered his pressures ulcers because of a failure of hospital employees to adhere to the applicable standard of care. What CMS has determined as to reimbursement for the (additional cost of) treating such pressure ulcers when they do occur (regardless of why they occurred) does not make it any more or less likely that the hospital employees in this case adhered to the standard of care. Put simply, such evidence is not logically relevant and its admission was prejudicial error.

Assuming that the test of logical relevancy is met, only then would legal relevancy be analyzed. If the evidence is not logically relevant, then it is inadmissible; there is no need to analyze legal relevancy. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo. App. S.D. 2004).

It is also clear the references to "never events" and Medicare reimbursement policies are not legally relevant. Legal relevance, "'is a determination of the balance between the probative and prejudicial effect of the evidence.'" *Secrist v. Treadstone LLC*, 356 S.W.3d 276, 281 (Mo.App. W.D.2011). That balancing requires the trial court to "'weigh the probative value, or usefulness, of the evidence against its costs, specifically the dangers of unfair prejudice, confusion of the issues, undue delay, misleading the jury, waste of time, or needless presentation of cumulative evidence.' " *Adkins v. Hontz*, 337 S.W.3d 711, 720 (Mo.App. W.D.2011) (quoting *Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38, 43 (Mo.App. E.D.2007)). If the "cost" outweighs the usefulness, the evidence is not legally relevant and should be excluded. *Id.*

It is reasonable to conclude that counsel's argument led the jurors to believe that Medicare refused to reimburse the hospital for the additional cost of Plaintiff's care resulting from his ulcers, and that this must have resulted from a Medicare determination that the hospital's negligence caused the ulcers. This possible prejudicial effect makes this examination and the responses elicited legally irrelevant (as well as logically irrelevant).

Admission of this evidence was prejudicial. The evidence about the hospital's conduct was very much in dispute. Dr. Krasner explained the medical consensus that

some pressure sores are unavoidable in patients with certain risk factors and co-morbidities, and showed in detail why that is what happened with respect to Mr. Dieser.

Up to the point of the examination challenged here, this trial was on course toward a proper adjudication as to this disputed issue, based on correct legal principles. Up to that point, the Court had not allowed Plaintiff to convert this to essentially a negligence *per se* or strict liability case by arguing, without basis in fact, that there is some regulation somewhere that says a hospital allowing pressure ulcers to occur violates a regulation, which automatically proves negligence in a civil case. Had Plaintiff been allowed to use this supposed "regulation" as the basis for the standard of care, it would have been error, because the reimbursement regulations at issue were not even in effect at the time of Plaintiff's treatment, even based on plaintiff's own Exhibit 34.

Similarly, up to this point in the trial, the Court had not allowed Plaintiff to present to the jury the irrelevant and prejudicial issue of Medicare reimbursement for hospital costs. As a matter of fact, plaintiff never made any attempt to show that Medicare had denied reimbursement for the pressure ulcer at issue. Therefore, the mention of Medicare denying reimbursement for plaintiff's case would have been rank guess-work. Yet there is no doubt plaintiff's counsel was trying very hard to create the perception that Medicare had done just that. What would have been the relevance, though, of pursuing or developing the status of the medicare reimbursement for plaintiff Dieser's pressure ulcer? Surely, it could never be relevant to any issue in this trial.

Admission of Never Event as a Medicare Regulation Functionally Changed the Case Into One of Strict Liability or Negligence Per Se

Prior to committing the error at issue here, the Court had properly held plaintiff to the proof ordinarily required in a medical negligence case: proof of the applicable standard of care, and proof of acts or omissions by defendant that failed to meet that standard. To make a submissible case for medical negligence in Missouri, a plaintiff is required to show: (1) defendant(s) failed to meet a required medical standard of care; (2) defendant(s)' acts or omissions were performed negligently; and, (3) defendant(s)' acts or omissions caused plaintiff damage. *Watson v. Tenet Healthsystem SL, Inc.,* 304 S.W.3d 236, 240 (Mo. Ct. App. 2009) (citing *Sundermeyer v. SSM Regional Health Services,* 271 S.W.3d 552, 554 (Mo. banc 2008)). "In a medical malpractice case, where proof of causation requires a certain degree of expertise, the Plaintiff must present expert testimony to establish causation." *Id.*

In the course of the cross-examination of Dr. Krasner, prejudicial error occurred. Hearing that Medicare had found Stage III and IV pressure ulcers to be "never events," the jurors surely concluded that no further consideration of the conflicting evidence on the subject of the hospital's conformance to the standard of care was necessary (the excessive verdict shows this). Dr. Krasner had no choice but to attempt to answer plaintiff's counsel's questions about the term "never event." Dr. Krasner never should have been required to go into the necessarily complicated explanation of the subject. The topic should never have been open for questioning or discussion.

The prejudice was further compounded by counsel's reference to the term "never events" at a key point in closing argument.[2] Use of the term in argument strongly reinforced Plaintiff's unfounded theme: that CMS – the federal agency for health care services – had actually determined that Mr. Dieser's pressure sores were "never events" so that the hospital's negligence was undisputable; this was something that was absolutely unacceptable across the entire United States, not just in Mr. Dieser's case. This was error for cross-examination or closing argument about "never event" and it was prejudicial.

5. Defendant Did Not Open the Door.

The only remaining issue, then, is whether Dr. Krasner's brief reference to Medicare and CMS did in fact open the door to what followed. In referring to Medicare, Dr. Krasner did not use the term "never events." She referred only to Medicare and only to answer counsel's question about the NPUAP's definition of "unavoidable" pressure sores.

Offering inadmissible evidence can "open the door" to countervailing proof by the opposing party. The general rule has been stated often: "If a party invites incompetent evidence, he estops himself from objecting to the other party following it up with

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[2] Defendant did not renew its objection to the term at that point, but was not required to do so. Since the trial court had already erroneously permitted the evidence, objection to referring to it in argument would have been futile. *Brug v. Manufacturers Bank & Trust Company*, 461 S.W.2d 269, 275 (Mo. banc 1970).

testimony tending to explain his side of the controversy." *E.g.*, *Baker v. Thompson-Hayward Chem. Co.* 316 S.W.2d 652, 657 (Mo. App. 1958)(citations omitted).

There are limits, however, to what the opened door leads to. In applying the test set out above, courts must be careful to go no further in allowing otherwise inadmissible evidence than is necessary to redress any unfairness resulting from the conduct of the party who opened the door. See *Iseminger v. Holden*, 544 S.W.2d 550, 554 (Mo. 1976). Where no unfair advantage is created, the door is not opened. *Id.* "[T]he trial court in the first instance, is to resolve whether or not such an undue advantage had been created." *Id.* In this way, the Court prevents the doctrine of "opening the door" from being an avenue for the injection of prejudice.

Thus, where Plaintiff cross-examines an expert witness about his compensation for services performed for the defendant in other cases, this does not open the door for defendant's counsel to examine that same witness about the results in those cases. *Moon v. Hy-Vee*, 351, S.W.3d 279, (Mo. App. W. D. 2011). Also, where a personal injury plaintiff puts into evidence a medical bill containing a reference to reimbursement from a collateral source like Blue Cross, he does not open the door to cross-examination about the subject of collateral sources. *Iseminger, supra,* at 554. Although it is for a trial court to determine in the first instance how far a door has been opened, the trial court's ruling is subject to reversal if it abuses its discretion. *Leake v. Burlington Northern Railroad Co.*, 892 S.W.2d 359, 363 (Mo.App. E.D.1995).

In the case at bar, there is no reasonable interpretation of the evidence under which Dr. Krasner's single mention of Medicare opened the door to the plaintiff's counsel's full

exploration of the "never event" subject that followed. First, Dr. Krasner did not mention "never event" or anything about Medicare reimbursement. Second, the brief mention by the witness of Medicare did not create any "undue advantage." It was mentioned as a historical reference in the definition of unavoidable pressure ulcer by the NPUAP, clearly identified as different from Medicare. Third, that single reference could not possibly open the door to: **(a)** counsel's incorrect representation that there was a Medicare "never event" regulation describing or defining certain pressure sores in hospitals as being "never events"; **(b)** to a discussion of Medicare reimbursement practices; or, **(c)** to closing argument that the hospital was negligent because a Medicare "never event" occurred.

The trial court here abused its discretion in determining that the door had been opened to the cross-examination it permitted, over defendant's repeated and strenuous objections. As a result of what followed, this Court can have no confidence that the resulting Plaintiff's verdict and very large damage award resulted from the jury's proper application of the correct standard of care to the facts of this case. A new trial is necessary as a result of the improper cross-examination the trial court allowed.

II. The trial court erred in allowing Plaintiff's counsel, over objection, during jury selection to make statements and question the venire as to the burden of proof because such statements and questions misstated the burden of proof in that it conveyed to the jury that the burden of proof was a matter of percentages; that the Plaintiff and Defendant are on equal footing; that Defendant had a burden of proof equal to that of the Plaintiff; and, that the jury needed only believe Plaintiff's evidence 51% for him to win.

A. Summary of Argument

Under Missouri law, the correct procedure during jury selection would be for counsel to ask the members of the panel whether, if the court later instructs them in a specific manner, they have any opinion which would prevent them from returning a verdict accordingly. Here, Plaintiff's counsel went well beyond this and attempted to, herself, incorrectly explain the concept of burden of proof in terms of percentages and more than implying that a mere 1% difference of "belief" meant plaintiff should win. This was all to her client's unfair advantage.

B. Standard of Review

The standard of review for the denial of a Motion for New Trial is abuse of discretion by the trial court. *M.E.S. v. Daughters of Charity Services of St. Louis*, 975 S.W.2d 477, 482 (Mo.App. E.D. 1998). A new trial will be available upon a showing that trial court error or misconduct by the prevailing party incited prejudice in the jury. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 372 (Mo. banc 1993).

The control of *voir dire* is within the discretion of the trial court and will be reviewed for abuse of discretion. *Pollard v. Whitener*, 965 S.W.2d 281, 286 (Mo.App. W.D. 1998). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court, and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *Id.*

C. The trial court erred in allowing Plaintiff's counsel during jury selection to make incorrect statements as to the burden of proof.

During jury selection, Plaintiff's counsel pursued a line of statements and questioning purportedly involving the proper burden of proof. The trial court initially sustained Defendant's objections as to misstatements of the law, but Plaintiff's counsel persisted in her misstatements of the burden of proof, utilizing confusing and incorrect references, including confusing percentages and essentially indicating the parties are on equal footing. What resulted was a protracted and misleading discussion of the incorrect burden of proof in the case, which was highlighted by the number of times Plaintiff's counsel repeatedly asked the same improper questions. A portion of the jury selection discussion at issue was as follows:

> MS COFFEY: … In a criminal case, the question the jury has to discuss is what probably – what happened beyond a reasonable doubt, what can be shown, you know, happened without any reasonable doubt. That's a question for a jury in a criminal case.

But in a civil case, like this one, a civil case, this jury can go back into the jury room and talk about well, what do you-all – what do you think probably happened based on the evidence that you have heard.

MR. VENKER: Judge, I am just going to object to that explanation of what the burden of proof is. I think it is incorrect.

THE COURT: The objection is sustained.

MS. COFFEY: Well, in a civil case, the jury can go back and talk about what is more likely true than not true, which side is more likely true than not true. Just more likely, just a little bit more likely.

If you believe what we're telling you is 51 percent more likely true and they are, you know, 49 or 52, you know, under the law, that's enough for us to win.

All the jury has to believe, and for us to win, is that it's more likely true than not true that Mr. Dieser sustained this pressure injury in the hospital under circumstances that – with standard care, the injury would have been prevented or lessened.

So you don't have to be 90 percent convinced what we're saying is true or 80 percent convinced or 70 or 60, just 51 percent more likely true than not true.

Is there anybody in the box who thinks that that is just not – that that is just a little too easy for us? That 51 percent ought to be – you know, it ought to be more like 60, 70, 80 percent in order to hold the hospital responsible for the injury

that happened to this patient? Anybody believe it is too easy, 51 percent? I saw maybe some nods.

PANELIST VANCE: I just thought it was funny, your characterization of it being too easy.

MS. COFFEY: Do you have any problem with that? The idea – could you base a verdict for the patient if you believed that we were – what we were saying is only a little more likely true than not true?

MR. VENKER: Your Honor, may we approach?

THE COURT: Let's approach.

(Proceedings were held at sidebar, outside the hearing of the jury.)

MR. VENKER: Okay. I object to the characterization of this. I let it go for quite a while, but Ms. Coffey keeps pursuing this. I think the problem is now that we're sounding like we're getting into a difference of if you just believe one percent more in this case for the plaintiff than the defendant than (sic) we win.

The problem is, she is not talking about the fact that they have the burden of proof. So I object to percentages, splitting all of this.

She correctly stat[ed] in the beginning it would be more likely than not. That is the correct standard. It is up to the Court to explain – for the Court to explain to the jury what the law is. I have let it go this far. I now ask that the objection be sustained.

THE COURT: Your response?

MS. COFFEY: I have correctly stated the burden of proof. I get to find out if the jurors are going to have a problem with more likely true than not true. That is where I'm going. Is anybody going to have trouble basing a verdict on more likely true than not true.

THE COURT: I'm going to sustain the objection and just ask that you specifically refer to the language that comes right out of the statute.

MS. COFFEY: The jury instruction?

THE COURT: Correct. Out of the jury instruction, correct.

MR. VENKER: At this point, Your Honor, I think Ms. Coffey explained it. She hasn't gotten answers, and now she is going to talk with individuals. So I think really the question that she has asked is either not responded to as not having any problems. I think the line inquiry should be over. I object to anything further.

THE COURT: That objection is overruled. Let's proceed.

MS. COFFEY: Thank you, Judge.

(Proceedings were held in open court, within the hearing of the jury.)

MS. COFFEY: I anticipate that the Judge is going to give you an instruction at the end of this case that tells you that if you believe certain propositions that will be submitted to you by A, B, C and D are – if you believe that such propositions that we submit in support of our case are more likely to be true than not true, then you can find in favor of the plaintiff.

What I'm trying to ask is if anybody would have a problem finding in favor of the patient if all they believe was what we said was more likely true than not

true? Would anybody hold us to a higher standard than that, that you would need to be 80, 90 percent sure? Anybody in the box?

MR. VENKER: Your Honor, I'm just going to object, again, to this reference about 80 to 90 percent sure. I think that gets into percentages which I think is confusing. I object on those grounds and ask that the jury be instructed to disregard that.

THE COURT: Objection overruled.

(Tr. 126:18-131:2, A8-9)(emphasis added).

* * *

MS. COFFEY: I anticipate – You know, I anticipate that if you're on the jury that the Court will give you an instruction at the end that will say things like – to the effect of, your verdict must be for plaintiff if you believe A, B, C is more likely true than not true. And what I'm trying to understand, more likely true, you know, like a scale. You know, more likely true. It could be like this, and I think we will show you more like this.

MR. VENKER: Your honor – I'm sorry, Ms. Coffey. I really don't mean to interrupt. But I think demonstrating about – you know, could we approach, Your Honor?

THE COURT: You can.

(Proceedings were held at sidebar, outside the hearing of the jury.)

MR. VENKER: Your Honor, I want to object. Now [she's] gesturing about the scales of justice and how even those are, whatever they are, plates might be. I

think again that really is confusing, and it is not taking into account the burden of proof that plaintiff has. I think a reference, a physical reference, to the scales of justice is not being on equal footing. That is not what the law is. I don't think it is an appropriate way in any event to try to explain the burden of proof, so I object on those grounds.

THE COURT: Your response?

MS. COFFEY: Exactly. It is – the burden of proof is more likely true than not true. You have to show a little more, and that's the way everybody does it all the time.

MR. VENKER: Well –

THE COURT: I'm going to overrule the objection; however, when you are getting into the percentages, it does create an issue that causes me some concern, because it is not asking the jurors to follow the specific language that is in the instruction. That is my concern. So I'm going to overrule the last objection, but make sure you are using the language right out of the instruction.

(Tr. 131:15-133:4, A9)(emphasis added).

An individual's right to a jury trial is one of the fundamental, inviolate rights guaranteed the citizens of this state. Mo. Const. art. I §22(a); *see Watts v. Lester E. Cox Medical Centers,* 376 S.W.3d 633, 637 (Mo. banc 2012); *Kansas City, C. & S.R. Co. v. Story*, 10 S.W. 203, 206 (Mo. 1888) (Section 4, art. 12, of our constitution, provides that "the right of trial by jury shall be held inviolate in all trials of claims…"). The essential purpose of *voir dire* is to provide for the selection of a fair and impartial jury through

questions which permit the intelligent development of facts which may form the basis of challenges for cause, and to learn such facts as might be useful in intelligently executing peremptory challenges. *Adkins v. Hontz*, 337 S.W.3d 711, 716 (Mo.App. W.D. 2011); *Pollard v. Whitener,* 965 S.W.2d 281, 286 (Mo.App. W.D.1998). The right to unbiased and unprejudiced jurors applies equally to civil and criminal cases. *Kendall v. Prudential Life Ins. Co. of America*, 327 S.W.2d 174, 177 (Mo. banc 1959).

Here, the trial court prejudicially erred in allowing Plaintiff's counsel, after initially sustaining Defendant's objections and then later overruling Defendant's objections, to continue to ask questions that amounted to incorrect explanations of the law on the proof required in order to find in favor of Plaintiff. During *voir dire*, the questioning attorney may not incorrectly instruct on the law. *State v. Bolle*, 201 S.W.2d 158, 159-60 (Mo. 1947); *State v. Richardson,* 163 S.W.2d 956, 960 (Mo. 1942); *State v. Smith*, 422 S.W.2d 50, 68 (Mo. banc 1967). Courts may exclude questions that imply a misstatement of the law or that may confuse or mislead the venire members. *State v. Lutz*, 334 S.W.3d 157, 163 (Mo.App. S.D. 2011).

The protracted line of questioning by Plaintiff's counsel in this case, as recounted above, created confusion of the issues and prejudiced Defendant by allowing Plaintiff's counsel, over objection, to create and leave an incorrect impression with the jury as to which party had the burden of proof and what quantum of "belief" the burden of proof required to return a verdict in favor of Plaintiff.

In *State v. Smith, supra,* defense counsel stated, "[t]he defendant has entered a plea of not guilty, and he stands presumed in the eyes of the law to be not guilty." The trial

court sustained the prosecutor's objection to the question, admonishing defense counsel that he would instruct on the law. *Id.* at 67-68. The defense attorney then attempted to ask, "[t]he determination of this question of obscenity is one for you to make judged by what the average person..." The prosecutor again objected that the question referred to was a matter of law. The trial court again sustained the objection, commenting, "The court will instruct the jury on the law." *Id.* at 68.

On appeal, this Court affirmed, noting:

> Asking whether prospective jurors have any personal feelings for or against a rule of law is like asking whether they think the law is good or bad. When the latter question was before this Court…we said, [prospective jurors] opinions on the merits of the law were immaterial unless so unyielding as to preclude them from following the law under the court's instructions. That should have been the question asked.
>
> In the instant case the personal feelings of the veniremen for or against the rules referred to were immaterial unless with respect to those rules they entertained views so unyielding as to preclude them from following the law under the court's instructions. Defense counsel did not indicate any intention to question in this area.

Id. at 67-68.

Similarly, in *Smith v. Nickels*, 390 S.W.2d 578, 581 (Mo. App 1965), defense counsel asked: "Would any of you hesitate to find in favor of my client if you felt that my client wasn't to blame for this accident?" Plaintiff's counsel objected that the question

was an attempt to get a commitment from the jury prior to hearing the evidence. The trial court granted the plaintiff a new trial on the basis of error in asking the venire panel this question. In determining whether the question was improper, the appellate court juxtaposed the permissible versus the impermissible and affirmed:

> [C]ounsel is given great latitude in seeking out any bias or prejudice. No difficulty is created by interrogation seeking to reveal a 'present state of mind,' or, dependent on the skill of the interrogator, establishing some basis for anticipating the reaction of the prospective juror to the immediate issues involved. However, when the inquiry includes questions phrased or framed in such manner that they require the one answering to speculate on his own reaction to such an extent that he tends to feel obligated to react in that manner, prejudice can be created. The limitation is not as to the information sought but in the manner of asking.

Id. at 582-83.

Here, Plaintiff's counsel wrongly attempted, in a protracted manner, to explain the burden of proof, mostly in terms of percentages of "belief" and referring to scales of justice. She even asked the potential jurors if any of them had "any problem with that." (*See supra*, p. 94-95). Explaining the concept of burden of proof is a matter of instruction by the court, not a matter for extensive questioning by counsel during *voir dire*. It has been said that "[t]he correct procedure is for counsel to ask the members of the panel whether, if the court later instructs them in a specified manner, they have any opinion or conscientious scruples such as would prevent them from returning a verdict accordingly."

Duensing v. Huscher, 431 S.W.2d 169, 172 (Mo.1968). Plaintiff's counsel in this case went well beyond this and attempted to explain (incorrectly) the concept of burden of proof, often using percentages to minimize Plaintiff's burden of proof.

In *State v. Hines*, 567 S.W.2d 740, 742 (Mo. App. 1978), the defendant's attorney asked the following question during jury selection, "[h]as anyone here ever served on a civil jury before? If you have please raise your hand…[d]o you understand, having served on a civil jury before, that the burden of proof…" The trial court interrupted the question, refusing to allow the remainder of the question to be posed. *Id.* Defendant's counsel explained, "[y]our Honor, I propose to ask I want to lay a foundation for my question by explaining what the burden is in a civil case, ask them if they have the ability to apply a different standard in this case." *Id.* at 742. On appeal, the defendant argued trial court error in the refusal to allow him to ask the question regarding the burden of proof. The appellate court affirmed, holding that "[t]he matter with respect to which defense counsel sought to inquire was a matter for instruction by the court, not questions by counsel on voir dire." *Id.*

In *Bender v. Burlington-N. R. Co.*, 654 S.W.2d 194 (Mo.App. S.D. 1983), during plaintiff's counsel's *voir dire*, a member of the panel indicated that he had been a juror in a criminal case. Plaintiff's counsel then commented that, in a criminal case, "[t]he state has to prove something beyond a reasonable doubt, sometimes to a moral certainty." *Id.* at 198. Thereafter, plaintiff's counsel also asked the panel whether any preconceived idea would prevent any one of them from following the law, which would be given to them by the court at the conclusion of the trial, and which would say the plaintiff's burden is

something different than proving the defendant's liability beyond a reasonable doubt. *Id.* On appeal, the defendant, relying on *Hines, supra*, contended plaintiff's counsel should have been precluded from asking prospective jurors about the differences between criminal and civil burdens of proof and whether they could follow the law as instructed. The appellate court, however, affirmed and distinguished the holding in *Hines.* In *Bender*, the appellate court reasoned, plaintiff's counsel engaged in a very a limited inquiry concerning the difference between the burden of proof in civil and criminal cases and had not run afoul of the limited inquiry approved by *Duensing v. Huscher. Id.* at 198.

Here, Plaintiff's counsel's questioning went well beyond a limited inquiry into whether the prospective jury members could follow the law as would be later instructed upon by the judge. Plaintiff's counsel declared her own version of what the instruction on the law would be and, despite the trial court's admonition about using percentages, went beyond the language of MAI 3.01itself. The prejudice to the Defendant is clear from the comment made by Panelist Vance. After plaintiff's counsel asked whether anyone of the venire panel felt, "[t]hat 51 percent ought to be – you know, it ought to be more like 60, 70, 80 percent in order to hold the hospital responsible for the injury that happened to this patient?", Panelist Vance thought Plaintiff's counsel's own characterization of plaintiff's burden being "too easy" was "funny." (Tr. 128:4-10, A8). Clearly, he was confused by the percentages and was not likely the only venireman who was.

The burden of proof under Missouri law, however, is not about being easy or hard. As the jury would be instructed later, Plaintiff Dieser had the burden of proof on the issues he sought to have the jury determine. It would be his burden to cause the jury to

believe that each such proposition is more likely to be true than not true. (L.F. 181, Instruction No. 5 based upon MAI 3.01). The jury instruction says nothing of percentages and in no way places a burden of proof on the Defendant to in any way disprove Plaintiff's propositions. "When a plaintiff, having the affirmative of the issue, presents evidence to establish a prima facie case, the burden of going forward with the evidence shifts to the defendant but, absent a statutory provision to the contrary, the burden of proof never shifts and remains with the plaintiff throughout the case." *State ex rel. State Dept. of Pub. Health & Welfare v. Ruble*, 461 S.W.2d 909, 913 (Mo. App. 1970). Yet, by her questioning, Plaintiff's counsel implied to the jury that Plaintiff and Defendant were each equally positioned as to the burden of proof and/or had an equal burden of proof. Thus, she posited that a verdict could be had in favor of Plaintiff if, through a balancing of the equal burdens of proof, the jury found evidence was just one percentage point more in Plaintiff's favor. This is not the law.

The trial court, therefore, should have excluded the excessive and incorrect statements and questioning from Plaintiff's counsel as to the burden of proof in terms of percentages and the comparable burden of proofs in civil and criminal matters as misstatements of the law and beyond the scope of proper *voir dire* questioning as allowed by Missouri law. By allowing Plaintiff's counsel, over objection, to create and leave an incorrect impression as to the burden of proof required to return a verdict in Plaintiff's favor, the trial court allowed jury confusion of the issues and prejudiced Defendant, warranting a new trial.

III. The trial court erred in denying Defendant's Motion for New Trial because the trial court abused its discretion in permitting Plaintiff to testify to St. Anthony's Medical Center being a "Catholic institution" and to his feeling "betrayed," "deceived," and angry as a Catholic in that the religious affiliation of the defendant hospital and Plaintiff's alleged sense of betrayal as a Catholic was prejudicial and irrelevant and encouraged the jury to believe the defendant hospital was somehow to be held to some higher standard of care due to its purported religious affiliation.

A. Summary of Argument

Plaintiff's testimony about the defendant hospital being a "Catholic institution" and his emotional feelings of betrayal and of being deceived in that he, too, is Catholic, impermissibly injected religion into the case. The testimony also misled the jury to believe St. Anthony's Medical Center was to be held to some higher standard of care as of result of its supposed religious affiliation.

B. Standard of Review

The standard of review for the denial of a Motion for New Trial is abuse of discretion by the trial court. *M.E.S. v. Daughters of Charity Services of St. Louis*, 975 S.W.2d 477, 482 (Mo.App. E.D. 1998). A new trial will be available upon a showing that trial court error or misconduct by the prevailing party incited prejudice in the jury. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 372 (Mo. banc 1993). Although a trial court is accorded broad discretion in admitting evidence, only relevant evidence is admissible. *See Pittman v. Ripley County Memorial Hosp.*, 318 S.W.3d 289, 293-294 (Mo.App. S.D. 2010).

"The test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence." *Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. banc 1993)(citing *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991)). "Irrelevant testimony is excluded because such evidence tends to draw the minds of the jurors away from the point at issue and misleads [the jurors]." *Ward v. Kansas City Southern Ry. Co.*, 157 S.W.3d 696, 699 (Mo.App. W.D. 2004)(quoting *Luechtefeld v. Marglous*, 151 S.W.2d 710, 713 (Mo. App.1941)). It is presumed that erroneously admitting any evidence whose only purpose is to mislead jurors is prejudicial. *Id.*

C. Plaintiff's testimony regarding the religious affiliation of the defendant hospital and his alleged feeling of betrayal and deception "as a Catholic" was prejudicial and irrelevant and led the jury to decide the case on a religious issue and not on the evidence.

During Plaintiff's counsel's direct examination of Plaintiff William Dieser, certain testimony was elicited, over objection, regarding the defendant hospital being a Catholic institution and Mr. Dieser's alleged sense of betrayal as a result:

Q. Bill, I wanted to talk about, you know, the impact of this wound on you. I guess I want to ask if it affected you emotionally?

A. Oh, it has.

Q. Can you explain that a little bit?

A. I felt betrayed. I'm a Catholic. St. Anthony's is a Catholic institution.

MR. VENKER: Your Honor, may we approach?

THE COURT: You may.

(Proceedings were held at sidebar, outside the hearing of the jury.)

MR. VENKER: I have to say this is new one on me to inject religion into a case, but I object to it. I think it is a pretty standard thing to object to religious components (sic) on (sic) a case. There has been no discovery on religion on St. Anthony's being a Catholic institution. I object to this as being prejudicial to interjecting religion into the case.

MS. COFFEY: I wanted him to tell the emotional impact on him and explain it to the jury. He gets to do that.

MR. VENKER: I agree with that part.

MS. COFFEY: Okay. So maybe you don't like what – how it impacts him. Maybe it is – you know, but that is how it is.

MR. VENKER: You know, Judge, this is – I don't know what the religious background of the jury is. Now, we are in a position – and I don't think it takes a rocket scientist to figure out that Ms. Coffey and I are both Catholics. For example, not [every]body is happy about the Catholic church and people now days are not happy with organized religion and now we're stirring this up. This is not what this case is supposed to be decided about or decided on, so I object for those reasons.

THE COURT: The objection is overruled.

(Proceedings were held in open court, within the hearing of the jury.)

BY MS. COFFEY:

Q. Okay. You can go ahead, Bill. You were saying – I was asking you about – You were saying that you felt betrayed and you were explaining that.

A. I was in a Catholic institution. I am a Catholic. I felt deceived. I have never really found out about what was really going on. I felt like I didn't have a real participation with my nursing case. And then as I find out some of these things, I feel like St. Anthony's wants to cast me off to the side and say it's your fault, you deal with it. Yes, I am angry.

(Tr. 892:4-894:1, A24)(emphasis added).

The trial court prejudicially erred in permitting Plaintiff, over Defendant's objections, to testify to his own religious affiliation, the supposed religious affiliation of the defendant hospital, and to express to the jury that he somehow felt betrayed and deceived as a Catholic by this Catholic institution. This line of questioning and testimony was prejudicial and irrelevant, and implied there is some heightened standard of care for a religiously-affiliated institution. Further, it clearly was intended to prejudice, impassion, and inflame the jury against St. Anthony's Medical Center.

Relevancy is the main criterion for the admission of evidence. *Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38, 43 (Mo.App. E.D. 2007). Evidence must be both logically and legally relevant to be admissible. *Id.* To be inadmissible, evidence must satisfy both prongs of this bifurcated relevancy standard. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo.App. S.D. 2004). The party seeking to admit evidence bears the burden of establishing both its logical and legal relevance. *Nolte v. Ford Motor Co.*, 458 S.W.3d 368, 382 (Mo.App. W.D. 2014).

Here, the questioning and testimony regarding the religious affiliation of the defendant hospital was neither logically nor legally relevant to any issue in this case and, therefore, had no probative value. Evidence of a party's social or religious connections is irrelevant. The Missouri Supreme Court has made it clear that "[t]he ethnicity or religion of any party or witness unrelated to the evidence should have no bearing on the outcome of a trial." *Fleshner v. Pepose Vision Institute*, 304 S.W.3d 81, 90 (Mo. banc 2010).

In *Fleshner*, the defendant asserted the trial court erred in failing to hold a hearing on its Motion for New Trial based on one juror's anti-Semitic comments about a defense witness. *Id.* at 85. In holding the trial court should have held a hearing to determine whether the alleged anti-Semitic comments were made, this Court found "that if a juror makes statements evincing ethnic or religious bias or prejudice during jury deliberations, the parties are deprived of their right to a fair and impartial jury and equal protection of the law." *Id.* This Court explained the clear potential for prejudice by the injection of religion into a trial:

> Jurors are encouraged to voice their common knowledge and beliefs during deliberations, but common knowledge and beliefs do not include ethnic or religious bias or prejudice. The alleged anti-Semitic comments made during deliberations in this case are "not simply a matter of 'political correctness' to be brushed aside by a thick-skinned judiciary." [internal citation omitted] As stated in *United States v. Heller*, "A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well

prevent him or her from making decisions based solely on the facts and law that our jury system requires." 785 F.2d 1524, 1527 (11th Cir. 1986). Such stereotyping has no place in jury deliberations.

304 S.W.3d at 90.

Although the religious-affiliation testimony here was not made by a juror, plaintiff's counsel clearly wanted to bring it out. This was clearly an attempt to tap into jurors' possible feelings of anger directed toward Catholicism or any organized religion. It also implored the jury to consider religion as relevant to the issues in the case, which clearly is not permitted. The religious affiliation testimony lacked logical relevance to any issue to be decided by the jury. Whether Plaintiff was or was not a Catholic or the defendant hospital was or was not a religious institution did not tend to make any more or less probable the existence of any fact that was of consequence to the determination Plaintiff's medical malpractice claim. Nothing about being Catholic or religiously-affiliated in any way, bears any logical relevance to whether the hospital through its employees breached or met the standard of care in the care and treatment of Mr. Dieser. Plaintiff's alleged feeling of being "deceived", "betrayed" or "angry" had nothing to do with his claim, the burden of proof Plaintiff bore, or any other issue to be decided by the jury. In this way, it clearly did what this Court in *Fleshner* proscribed: it allowed the jury to consider the religion of a party as having some bearing on the outcome.

This Court also addressed evidence of religious affiliations in *State v. Cavener*, 202 S.W.2d 869, 872-74 (Mo. 1947). In that case, the trial court admitted evidence that a murder victim was a member of the Masonic Lodge and the Methodist Church. *Id.* at 872.

In holding it was reversible error to allow such inquiries, this Court found "[t]he only purpose such evidence could have served was to bolster the good reputation evidence as to the deceased on the one hand, and on the other hand, prejudice the jury against defendant." *Id.* at 873. Thus, this Court noted, evidence of religious affiliations is inappropriate because it might tend to create sympathy and favor for one party while creating prejudice for the other. *Id.* at 874.

In this case, the questioning and testimony about religious affiliation and feeling "betrayed", "deceived" or "angry" as a Catholic had no logical or legal relevance. Defendant never presented testimony or other evidence of its religious-affiliation or made any mention of whether it was a "Catholic institution." There was no discovery on the issue, which was not even present in this case. Clearly, the sole purpose of this unsupported testimony could only have been to prejudice the minds of the jury against the defendant hospital and portray it as somehow uncaring and possibly failing in its religious or spiritual mission. Erroneously admitting evidence whose only purpose is to mislead and prejudice jurors is presumed prejudicial. *See Ward v. Kansas City Southern Ry. Co.*, 157 S.W.3d 696, 699 (Mo.App. W.D. 2004).

This prejudice clearly outweighed whatever usefulness Plaintiff claimed the evidence had. The questioning and testimony had no probative value and did not further the inquiry regarding any relevant issue in the case. Religious affiliation, or even the lack thereof, by its very nature, cannot inform the issues of standard of care, causation or damages. The questioning and testimony at issue was inadmissible as both logically and

legally irrelevant, and the trial court erred and abused its discretion in denying Defendant a new trial on this ground.

IV. The trial court erred in allowing Plaintiff's counsel, over objection, to state to the jury during closing argument that they will be telling the community what constitutes acceptable medical practice because such argument was improper and prejudicial in that it constituted a "send a message" argument in a case where Plaintiff alleged no punitive or exemplary damages.

A. Summary of Argument

Plaintiff's counsel's comments during closing argument that the jury members were, by their verdict, saying something to the community about the adequacy of the health care at issue, was improper and prejudicial. In this case where there are no allegations of punitive or exemplary damages, such argument amounts to no more than an improper "send a message" argument to the jury.

B. Standard of Review

The trial court is accorded broad discretion in ruling on the propriety of closing argument to the jury and will suffer reversal only for an abuse of discretion. *Moore v. Missouri Pacific R. Co.,* 825 S.W.2d 839, 844 (Mo. banc 1992). It is improper for counsel to go beyond the issues and urge prejudicial matters. *Kelly by Kelly v. Jackson,* 798 S.W.2d 699, 704 (Mo. banc 1990). In ruling on the propriety of final argument, the challenged comment from counsel must be interpreted in light of the entire record rather than in isolation. *Wilson v. Kaufmann*, 847 S.W.2d 840, 848-49 (Mo.App. E.D. 1992).

C. **The Court prejudicially erred in allowing Plaintiff's counsel, over objection, to state to the jury during closing arguments that they were the community standard-setters as to what constituted acceptable medical care and could send a message with their verdict.**

During closing arguments, Plaintiff's counsel, over Defendant's objections, was allowed to make the following statements to the jury regarding the jury's role:

> [BY MS. COFFEY:] I had thought the hospital admitted that this was a pressure injury sustained in the hospital, a Stage III or Stage IV crater in his backside all the way down to the wound sustained in St. Anthony's Hospital in the course of three days. That, ladies and gentleman, is not acceptable medical care in this community, and that's what your verdict will say. Your verdict becomes a legal document. (emphasis added)
>
> MR. VENKER: Your Honor, may we approach?
>
> THE COURT: You may.
>
> MS. COFFEY: Does my time run during these things?
>
> THE BAILIFF: I will take care of it.
>
> (Whereupon, the following proceedings transpired at sidebar outside the hearing of the jury.)
>
> MR. VENKER: Your Honor, I object to this being an inappropriate reference to the community at large. This is very upsetting, [and in response yesterday] about sending a message to the community. The kind of statement that Ms. Coffey just made to this jury about telling the

community, so I think I object on those grounds that the jury be instructed to disregard her comment about that.

THE COURT: Your response?

MS. COFFEY: I said that their verdict becomes a legal document, saying whether the care provided to Mr. Dieser was acceptable in this community. That is what it is. The jury is always told that they are the conscience of the community.

THE COURT: I didn't hear the argument the way you did. I'm going to overrule the objection. Let's proceed.

MS. COFFEY: Thank you.

(Tr. 1172:24-1174:5, A42)(emphasis added).

This argument improperly told the jury to "send a message" to the community of doctors, hospitals and other health care providers through its verdict. This was a blatantly improper appeal to the jury to punish Defendant SAMC, despite the fact that Plaintiff did not allege willful or wanton misconduct and did not request punitive damages.

This Court has long shown displeasure with "send a message" arguments in cases where punitive damages are not sought. *See Smith vs. Courter*, 531 S.W.2d 743, 747 (Mo. 1976) (overruled on other grounds in *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, (Mo. banc 1994)). In *Smith v. Courter*, Plaintiff's counsel made the following statement during his closing argument:

I think also that when you sit on a case like this, I think from the very beginning you realize that your conduct in this case is important to your

community as well as to the litigants here, and I think that as you weigh that you will realize that as you sit here as a collective group of 12 people you are speaking as the conscience of our community when you pass upon issues such as this. By your verdict you can speak out about your feelings as to the quality of medical care…

* * *

Well, you, by the adequacy of this verdict, can accomplish several things. One, you can say, I recognize you, Ray Smith, for who you are, what you are, what your problems are, and the totality of your being and that you're not an irresponsible man, and we know it's humiliated you to have to go through these proceedings, for your life to be an open book for the last five years when you filed a lawsuit; we know these things. You can also say, through the adequacy of your verdict, Lockwood—and anybody else that reads about it or hears about it—improve the quality of what you sell—

531 S.W.2d at 745 (emphasis added). The trial court granted a new trial on the ground that the closing argument of plaintiff's counsel improperly injected an issue of punitive damages. *Id.* On appeal, this Court affirmed,

> [J]uries cannot be told directly or in effect that they may consider punishment or deterrence as an element of damages and include a sum of money in their verdict so as to punish the defendant or deter others from like conduct unless the pleadings, evidence and instructions warrant the separate submission of punitive damages under the law. To do otherwise,

> would eliminate the distinction between compensatory and punitive damages, a distinction long part of the law of this state, and would cloud every verdict to a point where the court could not know whether the compensatory damage verdict did or did not include a punitive sum.

Id. at 748.

In *Fisher v. McIlroy*, 739 S.W.2d 577, 582 (Mo.App. E.D.1987), defendant's counsel, on defendant's counterclaim for personal injuries sustained in an automobile accident, argued for the jury to "send a message to the young people in this city." Holding that this argument injected a plea for punitive damages into the trial where none had been prayed for, the Court of Appeals affirmed the trial court's grant of a new trial. *Id.* Citing *Smith v. Courter*, the Court said, "A closing argument to a jury that the jury could, by its verdict, speak out about its feelings as to a certain matter in issue at trial and that the jury could send a message to a particular group in the community through its verdict is viewed as injecting the issue of punitive damages into a case through the argument, even though such damages had not been pled." *Id.* (emphasis added)

Here, Plaintiff's counsel's argument was nearly identical to the arguments found to be improper in *Smith v. Courter* and *Fisher v. McIlroy.* Plaintiff's counsel told the jurors what they would be saying to the community with their verdict and made a plea for the jury to send a message to the health care provider community about what it would consider to be adequate medical care. Counsel went so far as to tell the jury its verdict would be a "legal document," ascribing to it some sort of legal force extending beyond this Plaintiff and this set of facts. This was clearly a plea for the jury, as was found

erroneous in *Smith v. Courter* and *Fisher v. McIlroy*, to speak through its verdict and send a message to the community. Adding to this prejudice was plaintiff's counsel's argument that plaintiff Dieser's injury was a "never event" essentially arguing it never should have happened anywhere in the United States. The trial court, therefore, erred in overruling Defendant's objection to the improper argument and in not granting Defendant a new trial on this basis. This improper argument severely prejudiced Defendant, as reflected in the excessive verdict for damages. The trial court abused its discretion with its ruling and should have granted Defendants a new trial.

V. The trial court erred in denying Defendant's Motion for New Trial because the jury's verdict was excessive in that it was the result of passion and prejudice fueled by the aforementioned trial court errors and exceeded fair and reasonable compensation for Plaintiff's injuries, particularly in the absence of competent evidence of any significant or chronic physical injury to the Plaintiff and its gross disproportionality to Plaintiff's economic damages.

A. Summary of Argument

A new trial is necessary and proper in this case. Plaintiff presented no evidence of a significant permanent injury and submitted economic damages of only $33,000.00. The verdict of $883,000.00 – more than 26 times the amount of economic damages – was excessive and clearly the result of cumulative trial court errors resulting in jury bias and prejudice.

B. Standard of Review

The standard of review for a trial court's order denying a Motion for a New Trial is abuse of discretion. *St. Louis Cnty. v. River Bend Estates Homeowners' Ass'n,* 408 S.W.3d 116, 134 (Mo. banc 2013). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks one's sense of justice and indicates a lack of careful consideration. *Id.* In considering whether the trial court abused its discretion, appellate courts view the facts in the light most favorable to the trial court's order. *Id.*

C. The excessiveness of the verdict in this case resulted from passion and prejudice and far exceeded fair and reasonable compensation for Plaintiff's injuries, thus requiring a new trial.

Courts have noted there are two general types of excessive verdicts: (1) where the verdict is disproportionate to the evidence of injury and results from an "honest mistake" by the jury in assessing damages; and (2) where the verdict is excessive due to trial court error that causes bias and prejudice by the jury. *Stewart v. Partamian*, 465 S.W.3d 51, 56 (Mo. banc 2015). If there was trial court error which caused bias and prejudice by the jury, a new trial is warranted where the verdict "is so grossly excessive as to shock the conscience because it is glaringly unwarranted." *Id.* (quoting *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 822 (Mo. banc 2000).

Here, the verdict in this case of $883,000 is excessive because trial court errors as outlined in the above Points Relied On resulted in jury bias and prejudice. For the reasons set forth in each of the previous sections, jury bias and prejudice was created by: **(1)** the trial court erroneously permitting Plaintiff to use the prejudicial and irrelevant phrase "never event" with respect to Plaintiff's skin wound/pressure wound; **(2)** the trial court erroneously permitting Plaintiff's counsel, during jury selection, to make statements and question the venire as to the burden of proof; **(3)** the trial court erroneously permitting Plaintiff to testify to St. Anthony's Medical Center being a "Catholic institution" and to his feeling "betrayed", "deceived" and "angry" as a Catholic; and **(4)** the trial court erroneously allowing Plaintiff's counsel, during closing argument, to state to the jury that they were setting the standard for the community as to what constitutes acceptable

medical practice. Both individually and cumulatively, these trial court errors resulted in a verdict far exceeding what Plaintiff himself identified as reasonable compensation for his injuries. (*See* Tr. 1182:20-22, A43, suggesting to the jury that $633,000 is a "reasonable verdict.")

Further, the total damage award exceeds fair and reasonable compensation for Plaintiff injuries when viewed in light of the nature of the injury and how grossly disproportionate the verdict is both to the evidence of Plaintiff's economic damages and of his pain and suffering. There is no precise formula for determining whether a verdict is excessive, and each case must be considered on its own facts with the ultimate test being what fairly and reasonably compensates plaintiff for the injuries sustained. *Seabaugh v. Milde Farms, Inc.,* 816 S.W.2d 202, 211 (Mo. banc 1991). Typically, courts evaluate the reasonableness of a compensatory damage award based on the following factors: **(1)** loss of income, both present and future; **(2)** medical expenses; **(3)** the plaintiff's age; **(4)** the nature and extent of plaintiff's injuries; **(5)** other economic considerations; **(6)** awards approved in comparable cases; and **(7)** the superior opportunity for the jury and the trial court to evaluate plaintiff's injuries and other damages. *McCormack v. Capital Elec. Const. Co.*, 159 S.W.3d 387, 395 (Mo. App. W.D. 2004).

For example, in *McCormack,* the trial court remitted a compensatory damage award of $28.8 million down to $7.7 million in a case where plaintiff presented evidence of economic damages of approximately $1.4 million. 159 S.W.3d at 398. In that case, the evidence showed a significant and permanent, physical injury, which also resulted in significant economic damages. Plaintiff presented evidence as to his physical condition

which included: **(1)** that he was a healthy 39 year-old at the time of the electrical shock incident which caused his injuries; **(2)** that within two weeks of the incident he began to experience seizure-like "spells"; **(3)** that he had at least two grand-mal seizures, causing a loss of control over his bladder and bowels; **(4)** that he developed chronic pain in his chest, hips, and shoulders, migraine headaches, impaired concentration, and confusion; **(5)** that he now had to walk with a cane; **(6)** that he has facial numbness, loss of motor control, and difficulty thinking of words; and **(7)** that he is now mentally and physically "very slow" and "in a fog." *Id.* at 395-96. Plaintiff's expert testified that Plaintiff was permanently disabled and unemployable and that his condition would likely worsen over time. *Id.* Plaintiff's economist expert testified that Plaintiff's lifetime earnings but for the accident would have been approximately $1.4 million. *Id.*

In light of the above evidence, the court of appeals in *McCormack* affirmed the trial court's remittitur as not manifestly unjust. *Id.* at 398. The appellate court noted that the plaintiff's actual economic loss was in the range of $1.4 million to $1.7 million. *Id.* Thus, as the trial court explained in its order granting the remitter, the remitted negligence award of $7.7 million included the actual loss and a five-fold multiplier for pain, suffering, and other intangible losses. *Id.* By contrast, the original jury award was at least (or approximately) 17 times the plaintiff's economic loss. *Id.*

Here, Plaintiff Dieser testified he was 58 years old at the time of the health care at issue in 2008. (Tr. 788:3-5, A18). He had earlier stopped working in 2000, after suffering a massive heart attack. (Tr. 790:20-23, A18). His myriad *pre-existing* conditions included Type 2 diabetes, for which he generally took three insulin shots per day (Tr. 791:5-792:9,

A18-19), neuropathy in his hands and feet (Tr. 792:10-23, A19); sleep apnea (Tr. 793:21-794:11, A19); three spinal surgeries dating back to the 1970s with continuing back pain (Tr. 795:12-796:13, A19-20); and an inability to walk without a cane (Tr. p. 1161:2-5, A41).

As to the pressure wound at issue, Plaintiff Dieser ultimately underwent two plastic surgeries. (Tr. 693:13-17, A14; 699:8-12, A15; 708:18-709:7, A16). Plaintiff's wife testified that she dressed the wound for close to a year, at times doing three dressing changes a day. (Tr. 699:8-12, A15; 706:23-707:1, A16). She also testified that he underwent some in-office procedures to slice with a scalpel a small flap of skin that remained across the wound. (Tr. 709:15-19, A16). Plaintiff Dieser testified that he stopped seeing his treating physician for this issue in February 2009. (Tr. 830:2-5, A22; 840:19-25, A23). He testified that currently his only remaining issues with the wound is that when he sits down he still feels some tightness and pain in a scar in that area. (Tr. 900:24-901:12, A25). He can still drive a car and mow his lawn using a riding lawn mower. (Tr. 907:3-22, A26). When asked about his concerns for the future in terms of this wound, he identified only a fear of going to the hospital. (Tr. 901:13-15, A25).

Plaintiff presented evidence of $33,000.00 in total economic damages, consisting entirely of past medical bills. (Tr. 1185:18-20, A44; L.F. 203). He suffered no past lost wages and there was no evidence presented as to any future economic damages, medical or otherwise. The verdict of $883,000, therefore, is more than 26 times the amount of economic damages claimed. Put another way, the economic loss is a mere 3.7% of the total damages award.

This disproportionality of this award is underscored when one looks to awards in other, comparable cases. In *Alcorn v. Union Pacific Railroad Company*, 50 S.W.3d 226 (Mo. banc 2001)(overruled by *Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013) only as to the stated standard of review), the plaintiff's injuries consisted of over 20 broken bones, significant blood loss, a traumatic head injury, cardiac arrest, and over 40 days spent in the hospital, including several days in a coma. *Id.* at 234. The plaintiff's vision had been diminished, she suffered from a permanent mood disorder and depression, she suffered chronic pain, her cognitive abilities decreased, and she was unable to care for herself. *Id.* Plaintiff presented economic damages of approximately $2,000,000, and the jury awarded compensatory damages of $40,400,000. The trial court remitted the compensatory damage award to $25,000,000, or 11.5 times the economic damages, instead of the original award's approximately 20 times economic damages. *Id.* In affirming, this Court found this remitted amount not manifestly unjust under the facts of the case. *Id.* at 249.

In *Smith v. Wal-Mart Stores, Inc.*, 967 S.W.2d 198, 209 (Mo.App. E.D. 1998)(overruled by *Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013) only as to the stated standard of review), a $300,000 verdict with $19,000 presented in economic damages (15.8 times economic damages) was held not excessive. There, the 33-year old plaintiff continued to have back pain, wore a brace every day, could no longer stand for long periods of time, had a toe which was completely and permanently numb, and could no longer do most household chores and recreational activities. *Id.* at 209.

In *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 36-37 (Mo.App. E.D. 2013), a compensatory damage award of $4,000,000 for each of five wrongful death plaintiffs was held to not be excessive in light of the economic damages presented. The evidence of economic damages ranged from $400,000 for one plaintiff (or about 10 times the economic damages) to approximately $1,800,000 for another plaintiff (or about 2.2 times the economic damages). *Id.*

In *Mackey v. Smith*, 438 S.W.3d 465 (Mo.App. W.D. 2014), the court of appeals held a damages award totaling $3,457,000 was not excessive. There, the plaintiff underwent several surgeries, suffered a broken femur and loss of mobility, had an oozing deep-wound infection that went undiagnosed and untreated for several months, and ultimately lost his leg at the hip. *Id.* at 480. He presented evidence of future economic damages alone of more than $1,500,000. *Id.* The court held the jury's award of $1,870,000 in non-economic damages was not grossly excessive under the circumstances. *Id.*

Thus, in light of the absence in this case of competent evidence of any significant, chronic, physical injury to Plaintiff Dieser as a result of the treatment at SAMC, especially when considered against the damages evidence presented in *McCormack* and the other cases discussed above, the excessive verdict in this case constitutes and demonstrates misconduct and prejudice by the jury against Defendant. Again, Plaintiff's claimed economic damages were only $33,000 in past medical expenses. ***The verdict of $883,000 was more than 26 times this amount.*** This disproportionate award should shock the conscience of this Court, and certainly demonstrates that the jury's damages

award was excessive and exceeded the upper limit of fair and reasonable compensation for Plaintiff's injuries. The trial court abused its discretion in denying a new trial on this basis.[3]

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[3] In light of the statutory damage cap on non-economic damages in medical malpractice actions enacted with the 2005 version of Section 538.210(1), RSMo, the legislature also enacted Section 538.300 which provides, in pertinent part, that remittitur shall be unavailable in medical malpractice actions. In *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 636 (Mo. banc 2012), this Court struck as unconstitutional the non-economic damage cap as applied to medical negligence cases not resulting in death. As part of that decision, this Court discussed and seemed to hold that remittitur remains available in medical malpractice cases: "Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case." *Id.* at 640. At least one court has held that since *Watts* declared the statutory cap on damages unconstitutional in non-wrongful death medical negligence cases, remittitur is still available in those cases. *Mackey v. Smith*, 438 S.W.3d 465, 479 (Mo.App. W.D. 2014)(citing *Watts*, 376 S.W.3d at 640). However, in July 2015 in *Stewart v. Partamian*, 465 S.W.3d 51, 59 (Mo. banc 2015), this Court noted that "section 538.300 prohibits courts from ordering remittitur in medical negligence cases." In light of *Stewart*, Defendant herein seeks, as it did alternatively before the trial court, a new trial. (L.F. 570).

CONCLUSION

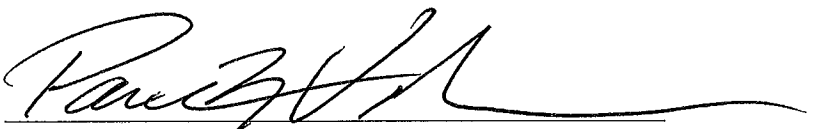
For the reasons fully discussed above, the trial court did not err in denying First, Plaintiff's Motion for Post-Judgment Interest. Section 408.040(1) does not mandate such an award in any case, and Section 538.300 actually precludes such an award in a medical negligence case. Second, Plaintiff has failed to show an equal protection violation in that there is a rational basis for the legislature's use of Section 538.300 to preclude the application of Sections 408.040(2) and (3). Third, Plaintiff has failed to show a violation off the open courts and certain remedy provision in that he was not denied his right to bring a substantive cause of action. Finally, Plaintiff has failed to show a violation of the right to jury trial because post-judgment interest is beyond the function and scope of a jury's role as finder of fact.

Also, for the reasons fully discussed above, the trial court erred as follows: (1) permitted testimony of Medicare payment guidelines and so-called "never events"; (2) permitted Plaintiff's counsel during jury selection to make misstatements of law and to question the venire as to the burden of proof; (3) permitted Plaintiff Dieser to testify to St. Anthony's Medical Center being a "Catholic institution" and to his feeling "betrayed", "deceived" and "angry" as a Catholic; (4) allowed Plaintiff's counsel to state to the jury during closing argument that, with their verdict, they were setting the standard for the community as to what is acceptable medical care; and, (5) failed to remit Plaintiff's compensatory damages to an amount representing fair and reasonable compensation for Plaintiff's injuries. Any single one of these errors, standing alone, constitutes reversible error, as does the cumulative weight of these errors. *See Faught v. Washam*, 329 S.W.2d

588, 604 (Mo. 1959)(noting a new trial can be ordered for cumulative error without undertaking to determine whether any single point standing alone would constitute reversible error)(overruled on other grounds by *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. banc 1994).

Defendant, therefore, asks that the Judgment in this case be reversed and the case remanded for a new trial on all issues. In any event, the trial court should be affirmed as to its denial of post-judgment interest.

WILLIAMS VENKER & SANDERS LLC

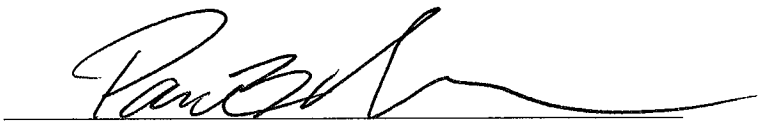


Paul N. Venker, #28768
Lisa A. Larkin, #46796
Bank of America Tower
100 North Broadway, 21st Floor
St. Louis, Missouri 63102
(314) 345-5000
(314) 345-5055 Fax
pvenker@wvslaw.com
llarkin@wvslaw.com

ATTORNEYS FOR
DEFENDANT/RESPONDENT/CROSS-
APPELLANT ST. ANTHONY'S MEDICAL
CENTER

RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing initial Brief of Defendant/Respondent/Cross-Appellant St. Anthony's Medical Center contains 30,256 words (exclusive of the cover, the proof of service, this Rule 84.06(c) certificate of compliance, the signature block and appendix), and that counsel relied on the word count of Microsoft Word for Windows, which was used to prepare the brief. Further, counsel certifies that the electronic copies of the foregoing brief have been scanned for viruses and are virus free.



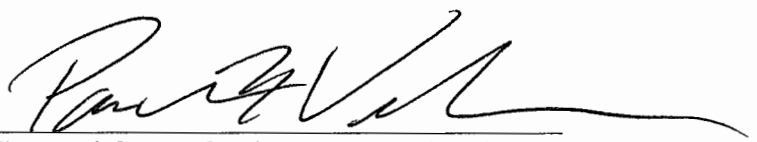
Counsel for Defendant/Respondent/Cross-Appellant St. Anthony's Medical Center

PROOF OF SERVICE

The undersigned hereby certifies that he signed the original of the foregoing document and that the foregoing was filed and served electronically through the Missouri Courts eFiling System this 14th day of December 2015 , which sent notification to all parties of interest herein. Counsel further certifies that he signed the original of this document and has retained that original. A copy of the foregoing was also served via U.S. mail and email to the following:

Mary Coffey
Genevieve Nichols
Adam Henningsen
Coffey & Nichols, LLC
6202 Columbia Avenue
St. Louis, MO 63139
314-647-0033
314-647-8231 (fax)
mc@coffeynichols.com
gn@coffeynichols.com
ah@coffeynichols.com

Attorneys for Plaintiff/Appellant/Cross-Respondent



Counsel for Defendant/Respondent/Cross-Appellant St. Anthony's Medical Center