SD No. 29799

IN THE

MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

EDITH C. DECK, Plaintiff-Appellant

v.

DELMAR TEASLEY, Defendant-Respondent

Appeal from the Circuit Court of Greene County, Missouri
31st Judicial Circuit
The Honorable Michael J. Cordonnier

REPLY BRIEF OF APPELLANT EDITH C. DECK

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I. Respondent ignores the actual evidence that rebutted the presumption under R.S.Mo. §490.715.

Berra v. Danter, 2009 WL 3444814 (Mo. App. E.D. 2009).

34 *Missouri Practice, Personal Injury & Tort Handbook*, §36:10 (2009 ed.).

A. Introduction

Respondent's first point confuses a proposed policy argument with the actual language of the statute. The statute's express terms state the presumption that the amount paid is the value of past medical damages is rebuttable. The question on Appellant's first point is thus whether she offered evidence to rebut that presumption. In trying to avoid the inevitable conclusion that the presumption disappeared, Respondent ignores the actual evidence. The reason is the evidence offered by Appellant was significantly more than that which the Court in *Berra v. Danter*, 2009 WL 3444814 (Mo. App. E.D. 2009) found rebutted the presumption under the statute.

B. Argument

At the hearing, Respondent called two representatives of the treaters who provided medical services to Appellant. Respondent's argument completely ignores their testimony as it relates to the value of the medical services in this case. The reason Respondent does so is the testimony of these two witnesses clearly rebuts the presumption under R.S.Mo. §490.715 by themselves. Both Mr. Bell and Ms. Mitchell testified that the amounts billed for the services provided to appellant were reasonable, customary and fair. TR. P. 9, Lines

11-18; P. 29, Line 9-P. 30, Line 3. Both confirmed that the value of the services rendered was the amount billed, and not the reduced amount that Medicare would reimburse for such services. TR. P. 9, Line 19-P. 10, Line 15; TR. P. 30, Lines 7-11. They both likewise testified the amount billed was what the services rendered are actually worth. TR. P. 18, Lines 11-13; TR. P. 31, Lines 1-4. Finally, evidence by affidavit was provided which confirmed the amount billed was the reasonable charge for the medical care provided, "irrespective of the amount, if any, we accepted for payment." Respondent's Appendix A-10. The fact Respondent does not like this evidence does not mean it can be ignored.

Mr. Smith, the Executive Vice President of Cox Hospital in Springfield for over two decades agreed that the amount billed was reasonable, customary and fair. TR. P. 52, Lines 7-24. Mr. Smith also provided additional testimony about the relation of Medicare reimbursement rates to the value of medical services. TR. P. 40, Line 16 - P.42, Line 22. Mr. Smith advised that Medicare rates of are not based upon the actual value of the medical care provided, but are instead arbitrary. Medicare does not even attempt to value the services provided. TR. P. 46, Lines 6-17.[1] TR. P. 43, Line 10- P. 44, Line 3. Under general industry standards, the amount reimbursed by Medicare does not cover the cost of doing business. TR. P. 45, Lines 1-14. Mr. Smith thus provided evidence not only as to why the amount billed was the value of the care, but also why the amount paid by Medicare could <u>not</u> be the

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[1] Evidence of value was also provided by Dr. Bennoch. TR. P. 262, Line 16 - P. 263, Line 23; P. 267, Lines 3-19.

value of the medical bills.

That such evidence was sufficient to rebut the presumption set forth in R.S.Mo. §490.715 can be seen by the recent opinion filed after Appellant's initial brief, *Berra v. Danter*, 2009 WL 3444814 (Mo. App. E.D. 2009).[2] In *Berra*, the plaintiff introduced his medical bills and an affidavit from the providers that the amount the providers charged were reasonable. *Id.* at 3. The *Berra* Court rejected the argument that such evidence did not "rebut the presumption in section 490.715(2)." *Id.* at 3-4. Under *Berra*, the medical bills showing what was billed, coupled with an affidavit that such bills were reasonable for the care and services provided, is sufficient by itself to rebut the presumption created by the statute. *Id.* at 3-5.

The same standard is set forth by Judges Dierker and Mehan at 34 *Missouri Practice, Personal Injury & Tort Handbook*, §36:10 (2009 ed.). In discussing the revision to R.S.Mo. §490.715, the Missouri Practice states the rebuttable presumption will be met by evidence regarding the reasonableness of the medical bills as charged. *Id.* at 3(d). The authors go on to conclude that in most instances the Court will be left with nothing but this evidence that the value of the medical bills is that which was charged. *Id.* Here, the Court had the bills and an affidavit like in *Berra*. Unlike *Berra*, the Court here also had specific testimony from both providers that the value of the services rendered was the full amount billed, and not the

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[2] The Court in *Berra* adopted many of the arguments and citations from Appellant's initial brief.

reduced amount that Medicare would reimburse for such services. This testimony, coupled with that of Mr. Smith that Medicare rates are arbitrary, and not related to the care provided, is considerably more than the Court in *Berra* held rebutted the presumption.

The legislature's use of rebuttable presumption is presumed to be enacted in light of the prior judicial decisions regarding rebuttable presumptions. *Berra* at 4. This precedent is clear that the presumption vanishes upon the introduction of evidence. Please see e.g. *J.D. v. M.D.*, 453 S.W.2d 661, 663 (Mo. App. 1970).

Respondent offered no evidence that the amount paid by Medicare was the value of the medical bills. The statute does not state the issue to be determined is the amount of money the plaintiff is out for medical services. Instead, the statute states that the issue to be resolved is "the value of the medical treatment rendered." R.S.Mo. §490.715.5(2), emphasis added. If a person has no coverage, it is undisputed the "value" of the services provided is the amount billed by the medical provider for those services. How then can the "value" of the identical services, by the identical provider, be different because the person has coverage? The answer, as noted by the authors of the Missouri practice, is it cannot. Respondent's argument that the "value" of the services should be reduced to penalize those who have coverage, or reward those who have no coverage, is not the statute adopted. Instead, once the presumption is rebutted, the Court is left solely with the evidence that the value of the medical bills is that which was charged. 34 *Missouri Practice, Personal Injury & Tort Handbook*, §36:10 (2009 ed.)

In this case the overwhelming evidence was the amount billed was the"value" of the medical treatment rendered to Ms. Deck. Respondent's arguments regarding the alleged purpose of the statute or how he would prefer the collateral source rule operate is not in keeping with the plain language of the statute actually adopted.

II. The Trial Court expressly stated that its ruling was based upon a finding that the presumption set forth in the statute was not rebutted, which was contrary to the terms of the statute and case law applying same.

Berra v. Danter, 2009 WL 3444814 (Mo. App. E.D. 2009) .

34 *Missouri Practice, Personal Injury & Tort Handbook*, §36:10 (2009 ed.).

A. Introduction

Respondent's second point tries to gloss over the fact the Court held its decision was based not on consideration of all of the evidence of value, but instead based upon a presumption that under the law had vanished. The Statute in question provides a two step process. First, there is a rebuttable presumption as to value. If that presumption is rebutted, then the second stage is to consider just the evidence offered and make a determination of value on that evidence. The Court in this case, however, relied upon the presumption which was not evidence, and which was no longer valid. This is an incorrect interpretation of the statute and the case law on rebuttable presumptions.

B. Argument

As more fully set out above, Appellant presented evidence from multiple witnesses that rebutted the presumption that the amount paid was the value of the services provided in this case. Once the presumption was rebutted, the second part of the statute requires the Court to consider evidence to determine the value of plaintiff's past medical damages. The Court's ruling, however, clearly stated it never reached the second layer of the statute. Instead it relied on the presumption. This interpretation is contrary to Missouri law. In *Berra v. Danter*, 2009 WL 3444814 (Mo. App. E.D. 2009), the Court held that the legislature when it adopted the amendment to R.S.Mo. §490.715, took the well established meaning of rebuttable presumption with it. *Id.* at 4. The presumption the amount paid is the value of the medical services provided is procedural only, "and not for consideration of the triers of facts who have the function of determining what facts are proved by the evidence produced." *Berra* at 4, emphasis added.

The Trial Court, however, despite the significant evidence of value offered by Appellant, relied upon the statutory presumption in making its ruling. It did so based upon the specific request of counsel for Respondent to decide the issue on the presumption and not the evidence. TR. P. 57, Line 21, to P. 58, Line 4. The Court therefore did not consider the evidence introduced to determine the value of the services provided, but instead only upon whether the presumption had been rebutted. TR. P. 59, Lines 10-11.[3]

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[3] Respondent's argument that the fact different size gloves cost a different amount

In doing so, the Court set forth a policy decision that the providers should not be allowed to determine the value of their services. Id. This policy, however, is not included in the statute. Instead, the legislature considered and rejected this exact proposal. Please see Appellant's Brief, Appendix, Exhibit I (pages 4-5 of 19). If the legislature wished to do what Respondent claims, they did not accomplish this objective in the statute as written. 34 *Missouri Practice, Personal Injury & Tort Handbook*, §36:10 (2009 ed.)[4]

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somehow prevented the presumption from being rebutted is difficult to comprehend, and without any legal authority. Further, it is contrary to the evidence, as none of the witnesses were questioned about this matter.

[4] Judges Dierker and Mehan go on to conclude that the adoption of R.S.Mo. 490.715 "has had little effect **other than to cause confusion**," as once the presumption is rebutted, the amount of medical bills charged should be the amount presented to the jury. *Id.*, emphasis added.

III. Respondent does not address the uniform case law holding that the factual determination of the amount of damages is a matter for jury resolution.

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 118 S.Ct. 1279 (1998).

Sorrell v. Thevenir, 633 N.E.2d 504, 510 (Ohio 1994).

A. Introduction

Respondent's third point utterly fails to address the issue of right to trial by jury. Respondent fails to cite, mention or even attempt to distinguish the unanimous and overwhelming case law that determination of past medical damages is reserved to the jury. Instead, defendant spends 35 pages discussing a matter not before the Court, the history of the collateral source doctrine. While the discussion of the collateral source rule would perhaps be interesting in an academic setting, it does not engage the error raised by Appellant. Respondent's complete refusal to distinguish or even discuss a single case cited by Appellant speaks volumes.

B. Argument

Respondent admits in its brief that the hearing in this case was an evidentiary hearing. The Court heard contested evidence regarding the amount of a plaintiff's past damages to "determine the value of the medical treatment actually provided." Defendant's brief, page 48. Case law applying the right to trial by jury has uniformly held such determinations of

damages are reserved for the jury. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 118 S.Ct. 1279 (1998); *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578, 588 (Mo. App. W.D. 2002). Respondent did not address the unanimous and overwhelming authority cited by Appellant holding damage determinations are reserved for the jury. Respondent likewise cited no case that the determination of the amount of damages is not a jury matter.

Indeed, the only case cited by Respondent which addressed the issue confirmed this clear rule. In *Arthur v. Catour*, 833 N.E.2d 847 (Ill. 2005), the Illinois Supreme Court stated it is a controlling principle of "quite settled" law that "the question of damages is peculiarly one of fact for the jury." *Id.* at 853. The Illinois Supreme Court confirmed the jury's function in deciding past medical damages in *Wills v. Foster*, 892 N.E.2d 1018, 1034 (Ill. 2008) holding it is for the jury, and not the Trial Court, to determine past medical damages, whether or not Medicare pays a lesser amount. Please see also *Sorrell v. Thevenir*, 633 N.E.2d 504, 510 (Ohio 1994) where the Ohio Supreme Court held a statute which required the trial court to deduct collateral source benefits from a jury award "encroaches upon the fundamental and inviolate right to trial by jury" as a plaintiff has an absolute right to have "all facts determined by the jury, including damages." *Id.*

Having ignored the overwhelming case authority, defendant asks the Court to engage in "weighing the interest." Primarily, this argument is invalid because no matter what the reason, the right to trial by jury may not be infringed, no matter how allegedly worthy the purported reason is claimed to be. "The Constitution was intended-its very purpose was-to

prevent experimentation with the fundamental rights of the individual." *Truax v. Corrigan*, 257 U.S. 312, 338, 42 S.Ct. 124, 131 (1921).

> It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.

Id.

The Missouri Constitution establishes a framework of general principles which may not be altered by legislation. *Pogue v. Swink*, 261 S.W.2d 40, 43 (Mo. 1953). The right to trial by jury is the primary example of such an absolute right, which has been guaranteed in every Constitution from 1820 to date. Please see e.g. *State ex rel Diehl v. O'Malley*, 95 S.W.3d 82, 84-85 (Mo. banc 2003). Respondent cites no case which holds this inviolate right may be altered or modified because of a perceived need to change the collateral source doctrine. Instead, the law is directly contrary, holding that "all substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient, substantial extent as existing at common law." *State ex rel St. Louis K & N. W. Ry. Co. v. Withrow*, 36 S.W. 43, 48 (Mo. 1896).

The collateral source rule does not involve holding a hearing where the Court receives evidence on conflicting matters of past medical damages and then makes a factual determination of the plaintiff's past medical damages. Indeed, *Washington by Washington v. Barnes Hospital*, 897 S.W.2d 611, 620-621 (Mo. Banc 1995) cited by Respondent held the

amount of damages suffered by plaintiff was a jury question. Respondent's"opened the door" argument misunderstands that key point, as the door was "opened" in *Washington* for jury resolution, and not determination by the Trial Court of this factual matter. *Id.* at 621-622. Respondent's reliance on *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. Banc 2003) is likewise misplaced because it is a workers compensation claim, for which there is no right to trial by jury on damages. Please see e.g. *DeMayf v. Liberty Foundry Co.*, 37 S.W.2d 640, 648 (Mo. 1931)(Workers Compensation is new cause of action for which no right to a jury trial was in existence when Constitution adopted).

The collateral source rule operates to preclude the defendant from receiving a windfall because of something that occurs after they have damaged the plaintiff. The Missouri Supreme Court in *Collier v. Roth*, 434 S.W.2d 502, 506-507 (Mo. 1968) stated the wrongdoer should not be entitled to benefit from collateral payments to the person he had wronged. This is because:

> the plaintiff against whom a tort is committed has his cause of action at the moment that the tort occurs. Things which happen later and let an injured plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant.

Id. at 507, emphasis added. Accord *Baptist Healthcare Systems v. Miller*, 177 S.W.3d 676, 683-684 (Ky. 1995)(Whether Medicare paid a lower amount than initially was billed does not relieve the tortfeasor from the "duty to pay the reasonable value" of the plaintiff's

medical expenses).

While Respondent spends 14 pages discussing the collateral source rule in other jurisdictions, he fails to advise that the Courts of multiple states have found attempts to modify the doctrine unconstitutional. Please see e.g. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995); *Farley v. Engelken*, 740 P.2d 1058 (Kan. 1987); *Johnson v. Rockwell Automation, Inc.*, _____ S.W.3d ____, 2009 WL 1218362 (Ark. 2009); *Sorrell v. Thevenir*, 633 N.E.2d 504, 510 (Ohio 1994); *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1088-1089 (Ohio 1999).

Further, the out of jurisdiction cases cited by Respondent allow the jury to make the initial finding of fact. That is not the process for R.S.Mo. §490.715. In *Adams v. The Children's Mercy Hospital*, 832 S.W.2d 898, 907 (Mo. Banc 1992) the Missouri Supreme Court held that a limitation on damages if done before the jury completed its constituional task of determining a plaintiff's damages would infringe upon the right to trial by jury.[5] Unlike *Adams* and several of the out of state procedures cited by Respondent, R.S.Mo. §490.715.5(2) is applied before the jury is charged with the completion of its constitutional task of determining plaintiff's damages. R.S.Mo.§490.715, in removing from the jury the

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[5] It should also be noted the *Adam's* Court's decision was prior the Supreme Court's decision in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 118 S.Ct. 1279 (1998) which clarified the absolute right to have a jury determine the amount of damages.

ability to determine the value of a plaintiff's medical damages, preempts centuries of Constitutional precedent. In the 35 plus pages of discussion about the history of the collateral source rule, Respondent offers no authority to the contrary.

IV. Respondent concedes that H.B. 393 is so broad that its title requires that it list three separate subjects of the act, in violation of the single clear subject amendment to the Missouri Constitution

State ex rel Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1097-1100 (Ohio 1999).

A. Introduction

Respondent's argument regarding the Single Clear Subject standard is not even internally consistent. Respondent's brief admits that the Bill actually has three separate subjects, claims, damages and payments. Further, even using these three separate and overly broad subjects, H.B. 393 still manages to have provisions which do not fit within these categories. Recognizing this defect, Respondent's answer is that the subject really should be read as anything having any relation what so ever to do with tort lawsuits. Such an overly broad subject would by its very nature violate the Constitutional guarantee under Article III §23.

B. Argument

H.B. 393's title makes clear that the numerous new and repealed statutes are too broadly scattered to involve a single subject. Rather than a single subject, the very title notes

that the Bill is so broad it actually covers three separate subjects, (1) Claims, (2) Damages and (3) Payment. The provisions of the law that deal with venue do not relate to the subject of damages, nor the payment of damages. Similarly, the alteration to the statute of limitations for certain claims do not related to either the subject of damages or payment. The same is true of R.S.Mo. §355.176 on service for not for profit corporations, and the provision setting out new rules of civil procedure regarding transfer of venue (R.S.Mo. §508.010). R.S.Mo. §490.715 likewise has no relation to payment. The same is true for the revision to R.S.Mo. §538.229.1 regarding "benevolent gestures," whose express terms state that it deals not with damages or payment of damages, but instead with liability.

Respondent's fall back position is that the title to the Bill should really be considered as involving "the process by which a litigant or potential litigant present their claims for damages." Respondent's brief page 85. H.B. 393, however, fails that overly broad, multiple subject test. The provision on appellate bond does not relate to the presentation of a claim for damages. Instead, it relates to how a party can avoid execution while on appeal once the "presentation" has been made, and the claim ultimately found valid.

To condone such an expansive "subject" would be in essence to find that a bill could be titled "a bill relating to things that deal with or cost money." Such broad attempts to congregate disparate chapters of the Missouri Statutes have been consistently rejected. Please see e.g. *Home Builders of Greater St. Louis v. State*, 75 S.W.3d 267, 272 (Mo. Banc 2002)("Relating to property ownership"); *St. Louis HealthCare Network v. State*, 968 S.W.2d

145, 147-148 (Mo. Banc 1998)("Relating to certain incorporated and non incorporated entities"); *Carmack v. Director of Mo. Dept of Agr.*, 945 S.W.2d 956, 959-961 (Mo. Banc 1997)("Relating to economic development").

That the disparate elements and provisions of H.B. 393 violate the one subject rule is illustrated by the Ohio Supreme Court's holding in *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1097-1100 (Ohio 1999). Like Missouri, Ohio has a one subject amendment to its constitution which states, "No bill shall contain more than one subject, which shall be clearly expressed in its title." *Id.* at 1097. Unlike Missouri, however, Ohio has interpreted its constitutional provision as being "merely directory" and not mandatory. *Sheward* at 1098. Please see also *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. Banc 1994)(Holding that Missouri's single subject amendment is not directory, but instead mandatory). Under Ohio law, therefore, it requires gross and fraudulent violation of the single subject rule before the Court will declare an enactment invalid. *Sheward* at 1098.

With this much less stringent level of review, the Court in *Sheward* found that a bill which addressed numerous different topics regarding torts and alleged "tort reform" was such a gross and fraudulent violation to require the Bill be struck down. *Id.* at 1100-1101. Like H.B. 393, the Ohio Bill involved amendments to nearly twenty (20) different titles in the Ohio Code. *Id.* at 1099. The similarities in the Bills are striking as they both involved changes, modifications or additions to things such as:

1. The statute of limitations (*Id.* at 1085);

2. Certificates of Merit for medical malpractice claims (*Id.* at 1087);

3. The Collateral Source Rule (*Id.* at 1088);

4. Caps on punitive damages (*Id.* at 1090);

5. A cap on non economic medical malpractice damages (*Id.* at 1091); and

6. Immunity for certain professions (*Id.* at 1100).

The Court considered the numerous areas which the Bill affected in procedure, evidence, and substantive law, and held that while an argument could be made that some of the provisions appeared related, when it was considered in total, the "subject" had to keep growing. *Id.* at 1099-1100. When all the changes were considered:

> it becomes apparent that the commonality of purpose or relationship between them becomes increasingly attenuated, and the statement of subject necessary to encompass them goes broader and more expansive until finally any suggestion of unity of subject matter is illusory.

Id. at 1100.

The Ohio Supreme Court held that the various tort change provisions of the Bill were so disparate that if the Court were to approve it, there would be no basis to ever declare a violation of this constitutional provision. *Id.* at 1100. To uphold such a bill would be an abdication of the duty to enforce the Constitution. *Id.*

H.B. 393 is strikingly similar to Ohio Bill 350 which the *Sheward* Court found

unconstitutional. The Ohio Supreme Court's holding is especially compelling given the much more deferential directory standard upon which it was reviewed. Considered under Missouri's more protective standard, the answer becomes that much more clear that the provisions of the Bill do not relate to a single clear subject.

V. Respondent asks that the Court determine the factual issue of of future medical care, rather than allow the jury to consider such evidence, which is contrary to Missouri law.

Swartz v. Gale Webb Transportation Co., 215 S.W.3d 127, 131 (Mo. Banc 2007).

A. Introduction

Respondent's final point argues the Court should refuse to review the failure to allow evidence of future medical consequences because the point on appeal was not specific enough. The point on appeal, however, specifically noted the ruling at issue as defined under Missouri substantive law. This sufficiently identified the error alleged. In regard to the merits of the exclusion, Respondent does not rely on what the actual evidence was. Instead he asks the Court to adopt a standard that medical evidence is not admissible unless it is uncontested and corroborated by a second expert, which has never been a rule of law.

B. Argument

Respondent's initial argument is the point on appeal which tracks Missouri substantive law should be disregarded. The point raised, however, identifies the action of the Court, the

exclusion of evidence regarding future medical care and treatment. Under Missouri substantive law, evidence of the cost of future care is considered to be within the subject of future medical care and treatment. Please see e.g. *Swartz v. Gale Webb Transportation Co.*, 215 S.W.3d 127, 131 (Mo. Banc 2007). As such, the point tracks Missouri substantive law in identifying the evidence excluded.

"Technical perfection is not necessary" when drafting a point on appeal. *Parker v. Wallace*, 473 S.W.2d 767, 772 (Mo. App. 1971). All that is required is that the Court be able to determine with reasonable effort what the issue is, and what appellant's position is in regard to that issue. *Id.* An Appellate Court must "decide a case on its merits," rather than on any alleged technical deficiency. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. Banc 1997). It is thus only where the alleged deficiency impedes disposition of the merits that a point will be ignored. *Id.* This occurs only where the point is so deficient it fails to identify to the Court and opposing counsel what is actually at issue. *Id.* Accord *State ex rel Nixon v. Koonce*, 173 S.W.3d 277, 281 (Mo. App. W.D. 2005). A point which specifically identifies the evidence as categorized by Missouri substantive law does not fall within the ambit of the argument raised by Respondent.

When Respondent attempts to support the substance of the issue, he can do so only by asking the Court to consider inferences which are contrary to the evidence, consider objections which were never raised, and adopt standards contrary to the laws of evidence and the right to a jury trial. Contrary to Respondent's argument, Dr. Kelso did not testify Ms.

Deck would not possibly need surgery in the future. Further, even if he had, that would be a conflict between experts, which calls for jury resolution, and not resolution by the Court.

Dr. Kelso performed surgery on Ms. Deck's shoulder. He saw Ms. Deck last in September of 2006. L.F. at 45-47, deposition of Dr. Kelso pp. 30-39. This was a year and two months after the surgery. Id. at 45, depo p. 30. Dr. Kelso ordered an MRI at that time because a full thickness tear can occur well after someone has initial shoulder surgery. Id. at 47, depo p. 39. If such a tear occurs after surgery, it would require another operation. Id.

While Respondent attempts to paint the testimony of Dr. Kelso as saying future complications had been ruled out by this 2006 MRI, that was not Dr. Kelso's testimony. Instead, Dr. Kelso testified only that at that time Ms. Deck did not have full thickness tear of her shoulder. Id. at 46, depo p. 36. Further, Dr. Kelso confirmed that while the MRI did not show a rotator cuff tear at that time, it did show classic signs of impingement. Id. A tear can develop after surgery if the person has chronic impingement of the shoulder. Id. at P. 47, depo p. 36. Dr. Kelso also advised that the MRI of 2006 showed degenerative fraying of the labrum. Id.

Dr. Kelso never testified Ms. Deck could not require surgery in the future. Instead, he confirmed Dr. Bennoch's testimony that if Ms. Deck developed a tear it would require surgery. He also provided evidence that the need for such surgery can arise well after the primary surgery. Further, he confirmed that Ms. Deck had continuing problems in her shoulder, including classic impingement signs, which can cause a full thickness tear much

later. The evidence from Dr. Kelso was thus that Ms. Deck did not need surgery as of September 2006, but had symptoms and signs which would be consistent with a possible future problem requiring surgery.

This is not inconsistent with Dr. Bennoch's testimony of the cost of possible future surgery. Dr. Bennoch saw Ms. Deck over a year after Dr. Kelso. TR. P. 202, Lines 21-24. When examined a year later Ms. Deck had a positive Hawkins test and Neer test. TR. PP. 205-206. These are things Dr. Kelso identified as indicative of rotator cuff injury. L.F. PP. 39-40, depo. pp. 8-9. Further, Dr. Bennoch explained that initial improvement with eventual worsening was consistent with continued problems due to fraying of her labrum. TR. P. 235, Line 12, to P. 236, Line 9. There is thus nothing inconsistent between Dr. Bennoch's testimony and Dr. Kelso.

Even if Dr. Kelso and Dr. Bennoch held directly contrary opinions, it would be for the jury to resolve this dispute between expert witnesses. Dr. Bennoch is a qualified medical expert. Respondent's claim that Dr. Bennoch's testimony should be disregarded because he does not specialize in orthopedic medicine is belied by the fact he failed to pose this objection to Dr. Bennoch's qualifications as a medical expert at trial. Please see e.g. *State v. Duckett*, 706 S.W.2d 241, 243 (Mo. App. 1986)(Internest properly provided testimony regarding orthopedic injuries, as no objection was made at trial that he was not a specialist).

The Court in considering the admissibility of evidence cannot decide that it likes one expert more than the other. It is not a function of the Court to decide how much weight or

credibility to give to a particular expert or witness. *Martin v. Durham*, 933 S.W.2d 921, 925 (Mo. App. W.D. 1996). Instead, the determination of credibility and what evidence to believe is solely a matter for the jury. *Savannah Place, Ltd. v. Heidelberg,* 164 S.W.3d 64, 70 fn7 (Mo. App. S.D. 2005). Juries decide contested factual matters, not the Court.

Missouri case law does not require "unanimous" opinion among doctors before evidence is admissible. Instead, Missouri law holds that evidence of the cost of possible future care is admissible. *Swartz v. Gale Webb Transportation Co.*, 215 S.W.3d 127, 131 (Mo. Banc 2007). The Court's ruling that the cost of such possible future care was not admissible absent testimony within a reasonable degree of medical certainty Ms. Deck would need the surgery is directly contrary to *Swartz*. Id. at 131.

Respondent's argument that Dr. Bennoch's testimony should be excluded as speculation misstates the full testimony of Dr. Bennoch. Dr. Bennoch established that Ms. Deck had complaints and physical findings consistent with injury requiring surgery. Before he would say for sure she needed such surgery, however, another MRI needed to be performed. TR. P. 231, Line 2-8. If the MRI showed further degeneration, shoulder surgery was a certainty.[6] Respondent also fails to identify the entire section of testimony from the

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[6] Respondent's argument regarding the fact that this testimony was before the Court in direct testimony rather than during the later offer of proof is unexplained. No authority is cited for the proposition that evidence which comes in without objection should not be considered, and Appellant is aware of none.

cross examination of Dr. Bennoch during the offer of proof. The reason is that Dr. Bennoch puts his statement about "speculation" in context by testifying that he believes Ms. Deck would need future treatment now "based on symptoms," but that it "may be more specific based on an MRI." TR. P. 272, Line 4-9.

Further, the argument that a doctor stating future consequences are "speculative" requires its exclusion is directly contrary to binding Missouri law. An increased risk of possible future consequences is admissible, even if those future consequences are not reasonably certain to occur. *Swartz* at 131. In *Swartz*, the Court held that this required evidence of the cost of possible future surgery, despite the fact the doctor on cross examination agreed that whether the person would ever need the surgery "was speculation on his part." *Id.* at 130-131. Respondent's "speculation" argument has thus been flatly rejected by the Missouri Supreme Court. *Id.*

Finally, the argument that Ms. Deck was not prejudiced by the exclusion of this evidence is meritless. The evidence of cost from Dr. Bennoch that was excluded was different from the cost admitted by the Court for Dr. Kelso's surgery for several reasons. First, as set forth above, the cost admitted was not the value of the services provided, but instead only the cost Medicare paid. Second, Dr. Bennoch indicated he would recommend plaintiff be treated by a shoulder specialist in St. Louis. TR. P. 228, Line 16, to P. 230, Line 8. The cost of that care was not what Dr. Kelso charged, but instead between $15,000.00 to $20,000.00. TR. P. 268, Line 20, to P. 269, Line 7. Similarly, the cost of possible future

therapy Dr. Bennoch identified in his offer of proof was several thousand dollars. TR. P. 269, Lines 11-23. This evidence of cost was significant evidence for the jury to consider in valuing Ms. Deck's injury. *Swartz* at 131 (citing numerous cases holding such evidence of cost is required for the jury to fully and competently assess the current injury suffered by the injured plaintiff).

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate paper copies and one CD of the foregoing document was served upon attorney(s) of record via **U.S. MAIL**, as prescribed by law, on this the 21st day of December, 2009.

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MO.R.CIV.P. 84.06(c) AND (g) CERTIFICATE

The undersigned hereby certifies that the foregoing *Appellant's Reply Brief* complies with the limitations contained in Mo.R.Civ.P. 84.05(b). There are 6,627 words in the foregoing brief, according to the Word Perfect tool count Corel Word Perfect X3 for Windows, the word processing software used to prepare the foregoing brief. The one paper original and nine (9) paper copies of the foregoing brief and one copy of the brief on a CD-ROM shall be filed in the Missouri Court of Appeals, Southern District. In addition, two paper copies plus one copy of the brief on a CD-ROM has been served on the attorney named in the Certificate of Service which appears on the page immediately preceding. The CD-ROM filed in the Court and the CD-ROM served on the attorney have been scanned for viruses and those disks are virus-free.

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