IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Thomas Dennis, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	**Case No. ED103904**
Sonya Cherry, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

15 U.S.C. § 1692a	16, 17, 35
15 U.S.C. § 1692e	*passim*
15 U.S.C. § 1692f	*passim*

JURISDICTIONAL STATEMENT

This case is an appeal from a final Judgment of the Circuit Court of St. Louis County, granting Defendants' Motion to Dismiss, entered in a consolidated case filed in the Circuit Court of Saint Louis County on January 14, 2016. Only a single judgment was rendered in the single action into which the two cases, 15SL-CC033338 and 15SL-CC03495, were consolidated. Because the dismissal was with prejudice, "it is appealable even though it is not a judgment on the merits for all purposes." Doe v. Visionaire Corp., 13 SW 3d 674, 676, n. 3 (Mo. App. E.D. 2000). Appellants thus timely appealed a final appealable decision.

This case does not involve any of the categories reserved for the exclusive jurisdiction of the Missouri Supreme Court. Therefore, jurisdiction lies in this Court, pursuant to Missouri Constitution, Article V, Section 3.

STATEMENT OF FACTS

These consolidated cases stem from attempts by Mercy Hospital Jefferson ("Mercy Hospital") and its debt collection attorneys, Riezman Berger, P.C. ("Riezman Berger"), to collect past-due medical bills from Appellants Thomas Dennis ("Dennis") and Sonja Cherry ("Cherry"). In the first case, Defendants alleged that Appellant Dennis owed Mercy Hospital $850. Legal File ("LF"), p. 7, Plaintiff's Petition, ¶ 14. Mercy, through its attorneys Riezman Berger, filed a lawsuit against Appellant Dennis in the Associate Circuit Court of Jefferson County. LF, p. 7, Plaintiff's Petition, ¶ 13. Appellant Dennis entered into a consent judgment whereby he agreed to pay Mercy $850.00 plus court costs – no more, no less. LF, p. 7, Plaintiff's Petition, ¶¶ 15-17; Appendix, A3. Within the Consent Judgment, the parties did not agree to the assessment of any post-judgment interest on the judgment balance. LF, p. 7, Plaintiff's Petition, ¶ 18; Appendix, A3. On May 13, 2014, the Court entered the Consent Judgment as a final judgment. LF, p. 7, Plaintiff's Petition, ¶¶ 15-17; Appendix, A3. The deadline to file a motion to modify the judgment and request the Court to award post-judgment interest expired within thirty-days from the entry of the judgment, on or about June 22, 2014. LF, p. 7, Plaintiff's Petition, ¶ 20; Appendix, A3.

As of the filing of the Dennis Petition, no party had ever filed a motion seeking the award of post-judgment interest to accrue on the judgment. LF, pp. 7-8, Plaintiff's Petition, ¶¶ 18, 21-22. After the Consent Judgment had been entered, Dennis made three separate, voluntary payments through January 29, 2015, totaling $300.00 to Riezman. LF, p. 8, Plaintiff's Petition, ¶¶ 23-31. As of January 29, 2015, the remaining judgment balance was only $550 plus court costs of $122.94. LF, p. 8, Plaintiff's Petition, ¶¶ 23-31. However,

when Riezman Berger filed an application for a garnishment March 10, 2015, it listed an inflated amount due of $858.35. LF, p. 8, Plaintiff's Petition, ¶¶ 31-33; Appendix, A4. The amount Riezman Berger attempted to collect from Plaintiff was false for two reasons. First, Respondents unilaterally assessed $23.41 in post-judgment interest even though the Consent Judgment did not award any such interest. LF, p. 9, Plaintiff's Petition, ¶¶ 34-35. Second, Respondents only credited $200 worth of the voluntary payments made by Dennis. LF, p. 9, Plaintiff's Petition, ¶¶ 34-35. Respondents seized the entire $858.35 from Dennis' bank account, which Dennis discovered while waiting in the check-out line to purchase food for his family. LF, p. 9, Plaintiff's Petition, ¶¶ 38-40.

At the time of Respondents' garnishment, Dennis possessed $802 in his account, which would have covered the entire remaining judgment balance had Respondents issued a garnishment for the amount actually owed. LF, p. 9, Plaintiff's Petition, ¶¶ 37, 43. Respondents' garnishment caused Plaintiff to incur a $50.00 fee from his bank as a result of his account possessing a zero balance. LF, p. 9, Plaintiff's Petition, ¶¶ 36-38, 40-42. Had Respondents issued a garnishment for the correct amount due of $672.94, Dennis would have had enough money in his account to cover that amount. LF, p. 9, Plaintiff's Petition, ¶ 43. Following Respondents' unlawful seizure of his funds, Dennis filed an FDCPA claim against Riezman Berger for its unlawful collection conduct and an MMPA claim against Mercy and Riezman for their unfair business practices. LF, pp. 5-6, Plaintiff's Petition, ¶¶ 1-2.

Similarly, Respondents filed another debt collection lawsuit on behalf of Mercy Jefferson against Appellant Sonya Cherry, seeking to recover an outstanding balance of

$23,325.30 from Plaintiff. LF, p. 77, Plaintiff Cherry Petition, ¶¶ 13-14. Respondents filed suit in Jefferson County Associate Circuit Court and obtained a default judgment on November 12, 2013. LF, p. 77, Plaintiff Cherry Petition, ¶¶ 15-16; Appendix, A8. Respondents failed to request the award of post-judgment interest within the Default Judgment that they prepared, and the Court did not award any such interest. LF, p. 77, Plaintiff Cherry Petition, ¶¶ 15-17; Appendix, A8. The deadline to file a motion to modify the judgment and request the Court to award post-judgment interest expired within thirty-days from the entry of the judgment, on or about December 12, 2013. LF, p. 77, Plaintiff Cherry Petition, ¶ 19.

As of the filing of the Cherry Petition, no party had ever filed a motion seeking the award of post-judgment interest to accrue on the judgment. LF, p. 77, Plaintiff Cherry Petition, ¶ 21. However, Respondents subsequently caused to be issued three garnishments against Cherry, each of which included thousands of dollars' worth of post-judgment interest. LF, pp. 77-78, Plaintiff Cherry Petition, ¶¶ 17, 22-26; Appendix, A9, A12, A16. Respondents collected approximately $350 in unawarded interest by the time Cherry filed her suit below on October 20, 2015. LF, p. 78, Plaintiff Cherry Petition, ¶ 27. Cherry filed an FDCPA claim against Riezman Berger for its unlawful collection conduct and an MMPA claim against Mercy and Riezman for their unfair business practices. LF, p. 775-76, Plaintiff Cherry Petition, ¶¶ 1-2.

In both of the cases on appeal, Respondents filed identical motions to dismiss. *Compare* LF, pp. 88-90, Riezman Motion to Dismiss, Mercy Motion to Dismiss *with* LF, pp. 22-23, 26-27, Riezman Motion to Dismiss, Mercy Motion to Dismiss. Riezman

Berger's motion to dismiss consisted of the isolated argument that it was allowed to unilaterally and extra-judicially assess post-judgment interest because it "automatically" attaches to a judgment. LF, pp. 22-23, 88-89. Riezman Berger chose not to address the argument that, even assuming interest was awarded on the judgment (it was not), Riezman Berger nevertheless violated the FDCPA and MMPA by over-garnishing Dennis' bank account due to the voluntary payments Riezman Berger failed to credit. Id. With respect to the MMPA claim, Mercy filed a single-sentence motion to dismiss without any corresponding memorandum of law. LF pp. 26, 90. From the record, it is unclear as to the grounds for Mercy's requested dismissal.

On December 7, 2015, the trial court consolidated both actions. LF, p. 95. Thereafter, Dennis and Cherry filed a Response in Opposition, which outlined the relevant authority regarding the purported "automatic" award of post-judgment interest. LF, p. 39-57. On January 14, 2016, the trial court granted Respondents' motions to dismiss. LF, p. 96. The Order dismissing the consolidated action stated, in full: "Defendants' Motions to Dismiss called, heard, and granted. Both case numbers 15SL-CC0338 and 15SL-CC03405 are hereby DISMISSED, with prejudice at Plaintiff's cost." Id. The trial court did not provide a stated basis for the dismissal. Id.

POINTS RELIED ON

POINT I

The Trial Court Erred in Dismissing Appellants' Petitions alleging violations of the FDCPA as to Respondent Riezman Berger, P.C. for collecting post-judgment interest because this was an action not legally allowed to be taken in violation of 15 U.S.C. § 1692e(5) and an attempt to collect interest not permitted by law in violation of 15 U.S.C. § 1692f(1), in that the judgments entered against Appellants in the underlying collection cases did not include an award of post-judgment interest and section 408.040 does not provide for automatic interest to attach to a judgment.

McGuire v. Kenoma, LLC, 447 S.W.3d 659 (Mo. 2014).
Peterson v. Discover Prop. & Cas. Ins. Co., 460 S.W.3d 393 (Mo. App. W.D. 2015).
SKMDV Holdings, Inc. v. Green Jacobson, P.C., No. ED 102493, 2016 WL 1469995 (Mo. App. E.D. Apr. 12, 2016)
Ballou v. Law Offices Howard Lee Schiff, P.C., 39 A.3d 1075 (Conn. 2012).
Section 408.040 R.S.Mo.
15 U.S.C. § 1692e
15 U.S.C. § 1692f

POINT II

The Trial Court Erred in Dismissing Appellants' Petitions alleging a violation of the FDCPA as to Respondent Riezman Berger, P.C. for collection of post-judgment interest because it falsely represented the amount of the debt in violation of 15 U.S.C. § 1692e(2)(A), in that Defendant failed to disclose that interest would be accruing.

Avila v. Riexinger & Associates, LLC, Docket Nos. 15–1584 (L), 15–1597, - F.3d -, 2016 WL 1104776. *3 (2nd Cir. 2016).
Wideman v. Kramer and Frank, P.C., No. 4:14CV1495 SNLJ, 2015 WL 1623814 (E.D. Mo. Apr. 10, 2015).
Mueller v. Barton, No. 4:13-CV-2523 CAS, 2014 WL 4546061, at *7 (E.D. Mo. Sept. 12, 2014).
15 U.S.C. § 1692e

POINT III

The Trial Court Erred in Dismissing Appellant Dennis' Petition alleging a violation of the FDCPA as to Respondent Riezman Berger, P.C. for failing to credit all of Appellant Dennis' payments when issuing a garnishment, because Respondent Riezman Berger, P.C violated 15 U.S.C 1692e(2)(A) and 15 U.S.C. 1692f(1), in that it overstates the amount of debt.

Asch v. Teller, Levit & Silvertrust, P.C., No. 00-C-3290, 2003 WL 22232801 (N.D. Ill. Sept. 26, 2003).
15 U.S.C. § 1692e
15 U.S.C. § 1692f

POINT IV

The Trial Court Erred in Dismissing Appellants' Petitions alleging a violation of the Missouri Merchandising Practices Act as to both Respondents for collecting post-judgment interest, because it is an unfair and deceptive business practice in violation of 407.020 R.S.Mo., in that the judgments entered against Appellants in the underlying collection cases did not include an award of post-judgment interest and section 408.040 does not provide for automatic interest to attach to a judgment.

McGuire v. Kenoma, LLC, 447 S.W.3d 659 (Mo. 2014).
Section 407.025 R.S.Mo.
Section 408.040 R.S.Mo.

POINT V

The Trial Court Erred in Dismissing Appellant Cherry's Petition alleging wrongful garnishment as to both Respondents because her wages were garnished for an amount she did not owe, in that the judgments entered against Appellants in the underlying collection cases did not include an award of post-judgment interest and section 408.040 does not provide for automatic interest to attach to a judgment.

Howard v. Frost National Bank, 458 S.W.3d 849,(Mo. App. 2015).
McGuire v. Kenoma, LLC, 447 S.W.3d 659 (Mo. 2014).
Section 408.040 R.S.Mo.

ARGUMENT

I. The Trial Court Erred in Dismissing Appellants' Petitions alleging violations of the FDCPA as to Respondent Riezman Berger, P.C. for collecting post-judgment interest because this was an action not legally allowed to be taken in violation of 15 U.S.C. § 1692e(5) and an attempt to collect interest not permitted by law in violation of 15 U.S.C § 1692f(1), in that the judgments entered against Appellants in the underlying collection cases did not include an award of post-judgment interest and section 408.040 does not provide for automatic interest to attach to a judgment.

The Missouri Supreme Court recently reaffirmed the fact that a judgment which does not award post-judgment interest, and a subsequent failure to move for its inclusion via a timely motion to amend, precludes a judgment creditor from seeking to collect post-judgment interest. McGuire v. Kenoma, LLC, 447 S.W.3d 659 (Mo. 2014). This conclusion is firmly supported by the text of section 408.040 R.S.Mo. While section 408.040 R.S.Mo. requires a trial court to award post-judgment interest *if requested*, post-judgment interest does not *automatically* attach to a judgment. This principle has been applied by subsequent appellate decisions, including this Court's recent holding that "the award of post-judgment interest must be included in the original judgment to which it applies or in a timely amendment to that judgment." SKMDV Holdings, Inc. v. Green Jacobson, P.C., No. ED 102493, 2016 WL 1469995 (Mo. App. E.D. Apr. 12, 2016). In this case, neither the consent judgment signed by Appellant Dennis nor the default judgment taken against Appellant Cherry included an award of post-judgment interest.[1]

[1] A court may take judicial notice of its own records and may take judicial notice of the records of other cases when justice so requires. Sher v. Chand, 889 S.W.2d 79, 84 (Mo. App. E.D. 1994). The judgments and garnishment orders in the underlying collection cases have been attached to Appellants' Appendix.

LF, p. 7, ¶ 18, Plaintiff Dennis' Petition; Appendix, A3; LF, p. 77, ¶ 17, Plaintiff Cherry's Petition; Appendix, 8. Defendant Riezman Berger did not seek an amendment to the judgment. LF, p. 7, ¶¶ 20-21, Plaintiff Dennis' Petition; LF, p. 77, ¶¶ 21-22, Plaintiff Cherry's Petition.

Despite the fact that neither judgment awarded post-judgment interest, Defendant Riezman Berger unilaterally and extra-judicially assessed post-judgment interest when garnishing Plaintiffs, thus violating the Fair Debt Collection Practices Act ("FDCPA"). LF, p. 9, ¶ 34, Plaintiff Dennis' Petition; LF, p. 78, ¶¶ 23-27, Plaintiff Cherry's Petition. The Trial Court therefore erred in granting Respondents' Motion to Dismiss.

A. Appellants properly pled each element of the FDCPA.

At the initial pleading stage, to state a claim for a violation of the FDCPA, a plaintiff need only allege facts that support the following elements: (1) plaintiff is a consumer, (2) the debt is for personal, family, or household purpose, (3) defendant is a debt collector, and (4) Defendant violated, by act or omission, a provision of the FDCPA. Royal Financial Group, LLC v. George, No. ED92972, p. 4 (Mo. App. E.D. 2010); see also Rogers v. Medicredit, Inc., 4:12-cv-02277-CEJ, 2013 WL 2403661, *2 (E.D. Mo. May 31, 2013).

Each Plaintiff properly alleged all four elements in their respective Petitions. First, Plaintiffs alleged that they are each a "consumer" because each Plaintiff is a natural person obligated to pay a debt. *See* 15 U.S.C. § 1692a(3); LF, pp. 6-7, Plaintiff Dennis' Petition, ¶¶ 4, 14; LF, pp. 76-77, Plaintiff Cherry's Petition, ¶¶ 5, 14. Second, the debts that Plaintiffs allegedly owed arose primarily from personal, family, or household purposes; namely, medical services Plaintiffs received from Defendant Mercy Hospital Jefferson. 15

U.S.C. § 1692a(5); LF, pp. 7, 10, Plaintiff Dennis' Petition ¶¶ 14, 52; LF, pp. 77-78, Plaintiff Cherry's Petition ¶¶ 14, 31. Third, Plaintiffs alleged that Defendant Riezman Berger is a "debt collector," one "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6); LF, pp. 6-7, 10, Plaintiff Dennis' Petition, ¶¶ 7, 11, 51; LF, pp. 76, 78, Plaintiff Cherry's Petition, ¶¶ 7, 8, 11, 30. Plaintiff also alleged that Defendant Riezman Berger attempted to collect the debts by issuing garnishments. LF, pp. 7, 8, ¶¶ 13, 32, Plaintiff Dennis' Petition; LF, pp. 77-78, Plaintiff Cherry's Petition, ¶¶ 13, 22, 23-25. These are not mere legal conclusions—they are facts substantiated by Respondent's conduct as described in the respective Petitions.

For the violations arising from the collection of post-judgment interest, Plaintiffs each pleaded that Defendant Riezman Berger violated sections 1692e(2)(A), 1692e(5), and 1692f(1) by its acts and omissions. LF, p. 7, Plaintiff Dennis' Petition, ¶ 54; LF, p. 79, Plaintiff Cherry Petition, ¶ 34. Section 1692e(2)(A) prohibits debt collectors from falsely representing to a consumer "the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). "One type of misrepresentation prohibited by § 1692e(2)(A) is the false representation that a debt exists," such as non-existent post-judgment interest that Defendant Riezman Berger unlawfully garnished from Appellants. Yarney v. Ocwen Loan Servicing, LLC, 929 F. Supp. 2d 569, 576 (W.D. Va. 2013). Section 1692e(5) likewise prohibits debt collectors from "threat[ening] to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5). Here, Plaintiffs alleged that Defendant Riezman Berger threatened to garnish funds from them that they did not legally

owe. Of similar effect, under Section 1692f(1), a debt collector is prohibited from collecting "any amount…including any interest… unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). As pleaded, Defendant Riezman Berger violated Section 1692f(1) when it garnished post-judgment interest that it neglected to request before the underlying judgment became final. Duffy v. Landberg, 215 F. 3d 871, 875 (8th Cir. 2000).

This Court's review of the trial court's dismissal of Appellants' causes of action is *de novo*. Chochorowski v. Home Depot U.S.A., Inc., 295 S.W.3d 194, 197 (Mo.App. E.D. 2009) (citation omitted). Because the Trial Court did not explain its reasons for granting the motion to dismiss, this Court presumes "that it did so for the reasons advanced in the motion to dismiss." Id**.** (citation omitted). As its sole basis for the motion, Defendant Riezman Berger asserted that there is "no requirement under Missouri law that the Judgment entered againeralnst Defendant for a nontort debt provide for post-judgment interest before such interest may be collected." LF, pp. 22-23, Riezman Berger's Motion to Dismiss Plaintiff Dennis' Petition; LF, pp. 88-89, Riezman Berger's Motion to Dismiss Plaintiff Cherry's Petition. Given that the entirety of Riezman Berger's Motion to Dismiss is premised upon a misstatement of the law, Appellants have properly pleaded a claim for violations of the FDCPA, and this Court should remand the case for further proceedings.

B. The Missouri Supreme Court Held that Post-Judgment Interest Under Section 408.040, Without Limitation to Any Subsection, Must Be Awarded Within the Judgment.

The Missouri Supreme Court recently held that the award of post-judgment interest under Section 408.040 is such a substantive legal claim that it must be explicitly awarded within the judgment. McGuire v. Kenoma, LLC, 447 S.W.3d 659, 667 (Mo. banc 2014)). In McGuire, the plaintiffs brought a nuisance action arising out of large-scale hog operations. Id. at 661. After a jury trial, the trial court entered judgment in favor of the plaintiffs consistent with the jury's verdict. Id. The judgment did not provide for the recovery of post-judgment interest. Id. The defendants initially appealed on several grounds, and the Court of Appeals affirmed in part and reversed in part by reducing the amount of damages. McGuire v. Kenoma, LLC, 375 S.W.3d 157, 190 (Mo. Ct. App. W.D. 2012). On remand, the plaintiffs moved to amend the judgment *nunc pro tunc* to include post-judgment interest. McGuire, 447 S.W.3d at 662. The trial court granted the motion, and defendants again appealed, this time on the basis that "the award of statutory post-judgment interest was not requested or actually awarded until after the judgment became final." Id. at 661.

The plaintiffs made the same "automatically awarded" argument that Riezman Berger advances here: that "the omission of post-judgment statutory interest is a clerical error that does not change the substance of the judgment because the **interest is automatic** insofar it does not require any party to make a request." Id. at 665 (emphasis added). The Missouri Supreme Court disagreed and held that the award of post-judgment interest is

such a substantive change that it must be explicitly awarded within the judgment. Id. at 667.

Post-judgment interest can dramatically alter how much money a defendant might owe. If the principal is large, or the contract interest rate is high, or a substantial amount of time has passed since the judgment has been entered, a defendant might suddenly, without warning, be faced with a debt thousands of dollars greater than the amount on the face of the judgment, as was the case with Appellant Cherry's judgment balance. In light of the recently-revised section 408.040(1) R.S.Mo, which requires payments first be applied to post-judgment costs and interest, a consumer's payments might not even serve to reduce the principal balance of a debt. The McGuire Court held that it is unfair to create such circumstances by *substantively* changing a judgment to include post-judgment interest. See id.

The Supreme Court's decision goes beyond explaining the use of *nunc pro tunc* motions; it serves as a guideline on how to properly preserve a request for post-judgment interest. A judge does not have the authority to add post-judgment interest to a judgment which did not include such an award. A debt collector, then, has even less authority to do so. Respondents in this case took it upon themselves to do what even a judge had no power to do – add post-judgment interest that had not been awarded in the judgment without filing the proper motions to amend the judgment. These were actions that Respondents were not legally entitled to take.

The plaintiffs in McGuire also argued that a failure to award interest is a mere clerical error, since interest is fixed by Section 408.040 R.S.Mo. Id. at 664. The Supreme

Court rejected this argument as well and explicitly overruled the line of cases that had held that "omissions of mandatory statutory language are presumed to be clerical errors correctable by a nunc pro tunc judgment." Id. at 666. The Supreme Court explained that "[t]hough the trial court should have included the award of post-judgment interest in its original judgment, it did not." Id. at 667. (emphasis added). Without evidence in the record that an "award of post-judgment interest was actually made," the only way to modify the judgment to include post-judgment interest is to bring a motion pursuant to Rule 75.01 or Rule 78.07. Id.

In this case, Appellant Dennis pleaded that the record is similarly devoid of evidence that post-judgment interest was requested or awarded. LF, p. 7, Plaintiff Dennis' Petition, ¶¶ 18-21. Dennis signed a consent judgment that did include post-judgment interest. Id. at ¶¶ 15-16, 18. Similarly, the default judgment entered against Appellant Cherry did not provide for the recovery of post-judgment interest. LF, p. 3, Plaintiff Cherry's Petition, ¶¶ 16-17. The issue is not, as the Missouri Supreme Court explained, whether the record contained sufficient evidence of the appropriate post-judgment interest rate, since that is determined by section 408.040 R.S.Mo. Rather, the burden is on Respondents to show that the trial court "had intended to include the post-judgment interest in its original judgment but merely omitted the interest as a clerical error." McGuire, 447 S.W.3d at 667. No such showing was made, nor would one have been appropriate for Defendant Riezman Berger's motions to dismiss. Moreover, Appellants pleaded, and it is indisputable, that Respondents did not make the necessary post-trial motions to obtain the award of post-judgment interest.

LF, p. 7, Plaintiff Dennis' Petition, ¶¶ 18-21; LF, p. 77, Plaintiff Cherry's Petition, ¶¶ 18-21.

Following McGuire, the Missouri Court of Appeals revisited the issue of post-judgment interest under Section 408.040 in Peterson v. Discover Prop. & Cas. Ins. Co., 460 S.W.3d 393 (Mo. App. W.D. 2015). The Peterson creditors sued several defendants and reached a settlement pursuant to section 537.065 R.S.Mo. with one of the defendants. Id. at 399. The trial court subsequently entered a consent judgment. Id. at 400. The underlying defendant's insurer disclaimed coverage, and the judgment-creditors pursued an equitable garnishment action against the insurer. Id. After the circuit court granted summary judgment in favor of the plaintiffs on the issue of insurance coverage, the plaintiffs moved to amend the 2011 consent judgment to award post-judgment interest that had accrued in the interim. Id. at 401. The circuit court granted the motion and allowed the plaintiffs to recover post-judgment statutory interest that was not provided for in the original judgment. Id. The insurer appealed this award of post-judgment interest, asserting that, since McGuire, a trial court cannot retroactively award post-judgment interest when not presented with a timely, authorized post-trial motion.

The Western District Court of Appeals, citing McGuire, held that "it is evident that an award of interest pursuant to Section 408.040 [R.S.Mo.] must be made in the original judgment" or pursuant to an authorized and timely post-trial motion. Id. at 413 (emphasis added). This is true "even though [such interest is] mandated by statute." Id. Faithfully applying the law as articulated in McGuire, the Court of Appeals held that an award of interest pursuant to section 408.040 R.S.Mo. must be made in the original judgment, or be

so included through an authorized and timely post-trial motion, otherwise it is subject to waiver. Id.

Even more recently, this Court joined the Western District Court of Appeals in holding that post-judgment interest must be expressly awarded in the judgment to be collectible. SKMDV Holdings, Inc. v. Green Jacobson, P.C., No. ED 102493, 2016 WL 1469995 (Mo. App. E.D. Apr. 12, 2016). The trial court in Green Jacobson entered judgment for the plaintiff in accordance with the jury verdict. Id. at *1. The judgment did not include an award of post-judgment interest. Id. at *15. Over a month later, the trial court attempted to amend its previous judgment and award interest "pursuant to Section 408.040." Id. This Court stated, in discussing section 408.040 R.S.Mo. (without limitation to any subsection), that "[e]ven though mandated by statute, the award of post-judgment interest must be included in the original judgment to which it applies or in a timely amendment to that motion." Id. at *16 citing Peterson, 460 S.W.3d at 413 and McGuire, 447 S.W.3d at 666-67. Because the judgment-creditor in Green Jacobson failed to ensure that post-judgment interest was awarded on the face of the judgment, and further failed to include a specific request for post-judgment interest via a timely-filed post-judgment motion, this Court held that a later amendment could not award such interest, even if interest was "mandated" by statute.

McGuire and its progeny therefore stand for the straightforward principle that post-judgment interest does not automatically attach to a judgment but rather requires creditors to obtain an award of such interest on the face of the judgment.

C. The text of section 408.040 R.S.Mo does not allow interest to be added automatically to a judgment that does not include such an award.

Plaintiff pleaded, and there is no dispute, that the judgments in question do not explicitly provide for post-judgment interest. LF, p. 7, Plaintiff Dennis' Petition, ¶ 18; LF, p. 77, Plaintiff Cherry's Petition, ¶ 17. Riezman Berger asserted that it was permitted to unilaterally assess interest because section 408.040 provides for the *automatic* award of such interest. LF, pp. 22-23, Defendant Riezman Berger's Motion to Dismiss Plaintiff Dennis' Petition; LF, pp. 88-89, Defendant Riezman Berger's Motion to Dismiss Plaintiff Cherry's Petition. Riezman Berger is mistaken. There is a qualitative difference between a remedy being expressly *allowed* versus one that is automatically *awarded*.

Section 408.040 *allows* a party the opportunity to request post-judgment interest and, if timely requested, the trial court does not have discretion to deny the requested remedy. But, by its own terms, the statute does provide for the *automatic* award of post-judgment interest. Interest on judgments is a creature of statute, not found at common law. Mackey v. Smith, 438 S.W.3d 465, 482 (Mo. App. W.D. 2012) ("post-judgment interest is created by statute (and not the Constitution or the common law, which the Constitution preserves)"). Therefore, creditors possess the burden to strictly comply with this statutory remedy. Zartman-Thalman Carriage Co. v. Reid, 73 S.W. 942, 943 (Mo. App. K.C. 1903) ("such statutes as take away a common-law right, remove or add to common-law disabilities, or provide for proceedings unknown or contrary to that law, are construed strictly.") (citation and quotation omitted). Respondent's argument that post-judgment

interest automatically attaches is inconsistent with the required strict construction of the statute. Section 408.040 states, in relevant part:

> 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. Section 408.040(2) R.S.Mo.

The statute first provides that interest "shall be allowed" on a judgment. The phrase "shall be allowed" dictates that an action is not required, but that the Court has a mandatory duty to grant a request only if made. Appellants agree that the award of interest, *when applicable*, is "not matter of court discretion." Holtmeier v. Dayani, 862 S.W.2d 391, 407 (Mo. Ct. App. E.D. 1993). But this is not the only instance the words "shall be allowed" appear in the context of a mandatory action contingent upon a prerequisite. See Mo Rev. Stat. § 491.060 ("[A] child under the age of ten…shall be allowed to testify without qualification."); Mo Rev. Stat. § 211.261 ("An appeal shall be allowed to the child from any final judgment, order or decree."); Mo Rev. Stat. § 535.110 ("[A]pplications for trials de novo and appeals shall be allowed and conducted in the manner provided in chapter 512 RSMo."); Missouri Rule of Civil Procedure 67.02(2) ("A party who once so dismisses a civil action and thereafter files another civil action upon the same claim shall be allowed to dismiss the same without prejudice only."). It should be readily apparent that a child is

not "automatically" called as a witness, nor is a case "automatically" dismissed or appealed, by operation of law In none of these instances does the relief or action automatically ensue; rather, a party must first file the appropriate request.

Once post-judgment is awarded, the second clause of section 408.040(2) R.S.Mo. provides that the *rate* of interest *shall* be "nine percent interest per annum" or the interest rate as provided by contract. The word "shall" – without the following words "be allowed" – does connote an automatic duty. Bauer v. Transitional School District, 111 S.W.3d 405, 408 (Mo. 2003). But this clause is only reached *if* the request for post-judgment interest is made by a plaintiff and such request is granted by the court. The clause begins by reference to "all such judgments," that is, judgments that have "been allowed" to accrue post-judgment interest, per the preceding clause. Based on the text of the statute, only those judgments are the ones that "shall" accrue the specified rate of interest.

The statutory language awarding pre-judgment interest in contract cases tracks the statutory language for post-judgment interest in all material respects. Specifically, it provides that judgment creditors in contract cases "shall be allowed" to receive pre-judgment interest after a demand for payment. Section 408.020 R.S.Mo. The pre-judgment interest statute must be read *in pari materia* with section 408.040 R.S.Mo, the post-judgment interest statute, so as to harmonize the whole. PDQ Tower Servs., Inc. v. Adams, 213 S.W.3d 697, 698 (Mo.App. W.D. 2007). In the context of prejudgment interest, Missouri courts have consistently held that a creditor is not "automatically" entitled to prejudgment interest on a judgment. Rather, the creditor must first make a demand on a debtor and then request the proper relief from the court to be eligible for such

an award. Bailey v. Hawthorn Bank, 382. S.W.3d 84, 106 (Mo.Ct.App. W.D. 2012); Walton Construction Co. v. MGM Masonry, Inc., 199 S.W.3d 799, 808 (Mo. Ct. App. W.D. 2006); A.G Edwards & Sons, Inc. v. Drew, 978 S.W 2d 386, 397 (Mo. Ct. App. E.D. 1998); Folk v. Countryside Cas. Co., 686 S.W.2d 882, 885 (Mo. App. E.D. 1985). Thus, while a plaintiff is entitled to interest upon a proper statutory request, an award of interest is never imposed automatically by operation of law.

In contrast to some other states, there is no provision within Missouri's post-judgment interest statute that automatically assesses interest even without an express award. For example, Georgia's statute on post-judgment interest explicitly provides for the automatic accrual of post-judgment interest even absent an award within the judgment. Ga. Code § 7-4-12 ("The postjudgment interest provided for in this Code section shall apply *automatically* to all judgments in this state and the interest shall be collectable as a part of each judgment whether or not the judgment specifically reflects the entitlement to postjudgment interest") (emphasis added). This section of the Georgia Code, in effect since 2003, is only one example the General Assembly could have used legislatively engraft interest onto all judgments in the State of Missouri. Despite amending the post-judgment interest statute twice since 2003, the legislature has chosen not to include such a clause.

The Supreme Court of Connecticut has likewise held, under very similar facts to those in this appeal, that a defendant violated the FDCPA by attempting to collect statutory post-judgment interest on a judgment that did not actually award such interest on its face. Ballou v. Law Offices Howard Lee Schiff, P.C., 39 A.3d 1075, 1077 (Conn. 2012). In Ballou, the Supreme Court of Connecticut determined that "postjudgment interest is not

automatic but, rather, is awarded in the discretion of the court upon application of the party seeking such interest." Id. The Court noted that the legislature could have provided for an automatic award of interest but, as with Missouri's post-judgment interest statute, did not use such language. Id. at 1080. Connecticut's statute also includes the word "shall" but it is "juxtaposed with the word 'continue.'" Id. at 1079. Analogously, Missouri's statute includes the word "shall" juxtaposed with the phrase "all such judgments." Section 408.040(2) R.S.Mo.

Like Respondents in this case, the defendants in Ballou failed to obtain an award of post-judgment interest but nevertheless unilaterally included post-judgment on the judgment balance within their bank execution. Id. at 1084. The court held that the defendants unlawfully overstated the amount of the debt, in violation of 15 U.S.C 1692e(2)(A) and 1692f(1), because the Connecticut statute did not provide for the automatic accrual of post-judgment interest. Id.

D. Section 408.040's Requirement for Specifying the Rate of Interest in Tort Actions Does Not Mean Post-Judgment Interest Automatically Attaches in Nontort Actions.

The plain language of the section 408.040 R.S.Mo. belies an interpretation that interest is automatically awarded in nontort action:

Mo. Rev. Stat. § 408.040.1	***Mo. Rev. Stat. § 408.040.2***
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	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

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.	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.

Contrary to Riezman Berger's interpretation, the fact that the statute requires an exact rate of interest in tort actions is not meant to implicitly grant an automatic award of post-judgment in nontort actions. Rather, the purpose of specifying the rate of interest in tort actions ensures that the constantly-changing federal interest rate is made part of the record. In tort actions, interest is calculated by taking the Federal Funds Rate on the given day of the judgment and adding five percent. Therefore, post-judgment interest in tort actions is invariably a fluid rate that changes depending on the day that judgment is entered. That is not a concern in nontort actions where post-judgment interest is assessed at either (1) the statutorily fixed-rate of nine percent; or (2) in the case of actions upon written instruments, the interest rate specified within the contract. With nontort actions, the interest rate is static and already part of the record at the time of judgment. See Mo. Rev. Stat. § 517.031 (instructing that parties should attach a copy of the written instrument upon which they are suing at the time of filing).

The added statutory requirement of specifying the applicable rate of interest in tort actions does not provide an automatic award of post-judgment interest in nontort actions. It simply means that parties must ensure post-judgment interest is awarded on all judgments (tort and nontort) *and* specify the applicable rate of interest as of the date of the judgment for tort actions. The Missouri Supreme Court in McGuire made this point explicitly: "The

judgment did not award post-judgment interest ***OR*** state an applicable interest rate as prescribed in section 408.040." McGuire, 447 S.W.3d at 661 (emphasis added). If tort actions are treated differently because the statute requires the exact interest rate to be specified, there would have been no need for the Supreme Court to make the additional point that "the judgment did not award post-judgment interest…as prescribed in section 408.040." The Supreme Court would have simply stated that the judgment did not "state the applicable rate of interest" and left it at that. Of course, the Supreme Court did not make such a narrow holding because post-judgment interest needs to be awarded within the judgment for all actions. As the Court of Appeals instructed in Peterson, the state of post-judgment interest in Missouri is clear:

> After *McGuire*, however, it is evident that an interest award pursuant to Section 408.040 [without limitation to any subsection] must be made in the original judgment, pursuant to a timely amendment following a Rule 78.07 motion, pursuant to Rule 75.01, or even pursuant to a *nunc pro tunc* where there is evidence in the record that the trial court intended to include an interest rate or order payment of interest at the time the judgment was entered.

Peterson, 460 S.W.3d at 413.

Here, as Appellants outlined in each of their Petitions, Respondents did not obtain an award of interest in the original judgment, file a timely motion to amend the judgment, or show that the presiding judge intended to award interest at the time judgment was entered. Under Missouri law, Riezman Berger were thus prohibited from seeking post-judgment interest in its garnishment, and violated the FDCPA when it seized post-judgment interest that was not awarded.

E. Judgments are to be construed as complete and correct absent a timely motion.

Judgments are not only presumed to be free of clerical errors, but are "presumed to be correct." Kells v. Missouri Mountain Properties, Inc., 247 S.W.3d 79, 81 (Mo. App. S.D. 2008); Pirtle v. Cook, 956 S.W.2d 235, 243 (Mo. banc 1997). This "presumption of validity that surrounds a judgment extends to every essential fact that must have existed in order for the court to enter a valid decree." Nandan v. Drummond, 5 S.W.3d 552, 557 (Mo. Ct. App. W.D. 1999) citing Linzenni v. Hoffman, 937 S.W.2d 723, 725 (Mo. 1997). This allows parties to understand their legal obligations imposed by the judgment upon review of the document itself. Lombardo v. Lombardo, 120 S.W. 3d 232, 244 (Mo.Ct.App. W.D. 2003) ("[W]here the language of the judgment is plain and unambiguous, we do not look outside the four corners of the judgment for its interpretation."). There is nothing ambiguous about the judgments at issue in this appeal, thus the presumption should be that they were complete as entered.

This presumption is essential to the execution process, which requires garnishments to be issued to the person in whose favor judgment was rendered "*in conformance therewith*." § 513.015 R.S.Mo. (emphasis added). Under Missouri law, a judgment creditor is entitled to "execution for the amount shown to be due *on the judgment*, but should not be permitted to tie up property of the judgment debtor by execution and garnishment *for an amount in excess thereof*." Pflanz v. Pflanz, 177 S.W.2d 631, 636 (Mo. App. St.L. 1944) (emphasis added).

The general principle that post-judgment interest cannot be collected when it is not specifically awarded in the judgment carries even greater force in the context of consent judgments, like that signed by Appellant Dennis. LF, p. 7, Plaintiff Dennis' Petition, ¶¶ 15-17. Consent judgments differ from a "judgment rendered on the merits, because it is primarily the act of the parties rather than the considered judgment of the court." Boillot v. Conyer, 887 S.W.2d 761, 763 (Mo. App. E.D. 1994) (citation omitted). A consent judgment is contractual in nature. American Family Mut. Ins. Co. v. Hart, 41 S.W.3d 504, 510 (Mo.App.W.D. 2000). In Hart, a judgment creditor filed a motion for prejudgment interest after the entry of a consent judgment. Id. at 508. Although the consent judgment was silent as to the issue of prejudgment interest, the judgment creditor claimed "they were automatically entitled to prejudgment interest under § 408.040." Id. at 510. The court rejected the creditor's contention, noting that the consent judgment entered is based upon the terms of the agreement between the parties. Id. Thus, the court concluded that the creditor had no claim for an automatic award of interest under section 408.040 because the creditor failed to reserve the right in the consent judgment. Id. at 511.

If a requested remedy is missing from a judgment, parties possess thirty-days following the entry of a judgment to motion the Court to "vacate, reopen, correct, amend, or modify its judgment." Missouri Rule of Civil Procedure 75.01; State ex rel. State Highway Commission v. Galloway, 292 S.W.2d 904, 912 (Mo. Ct. App. 1956). Failure to file a timely motion to amend the judgment therefore waives any dispute that the judgment does not "say what it says."

In Galloway, the Missouri Supreme Court affirmed a decision of the Court of Appeals finding that a landowner waived his statutory and constitutional rights to mandatory interest in a condemnation action by failing to secure such interest within the original judgment. State ex rel. State Highway Comm'n v. Galloway, 300 S.W.2d 480 (Mo. 1957), affirming 292 S.W.2d 904 (Mo. App. Sprfld. 1956). The Court agreed that interest for the delayed payment was "a part of the 'just compensation' required by the Constitution from the date of the filing of the commissioners' award to the date of final judgment in the condemnation action." Id. at 910. Even so, the proper time to seek "mandatory" interest on a damages award is either within the judgment itself or by motion *before* the judgment becomes final and appealable.

> Under the procedure in Missouri the only method that could be followed in allowing interest for delayed payment of the award, as a part of the just compensation due respondents, would be to allow the court, upon motion of respondents and within the time the court is empowered to act, to amend the judgment by adding to the amount of the award of the jury such interest or to amend the verdict of the jury so as to allow interest on the amount so found at the legal rate. This was not done by respondents and it is the judgment of this court that, **while respondents were legally entitled to interest** as prayed for in their motion and as awarded by the trial court, **they waived that right by not presenting it to the trial court in proper time**.

Id. at 912 (emphasis added).

Respondents waived their right to post-judgment interest by not presenting such a request to the Trial Court. They are now trying to turn the presumption that judgments are accurate on its head. Since post-judgment interest did not exist at common law, whether the statute provides for the automatic award must be strictly construed. The statute "allows" creditors to obtain the award of post-judgment interest. The legislature used the words "shall be allowed" for prejudgment interest in nontort actions, for post-judgment interest in tort actions, and post-judgment interest in nontort actions. The Missouri Supreme Court and Courts of Appeals have already held that the words "shall be allowed" do not provide for the automatic recovery of prejudgment interest in nontort actions and post-judgment interest in tort actions. See McGuire, 447 S.W.3d at 665 (denying defendants' argument that "interest is automatic insofar it does not require any party to make a request."); Hart, 41 S.W.3d at 510 (denying creditors argument that "they were automatically entitled to prejudgment interest under § 408.040."). Respondents now want a special carve-out for nontort post-judgment interest that is not supported by the language of the statute or by case law.

The provisions of section 408.040 R.S.Mo, must be harmonized together. This is precisely why the McGuire, Peterson, and Green Jacobson decisions all spoke in terms of section 408.040 R.S.Mo. as a whole, without limitation to any subsection. Appellants did not agree to pay post-judgment interest on the judgments, and the underlying courts did not award that remedy. As such, Appellants respectfully request this Court reject Respondents' attempt to amend the substance of the judgments through legal argument and reverse the judgment of the Trial Court.

II. The Trial Court Erred in Dismissing Appellants' Petitions alleging a violation of the FDCPA as to Respondent Riezman Berger, P.C. for collection of post-judgment interest because it falsely represented the amount of the debt in violation of 15 U.S.C 1692e(2)(A), in that Defendant failed to disclose that interest would be accruing.

Even assuming, *arguendo*, that post-judgment interest automatically attaches under Missouri law without any award in the judgment itself, Riezman Berger is asking this Court to adopt an interpretation that is nevertheless violative of the FDPCA itself. Under the FDCPA, even where all parties *agree* that interest is otherwise authorized, a debt collector must nevertheless disclose that it will assess interest on the balance listed within its collection communication. If the debt fails to do so, it violates Section 1692e, which broadly prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Section 1692e provides a non-exhaustive list of conduct that constitutes a *per se* violation of the Act, including "[t]he false representation of the character, amount, or legal status of any debt." Id. § 1692e(2)(A). This requirement applies to all collection communications. 15 U.S.C. § 1692e.

The FDCPA defines a "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). A judgment conveys information about a consumer's obligations to pay money; most importantly, the alleged amount of the debt. Courts have expressly held that "the FDCPA applies to pleadings filed in state court actions." Mueller v. Barton, No. 4:13-CV-2523 CAS, 2014 WL 4546061, at *7 (E.D. Mo. Sept. 12, 2014) (denying motion to dismiss

Section 1692e claim arising out of collection communications in conjunction with a consent judgment).

The amount of a judgment is misleading "where it can be reasonably read to have two or more different meanings, one of which is inaccurate." Michalek v. ARS Nat. Sys., Inc., Civil Action No. 3:11–CV–1374, 2011 WL 6180498, *4 (M.D. Penn. Dec. 13, 2011). If a judgment does not even hint at the accrual of interest, it misleads the unsophisticated consumer because "it would be possible to interpret 'balance' to mean that it was either a dynamic or static amount." Id. Accordingly, if late charges, interest, and other fees will accumulate after the date of the judgment, increasing the actual balance due, the debt collector must provide a disclosure of the same. Jones v. Midland Funding, LLC, No. 3:08–CV–802 (RNC), 2012 WL 1204716, at *2 (D. Conn. April 11, 2012). The reasoning for such an interest-disclosure requirement is manifest: it "prevent[s] confusion by debtors for whom the 'exact amount due' is a constantly shifting target due to accruing interest and accumulating unpaid charges." Veach v. Sheeks, 316 F.3d 690, 693 (7th Cir. 2003). A debt collector thus violates Section 1692e(2)(A) when it merely states a single "balance due" and fails to state disclose that interest is accruing on the account. Dragon v. I.C. System, Inc., 483 F. Supp. 2d 198, 202 (D. Conn. 2007).

The noted decision of the Seventh Circuit Court of Appeals in Miller v. McCalla even provided debt collectors with exemplar language:

> As of the date of this letter, you owe $___ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount

shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number].

Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 876 (7th Cir. 2000). The Court clarified that debt collectors need not use this precise language, but they must notify consumers of any accruing fees and interest. Id.

The local federal district courts and Missouri circuit courts have agreed with this requirement. By way of example, in Christopher Fisher v. Consumer Adjustment Company, Cause No. 13JE-AC05847, the Jefferson County, Missouri Associate Circuit Court addressed whether collection communications must disclose the accrual of interest under Section 1692e. Appendix, A41-43. The court, after conducting "painstaking review" of the pleadings and the relevant case law on interest nondisclosure, the defendants' motion to dismiss. Appendix, A41. The court concluded that "[t]he Miller Court, by means of actual holding, was telling debt collectors" that if they are attempting to collect interest, they possess "a duty to use 'some form of words' to notify the debtor that the debt amount may vary from day to day." Appendix, A42. The court thus held that "[i]f a debt collector wants to collect interest that is accruing on a debt, then the collector must notify and disclose such to consumers like plaintiff with 'safe harbor' or similar 'heads up' language on its collection letters. . Should a debt collector fail to do so, then the collection letter does not correctly state the amount of the debt and violates the FDCPA." Appendix, A42-A43. This holding accords with the plain language of the

Section 1692e, which requires debt collectors to accurately represent the entire amount and character of a debt they are attempting to collect.

Similarly, the District Court for the Eastern District of Missouri has held that debt collectors must apprise consumers under Section 1692e that interest will be accruing on their account *if* the debt collectors are seeking to collect such interest beyond the static balance within their collection communication. Wideman v. Kramer and Frank, P.C., No. 4:14CV1495 SNLJ, 2015 WL 1623814 (E.D. Mo. Apr. 10, 2015) and Ray v. Resurgent Capital Servs., L.P., No. 4:15CV272 JCH, 2015 WL 3453467 (E.D. Mo. May 29, 2015). In Mueller v. Barton, the plaintiff filed an FDCPA claim against a debt collection law firm because the consent judgment did not indicate interest would accrue on the debt while she was making payments. Mueller, 2014 WL 4546061, at *8. The plaintiff reasoned that the undisclosed interest "would continually drive up the balance of the judgment, which is a violation of the general prohibition against deception in § 1692e, and of the interest disclosure requirement in § 1692e(2)(A)." Id. The Court agreed because an uninformed consumer would likely "believe interest would not accrue on a judgment." Id. Thus, the Mueller Court concluded that, with respect to the consent judgment, the plaintiff had stated a claim under Section 1692e regarding the undisclosed accrual of interest during the pendency of voluntary payments on the judgment. Id.; accord Moss v. Barton, No. 4:13-CV-2535 RLW, 2016 WL 1441146, *3-*4 (E.D. Mo. 2016).

Most recently, the Second Circuit Court of Appeals reiterated that "the FDCPA requires debt collectors, when they notify consumers of their account balance, to disclose that the balance may increase due to interest." Avila v. Riexinger & Associates, LLC,

Docket Nos. 15–1584 (L), 15–1597, - F.3d -, 2016 WL 1104776, *3 (2nd Cir. 2016). Because of the defendant's failure to do so in that case, the plaintiffs "stated a claim that the collection notices…are misleading within the meaning of Section 1692e." Id. at *2. The Court noted the alleged violations of the FDCPA are viewed using the unsophisticated-consumer standard. Id. at *2. This standard is designed to protect consumers of below average sophistication or intelligence without having the standard tied to the very last rung on the sophistication ladder." Strand v. Diversified Collection Service, Inc., 380 F.3d 316, 317 (8th Cir. 2004). Applying these principles, the Second Circuit Court of Appeals found that an unsophisticated consumer would be misled because of undisclosed accruing interest, even if there was no question that the debt collector was otherwise legally entitled to such interest. Avila, 2016 WL 1104776 at *3.

The judgments and corresponding garnishments at issue in this appeal are similarly misleading within the meaning section 1692e. An unsophisticated consumer could read the static amount listed within the judgment and be misled about the fact that it would change daily due to ever-accruing interest that Riezman Berger was attempting to collect but failed to disclose. A consumer who pays the entire balance listed on the judgment should have the reasonable expectation that he has discharged his obligation, especially when viewed through the lens of an unsophisticated consumer. See Lombardo v. Lombardo, 120 S.W. 3d 232, 244 (Mo. Ct. App. W.D. 2003). ("[W]here the language of the judgment is plain and unambiguous, we do not look outside the four corners of the judgment for its interpretation."). In actuality, due to the constant accrual of (undisclosed) interest, such a consumer would not be entitled to a satisfaction of judgment. Since post-

judgment payments are first credited to post-judgment costs, then to post-judgment interest, and only then to the original judgment balance, the consumer would still have a remaining balance that would continue to balloon due to undisclosed interest. As a result, even after the consumer paid the entire amount listed within the judgment, he would unknowingly be subject to additional executions as well the continued existence of a lien on real property.

Even if Respondents were not required to obtain an award of post-judgment interest in order to obtain the legal authority to assess such interest – an assertion with which Appellants strenuously disagree – "requiring such disclosure best achieves the Congressional purpose of full and fair disclosure to consumers that is embodied in Section 1692e." Avila, 2016 WL 1104776 at *3. In this case, the money judgments the Respondents' obtained against the Appellants that did not specifically disclose that they would seek ever-accruing interest beyond the static balance included on the face of the judgment. Even if this Court adopts Respondents' unsupported argument that post-judgment interest in non-tort cases "automatically" attaches under Missouri law, that does not end the analysis. For purposes of Section 1692e(2)(A), it does not matter if Riezman Berger was authorized to assess and collect interest beyond the static balance of that it listed within its judgments. The FDCPA has a separate section that addresses a debt collector's attempt to collect an amount unless it is legally authorized to do so. 15 U.S.C. § 1692f(1). Under Section 1692e, however, the focus is on the accurate representation to Appellants regarding the full amounts of the debts Riezman Berger was collecting. As a result of Riezman Berger's failure to disclose that it was assessing and attempting to collect

interest beyond the bare judgment balance, any attempt to collect that undisclosed interest via its subsequent garnishments was a violation of the FDCPA.

III. The Trial Court Erred in Dismissing Appellant Dennis' Petition alleging a violation of the FDCPA as to Respondent Riezman Berger, P.C. for failing to credit all of Appellant Dennis' payments when issuing a garnishment, because Respondent Riezman Berger, P.C violated 15 U.S.C § 1692e(2)(A) and 15 U.S.C. § 1692f(1), in that it overstates the amount of debt.

In addition to pleading that he is a consumer, the alleged debt was for a personal, family, or household purpose, and Respondent Riezman Berger is a debt collector, Appellant Dennis also pleaded that Riezman Berger refused to credit a number of his voluntary payments and proceeded to seize funds from Plaintiff's personal bank account for the already paid-for amount. LF, pp. 8-10, Plaintiff Dennis' Petition ¶¶ 23-33 35, 36, 49-52. Regardless of whether post-judgment interest was awarded, Appellant Dennis stated a claim related to Riezman Berger's overstatement of the debt.

In his Petition, Appellant Dennis alleged the following facts:

- He made voluntary payments totaling $300. LF, p. 8, Plaintiff Dennis' Petition, ¶¶ 23- 29.
- Respondents only gave him credit for $200.00 on the garnishment. LF, p. 9, Plaintiff Dennis' Petition, ¶ 38.
- Through their collection attempt, Respondents caused his checking account to be depleted to a zero balance**.** LF, p. 9, Plaintiff Dennis' Petition, ¶ 38.
- Respondents forced him to borrow money in order to deposit enough funds to cover the garnishment so that he could then regain use of his checking account. LF, p. 9, Plaintiff Dennis' Petition, ¶ 41.

- As a result of Respondents' garnishment, his bank assessed a $50.00 fee for failure to maintain funds in his account. LF, p. 9, Plaintiff Dennis' Petition, ¶ 42.
- Had Respondents only issued a garnishment for the amount he actually owed, $672.94, he would have had enough funds in his account to cover the garnishment and would not have been assessed the $50.00 bank fee. LF, p. 9, Plaintiff Dennis' Petition, ¶ 43.

The trial court was obliged to take these averments are true and liberally grant to plaintiff all reasonable inferences therefrom. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo. 1993). Section 1692e prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "[t]he false representation of the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). The FDCPA also prohibits debt collectors from using unfair means to collect a debt, including "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principle obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). Under both sections, debt collectors are "strictly liable for attempting to collect an incorrect debt, regardless of their knowledge of the accuracy of that debt." Erickson v. Johnson, No. CIV.05-427 (MJD/SRN), 2006 WL 453201, at *3 (D. Minn. Feb. 22, 2006).

By not crediting all of Appellant Dennis' payments, Respondents' garnishment sought a balance greater than the remaining balance Appellant could have owed on the consent judgment. Since the garnishment credited only $200.00 of the $300.00 Appellant paid, Respondents still misrepresented the amount of the debt by at least $100.00, even

ignoring the unlawful post-judgment interest. By issuing a garnishment that overstates the amount of the debt, Riezman Berger "misrepresent[ed] the debt in contravention of § 1692e and [sought] to collect an amount that is not permitted by law in contravention of § 1692f(1)." Clark v. Capital Credit & Collection Serv., 460 F. 3d 1162, 1178 (9th Cir. 2006).

In Asch v. Teller, a debtor collector was found to have violated sections 1692e(2) and 1692f(1) by engaging in similar collection conduct that is at issue in this appeal. Asch v. Teller, Levit & Silvertrust, P.C., No. 00-C-3290, 2003 WL 22232801, *5 (N.D. Ill. Sept. 26, 2003). There, the debt collection law firm admitted that it was not applying every payment it received from debtors on the actual date of receipt. Id. As a result, the plaintiffs filed an FDCPA case alleging that the defendant was thus creating false payment histories and artificially-inflated account balances. Id. at *3. The Court agreed, holding that payment "should be credited…at the time it is *received*." Id. (emphasis in original). The Court found that as a result of the "improper crediting," the defendant had "falsely represented the amount of a debtor's debt" in violation of section 1692e(2), and "collected more money than it was owed, in violation of Section 1692f(1)." Id. at *5.

"Because the FDCPA is a remedial, strict liability statute, [plaintiff] need not prove …actual damages to recover under the FDCPA." Knoll v. Allied Interstate, Inc., 502 F. Supp. 2d 943, 948 (D. Minn. 2007). Nevertheless, the harm to Appellant Dennis is not theoretical. Respondents did not just seek from Dennis an unlawful balance within their garnishment request, they ultimately seized from him more money than that to which they were legally entitled. LF, p. 9, Plaintiff Dennis' Petition, ¶ 36. Moreover, Dennis incurred

an additional $50.00 bank fee that could have been avoided but for Respondents' improper garnishment. LF, p. 9, Plaintiff Dennis' Petition, ¶ 42. Respondents' conduct is the very type of "abusive debt collection practice" that the FDCPA is designed to eliminate. See 15 U.S.C. 1692(e).

IV. The Trial Court Erred in Dismissing Appellants' Petitions alleging a violation of the Missouri Merchandising Practices Act as to both Respondents for collecting post-judgment interest, because it is an unfair and deceptive business practice in violation of 407.020 R.S.Mo., in that the judgments entered against Appellants in the underlying collection cases did not include an award of post-judgment interest and section 408.040 does not provide for automatic interest to attach to a judgment.

Appellants' Petitions "should be held as good" against the "general motion to dismiss for failure to state a claim upon which relief can be granted" filed by Mercy Hospital and Riezman Berger. Household Finance Corporation v. Avery, 476 S.W.2d 165, 168 (Mo. Ct. App. 1972). "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." Nazeri v. Missouri Valley College, 860 SW 2d 303, 306 (Mo. 1993). In this case, each Appellant pleaded each element necessary for a claim pursuant to the Missouri Merchandising Practices Act ("MMPA").

To state a claim under the MMPA at the initial pleadings stage, Appellants need only allege that (1) they purchased "merchandise", (2) for personal, family, or household purposes, (3) Respondents caused them to suffer an ascertainable loss of money, and (4) this loss was the result of an act declared unlawful under the MMPA. Edmonds v. Hough, 344 S.W.3d 219, 223 (Mo. App. 2013); *see* RSMo. § 407.025.1.

First, Appellants purchased "merchandise" in the form of medical services. LF, pp. 7, 12, Plaintiff Dennis' Petition, ¶¶ 14, 59; LF, pp. 77, 80, Plaintiff Cherry's Petition, ¶¶

14, 39. The MMPA defines "merchandise" as "any objects, wares, goods, commodities, intangibles, real estate or services." Section 407.010(4). "Medical goods and services meet the statutory definition of merchandise as defined by section 407.010(4)." Freeman Health System v. Wass, 124 S.W.3d 504, 507 (Mo. App. S.D. 2004). Second, each of the Appellants' purchase of medical services was made for personal use. LF, p. 12, Plaintiff Dennis' Petition, ¶ 60; LF, p. 80, Plaintiff Cherry's Petition, ¶ 40. Critically, this transaction would not be complete until Plaintiff paid for the services.

Each Appellant pleaded facts to establish that Respondents' acts were "in connection with" the purchase of medical services. § 407.020.1 R.S.Mo. Mercy Hospital is the original creditor, such that "[t]he sale between Mercy and Plaintiff created a relationship that applied to the performance of duties related to the sale, including Defendants' collection of unpaid payments arising out of the medical service." LF, p. 12, Plaintiff Dennis' Petition, ¶¶ 59-61; LF, p. 80, Plaintiff Cherry's Petition, ¶¶ 39-41; Conway v. CitiMortgage, Inc., 438 S.W.3d 410, 416 (Mo banc. 2014). The Missouri Supreme Court has held that "[g]iven that the MMPA was enacted to supplement the common law definition of fraud, there is no compelling reason to interpret 'in connection with' to apply only when the entity engaged in the misconduct was a party to the transaction at the time the transaction was initiated." Conway v. CitiMortgage, Inc., 438 S.W.3d 410, 415 (Mo banc. 2014). Conway held that "how a party enforces the terms of a 'sale' is 'in connection with' the original sale of merchandise," and thus "a party's right to collect a loan is part of that sale and is . . . 'in connection with' the loan." Id. The Missouri Supreme Court explained:

> While the MMPA states that a violation can happen at any time before, during or after a sale, it does not set out when an unlawful act is committed "in connection with" the sale. When a statute does not include a definition for a term, courts consider its plain and ordinary meaning. While the full phrase "in connection with" is not in the dictionary, "to connect" is defined as "to have a relationship." In this light, section 407.020.1 prohibits the use of the enumerated deceptive practices if there is a relationship between the sale of merchandise and the alleged unlawful action. According to the statute, the unlawful action may occur at any time before, during or after the sale and by any person.

Conway, 438 S.W.3d at 414 (citations omitted). Under this precedent, both Mercy Hospital and Riezman Berger's collection activity was "in connection with" the payment obligations for the medical services rendered to Appellants.

Respondents' unfair and deceptive business practices caused each Appellant an ascertainable loss of money. The garnishments on both Appellants seized post-judgment interest that was not awarded on the face of the judgment. Appellant Dennis paid $123.41 in illicit post-judgment interest, the entire amount Respondents improperly included in the garnishment. LF, p. 9, Plaintiff Dennis' Petition, ¶¶ 34, 36. Respondents seized over $350.00 from Appellant Cherry via garnishment, all of which they applied to the non-existent post judgment interest per section 408.040(1) R.S.Mo. LF, p. 78, Plaintiff Cherry's Petition, ¶¶ 23-25, 27. Additionally, because Respondents collected the entirety of their

garnishment of Appellant Dennis, he lost the benefit of the $100.00 that Respondents failed to credit. LF, pp. 8-9, Plaintiff Dennis' Petition, ¶¶ 23-30, 35. Respondents also caused Appellant Dennis to incur a $50.00 bank fee by seeking an improper garnishment balance. LF, p. 9, Plaintiff Dennis' Petition, ¶ 42.

Respondents knowingly and willfully used deception, lies, misrepresentation, and unfair business practices when they unlawfully inflated the amount of the alleged debts to include post-judgment interest that was not awarded. As discussed herein, the Missouri Supreme Court, the Missouri Courts of Appeals, and the text of section 408.040 R.S.Mo. do not allow for post-judgment interest to automatically attach to a judgment. See Section I, *supra*. Respondents' judgments did not provide for the recovery of post-judgment interest, nor did Respondents file a motion to amend the judgment. Respondents nevertheless sought to collect post-judgment interest through their garnishments. Doing so offends the public policy as it has been established by the statutes and common law of Missouri. See 15 C.S.R. 60-8.020; McGuire v. Kenoma, LLC, 447 S.W.3d 659 (Mo. banc 2014); Section 408.040(2) R.S.Mo. By violating state and federal laws intended to protect the public, it is also an unfair practice under the MMPA. 15 C.S.R 60-8.090. Accordingly, the Trial Court erred in granting Respondent Mercy's motion to dismiss, as each Appellant stated a cause of action under the MMPA.

V. The Trial Court Erred in Dismissing Appellant Cherry's Petition alleging wrongful garnishment as to both Respondents because her wages were garnished for an amount she did not owe, in that the judgments entered against Appellants in the underlying collection cases did not include an award of post-judgment interest and section 408.040 does not provide for automatic interest to attach to a judgment.

Appellant Cherry has pleaded the necessary elements to state a claim for wrongful garnishment. To bring an action for wrongful garnishment, "a plaintiff must allege that the garnished property is his property and also must allege abuse or misuse of the garnishment statute." Howard v. Frost National Bank, 458 S.W.3d 849, 854 (Mo. App. 2015). Here, Appellant Cherry alleges that Respondents garnished his property, namely her wages. LF, p. 81, Plaintiff Cherry's Petition, ¶¶ 52-54. Respondents abused and/or misused the garnishment statute by taking post-judgment interest in the garnishment when the judgment did not provide for such interest. Id. at ¶¶ 55-57. Respondents did not address this cause of action directly in their respective motions to dismiss. Riezman Berger's arguments regarding post-judgment interest are addressed entirely by the previous sections. *See supra* Part I. Plaintiff therefore incorporates those arguments herein by reference. Mercy Hospital's motion to dismiss did not provide any specific grounds or state any specific deficiency with the Petition. LF, p. 90. Reviewing Appellant Cherry's Petition in academic manner reveals that she alleged the necessary elements of a recognized cause of action. City of Lake Saint Louis v. City of O'Fallon, 324 S.W.3d 756, 759 (Mo. banc 2010). Therefore, Appellant Cherry respectfully request this Court reverse the judgment of the Trial Court as to the dismissal of her wrongful garnishment cause of action.

CONCLUSION

For the reasons set for above, Appellants Thomas Dennis and Sonya Cherry respectfully request that this Court reverse the Trial Court's Judgment dismissing Plaintiffs' FDCPA, MMPA, and Wrongful Garnishment claims with prejudice, and remand the case for further proceedings in accordance with the Missouri Rules of Civil Procedure.

Respectfully submitted,

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Thomas Dennis, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	**Case No. ED103904**
Sonya Cherry, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Appellants' Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b).

Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 12,786.

The undersigned further certifies that this Appellants' Brief and was scanned for viruses and found virus-free. Pursuant to Eastern District Local Rule 333(d), due to the fact

that this brief is being electronically filed via the Missouri State Court E-Filing System, a CD-ROM or e-mail version of this brief is not being provided to the Court or any parties.

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CERTIFICATE OF SERVICE

A copy of this Appellants' Brief was filed electronically with the Clerk of the Court on this April 25, 2016, to be served by operation of the Court's electronic filing system upon all participating parties of record:

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