IN THE SUPREME COURT
STATE OF MISSOURI

Thomas Dennis, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	**Case No. SC96038**
Sonya Cherry, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	

APPELLANTS' SUBSTITUTE REPLY BRIEF

Bryan E. Brody, MO #57580
Alexander J. Cornwell, MO #64793
1 N. Taylor Ave.
St. Louis, MO 63108
(314) 932-1068 / Fax (314) 228-0338
BBrody@BrodyandCornwell.com
ACornwell@BrodyandCornwell.com
Attorneys for Appellants,
Thomas Dennis and Sonya Cherry

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I. RIEZMAN BERGER FAILS TO ACKNOWLEDGE, MUCH LESS DISTINGUISH, THIS COURT'S HOLDING IN MCGUIRE V. KENOMA THAT POST-JUDGMENT INTEREST IS A SUBSTANTIVE REMEDY THAT MUST BE AWARDED IN A JUDGMENT.

The discussion of this Court's unanimous *en banc* decision of McGuire v. Kenoma, LLC, 447 S.W.3d 659 (Mo. 2014) appears just once throughout Riezman Berger's entire response, on page 13. Riezman Berger's passing treatment of McGuire is no accident. It would be impossible for Riezman Berger to simultaneously maintain a good faith argument that post-judgment interest is "automatic" while also acknowledging the substance of this Court's decision. Faced with such a choice, Riezman Berger attempts to narrow the holding in McGuire to its bare facts of involving a tort claim, which ignores the language and reasoning of this Court's prior decision.

An actual reading of the McGuire decision reveals that the plaintiff there made the same argument that comprises the entirety of Riezman Berger's position on appeal: post-judgment interest under Section 408.040 "is automatic insofar 'it does not require any party to make a request.'" Id. at 665. After reciting this assertion, this Court proceeded to reject the argument and the applicability of the case law that plaintiff cited. In an attempt to side-step this Court's holding in McGuire, Riezman Berger argues that the requirement of obtaining an award of post-judgment interest only applies to tort actions. This Court already addressed and rejected this argument as well. Riezman Berger points to Section 408.040's added requirement in tort actions that judgments must also recite the

"rate" of interest based on the fluctuating federal funds rate that applies on the given date of the judgment (as opposed to the static contract rate or statutory rate applicable to non-tort actions). This Court made clear, however, that the judgment creditor's error in McGuire was not simply the failure to include the *rate* of interest but also the lack of a substantive *award* of post-judgment interest as a whole. Indeed, this acknowledgment appears repeatedly throughout the McGuire decision:

- "[E]ven if the post-judgment interest is mandated by statute, "an omission of ***an award of interest*** cannot be considered a mere clerical error…." Id. at 667 (emphasis added).
- "Without evidence in the record to indicate that ***the award*** of post-judgment ***interest*** was actually made, the omission of the mandatory statutory language in a judgment is mere error…." Id. (emphasis added).
- "Though the trial court should have included ***the award*** of post-judgment interest in its original judgment, it did not; **NOR** is there any evidence in the record showing the court's intention to set the interest rate." Id. (emphasis added).
- "The judgment ***did not award*** post-judgment interest **OR** state an applicable interest rate as prescribed in section 408.040." Id. at 661 (emphasis added).

The last two quoted portions of McGuire above are particularly telling, as they undermine the linchpin of Riezman Berger's attempt at distinguishing tort actions and nontort actions under Section 408.040. As illustrated, this Court in McGuire did not rest its decision solely on the fact that the creditor failed to recite the rate of interest. Rather, as this Court held, a judgment creditor must obtain an "award" of post-judgment interest

under Section 408.040 if it subsequently wishes to collect such interest. Under McGuire, a plaintiff must obtain an award of post-judgment interest on all judgments – tort and nontort – and in the case of tort actions, must also specify the applicable rate of interest as of the date of the judgment, given the fluctuating federal funds rate. Riezman Berger does not even attempt to address the portions of the McGuire decision that are inconsistent with its desired import of Section 408.040. This is a tacit admission that it does not possess any valid response.

Judge Dowd, Judge Quigless, and Judge Van Amburg of the Missouri Court of Appeals concluded that while McGuire involved a tort action, the "*reasoning* behind the [McGuire] decision and its progeny" necessarily applies to nontort actions as well. Dennis v. Riezman Berger, P.C., No. ED 103904, 2016 WL 5030349, at *4 (Mo. Ct. App. Sept. 20, 2016) (emphasis added). The Court of Appeals found that faithful application of the principles this Court enunciated in McGuire mandated that interest must be awarded on the judgment. Along with the Court of Appeal's decision in the instant case, multiple other unanimous appellate panels from our state have addressed McGuire's application to Section 408.040 as a whole and confirmed that post-judgment interest does not automatically and silently attach to all judgments. Peterson v. Discover Prop. & Cas. Ins. Co., 460 S.W.3d 393, 413 (Mo. Ct. App. 2015) ("After *McGuire* . . . it is evident that an interest award pursuant to Section 408.040 [without limitation to any subsection] must be made in the original judgment."); SKMDV Holdings, Inc. v. Green Jacobson, P.C., 494 S.W.3d 537, 561 (Mo. Ct. App. 2016) ("Even 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 judgment."); see also Banks v. Slay, No. 4:13CV02158 ERW, 2016 WL 3971380, at *14 (E.D. Mo. July 25, 2016) ("[T]he court in *McGuire* concluded post-judgment interest should have been included. As a result, it does not matter in this case whether the judgment was in tort or in a non-tort action, because even where the judgment was appropriate, interest was still not allowed because it substantially changed the nature of the judgment.").

To date, sixteen (16) appellate judges from our state have agreed that post-judgment interest is a substantive remedy that must be awarded within a judgment whereas zero have adopted Riezman Berger's position. Even if one were to disregard this precedent, Riezman Berger fails to provide any justification as to why the legislature would allow for the automatic and silent attachment of post-judgment interest for nontort judgments but require an actual award of post-judgment interest in tort actions under the very same statute. The simple answer is that it did not. Section 408.040 uses the same words - "shall be allowed" - when referencing both the award of post-judgment interest in tort and nontort actions. The use of the word "allowed" for both tort and nontort actions indicates that "the trial court has a mandatory duty to grant post-judgment interest ***where sought***, not that such interest is automatic on every judgment." Dennis, 2016 WL 5030349, at *3 (emphasis added). Specifying the rate of interest in tort actions is an *additional* requirement to the inclusion of an award of post-judgment interest in this first instance. Riezman Berger thus asks this Court to adopt a holding that not only ignores the substantive reasoning of this Court's decision in McGuire, but also does not consider Sections 408.040.2 and 408.040.3 *in para materia* and is otherwise irreconcilable with

the required strict construction of a statutorily-created remedy that did not exist at common law.

II. RIEZMAN BERGER NEVER MADE THE ARGUMENT OF "PROSPECTIVITY" TO THE TRIAL COURT NOR DO THE CIRCUMSTANCES SUPPORT THE PROSPECTIVE-ONLY APPLICATION OF MCGUIRE AND/OR THIS CASE.

Likely realizing the lack of logic in its argument that a substantive award of post-judgment interest automatically and silently attaches to all judgments, Riezman Berger defensively resorts to arguing – for the first time – that any holding to the contrary should only apply prospectively. It is unclear as to whether Riezman Berger is advocating for the prospective application of the McGuire decision or the instant decision. Riezman Berger's argument regarding prospective application is neither procedurally proper nor substantively meritorious.

A. Riezman Berger's Prospective-Only Argument is Not Properly Before the Court.

Riezman Berger never argued to the Trial Court that, in the alternative, if McGuire applied to nontort actions, such a ruling should only possess prospective application. As the Court of Appeals acknowledged, a court "will not affirm 'the grant of a motion to dismiss on grounds that are not stated in the motion'" under a *de novo* standard of review. Dennis, 2016 WL 5030349, at *3; see also Thatcher v. Trans World Airlines, 69 S.W.3d 533, 547 (Mo. Ct. App. 2002) (finding that the defendant waived its argument concerning the prospective-only application of a law by raising it for the first time on appeal).

Within its brief five-sentence Motion to Dismiss, Riezman Berger argued that all nontort judgments, regardless of whether they are dated before or after McGuire, automatically include the substantive award of post-judgment interest. The Trial Court then entered its Order granting the Motion to Dismiss without providing the basis for its dismissal. Therefore, it is presumed the Trial Court dismissed Appellants' causes of action for the sole ground stated in Riezman Berger's motion; namely, that all nontort judgments automatically include post-judgment interest even without an actual award of such interest in the judgment. See Duvall v. Lawrence, 86 S.W.3d 74, 78 (Mo. Ct. App. 2002) ("Because the court did not state a basis for its dismissal, we presume that dismissal was based on the grounds stated in each motion to dismiss and will affirm if dismissal was appropriate on any ground supported by the motions."). It is this narrow decision from which the parties seek this Court's review.

B. Neither of the Exceptions to the General Presumption of Retroactive Application of a Judicial Decision are Applicable.

Even assuming Riezman Berger had properly raised the issue of prospective application before the Trial Court, it would have been denied. "At common law there was no authority for the proposition that judicial decisions made law only for the future." Sumners v. Sumners, 701 S.W.2d 720, 722 (Mo. 1985) (citing Linkletter v. Walker, 381 U.S. 618, 622–23, 85 S.Ct. 1731, 1733–34 (1965)). Therefore, "[a] decision overruling a prior rule of substantive law should generally be applied retroactively." Campbell v. Anderson, 866 S.W.2d 139, 144 (Mo. Ct. App. 1993); see also Trout v. State, 231 S.W.3d 140, 148 (Mo. 2007) ("Solely prospective application of a decision is the exception not

the norm"). As this Court has instructed, there are only two limited exceptions to this general rule, see Sumners, 701 S.W.2d at 723, neither of which is applicable here. First, a court may give prospective-only application to a decision if it overrules past precedent concerning a procedural, as opposed to substantive, area of law. Riezman Berger does not argue for the applicability of this exception. That is because this Court has already confirmed that the award of post-judgment interest is a "substantive change to the party's rights." McGuire, 447 S.W.3d at 663; accord Ball-Sawyers v. Blue Springs Sch. Dist., 286 S.W.3d 247, 256 (Mo. Ct. App. 2009) ("Missouri courts have interpreted statutes that affect a measure of damages as remedial and applied them retroactively.").[1]

Instead, Riezman Berger only argues for the application of the second exception: fundamental fairness. Under this exception, a party wanting to give a decision prospective-only effect must establish the following three factors: (1) "the decision in question must establish a new principle of law by overruling clear past precedent;" (2) "the purpose and effect of the newly announced rule will be enhanced [rather than] retarded by retrospective operation;" and (3) "the interests of those who may be affected by the change in the law" outweigh "the possible hardship to those parties who would be denied the benefit of the new rule." Sumners, 701 S.W.2d at 724. Each of these factors strongly militate against, rather than for, the prospective limitation of this Court's

[1] As outlined *infra*, even if the award of post-judgment interest was procedural instead of substantive, this case does not involve "a decision overruling clear past precedent," which is a requirement for either exception to the general principle of retroactive application.

straightforward holding in McGuire and/or the instant Court of Appeal's decision that post-judgment interest is a substantive award that does not automatically and silently attach to a judgment.

1. The "Decision in Question" Does Not Establish a New Principle of Law by Overruling Clear Past Precedent.

It is unclear from Riezman Berger's argument as to whether McGuire or the instant case is the relevant "decision in question" for which it seeks prospective-only application. Regardless, McGuire and the underlying Court of Appeals decision in this case each possess the same holding: a substantive change to a judgment – such as an award of post-judgment interest – must be included on the face of the judgment. These holdings are neither new nor novel. They are consistent with the guiding principle that judgments are presumed to be correct, in general, and the plain language of Section 408.040 that only "allows" parties to obtain post-judgment interest, in particular. Dennis, 2016 WL 5030349, at *6 ("Not only are judgments presumed to be correct, but as a general matter, judgments must be definite and certain to be enforceable.")

In order to demonstrate that these decisions should be given prospective-only effect, Riezman Berger must establish that McGuire and/or the Court of Appeals overruled "**clear** past precedent." Sumners, 701 S.W.2d at 724 (emphasis added). Riezman Berger rests its argument almost exclusively on Laughlin v. Boatman's Nat'l Bank of St. Louis, 189 S.W.2d 974 (Mo. 1945), which is a seventy-year old decision that only addressed *when* interest (that the parties agreed was awarded) began accruing. Riezman Berger's entire discussion of Laughlin is predicated upon an incorrect factual

interpretation of the case; namely, Riezman Berger believes that, in Laughlin, "[t]he judgment was silent on the issue of interest." Substitute Brief of Respondent Riezman Berger, at 6.

Contrary to Riezman Berger's misstatement of the case (which notably does not possess a pinpoint cite to this nonexistent fact), the issue in Laughlin was not whether the trial court did or did not award post-judgment interest. Laughlin, 354 Mo. at 477. In fact, the creditor agreed that post-judgment interest was awarded on the judgment. Id. The issue concerned *when* post-judgment interest, which was otherwise awarded on the judgment, began to accrue. Id. There were three counts at issue in Laughlin, and the circuit court entered judgment on two counts before the last count was retried after an appeal. Id. The judgment creditor claimed that post-judgment interest should not have begun to accrue on the judgment until all counts were final. Id. (conceding that interest was awarded but arguing that "those two counts [should] bear interest from the date of the final judgment on all counts only and not from the date of the original verdicts which were subsequently affirmed…. [T]he mandate and opinion remanding the case [was] silent as to interest"). The Court disagreed and found that the *mandate* remanding the case for retrial on count one did not need to reference interest or state that the judgment was final as to counts two and three. Id.

> Here ***whatever the mandate may have said*** and regardless of when final judgment could be entered on all counts, the verdicts as to counts two and three were affirmed by our former opinion and so far as the interest-judgment statute is

> concerned the determination of those two counts was final. . . . The judgment bears interest by reason of the statute and it is not necessary that it or ***the mandate recite the fact***.

Id. at 477-78 (emphasis added).

The Court held that plaintiff could recover post-judgment interest on counts two and three dating back to the earlier judgment, even though the mandate remanding the case as to count one was silent as to the time period for the accrual of post-judgment interest. Id. at 478. Riezman Berger relies solely upon the out-of-context snippet in Laughlin referencing that judgments "bear interest by reason of the statute and it is not necessary that it . . . recite the fact." At most, such an errant comment is dicta, since Laughlin had nothing to do with whether the underlying judgment awarded interest; as provided, the only question was when the interest that was awarded on the judgment began to accrue. "A case is only authority for what it actually decides." State ex rel. State Highway Comm'n v. Goodson, 365 Mo. 260, 264, 281 S.W.2d 858, 860 (1955). "The reasoning adopted is not a holding or a precedent." Id. On its facts, the Laughlin Court only addressed as a holding whether interest needs to be mentioned in the Supreme Court's mandate remanding the case.

It should also be noted that the term "judgment" possessed a very different meaning when the Laughlin decision was issued in 1945. The Supreme Court Rule defining the word judgment was not adopted until 1987. See Mo. Sup. Ct. R. 74.01. Before then, Missouri courts often used the term colloquially to encompass any action by the Court, including something as routine as a procedural docket entry. See, e.g., Byrd v.

Brown, 641 S.W.2d 163, 165 (Mo. Ct. App. 1982). Viewed in this context, there is a significant question as to whether the "judgment" to which the Laughlin Court was referring was its own original decision and corresponding mandate before the second appeal. Under the actual facts and holding of the case, this is a more consistent reading. If anything, however, it underscores why Laughlin is – at best – dicta and – more fairly – a decision that did not address the issue before this Court at all. The one conclusion that is indisputable is that Riezman Berger cannot rely on Laughlin as the purported "clear" past precedent that McGuire and the Court of Appeals overruled given that its one-sentence comment regarding judgments was not necessary to the decision. "Obiter dicta, by definition, is a gratuitous opinion." Swisher v. Swisher, 124 S.W.3d 477, 482 (Mo. Ct. App. 2003). "Statements are obiter dicta if they are not essential to the court's decision of the issue before it." Id. "While *dicta* can be persuasive when supported by logic, it is not precedent that is binding upon us." Id.

The only relevance that the Laughlin decision possesses in this appeal is that Riezman Berger was forced to cite to it in the first place. The fact that Laughlin is Riezman Berger's main authority is perhaps more telling than anything mentioned in the Laughlin case itself. Therefore, in an attempt to bolster Laughlin, Riezman also dredges up a line of nineteenth century cases it claims supports its proposition that interest on judgments automatically attaches; but, like Laughlin itself, none of them address the central issue in this case.

In the first such case, the only issue was whether the rate of interest of a judgment entered in a *subsequent* action brought by a surety in a replevin bond bore the same rate

of interest as the underlying judgment to which it related. State ex rel. Walsh v. Vogel, 14 Mo. App. 187, 188 (1883). Riezman Berger cites to Walsh for the same proposition that the Laughlin decision cited the case: "[i]n order that the judgment shall bear interest, it was not necessary that the court delivering the judgment should say so and make this statement a part of the judgment." Id. at 189. Similar to its out-of-context citation in Laughlin, Riezman Berger ignores that the Walsh court was not discussing whether post-judgment interest was automatically awarded in the original judgment. The Court held that because the underlying replevin judgment "bore interest at ten per cent, it is plain from the language of the statute cited above [former Revised Statute sect. 2725], that the *judgment upon this judgment* must bear interest at the same rate." Id. (emphasis added). Notably, the plaintiff in that case ensured that its judgment expressly awarded post-judgment interest on the face of the judgment: "the sum of $3,283.20, **with ten per cent interest from this date**, till the said amount is paid, together with the costs of this motion." Id. (emphasis added). As Walsh demonstrates, parties have been properly ensuring that their judgments include an award of post-judgment interest for nearly a century and a half.

Aside from Walsh, Riezman Berger string-cites to multiple other decisions from the nineteenth century. In Catron v. Lafayette County, 25 S.W. 331 (Mo. 1894) the only issue before the Court was whether interest on judgments could be compounded—again, the parties simply did not dispute the fact that interest was properly awarded on the judgment. In Crook v. Tull, 111 Mo. 283, 20 S.W. 8 (1892), the judgment stated that it was rendered upon notes bearing 10% interest. Under these facts, the Court held that the

judgment itself did not need to recite the *rate* of interest that was already part of the record. Id. at 9. In State ex rel. Harrison v. Babb, 77 Mo. App. 277 (K.C. 1898), the decision revolved around the interplay between the interest statute and the intricacies of probate procedure; specifically whether a demand upon the administrator of a decedent's estate could properly trigger the running of interest. Id. Yet again, the question of whether interest was awarded on the judgment was not at issue. Id.

Lastly, among its class of dated decisions, Riezman Berger attempts to rely upon Evans v. Fisher, 26 Mo. App. 541 (St.L. 1887) for its proposition that interest is automatically awarded under Section 408.040. Riezman's reliance on Evans is curious. There, the issue was only what *rate* of post-judgment applied to the judgment, not whether post-judgment interest was awarded in the first place. Rather than sitting back and unilaterally collecting whatever interest rate it subjectively deemed it was entitled to (as Riezman Berger did here), the plaintiff in Evans filed a motion to amend the judgment to award 10% on the judgment rather than the default rate of 6%. Id. at 543. The Court allowed the judgment creditor to amend its judgment to award post-judgment interest at the rate of 10% and, in the process of doing so, made the following astute observation: "A judgment is a record contract**. It is to the interest, not only of the litigants themselves, but of all persons who are likely to be affected thereby, that all the terms of such contract should appear by the entry itself.**" Id. at 544 (emphasis added).

The only (comparatively) recent cases Riezman Berger cites are three Court of Appeals cases that only addressed the omission of the exact *rate* of interest in a judgment,

not the failure to obtain the *award* of post-judgment interest in the first instance. Adkins v. Hontz, 337 S.W.3d 711, 723 (Mo. Ct. App. 2011) ("[Defendant] argues that the trial court erred ***in awarding post-judgment interest*** in its Amended Judgment because it failed to apply the requisite statutory interest rate. . . . It was unnecessary to specify the interest ***rate*** in the judgment itself."); Robinson v. St. Louis Bd. of Police Comm'rs, 212 S.W.3d 165, 167 (Mo. Ct. App. 2006) ("The Board also alleges that Robinson is not entitled to interest on the judgment pursuant to Section 408.040 because the trial court failed to state the applicable interest ***rate*** in its judgment. We disagree."); [2] Cotton v. 71 Highway Mini-Warehouse, 614 S.W.2d 304, 308 (Mo. Ct. App. 1981) ("The judgment entered in favor of Whelan's should, in accordance with the statute, bear interest at the rate of 9 percent from and after the date of its entry, rather than the 6 percent rate ***awarded by the trial court***. The imposition of any interest from the date of judgment until payment is fixed and determined by the statute, and no declaration of the trial court can affect the ***rate***.").

[2] Adkins and Robinson were tort actions and interpreted the prior version of Section 408.040 before the legislature amended the statute and added the additional requirement for tort judgments to recite the specific rate along with obtaining the substantive award of post-judgment interest. Because Appellants are not arguing Riezman Berger failed to recite the applicable *rate* of interest but rather than it failed to obtain the *award* of post-judgment interest as a whole, these decisions do not bear on the issue in this case.

Although it construes its largely century-old decisions as absolving it of any obligation to obtain an award of post-judgment interest, Riezman Berger's own decisions are either dicta or actually reiterate Appellants' point that a creditor is statutorily entitled to such interest *if* it makes a proper request within the original judgment or files a timely post-trial motion or appeal. In this respect, it is actually Riezman Berger who is asking for a departure from "clear past precedent." Once this Court disregards the inapplicable decisions to which Riezman Berger cites, the fact remains that McGuire is consistent with the general rule that substantive remedies should awarded within a judgment.

2. Allowing Litigants to Obtain an Automatic and Silent Award of Post-Judgment Interest Is Contrary to the "Purpose and Effect" of this Court's Holding in McGuire as Well as Judgments as a Whole.

Given that the decision in question is not contrary to past precedent, this Court need not address whether Riezman Berger has satisfied the remaining elements for prospective-only application. See Contel of Missouri, Inc. v. Dir. of Revenue, 863 S.W.2d 928, 930 (Mo. Ct. App. 1993) ("Since the first prong of *Sumners* regarding a break from clear past precedent has not been satisfied, we need not examine whether the second and third prongs of the test are satisfied."). That said, every other available factor strongly militates against a prospective-only application of the principles this Court reaffirmed in McGuire, including those concerning the general "purpose and effect" of judgments.

Judgments 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). "A valid judgment fixes the rights and responsibilities of the parties, with the obligor's duties readily understood so as to be capable of performance, and with the clerk able to issue, and the sheriff to levy, execution." Hall v. Fru-Con Cost. Corp., 101 S.W.3d 318, 319 (Mo. App. E.D. 2003). Courts do not look outside the four corners of the judgment for its interpretation. Lombardo v. Lombardo, 120 S.W.3d 232, 244 (Mo. App. W.D 2003) citing Howard v. Howard, 916 S.W.2d 875, 876 (Mo. App.1996); Saunders v. Bowersox, 179 S.W.3d 288, 294 (Mo. App. S.D. 2005). Moreover, a judgment cannot be modified, explained, or contradicted by extrinsic evidence. Howard 916 S.W.2d at 876 citing Robertson v. Hagan, 782 S.W.2d 780, 781 (Mo.App.1989). Nor should a judgment be modified or amended by a subsequent decision or statute, lest it "violate the principle of finality of judgment." Department of Transp. v. Delta Mach. Prods. Co., 291 S.E.2d 104, 107 (Ga. Ct. App. 1982). Instead, as the Court of Appeals explained, "[t]he rights and responsibilities of the parties and the obligor's duties can be better understood by the parties and anyone else who would have reason to later review the judgment where the post-judgment interest is an express provision of the judgment." Dennis v. Riezman Berger, P.C., 2016 WL 5030349 at *4 (Mo. Ct. App. Sept. 20, 2016).

The judicial administration of any limitation for collection conduct predating McGuire would be antithetical to the "purpose and effect" of judgments. In this case, final judgments were entered against Appellant Dennis and Appellant Cherry that did not award interest. If McGuire is applied prospectively as Respondents desire, then the

judgments at issue in these cases will be substantively modified to include an award of interest that did not originally exist. The parties will necessarily have to look outside the judgments to understand what may be owed.

The McGuire Court and the underlying Court of Appeals decision in this case did not narrowly confine their holdings to post-judgment interest but were rather grounded in general jurisprudence concerning the substantive award of remedies within judgments as a whole. Therefore, if Riezman Berger wishes to confine the content of those decisions prospectively, any judgment dated before November 12, 2014 will be an open invitation for judgment-creditors to unilaterally award themselves other substantive remedies that "shall be **allowed**" but were not included on the face of the judgment. For example, even though Missouri courts have already rejected the suggestion that the same words "shall be allowed" under Section 408.020 provide for an automatic award of pre-judgment interest, see, e.g., Am. Family Mut. Ins. Co. v. Hart, 41 S.W.3d 504, 512 (Mo. Ct. App. 2000), creditors will seek to award themselves pre-judgment interest after-the-fact if the judgment was silent as to that remedy. Similarly, a prospective-only application of this principle would implicate any prior judgment entered in an action involving a statute or contract which provides that the prevailing party "shall be allowed" to recover its attorney's fees. In those cases, even if the judgment was previously silent as to the award of attorney's fees, judgment-creditors could seek to collect unawarded fees under the same reasoning that Riezman Berger advances here with respect to post-judgment interest.

This turns the "purpose and effect" of judgments on their head and requires parties to recite the substantive remedies that are *not* awarded. Judgments in Missouri will become a "donut-hole" system whereby parties are expected to understand what is awarded by reciting a laundry list of remedies that are *not* included and seeing what is left. Riezman Berger's judgment-by-inference theory is contrary to the every principle concerning judgments this Court reaffirmed in McGuire. Even if Riezman Berger would have this Court create a special carve-out for post-judgment interest only and declare that it (but no other substantive remedy) is deemed automatically awarded up to and through November 12, 2014, this too is unworkable. Debtors whose judgments were entered prior to that date would be subject to the payment of post-judgment interest without warning when that same judgment – if entered a single day later – would yield an entirely different result just by virtue of arbitrary timing. Conversely, judgments that possess different wording (i.e. some of which include an actual award of interest whereas others are silent) would be treated the same if they fell on opposite sides of Riezman Berger's proposed "McGuire cut-off" point.

The judgment entered against Appellant Cherry at issue in this case is instructive. On November 11, 2013, before this Court issued its McGuire decision, Riezman Berger obtained a default judgment against Appellant Cherry but did not request, and was not awarded, post-judgment interest on behalf of its client, Mercy Hospital. Then, on February 16, 2016, Riezman Berger obtained a second judgment against Appellant Cherry arising out of a separate medical service. Within that judgment, Riezman Berger properly requested, and was awarded, post-judgment on behalf of its same client, Mercy

Hospital. From Appellant Cherry's perspective, when comparing the face of the two judgments (obtained by the same collection attorney on behalf of the same creditor), one is accruing nine-percent interest per annum whereas the other is not. In actuality, according to Riezman Berger, both possess an award of interest even though there is no indication of that fact on the face of the first judgment and, indeed, the presence of an express award of interests within the second judgment creates the exact opposite inference. This confusion for Appellant Cherry is representative of the impact Riezman Berger's prospective-only treatment would have on Missouri judgments statewide. Litigants will no longer be able to look at the face of a judgment with confidence and know whether post-judgment interest is, in fact, awarded. A prospective-only application of McGuire would thus cast doubt as to the finality and completeness of any judgment entered prior to November 12, 2014.

Not only is Riezman Berger's suggestion premised upon bad law and bad policy, it is arguably unconstitutional. Due process in any proceeding requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W. 2d 86, 88 (Mo. 1985) quoting Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), Riezman Berger suggests a scheme that substantially changes the parties' existing obligations without any hearing or notice. A prospective application of McGuire would allow, and perhaps encourage, a creditor to automatically change to the existing judgment without the need to inform the judgment-debtor.

Most importantly, there is no need to wade into the litany of concerns that arises with a prospective-only application of McGuire and/or the instant case. If, instead, we apply the general presumption that case law applies looking back as well as looking forward,[3] we are left with a simple ruling that is clear for the courts as well as the parties: if a judgment includes an award of post-judgment interest, it is collectible. If the judgment interest does not include such an award, it is not collectible. The alternative that Riezman Berger suggests would have this Court absolve a handful of collectors and creditors of liability at the expense of undermining the confidence in thousands of Missouri judgments.

3. The Balance of Interests of Those Who May Be Affected Weighs Against the Prospective-Only Application of McGuire and/or the Instant Decision.

"Even where . . . a judicial decision changes the construction of a statute, prospective-only application depends on the presence of reliance by the parties." Sumners, 701 S.W.2d at 723. In order to make this determination, "the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible

[3] This also presupposes that this principle came from an overruling decision, but as outlined *supra* in Part II.B.1, the fact that substantive remedies must be awarded on the face of a judgment is anything but a new concept.

hardship to those parties who would be denied the benefit of the new rule. Id. at 724. Here, there is no indication that Riezman Berger detrimentally relied upon the case law it claims was overruled; namely, the Laughlin decision that was decided in 1945. Nor is there any indication that any hardship to creditors from applying this Court's straightforward holding in McGuire would outweigh the hardship to debtors if this Court adopts Riezman Berger's suggestion that certain substantive awards automatically and silent attach to judgments.

i. Riezman Berger did not rely upon prior precedent to purposefully omit the award of post-judgment interest from its judgments.

First, with respect to its reliance, Riezman Berger protests that it relied upon the Laughlin decision to purposefully omit an award of post-judgment interest within judgments at issue here. The suggestion that Riezman Berger made a conscious decision based upon a single clause of dicta within a seventy-year old decision is disingenuous at best. In fact, the only reason Riezman Berger is likely aware of the decision is that it located the case after-the-fact when responding to the instant suit and researching the McGuire decision. Specifically, the Laughin decision was cited by the lower Court of Appeals in McGuire v. Kenoma, LLC, No. WD75873, 2013 WL 5614181, at *2 (Mo. Ct. App. Oct. 15, 2013), transferred to Mo. S.Ct., 447 S.W.3d 659 (Mo. 2014). Not only did this Court not adopt the dicta provided in Laughlin, it expressly disagreed with the lower court's reasoning that included the citation to Laughlin.

Moreover, Riezman Berger's own conduct reveals that it knows the argument it is advancing to this Court is wrong. According to Riezman Berger, it relied upon prior precedent to omit an express award of post-judgment interest when obtaining nontort judgments since it automatically attaches. In reality, and contrary to its argument on appeal, Riezman regularly includes an express award of post-judgment interest in the judgments it obtains in both tort *and* nontort actions. Riezman cannot claim that it was simply being reactive to this lawsuit by choosing to include an award of post-judgment interest going forward out of an abundance of caution. In fact, according to Missouri court records, of which this Court can take judicial notice, there are hundreds of instances in which Riezman Berger sought the express award of post-judgment interest in nontort judgments predating the McGuire decision. See, e.g., Mercy Hospital Jefferson v. John S. Cull, Jefferson County Circuit Court Case No. 13JE-AC03770 (non-tort consent judgment obtained by Riezman Berger dated October 22, 2013 and expressly awarding post-judgment interest).

As further evinced by the fact that Riezman Berger continued to collect unawarded post-judgment interest well-over a year after this Court issued its McGuire decision, Riezman Berger never altered its conduct in response to *any* decision, either before or after obtaining its judgments. Thus, the judgments at issue are not the result of a consistent, purposeful decision to omit post-judgment interest based on the reliance of prior case law. Instead, Riezman Berger neglected to obtain an award of post-judgment interest. Then, instead of filing a motion to amend the judgment, or properly confining its collection efforts to the amount actually awarded, Riezman chose to extra-judicially

add interest to the judgment. There is no question that if Riezman Berger wanted to assess and collect post-judgment interest, it was obligated to obtain such an award at all relevant, including but not limited to before the date of this Court's decision in McGuire. As evidenced by its own conduct, even Riezman Berger agrees with this point.

ii. The impact on judgment-debtors outweighs the impact on judgment-creditors.

While Riezman Berger must demonstrate that the hardship to creditors absent a finding that post-judgment is automatically awarded outweighs the hardship to debtors, the exact opposite is true. The inevitable result of prospective application of McGuire and/or the instant decision is that all existing non-tort judgments would automatically include an award of post-judgment interest. Thus, the vast majority of creditors who were properly limiting their collection efforts to the amount actually awarded on the judgments would be free to assess potentially thousands of dollars in previously-unawarded post-judgment interest. Debtors would see their outstanding balances increase dramatically overnight, without notice or court action. Since judgments remain valid for ten years (or even longer if the judgment is revived by motion or payment), see Mo. Rev. Stat. § 516.350, thousands of debtors will be negatively affected.

To illustrate this reality, Appellants direct this Court's attention to the thousands of judgments Metropolitan St. Louis Sewer District ("MSD") has obtained against debtors every year. See, e.g., Metropolitan St. Louis Sewer District v. Sandra M. James, et al., St. Louis County Circuit Court Case No. 15SL-AC04315. A review of the thousands of judgments and corresponding garnishment requests from Missouri's

Case.Net (over 20,000 from the last five years alone) does not reveal a single occasion in which MSD attempted to collect unawarded post-judgment interest. Vogt v. Emmons, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005) ("[C]ourts may take judicial notice of their own records and ... [those] of other cases when justice so requires."). MSD was never awarded post-judgment interest within any of its judgments and, as a result, it never sought post-judgment interest within any of its wage garnishments. If this Court adopts Riezman Berger's invitation for it to rewrite the substance of those judgments and insert an award of post-judgment interest, tens of thousands of judgments will be affected. That just includes one creditor within a single metropolitan area whereas Riezman Berger wants this result for every judgment statewide.

With respect to the hardship on creditors, Riezman Berger speculates, without support, that most creditors are awarding themselves post-judgment interest after-the-fact, despite the record containing proof that Riezman Berger itself has routinely obtained an award of post-judgment interest within numerous other judgments.[4] However, if there

[4] Appellants note that Riezman Berger's straw man arguments regarding family law judgments fail for this same reason. Riezman Berger has not provided this court a single example of a child support or maintenance judgment not possessing an award of interest and, then, the collection of that judgment requesting such interest. The creditors under these hypothetical circumstances would not be without a remedy; they could seek a modification of the judgment to obtain an award of post-judgment interest. See Lueckenotte v. Lueckenotte, 34 S.W.3d 387, 397 (Mo. 2001). Likewise, Riezman

are truly that many debtors who are being subjected to paying amounts they do not legally owe, that provides further support *against* disturbing this Court's holding in McGuire and the Court of Appeals decision, not *for* it. Riezman Berger's treats post-judgment interest as an automatic entitlement rather than a statutory-only tool that the legislature provided creditors to obtain prompt payment of a judgment. Such a distorted view is premised upon a continued understanding of the fundamental purpose of post-judgment interest: "Judgments do not bear interest either as a matter of legal right or under the common law." A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386, 396 (Mo. Ct. App. 1998).

At most, the impact on creditors and debtors is equivalent. For every creditor and special interest group who wants this Court to provide it an automatic award of post-judgment interest that it neglected to obtain within its own judgment, there is an individual who is sustaining the same, opposite hardship. It is a zero-sum game. By definition, that does not demonstrate the "outweighed" hardship to creditors necessary for prospective-only application. While Appellants do not concede that this Court should consider policy implications at the expense of the correct interpretation of a statute, the

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Berger's characterization that creditors would have to "pay back" the interest ignores the practical reality that the reason interest is accruing in the first place is that the principal amount of the child support or maintenance obligation is not being paid. Therefore, creditors would not have to "pay back" the interest but rather would apply the payments received to the actual judgment balance.

only policy factors that do exist strongly militate against, not in favor of, prospective-application of McGuire and/or the instant decision.

III. RIEZMAN BERGER VIOLATED THE MMPA AND COMMITTED A WRONGFUL GARNISHMENT BY ISSUING GARNISHMENTS IN EXCESS OF THE AMOUNTS THE COURT AWARDED.

Within its Response, the only reference Riezman Berger makes to Appellants' MMPA and Wrongful Garnishment causes of action is its belief that "Points I, III, IV, and V of Appellants' appeal" all turn on the same issue: whether "post-judgment interest must be stated in a nontort judgment in order to accrue." Substitute Response Brief, at 3. Other than this single sentence, Riezman Berger makes no other attempt to respond to Appellants' additional claims under the MMPA or for Wrongful Garnishment. This is consistent with Riezman Berger's motion to dismiss at the trial court level wherein the only basis for dismissal was its argument that it was entitled to assess and collect post-judgment interest that was not awarded within the judgment.

Riezman Berger itself thus concedes that the dismissal of Appellants' MMPA and Wrongful Garnishment claims must be reversed if this Court concludes that Respondents were not permitted to unilaterally and extra-judicially award themselves post-judgment interest under Section 408.040. Since Appellants have already established in their opening Brief, as well as the instant Substitute Reply, that Missouri law requires an award of post-judgment interest on the face of the judgment, this Court should reverse the Trial Court's grant of Riezman Berger's motion to dismiss the MMPA and Wrongful Garnishment claims.

IV. WITHIN ITS MOTIONS TO DISMISS, RIEZMAN BERGER FAILED TO ADDRESS APPELLANTS' ADDITIONAL CLAIMS UNDER THE FDCPA IRRESPECTIVE OF THE AWARD OF POST-JUDGMENT INTEREST.

"The FDCPA is a strict liability statute." Coleman v. Berman & Rabin, P.A., No. 4:14-CV-1090 CEJ, 2015 WL 4524599, at *3 (E.D. Mo. July 27, 2015). Therefore, "a single violation . . . is sufficient to establish civil liability under the Act." Id. (citing Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2d Cir.1993)); see also 15 U.S.C. § 1692k ("[A]ny debt collector who fails to comply with *any* provision of this subchapter with respect to any person is liable. . . .").

When evaluating the propriety of a grant of a motion to dismiss, courts of appeal "will only consider the grounds raised in the motion." City of Lake Saint Louis v. City of O'Fallon, 324 S.W.3d 756, 759 (Mo. 2010). Appellate courts "will not . . . affirm the grant of a motion to dismiss on grounds not stated in the motion." Breeden v. Hueser, 273 S.W.3d 1, 6 (Mo. App. W.D. 2008). Before the Trial Court, Riezman Berger confined its motion to dismiss to the sole argument that post-judgment interest automatically attaches to all judgments. Riezman Berger's Motion to Dismiss was, in effect, a partial motion to dismiss the allegations relating to post-judgment interest only.

Riezman Berger only moved for the dismissal of Appellants' FDCPA for collecting unawarded post-judgment interest. While it is true that Appellants each pled causes of action under 15 U.S.C. § 1692f, which prohibits the collection of any amount not legally owed (such as unwarded post-judgment interest), they also pled causes of under 15 U.S.C. § 1692e, which courts have interpreted as requiring debt collectors to

disclose that they are assessing interest on a debt if they wish to collect such interest. In addition, Appellant Dennis also pleaded in his petition that Riezman Berger seized funds from his bank account in excess of the amount he owed *even assuming interest was awarded*. Therefore, even assuming the dismissal of Appellants' claims under Section 1692f arising out of Riezman Berger's collection of unawarded post-judgment interest was proper, that would have left Appellants' additional claims that Riezman Berger never addressed within its Motions to Dismiss.

A. Riezman Berger Violated Appellant Dennis' FDCPA Rights By Seizing Funds from His Bank Account that He No Longer Owed.

Under Sections 1692e(2)(A) and 1692g(a)(1), 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). "One type of misrepresentation prohibited by § 1692e(2)(A) is the false representation that a debt exists." Yarney v. Ocwen Loan Servicing, LLC, 929 F. Supp. 2d 569, 576 (W.D. Va. 2013). Within its Substitute Brief, Riezman Berger studiously avoids addressing the fact that, even if post-judgment had been awarded, it failed to credit Appellant Dennis' voluntary payments and seized funds from his bank account that he did not owe. Riezman Berger's garnishment of additional funds, regardless of the award of post-judgment interest, and the related misstatement of an amount owed, constitutes a separate violation of the FDCPA. See In re: FDCPA Cognate Cases, No. 1:13CV1328, 2016 WL 1273349, at *6 (W.D. Mich. Mar. 28, 2016). Riezman Berger cannot now raise an argument in response to these allegations for the

first time on appeal. See Kixmiller v. Bd. of Curators of Lincoln Univ., 341 S.W.3d 711, 713, n. 1 (Mo. App. W.D. 2011). Since Riezman Berger only addressed a portion of Appellant Dennis' allegations, the trial court's grant of Riezman Berger's motion to dismiss the entirety of his FDCPA claim must be reversed.

B. Riezman Berger Violated Section 1692e(2)(A) of the FDCPA by Misrepresenting the Amount and Character of Appellants' Debts within the Underlying Judgments.

Riezman Berger's arguments regarding the statute of limitations and its failure to disclose that interest was accruing (even if awarded) are beyond the scope of review because Riezman failed to raise these issues in its motion to dismiss. This Court need not consider a statute of limitations defense that was "not pleaded or otherwise specifically invoked." Southwestern Bell Telephone Co. v. Buie, 689 S.W.2d 848, 853 (Mo. App. E.D. 1985). Nevertheless, as provided below, even assuming Riezman had raised these arguments, they still would not have supported the grant of its motions to dismiss.

1. Appellant Dennis' Claims Relating to Riezman Berger's False Representation of the Entire Amount He Would Owe On His Debt Accrued Within One Year of Filing His Claim.

In determining when a cause of action accrues, Missouri courts look to when "[d]amage is sustained and capable of ascertainment when it *can be* discovered or made known." Harris-Laboy v. Blessing Hosp., Inc., 972 S.W.2d 522, 524 (Mo. App. E.D. 1998). Riezman Berger prepared and provided Appellant Dennis a consent judgment that listed an aggregate, and apparently static, amount due of $850.00. Riezman Berger did

not disclose on the consent judgment that interest would be accruing on the debt, causing the amount due to change on a daily basis. In reality, and unbeknownst to Appellant Dennis at the time he signed the judgment, the amount due listed within the consent judgment was already false the very next day.

The earliest possible date Plaintiff Dennis could have discovered that Riezman Berger was assessing and collecting interest on the static amount listed on the judgment was March 10, 2015 – the date of Riezman Berger's first collection attempt after the judgment. It should be noted that Plaintiff did not actually receive service of the garnishment request on the filing date and only discovered the fact that Riezman was assessing interest after his wages were seized. Notwithstanding this fact, March 10, 2015 is the earliest conceivable date Appellant Dennis could have objectively ascertained the fact that Riezman was assessing and attempting to collect interest beyond the amount due listed on the consent judgment.

Therefore, even had Riezman raised the defense of statute of limitations before the trial court (it did not), Appellant Dennis' FDCPA claim under 15 U.S.C. § 1692e(2)(A) for Riezman's failure to disclose that it was assessing interest on the debt did not accrue until March 10, 2015. Appellant Dennis filed his Petition on September 29, 2015, well-within one year of the accrual of Riezman's FDCPA violation.

2. Debt Collectors Must Disclose that Interest Will Accrue on the Amount of a Debt Listed Within Their Collection Communication.

Irrespective of whether Missouri law allows creditors to extra-judicially award

themselves post-judgment interest, the failure to apprise an unsophisticated consumer that interest is accruing on a debt (even assuming interest is awarded) is a separate violation of the FDCPA. Riezman Berger disputes that debt collectors are obligated to accurately represent the amount of the debt within a collection communication by disclosing the accrual of interest. Riezman fails to acknowledge that the Second Circuit Court of Appeals in Avila v. Riexinger & Associates, LLC, No. 15-1584, 2016 WL 1104776 (2d Cir. Mar. 22, 2016) recently rejected this reasoning.

In Avila, the Second Circuit became the first federal court of appeals to address whether a debt collector must disclose that interest will accrue on the balance listed within the collection communication. The Court ultimately held that "Section 1692e of the FDCPA requires debt collectors, when they notify consumers of their account balance, to disclose that the balance may increase due to interest and fees." Id. at *3. The Court's holding in Avila holding is consistent with the local district courts of Missouri that have addressed the issue. See Wideman v. Kramer and Frank, P.C., No. 4:14CV1495 SNLJ, 2015 WL 1623814 (E.D. Mo. Apr. 10, 2015; see also Ray v. Resurgent Capital Servs., L.P., No. 4:15CV272 JCH, 2015 WL 3453467 (E.D. Mo. May 29, 2015).

Other than the lower district court decisions which have since been rejected, Riezman Berger also cites to Chuway v. Nat. Action Fin. Servs., 362 F.3d 944, 949 (7th Cir. 2004), which actually supports Appellants' position. In Chuway, the Seventh Circuit Court of Appeals adopted the straightforward principle that a debt collector must inform a consumer that the amount within its communication will increase *if* the original creditor

hires the debt collector to assess and collect interest. 362 F.3d at 949. If the debt collector is not attempting to collect interest, it should only list the amount due without any reference to interest. Id. ("If the debt collector is trying to collect only the amount due on the date the letter is sent, then he complies with the Act by stating the "balance" due. . . . If, instead, the debt collector is trying to collect the listed balance plus the interest running on it or other charges, he should use the safe-harbor language [disclosing that interest will accrue].").

In addition, all of the cases upon which Riezman relies (which have been abrogated) involved a credit card account that was already accruing interest before collections. In this regard, the instant Appellants' judgments arising out of unpaid hospital visits are "distinguishable from nearly all of the cases finding that the FDCPA does not impose a duty to inform the consumer that the debt is accruing interest. In those decisions . . . the debt at issue was credit card debt; thus, those courts distinguished the line of cases finding an affirmative duty to disclose the accrual of interest because 'even the most unsophisticated consumer would understand that credit card debt accrues interest.'" Gill v. Credit Bureau of Carbon County, 14-CV-01888-KMT, 2015 WL 2128465, at *1 (D. Colo. May 5, 2015) (granting summary judgment under Section 1692e in favor of the consumer for the debt collector's failure to disclose that it was assessing and attempting to collect interest on a hospital debt).

By failing to disclose that interest was in fact accruing on Appellants' balances, rendering the amount false the very day after the date of the judgment without any indication of that fact, Riezman Berger mischaracterized the amount and character of the

debts they were attempting to collect in violation of 15 U.S.C. § 1692e(2)(A).

3. There Is No Statutory Exception Under the FDCPA Exempting Judgments from the Broad Definition of a Collection Communication.

The FDCPA applies broadly to all "communications" which convey "information regarding a debt ***directly or indirectly*** to any person ***through any medium***." 15 U.S.C. § 1692a(2) (emphasis added). As long as any given communication meets these basic elements, a debt collector must comply with the requirements under the Act, including accurately representing the amount and character of the debt that is listed within the communication. See id. Moreover, under Section 1692e, there need not even be a "communication" as long as there is proof of a misleading representation or means in the collection of a debt. 15 U.S.C. § 1692e; see also Lewis v. Marinosci Law Group, P.C., 13-61676-CIV, 2013 WL 5789183, at *4 (S.D. Fla. Oct. 29, 2013) ("Defendant argues that legal pleadings and related papers cannot be treated as a 'communication' under the FDCPA. This argument is inapposite. Plaintiff has brought a claim under § 1692e, which creates liability for deceptive 'representations or means,' not deceptive 'first communications.' Indeed, unlike other portions of § 1692, subsection 1692e does not refer to, define, or otherwise require any 'communication.'") (internal citations omitted).

Here, the judgments meet both the broad definition of "communication" under the Act and also constitute a misleading representation and means under Section 1692e, in particular. Riezman Berger contends that the FDCPA exempts from its application "judgments" that debt collectors prepare and obtain on behalf of their creditor clients.

Riezman Berger's position has no basis in the statute or case law interpreting the same. The few cases Riezman Berger proffers in an attempt to support its unsupported proposition that judgments are not subject to the FDCPA are also unavailing.

Those cases simply reiterate that communications made solely to the court, rather than directly or indirectly to a consumer, do not violate the FDCPA. See Sayyed v. Wolpoff & Abramson, LLP, 733 F. Supp. 2d 635, 648 (D. Md. 2010) (holding that request for attorney's fees directed to the court, and not the consumer, was not a "communication" under the FDCPA); Hrivnak v. NCO Portfolio Management, 994 F.Supp 889 (N.D. Ohio 2014) (stating that the FDCPA "does not extend protection to communications to courts" as opposed to consumers); O'Rourke v. Palisades Acq. XVI, LLC, 635 F.3d 938 (7th Cir. 2011) (same).

As its only other argument against judgments being subject to the FDCPA, Riezman Berger notes that judgments are not "pleadings" and, therefore, are not "communications" under the FDCPA. This is faulty logic. That Riezman Berger located case law stating that pleadings are collection communications and that judgments are not pleadings, does not mean that a judgment is not a communication. This is a *non sequitur*; the inclusion of one does not require the exclusion of the other. More importantly, Riezman Berger ignores the decisions of multiple courts, including the local Eastern District of Missouri, which have held that representations made in connection with a court judgment are in fact subject to the FDCPA. See, e.g., Mueller v. Barton, 4:13-CV-2523 CAS, 2014 WL 4546061, at *2 (E.D. Mo. Sept. 12, 2014) (denying defendant's motion to dismiss where the consumer alleged that "the consent judgment did not

indicate interest would accrue on the debt while she was making the $50 payments, and appeared to indicate that interest would only accrue if the judgment were executed upon."); see also Moss v. Barton, 4:13-CV-2535 RLW, 2016 WL 1441146, at *4 (E.D. Mo. Apr. 8, 2016) ("Here, [defendant] allegedly did not tell Plaintiff that interest would accrue. Therefore, the Court 'concludes that plaintiff's claim with respect to the consent judgment asserts sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

In this case, Riezman Berger represented to Appellants that they owed a static balance listed on the face of the judgment, without any indication that the amount would increase after the date of the judgment. This information was conveyed to both Appellants. Each judgment therefore satisfies the basic statutory definition of a "communication" in that Riezman Berger "convey[ed] information regarding a debt directly or indirectly to [a] person through any medium." 15 U.S.C. § 1692a(2). Therefore, even had Riezman Berger raised these arguments concerning Appellants' claims under Section 1692e within its motion to dismiss (it did not), they would have been rejected.

V. MERCY HOSPITAL FAILED TO PROVIDE ANY BASIS FOR DISMISSAL WITHIN ITS MOTION TO DISMISS, AND NONE OF ITS ARGUMENTS ON APPEAL ARE OTHERWISE MERITORIOUS.

Before the Trial Court, Mercy filed a single-sentence Motion to Dismiss for failure to state a claim with respect to Appellant Dennis' claims that Mercy violated the MMPA and Appellant Cherry's claims that Mercy both violated the MMPA and committed a

Wrongful Garnishment.[5] The Trial Court then granted the Motion without providing a basis for the dismissal. "Where, as here, the trial court did not state a basis for its dismissal, 'we presume that dismissal was based on the grounds stated in the motions to dismiss.'" Dennis, at 2016 WL 5030349, at *3 (citing Duvall v. Lawrence, 86 S.W.3d at 78). "If the motion to dismiss cannot be sustained on any ground alleged in the motion, the trial court's ruling will be reversed." In re Estate of Austin, 389 S.W.3d 168, 171 (Mo. banc 2013). In this case, since the Trial Court entered a bare Order denying Appellants' claims, it is presumed the court dismissed Appellants' cases for the reasons stated Mercy's Motion. However, given that Mercy's underlying Motion to Dismiss provided no basis for dismissal, it logically follows that the Trial Court dismissed the cases for no reason at all. Because Mercy "did not provide any specific grounds for the motion which this Court can review, much less affirm," the Trial Court's Order must be reversed. Dennis, at 2016 WL 5030349, at *3.

Even if Mercy had raised the arguments for dismissal that it interposes for the first time on appeal, it simply parrots the same arguments Riezman Berger raised regarding the automatic award of post-judgment interest. As with Riezman Berger's argument

[5] Mercy is not subject to the FDCPA nor did Appellants name Mercy as a defendant to their causes of action under the FDCPA. As such, Appellants ask this Court to disregard Mercy's procedurally improper commentary about the efficacy of Appellants' FDCPA claims against Riezman Berger. Appellants have addressed the merits of Mercy's arguments within the discussion of their claims against Riezman Berger.

above, dismissal of Appellants' MMPA and Wrongful Garnishment claims as to Respondent Mercy must be reversed if this Court concludes that Respondents were not permitted to unilaterally and extra-judicially award themselves post-judgment interest under Section 408.040. Moreover, even if interest was awarded on the judgment, Respondent Mercy still failed to credit all of Appellant Dennis's voluntary payments, resulting in seizure of funds that Appellant Dennis did not owe. In the Petition, Appellant Dennis detailed his voluntary payments totaling $300.00. Appellant Dennis calculated the maximum possible balance, after applying his payment, even assuming that post-judgment interest was awarded. The amount Mercy seized from Dennis' bank account exceeded this maximum possible balance allowable by law. Thus, Appellant Dennis stated an MMPA claim as to Respondent Mercy.

Respondent Cherry has two separate default judgments entered against her by Mercy, only one of which includes an award of post-judgment interest. In a separate case filed against Appellant Cherry, Respondent Mercy included an award of post-judgment interest on the face of the judgment itself. See 13JE-AC04505, Default Judgment and Memorandum, 23rd Judicial Circuit of Missouri, February 16, 2016. Respondent Mercy's own conduct highlights that even it does not believe its own arguments regarding the automatic attachment of post-judgment interest to judgments. When viewing the two different judgments in conjunction, one provides for an award and the other does not. This confusing situation illustrates Mercy's unfair and deceptive business practice with regard to collection of judgments.

CONCLUSION

For the foregoing reasons, Appellants Thomas Dennis and Sonya Cherry respectfully request this Court grant their Points on Appeal, reverse the judgment of the trial court dismissing their Petitions with prejudice, and remand the cause for further proceedings in accordance with Missouri Supreme Court Rules.

Respectfully submitted,

/s/ Bryan E. Brody
Bryan E. Brody, MO #57580
Alexander J. Cornwell, MO #64793
1 N. Taylor Ave.
St. Louis, MO 63108
(314) 932-1068
Fax (314) 228-0338
bbrody@brodyandcornwell.com
acornwell@brodyandcornwell.com

Attorneys for Appellants,
Thomas Dennis and Sonya Cherry

IN THE SUPREME COURT
STATE OF MISSOURI

Thomas Dennis, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	**Case No. SC96038**
Sonya Cherry, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Appellants' Substitute Reply Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and this Court's Order dated April 7, 2017.

Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 11,468.

/s/ Bryan E. Brody
Bryan E. Brody, MO #57580
Alexander J. Cornwell, MO #64793
1 N. Taylor Ave.
St. Louis, MO 63108
(314) 932-1068
Fax (314) 228-0338
bbrody@brodyandcornwell.com
acornwell@brodyandcornwell.com

Attorneys for Appellants,
Thomas Dennis and Sonya Cherry

IN THE SUPREME COURT
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Sonya Cherry, Appellant, vs. Riezman Berger, P.C. and Mercy Hospital Jefferson, Respondents.	)	

CERTIFICATE OF SERVICE

A copy of this Appellants' Substitute Reply Brief was filed electronically with the Clerk of the Court on this April 7, 2017, to be served by operation of the Court's electronic filing system upon all participating parties of record:

Nelson L. Mitten
Riezman Berger, P.C.
Attorneys for Respondent Riezman Berger, P.C.

Nicholas G. Higgins
Higgins Law Office
Attorneys for Respondent Mercy Hospital Jefferson

/s/ Bryan E. Brody
Bryan E. Brody, MO #57580
Alexander J. Cornwell, MO #64793
1 N. Taylor Ave.
St. Louis, MO 63108
(314) 932-1068
Fax (314) 228-0338
bbrody@brodyandcornwell.com
acornwell@brodyandcornwell.com

Attorneys for Appellants,
Thomas Dennis and Sonya Cherry