IN THE SUPREME COURT OF MISSOURI

THOMAS DENNIS, Appellant, v. RIEZMAN BERGER, P.C. and MERCY HOSPITAL JEFFERSON, Respondents.	)	Cause No. SC96038
SONYA CHERRY, Appellant, v. RIEZMAN BERGER, P.C. and MERCY HOSPITAL JEFFERSON, Respondents.	)	

SUBSTITUTE BRIEF OF RESPONDENT RIEZMAN BERGER, P.C.

RIEZMAN BERGER, P.C.

Nelson L. Mitten, MBN 35818
Paul A. Grote, MBN 63842
7700 Bonhomme Ave., 7th Floor
St. Louis, Missouri 63105
Telephone: 314.727.0101
Facsimile: 314.727.6458
nlm@riezmanberger.com
pag@riezmanberger.com

Attorneys for Respondent Riezman Berger, P.C.

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A. Appellant's claims are barred by the FDCPA limitations period of one year;

B. The failure to state in the Judgments that interest is accruing is not a "false representation" under the FDCPA; and

C. A judgment is not a "communication" to Appellants for the purposes of the FDCPA.

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ARGUMENT

Standard of Review

"The standard of review for a trial court's grant of a motion to dismiss is de novo." *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). This standard is applicable to all points raised.

I. The Trial Court Did Not Err and Properly Dismissed Appellants' Petitions Under the Fair Debt Collections Practices Act, the Missouri Merchandising Practices Act, and for Wrongful Garnishment Because Mo. Rev. Stat. § 408.040.2 Allows for the Judgments Entered Against the Appellants for NonTort Claims to Accrue and Collect Post-Judgment Interest Without It Being Stated In the Judgment.

A. History of Post-Judgment Interest in the State of Missouri;

B. The current statute does not require post-judgment interest be stated in nontort judgments; and

C. If prior case law reversed, this holding should be prospective only.

Points I, III, IV, and V of Appellants' appeal all claim that the trial court erred in granting Defendants' Motion to Dismiss, alleging that post-judgment interest must be stated in a nontort judgment in order to accrue. As both of the underlying actions against

Appellants which resulted in judgments were contract claims, the statute at issue in this case is Mo. Rev. Stat. § 408.040.2[1], which reads as follows:

> 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.

Appellants urge the Court to adopt a construction of this statute which would require judgments to specifically state the amount of interest. Such a construction overlooks over a hundred years of precedent in this State concerning this statute and its predecessors which held otherwise. As shown below, there have been no amendments to this subsection dealing which would show any intent by the legislature to make a substantive change in longstanding law concerning post-judgment interest.

A. History of post-judgment interest in the State of Missouri.

The statutory imposition of post-judgment interest is not a novel feature of Missouri law. By at least 1879, the Missouri legislature had imposed mandatory interest

[1] Section 408.040 was also revised in 2014, which added subsection 1 to the statute. No changes were made to what became subsection 2, other than the renumbering. 2014 Mo. Legis. Serv. H.B. 1231 (VERNON'S) (West's No. 94). Appendix at 18.

on all money due upon any judgment or order of the court until the judgment was satisfied. Mo. Stat. § 2725 (1879). The relevant statutory language has largely remained the same in the intervening years. *C.f.* R.S.Mo.§ 2725(1879); R.S.Mo. § 5972(1889); R.S.Mo.§ 3707(1899); R.S.Mo.§ 7181(1909); R.S.Mo.§ 6494(1919); R.S.Mo.§ 2841(1929); R.S.Mo.§ 3228(1939); R.S.Mo.§ 408.040 (1979)(1987)(2005)and (2014).[2] The statute was soon interpreted in *State ex rel. Walsh v. Vogel*, 14 Mo. App. 187 (1883). There, a judgment was issued that was silent as to amount of interest. The defendant paid the principal amount of judgment an interest at the rate of 6%. The plaintiff claimed he was entitled to 10% interest on the judgment, and ultimately brought a writ to the Court of Appeals to compel the clerk of court to issue execution for the additional interest. Relying on then Section 2725 (the predecessor to the current Section 408.040.2), the court held that "In order that the judgment should bear interest, **it was not necessary that the court delivering the judgment should say so and make this statement a part of the judgment, because the statute expressly provides that every judgment shall bear interest**." *State ex rel. Walsh v. Vogel*, 14 Mo. App. 187, 189–90 (1883) (emphasis supplied). Further, the court observed "It is not only the right, but the duty, of the clerk to look to the record in issuing execution to determine the legal effect of the judgment." *Id*. at 190. In other words, the court held that a judgment need not state the interest, and that the clerk of court had a duty to review the record to determine the amount of interest.

[2] The 2005 revisions changed post-judgment interest in tort cases, which is discussed in more detail below. 2005 Mo. Legis. Serv. H.B. 393 (VERNON'S). Appendix at 1-2.

> The *Vogel* decision was not an isolated ruling; and other opinions soon followed. The rate of interest which a judgment shall bear, is a quality which the statute ascribes to the judgment, and it is not a *necessary* part of the judgment entry; and where it is not shown by the judgment entry, it is the duty of the clerk to ascertain from the record the interest which the judgment shall bear, and to issue execution accordingly; and where he refuses to perform this duty, the circuit court can direct him so to do on motion, or the defendant can compel him to do so by mandamus.

Evans v. Fisher, 26 Mo. App. 541, 543 (1887). *Accord State ex rel. Harrison v. Babb*, 77 Mo. App. 277 (Mo. App. 1898). This Court acknowledged that a judgment need not state the rate of interest in 1892 and again in 1894. *Crook v. Tull*, 111 Mo. 283 (Mo. 1892); *Catron v. Lafayette Cty.*, 125 Mo. 67 (Mo. 1894).

This Court made the exact same holding over fifty years later in *Laughlin v. Boatman's National Bank of St. Louis*, 354 Mo. 467, 289 S.W.2d 974 (1945). In that case, the plaintiff had obtained a judgment against the defendant bank on three separate counts. The judgment was silent on the issue of interest. On appeal the judgment was affirmed as to two of the counts, but reversed and remanded for a new trial as to the third. After remand, the case was tried and a second judgment was entered in favor of the plaintiff. On appeal to the Supreme Court this judgment was reversed a second time. During the second appeal the defendant bank also raised the issue of post-judgment interest on the judgments on the two counts that had been affirmed in the first appeal. *Id.* at 470, 477, 289 S.W.2d at 976, 980.

In considering this appeal, this Court considered the predecessor to this statute which stated that "Interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment."[3] *Id.* at 476, 289 S.W.2d at 980. *See also* Appendix at 38, Mo. Rev. Stat. § 3228. Based upon this language, the Court, consistent with its prior precedent, stated that the original "judgment bears interest by reason of the statute and it is not necessary that it or the mandate recite the fact." The Supreme Court then held the judgments affirmed in the first appeal bore interest from the date of the entry. *Id.* Governed by *stare decisis*, Missouri courts have continued to state that interest need not be stated in the judgment. *See, e.g., Robinson v. St. Louis Bd. Of Police Com'rs*, 212 S.W.3d 165 (Mo. App. E.D. 2006) (post-judgment interest accrued in tort case even though not stated in judgment); *Adkins v. Hontz*, 337 S.W.3d 711, 723 (Mo. App. W..D. 2011) (noting that tort judgment under prior version of statute would have accrued interest at 9 percent and it was unnecessary to specify so in the judgment). Other cases noted that "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." *Cotton v. 71 Highway Mini-*

[3] The statutory language is nearly identical in the current version, with the additions as "In all nontort actions" and replacement of "day of rendering the same" with the "date judgment is entered." *C.f.* Mo. Rev. Stat. § 3228 *with* Mo. Rev. Stat. § 408.040.2.

Warehouse, 614 S.W.2d 304, 308 (Mo. Ct. App. 1981) (citing *Leggett v. Missouri State Life Insurance Company*, 342 S.W.2d 833, 931-32 (Mo. banc 1960)).[4]

In 2005, the Missouri legislature changed the law concerning interest on tort judgments. Appendix at 1-2, 2005 Mo. Legis. Serv. H.B. 393 (VERNON'S). Before that time, tort judgments were treated just the same as nontort judgments, and accrued interest even if the rate was not stated in the judgment. *See, e.g.*, *Robinson v. St. Louis Bd. Of Police Com'rs*, 212 S.W.3d 165 (Mo. App. E.D. 2006) (post-judgment interest accrued in tort case even though not stated in judgment); *Adkins v. Hontz*, 337 S.W.3d 711, 723 (Mo. App. W.D. 2011) (noting that tort judgment under prior version of statute would have accrued interest at 9 percent and it was unnecessary to specify so in the judgment). Importantly, the revisions to the tort portion of the statue include a sentence which reads "The judgment shall state the applicable interest rate, which shall not vary once entered." Mo. Rev. Stat. § 404.040.2. (2005). In subsection one of the statute, the legislature merely added "In all nontort actions," to the beginning, and replaced "day of rendering the same" with "date judgment is entered by the trial court." No language was added to the nontort section stating that judgment should state the applicable interest rate. In other words, the only substantive change by the Missouri legislature to the subsection of the statute at issue in this case was to make it only applicable to nontort claims.

[4] Like *Vogel*, the *Cotton* case held that the plaintiff was entitled to *more* interest than stated in the judgment.

B. The current statute does not require post-judgment interest be stated in nontort judgments.

Again, Mo. Rev. Stat. § 408.040.2 reads as follows:

> 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.

The language of the statute clearly reads as a mandatory prescription for interest on all nontort judgments. The statute—in three separate places—states that interest "shall" accrue on judgments. "The definition of "shall" states that it is 'used in laws, regulations, or directives to express what is mandatory.'" *U.S. Cent. Underwriters Agency v. Hutchings*, 952 S.W.2d 723, 725 (Mo. Ct. App. 1997) (quoting Webster's Third International Dictionary 2085 (1976)). *See also* SHALL, Black's Law Dictionary (10th ed. 2014) ("**1.** Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold"). The statute further provides that for the universe of nontort claims judgments "shall bear" interest at either a contractual amount or nine percent. This subsection contains no language that even implies a judgment must include

language concerning interest before it accrues. As set forth above, this mandatory reading of the statute is confirmed by over a hundred years of caselaw.

Contrast this provision with Subsection 3 of Section 408.040 dealing with tort actions. This relevant portion of Subsection 3 reads as follows:

> Notwithstanding the provisions of subsection 2 of this section, in tort actions, interest shall be allowed on all money due upon any judgment or order of any court from the date judgment is entered by the trial court until full satisfaction. All such judgments and orders for money shall bear a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus five percent, until full satisfaction is made. *The judgment shall state the applicable interest rate, which shall not vary once entered.*

Mo. Rev. Stat. § 408.040.3 (emphasis added). The language of this subsection is relevant as a contrast to the language of Subsection 2 for two reasons. First, the second clause of the first sentence in Subsection 3 is virtually identical to the first clause in Subsection 2. Second, Subsection 3 then goes on and expressly states that a "judgment shall state the applicable interest rate, which shall not vary once entered."

Under well-established principles of statutory construction, statutes should not be read to render words as "mere surplusage." *E.g.*, *State v. Graham*, 149 S.W.3d 465, 467 (Mo. App. E.D. 2004) (citing *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993)) ("Every word, clause, sentence and section of a statute should be given meaning, and under the rules of statutory construction statutes should not be interpreted in a way that would render some of their phrases to be mere surplusage.")

The construction urged by Appellants would violate this principle. If a judgment must state that post-judgment interest is not to accrue without it being set forth in the judgment, then the sentence italicized in Subsection 3 would not be required, rendering the entire sentence of that subsection mere surplusage. Its inclusion in Subsection 3, especially with the almost identical language from Subsection 2 in Subsection 3's first sentence, indicates that absent the express requirement contained in Subsection 3, a judgment does not have to state that post-judgment interest accrues in order for the judgment to bear such interest.

As set forth above, the post-judgment interest statute was enacted by 1879, and the language has been interpreted as self-executing, allowing a plaintiff to collect post-judgment interest on a judgment in a nontort case, even if the judgment does not so provide. Notably, the 2005 amendment to the statute only added "in nontort" cases to this statute, and updated one other phrase. These amendments do not reveal an intent by the legislature to disturb over a century of established precedent. The language interpreted by this Court in *Laughlin* was **not** substantively modified with respect to nontort claims. The legislature's action has meaning which should not be disregarded.

> The fact that the legislature has not seen fit by amendment to express disapproval of a contemporaneous or judicial interpretation of a particular statute, has been referred to as bolstering such construction of the statute, or has persuasive evidence of the adoption of the judicial construction. In this respect, it has been declared that where a judicial construction has been placed upon the language of a statute for a long period of time, so that there

> has been abundant opportunity for the law making power to give further expression to its will, the failure to do so amounts to legislative approval and ratification of the construction placed upon the statute by the courts, and that such construction should generally be adhered to, leaving it to the legislature to amend the law should a change be deemed necessary.

State ex rel. Howard Electric Co.-Op. v. Riney, 490 S.W.2d 1, 9 (Mo. App. 1973)(quoting 50 Am.Jur. Statutes §326, pp. 318-19). *See also Jacoby v. Missouri Valley Drainage District of Holt County*, 163 S.W.2d 930, 939 (Mo. App. 1942). In sum, the language which the legislature *preserved* as applicable to non-tort cases has its roots in over one hundred years of Missouri cases.

Appellants rely upon the recent decisions of *McGuire v. Kenoma LLC*, 447 S.W.3d 659 (Mo. banc 2014), *SKMDV Holdings, Inc. v. Green Jacobson, P.C.*, 494 S.W.3d 537 (Mo. App. E.D. 2016), and *Peterson v. Discover Prop. & Cas. Ins. Co., 46*0 S.W.3d 393 (Mo. App. W.D. 2015) for the proposition that all judgments under Section 408.040 must include a statement concerning post-judgment interest. These cases are each easily distinguished because they are tort claims, and involve a different subsection of the statute which has an explicit requirement that tort judgments state the amount of interest. [5] As such, these decisions are not controlling in this case.

[5] *McGuire* was a nuisance case where the plaintiff sought to amend the judgment *nunc pro tunc* to award post-judgment interest and set the post-judgment interest rate. *McGuire*, 447 S.W.3d at 662. Both of the other cases cited to *McGuire* and also involved

In *McGuire*, the underlying suit was a nuisance suit relating to large-scale hog operations. 447 S.W.3d at 661. After a jury trial, a judgment was entered on May 10, 2011, which did not award post-judgment interest or state an applicable interest rate. The plaintiffs did not file a post-trial motion, seek to amend the judgment, or appeal the judgment. *Id.* at 662. That judgment was appealed by the defendant, and the court of appeals affirmed in part and reversed in part, but did not remand the case for further proceedings. *Id.* After the mandate was issued, plaintiffs filed a motion with the trial court to award post-judgment interest, which the trial court granted, and subsequently entered a *nunc pro tunc* judgment. *Id.* The court observed that "Section 408.040 regulates awards of post-judgment interest" and in a footnote quoted the relevant subsection relating to tort judgment. *Id.* at 662. The Court held that this was not a proper use of *nunc pro tunc*.

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tort claims. *SKMDV Holdings* sought to add interest to a malpractice judgment, and *Peterson* was a wrongful death and personal injury case. *Peterson*, 460 S.W.3d at 397.

Likewise, *Peterson*[6] was a wrongful death and personal injury case stemming from a one-car automobile accident. *Peterson*, 460 S.W.3d at 397. The underlying action was settled shortly before trial under a consent judgment pursuant to Section 537.065. *Id.* at 397, 399. The consent judgment did not contain a provision for interest. An equitable garnishment action was then filed pursuant to Section 379.200. *Id*. at 400. A judgment was entered on the equitable garnishment action in August of 2013. The plaintiffs then filed a motion for post-judgment interest seeking interest back to the September consent judgment. *Id*. at 401. The *Peterson* court held simply that the September 2011 consent judgment, under *McGuire*, was required to state the amount of interest. Similarly, *SKMDV Holdings*, a legal malpractice tort case, cited to both *Peterson* and *McGuire* for the proposition that a judgment must state the amount of interest. *SKMDV Holdings*, 494 S.W.3d at 561.

All three cases therefore cited by Appellants are cases stating that tort judgments must include the amount of interest. This is mandated by the applicable statutory language to tort judgments, which is *missing* from the non-tort judgment subsection. None of the cases addressed nontort cases. Because the cases cited by Appellants are tort cases under a different subsection of the statute with materially different language, they should not be read to apply to the nontort subsection of the statute. *State v. Honeycutt*,

[6] The *Peterson* decision referred to section 408.040 before the current subsection 1 was added, and therefore when it refers to 408.040.2, it is referring to the current 408.040.3. *See Peterson*, 460 S.W.3d at 413 (citing subsection 2 and quoting "in tort actions . . .").

421 S.W.3d 410, 422 (Mo. banc 2013), *as modified* (Dec. 24, 2013) (quoting *Broadwater v. Wabash R. Co.*, 212 Mo. 437, 110 S.W. 1084, 1086 (1908)) ("'[t]he maxim of stare decisis applies only to decisions on points arising and decided in causes' and does not extend to mere implications from issues actually decided.").

Further, the *McGuire* decision neither cited nor addressed the prior *Laughlin Crook*, *Catron* cases. Appellants' forced construction of the statute would mean that *McGuire* would have overruled over a century of precedent *sub silentio*. "This Court presumes that, absent a contrary showing, prior opinions of this Court are not overruled *sub silentio*." *Honeycutt*, 421 S.W.3d at 422 (citing *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 37 n. 10 (Mo. banc 2013)). There has been no showing here which would overcome that presumption.

In sum, there has been no change to the section of the post-judgment interest statute which would warrant a departure from the well-established law of this state that a nontort judgment accrues interest, whether or not it is stated in the judgment. As such, the trial court properly granted Respondents' Motion to Dismiss on that basis.

C. If prior case law reversed, this holding should be prospective only.

As set forth in Point I above, the subsection of the post-judgment interest statute dealing with nontort claims has a lengthy history in Missouri law, and was not affected by the 2005 amendments which changed post-judgment interest for tort claims. Should the Court disagree and overrule prior precedent, including *Laughlin*, this change should be made only prospectively, and not retroactively.

This Court has adopted a three factor test to determine whether an overruling decision should be given prospective-only effect." *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. banc 1985); *Trans UCU, Inc. v. Dir. of Revenue*, 808 S.W.2d 374, 377 (Mo. 1991); *Johnson v. St. Mercy's Med. Ctr*., 812 S.W.2d 845, 847 (Mo. App. E.D. 1991). The first the decision in question "must establish a new principle of law ... by overruling clear past precedent." *Sumners*, 701 S.W 2d. at 724. Second, the court "must determine whether the purpose and effect of the newly announced rule be enhanced or retarded by retrospective operation." *Id*. "Third, the Court must balance the interest 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 hardship to those parties who would be denied the benefit of the new rule" *Id.*

With respect to the first factor, the language of the current Section 408.040.2 has previously been clearly interpreted in the *Laughlin* decision. Thus, this will overrule clear past precedent.

As to the second prong, the purpose of the new rule will not be retarded by its application as prospective only. The policy decision underlying the decision of the Court of Appeals was that a judgment should clearly state whether post-judgment interest may be collected. If the rule is applied prospectively only, then it would put creditors on notice that they should not collect post-judgment interest upon those judgments which do not specifically provide for it. The judgment debtors do not suffer any hardship, as even under this Court's ruling if the plaintiff had requested the post-judgment interest the

statute requires the court to award it. As such, these judgment debtors would primarily gain a windfall as to future interest.

Finally, in balancing the hardships between the respective parties, it is clear that the superior hardship falls upon judgment creditors if this rule is applied retroactively. This case alone establishes that an extreme hardship arises for judgment creditors and their attorneys to determine that the law in this area was going to be changed. For example, both of the judgments entered in this case were entered prior to the Missouri Supreme Court's decision in *McGuire* on November 12, 2014, with the judgment against Cherry being entered on December 13, 2013, and the judgment against Dennis being entered on May 22, 2014. Anticipating that the decisional law would reverse its interpretation of Section 406.040.2 for nontort actions without a change in the statute by the Missouri Legislature would require a form of prescience that few humans have.

If a new rule is applied retroactively, the effect on law firms and litigants in this State is obvious from the Petitions filed in this action. Law firms, and their clients, are going to be subjected to suits, just like this one, when they were merely collecting interest as was previously allowed by law. Notably, while the FDCPA claims have a one-year statute of limitations, the Appellants (as will others) have included claims under the Missouri Merchandising Practices Act, which is subject to a longer five-year statute of limitations. *See Boulds v. Chase Auto Fin. Cor.*, 266 S.W.3d 84, 851 (Mo. App. E.D. 2008) (on MMPA statute of limitations). This will open up thousands of nontort judgments throughout the State over the past five-years, many of which may have been

drafted on preprinted forms prepared by the trial courts which do not have a section for post-judgment interest.

It is also not just law firms and business judgment creditors that will feel the effect of this decision. Parents spouses who have collected interest on child support or maintenance judgments could also be forced to pay back this interest. The statutory provision governing interest on delinquent child support and maintenance judgments reads as follows:

> All delinquent child support and maintenance payments which accrue based upon judgments of courts of this state entered on or after September 1, 1982, shall draw interest at the rate of one percent per month.

R.S.Mo. §454.520.3. This statute also does not have any language requiring that the interest must be included in the judgment to collect it. If the Court holds as urged by the Appellants, but does not make the rule prospective only, then many of these parents and spouses who have used interest monies for the support of their children or themselves could now be forced to pay it back.

In sum, retrospective application will flood the courts with litigation over thousands upon thousands of judgments over the past five years, affecting judgment creditors, their attorneys, pro se litigants using form judgments by the courts, and parents trying to collect delinquent child support.

II. The Trial Court Did Not Err and Properly Dismissed Appellants' Petitions Under the Fair Debt Collections Practices Act, 15 U.S.C. § 1692e(2)(A) Because:

A. Appellant's claims are barred by the FDCPA limitations period of one year;

B. The failure to state in the Judgments that interest is accruing is not a "false representation" under the FDCPA; and

C. A judgment is not a "communication" to Appellants for the purposes of the FDCPA.

In Point II, Appellants argue that even if Missouri state law is found to allow post-judgment interest without it being set forth in the judgment, Appellants have still stated claims under the FDCPA. For a myriad of reasons, such arguments fail.

A. Appellant's claims are barred by the FDCPA limitations period of one year.[7]

In both Petitions of the Appellants, the claimed effective communications were the judgments entered against them. For Dennis, the Consent Judgment was entered on May 22, 2014. L.F. at 7(Petition at ¶ 17). For Cherry, the Default Judgment was entered on November 12, 2013. L.F. at 77 (Petition at ¶ 15). Dennis then filed his action in the Court below on September 29, 2015. L.F. at 1-4 (Docket Sheet) and at 5-13 (Petition).

[7] Riezman Berger admits that the issue of statute of limitations was not addressed by the trial court. However, this Court may affirm a court's judgment on any grounds as long as it reached a correct result. *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 603 n.2 (Mo. Ct. App. 2015). Under this standard a respondent may raise new arguments not heard below. *Id.*

Cherry filed her case on October 5, 2015. L.F. at 73-34 (Docket Sheet) and 75-82 (Petition). Both of these cases were therefore filed far beyond the one (1) year statute of limitations applicable to actions under the FDCPA.

The FDCPA contains a one (1) year statute of limitations. 15 U.S.C. § 1692k(d). This limitation period is jurisdictional and is therefore not subject to equitable tolling. *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259 (8th Cir. 1992).

Over sixteen months passed between the time the consent judgment was entered against Dennis and the date he filed suit against the Respondents. Over twenty-three months passed between the time the default judgment was entered against Cherry and the date she filed suit against the Respondents. It is thus clear that both Appellants filed their FDCPA claims well beyond the one (1) year statute of limitations under the FDCPA. As such, the decision of the Trial Court in dismissing their claims and should be affirmed.

B. The failure to state in the Judgments that interest is accruing is not a "false representation" under the FDCPA.

Plaintiffs further allege that the failure to place in the Consent Judgment and in the Default Judgment that post-judgment statutory interest would accrue constitutes a "false representation of the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(a).

First, the omission of the accrual of interest cannot be deemed to be a "false representation." Appellants do not contest that the amount identified on either the Consent Judgment against Dennis and the Default Judgment against Cherry were not

accurate statements of the debt as of the time the Judgments were entered. Therefore, it was not a "false representation" of the "character, amount, or legal status" of the debt. It was the debt as of the date of the Judgment. The fact that the FDCPA expressly provides that the collection of an amount allowed by or permitted by law is proper, *see* 15 U.S.C. §1692f(1)(2012), the omission of the statutory interest in the Judgment can hardly be seen to be a false representation.

Although Appellants cite a number of cases in support of their position, other courts have expressly held that the failure to include that a debt will increase over time through interest or other charges in a notice to the consumer does not violate the FDCPA. *See, Schaefer v. ARM Receivable Management, Inc.*, 2011 W.L. 2847768 (D. Mass. July 19, 2011); *Schaefer* relies upon, in part or in whole, that the validation of debt provision under 15 U.S.C. §1692g (2012), merely requires that a debt collector send a notice indicating the "amount of the debt." *Id.*

Here it is clear that the Judgments at issue indicate the total amount to be collected at the time of the entry of the Judgment. The subsequent imposition of statutory interest for failure to pay was properly not included in the Judgment. Accordingly, there is no violation of the FDCPA.

C. A judgment is not a "communication" to Appellants for the purposes of the FDCPA.

The Trial Court's decision may also be affirmed because the Judgments entered in this case are not "communications" under the FDCPA. Plaintiffs' arguments to the contrary are based on caselaw concerning "pleadings." As shown below, this fails to

recognize a crucial distinction between pleadings (which are authored solely by a party) and judgments (which is an order of the court). For these reasons, both the Consent Judgment and the Default Judgment are not "communications" to the debtor, and therefore do not fall under the provisions of the FDCPA.

Under Missouri law, "An order or judgment of the court is plainly an exercise of judicial power by the court regarding some cause pending before it" *Reed,* 437 S.W.2d at 721 (citing Rule 74.01). A judgment is the judicial act of the court. *Rehm v. Fishman*, 395 S.W.2d 251, 255 (Mo. Ct. App. 1965). In contrast, Rule 55.01 defines what constitutes a "pleading" under Missouri law. A judgment is not included in this list. Thus, because a judgment is not a pleading but rather an act of the court, it should not be deemed a "communication" to a consumer under the FDCPA.

Various decisions under the FDCPA support this proposition. In *O'Rourke v. Palisades Acq. XVI, L.L.C.*, 635 F.3d 938 (7th Cir. 2011), the Seventh Circuit found that a misleading document attached to a complaint did not constitute a communication to the consumer, and therefore was not a violation of the FDCPA. In *Sayyed v. Wolpoff & Abramson, L.L.P., 73*3 F. Supp. 2d 635 (D. Md. 2010), the court held that a request to a state court for attorneys' fees contained in a motion for summary judgment, was not a communication to the consumer and therefore not in violation of the FDCPA. In *Hrivnak v. NCO Portfolio Mgmt.*, 994 F. Supp. 2d 889 (N.D. Ohio 2014), the court held that a prayer for relief does not constitute a representation to the consumer. *Cf. Hemmingsen v. Messerli & Kramer, P.A., 67*4 F.3d 814 (8th Cir. 2012) (allegedly false pleadings filed in collection action not a "false, deceptive, or misleading" communication.). Thus it is clear

that under the FDCPA, the Judgments entered in this case do not constitute the communications under it. Accordingly, dismissal of Appellants' claims was proper.

CONCLUSION

Judge Cohen carefully considered the arguments of counsel and properly dismissed the Petitions of both Appellant Thomas Dennis and Sonya Cherry. For the reasons set forth above, the decision of the Trial Court should be affirmed.

RIEZMAN BERGER, P.C.

By: /s/ Nelson L. Mitten
Nelson L. Mitten, MBN 35818
Paul A. Grote, MBN 63842
7700 Bonhomme Ave., 7th Floor
St. Louis, Missouri 63105
Telephone: 314.727.0101
Facsimile: 314.727.6458
nlm@riezmanberger.com
pag@riezmanberger.com

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the requirements of Mo. Sup. Ct. R. 84.06 and E.D. Special Rule 360, and that based on a word count under Microsoft Office Word 2010, this brief, including all footnotes, contains 6,466 words, which is less than the 15,500 word limit. The undersigned further certifies that he signed the original, in compliance with Mo. Sup. Ct. R. 55.03(a).

/s/ Nelson L. Mitten

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed through the Court's electronic filing system, on this 14th day of March, 2017, which, which will send notice to the following pursuant to Mo. Sup. Ct. R. 103.08:

Bryan E. Brody
Alexander J. Cornwell
1 North Taylor Avenue
St. Louis, Missouri 63108

Nicholas G. Higgins
P.O. Box 645
Eureka, Missouri 63025

/s/ Nelson L. Mitten