IN THE SUPREME COURT OF MISSOURI

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No. SC 96528

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THOMAS E. THARP and PAULA M. THARP,
Appellants/Cross-Respondents,

v.

ST. LUKE'S SURGICENTER - LEE'S SUMMIT, LLC,
Respondent/Cross-Appellant.

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Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
Hon. Kenneth R. Garrett, III, Circuit Judge

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APPELLANTS' SECOND BRIEF

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SUPPLEMENTAL STATEMENT OF FACTS

Defendant has not provided a "fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04(c). Consistent with the correct standard of review, it was obliged to set out the evidence and inferences most favorable to the verdict and to disregard all contrary evidence; it has instead recited facts most helpful to its arguments, thereby depriving this Court of a complete and unbiased understanding of the facts of the case. Wipfler v. Basler, 250 S.W.2d 982, 984-5 (Mo. 1952). The burden of this non-compliance has unfairly fallen to plaintiffs. Walker v. Thompson, 338 S.W.2d 114, 118 (Mo. 1960). Evidentiary omissions from the record on appeal should not be taken as favorable to an appellant. Wilkerson v. Prelutsky, 943 S.W.2d 643, 649 (Mo.banc 1997).

The 12/30/2011 Gallbladder Surgery. After experiencing central epigastric pain in the right upper quadrant of his abdomen, Tom Tharp was seen by his primary care physician in November 2011 (Pltf.Exh. 49 - Anwuri depo pp. 7-8). DR. VERONICA ANWURI is a board-certified family practice physician in the St. Luke's Health System (id. pp. 4-5). After a CT scan, he was diagnosed with severe gallbladder dysfunction (id. pp. 8-9). Mr. Tharp was referred to a Dr. Nunley for surgery (id. pp. 9-10), but because surgery could not be scheduled until the middle of the busy tax season that made up his livelihood, he contacted Dr. Anwuri's office again and was given the name of Dr. Norman Mutchnick, a general surgeon whom he then contacted and met with (Tr. 431-2). Dr. Mutchnick performed the

gallbladder removal (laparoscopic cholecystectomy) (Anwuri depo pp. 10-12). Dr. Anwuri did not see Mr. Tharp again until February 2012, after that surgery and additional surgeries to repair the damage Dr. Mutchnick had done (id. pp. 11-12).

The laparoscopic cholecystectomy was performed at the St. Luke's Surgicenter - Lee's Summit, on December 30, 2011 (Tr. 432-33; First Amended Petition, LF 45-6).

A few days later (on January 4, 2012), while Mr. Tharp was at work, "everything just come crashing down" (Tr. 433). After lunch he began feeling abdominal discomfort which began to build; he lay down in a "quiet room" for a time, then decided to walk to the security office about 300 yards away (Tr. 433-34). He only walked 50 or 60 yards when he collapsed onto the floor (Tr. 434). Mr. Tharp was taken by ambulance to Saint Luke's South Hospital in Overland Park, KS (Tr. 434-35). He remembers nothing of the next two days (Tr. 435). He was then transferred by ambulance to Saint Luke's Hospital on the Plaza in Kansas City a couple days later, where he remembers meeting with Dr. Randall and Dr. Cummings and discussing the imminent hepaticojejunostomy (Tr. 435-36). Mr. Tharp was discharged a few days later after that procedure but readmitted in March 2012, because of more bile leakage, requiring another surgery to drain an abscess and place a drain tube (Tr. 437-38).

Dr. Mutchnick's Negligent Surgery. DR. HENRY B. RANDALL is a non-retained expert called by plaintiffs. He is an abdominal transplant surgeon and hepatobiliary surgeon--more precisely, a hepaticopancreaticobiliary surgeon (Pltf.Exh. 51 - Randall depo pp. 6-8). Dr. Randall operates on the liver, bile duct, and pancreas (id. pp. 7-8). He was director of

transplant and hepatobiliary surgery at St. Luke's Hospital in Kansas City, but now is division chief of transplantation at St. Louis University as well as associate professor of surgery there (id. pp. 7-9).

Dr. Randall testified to the complications and problems Mr. Tharp experienced after the laparoscopic cholecystectomy. After developing post-surgery abdominal pain, Mr. Tharp was seen by Dr. Wendell Clarkston who obtained a CT scan, performed an endoscopic x-ray of the biliary tree, and found a bile duct leak (id. pp. 9-11). Dr. Geoffrey Slayden laparoscopically placed a stent in the bile duct to aid healing (id. pp. 11-12). That was not entirely successful, so Dr. Slayden requested a consultation from Dr. Randall who recommended and then performed a Roux-en-Y bypass hepaticojejunostomy, in which the bile duct is surgically shortened, attached directly to the small intestine and allowed to drain there (id. pp. 13-17). It is considered major surgery (id. p. 15). It was performed on January 7, 2012 (id. p. 32).

During his surgery Dr. Randall found "thermal injuries to the common bile duct"--the dissecting instrument used by Dr. Mutchnick to remove the gallbladder (a Harmonic scalpel) "had caused a burn to the common bile duct" (id. pp. 17-18). Bile had been leaking out of the area of the thermal injury (id.). The common bile duct "should be far away from the area of . . . intended operation" during the cholecystectomy; a burn injury at that location should not typically happen (id. pp. 18-19). When Dr. Randall trains hepatobiliary surgery residents and transplant fellows, he "caution[s] them about dissecting over too far, [and] instruct[s] them to stay away from the common bile duct to avoid injuries like this" (id. p. 20).

Dr. Randall opined that "these kinds of injuries shouldn't happen [in a laparoscopic cholecystectomy]. . . . so in my mind someone [*i.e.*, Dr. Mutchnick] went way too far over to the patient's left side which caused that thermal injury" (id. pp. 26-27). If the surgeon performing the cholecystectomy "can clearly see the common bile duct," then the surgeon should be able to minimize the risk of injuring that structure (id. p. 41).

DR. DAVID K. IMAGAWA, plaintiffs' specially-retained expert, is a professor of clinical surgery and pathology and also chief of the Division of Hepatobiliary and Pancreas Surgery (*i.e.*, surgery on the gallbladder, liver and pancreas, his medical specialties) at the Univ. of Calif. - Irvine (Tr. 51-52). He performed liver transplants earlier in his career but ceased doing so after a heart attack in 2000 (Tr. 51, 110).

Dr. Imagawa testified that when doing a laparoscopic cholecystectomy, "you want to make sure you ascertain what the anatomy is, you want to make sure you don't cut any structures until you know what the anatomy is, and you want to make sure you don't damage any surrounding tissue with the devices that you're using, either cutting devices or, in this particular case he used what's called a Harmonic scalpel, which is an energy and ultrasonic device that generates heat and causes -- cuts tissue" (Tr. 56-57). He added, "I do not use a Harmonic scalpel. One of the problems with the Harmonic scalpel is the tips become very, very hot. And if you accidently touch it against other surrounding tissues, you'll cause a thermal injury that will cause the tissue to burn" (Tr. 57). At the UC-Irvine hospital where he teaches, Harmonic scalpels are not used for laparoscopic cholecystectomies (id.).

The standard of care requires the surgeon to obtain a critical view of safety by identifying the cystic duct, the cystic artery, and the liver behind the gallbladder, then to clip the cystic artery and duct, then remove the gallbladder, put it in a bag, and pull it out through the abdomen (Tr. 58-59). "Failure to do that would then potentially lead to an injury by misidentifying structures" (Tr. 59). Dr. Mutchnick's operative report does not indicate that he obtained the critical view before attempting to remove Mr. Tharp's gallbladder (Tr. 60).

The thermal injury to the common bile duct led to bile leakage in the abdomen, significant irritation, and eventually bile peritonitis which caused Mr. Tharp's excruciating abdominal pain and fainting on January 4, 2012, and his admission to Saint Luke's South (Tr. 61). Dr. Slayden's laparoscopy showed "a lot of bile . . . leaking out from the ducts" into the abdomen and "knew that something terribly wrong had happened during the initial surgery" by Dr. Mutchnick (Tr. 62-63). A drain was placed and Mr. Tharp was transferred to the Plaza location for repair of the bile duct injuries by Dr. Randall (Tr. 63-67).

Dr. Imagawa opined, to a reasonable degree of medical certainty, the Dr. Mutchnick's surgery was "clearly below the standard of care for this operation" in causing the thermal injuries to the main common bile duct (Tr. 67). The "failure to obtain this critical view" of safety to identify the structures "and then causing an injury with the Harmonic scalpel leading to a burn is below the standard of care" (Tr. 68). A Harmonic scalpel works by using ultrasound; the tips "vibrate at thousands upon thousands of times a second and causes heat," "the end of the instrument becomes extremely hot and can burn," and the common bile duct

"was touched with this device after it had been activated and caused a burn to the bile duct" (Tr. 68-69). Surgeons know "these things get extremely hot," "have to be very careful" when using them, and are "taught to stay away from those structures" (Tr. 69). Dr. Mutchnick "shouldn't have been near the common bile duct" during the cholecystectomy (Tr. 91).

While nationally bile duct injuries occur somewhere between 1% and 1.5% of the time in surgeries of this kind (Tr. 86-87), Dr. Imagawa thinks that "is an outrageous number because it ought not to be that high" (Tr. 87). Studies by one researcher (Dr. Strasberg, "probably the foremost authority on bile duct injuries in the world") "found in the vast majority of bile duct injuries, that injury to the common bile duct is secondary to an inability to property visualize the anatomy or a cautery or thermal injury due to getting too close to the bile duct" (Tr. 109-10). In other words, the vast majority of bile duct injuries in such cases are "basically caused by malpractice" (Tr. 110). Dr. Imagawa does not hold the opinion that Mr. Tharp's injury was an instance or example of a known risk and complication that occurred in spite of the surgeon doing "everything within the standards of care" (Tr. 90).

Dr. Mutchnick himself did not testify, in person or by deposition.

Evidence of Mr. Tharp's Injuries and Future Damages. DR. RANDALL, who performed the hepaticojejunostomy repair surgery, testified that the possible future complications from that surgery range from "no long term sequelae or problems all the way up to having strictures long-term that require a liver transplantation" (Pltf.Exh. 51 - Randall depo p. 20). Strictures "are the narrowing of . . . any tube. In this case the bile duct" (id. p.

21). He explained, "Any time you operate or injure that area, it's at risk for narrowing because the blood supply to the bile duct is very small. . . . So if you injure the blood vessels on the side of that bile duct, then it loses nutrition and, therefore, you end up with areas below that becoming strictured or narrow because they don't have good blood supply" (id.). The treatments for strictures include possibly another hepaticojejunostomy--a "reoperation to try to go higher into the liver to find healthy bile duct" (id.). Patients who are not candidates for reoperation can have procedures performed by an interventional radiologist in which a hole is poked into the liver, the bile duct is accessed, and a guy wire passed into the intestine to open it up; or to have a stent placed to allow for either internal or external bile drainage (id. pp. 21-22). In some patients, those procedures are performed annually, but in others as often as monthly (id. p. 22). Sometimes secondary biliary cirrhosis develops that could require a liver transplant (id.).

Dr. Randall testified, to a reasonable degree of medical certainty, that 7% to 10% of hepaticojejunostomy patients develop strictures, while 1% need evaluation for and performance of a liver transplant (id. pp. 22-3). He believes Mr. Tharp will have a good outcome, but opined that "he's always at risk for having strictures long-term" (id. p. 23). He also noted Mr. Tharp had continued to express complaints of abdominal pain up through August 2012 (id. pp. 24-25).

DR. IMAGAWA also discussed the long-term effects of the hepatojejunostomy (Tr. 70-75):

[O]ver time where you've sewn these things together, there can be strictures. Typically after this procedure people unfortunately, since they've gone from a small pin-hole surgery to a big incision, have a significant amount of pain. . . . [T]heir quality of life is decreased and typically . . . they die quicker. In other words, they die 10 to 15 years sooner than someone who's not had this injury. So it's a major, major consequence with bad long-term outcomes. . . . [W]hen you redo this with the intestine, the intestine sometimes contract when they're not supposed to contract and cause abdominal pain. Also, since the muscles have been cut from the surgery, there can be significant spasms in the muscles from these operations. But these patients can go and seek pain management people, . . . [but] there's a significant portion of these people who never return to normal qualify of life after this operation.

[In many cases, the patient develops postoperative neuralgia] [b]ecause when you cut through the abdomen, you also cut through all of the nerves that are there. So when those nerves get cut, sometimes as they heal back slowly, they continue to fire and cause significant pain.

. . . [When you cut into the abdomen] you have the risk of what's called small bowel obstructions, where the intestines basically get scarring from the surgery and can cause abdominal pain or another operation. The biggest problem is, again, where this bile duct has been sewn to the intestine, over time

that connection can actually narrow as it scars. And that -- that scar at any particular time in about 20 to 25 percent of the patients after 10 years after the surgery have a problem that requires another procedure or procedures to correct that. In another 10 percent of the patients it may require another operation to actually fix this.

. . . Over time and with age [that percentage] will increase . . . [to] as high as 50 percent in 15 or 20 years.

. . . There are basically two procedures that can be done to fix the strictures: One is to do . . . a transhepatic cholangiogram, where a radiologist sticks a needle through the skin, through the liver, through the bile duct, through the stricture, and that leaves a tube that comes outside of the body that typically has to stay there for months to years. And they're exquisitely painful because these tubes come out right under the rib cage. The other option is sometimes you can inside [*sic*] and try that ERCP procedure again [to try to] fix the stricture that way. But that's a very difficult procedure, and it's usually not successful. [If neither one of those works, another option] would be another surgery to go back and redo that connection.

. . . So if this is stricturing, you can develop what's called secondary biliary cirrhosis. So basically when the narrowing occurs, the pressure builds up in the liver, and the liver can actually develop the same kind of cirrhosis

> that you get from heavy drinking. . . . Typically you would have to fix that stricture. In rare cases you might need a liver transplant.
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> . . . [T]he percentages are somewhat general; but, yes, these individuals who have this repair operation need to be followed for the rest of their life by a specialist. . . . Typically we say they should get blood work done every three months. They should have an ultrasound of their liver every six months, and I typically see anybody that I've repaired at least once or twice a year. [That is the standard recommendation.]

All of those opinions as to what will happen to Mr. Tharp were given to a reasonable degree of medical certainty (Tr. 74, 76). The various operations he described "are expensive procedures and require a speciality of which . . . there are not a large number in any particular state" (Tr. 77-78).

DR. ANWURI described the treatment she provided to Mr. Tharp for his continuing abdominal pain and spasms beginning in February 2012, through the time of her deposition in March 2016 (Pltf.Exh. 49 - Anwuri depo pp. 11-30). She recorded the location, nature and severity of his complaints of abdominal pain, and the pain medications she prescribed serially over that period, which were variously discontinued if they provided too little relief or lost their effectiveness over time (id.). She opined, to a reasonable degree of certainty, that his abdominal pain was causally related to the cholecystectomy by Dr. Mutchnick, the complications he suffered, and the subsequent repair surgeries; that it is severe; and that it

is "very likely permanent" (id. pp. 30-32, 83). Mr. Tharp will need to continue taking narcotic drugs to manage his pain (id. p. 32). The dosages will need to be increased over time as their effectiveness wanes, which carries an "increase[d] risk of complications, sedation, constipation [and] addiction" (id. p. 32).

Dr. Anwuri and Mr. Tharp have discussed referring him to the Mayo Clinic for treatment of his continuing pain (id. pp. 28, 77-80). Mr. Tharp indicated at trial that arrangements for that referral are "in process" and he intends to go (Tr. 430-31).

Defendant's Corporate Bylaws Concerning Credentialing Applications and Its Notice or Knowledge of Dr. Mutchnick's Actual Litigation History. DR JOHN C. HYDE, II, a professor of health care administration at the Univ. of Alabama - Birmingham (Tr. 115-17), is an expert called by plaintiffs. An area of focus during his 27 years as a professor, author and lecturer has been on physician credentialing in hospitals and ambulatory surgical centers (Tr. 117-23)

Plaintiffs requested the court to take judicial notice of the 2007 version of 19 CSR 30-30 (Pltf.Exh. 60) which govern the licensure, organization and operation of Ambulatory Surgical Centers (ASCs) such as the defendant's facility (Tr. 124-25) (*see* Appdx A1-A3). In 19 CSR 30-30.020(1)(A)(1), all ASCs are directed "to establish and adopt bylaws by which it shall abide in conducting all business of the facility" (Appdx A2). The regulations expressly require the adoption of bylaws by the governing body that "shall provide for the selection and appointment of medical staff members based upon defined criteria and in

accordance with an established procedure for processing and evaluating applications for membership." 19 CSR 30-30.020(1)(A)(2) (Appdx A2).

Portions of the content of the regulations were summarized by Dr. Hyde for the jury (Tr. 126). Those excerpts pertained to the ASC's governing body's responsibility to develop bylaws, policies, procedures, rules and protocols to run the facility, including physician credentialing, and the obligation to follow them (Tr. 126).

Dr. Hyde opined that defendant fell below the standard of care in granting credentials to Dr. Mutchnick in 2005 initially, and in renewing his credentials in 2006, 2008, and 2010 (Tr. 126-7).[1] His opinion was based on the defendant's failure to follow "the prevailing and prudent standards [of care]" throughout the U.S., which standards were "very much" the same as the Surgicenter's own bylaws, policies and procedures, when it discovered "a material difference between" the information Dr. Mutchnick supplied in his applications about prior lawsuits and what defendant found out later to be the truth (Tr. 127). Dr. Mutchnick presented "not only an incomplete application, [but] a false application" (id.). The Surgicenter was bound to comply with its own policies and procedures in that situation (id.).

Facilities should be informed of and aware of "all lawsuits that have ever been filed against a doctor" who seeks credentialing, not just those in which a settlement was made or judgment entered in favor of the patient, in order to protect the public (Tr. 144-45). The

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[1]The initial appointment shall not exceed 12 months, and reappointments shall not exceed two years. 19 CSR 30-30.020(1)(A)(2) (Appdx A2).

standard of care requires a hospital or ASC to "track the lawsuits," or to "follow up on lawsuits by some source" such as a governmental entity that tracks the lawsuits to get the details about them, including by checking the National Practitioner Data Bank reports, by checking the local courthouses to determine if any lawsuits have been filed against an applicant (stemming from a Wisconsin court decision in the 1980s called Johnson v. Misericordia) (Tr. 161-62, 165-66), by checking Missouri case.net (Tr. 208-09), and/or by other means (Tr. 210-11).[2]

Dr. Hyde was shown Dr. Mutchnick's credentialing file, including applications for 2005, 2006, 2008 and 2010 which required a listing, brief description and outcome of all the suits against the applicant, unlimited as to time, and compared them with defendant's credentialing bylaws and with other sources of proof about lawsuits available to defendant such as Missouri case.net and the National Practitioner Data Bank (Tr. 145-56, 229).

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[2]Case.net reflects all suits filed against a physician. By contrast, there is no obligation to report every malpractice suit to the National Practitioner Data Bank (Tr. 141-3). The NPDB only collects information about payments made for the benefit of health care practitioners relating to a written claim or judgment for medical malpractice, or license revocations, suspensions or restrictions lasting 30 days or more, or felony convictions, and certain other matters (Tr. 142-43, 181-82, 215-16). But there are ways to get around the NPDB requirements and avoid reporting instances of serious physician malpractice (Tr. 148-49; 157, 182-83, 184-85, 222).

Dr. Hyde noted that the credentialing application forms ask, "Have any professional liability lawsuits been filed against you as a result of your actions or omissions?" and "Have any professional liability judgments or settlements been made against you as a result of your action?" (Tr. 146-47). A "yes" answer to either question requires that "full details" be given by the applicant (Tr. 148). Dr. Mutchnick had answered that he had been sued in the past, but that no judgments had been entered or settlements made (Tr. 147). But he gave incomplete details, failed to list all the lawsuits against him, and failed to disclose that he had settled several suits (Tr. 149-55; Pltf.Exh. 100 [Appdx A54]).

The same pattern of false answers and incomplete details appeared in each of his reappointment applications (Tr. 160-70; Pltf.Exh. 101-107 [Appdx A55-A61]). A Missouri case.net search showed lawsuits had been filed against Dr. Mutchnick 22 times[3] before Mr. Tharp's operation on December 30, 2011, but he had only reported 7 in total in all his applications through 2010 (Tr. 163-70; 216-18). The standard of care requires a hospital or ASC independently to verify or corroborate answers given on applications (Tr. 166).

Dr. Hyde was shown Pltf.Exh. 12 (Tr. 156), the Saint Luke's Surgicenter - Lee's Summit, LLC MEDICAL STAFF BYLAWS (Appdx A4-A17; admitted at Tr. 190-91). The bylaw provisions addressing this situation appear at p. 9 therein (Appdx A12) and read:

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[3]The 22 suits appear on Pltf.Exh. 79 (Appdx A51-A52), a color flow chart summarizing the suits on Pltf.Exh. 59, the case.net documents (Tr. 216-7, 359-64). Both were admitted for demonstrative purposes and used with witnesses (Tr. 162-3, 216-7, 359-64, 548).

3.4 The Chairman of the Credentials Committee or the Chairman's designee shall promptly notify the applicant of any problems in obtaining the information required, and it shall then be the applicant's obligation to obtain the required information in a timely fashion. If the applicant does not respond within ninety (90) days of a written request for additional information or completion of information for the application, the application shall be automatically removed from consideration for Medical Staff Membership. An applicant whose application is not completed within one hundred twenty (120) days of initial submission shall be automatically removed from consideration for Medical Staff Membership.

3.5 An applicant shall be automatically removed from consideration for Medical Staff Membership if it is determined that the applicant made misstatements, omissions or gave false or misleading information in preparing the application, or in providing any information required pursuant to the application process.

Dr. Hyde opined that, in light of the "material misstatements," "pretty gross and severe" omissions, false or misleading information on Dr. Mutchnick's applications, and the Surgicenter's actual knowledge of them, it should not have "credential[ed] him right away" but should have allowed the applicant to amend his responses and supplement the information as the bylaws provide (Tr. 156-57, 228-29).[4] "If there's some explanation for

[4]Dr. Hyde also noted that the Surgicenter had the power to "curtail privileges

that, you give people the benefit of the doubt" (Tr. 157). But the bylaws "tell[] you what to do. That's why you have medical staff bylaws, rules and regs. They apply to everybody. . . . [T]he surgical center facility has to act upon this. And it's clear that they not only didn't, they never did. . . . [B]y their own rule it's automatic, and everywhere else that I've ever been it would be automatic too. . . . [D]o [these bylaws] look like the other ones I've seen across the country? Yes, they do." (Tr. 158).

He concluded, to a reasonable degree of administrative certainty, that the Surgicenter acted below the standard of care in granting credentials to Dr. Mutchnick throughout the entire period from 2005 through 2011 (Tr. 158-59, 178). If the ASC has "some knowledge . . . of a fraudulent or a false application being submitted for privileges, you have an obligation to do something about it. . . . [The bylaws] tell[] you what to do. You have to follow what you say you're going to do" (Tr. 159-60, 228-29).

JANET GORDON was employed by Nueterra Health Care, which operated the Surgicenter during the relevant period, and she was administrator at the facility in 2010 through 2013 (Tr. 240-42). When a physician applied for privileges at the Surgicenter, she

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immediately. It's called a summary suspension" (Tr. 227). Defendant's bylaws allow that "whenever a Member's conduct leads to a reasonable believe [*sic*] that immediate action should be taken to reduce a substantial likelihood of future injury or the imminent impairment of the health or safety of a Facility patient, prospective patient employee or other person" (*see* Appdx A16-A17, section 5.2, pp. 17-8).

or another staff person there pulled the National Practitioner Data Bank reports and put them in the credentialing file (Tr. 248-49). Other data pertinent to the application was collected by an outside company called Credentialing Experts or by another staff person at the Surgicenter and placed in the file (Tr. 250). All that data was reviewed internally, often by Ms. Gordon herself, then would be given to the facility's medical director to review for completeness (Tr. 250-51). It was then forwarded to the credentials committee, consisting of physician members/owners (Tr. 251). That committee met monthly or quarterly to review the files, discuss the content and any areas of concern, and either sign off on the application or seek follow-up, depending on the issue of concern (Tr. 252). Follow-ups "didn't happen a lot" (Tr. 252). Once the committee signed off, the application and file would go to the quality assurance committee for review (Tr. 333), which then makes a recommendation to the board of managers for its final decision (Tr. 252-53, 333).

An application might be "flagged" if something was missing or because of a malpractice claim (Tr. 253-54). A credentialed physician was required to report a new malpractice suit "in some fashion," either verbally or in writing (Tr. 254). A record would be made by Ms. Gordon's office if it were reported verbally to her, and it "might be discussed at the credentialing committee level" if reported to a committee member (Tr. 254). She recalled no occasion when that happened (Tr. 255). She recalls no specific conversations with Dr. Mutchnick about any new lawsuits not mentioned on his applications (Tr. 255-56).

If an applicant advised a committee member of a new lawsuit, "that would have

involved perhaps asking for . . . additional documentation"; that is, the physician members of the quality assurance committee[5] would be responsible for any additional investigation (Tr. 257-58). She could not recall if any such occurrences involved Dr. Mutchnick (Tr. 258). Any such discussions "would be documented" in the committees' minutes and "documented in the [applicant's credentialing] file" (Tr. 258-59).

The credentials committee was responsible for making sure a detailed explanation of malpractice suits had been provided with the application (Tr. 261-62). If Ms. Gordon's office became aware that an applicant had not provided a written description of prior malpractice suits, the medical director, the quality assurance committee and the credentials committee would have been informed, and those individuals would have responsibility for obtaining all required information (Tr. 262).

The credentials committee and quality assurance committee were responsible for reconciling discrepancies or omissions between an application and the information contained in a NPDB report (Tr. 280, 302-03). Ms. Gordon conceded that, although the Surgicenter's "entire file" appeared to be missing some essential documents (Tr. 282-85), and the Mutchnick credentialing files from 2005 through 2010 produced in this litigation did not contain any explanations from Dr. Mutchnick of the lawsuits against him that the NPDB

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[5]The credentials committee "was part of, a subset of," the quality assurance committee; several of the quality assurance committee members were also on the credentials committee (Tr. 258).

reports reflected, yet he was still granted credentials (Tr. 286-95, 303-04).

Ms. Gordon acknowledged that 22 malpractice lawsuits had been filed against Dr. Mutchnick prior to surgery on Mr. Tharp that he was obligated to disclose to the Surgicenter in his applications (Tr. 359, 363-64), but he had only cited 7 of them (Tr. 369). Neither she nor anyone in her office searched the Jackson County Circuit Court files for cases involving Dr. Mutchnick, nor checked with Missouri case.net, because the Surgicenter's policy and procedure for verifying information in a credentialing application do not require that either of those two procedures be done (Tr. 365-69).

Approximately 25 or 30 people are involved in collecting information, ascertaining completeness, and evaluating the merits of an applicant for credentialing have access to both the application and the inconsistent information from the NPDB (Tr. 332-34, 374). But the members of the board of managers who make the final credentialing decision "typically never look at the actual filings"--they do not have the NPDB reports to examine and compare with the application and do not know of the omissions and false statements in the application (Tr. 375). They only have the committees' recommendation to consider--"the credentialing committee recommends, and the board of managers approves" (Tr. 375).

Defense expert RICHARD SCHMIDT agreed that the NPDB reports he had been given showed nine payments on behalf of Dr. Mutchnick following judgments or settlements (Tr. 532-35; Pltf.Exh. 135 [Appdx A62-A66], admitted at Tr. 530-31). He agreed that, by force of state law and the demands of The Joint Commission (the credentialing organization),

the Surgicenter's governing body was responsible for promulgating and enforcing its own medical staff bylaws, credential manuals, policies and procedures, in the interest of protecting patient safety (Tr. 544-45). He agreed that, in accordance with policies regarding the Credentialing Process,[6] the physician applying for credentials must advise the hospital (or ASC) "[if] he gets sued in a lawsuit" because that kind of information would not be reflected in an NPDB report unless a payment has been made (Tr. 547-48). Because the NPDB would not have such information, "[i]t would be completely upon the doctor to provide that information" (Tr. 548). Schmidt agreed Dr. Mutchnick should have reported all 22 malpractice lawsuits to the Surgicenter on his various requests for appointment and reappointment, together with "a written explanation of every one of those 22" (Tr. 548). Schmidt agreed that Dr. Mutchnick had not done so, though he gave an account of about six of them (Tr. 548-49). The Surgicenter's bylaws in this regard were "similar to the bylaws [of] every hospital that I've been to" (Tr. 551).

Dr. Mutchnick's Financial Interest in and Value to Defendant. JANET GORDON testified that Saint Luke's Surgicenter - Lee's Summit is a limited liability company (Tr. 247). In the period of 2010 through 2013, Saint Luke's East Hospital owned 51 percent,

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[6]Defendant's Policy #ADMS.07, at p. 2 of 7 (Pltf.Exh. 13, Appdx A20), states, "If the applicant has been or is currently involved in any professional liability actions a summary of the malpractice suits must be submitted with the application. This is also applicable to the reappointment process."

Nueterra Health Care owned 4%, and the remaining 45% was divided among a group of 43 physician members (Tr. 247). Dr. Mutchnick was one of those members (Tr. 248).

Physician members of the LLC shared in the profits of the Surgicenter and were paid monthly (Tr. 260-61). Plaintiffs counsel read into evidence a document produced by defendant that set out the amount of gross revenue the Surgicenter made from Dr. Mutchnick's practice there (Tr. 467-68). It declared that:

(1) in 2007 he did 270 cases and generated gross revenues of $1,815,146.83;

(2) in 2008 he had 363 cases, generated gross revenues of $2,641,357.88;

(3) in 2009 he performed 263 cases and generated gross revenues of $1,969,595.49;

(4) in 2010 he did 217 cases and generated gross revenues of $1,730,068.26;

(5) in 2011 he did 223 cases and generated gross revenues of $2,163,376.05;

(6) the total cases done by Dr. Mutchnick, at Saint Luke's Surgicenter between 2007 and 2011 were 1,337, and the total gross revenues for that period was $10,319,544.51.

Defendant's Motions for Directed Verdict. Defendant's Motion for Directed Verdict at the Close of Plaintiffs' Evidence (Supp.LF A59-A62) and its Motion for Directed Verdict at the Close of All Evidence (Supp.LFA64-A67) are identical in all material respects.[7]

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[7]The only variations appear on the first page of each to distinguish the timing of one motion from the other: "the close of *plaintiff's* evidence" v. "the close of *all* evidence," and "The *plaintiffs have now rested*, but *their* evidence. . ." v. "The *evidence is now complete*, but *the* evidence. . ."

Neither motion raised the argument that plaintiffs had failed to make a submissible case by showing Dr. Mutchnick's "incompetence" or "lack of qualification" (defendant's first Point Relied On) or that plaintiffs had not presented sufficient evidence to support future damages (its second Point Relied On).

Both motions posited defendant's contention that plaintiffs had grounded their case on (1) Dr. Mutchnick's failure to disclose "two of the several medical-malpractice claims that had been asserted against him" and that (2) "defendant's internal procedures stated that applicants were required to disclose all such claims, as a condition of being credentialed" (Supp.LF A60, A65). The Surgicenter claimed entitlement to a directed verdict because "there is no evidence in this case that either of the omitted claims asserted (or actually involved) conduct on the part of Dr. Mutchnick that defendant should have considered disqualifying circumstances, in terms of issuing him credentials—*i.e.*, no evidence that defendant had any negligence duty to refuse to issue credentials to Dr. Mutchnick, in the event he had actually disclosed these claims, in his application" (Supp.LF A60, A65).[8]

The motions added, "Nor is there any evidence that defendant should have refused to

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[8]Plaintiffs' actual theory of recovery differed from those scenarios. It was accurately stated by their counsel during trial twice: "This case isn't about the number of lawsuits; it's about did he give false or misleading information on his application" (Tr. 227); and, "And you know that the issue in this case is not what others report about Dr. Mutchnick, it's what Dr. Mutchnick was supposed to report and didn't report" (Tr. 368).

issue credentials to Dr. Mutchnick, merely because the true number of the claims asserted against him was too high" and "there is no evidence that defendant had a duty not to allow Dr. Mutchnick to correct his application, so as to include references to the originally-omitted claims. Consequently, there is no evidence that would support the conclusion that there was any breach of duty on the part of defendant that constituted a proximate cause of the event complained of, here" (Supp.LF A60-A61, A65-A66).

In oral argument on the first motion for directed verdict, defense counsel stated: "In addition to the arguments set forth therein, I'd like to incorporate a couple of other thoughts on why I think Plaintiffs have not made a submissible case" (Tr. 469). His remarks dealt only with but-for and proximate causation issues: "I don't think they've met their burden on proximate causation to show that, had all this [lawsuit] information been disclosed, it would have changed the credentialing process" (Tr. 470, 471-80). The theory was that, had the Surgicenter denied his applications, or suspended or terminated Dr. Mutchnick's surgical privileges there, he would have performed the cholecystectomy at some other hospital or ASC not within the Saint Luke's Health System. The motion was overruled (Tr. 480).

Similarly, in speaking in favor of the motion for directed verdict at the close of all evidence, after incorporating by reference "all of the arguments that were previously made at the close of the plaintiffs' evidence," defense counsel focused solely on the issues of but-for and proximate causation (Tr. 601-04). "Incompetency" and future damages were not mentioned.

Immediately before the instruction conference, plaintiffs' motion to amend their pleadings to conform with the evidence was granted (Tr. 613-14).

The Instruction Conference. At some point off the record, the trial judge and the parties' counsel worked together to draft plaintiffs' verdict director (Instruction No. 6, 2nd Supp.LF 1 [Appdx A67]). During the formal instruction conference, after acknowledging defendant's general objection and after defense counsel announced "no objection" to the first five mandatory instructions in the package (Tr. 615), the court addressed the joint effort in drafting the verdict director that would be given (Tr. 615-16):

> THE COURT: Instruction No. 6 was -- there's two instructions. There's one that was submitted by the plaintiff and then one submitted by the defendant. And I think in a collaboration we came to an agreement in regards to the form [and] the contents in regards to Instruction No. 6. Has the Court misstated that in any way, shape or form?
>
> MR. STITT [defense attorney]: It looks all good to me, Your Honor. So the defendant has no objection to form.
>
> MR. McINTOSH: Okay. I have no objection as to form. We all had input into this one.

The court continued its task, and defendant had no objection to the remaining instructions, specifically the damage instruction (No. 8). He said the form of verdict "[l]ooks good to me, Your Honor" (Tr. 616-18).

PLAINTIFFS' REPLY ARGUMENT

A. SEC. 538.220 RSMo VIOLATES ART. I, §22(a) OF THE MISSOURI CONSTITUTION (RIGHT TO TRIAL BY JURY).

Defendant contends that application of §538.220.2, with the trial court incorporating its provisions into the Amended Judgment, does not result in an infringement of their constitutional right to commence execution "immediately upon the rendition of judgment." Defendant does not confront the insurmountable facts. Rather it offers an unconventional definition of "immediate" so as to include a delay of four years after rendition of a judgment.

At common law and for most of its history as a State, Missouri steadfastly held to the principle that a judgment was "operative from the date of its rendition[9] . . . [and] [t]he right of execution follows immediately upon the rendition of judgment." State v. Haney, 277 S.W.2d 632, 635 (Mo. 1955); Fontaine v. Hudson, 93 Mo. 62, 5 S.W. 692, 694 (1887) ("the party in whose favor any judgment is rendered may have execution in conformity therewith, . . . [and] the right to the execution follows *eo instante* upon the rendition of the judgment").

That right was available to each plaintiff awarded future damages in a personal injury judgment. Missouri trial courts have been instructing juries to award future damages where supported by the evidence since the 19th century. *See, e.g.,* Britton v. City of St. Louis, 120 Mo. 437, 25 S.W. 366, 369 (1894) (jury was instructed to allow plaintiff damages which they

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[9]Although the judicial act of rendering and the ministerial act of entering judgment are separate, Rule 74.01 obliterates their distinction and makes entry the operative act.

believe "will result to him in the future as the direct result of his injuries").

Prior to 1986 and at common law, a jury's award in a medical malpractice case was not divided into specific categories of damages; it was a general one and would have included future medical damages where appropriate. A prevailing plaintiff could enforce a judgment immediately upon its rendition to collect it as soon as possible.

Had plaintiffs' cause of action arisen prior to the effective date of §538.220 in August 1986, they could have enforced their original judgment by seeking execution the day of, or the day after, its entry to collect the full amount.[10] The trial court could not have amended their judgment to set out an installment plan for payment of future damages, thereby delaying their complete recovery, because it lacked authority to amend the jury's verdict in matters of substance or materiality. Kahn v. Prahl, 414 S.W.2d 269, 278 (Mo. 1967).

It is plain that the Amended Judgment does not permit Mr. Tharp to initiate execution proceedings "immediately upon the rendition of judgment" to collect the $550,000 in future medical damages as soon as possible. Sec. 538.220, and nothing else, allowed and compelled the court to enter its Amended Judgment to comply with the legislative dictate to devise an

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[10]While the judgment recites the jury's verdict, it does not explicitly declare the amount of each plaintiff's recovery. That does not render it indefinite or unenforceable. In cases where "a judgment is ambiguous or silent as to the amount of recovery, reference may be had to the pleadings and other parts of the record [*i.e.,* the verdict] and the judgment will be presumed to be in the amount therein shown." State v. Haney, 277 S.W.2d at 635-6.

installment payment plan. Instead of being collectible upon the entry of judgment through execution, that $550,000 is to be paid out in five equal installments spanning a three or four year period (LF 115-16). And part of it could be declared beyond collection entirely under §538.220.5. How can this not be "hostile" legislation? State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow, 133 Mo. 500, 36 S.W. 43, 48 (banc 1896).

"[A] judgment must fix 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." Payne v. Payne, 695 S.W.2d 494, 497 (Mo.App.S.D. 1985). The Amended Judgment gives the Surgicenter a right not to pay the $550,000 before the dates specified therein, and the plaintiffs have the responsibility to wait until a payment is past due before executing.

The Amended Judgment can only be enforced in accordance with its provisions. That money is not due and payable except as the Amended Judgment states. Any enforcement efforts to compel payment of the $550,000 even one day earlier than the court-ordered deadlines cannot succeed and are fraught with danger. Missouri recognizes an independent action for wrongful execution. Pourney v. Seabaugh, 604 S.W.2d 646, 651 (Mo.App.E.D. 1980). "A wrongful execution results when a seizure is premature." 30 Am.Jur.2d *Executions and Enforcement of Judgments* §434, p. 408 (2017). Plaintiffs could be liable for wrongful execution (or conversion) and subjected to compensatory and possibly punitive damages, plus interest. Southern Missouri Bank v. Fogle, 738 S.W.2d 153, 157-9 (Mo.App.S.D. 1987).

Defendant next seems to contend that delayed payment of future medical damages was intended by the jury (despite no evidence of that at all) (C-App.Br. 19-20). The jury by its verdict did not, and could not, specify that the plaintiffs' recovery of future medical damages should be delayed for several years, as defendant contends. The verdict announced the amount of those damages and nothing more (LF 60-61). Jurors speak through their verdict and "cannot speak . . . of the motives which induced or operated to produce the verdict." Ledure v. BNSF Ry. Co., 351 S.W.3d 13, 23 (Mo.App.S.D. 2011).

Defendant argues that §538.220 is merely another proper way in which the legislature can use courts to control verdicts (C-App.Br. 20-1, 24-5); *i.e.*, by mandating that courts fashion a delayed payment schedule that prevents immediate enforcement of that part of a judgment awarding future damages (particularly medical damages), and arming them with "discretion" over the details of that schedule. But neither the courts nor the legislature can deprive litigants of the substantial incidents and consequences of a jury trial. Encouraging courts to exercise sound discretion while they set about to impair the incidents and consequences of a jury trial does not save the statute from constitutional infirmity.

The power purportedly given by §538.220 is nothing like the power of remittitur, as the Surgicenter contends, and does not provide a precedent for this statute. Remittitur could only be granted if the damage award was against the weight of the evidence, such as where the jury erroneously included an item for which the defendant was not liable (Watts v. Lester E. Cox Med. Centers, 376 S.W.3d 633, 639 (Mo.banc 2012)), or to bring "uniformity to

verdicts and judgments for unliquidated damages" (Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99, 110 (Mo.banc 1985)). In either event, remittitur is a *judicial* act, tailored to the specific facts of the case and justified by trial court or jury error.

And remittitur has some inherent protection for the plaintiff. Former Rule 78.01 provided, "Consenting to a remittitur as a condition to the denial of a new trial does not preclude the consenting party from asserting on appeal that the amount of the verdict was proper or that the amount of the remittitur is excessive. A party consenting to a remittitur may not initiate the appeal on the ground but may raise the same on the other party's appeal." Firestone, at 108. Furthermore, the plaintiff could reject the remittitur and file an appeal seeking reinstatement of the verdict. Under remittitur, a verdict could not be taken away altogether nor damages reduced (as defendant asserts) without granting a new trial, unless the plaintiff consented. Even then, the plaintiff was entitled to appellate review. Sec. 537.068 and present Rule 78.10 provide such protections now.

By contrast, the delay in obtaining the full damage award imposed by §538.220 is unrelated to any claim of jury error, and the statute includes no similar safeguards.

Defendant states that §538.220.2 "is utterly devoid of any language that would require a court to reduce the amount of future damages awarded" (C-App.Br. 19). That is literally correct; §538.220.5 does that by providing a formula by which future medical damages can be capped arbitrarily when the plaintiff dies before incurring expenses for, or spending all of the money awarded on, future medical damages. That is no less a cap than a set figure of

$350,000 because it is less than the jury awarded. Watts v. Lester E. Cox Medical Centers, supra 376 S.W.3d at 640 ("The individual right to trial by jury cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case"). In accordance with the substance and meaning of the right of trial by jury, the Tharps have the constitutional right to recover all of the jury's award of future medical damages, even if Mr. Tharp never spends one dollar for future medical care and treatment.[11] That should not be considered a "windfall."

But defendant also overlooks the flip side. What is Mr. Tharp supposed to do if the expenses of his necessary medical treatment in any of the next four years (or in each year) exceed the annual instalments ordered by the court? Must he forego any treatment for his permanent pain, or regular physician visits, or diagnostic blood work and ultrasounds, or procedures to treat his strictures, or treatment for a small bowel obstruction should it occur,

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[11] What the Surgicenter calls a "windfall," the jurors deemed "fair and just." For all anyone knows, its $1,000,000 future medical damage figure was the product of their own "present value" calculation, which they are competent to make (Byrd v. Burlington Northern R. Co., 939 S.W.2d 416, 417-8 (Mo.App.E.D. 1996)). By logical extension, defendant's reasoning could justify ongoing monitoring of any injured plaintiff to verify he/she has actually received and paid for future medical treatment with that money; or allowing a defendant to recoup some part of future medical damages awarded where any plaintiff (injured by some other kind of tort) died before spending the full amount allocated to future medical care.

or another hepaticojejunostomy, or treatment for secondary biliary cirrhosis, or a possible liver transplant?[12] Sec. 538.220.2 and -.5 fail to address such scenarios. That shows the folly of a one-size-fits-all approach to interfering with a jury verdict and the right of immediate execution on a judgment, where additional and unnecessary risks of serious harm are gratuitously heaped on a grievously injured patient in order to aid those who injured him.

Furthermore, defendant's reliance on Watts is unavailing. Plaintiffs have not ignored Watts. They pointed out in their Jurisdictional Statement that "No constitutional objection to §538.220 was made in Watts. The trial court's decision and method of payment of future damages (other than medical damages) in Watts was reviewed under the 'abuse of discretion' standard only for arbitrariness" (App.Br. 10). Defendant seems to suggest this Court deftly sidestepped a ruling on constitutionality.

Sec. 538.220 is unconstitutional under the analysis used in Watts. Most importantly, it held that at common law the jury's determination of damages affected the remedy, and so the availability of the remedy was a part of the *substance* of the constitutional right. 376 S.W.3d at 641. Sec. 538.220 interferes with the Tharps' remedy as it existed at common law, and it disregards the jury's function after the verdict. Id. at 641-3.

Finally, defendant's cite to Sanders v. Ahmed, 364 S.W.3d 195 (Mo.banc 2012), is inapt (C-App.Br. 26-7). Sanders was a wrongful death case, deemed to be a statutory action,

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[12]The medical testimony at trial supports the present and future need for, or increased risk for, every one of these kinds of treatment, as summarized *infra* at pp. 79-84.

and is limited to wrongful death cases arising from medical malpractice. The opinion so declared: "Section 538.220 does not violate the right to trial by jury, at the very least, in relation to periodic payments of damages for wrongful death claims. Nor does section 538.220 violate the principle of separation of powers . . . [because] the legislature may place limits on statutorily created remedies." Id. at 205.

B. SEC. 538.220 RSMo VIOLATES ART. II, §1 OF THE MISSOURI CONSTITUTION (SEPARATION OF POWERS).

Defendant glosses over the rationale expressed in Fust v. Attorney General for the State of Mo., 947 S.W.2d 424 (Mo.banc 1997), which involved a statute directing that half of any punitive damages award be deemed rendered in favor of the State and paid into the state-controlled Tort Victims' Compensation Fund. This is the operative holding: "Nothing in the text of the statute at hand interferes with the judicial function." Id. at 430.

Unlike Fust, §538.220 clearly interferes with judicial functions. "The authority that the constitution places exclusively in the judicial department has at least two components--judicial review and *the power of courts to decide issues and pronounce and enforce judgments*." Chastain v. Chastain, 932 S.W.2d 396, 399 (Mo.banc 1996).

Sec. 538.220.2 directs courts as to what judgment they must pronounce:

> At the request of any party . . . the court ***shall*** include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars. Any judgment ordering such periodic or installment payments ***shall*** specify a future medical periodic payment schedule, which ***shall*** include the recipient, the amount of each payment, the interval between payments, and the number of payments. The duration of the future medical payment schedule ***shall*** be for a period of time equal to the life expectancy of

> the person to whom such services were rendered. . . . The amount of each of the future medical periodic payments ***shall*** be determined by dividing the total amount of future medical damages by the number of future medical periodic payments. The court ***shall*** apply interest on such future periodic payments at a per annum interest rate [therein specified].

The repeated use of "shall" demonstrates the legislature's mandate. The legislature dictates that the judgment courts are to enter in these cases must declare that future damages are to be paid in installment payments, over a period of time the legislature has chosen, in amounts determined by the formula the legislature specified, and bearing an interest rate decided upon by the legislature (if the parties cannot agree to one). Implicit in the statute is the command to appellate courts to reverse any judgment in such cases that does not comply with these provisions.

That the General Assembly's choice of the word "shall" is meant to be understood as mandatory cannot seriously be doubted. Bauer v. Transitional Sch. Dist. of City of St. Louis, 111 S.W.3d 405, 407-8 (Mo.banc 2003).

Sec. 538.220.2 and -.5 both interfere with the court's exclusive power to enforce judgments. The legislative command that future damages shall be paid periodically in installment payments necessarily conflicts with the judgment creditor's right to "immediate execution upon the rendition of judgment." State v. Haney, supra 277 S.W.2d at 635. It compels the judgment creditor to wait on collecting his/her judgment while the periodic

payments are made, and precludes execution until a payment is past due (*see* pp. 35-37 *supra*). And the legislative mandate in subs. 5 that unpaid future medical damages no longer must be paid, and are in effect deemed uncollectible even by execution, in the event the injured plaintiff dies before fully recovering them or incurring medical bills in an amount equal thereto, interferes with the judiciary's historical role, right and duty in enforcing its own judgments. The legislature has made a *judicial* determination that the judgment is to be treated as fully satisfied by operation of law, even though it has not been paid. Presumably a judgment debtor can insist upon a satisfaction of judgment.

In addition, Watts recognized that at common law the jury's determination of damages affected the remedy, and so the availability of the remedy was a part of the substance of the constitutional right to trial by jury. 376 S.W.3d at 641. It follows that any legislation that usurps or infringes upon the authority and duty of courts to render judgment in accordance with the jury's verdict, or impairs the right of immediate execution upon rendition thereof, or disregards the jury's function by making changes in matters of substance passed on by the jury, necessarily invades the judicial realm in violation of Art. II, §1 of the constitution.

C. SEC. 538.220 RSMo VIOLATES ART. I, §26 OF THE MISSOURI CONSTITUTION (TAKING WITHOUT JUST COMPENSATION).

Defendant cited no authority to support its argument that a judgment, or the right to receive proceeds under a judgment, is not property. Many Missouri cases so hold. *See, e.g.*, Vitale v. Duerback, 338 Mo. 556, 92 S.W.2d 691, 696-7 (1935) (on rehearing) ("A judgment is a debt, a property right which goes, upon the owner's death, to his personal representative, regardless of what may have been the cause of action upon which it was obtained"); Overstreet v. Overstreet, 319 S.W.2d 49, 51 (Mo. 1958) ("The property rights in a personal judgment survive to the personal representative"); Millar v. St. Louis Transit Co., 216 Mo. 99, 115 S.W. 521, 523 (1908) (a "judgment is a property right"). It is a form of private property because it is not public property. Furthermore, this discussion appears at 46 Am.Jur.2d *Judgments* §11, pp. 408-9 (2017):

> The vested rights doctrine states that once private rights are fixed by judgment, they are a form of property over which the legislature has no greater power than it has over any other form of property. . . . Thus, the general rule is that the legislature may not destroy, annul, set aside, vacate, reverse, modify, or impair the final judgment of a court of competent jurisdiction, so as to take away private rights which have become vested by the judgment. A statute attempting to do so is unconstitutional as an attempt on the part of the legislature to exercise judicial power.

In §410, p. 782 of the same authority, it is written that "An assignment may be made of a judgment, even if the claim which is later reduced to a monetary judgment is unassignable, because a court judgment is considered a property right or property which may be transferred, like other property, even prior to payment of the judgment." And it adds, "Once a tort claim is reduced to judgment, it is an assignable property right." Id. §411, p. 783. *Accord*, 49 C.J.S. *Judgments* §2, p. 27 (2009) ("A judgment may constitute a vested right of property in the judgment creditor with the protection of constitutional provisions"); and 50 C.J.S. *Judgments* §833, p. 158 ("A judgment has been said to have the assignable quality of a chose in action, deriving its assignability from the fact that it constitutes a debt or property right made of record in favor of the party who obtains the judgment against his adversary").

Defendant asserts that the Tharps' property has not been "taken." But it never addresses or discusses this Court's holding in Hamer v. State Highway Comm'n, 304 S.W.2d 869, 871 (Mo. 1957), that a claimant need not show a physical taking, but rather "an *invasion* or an *appropriation* of some valuable property right which the [owner] has to the legal and proper use of his property, which invasion or appropriation must directly and specially affect the [owner] to his injury" (adding emphasis). Preventing the plaintiffs from taking immediate possession of the proceeds of their judgment is just such an invasion, appropriation, interference or divestment within the meaning of Art. I, §26. So, too, is barring Mr. Tharp's personal administrator and heirs from collecting the unpaid future medical damages should

he pass away before he has incurred medical bills equal to or greater than the jury's $1,000,000 verdict. Execution is merely a method or mechanism by which a judgment creditor may obtain monetary satisfaction, with the assistance of court officers; the real purpose is to obtain the money. Mr. Tharp has the legal right to collect the full amount of the verdict (subject to the prior settlement), but §538.220.5 directed the court to alter the original judgment with the express purpose of preventing immediate or at least prompt possession of it, with the attendant preclusion of enlisting any assistance by court officers.

Defendant again asserts that plaintiffs have "the right and ability to immediately execute on this judgment" (C-App.Br. 41). It is difficult to discern how this may be, since the Amended Judgment grants to the Surgicenter the enforceable right *not* to pay $550,000 "immediately upon rendition of judgment," but rather according to a payment plan stretching out over three or four years. How plaintiffs can levy execution to compel payment of that $550,000 "immediately" is never explained. A judgment can only be enforced according to its terms. The Amended Judgment fixes the rights and obligations of the litigants, as judgments must; thus the Surgicenter has the right to delay full payment of the future medical damages provisions in the judgment and plaintiffs have the obligation to wait until a payment is past due before commencing execution.

Defendant next asserts that courts have the power and authority to "control jury verdicts" by remittitur and additur and by "tak[ing] away a jury's damage award altogether," and allowing Mr. Tharp or his wife and heirs to keep unspent money allocated as future

medical damages is tantamount to giving them a windfall (C-App.Br. 41-2). These specious arguments were addressed above (at 37-40). The Amended Judgment is not an application of remittitur;[13] it is the product of application of §536.220.2 and -.5. Courts cannot simply "take away a damage award altogether" without granting a new trial, except in carefully circumscribed situations where JNOV is appropriate, without violating constitutional provisions protecting property rights.

Lastly, defendant asserts that plaintiffs received "just compensation" in the form of interest at 1.03% per annum--a rate established by the legislature--that is not to be paid (if at all) for years to come. But defendant disregards the constitutional requirements of (1) *trial by jury* to determine "just compensation" which plaintiffs requested in the trial court (LF 63-64, 83-84, 117-19), and (2) *payment* of the compensation *prior to divestment--i.e.*, payment at the time of rendition of the Amended Judgment (*see* App.Br. 41-43).

Taking these constitutional requirements into consideration, a jury charged with "measuring the value of the deprivation of the use of the property" (Ark.-Mo. Power Co. v. Hamlin, 288 S.W.2d 14, 17 (Mo.App.S.D. 1956)) would not be bound to award an annual interest rate of 1.03% dictated by the legislature in §538.220.2. A jury's determination of "just compensation" might yield a much higher rate.

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[13]The General Assembly restored remittitur by enacting §537.068 in 1987 (H.B. 700 §42) but simultaneously declared that it was not available in any medical malpractice case by enacting §538.300 (H.B. 700 §44).

Defendant's contention that plaintiffs were not entitled to a jury trial without commencing an inverse condemnation action is not supported by the constitutional language. And the additional argument that they deserve no jury trial because they have already received "just compensation" in the form of a legislatively-mandated interest rate is circular reasoning.

The statute plainly does not comply with the constitutional requirement that "the property shall not be disturbed or the propriety rights of the owner therein divested" until the compensation "shall be paid to the owner." Art. I, §26. Perhaps, in order to comply with the "up-front payment" mandate in all cases of this kind, the General Assembly as the instigator of the deprivation should appropriate sufficient money each year and authorize payment to each plaintiff adversely affected by application of §538.220.2 of the "just compensation" contemplated by Art. I, §26 (as determined by a jury), and then seek reimbursement over the expected life expectancy of the plaintiff from the medical malpractice tortfeasors and their insurers whom the legislature has sought to protect. That procedure might advance the public purposes of "preserving adequate, affordable healthcare for all Missourians[,] . . . reduc[ing] costs to insurance companies and reduc[ing] insurance premiums, lowering insurance premiums and making medical services less expensive and more available" without violating the constitution or further harming seriously injured patients. Adams v. Children's Mercy Hospital, 832 S.W.2d 898, 904-5 (Mo.banc 1992).

D. SEC. 538.220 RSMo VIOLATES ART. III, §40(4) OF THE MISSOURI CONSTITUTION (PROHIBITION AGAINST SPECIAL LAWS CHANGING METHODS FOR COLLECTION OF DEBTS OR ENFORCING JUDGMENTS).

Contrary to defendant's claim, plaintiffs have identified the class of persons adversely affected by this statute--those who commence "a certain class of personal injury suits arising from medical malpractice" (App.Br. 47, 48), whose damages exceed $100,000 and who have been awarded future damages including future medical damages. It is obvious on the face of the statute itself that no other personal injury plaintiffs whose damages exceed $100,000 and who have been awarded future damages are treated this way. Their jury verdicts and right of immediate execution are untouched; they are not forced to wait years before collecting their judgment; their future damage awards are unaffected should they pass away prematurely before, *e.g.*, annuity payments have been made in full. Nor does it purport to affect the rights of business plaintiffs (individuals or entities) that obtain a judgment for future lost profits. This statute is undeniably "special" legislation directed only toward the most seriously injured members of society who successfully pursue medical malpractice suits.

That it impinges upon the fundamental right of trial by jury, with all its incidents and consequences, has already been explained. Defendant has not articulated a compelling state interest sufficient to overcome the "inviolate" right of a jury trial. That it also amounts to a legislative interference with the judiciary's exclusive power "to decide issues and pronounce and enforce judgments" (Chastain v. Chastain, supra 932 S.W.2d at 399) is indisputable.

ARGUMENT IN CROSS-APPEAL

I. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE: (A) IT FAILED TO PRESERVE THE ISSUE OF INSUFFICIENT EVIDENCE OF DR. MUTCHNICK'S INCOMPETENCE OR LACK OF QUALIFICATION BY FAILING TO STATE THAT SPECIFIC GROUND IN ITS MOTION FOR DIRECTED VERDICT; (B) STATE REGULATIONS REQUIRED DEFENDANT TO ABIDE BY ITS OWN BYLAWS AND AUTOMATICALLY REMOVE DR. MUTCHNICK FROM CONSIDERATION FOR GRANTING HIM CREDENTIALS, IRRESPECTIVE OF HIS COMPETENCE, WHEN IT LEARNED HIS APPLICATION CONTAINED MISSTATEMENTS, OMISSIONS, AND FALSE OR MISLEADING INFORMATION; (C) DR. MUTCHNICK'S "INCOMPETENCE" IS NOT AN ESSENTIAL ELEMENT OF NEGLIGENT CREDENTIALING AND NOT PART OF PLAINTIFFS' BURDEN OF PROOF; (D) DEFENDANT WAIVED ANY CLAIM OF ERROR BY ASSISTING IN DRAFTING THE VERDICT DIRECTOR AND FAILING TO OBJECT TO IT DURING THE TRIAL; (E) PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE THAT DR. MUTCHNICK WAS UNSKILLED AND NOT QUALIFIED TO PERFORM SURGERY UNDER DEFENDANT'S MEDICAL STAFF BYLAWS WHEN HE REMOVED MR. THARP'S GALLBLADDER; AND (F) PLAINTIFFS

PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT BREACHED ITS DUTY TO USE REASONABLE CARE IN GRANTING CREDENTIALS TO DR. MUTCHNICK IN VIOLATION OF ITS OWN BYLAWS AND STATE REGULATIONS.

Standard of Review. Construction and interpretation of rules, like statutes, involve questions of law. Ressler v. Clay Cnty., 375 S.W.3d 132,136 (Mo.App.W.D. 2012).

The standard of review of denial of a motion for directed verdict is whether the non-moving party submitted substantial evidence that tended to prove the facts essential to its claim. Lasky v. Union Elec. Co., 936 S.W.2d 797, 801 (Mo.banc 1997). "The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict." Dhyne v. State Farm Fire and Cas. Co., 188 S.W.3d 454, 456 (Mo.banc 2006). "In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in *the light most favorable to the result reached by the jury*, giving the plaintiff the benefit of all reasonable inferences and *disregarding evidence and inferences that conflict with that verdict*." Id. at 456-7.[14] "This Court will reverse only where there is a complete absence of probative fact to support the jury's conclusion." Id. at 457 (emphasis added).

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[14]Defendant's statement of the standard of review (C-App.Br. 56) quotes Steward v. Goetz, 945 S.W.2d 520, 528 (Mo.App.E.D. 1997), but omits this sentence: "We disregard defendants' evidence that does not support the plaintiff's case."

Argument and Authorities

A. ***Waiver by Failing to Include "Incompetence" or "Lack of Qualification" in Motions for Directed Verdict.*** Defendant has not preserved its claim of error and cannot seek a JNOV because its motion for directed verdict at the close of all evidence (Supp.LF A64-A67) does not state the same ground that its Point Relied On attempts to raise. The motion is not a model of clarity, but it nowhere asserted that the plaintiffs had not presented sufficient evidence to show Dr. Mutchnick was not "competent" to perform the surgery or that he was "not qualified" to do so. The motion does not use the words "competent," "competence," "competency," "incompetent," "incompetence," "incompetency," or "lack of competence," or anything substantially similar in import (but for a single irrelevant reference to "competent and substantial evidence"; Supp.LF A66). The motion does not contain "qualified," "qualification," "not qualified," "unqualified," "lack of qualification" or anything substantially similar.[15]

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[15]The motion alleges a lack of evidence "that either of the omitted claims asserted (or actually involved) conduct on the part of Dr. Mutchnick that defendant should have considered disqualifying circumstances, in terms of issuing him credentials—*i.e.*, no evidence that defendant had any negligence duty to refuse to issue credentials to Dr. Mutchnick, in the event he had actually disclosed these claims, in his application" (Supp.LF A66). In context, "disqualifying" does not connote a "lack of qualification," nor is it followed by any argument that the evidence failed to show Dr. Mutchnick's lack of qualification or competence.

Instead, the motion focuses on insufficient evidence to establish "a negligence duty," lack of duty, breach of duty, and proximate causation, concluding that plaintiffs failed to establish with sufficient evidence "at least one of elements [*sic*] of the claim being asserted defendant [*sic*]," without identifying the exact element (Supp.LF A67). The oral arguments on the motions were confined to the question of causation (Tr. 470-80, 601-04).

The Surgicenter could simply have stated that this evidence of the lawsuits Dr. Mutchnick omitted from his applications (15 in all, not just two) does not, by itself, show his *lack of competence or lack of qualification*, if that is what defendant actually intended to say in the motion. But it did not say that. Or it could have said that the true number of suits against Dr. Mutchnick (22) did not show his *lack of competence or lack of qualification* to be granted privileges. But it did not say that either.

Rule 72.01(a) states, "A motion for directed verdict shall state the specific grounds therefor." The grounds alleged in the motion for directed verdict are not sufficiently specific to preserve any claim of error regarding the sufficiency of Dr. Mutchnick's "incompetency" or "lack of qualification."

This issue was addressed in Pope v. Pope, 179 S.W.3d 442, 451-9 (Mo.App.W.D. banc 2005). The defendant's motion for directed verdict contained five separate grounds stated in general, non-specific language (at 451-2). But its motion for JNOV cited a different ground that had not been included in the motion for directed verdict relating to an unpleaded theory of partnership. Id. at 457. Pope noted that the lack of specificity in the motion for

directed verdict was not cured by the motion for JNOV because "a sufficient motion for directed verdict is required to preserve the motion for judgment notwithstanding the verdict and for appeal." Id. It observed that the defendant's two identical motions for directed verdict "do not even contain the word 'partnership.' " Id. at 452.

Pope concluded that, if a rule of liberality ever existed with respect to interpreting the adequacy of a motion for directed verdict alleging "insufficiency of the evidence," it was abrogated by the adoption of the present language of Rule 72.01 in 1975. Id. at 455-6.

"[A] motion for directed verdict that does not comply with the requirements of Rule 72.01(a) neither presents a basis for relief in the trial court nor preserves the issue in the appellate court. . . . Where an insufficient motion for directed verdict has been made, a subsequent post-verdict motion is without basis and preserves nothing for review." Howard v. City of Kansas City, 332 S.W.3d 772, 790 (Mo.banc 2011).

"Because a judgment notwithstanding the verdict is a motion to have judgment entered in accordance with a motion for directed verdict, 'a sufficient motion for a directed verdict is required to preserve the motion for judgment notwithstanding the verdict and for appeal.' " Wolf v. Midwest Nephrology Consultants, PC., 487 S.W.3d 78, 84 (Mo.App.W.D. 2016) (citation omitted). "A party cannot save an insufficient motion for directed verdict by making specific allegations in the motion for JNOV." Id.

B. ***State regulations required defendant to "abide by" its own bylaws and automatically remove Dr. Mutchnick from consideration for credentials irrespective of his***

competence. Whether Dr. Mutchnick was competent or qualified is irrelevant because the Surgicenter was *required* to remove him from consideration for staff privileges when it learned that his applications contained misstatements, omissions or false or misleading information.

Section 536.031.5 RSMo (2005) mandates that "[t]he courts of this state shall take judicial notice, without proof, of the contents of the code of state regulations." Trial courts are obligated "to take judicial notice of the code of state regulations with or without any formal request." State ex rel. Dept. of Soc. Serv. v. K.L.D., 118 S.W.3d 283, 290 n.13 (Mo.App.W.D. 2003). That the trial court did not rule upon plaintiffs' request for judicial notice, after defendant's hearsay objection, is of no moment (Tr. 124-25).

Each Ambulatory Surgical Center is mandated to by 19 CSR 30-30.020(1)(A)(1) "to establish and *adopt bylaws by which it shall abide* in conducting all business of the facility." (Appdx A2). The next section contains this express direction:

> 2. Bylaws of the governing body shall provide for the selection and appointment of medical staff members based upon defined criteria and in accordance with an established procedure for processing and evaluating applications for membership. Applications for appointment and reappointment shall be in writing and shall signify agreement of the applicant to conform with bylaws of both the governing body and medical staff and to abide by defined professional ethical standards.

Furthermore, the regulations require the ASC's medical staff to "initiate and adopt, with approval of the governing body, bylaws, rules and policies governing their professional activities in the facility" and require each member of the medical staff to "submit a written application for staff membership on an approved form to the governing body." 19 CSR 30-30.020(1)(B)(1) and (3) (Appdx A2-A3).

Defendant's governing body expressly adopted the Medical Staff Bylaws (Appdx A4). These bylaws constitute the standard of care in this case.[16]

The Surgicenter thereby obligated itself to enforce Section 3.5 of the Medical Staff Bylaws by "automatically remov[ing] [Dr. Mutchnick] from consideration for Medical Staff Membership" when "it determined that [he] made misstatements, omissions or gave false or misleading information in preparing the application, or in providing any information in required pursuant to the application process." In asserting that the bylaws were merely "guidelines" (C-App.Br. 54, 62, 63) defendant disregards the impact of the state regulations on the bylaws.

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[16]*See* Pedroza v. Bryant, 677 P.2d 166, 171 (Wash. 1984) ("Also relevant to a hospital's standard of care are the hospital's own bylaws. * * * Hospitals are required by statute and regulations to adopt bylaws with respect to medical staff activities. * * * It is 'recommended' that the organization and functions of the medical staff under the bylaws be in accord with the JCAH standards. * * * Bylaws are therefore based on national standards, and their use in defining a standard of care for hospitals is appropriate").

It is beyond dispute that Dr. Mutchnick made omissions from all of his applications. His "yes" answer to the question, "Have any professional liability lawsuits been filed against you as a result of your actions or omissions?" compelled him to "give full details on another sheet of paper" (Tr. 147-48, 359, 363-64, 369, 548-49; Appdx A48). Yet he failed to disclose 15 malpractice lawsuits that had been filed against him, and failed to set out the "full details" on those he did disclose (Tr. 148-52, 163-70, 216-18, 548-49).

It is also beyond dispute that Dr. Mutchnick gave false and misleading information on all of his applications when he answered "no" to the question, "Have any professional liability judgments or settlements been made against you as a result of your acts or omissions?"(Tr. 147-4; Appdx A48), when in truth at least nine payments were made by him (Tr. 152-56, 532-35, 548-49; Pltf.Exh. 135 [Appdx A62-A66]). The Surgicenter had several NPDB reports reflecting them at the time each of the applications was being considered (Tr. 248-49, 286-95, 303-04).

Yet the Surgicenter appointed and reappointed Dr. Mutchnick in 2005, 2006, 2008 and 2010 (Tr.287-89), in violation of its legal obligations and the standard of care.

C. *"Incompetence" Is Not An Essential Element of Negligent Credentialing and Not Part of Plaintiffs' Burden of Proof.* The Surgicenter erroneously assumes that plaintiffs had to prove Dr. Mutchnick was "incompetent" or "lacked qualifications" to perform the cholecystectomy properly and safely.

Defendant begins with a misdescription of the holding in LeBlanc v. Belton Research

Hospital, 278 S.W.3d 201 (Mo.App.W.D. 2008). That court did not set out either the elements of a cause of action for negligent credentialing, or the nature and extent of evidence sufficient to support a verdict. It nowhere held that a plaintiff must prove that the negligent physician was "incompetent" or "lacked qualifications." On the contrary the Western District merely recognized, perhaps not for the first time,[17] that a claim for negligent credentialing was viable in Missouri and that no previous decision had rejected it. Id. at 205.

LeBlanc noted such recognition "is consistent with two well-established principles in Missouri," namely that (1) a hospital "owes [its] patients a specific duty of reasonable care proportionate to the patient's needs as the patient's known condition requires" (citing Stacy v. Truman Med. Ctr., 836 S.W.2d 911 (Mo.banc 1992)); and (2) "an employer is liable for an independent contractor's negligence 'when the employer fails to exercise reasonable care' in hiring a competent contractor" (citing Lee v. Pulitzer Publ'g Co., 81 S.W.3d 625 (Mo.App.

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[17]LeBlanc explained (id. at 206) that "a cause of action against a hospital for injuries sustained at the hospital from unqualified independent doctors" was decided in Gridley v. Johnson, 476 S.W.2d 475, 484 (Mo. 1972) ("The fact the defendant doctors here were not employees of the defendant hospital does not necessarily mean the hospital cannot be held for adverse effects of treatment or surgery approved by the doctors") (citing Darling v. Charleston Cmty. Mem. Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965)). Darling involved the hospital's failure to supervise an orthopedic surgeon adequately and to require a consultation, particularly after the patient developed complications.

E.D. 2002), and Sullivan v. St. Louis Station Assoc., 770 S.W.2d 352 (Mo.App.E.D. 1989)). 278 S.W.3d at 206. LeBlanc then stated, "Missouri precedent does not bar a negligence claim against a hospital for injuries caused by independent doctors authorized to practice in that hospital." Id. It did not fix this cause of action with elements of the other two torts.

Whether Ms. LeBlanc had pleaded a cause of action was the other pertinent issue in the appeal. Her petition alleged that Research Belton Hospital was negligent in permitting the named physicians "to perform such extensive surgeries on [her] when the physicians were not qualified by education, training or experience and were not properly credentialed to perform same." Id. at 203-4. LeBlanc explained why that allegation sufficed (id. at 207):

> Corporate negligence is merely the application of "principles of common law negligence to hospitals in a manner that comports with the true scope of their operations." * * * Under this theory, the hospital's liability is based on its actions and not those of the doctors practicing within its facility. . . . Therefore, a claim for corporate negligence must *allege the hospital's duty* owed to the patient, the *breach of the duty*, and the *resulting injury* from the breach.

It is noteworthy that the trial court's dismissal was reversed and the case remanded to that court, where the parties later settled without trial. The Western District had no occasion to rule upon the sufficiency of the plaintiff's evidence in that or any other such case. No Missouri court has done so. Defendant overstates LeBlanc's facts and holding.

Yet from that rather spare decision, the Surgicenter leaps to an insupportable

conclusion about the nature and sufficiency of proof in *every* negligent credentialing case in Missouri. LeBlanc did not address that issue and cannot be enlisted as supporting the unfounded assertion that the Tharps were required to present evidence establishing that Dr. Mutchnick was "incompetent" or "lacked qualifications."

Plaintiffs' theory focuses upon a set of facts very early in the credentialing process by which the Surgicenter was obligated to "automatically remove[] [Dr. Mutchnick] from consideration for Medical Staff Membership" when it discovered his misstatements or omissions, or that he gave false or misleading information (Pltf.Exh. 12 [Medical Staff Bylaws], p. 9, ¶3.5 [Appdx A12]). In his credentialing applications Dr. Mutchnick "made misstatements, omissions, or gave false or misleading information." The omitted and false items go to the very heart of any credentialing determination. The Medical Staff Bylaws embodied the national standard of care (Tr. 127, 156-57, 228-29, 551), and defendant was required by state law to follow them (Tr. 158-60, 228-29). Its failure was negligence. That theory was submitted (Appdx A67) and argued to the jury.

Dr. Mutchnick's "incompetence" or "lack of qualifications" was simply irrelevant and unnecessary. Plaintiffs' theory fits within established principles of common law negligence, is a species of "negligent credentialing," and is wholly consistent with the statements describing the cause of action found in both LeBlanc and Gridley. The argument that a plaintiff must prove the physician was "incompetent" finds no support in Missouri law since neither LeBlanc nor any other case addressed that subject.

And contrary to its assertion, none of the seven cases it cited (C-App.Br. 57-9), nor any others across the country, holds that the plaintiff must prove "incompetence" or "lack of qualification." It is one thing for a court to mention "incompetence" in describing the tort but quite another to assign the burden of proving it to the plaintiff.

Defendant's argument was squarely raised and rejected in Johnson v. Misericordia Comm. Hosp., 99 Wis.2d 708, 301 N.E.2d 156, 171-2 (1981) (which it incorrectly cited as supporting its position):

> The defendant's primary claim before this court is that the plaintiff failed to meet its burden of proving a breach of duty on the part of the hospital, *i.e.* that Misericordia did not exercise reasonable care when granting orthopedic surgical privileges to Dr. Salinsky. *Misericordia contends that the failure to exercise reasonable care when granting staff privileges can only be shown by proof that Dr. Salinsky was an incompetent orthopedic surgeon before it granted him privileges or before the operation on July 11, 1975, and that the hospital knew or should have known of his incompetency.* Even if we were to hold proof of incompetency at the time a physician or surgeon applies for staff privileges to be the standard, there was sufficient testimony to establish [that]. . . . However, in this case, *we do not adopt the legal theory that knowledge of incompetency is the standard for determining whether a hospital exercised due care in selecting its staff.*

. . .

> The resolution of the issue of whether the hospital was negligent in granting Salinsky orthopedic surgical privileges and appointing him to its medical staff depends on whether Misericordia exercise that degree of care and skill as the average hospital exercises in selecting its medical staff. *Applying this standard to the facts of this case, Johnson was only required to show that the defendant did not exercise reasonable care (that degree of care ordinarily exercised by the average hospital) to determine whether Salinsky was competent.* Thus, ***the defendant's claim that the plaintiff had the burden of showing that Salinsky was actually incompetent and that the hospital knew or should have known of his incompetence before granting him surgical privileges on or before the July 11, 1975 operation is in error***, as we hold that ***Johnson was only obliged to prove that Misericordia did not make a reasonable effort to determine whether Salinsky was qualified to perform orthopedic surgery***. Therefore, the trial court's instruction that the hospital was required to exercise reasonable care in the granting of medical staff privileges and that reasonable care "meant that degree of care, skill and judgment usually exercised under like or similar circumstances by the average hospital," was proper. [Emphasis added.]

Plaintiffs' evidence here is even stronger because the Surgicenter knew before credentialing Mutchnick--from his applications and the NPDB reports alone--that his

application violated the bylaws, and thus he was not properly qualified.

Three other decisions cited by defendant also hold that the plaintiff need not prove "incompetence" or "lack of qualification." In Rule v. Lutheran Hospitals & Homes Soc., 835 F.2d 1250, 1253 (8th Cir. 1987), the jury was instructed that (1) "[a] hospital must use reasonable care in determining the competence of those granted medical staff privileges"; (2) that the plaintiff had the burden to prove the doctor negligently treated her; and (3) that the plaintiff had the burden to prove the child developed cerebral palsy "as a direct and proximate result of" the hospital's "negligent granting of privileges and medical malpractice"). That instruction was approved.

In Frigo v. Silver Cross Hosp., 876 N.E.2d 697, 722-3 (Ill.App.1st Dist. 2007), the court adopted the same three elements after citing Rule and Johnson:

> To summarize, we find the above cases adequately layout the elements needed to prove negligent credentialing. First, to prevail, the plaintiff must prove the hospital failed to meet the standard of reasonable care in the selection of the physician it granted medical staff privileges to whose treatment provided the basis for the underlying medical malpractice claim. Hospitals are required to exercise reasonable care in the granting of medical staff privileges.
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> . . .
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> Second, the plaintiff must prove that, while practicing pursuant to negligently granted medical staff privileges, the physician breached the

applicable standard of care. Finally, the plaintiff must prove that the negligent granting of medical staff privileges was a proximate cause of the plaintiff's injuries.

Frigo is significant because neither it nor other Illinois decision imposes any "incompetence" element. The hospital's duty is "to use reasonable care to discern the medical qualifications of persons who perform medical services in the hospital;" or "to know the qualifications and the standard of performance of the physicians who practice on its premises." Id. at 724. It is a breach "to permit a physician whom the hospital knows or should have known is unqualified, or negligent, to practice on its premises." Id. Frigo is very similar to this case because the hospital violated its own bylaws in granting and renewing credentials to the podiatrist, who lacked the minimal requirements for either the grant or the later renewal of privileges. Id. That testimony was sufficient to establish both the hospital's standard of care and its breach. Id. at 725.

In Beswick v. Bell, 940 N.E.2d 338 (Ind.App. 2011), the court quoted Frigo and adopted its approach to the elements a plaintiff must prove. Id. at 345. It affirmed summary judgment because plaintiffs had no evidence of the hospital's prior knowledge of previous complaints or allegations of the doctor's medical negligence or that he "ha[d] deviated from the normal practice;" nor evidence that "but for the lack of care in the selection or retention of" the doctor, he would not have been credentialed; nor an expert opinion that he should not have been granted privileges. Id.

Larson v. Wasemiller, 738 N.W.2d 300 (Minn. 2007), was a case of first impression where the court recognized the tort as part of the common law of a substantial majority of other states. Id. at 309. The Surgicenter refers to a general description of the tort that Larson drew from an Ohio case (Albain v. Flower Hosp., 50 Ohio St. 251, 553 N.E.2d 1038 (1990)), which had actually declined to recognize the tort under a "corporate negligence" theory. N.E.2d at 254. It certainly did not expound upon the essential elements of the cause of action the plaintiff was required to prove, nor consider the correctness of an instruction. Neither did Larson.

Defendant incorrectly describes Ferguson v. Gonyaw, 236 N.W.2d 543 (Mich.App. 1975), in which the hospital utterly failed to check the physician's background as the accreditation guidelines of the American Osteopathic Association required. Unlike the Surgicenter here, that hospital's bylaws did not require "automatic removal" of the doctor from consideration for privileges where his application contained misstatements, omissions, or false or misleading information. And Ferguson is not a breach-of- duty case at all, but a *causation* case. The directed verdict in favor of the hospital was sustained not because the plaintiff did not prove breach of duty--he did, and the court of appeals expressly agreed--but because he did not prove the causal connection:"Although the plaintiff proved that the hospital failed to exercise reasonable care in checking Dr. Gonyaw's application for staff privileges, he failed to prove that if the hospital had made a reasonable check it would have rejected his application." Id. at 551. Ferguson does not aid defendant.

In Taylor v. Singing River Hosp. Sys., 704 So.2d 75 (Miss. 1987), the hospital's bylaws did not require investigation of all statements in an application, nor require automatic removal from consideration for misstatements, omissions or false or misleading statements; and that doctor's misstatement was "inconsequential" to his qualifications. Taylor did note that "[i]n some circumstances, we can conceive that a candidate's truthfulness might well be relevant to a doctor's fitness for privileges, inasmuch as a dishonest doctor might engage in other misrepresentations and lies that were detrimental to a patient's medical care." Id. at 79.

Other cases the Surgicenter had cited to the trial court (Supp.LF A93-A97) do not support its position for the reasons plaintiffs set out below (Supp.LF A121-A126).

D. ***Defendant waived any claim of error by assisting in preparing the verdict director and failing to object to it during the trial.*** Plaintiffs' theory of recovery is embodied in the verdict director, Instruction No. 6 (2nd Supp.LF 1 [Appdx A67]), and it contains no mention of "incompetence" or "lack of qualification." Defense counsel "collaborated" in preparing that instruction, as the court and counsel all acknowledged (Tr. 615-16). Thus defendant knew and understood at the time of the instruction conference that Dr. Mutchnick's "incompetence" or "lack of qualification" was not being submitted to the jury, and it thereby conceded its irrelevance. Its counsel did not offer or request a verdict director submitting "incompetence" or "lack of qualifications" and did not make a specific objection to its omission (Tr. 615-16). Counsel said, "It all looks good to me, Your Honor. So the defendant has no objection as to form" (id.).

Defendant must have been satisfied that Instruction No. 6 contained all ultimate facts necessary to sustain a verdict in plaintiffs' favor. Coon v. Dryden, 46 S.W.3d 81, 93 (Mo.App.S.D. 2001) ("An instruction authorizing a verdict must . . . require a finding of all ultimate facts necessary to sustain the verdict"). By its drafting efforts and subsequent silence, defendant took the position that plaintiffs only needed to prove the propositions in the instruction, thus either *inviting* any error it claims to exist, or *joining* or *acquiescing* in any alleged error. "Under the invited error rule, 'a party is estopped from complaining of an error of his own creation, and committed at his request.' * * * '[A] party will not be heard to complain of alleged error in which, by his own conduct at the trial, he joined or acquiesced.' " Rouse v. Cuvelier, 363 S.W.3d 406, 416 n.6 (Mo.App.W.D. 2012) (citations omitted).

E. *Plaintiffs presented sufficient evidence that Dr. Mutchnick was unskilled and not qualified to perform surgery under defendant's Medical Staff.* But assuming *arguendo* that a showing of Dr. Mutchnick's incompetency or lack of qualification was even necessary to establish breach of the Surgicenter's duty, plaintiffs' evidence was sufficient.

"Incompetent" and "lack of qualifications" have very similar meanings. Random House Webster's Dictionary (1997) defines "incompetent" as "1. *lacking qualification* or ability; incapable. 2. characterized by or showing incompetence. 3. *not legally qualified.*"

The Surgicenter's repeated acts in making Dr. Mutchnick a member of the Medical Staff and extending privileges to him falls squarely within that definition. He was

"incompetent" or "lacking qualification" because he was *improperly* and *illegally* credentialed. The Surgicenter had to violate its own Medical Staff Bylaws to do so, despite its legal obligation to abide by them.

Its act was the functional equivalent of granting privileges to an applicant who did not meet other requirements under Missouri law or the defendant's Bylaws inasmuch as all of the state's and facility's requirements have equal dignity and each should be enforced faithfully, without favor. The jury could reasonably have found that credentialing Dr. Mutchnick under the circumstances was no less a violation of the Surgicenter's duty to exercise reasonable care than it would have been to grant privileges to someone who is not a physician "legally licensed" in Missouri (as required by 19 CSR 30-30.020(1)(B)(2), and Bylaws ¶3.6), or to someone who never submitted a written application (as required by 19 CSR 30-30.020(1)(B)(3), and Bylaws ¶3.2). The evidence viewed in the most favorable light showed that Dr. Mutchnick was incompetent or not qualified.

Moreover, at least one court has equated "incompetent" with "unskillful." Joiner v. Mitchell County Hospital Auth., 125 Ga.App. 1, 186 S.E.2d 307, 309 (1971). Plaintiffs presented evidence that 22 suits and claims had been made or filed against Dr. Mutchnick before December 30, 2011. It had actual knowledge of at least seven (Tr. 163-70, 216-18, 369) and perhaps nine (Tr. 532-35; Pltf.Exh. 135 [Appdx A62-A66]). And it had constructive knowledge of all 22 because it could and should have checked the Jackson County Circuit

Court records[18] or searched Missouri case.net,[19] as the standard of care demands (Tr. 127, 144-45, 161-62, 165-66, 208-09). Schwartz v. Lawson, 797 S.W.2d 828, 836 (Mo.App.W.D. 1990) (party having "the means to discover the fraud will be held to have known it . . . [T]he means of knowledge are deemed to be knowledge itself").

The jury could reasonably have found that to be sufficient evidence he was unskilled

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[18]*See* Johnson v. Misericordia Comm. Hosp., supra 301 N.W.2d at 174: "Misericordia had access to the Milwaukee Circuit Court files wherein it would have discovered [with due diligence] that seven malpractice suits had been filed against Salinsky" and thus was charged with knowledge of them before appointing him to its medical staff; "the dispositive issue is whether a hospital with knowledge of such facts would, in the exercise of ordinary care, have granted Salinsky orthopedic surgical privileges."

[19]The 22 suits appear on Pltf.Exh. 79 (Appdx A51-A52), a color flow chart summarizing the malpractice suits on Pltf.Exh. 59, the case.net printout (Tr. 162-63, 216-17, 359-64). Both were used to question witnesses and were displayed in the jury's presence (Tr. 163, 216-17, 360-64, 548). "[A]n exhibit that is marked, testified to, and displayed to the jury during the presentation of the evidence becomes as much a part of the evidence as if the proffering party had formally introduced it." Lester v. Sayles, 850 S.W.2d 858, 863 (Mo.banc 1993); Brotherton v. Burlington Northern R.R., 672 S.W.2d 133, 138 (Mo.App.E.D. 1984) ("Once marked and used, an exhibit is in evidence as though it had been formally introduced").

or lacked ability. No other reported decision involved as many as 22 suits; most involved fewer than eight. Courts uniformly note that prior lawsuits constitute probative evidence of incompetence: Purcell v. Zimbelman, 18 Ariz.App. 75, 500 P.2d 335, 343-4 (1972) (evidence of four previous suits was admissible to show notice as to general competency of physician to continue to be a member of hospital staff); Johnson v. Misericordia Comm. Hosp., supra 301 N.W.2d at 174 (seven malpractice suits); Raschel v. Rish, 488 N.Y.S.2d 923, 110 A.D.2d 1067 (1985) (at least three prior suits); Greenwood v. Wierdsma, 741 P.2d 1079, 1082 & n.1 (Wy. 1987) (court cited prior appellate decision involving 18 lawsuits against same physician); Strubhart v. Perry Mem. Hosp. Trust Auth., 903 P.2d 263, 273 (Okla. 1995) ("the fact the doctor has previously been sued for malpractice or experienced untoward results in prior cases" admissible); Ward v. Lutheran Hospitals & Homes Soc., 963 P.2d 1031, 1033 n.2 (Alaska 1998) ("the physician either lacked standard credentials or previously had been the subject of a malpractice suit or disciplinary proceedings"); Fletcher v. South Peninsula Hosp., 71 P.3d 833, 843 & n.50 (Alaska 2003) (seven prior cases).

F. *Plaintiffs presented sufficient evidence that defendant breached its duty to use reasonable care in granting credentials to Dr. Mutchnick in violation of its own bylaws and state regulations.* Plaintiffs proved with substantial evidence each proposition submitted in the verdict director (Instruction No. 6) that defense counsel helped to draft. Defendant does not contest the evidence of Dr. Mutchnick's negligence at all, or that it caused serious injury to Mr. Tharp (both propositions having been established by expert testimony).

Defendant does not dispute that it granted privileges to Dr. Mutchnick to perform surgeries in its facility. It concedes that Dr. Mutchnick's applications were deficient and omitted critical, material information, and that the Bylaws required that he should have been "automatically removed from consideration for Medical Staff Membership" (Pltf.Exh. 12, p. 9, ¶3.5 [Appdx A12]). The Surgicenter agrees that Dr. Mutchnick's applications were not denied and he was not automatically removed from consideration. And its decision to grant privileges to Mutchnick was done despite the Bylaws' directive--contrary to and in flagrant contravention of it. Those facts were established by Dr. Hyde's expert testimony although they were either undisputed or do not require specialized training, experience or education. The Surgicenter's credentialing decisions are fundamentally administrative or managerial in nature, not medical. 19 CSR 30-30.020(1); Estate of Waters v. Jarman, 547 S.E.2d 142, 146 (N.C.App. 2001) (claims against hospital asserting negligence in continuation of hospital privileges or failure to adequately assess physician's credentials prior to granting privileges "assert administrative and management deficiencies" rather than furnishing medical care); Jones v. Chicago HMO, Ltd., 191 Ill.2d 278, 730 N.E.2d 1119, 1128 (2000) (hospital's duty to assume responsibility for care of patients "is administrative or managerial in character").

Plaintiffs presented all of the expert testimony their case required and were not compelled to call experts on irrelevant topics.

The jury could reasonably have concluded that members of the Surgicenter's credentials and quality assurance committees--who were also members of the LLC--and the

board of managers negligently breached their duty to protect patients and approved Dr. Mutchnick's applications for appointment and reappointment because he generated a substantial income for the Surgicenter, producing over $10,000,000 in gross income from 2007 through 2011, part of which was disbursed to them (Tr. 260-61, 467-68).

Finally, defendant hints that plaintiffs did not prove but-for causation (C-App.Br. 62-63), a subject it argued long and hard in the trial court (Tr. 470-80, 601-04; Supp.LF A62-A63, A65-A66). But this issue is not fairly expressed in its Point Relied On and must be deemed abandoned. Brizendine v. Conrad, 71 S.W.3d 587, 593 (Mo.banc 2002).

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR NEW TRIAL ON THE GROUND THAT THE VERDICT FOR FUTURE DAMAGES WAS AGAINST THE WEIGHT OF THE EVIDENCE FOR THE REASONS THAT: (A) DEFENDANT WAIVED ANY SUCH ERROR BY FAILING TO RAISE THE MATTER IN ITS MOTIONS FOR DIRECTED VERDICT OR TO MAKE THAT OR ANY OTHER SPECIFIC OBJECTION TO INSTRUCTION NO. 8 (MAI 21.03 AND 4.18) SUBMITTING THE ISSUE OF FUTURE DAMAGES TO THE JURY AND FAILED TO OBJECT TO THE VERDICT FORM; (B) PLAINTIFFS PRESENTED SUBSTANTIAL EVIDENCE THAT DEFENDANT'S CONDUCT PLACED MR. THARP AT AN INCREASED RISK OF SUFFERING POSSIBLE FUTURE CONSEQUENCES; AND (C) PLAINTIFFS WERE NOT REQUIRED TO PRESENT EVIDENCE OF THE ANTICIPATED COST OF FUTURE CARE, TREATMENT AND SURGERY BECAUSE SUCH FUTURE COST NECESSARILY REQUIRES SPECULATION AND CONJECTURE.

Standard of Review. Whether defendant has preserved its claims of error by complying with Supreme Court Rules is a question of law. Nichols v. Director of Revenue, 116 S.W.3d 583, 585 (Mo.App.W.D. 2003).

Argument and Authorities

Three significant facts must be noted:

(1) The Motion for Directed Verdict at the Close of Plaintiffs' Evidence addressed

only the issue of negligent credentialing (Supp.LF A59-A62). Defendant did not assert or later argue (Tr. 469-80) that plaintiffs' evidence of future damages was legally insufficient.

(2) Defendant's Motion for Directed Verdict at the Close of All Evidence was a rescript of its previous motion and also addressed only the issue of negligent credentialing (Supp.LF A64-A67). It was silent as to submissibility of future damages, and defense counsel did not mention future damages in arguing that motion (Tr. 601-4).

(3) Defendant failed to make a *specific* objection to Instruction No. 8, based on MAI 21.03 and MAI 4.18 (2nd Supp.LF 2 [Appdx A68]), which charged the jury to "award plaintiff Thomas Tharp such sum as you believe will fairly and justly compensate plaintiff Thomas Tharp for any damages you believe he sustained *and is reasonably certain to sustain in the future*" for its negligence, and to award Paula Tharp damages it believed "she sustained and is reasonably certain to sustain in the future." And it failed to make any objection to the verdict form that allowed the jury to write down its damage awards for future medical and future non-economic damages. Defendant made only a general objection to all instructions during the instruction conference (Tr. 609, 613, 615-619), but not to the verdict form. When the court inquired about Instruction No. 8, defense counsel stated, "No objection, Your Honor" (Tr. 616); and "Looks good to me, Your Honor," referring to the verdict form (Tr. 618). Defendant lodged no other objection to No. 8 before the jury retired for deliberations or to the verdict form before the court accepted it (Tr. 619-71, 672-74).

A. *Waiver by Failing to Include This Matter in Motions for Directed Verdict or to*

Object at Instruction Conference. Defendant's Brief does not confess its failure to preserve this issue by a proper and timely objection at any point during the trial. Rule 70.03 states, "Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." A separate objection must be made to the verdict form since it is not an instruction. Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 166 (Mo.App.W.D. 1997) ("to be preserved, an objection to a verdict form must be raised either at the instruction conference or when the verdict is returned by the jury before it is accepted by the court"). In addition, Rule 72.01(a) provides, "A motion for directed verdict shall state the specific grounds therefor."[20]

Defendant's silence during the trial constitutes a waiver of the right to seek relief on appeal under any theory. It cannot sidestep the consequences of its failure to object by instead couching the claim of error as the court's failure to grant its motion for new trial. Although defendant's Brief does not complain that giving Instruction No. 8 or that submitting the

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[20]Although defendant requested JNOV as to future medical and non-economic damages in its Renewed Motion for Post-Trial Relief (Supp.LF A91, A104, A109), it has abandoned that request on appeal, perhaps because its motions for directed verdict omitted any reference to, and do not even contain the words, "future damages" (Supp.LF A59-A62; A64-A67).

verdict form were crucial trial court errors warranting a new trial, the instruction conference must be a central focus where a party asserts insufficiency of evidence to support a verdict. Its motions for directed verdict must also be examined.

A similar issue arose in Howard v. City of Kansas City, 332 S.W.3d 772 (Mo.banc 2011). The city failed to object to the MAI 4.01 instruction submitting future damages, yet asserted error in its motion for new trial in giving that instruction "because future damages were not supported by the evidence in that there was no evidence that [Howard] was reasonably certain to sustain damage in the future." Id. at 789. (The city had proffered its own damage instruction which was refused, but did not allege that ruling was erroneous in its post-trial motion.)

This Court first held that, "To the extent that this point attempts to challenge the instruction given, the claim of error has not been preserved" because no proper and timely objection had been made, citing Rule 70.03. Id. at 790.

After some further discussion, this Court then addressed the inadequacy of the city's motion for directed verdict in raising the issue of "insufficiency of evidence" to support a verdict for future damages:

> To preserve a question of submissibility for appellate review in a jury-tried case, a motion for directed verdict must be filed at the close of all the evidence and, in the event of an adverse verdict, an after-trial motion for new trial or to set aside a verdict must assign as error the trial court's failure to have directed

> such a verdict. . . . [However], a motion for directed verdict that does not comply with the requirements of Rule 72.01(a) neither presents a basis for relief in the trial court nor preserves the issue in the appellate court.

Id. (quoting Pope v. Pope, supra 179 S.W.3d at 451). This Court then held, "To the extent that [the city's] point challenges submissibility, this claim of error also was not preserved" because the city's motion for directed verdict "contain[ed] no language relating to the sufficiency of the evidence regarding future damages" as Rule 72.01(a) mandates. Id. *See also* Johnson v. Allstate Indemnity Co., 278 S.W.3d 228, 234[3] (Mo.App.E.D. 2009); Rolls v. Ernst & Young, 871 S.W.2d 632, 633 (Mo.App.E.D. 1994) ("by failing to object to the damage instruction which submitted future damages defendants waived any claim of error on the issue of damages. Further, this claim was not made in defendants' motion for directed verdict.").

An objection cannot be made for the first time in a motion for new trial. Amador v. Lea's Auto Sales & Leasing, Inc., 916 S.W.2d 845, 852 (Mo.App.S.D. 1996). "Proper preservation of error requires that objections be made at the instruction conference and renewed in a motion for new trial." Edwards v. Gerstein, 363 S.W.3d 155, 167 (Mo.App. W.D. 2012). Defendant's silence deprived the trial court of an opportunity to take corrective measures "immediately and inexpensively without risking the delay and expense of an appeal and a retrial." Howard, supra 332 S.W.3d at 790. Defendant's conduct in remaining silent at trial, then seeking relief after an adverse jury verdict, is a form of sandbagging long ago

condemned by this Court. Lopez v. Three Rivers Elec. Coop., 26S.W.3d 151, 158 n.4 (Mo.banc 2000) (explaining that in Fowler v. Park Corp., 673 S.W.2d 749 (Mo.banc 1984), the Court "eliminated the opportunity for sandbagging . . . [by seeking] to prevent a party faced with an erroneous instruction from waiting without objecting so that they could request a new trial only in the event the jury returned an unfavorable verdict").

B. ***Plaintiffs' Evidence of Increased Risk of Suffering Possible Future Consequences Was Legally Sufficient.*** Even if the insurmountable procedural bar did not exist, plaintiffs' evidence of future medical[21] damages was sufficient under the law.

(1) Defendant has not given this Court a full account of the expert testimony supporting the award of future medical damages. DR. IMAGAWA testified (Tr. 70-75):

> [O]ver time where you've sewn these things together [*i.e.*, the bile duct is rerouted into the small intestine], there can be *strictures*. Typically after this procedure people unfortunately . . . have a significant amount of pain. . . . [T]heir *quality of life is decreased* and typically . . . *they die 10 to 15 years sooner* than someone who's not had this injury. So it's a major, major consequence with *bad long-term outcomes*. . . . [W]hen you redo this with the

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[21]Defendant's Point II complains that the verdict awarding "future damages was against the weight of the evidence," ostensibly referring to both medical and non-economic damages (C-App.Br. 12, 65). The argument portion, however, is limited to future medical damages only.

intestine, the intestine sometimes contract when they're not supposed to contract and cause *abdominal pain*. Also, since the muscles have been cut from the surgery, there can be *significant spasms* in the muscles from these operations. But these patients can go and *seek pain management people*, . . . [but] there's a significant portion of these people who never return to normal qualify of life after this operation.

[In many cases, the patient develops *postoperative neuralgia*] [b]ecause when you cut through the abdomen, you also cut through all of the nerves that are there. So when those nerves get cut, sometimes as they heal back slowly, they continue to fire and cause *significant pain*.

. . . [When you cut into the abdomen] you have the *risk of . . . small bowel obstructions*, where the intestines basically get scarring from the surgery and *can cause abdominal pain or another operation*. The biggest problem is, again, where this bile duct has been sewn to the intestine, over time that connection can actually narrow as it scars. And that -- that scar at any particular time *in about 20 to 25 percent of the patients after 10 years after the surgery have a problem that requires another procedure or procedures to correct that*. In *another 10 percent of the patients it may require another operation to actually fix this*.

. . . Over time and with age [*that percentage] will increase* . . . [*to*] as

high as *50 percent* in 15 or 20 years.

. . . There are *basically two procedures that can be done to fix the strictures*: One is to do . . . *a transhepatic cholangiogram*, where a radiologist sticks a needle through the skin, through the liver, through the bile duct, through the stricture, and *that leaves a tube that comes outside of the body that typically has to stay there for months to years*. And they're exquisitely painful because these tubes come out right under the rib cage. The *other option is* sometimes you can inside [*sic*] and *try that ERCP procedure again* [to try to] fix the stricture that way. But that's a very difficult procedure, and it's *usually not successful*. [*If neither one of those works*, another option] would be *another surgery to go back and redo that connection.*

. . . So if this is stricturing, you can develop . . . *secondary biliary cirrhosis*. . . . Typically *you would have to fix that stricture*. In *rare cases* you *might need a liver transplant*.

. . . [T]he percentages are somewhat general; but, yes, these individuals who have this repair operation *need to be followed for the rest of their life by a specialist*. . . . Typically we say they should get *blood work done every three months*. They should have an *ultrasound of their liver every six months*, and *I typically see anybody that I've repaired at least once or twice a year*. [That is the standard recommendation.]

The various operations "are expensive procedures and require a speciality of which . . . there are not a large number in any particular state" (Tr. 77-78).

DR. RANDALL testified that the possible future complications from hepato-jejunostomy surgery *range from "no long term sequelae or problems all the way up to having strictures long-term that require a liver transplantation*" (Pltf.Exh. 51 - Randall depo p. 20). The treatments for strictures include *possibly another hepaticojejunostomy*--a "reoperation to try to go higher into the liver to find healthy bile duct" (id.). *Patients who are not candidates for reoperation can have procedures performed by an interventional radiologist* in which a hole is poked into the liver, the bile duct is accessed, and *a guy wire passed into the intestine to open it up*; or to *have a stent placed to allow for either internal or external bile drainage* (id. pp. 21-22). In *some patients, those procedures are performed annually, but in others as often as monthly* (id. p. 22). Sometimes *secondary biliary cirrhosis develops that could require a liver transplant* (id.).

Dr. Randall testified, to a reasonable degree of medical certainty, that *7% to 10% of hepaticojejunostomy patients develop strictures*, while *1% need evaluation for and performance of a liver transplant* (id. pp. 22-3). He believes Mr. Tharp is "*always at risk for having strictures long-term*" (id. p. 23). He also noted Mr. Tharp had continued to express complaints of abdominal pain up through August 2012 (id. pp. 24-25).

DR. ANWURI treated Mr. Tharp for his continuing abdominal pain and spasms from February 2012 through the time of her deposition in March 2016 (Pltf.Exh. 49 - Anwuri depo

pp. 11-30). She discussed the pain medications she prescribed serially over that period, which were variously discontinued if they provided too little relief or lost their effectiveness over time (id.). She opined, to a reasonable degree of certainty, that his *abdominal pain was* causally related to the cholecystectomy, that it is *severe*, and that it is "*very likely permanent*" (id. pp. 30-32, 83). Mr. Tharp will need to *continue taking narcotic drugs to manage his pain* (id. p. 32). The *dosages will need to be increased over time* as their effectiveness wanes, which carries an "*increase[d] risk of complications, sedation, constipation [and] addiction*" (id. p. 32). Dr. Anwuri and Mr. Tharp have discussed *referring him to the Mayo Clinic for treatment of his continuing pain* (id. pp. 28, 77-80). Mr. Tharp indicated at trial that arrangements for that referral are "*in process*" and he intends to go (Tr. 430-31).

In summary, the jury could reasonably have awarded future medical damages for all of the narcotic medications Mr. Tharp will need for the rest of his life to treat his permanent pain; regular visits to medical specialists including pain management physicians (anesthesiologists), other specialists to do blood work every three months and an ultrasound every six months, and a hepatobiliary surgeon like Dr. Randall or Dr. Imagawa once or twice a year; procedures to alleviate a small bowel obstruction; procedures to treat the strictures, either by transhepatic cholangiogram in which a tube is inserted and left for months or years, together with the cost of maintaining that as well as repeating it monthly, or another ERCP, or even another hepaticojejunostomy; treatment for secondary biliary cirrhosis; a liver transplant; and the medical and nursing costs associated with his declining health and

premature death.

(2) Defendant also fails to cite pertinent court decisions, or to quote the more pertinent passages in them, regarding the nature of evidence required to support the jury's award of future medical damages for Mr. Tharp.

Swartz v. Gale Webb Transp. Co., 215 S.W.3d 127 (Mo.banc 2007), articulates the standard for admission of expert testimony, and thus for submission of the issue of future damages in an instruction, for argument on the subject, and for obtaining an award of future medical damages. Defendant did not quote all of the relevant discussion and thereby leaves a false impression. This Court's pronouncement reads:

> [W]hen an expert testifies to a reasonable degree of certainty that the defendant's conduct placed the plaintiff at an increased risk of suffering possible future consequences, Missouri courts have long held that such testimony is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, *even if those future consequences are not reasonably certain to occur*. Id. at 131(emphasis added).

Defendant has disregarded the italicized language and argues the plainly incorrect position that the plaintiffs must show which specific future consequences *are* reasonably certain to occur. Swartz is merely a recent example in a long line of consistent decisions: Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 447 (Mo.banc 1998) (testimony that surgery was a possibility though it had not been recommended held to be "no more

speculative than that in other cases where surgery is possible in the future but has not yet been recommended to the patient"); Bynote v. National Super Markets, Inc., 891 S.W.2d 117, 124-25 (Mo.banc 1995) ("The mere fact that the course of treatment [the physician] recommended depended upon the results of a more conservative treatment prior to surgery does not render the evidence of future surgery inadmissible speculation and conjecture, or deprive such evidence of its probative value"); Breeding v. Dodson Trailer Repair, 679 S.W.2d 281, 283 (Mo.banc 1984) (finding evidence of cost of surgery admissible where doctor testified surgery would be necessary only if conservative treatment failed); and Stuart v. State Farm Mutual Auto Ins. Co., 699 S.W.2d 450, 456 (Mo.App.W.D. 1985) (testimony that a future danger exists is not speculative).

Defendant's citation to Wilson v. Lockwood, 711 S.W.2d 545 (Mo.App.W.D. 1986), does not aid its argument. First, to the extent it is contrary to Swartz and other Supreme Court cases cited herein, it lacks jurisprudential value. Second, the passage defendant quoted concerned the parents's limited claim for loss of their child's services and his medical bills during his minority. Id. at 554. But they presented no evidence "regarding the loss of the child's services or earning power"; a psychologist testified the child "was normal at the time of trial" and "he was uncertain about the degree or extent of psychological problems or damage the child might suffer in the future"; and another doctor said that cosmetic surgery might be possible but only if the child so desired. Id. The conclusion that such evidence was insufficient is consistent with Swartz and the other cases cited above.

C. ***Evidence of Anticipated Cost of Future Care, Treatment and Surgery Is Speculative and Unnecessary.*** Defendant incorrectly claims that plaintiffs were required to present evidence (preferably expert medical testimony) setting out the "expected" cost of Mr. Tharp's future medical care and treatment (C-App.Br.69-70). While some other states may have taken that approach, Missouri has not.

Defendant does not acknowledge that predicting the future unavoidably requires engaging in speculation. Speculative testimony is inadmissible.

Missouri recognizes this and does not require *any* testimony about the "expected" cost of future medical treatment to support a jury's award. That has been the rule in this state for well over a century.

In Sotebier v. St. Louis Transit Co., 203 Mo. 702, 102 S.W. 651 (1907), the plaintiff was injured when a streetcar started forward suddenly and jerked as she was alighting from it. She fell and sustained serious, permanent injuries including partial paralysis. S.W. at 652-3. The trial court's damage instruction charged the jury to award fair and reasonable compensation for her injuries, loss of income, and "for any reasonable and necessary expense that you may find from the evidence she has *or may hereafter incur for medical treatment* on account of her said injuries." Id. at 653. This Court rejected defendant's argument that evidence of the cost of future medical expenses was both necessary and lacking (at 654-5):

> The third objection lodged against this instruction is that it permits the jury to include in its verdict *expenditures which might be necessary for*

plaintiff to incur in the future on account of her injuries, when there was no evidence to show that they would be necessary, or what they would be reasonably worth. We are also of the opinion that this objection is without merit, because at the trial the evidence showed that plaintiff had three physicians and one or two of them testified that she was then still under their charge, and was a helpless, a suffering paralytic, and would never improve, but would continually grow worse. If that condition of her health does not tend to show she will need medical attention in the future, we are unable to conceive a case where such attention would be necessary. As to what attention in the future, we are unable to conceive a case where such attention would be necessary. *As to what attention she will require during her life and its probable value are matters of more or less speculation. No one can tell how long she will live, what her suffering will be, or what amount of medical attention she will require. The jurors are as capable of judging of those matters as any one else could be.*

. . . No physician or expert can tell how long plaintiff will live, what her pain and suffering will be, if any, what kind and how often she will need medical treatment, nor *what such services would be reasonably worth in the future*. The most the court can do in such cases is to call the attention of the jury to the injury, if permanent, and, if the evidence shows that the character

> of the injuries is such that the party will probably need medical attention in the future, then tell them that they may allow such sum therefor as the evidence and facts in the case show would be just and reasonable for such attention and services. [Emphasis added.]

To the same effect is Gelhot v. City of Excelsior Springs, Missouri, 277 S.W.2d 650, 656 (K.C.App. 1955), where an issue on appeal was the trial court's instruction on future damages. As relevant here, the city claimed there was insufficient evidence to support the court's instruction to the jury to award compensation for plaintiff's injuries, including "the sums . . . if any, which she is reasonably certain to expend in the future by reason of her said injury." Id. at 655-6. After reviewing the evidence, the court stated, "We cannot say that there was no substantial evidence that *some medical expense may be necessary in the future*." Id. at 656 (emphasis added). With that foundational showing, it rejected the point on appeal and declared plaintiff's evidence sufficient:

> *As to the amount of future medical expenses*, if any, *there was*, of course, *no definite proof offered nor, by its very nature, could such evidence be available*.

Id. at 656 (citing and quoting Sotebier) (emphasis added).

Gelhot was cited approvingly in the most recent pronouncement by this Court on the subject, Crawford v. Chicago-Kansas City Freight Line, Inc., 443 S.W.2d 161 (Mo.banc 1969). Addressing whether there was sufficient evidence to sustain an award for future medical care, the court found that the plaintiff's treating physician testified, in his medical

opinion to a reasonable degree of medical certainty, (*a*) the plaintiff had a disc or intervertebral disc injury with nerve root compression in his low back, (*b*) it was reasonably probable he would require fusion surgery for decompression of the nerve roots if the pain persisted, and (c) his injuries were permanent if the surgery were not performed. Id. at 166-7. After finding this testimony legally sufficient and comparable to that in a prior decision, this Court held that it supported giving the instruction and constituted "competent, substantial evidence that plaintiff would in the future be required to have surgery for his disc injury, and that fusion operation would more likely be required." Id. at 167. The plaintiff's evidence did not amount to conjecture, speculation or a mere possibility of surgery. Id. With that foundation, this Court then stated:

> Under the case of [Gelhot], *it is of no consequence that plaintiff did not prove the cost of fusion or stabilization surgery.*

Id. (adding emphasis). No Missouri case holds otherwise--not even Wilson v. Lockwood, supra can be fairly read as requiring evidence of the cost of future medical treatment, and it cited no decisions that mandate such evidence.

In any event, the jury was advised of the extensive post-cholecystectomy care, treatment, ambulance rides, surgeries and prescriptions Mr. Tharp had received up to the date of trial (Pltf.Exh. 51 - Randall depo pp. 9-17; Pltf.Exh. 49 - Anwuri depo pp. 11-30; Tr. 60-67, 434-38, 459-60). The court read the parties' stipulation to the jury that $254,538.26 had been charged for those items (Tr. 401). That is *some* evidence of future cost that the jury

could utilize, and should be considered sufficient in light of the speculative nature of this undertaking. Jurors are entitled to bring their own life experiences into the courthouse and "to exercise their judgment in accordance with the common knowledge and experience in life which men generally possess, and which the average jury is likewise supposed to possess." Roberts v. Kansas City Rys. Co., 204 Mo.App. 586, 228 S.W. 902, 905 (K.C.App. 1920). As part of their common experiences, intelligence and understanding, the jurors were well aware that the cost of medical care in this country is rising faster than the cost of other basic necessities such as food, housing, and energy.

CONCLUSION

The Surgicenter has failed to preserve either of its claims of error for appeal. In any event, plaintiffs presented sufficient substantial evidence to prove every element of their cause of action and to warrant the verdict for future medical damages.

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03; that it contains 22,096 words and complies with the word limitations contained in Rule 84.06(b); and that a copy of the Brief was served by electronic mail, in pdf format, this 21st day of March, 2018, to T. Michael Ward/Teresa M. Young, Brown & James, P.C., 800 Market St., Ste. 1100, St. Louis, MO 63101.

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