IN THE SUPREME COURT OF MISSOURI

EMILEE WILLIAMS, Appellant/Cross-Respondent, vs. MERCY CLINIC SPRINGFIELD COMMUNITIES, f/k/a ST. JOHN'S CLINIC, INC., Respondent/Cross-Appellant.	)	No: SC96547

BRIEF OF RESPONDENT/CROSS-APPELLANT MERCY CLINIC SPRINGFIELD COMMUNITIES

Appeal from the Circuit Court of Greene County, Missouri
Thirty-First Judicial Circuit
Honorable Mark Powell

William Ray Price, Jr. #29142
Jeffery T. McPherson #42825
Alexander C. Barrett #68695
Paul L. Brusati #67975
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314-621-5070 FAX 314-621-5065

ATTORNEYS FOR MERCY CLINIC SPRINGFIELD COMMUNITIES

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JURISDICTIONAL STATEMENT

On July 14, 2015, Plaintiff Emilee Williams commenced this medical negligence action against Mercy Clinic Springfield Communities, f/k/a St. John's Clinic, Inc., and Dr. Elene Pilapil. L.F. at 31. Before trial, Plaintiff dismissed Dr. Pilapil without prejudice, leaving Mercy as the sole defendant. L.F. at 425.

On March 8, 2017, the trial court entered a judgment for Plaintiff totaling $28,911,000. L.F. at 453-454; App 1. Mercy moved to set aside the judgment to set periodic payments for future damages. L.F. at 455-457. On March 20, 2017, the trial court entered a new judgment setting periodic payments under section 538.220. L.F. at 474, 816-818; App 3. On April 7, 2017, Mercy moved for JNOV or a new trial and alternatively moved to amend the judgment. L.F. at 475-505. On April 27, 2017, Mercy again moved to amend the judgment to remove post-judgment interest. L.F. at 819-820.

On June 23, 2017, the court entered an amended judgment removing post-judgment interest and setting a different periodic payment schedule. L.F. at 1303-1305; App 7. Mercy renewed its post-trial motions, and Plaintiff filed a motion to amend the June 23, 2017 judgment. L.F. at 1306-1319. On September 20, 2017, the trial court denied all pending motions. L.F. at 1562, 1594; App 10.

On June 30, 2017, Mercy filed a notice of appeal in the Court of Appeals, and Plaintiff filed a notice of appeal in this Court, challenging the constitutionality of section 538.220. L.F. at 1320, 1375. On July 7, 2017, Plaintiff filed a notice of appeal in the Court of Appeals. L.F. at 1478. On September 26, 2017, Mercy filed a notice of cross-appeal in this Court and a second notice of appeal in the Court of Appeals. L.F. at 1595.

On October 31, 2017, this Court sustained Mercy's motion to consolidate these appeals, leaving only this appeal and cross-appeal pending in this Court.

This Court has exclusive jurisdiction over these appeals under Article V, section 3 of the Missouri Constitution because Plaintiff's appeal involves a challenge to the constitutionality of a statute. Once this Court's jurisdiction attaches, it extends to all other issues in the case. *In re Estate of Austin*, 389 S.W.3d 168, 170 n.9 (Mo. banc 2013).

STATEMENT OF FACTS

On July 14, 2015, Plaintiff Emilee Williams commenced this action in the Greene County Circuit Court against Mercy and Dr. Elene Pilapil. L.F. at 31. Before trial, Plaintiff dismissed Dr. Pilapil without prejudice. L.F. at 425.

Plaintiff alleged that Dr. Pilapil, and by association Mercy, was negligent in her treatment and care of Plaintiff. L.F. at 32-36. Plaintiff was eventually diagnosed with Wilson's disease, a rare genetic disorder that causes an excess of copper to slowly accumulate in vital organs such as the liver and brain. L.F. at 32-33. Plaintiff alleged, among other things, that Dr. Pilapil's failure to diagnose and treat her for Wilson's disease or refer her to a neurologist, resulted in severe, permanent brain damage. L.F. at 34-35. Mercy's defense was that Plaintiff had accumulated enough copper in her system by her first visit with Dr. Pilapil that any delay in her diagnosis did not cause her further injury from the disease, or that treatment with trientine medication caused her injuries.

A. Plaintiff's medical history before seeing Dr. Pilapil.

Plaintiff was twenty years old and in her senior year at Rockhurst University when she first saw Dr. Pilapil in December 2012. Tr. at 290-291. During her freshman year Plaintiff saw a counselor for basic anxiety and depression. Tr. at 293. In 2011, she suffered leg swelling and visited her primary care physician, Dr. Dale Haverstick, who ordered lab tests, which showed that Plaintiff had elevated levels of liver enzymes. Tr. at 296. Dr. Haverstick diagnosed Plaintiff with mononucleosis. Tr. at 296-297.

On a visit home in October or November 2012, Plaintiff began exhibiting a "total flip" in her personality, including increased anxiety, depression, and becoming more introverted. Tr. at 300, 863-864. On November 21, 2012, Dr. Haverstick diagnosed Plaintiff with anxiety and depression, and prescribed Prozac. Tr. at 301. Plaintiff eventually returned to school, despite reluctance to do so. Tr. at 303-304.

When Plaintiff returned home in December 2012, she had developed a tremor in her right hand. Tr. at 305, 865. After several disagreements with Dr. Haverstick, and with the hope that an internal medicine specialist would determine what was going on, Plaintiff and her mother Theresa Williams sought a new physician. Tr. at 301-302, 501.

A family friend recommended Dr. Pilapil. Tr. at 304. While Dr. Pilapil had learned and read about Wilson's disease in medical school, she testified that she had never seen or diagnosed a patient with Wilson's disease. Tr. at 1306. Plaintiff saw Dr. Pilapil a total of four times between December 2012 and June 2013. Tr. at 1347.

B. Plaintiff's first visit (December 17, 2012).

Plaintiff first saw Dr. Pilapil on December 17, 2012. Tr. at 304, 1319. Before her appointment, Plaintiff answered a detailed "Health Questionnaire" stating her current medications, medical history, family medical history, social history, and current symptoms. Tr. at 1434; D.Ex.556. Plaintiff and Mrs. Williams told Dr. Pilapil that Plaintiff was improving with Prozac, but was still anxious and had trouble concentrating. Tr. at 1326-1327. In response to Mrs. Williams' fear that Plaintiff's tremors may be neurologic, Dr. Pilapil performed a neurologic exam, including a finger-to-nose test, and tests of sensory and motor skills, strength, balance, coordination and reflexes. Tr. at 306-307, 1335; D.Ex.501. Dr. Pilapil noted that the neurologic exam was normal and Plaintiff was alert and oriented. Tr. at 1338.

Dr. Pilapil's notes stated: "[n]o drift, finger to nose good, no tremors of rest, fine tremor on purpose." D.Ex.501. The neurologic exam revealed no resting or purposeful tremors. Tr. at 1334-1337. A "resting" tremor is a tremor that occurs without movement from the individual, while a "purposeful" tremor is one that occurs only when the individual performs a purposeful act. Tr. at 399-400. Tremors can also be classified as "fine" or "coarse." Tr. at 1370. "Fine" tremors are mild and less noticeable, while "coarse" tremors are obvious and more pronounced. Tr. at 1370.

Dr. Pilapil did not observe any tremor during the visit of December 17, 2012. Tr. at 1334-1337. Mrs. Williams testified, however, that Plaintiff had tremors at all four visits with Dr. Pilapil, including the December 17, 2012 visit. Tr. at 332.

Based on Plaintiff's history of anxiety and depression and Dr. Pilapil's opinion that if the tremors were neurologic they would not come and go, Dr. Pilapil concluded that Plaintiff's symptoms were anxiety-related. Tr. at 307, 1357-1358; D.Ex.501.

Because Plaintiff was responding to the Prozac, Dr. Pilapil increased her dosage. Tr. at 1357; D.Ex.501.

Mrs. Williams testified that Dr. Pilapil said the tremors may be a side-effect of the Prozac. Tr. at 308-309. Dr. Pilapil testified, however, that if she had believed that at the time, she would not have increased the dose. Tr. at 1358. Dr. Pilapil told Plaintiff to follow up in January 2013 before returning to school. Tr. at 309. After the first visit, Plaintiff's symptoms improved slightly. *Id.* She began to act less anxious, but the tremors continued. *Id.*

C. Plaintiff's second visit (January 11, 2013).

Plaintiff saw Dr. Pilapil for a brief follow-up appointment on January 11, 2013. Tr. at 310, 1346. There was conflicting testimony regarding whether Plaintiff mentioned her tremors at this visit. Mrs. Williams testified that she was positive that they told Dr. Pilapil the tremors were still present, that Dr. Pilapil reiterated that if the tremors were neurologic, they would not come and go, and again attributed the tremors to anxiety or medication. Tr. at 311-310. Dr. Pilapil testified that she did not remember Plaintiff mentioning the tremors and did not notice any signs of tremors during the January 2013 visit. Tr. at 1347-1350.

Dr. Pilapil explained that she performed a neurologic exam three of the four times she saw Plaintiff after Mrs. Williams or Plaintiff mentioned, or Dr. Pilapil observed, tremors. Tr. at 1349-1352. At the January visit, Dr. Pilapil did not mention tremors in her notes and did not perform a neurologic exam. Tr. at 1349-1350; D.Ex.502. Dr. Pilapil testified that if Plaintiff or Mrs. Williams had mentioned tremors, she would have done a neurologic exam. Tr. at 1352. Dr. Pilapil did not change Plaintiff's medication and told Plaintiff to call or email if problems arose at school. D.Ex.502; Tr. at 311.

D. Plaintiff's condition after the January visit.

After the January visit, Plaintiff returned to Kansas City for her last semester of college. Tr. at 311-312. When Plaintiff came home for spring break, she was doing "pretty good," and her anxiety and tremor persisted, but had not worsened. Tr. at 312.

Plaintiff, however, needed help doing her hair because she could not hold a brush. Tr. at 870-871.

Plaintiff returned to Springfield in April 2013 to attend a 5K race. Tr. at 313. She was able to walk it, but still had the tremor. Tr. at 313-314.

Plaintiff's family next saw her at her graduation in early May 2013 and noticed a significant decline in Plaintiff's health. Tr. at 314, 872. Her tremors were worse and more exaggerated (although still intermittent), her voice was elevating, her pinkie finger was beginning to involuntarily extend outwards, and her lip at times curled up involuntarily. *Id*. The movements resembled dystonia, a movement disorder where an individual's muscles contract involuntarily causing repetitive or twisting movements. Tr. at 432, 436, 626-627. Plaintiff also had balance issues and fatigue from walking up stairs. Tr. at 316.

After graduation, Plaintiff returned to Springfield for a few weeks before starting physical therapy school in Kansas City. Tr. at 316-317. Plaintiff became increasingly weak, had trouble helping her parents move things out of her apartment, and had developed a resting tremor. Tr. at 317-318. Mrs. Williams made an appointment with Dr. Pilapil for May 13, 2013. Tr. at 317, 1360-1361.

E. Plaintiff's third visit (May 13, 2013).

Between the January and May visits, neither Plaintiff nor Mrs. Williams had any contact with Dr. Pilapil. During the May visit, Dr. Pilapil documented that Plaintiff had developed a resting right-hand tremor, but no purposeful tremor. Tr. at 1361-1362; D.Ex.503. Plaintiff told Dr. Pilapil she was fidgety, had trouble writing, and was getting weak. Tr. at 1362. She mentioned that coffee made the tremors worse. Tr. at 1364. Dr. Pilapil performed a neurologic exam and documented that Plaintiff was "[a]lert oriented, tremors at rest but not with purposeful movement," and that the "[f]inger to nose tests are good." D.Ex.503.

Mrs. Williams testified that Dr. Pilapil did not seem concerned about Plaintiff's symptoms because she attributed the tremors to either medication or anxiety. Tr. at 318-319. Dr. Pilapil testified that she believed at this time that the increased dosage of Prozac

was causing the tremors. Tr. at 1366. As a result, she lowered Plaintiff's dose. D.Ex.503. Mrs. Williams testified that Dr. Pilapil said that she believed the tremors were anxiety-related. Tr. at 319-320.

Dr. Pilapil did not notice any dystonia during the first three visits, including May 13, 2013. Tr. at 1372. Dr. Pilapil told Plaintiff to reach out if her symptoms still persisted after four weeks of taking the lower dose of Prozac. D.Ex.503. Dr. Pilapil stated that she did not refer Plaintiff to a neurologist at this point because she believed the tremors were medication-related. Tr. at 1369-1370.

F. Plaintiff's emails with Dr. Pilapil.

The lower dosage of Prozac did not help Plaintiff's symptoms. Tr. at 319-321. Plaintiff began trembling much more, and fell five times on a trip to their family cabin over Memorial Day. *Id.* Plaintiff's voice also began to change and her arm began to involuntarily pull back in an odd position. *Id.* Mrs. Williams encouraged Plaintiff to follow up with Dr. Pilapil. Tr. at 321.

On Tuesday, May 28, 2013, Plaintiff emailed Dr. Pilapil stating, "My symptoms seem to be worsening. My trembling is worse. I've started sweating more for no reason. Here are my symptoms: shakes, fidgety, muscle spasms, sweating, lack of balance, twitchy, can't write or cut things. I think this is because of the generic of Prozac that I've been taking. The decrease in dosage doesn't seem to be helping. Should we try a different medication?" P.Ex.3A. Plaintiff told Dr. Pilapil that she would be in Springfield on May 29 if Dr. Pilapil wanted to see her. P.Ex.3 at 6. Dr. Pilapil did not see Plaintiff's email until the next day, May 29. P.Ex.3B; Tr. at 1375. That day, Dr. Pilapil responded, telling Plaintiff to stop taking the Prozac for a week to see if the symptoms subsided, and to call if Plaintiff had questions or needed to see her that day. P.Ex.3 at 3, 7.

On June 3, 2013, when Plaintiff began physical therapy school, she emailed Dr. Pilapil stating that she was beginning to have bad anxiety and that her symptoms had worsened, despite stopping Prozac, and asked if she could take a different medication. P.Ex.3C. Dr. Pilapil responded saying that the symptoms may be due to Plaintiff's

anxiety and if the tremors were from the Prozac they should have gone away. P.Ex.3 at 10. Dr. Pilapil prescribed a different anti-depressant, Celexa. Tr. at 324, 1389; P.Ex.3 at 10.

While the Celexa did not improve Plaintiff's tremors, it did help her anxiety and depression. Tr. at 324. On June 14, 2013, Plaintiff emailed Dr. Pilapil saying that the Celexa was working better and that she was "still shaky but not as bad." P.Ex.3D. Plaintiff asked if they should increase the dosage. *Id.* Dr. Pilapil responded saying that the dosage could be increased. *Id.*

G. Plaintiff's fourth visit (June 28, 2013).

Plaintiff struggled in physical therapy school. Tr. at 324-325. She was very fidgety and had trouble concentrating. *Id.* On June 28, 2013, Plaintiff drove to Springfield to visit Dr. Pilapil. Tr. at 325-326, 1390. Dr. Pilapil noted that Plaintiff continued to have tremors and had fallen five times, had balance issues, complained of fatigue, a change in handwriting and trouble cutting, and that her fifth finger seemed to be extending outward. D.Ex.504. Plaintiff stated the symptoms were intermittent and that she was doing well in school. *Id.*

Dr. Pilapil performed a comprehensive neurologic exam. Tr. at 1394-1396. Dr. Pilapil stated that Plaintiff performed all tasks in the exam "normally." Tr. at 1395. Dr. Pilapil documented the neurologic exam as "very excellent," and still believed the tremors were anxiety-related. D.Ex.504; Tr. at 326, 333-334. Dr. Pilapil continued the Celexa and added Klonopin, stating that the combination may help the tremors. Tr. at 334. Dr. Pilapil testified that this was the first time she discussed an MRI or neurologic consult with Plaintiff and Mrs. Williams because Plaintiff had been improving in January after the change in Prozac dosage. Tr. at 1399-1400.

Mrs. Williams specifically asked for an MRI to be performed. Tr. at 334. She testified that Dr. Pilapil said that MRIs are very expensive and that these were classic symptoms of anxiety and depression. *Id.* Dr. Pilapil recommended they start with an EEG first. *Id.* Dr. Pilapil testified and noted that if the Celexa combined with the

Klonopin did not improve Plaintiff's symptoms, she would consider doing an MRI or EEG. Tr. at 1398-1399; D.Ex.504.

H. Plaintiff's condition after June 28, 2013.

On July 1, 2013, Plaintiff emailed Dr. Pilapil stating: "[M]y symptoms are a lot better, I don't think they are perfect yet but they are much more manageable. I'm so glad I'll keep you updated." P.Ex.3 at 16. Dr. Pilapil responded asking Plaintiff to keep her updated, and that her medication could be increased as needed. *Id*. On July 8, 2013, Plaintiff emailed Dr. Pilapil saying that the medication seemed to help her shakiness, but her friends say she appears "high" when she takes the medication. P.Ex.3 at 19. Plaintiff asked Dr. Pilapil to call Mrs. Williams to discuss further treatment. *Id*.

Dr. Pilapil left Mrs. Williams a voicemail and emailed Plaintiff asking for clarification as to what Plaintiff meant by "high." Tr. at 1408. Plaintiff responded, explaining that she felt "high or drunk or loopy, I just zone out and everything seems in slow motion." P.Ex.3 at 19. Dr. Pilapil explained that Klonopin, a sedative, could cause these side effects. *Id*.; Tr. at 1408. She told Plaintiff to halve the dose. P.Ex.3 at 19.

On July 21, 2013, Plaintiff emailed Dr. Pilapil saying that she had ceased taking Celexa because it was not working, but was seeing a counselor. P.Ex.3 at 23. She stated that her anxiety was still a problem but would continue taking Klonopin. *Id*. Dr. Pilapil cautioned that Klonopin is a short-term, as needed medication, and was glad Plaintiff began seeing a counselor. *Id*.

On Tuesday, July 23, 2013, Plaintiff emailed Dr. Pilapil, informing her that she would be home that weekend, and asked Dr. Pilapil to schedule an appointment with a neurologist on that Friday and an MRI or CT scan if needed. P.Ex.3 at 26. Dr. Pilapil explained that the appointment and MRI could not be set up that quickly, but that she would order an MRI and Plaintiff would be called to determine the date. *Id*.

I. Plaintiff's diagnosis of Wilson's disease.

On July 26, 2013, an EEG was performed. Tr. at 336. Plaintiff subsequently returned to school, but immediately called Mrs. Williams and said she could not continue. Tr. at 337. Plaintiff explained that her hands and feet were clawing and that her lips were

curling out. *Id*. Plaintiff's parents picked her up and brought her back to Springfield. Tr. at 338. On July 29, 2013, Plaintiff emailed Dr. Pilapil and requested that she schedule an MRI for Friday, August 2, 2013 and an appointment with a neurologist. P.Ex.3 at 29. Dr. Pilapil responded that the EEG did not reveal any abnormal findings and that she had ordered the MRI on July 29, 2013. *Id*.

On July 31, 2013, Plaintiff saw neurologist Dr. Roger Oghlakian. Tr. at 338; D.Ex.505. Dr. Oghlakian testified that his neurological exam of Plaintiff was "normal." P.Ex.213 at 71. He noted that based on Plaintiff's medical records, medical history, and his examination, the most likely cause of Plaintiff's symptoms was anxiety and depression. *Id* at 72; D.Ex.505. Dr. Oghlakian believed the EEG was normal, but told Plaintiff to contact him after the MRI that Dr. Pilapil had ordered. D.Ex.505.

The MRI was on August 8, 2013. Tr. at 340. On the way home, Plaintiff and her parents received a call from a nurse saying something was found on the MRI and they should return immediately. *Id*. When they arrived, Dr. Pilapil said that the radiologist had found significant brain trauma and that it appeared to be Wilson's disease. *Id*.

On August 12, 2013, Plaintiff met with Dr. Oghlakian. D.Ex.506. He placed a referral to the Mayo Clinic for evaluation and treatment. *Id*. Through research, Mrs. Williams discovered the Wilson's Disease Center for Excellence at the University of Michigan. Tr. at 341-342. Plaintiff and her parents made plans to visit Dr. Frederick Askari at the University of Michigan on August 30, 2013.

Before Plaintiff saw Dr. Askari, Dr. Pilapil consulted with Dr. Askari's office regarding treatment. Tr. at 1426. Dr. Pilapil had placed an order for a medication called penicillamine. Tr. at 1427-1428. Before the order was sent and before Plaintiff received the medication, Mrs. Williams called Dr. Askari's nurse, who told her penicillamine may kill Plaintiff. Tr. at 342-343, 1427-1428. Instead, Plaintiff began taking trientine on August 19. Tr. at 344. After Plaintiff began taking the trientine, Mrs. Williams noticed a decline in her daughter's health, but could not say it was any more significant or faster than before. Tr. at 346. She stated that Plaintiff's health had rapidly deteriorated since her graduation in May. *Id*.

Dr. Askari initially recommended starting Plaintiff on trientine and a low dose of zinc. P.Ex.205 at p. 30-32. At the time, there were two approved chelating agents (medications that remove minerals from the body) for treating Wilson's disease: penicillamine and trientine. *Id*. at p. 27-28. Dr. Askari prefers trientine because it has fewer side effects, although he acknowledged that trientine can make copper unbind in the body, causing additional damage. *Id*. at p. 28-29, 58. He testified that an adverse reaction is more likely the more advanced a patient's symptoms are. *Id*. at p. 30. Dr. Matthew Lorincz, another specialist who treated Plaintiff, testified that trientine causes neurological degradation in approximately 25% of patients. P.Ex.210 at p. 63.

Dr. Askari first saw Plaintiff eleven days after she started trientine. P.Ex.205 at p. 10-11. He did not have concerns about Plaintiff's treatment at her first visit, and recommended continuing trientine. P.Ex.206 at 27-28. Plaintiff and her mother agreed that Dr. Pilapil would continue to oversee Plaintiff's care in Springfield and that Dr. Askari would consult when needed. Tr. at 346-347.

J. Plaintiff's health post-diagnosis.

Plaintiff's health continued to decline significantly. Tr. at 348. On September 26, 2013, approximately six weeks after beginning treatment with trientine, Plaintiff had trouble swallowing. *Id*. She was admitted to Mercy hospital and a PEG (feeding) tube was placed in her stomach. *Id*. After consulting with a neurologist at Mercy, Dr. Askari ordered that Plaintiff stop taking trientine. Tr. at 348-349. He stopped administering trientine in case it was causing Plaintiff's decline. P.Ex.206 at p.87. Dr. Askari believes it is impossible to tell whether neurological decline in an individual patient is due to trientine or natural Wilson's progression, and could not tell whether the drug or disease caused Plaintiff's decline. *Id*. at p.84-87.

After the PEG tube was inserted Plaintiff was essentially paralyzed. Tr. at 350. She could not walk, talk, or move, and had to blink her eyes to communicate. *Id*. Around October or November 2013, Plaintiff recovered some movement in her left hand, enough to communicate by pointing to letters on a chart. Tr. at 352-354.

Plaintiff was discharged on December 9, 2013, but remained on the PEG tube until June or July 2015. Tr. at 354-355. When she left the hospital, Plaintiff was still unable to walk, talk, or move her legs. Tr. at 355. Her family took shifts watching and caring for Plaintiff. Tr. at 356. When Dr. Lorincz first saw Plaintiff in February 2014, she was one of the worst Wilson's patients he had ever seen. P.Ex.210 at p. 38.

Plaintiff remained like this until September or October 2015. Tr. at 358-359. Dr. Lorincz saw Plaintiff again in October 2015. P.Ex.210 at p. 55. Her condition had improved, but she still had numerous neurological problems. *Id*. at p.55-57. Dr. Lorincz did not believe she would make significant further improvement and would need care and supervision for the rest of her life. *Id*. at p. 58-59.

Since then, Plaintiff has made remarkable improvements. Tr. at 359-362. She can walk now, albeit with a limp, and regained the ability to talk in the summer of 2016, although her voice is not the same. Tr. at 359-360. Despite remarkable improvements, Plaintiff's personality changed significantly, she is prone to outbursts, and has not been left unsupervised since August 2013. Tr. at 362-364.

K. Plaintiff's standard-of-care evidence.

Plaintiff's standard-of-care evidence consisted primarily of the testimony of Dr. Lisa Shah and Dr. Donald Frey. Dr. Shah testified that Dr. Pilapil negligently diagnosed and managed Plaintiff's tremor. Tr. at 369. She believed a differential diagnosis should rule out the most serious potential causes of a symptom, that an internist must know when to refer a patient to a specialist, and that a physician should keep good records to aid subsequent treaters. Tr. at 376-378, 383. Dr. Frey offered similar opinions. *See* Tr. at 579-580.

Dr. Shah and Dr. Frey concluded Dr. Pilapil was negligent at the December visit because she failed to take a proper medical history, gave Plaintiff incorrect medical advice, did not consider Plaintiff's medical records, and failed to refer Plaintiff to a neurologist. Tr. at 404-405, 606-607. They did not think Dr. Pilapil should have known Plaintiff had Wilson's disease, but that she should have made a referral. Tr. at 414, 632.

Plaintiff's experts criticized Dr. Pilapil for not following up on the tremor at the January visit. Tr. at 421, 608-611. Dr. Shah believed Plaintiff did not mention the tremor due to Dr. Pilapil's incorrect advice. Tr. at 418. Both experts believed Dr. Pilapil should have scheduled a follow-up visit before May. Tr. at 421-422, 612-613.

Dr. Shah and Dr. Frey disagreed with Dr. Pilapil's conduct at the May visit as well. Dr. Shah did not believe Dr. Pilapil did a review of systems and again criticized Dr. Pilapil's notes for not documenting the tremor's location. Tr. at 422, 424-425. Dr. Frey disagreed with Dr. Pilapil's assessment that the tremor was medication related. Tr. 618-623. Both concluded Dr. Pilapil breached the standard of care by not referring Plaintiff to a neurologist. Tr. at 426, 624.

Dr. Shah and Dr. Frey also addressed the email exchange between Dr. Pilapil and Plaintiff following the May visit. Tr. at 426-430, 624-626. Both were critical of Dr. Pilapil for not advising Plaintiff to see a physician in Kansas City. Tr. at 428-430, 625-626. Dr. Shah also disagreed with Dr. Pilapil's advice to increase and change Plaintiff's medication. Tr. at 428-430.

Dr. Shah noted that no review of systems was done at the June visit. Tr. at 431. She and Dr. Frey explained that Dr. Pilapil had documented that Plaintiff's pinkie finger was normal, likely because Plaintiff had previously complained of dystonia. Tr. at 432, 627-628. Dr. Shah disagreed with Dr. Pilapil's conclusion that Plaintiff's symptoms were anxiety-related and her plan to see if there was improvement before sending Plaintiff to a neurologist. Tr. at 433-434. Dr. Frey indicated that he was unable to make sense of Dr. Pilapil's notes from the June visit, which documented excellent coordination. Tr. at 629.

Dr. Shah said that Plaintiff should have been referred to a neurologist in December at which time she would have been diagnosed with Wilson's disease. Tr. at 436-437.

L. Dr. Frucht's Testimony.

Dr. Steven Frucht, a neurologist specializing in movement disorders, was Mercy's principle expert on Wilson's disease and causation. Tr. at 684-686. Due to scheduling issues, Dr. Frucht initially testified after Plaintiff's standard-of-care experts, but before

her life care planner and causation expert. Tr. at 3-5. His opinion was that Plaintiff had a significant amount of copper in her system in December 2012 and would have suffered a neurological decline even if treated with trientine at that time. Tr. at 706-707.

Dr. Frucht testified that Wilson's patients amass copper in their bodies slowly and steadily throughout their lives, and that Plaintiff would have had significant amounts of copper in her system in December 2012. Tr. at 707-710, 741-742. He explained that Plaintiff was almost exclusively a neurological Wilson's patient. Tr. at 703. He opined that chelating agents like trientine pose particular risks to neurological patients because they cause copper to unbind and potentially harm the brain. Tr. at 720-722.

Dr. Frucht testified that tremors and dystonia reflect brain damage, and that throughout 2013 Plaintiff experienced symptoms consistent with brain damage. Tr. at 717, 730-738, 821-825. He believed Plaintiff's copper burden would have been about the same in December or January as in August 2013. Tr. at 810-811. He testified that research had shown that the average delay between symptoms displaying and diagnosis in neurological Wilson's patients is 2.5 to 3 years, and that the time of diagnosis did not significantly affect treatment outcome. Tr. at 760-761, 799-802. Thus, he believed that Plaintiff would have experienced the same reaction if treated earlier. Tr. at 729-730, 812.

Dr. Frucht also discussed MRI images of Plaintiff's brain and explained the areas of damage shown on the August 2013 MRI. Tr. at 711-718. He opined that if an MRI had been taken in December or January, it would have looked about the same as the one taken in August 2013. Tr. at 715, 718. He did not think the damage shown in the August MRI would have developed in a matter of months. Tr. at 810-811. Dr. Frucht noted that a second MRI had been taken just before trial and showed damage to the same areas of the brain. Tr. at 740. He believed that if an MRI had been taken shortly after Plaintiff stopped receiving trientine, it would have looked worse. Tr. at 740-741.

Mercy was later permitted to recall Dr. Frucht to respond to testimony from Plaintiff's life care and causation experts. Tr. at 1634-1658. He reiterated his opinion that Plaintiff suffered brain damage before first visiting Dr. Pilapil, and testified that the phrase "subacute" (which came up for the first time in Dr. Belz's testimony) is an elastic

concept that simply means damage that had not occurred in the previous 24 to 48 hours. Tr. at 1637-1638. Comparing the August 2013 and February 2017 MRIs, Dr. Frucht explained that the latter MRI showed more extensive damage to the brain. Tr. at 1642-1643. He believed the permanent damage shown in the 2017 MRI was consistent with the decline Plaintiff experienced after starting trientine. Tr. at 1645.

M. Plaintiff's life care plan.

Dr. Norbert Belz described the scope of his retention as being to examine Plaintiff's condition, assess how Wilson's disease affected her, and determine her future needs. Tr. at 943. He testified that Plaintiff has a remaining life expectancy of 57 years. Tr. at 944. To ascertain Plaintiff's needs, Dr. Belz determined what parts of her brain were damaged and the extent to which it was permanent. Tr. at 954-955. He offered a general explanation of how the brain functions and how cell death affects the brain. Tr. at 955-957.

Plaintiff introduced images from the August 2013 and February 2017 MRIs. Tr. at 961-966. Dr. Belz explained that the 2017 MRI was taken to examine Plaintiff's jaw and that the brain was included at the request of her family. Tr. at 962-963. He testified that Plaintiff had not experienced symptoms associated with Wilson's disease her entire life because copper slowly amasses in the liver before spilling into the brain. Tr. at 972-974. He described exams that had been conducted on Plaintiff and what they showed about her brain function. Tr. at 974-978. Dr. Belz used the 2013 MRI to explain the parts of Plaintiff's brain that had been damaged and what that meant for her future needs. Tr. at 979-981.

Dr. Belz was asked whether a hypothetical MRI taken in December 2012 or January 2013 would have looked the same as the one taken in August 2013. Tr. at 980. He said it would not, explaining that the MRI mentioned "subacute necrosis," which meant cell death within the last three months. Tr. at 981. He testified that brain cells began dying in May, not in December or January. *Id.* Plaintiff's counsel then prompted Dr. Belz to further discuss subacute necrosis, asking whether those words were his or someone else's. *Id.*

Mercy objected to further testimony on this topic. Tr. at 981-987. Mercy argued the question called for hearsay and that Dr. Belz was not designated to address causation, which he did not discuss at his deposition. Tr. at 982. Plaintiff contended that Dr. Frucht did not discuss the timing of MRIs at his deposition but did at trial and that Plaintiff was entitled to respond. Tr. at 983. Plaintiff further argued that Dr. Belz could discuss medical records and that he would not opine on causation. *Id.* The court overruled Mercy's objection and ruled that Dr. Belz could explain why he ordered the second MRI, but instructed that Dr. Belz needed to start discussing his life care plan. Tr. at 985-987. Dr. Belz explained that the subacute necrosis language came from the MRI and that the 2017 MRI showed no changes. Tr. at 987-988.

Dr. Belz explained that his life care plan included only costs that would have been prevented if Plaintiff were diagnosed earlier. Tr. at 958-959, 997. He stated that he based the plan on local costs and charges Plaintiff was already incurring. Tr. at 999-1000. Outside the hearing of the jury, Mercy stipulated that the plan's costs were reasonable and necessary. Tr. at 1023-1024.

Plaintiff then argued Dr. Belz should be permitted to explain that the plan's costs were based on a hypothetical world in which Plaintiff was diagnosed in January or December, "where [Plaintiff's] medical doctors say the breach of the standard of care is." Tr. at 1024. Mercy objected that Plaintiff had never disclosed that the plan was based on negligence at a particular point in time, as opposed to the care that she currently needed, and that Dr. Belz was not a causation expert. Tr. at 1025-1026, 1029-1030. Plaintiff conceded that Dr. Belz had prepared a single life care plan, but presented Dr. Belz's designation, which listed a number of topics, including causation. Tr. at 1025, 1028.

Based on the designation, the court permitted Dr. Belz to discuss the basis for his life care plan. Tr. at 1029. Dr. Belz testified that the plan was based on Dr. Fischer's opinion that Plaintiff would have been normal if diagnosed before March or May 2013. Tr. at 1035. He stated that his own research was consistent with Dr. Fischer's conclusions. Tr. at 1036, 1075. Dr. Belz injected his opinion that brain damage had not occurred until May 2013. Tr. at 1076-1082. Dr. Belz also offered his opinion that

trientine did not cause brain damage because it was administered after the August 2013 MRI. Tr. at 1082-1083. Plaintiff's counsel later elicited additional testimony concerning whether the 2017 MRI showed damage to the same areas of the brain as the 2013 MRI. Tr. at 1092-1093.

N. Mercy's motion for mistrial.

Following Dr. Belz's testimony Mercy moved for a mistrial and submitted copies of an email Plaintiff's counsel had sent before trial and of the deposition testimony of Plaintiff's experts. *See* Tr. at 1099-1102, 1107; S.L.F. at 91-364. Plaintiff's counsel had represented before trial that the February 2017 MRI did not affect Dr. Belz's opinions and had no use at trial. Tr. at 1099; S.L.F. at 91. When deposed, Dr. Belz agreed that the scope of his retention was to prepare a life care plan. S.L.F. at 103. At the end of the deposition, Plaintiff's counsel advised that the one thing he had not discussed was calculation of Plaintiff's bills. S.L.F. at 111. There was no mention of necrosis. S.L.F. at 115-116. The sole reference to causation was when Dr. Belz stated that he sometimes did such analysis. S.L.F. at 104-105, 113.

At trial, however, Dr. Belz discussed both the 2017 MRI and subacute necrosis to attack and rebut Dr. Frucht's causation testimony. Tr. at 1099, 1104-1106. Mercy noted that Dr. Belz's testimony also violated a pre-trial order prohibiting experts from offering facts or opinions not previously disclosed. Tr. at 1099-1100, 1104; S.L.F. at 95. None of Plaintiff's other experts had ever mentioned necrosis or cell death. Tr. at 1101-1102; S.L.F. at 308-364. Mercy noted that Dr. Fischer had not previously discussed these issues and might attempt to offer similar opinions. Tr. at 1101, 1111. Mercy argued that these violations had greatly prejudiced its case and warranted a new trial. Tr. at 1102, 1105-1106.

Plaintiff argued that Dr. Frucht had discussed the 2017 MRI at trial and that she was entitled to respond. Tr. at 1102. She contended that Dr. Belz's testimony was authorized based on his designation. Tr. at 1103. She also claimed that Dr. Belz's opinions had not changed. Tr. at 1103-1104.

The court denied the motion. Tr. at 1109. Mercy then made an alternative motion to recall Dr. Frucht by video conference, which the court granted. Tr. at 1109-1110.

O. Plaintiff's causation expert.

Plaintiff's causation expert, Dr. Kenneth Fischer, testified after Dr. Belz that if Plaintiff had been diagnosed and treated before approximately May 2013, she would have been normal or essentially normal. Tr. at 1115. Dr. Fischer also discussed the relevance of unilateral and bilateral tremors to a diagnosis over Mercy's objection that he had not discussed tremors at his deposition and expressly stated he would not offer standard-of-care opinions. Tr. at 1131-1138.

Dr. Fischer opined that if Wilson's disease is diagnosed when a patient has a minor tremor, she can be treated without trientine, which, for Plaintiff, meant December 2012 or January 2013 when her tremor was still minor. Tr. at 1139-1141. He further testified that if Plaintiff had been diagnosed in May or June and started on trientine she would still have been mostly normal, though not completely. Tr. at 1141. He opined that the more symptoms a patient has when starting trientine, the more likely she is to have permanent damage. Tr. at 1142-1145. He testified that Plaintiff had less copper in her brain in December 2012 than at the time of her diagnosis. Tr. at 1222-1223.

As Mercy had warned, Dr. Fischer also discussed necrosis and cell death. He testified that once a patient begins having severe dystonia, she has suffered permanent structural damage to the brain. Tr. at 1146-1147. He testified that while minor irritation is reversible, cell death is irreversible. Tr. at 1147. He opined that Plaintiff would have been fine if treated before cell death occurred. Tr. at 1151. While acknowledging that 25% of patients treated with trientine suffer a neurological decline, he believed those numbers were based on patients receiving a higher dose of trientine than Plaintiff. Tr. at 1151-1152.

Mercy again moved for a mistrial, arguing that Dr. Fischer had not discussed necrosis at his deposition and that his testimony was part of a coordinated response to Dr. Frucht's testimony. Tr. at 1147-1151. The court denied the motion. Tr. at 1150.

Dr. Fischer testified that the damage to Plaintiff's brain worsened between May and August 2013. Tr. at 1159-1161. He testified that the first time dystonia was mentioned in the medical records was at the June 28, 2013 visit. Tr. at 1162-1163. He testified that dystonia "appear[ed] to be just starting at this point in time" and that the damage to Plaintiff's brain was reversible until then. Tr. at 1163. He testified that by Plaintiff's July 31, 2013 visit to Dr. Oghlakian, she had developed permanent brain damage. Tr. at 1163-1166. He testified that Plaintiff could no longer be treated without a chelating agent by that time. Tr. at 1165.

Dr. Fischer stated that whether Plaintiff was displaying dystonia in March 2013 was "very hypothetical" and that the first record of dystonia was in late May. Tr. at 1198. He conceded, however, that he testified at his deposition that symptoms the family observed in March 2013 sounded like dystonia and that if he saw a patient with dystonia, he would have administered trientine. Tr. at 1199-1200. He believed that if Plaintiff had been treated with trientine in December or January, she would not have had a negative reaction. Tr. at 1166-1167.

Dr. Fischer also addressed the two MRIs. Tr. at 1167, 1177-1181. Mercy again objected, pointing out that Dr. Fischer had not discussed the February 2017 MRI in his deposition. Tr. at 1168-1169. Plaintiff countered that Dr. Fischer's opinion had not changed, and had always been that trientine caused "temporary damage" to Plaintiff's brain. Tr. at 1169. Mercy pointed out that there was no reference to "temporary damage" in Dr. Fischer's deposition. *Id.* The court overruled Mercy's objection after confirming that Mercy would be allowed to recall Dr. Frucht via videoconference. Tr. at 1175-1176.

Dr. Fischer stated the two MRIs showed damage to the same areas of the brain and no appreciable change in condition. Tr. at 1177-1181. He testified that while he had previously believed trientine had caused brain damage, the second MRI caused him to believe it was actually caused by natural disease progression. Tr. at 1180-1181. He did not testify that trientine had caused "temporary" damage. Dr. Fischer conceded that he

had testified at his deposition that administration of trientine had caused Plaintiff to suffer a severe neurological decompensation. Tr. at 1190-1191.

P. Plaintiff's damages evidence.

Larry Ellison is a forensic economist and accountant. Tr. at 1566. He was retained to determine the future and present values of the costs in Dr. Belz's life care plan. Tr. at 1567-1568. He testified that the present value of the life care plan was $17,758,161. Tr. at 1569.

Mr. Ellison explained his general methodology for calculating the present value of the life care plan. Tr. at 1580-1604. The first step consisted of "growing" the value of Plaintiff's present medical needs by applying inflation rates to the costs in Dr. Belz's plan to arrive at a future value. Tr. at 1595-1601. He then reduced that future value to present value by applying a discount rate based on the amount of interest Plaintiff could earn by immediately investing the money. Tr. at 1588-1589, 1601-1602. His present value calculations were based on long-term interest rates. Tr. at 1589-1591, 1601-1602.

There were 95 categories of items in Dr. Belz's life care plan, and Mr. Ellison applied different growth rates to each category. Tr. at 1598-1600. He did not testify as to the specific growth rate he used to calculate the present value of the attendant care Plaintiff would require. Tr. at 1595-1604.

Q. The verdict and post-trial proceedings.

At the instruction conference, Mercy's objections were primarily directed at Instruction 6, the sole verdict director submitted by Plaintiff. Tr. at 1621; S.L.F. at 374. The trial court submitted Instruction 6 without modification. Tr. at 1627; A10; S.L.F. at 390; App 11.

The jury returned a verdict in favor of Plaintiff totaling $28,911,000 in damages. L.F. at 447-448.

On March 8, 2017, Plaintiff submitted a proposed judgment, which was promptly entered. L.F. at 449-454; App 1. The judgment did not include a schedule for periodic payments under section 538.220, RSMo. *Id.* Mercy immediately moved to set the judgment aside so that it could request application of the statute. L.F. at 455-457. The

trial court set the judgment aside on March 9. L.F. at 474; P.T. Tr. at 4.[1] Mercy filed its request and an evidentiary hearing was set. L.F. at 474, 744-745.

At the hearing both sides presented expert testimony. Mercy's expert primarily focused on whether periodic payment of future medical damages would permit Plaintiff to cover the costs of obtaining attendant care, which made up almost 93% of future damages. *See* P.T. Tr. at 7, 50. Mercy explained that if future medical damages were paid periodically, Plaintiff would receive surpluses over the amount necessary to cover her attendant care needs for the first 48 years of the payment plan, totaling approximately $5.5 million. P.T. Tr. at 8-10. Plaintiff argued that section 538.220 was unconstitutional and should not be applied. P.T. Tr. at 11-15.

Plaintiff presented the testimony of Brooke Liggett, an accountant who prepared an analysis of Plaintiff's future medical damages. P.T. Tr. at 19-20. She explained how Plaintiff's future medical damages were calculated. Ms. Liggett stated that the first step was to start with the actual costs contained in Dr. Belz's life care plan and to calculate their future value by applying a growth rate. P.T. Tr. at 21. The grown cost (or future value) that her partner Mr. Ellison came up with was $56,404,000. *Id.* She explained that the second step was to calculate the present value of the grown cost. P.T. Tr. at 21-22. This entailed determining how much money needed to be invested in the present to reach the grown costs figure. P.T. Tr. at 22-23. She opined that in order to do periodic payments correctly, it was necessary to use the grown costs figure, not the present value awarded by the jury. P.T. Tr. at 23-24

Ms. Liggett testified that periodic payments under section 538.220 were problematic because the statutory interest rate was much lower than the one she and Mr. Ellison had used to calculate present value. P.T. Tr. at 22-23. They calculated the present value of future medical damages by applying interest rates between 0.74% and 5.18%. P.T. Tr. at 26. Using those rates, they calculated a present value of $17,758,161.

[1] "P.T. Tr. at" refers to the transcript of the post-trial evidentiary hearing, which is separately paginated.

P.T. Tr. at 31-32. Had they used the interest rate Ms. Liggett believed was required by section 538.220, they would have calculated a present value of $39,930,601.[2] P.T. Tr. at 32. She testified that there would also be tax consequences with periodic payments. P.T. Tr. at 33-34.

Ms. Liggett agreed that no matter how Plaintiff is paid, she will never get the full value of the jury's award because there is a 40% contingency fee. P.T. Tr. at 28-30, 36-37. Plaintiff's counsel referred to the contingency fee as the "300-pound gorilla in the room" and noted that it would cause a shortfall no matter how payments were made. P.T. Tr. at 18-19.

Mercy presented the testimony of David Tucek. P.T. Tr. at 43. Mr. Tucek is a forensic economist and has previously published on the topic of periodic payments under section 538.220. P.T. Tr. at 43-44. Mercy submitted several reports and economic projections Mr. Tucek prepared concerning the application of the statute to this case. L.F. at 762-802.

Mercy and Mr. Tucek noted that the baseline costs for attendant care in Dr. Belz's life care plan substantially exceeded the amounts that Plaintiff had historically been billed and paid for such services. P.T. Tr. at 49, 54-56; L.F. at 765, 771-772. Mr. Tucek explained that Ms. Liggett and Mr. Ellison had applied a growth rate that was far too high in calculating the grown/future costs of attendant care services because it (i) was based on historically high inflation rates unlikely to reoccur and (ii) included growth rates applicable to physicians and dentists, which were higher than growth rates applicable to nurses, who would actually provide attendant care. P.T. Tr. at 46-48, 50; L.F. at 762-765. He testified that the growth rate they applied was approximately 58% higher than it should be. P.T. Tr. at 47.

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[2] She based this testimony on an interest rate of 0.98%. P.T. Tr. at 31-32. That was not the interest rate applicable under the statute at the time judgment was originally entered or when the amended judgment was entered on March 20. P.T. Tr. at 51-52; L.F. at 805-809.

Mr. Tucek opined that if section 538.220 were applied, Plaintiff would receive more than enough money to cover her attendant care needs given the growth rate used and the numbers in Dr. Belz's plan. P.T. Tr. at 48. He explained that if the correct growth rate was applied to the figures in Dr. Belz's life care plan, those damages could be paid periodically and Plaintiff would receive surpluses over the amounts necessary to cover the attendant care costs in Dr. Belz's life care plan for 48 of the 57 years of the plan totaling $5.5 million. P.T. Tr. at 49-54; *see* L.F. at 768.

At the conclusion of the hearing, the court announced its judgment. P.T. Tr. at 63-70; L.F. at 803. It ordered that the $3.2 million in future non-economic damages and $3,241,839 of the future medical damages were to be paid periodically, with everything else to be paid by lump sum. P.T. Tr. at 63-66.

Plaintiff's counsel submitted a proposed judgment, which the court entered on March 20. L.F. at 810-818; App 3. The proposed judgment included an award of post-judgment interest, without any indication to the trial judge that the proposed judgment was contrary to section 538.300, RSMo. *Id.* It also extracted the 40% contingency fee out of the amounts the court had determined would be paid periodically, resulting in only $3,865,104 being subject to periodic payment. *Id.*

On April 7, Mercy filed timely motions to amend the judgment, for new trial, for remittitur, and for judgment notwithstanding the verdict. L.F. at 475-505. In its Alternative Motion to Amend the Judgment Pursuant to § 538.220, Mercy argued that the trial court should award Plaintiff her past damages and attorney's fees and subject all remaining future damages to periodic payment. L.F. at 503-505.

On April 27, Mercy moved to amend the judgment to remove post-judgment interest. L.F. at 819-823. Plaintiff moved to strike the motion, arguing it was untimely. L.F. at 826-829. On June 20, Mercy filed a response arguing, *inter alia*, that the inclusion of post-judgment interest was plain error correctable under Rule 78.08. L.F. at 1267-1270.

On June 21 the court heard argument and took the motions under advisement. L.F. at 1301. In a June 22 order the court ruled on the motions. L.F. at 1302; App 6. It

partially granted Mercy's alternative motion to amend the judgment pursuant to section 538.220 and Mercy's motion to amend the judgment to remove post-judgment interest. *Id.* The order stated, in relevant part: "Defendant's alternative motion to amend the judgment pursuant to §538.220 is sustained in part. As a result, an amended judgment will be entered. Defendant's second motion to amend judgment is sustained." *Id.* The order noted that the court had erred in including post-judgment interest and that it was acting to correct "this oversight and plain error." *Id.*

The court entered an amended judgment on June 23. L.F. at 1303-1305; App 7. That judgment, which is the subject of these cross-appeals, ordered that $10,000,000 in future medical damages would be paid periodically pursuant to section 538.220. *Id.* All other damages were to be paid by lump sum. *Id.* On June 29, Mercy renewed its April 7 post-trial motions. L.F. at 1306-1308. Plaintiff filed a motion to amend the June 23 judgment. L.F. at 1309-1319. Both parties filed notices of appeal on June 30, 2017. L.F. at 1320-1323, 1375-1378. On September 20, the trial court overruled all remaining post-trial motions. L.F. at 740-741; App 10. On September 26, Mercy filed an additional notice of appeal with the Court of Appeals and a notice of cross-appeal with this Court. L.F. at 741. All appeals were subsequently consolidated in this Court.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6 AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE INSTRUCTION 6 CONSTITUTES A ROVING COMMISSION IN THAT INSTRUCTION 6 FAILS TO IDENTIFY ANY SPECIFIC DATES THAT DR. PILAPIL TREATED PLAINTIFF, THEREBY ALLOWING THE JURY TO FIND MERCY LIABLE FOR ALLEGED NEGLIGENCE BY DR. PILAPIL AFTER PLAINTIFF'S EXPERTS TESTIFIED PLAINTIFF HAD ALREADY SUFFERED HER INJURIES.

Scanwell Freight Express STL, Inc. v. Chan, 162 S.W.3d 477 (Mo. banc 2005)

Vest v. City National Bank & Trust Co., 470 S.W.2d 518 (Mo. 1971)

Minze v. Missouri Dep't of Public Safety, 437 S.W.3d 271 (Mo. App. 2014)

II. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6 AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE SUBPART "B" OF INSTRUCTION 6 IS VAGUE AND CONFUSING IN THAT THERE WAS NO CLEAR DEFINITION OF WHAT THE PHRASE "FAILED TO ADEQUATELY CONSIDER EMILEE WILLIAMS' MEDICAL CHART" MEANT OR WHAT DOCUMENTS OR RECORDS CONSTITUTED PLAINTIFF'S "MEDICAL CHART."

Centerre Bank of Kansas City, Nat'l Ass'n v. Angle, 976 S.W.2d 608 (Mo. App. 1998)

Ladish v. Gordon, 879 S.W.2d 623 (Mo. App. 1994)

Grindstaff v. Tygett, 655 S.W.2d 70 (Mo. App. 1983)

III. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6 AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND THAT DR. PILAPIL'S FAILURE TO TAKE AN ADEQUATE HISTORY OF PLAINTIFF'S TREMORS OR HER FAILURE TO CONSIDER PLAINTIFF'S MEDICAL CHART INDEPENDENTLY CAUSED PLAINTIFF'S INJURIES.

Ross-Paige v. Saint Louis Metro. Police Dep't, 492 S.W.3d 164 (Mo. banc 2016)

Hayes v. Price, 313 S.W.3d 645 (Mo. banc 2010)

IV. THE TRIAL COURT ERRED IN DENYING MERCY'S MOTIONS FOR MISTRIAL AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE ADMISSION OF THE TESTIMONY OF DR. BELZ CONCERNING THE 2017 MRI, THE CONCEPT OF NECROSIS, AND CAUSATION ISSUES VIOLATED RULE 56.01(E) AND A PRE-TRIAL ORDER IN THAT THE TESTIMONY MATERIALLY DIFFERED FROM HIS PRIOR DEPOSITION TESTIMONY, IN WHICH DR. BELZ STATED THAT THE SCOPE OF HIS RETENTION WAS TO PREPARE A LIFE CARE PLAN AND DID NOT DISCUSS THE 2017 MRI OR NECROSIS.

Snellen ex rel. Snellen v. Capital Region Med. Ctr., 422 S.W.3d 343 (Mo. App. 2013)

Sherar v. Zipper, 98 S.W.3d 628 (Mo. App. 2003)

Bailey v. Norfolk & Western Ry. Co., 942 S.W.2d 404 (Mo. App. 1997)

Gassen v. Woy, 785 S.W.2d 601 (Mo. App. 1990)

V. THE TRIAL COURT ERRED IN DENYING MERCY'S MOTIONS FOR MISTRIAL AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE ADMISSION OF THE TESTIMONY OF DR. FISCHER CONCERNING THE 2017 MRI, THE CONCEPT OF NECROSIS, AND STANDARD-OF-CARE ISSUES VIOLATED RULE 56.01(E) AND A PRE-TRIAL ORDER IN THAT THE TESTIMONY MATERIALLY DIFFERED FROM HIS PRIOR DEPOSITION TESTIMONY, IN WHICH DR. FISCHER DISCLAIMED STANDARD-OF-CARE OPINIONS AND DID NOT DISCUSS THE 2017 MRI OR NECROSIS.

Snellen ex rel. Snellen v. Capital Region Med. Ctr., 422 S.W.3d 343 (Mo. App. 2013)

Sherar v. Zipper, 98 S.W.3d 628 (Mo. App. 2003)

Bailey v. Norfolk & Western Ry. Co., 942 S.W.2d 404 (Mo. App. 1997)

Gassen v. Woy, 785 S.W.2d 601 (Mo. App. 1990)

VI. THE TRIAL COURT ERRED IN ENTERING ITS JUNE 23, 2017 JUDGMENT REQUIRING PAYMENT OF $11,000,000 IN FUTURE MEDICAL DAMAGES BY LUMP SUM BECAUSE THE TRIAL MISINTERPRETED THIS COURT'S HOLDING IN *WATTS V. LESTER E. COX MEDICAL CENTERS* IN THAT *WATTS* AND SECTION 538.220.2 REQUIRE THAT A TRIAL COURT ASSIGN ALL FUTURE MEDICAL DAMAGES TO PERIODIC PAYMENTS UNLESS A PLAINTIFF MAKES A SHOWING THAT HE OR SHE HAS A SPECIFIC MEDICAL NEED THAT REQUIRES A PORTION OF THE FUTURE MEDICAL DAMAGES TO BE PAID BY LUMP SUM, AND PLAINTIFF DID NOT MAKE SUCH A SHOWING IN THIS CASE.

§ 538.220, RSMo

Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. banc 2012)

ARGUMENT

The judgment in this case resulted from the submission of a verdict director that allowed the jury to find Dr. Pilapil negligent for actions, and Mercy liable for damages, that Plaintiff failed to show were causally linked to her injuries. Instruction 6 did not limit the jury to consideration of the visits that Plaintiff's own experts testified were causally relevant to Plaintiff's claimed damages. Plaintiff's claimed damages were based on Dr. Fischer's deposition opinion that Plaintiff would not have suffered brain damage if diagnosed and treated before May 2013. Instruction 6 did not direct the jury to consider only the treatment before that time. It permitted the jury to find Dr. Pilapil negligent based only on actions after May 2013, even though Plaintiff's theory of the case and all of her damages evidence were based on a claim of negligence before that time. Instruction 6 was therefore a roving commission and its submission was prejudicial error.

Moreover, Plaintiff's experts Dr. Belz and Dr. Fischer improperly changed their testimony at trial from what they had previously testified in deposition. And this testimony came after Mercy's expert testified. As a result, Mercy did not have a fair opportunity to adequately rebut this changed testimony. The trial court's only remedy should have been to declare a mistrial. The trial court erred in not doing so and in not granting Mercy's motion for a new trial.

Because of these and the other errors noted below, the judgment should be reversed, and the case remanded for a new trial.

I. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6 AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE INSTRUCTION 6 CONSTITUTES A ROVING COMMISSION IN THAT INSTRUCTION 6 FAILS TO IDENTIFY ANY SPECIFIC DATES THAT DR. PILAPIL TREATED PLAINTIFF, THEREBY ALLOWING THE JURY TO FIND MERCY LIABLE FOR ALLEGED NEGLIGENCE BY DR. PILAPIL AFTER PLAINTIFF'S EXPERTS TESTIFIED PLAINTIFF HAD ALREADY SUFFERED HER INJURIES.

This case turns on exactly when Dr. Pilapil should have referred Plaintiff to a neurologist for an MRI during Dr. Pilapil's ten patient contacts with Plaintiff occurring over eight months. This Court should reverse the judgment entered against Mercy and remand this case with instructions to order a new trial because Instruction 6 is an improper roving commission that failed to direct the jury as to which visits or interactions with Dr. Pilapil, if any, were negligent. The instruction permitted the jury to find Dr. Pilapil negligent for any interaction or visit she had with Plaintiff, including visits after May 2013, despite the fact that Plaintiff's damages testimony was based on her causation expert's opinion that Plaintiff suffered her damages ***before*** May 2013.

This improper instruction impacts both liability and damages. If Plaintiff had already suffered the injuries resulting from Wilson's disease before May 2013, any alleged malpractice of Dr. Pilapil afterwards was not the cause of her injury. Alternatively, if Dr. Pilapil's only negligent acts occurred after May of 2013, she could not be liable for damages prior to that date.

A. Standard of review and preservation.

The question of whether a jury was properly instructed is a question of law that this Court reviews *de novo*. *Rice v. Bol*, 116 S.W.3d 599, 606 (Mo. App. 2003). "To reverse a jury verdict on the grounds of instructional error, it must appear that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction." *Id*. When an erroneous instruction is given and the trial results in favor of the party at whose instance it was given, the error is presumed to be prejudicial. *Grindstaff v. Tygett*, 655 S.W.2d 70, 74 (Mo. App. 1983).

Mercy preserved this point on appeal by objecting to Instruction 6 at the instruction conference and renewing its objection in its post-trial motions. Tr. at 1614-1629; L.F. at 488-496, 1306-1308.

B. Instruction 6.

Instruction 6 states in full:

> Your verdict must be for plaintiff Emilee Williams if you believe:
>
> First, Dr. Pilapil either:
>
> a. Failed to take an adequate history in regards to Emilee Williams' tremor, or
>
> b. Failed to adequately consider Emilee Williams' medical chart as part of her comprehensive review, or
>
> c. Provided Emilee Williams' incorrect medical advice in regards to her tremors, or
>
> d. Failed to timely refer Emilee Williams for a neurological consultation, and
>
> Second, Dr. Pilapil in any one or more of the respects submitted in paragraph First, was thereby negligent, and
>
> Third, such negligence directly caused or directly contributed to cause damage to Emilee Williams.
>
> The term "negligent" or "negligence" as used in this instruction means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of Dr. Pilapil's profession.

App 11; S.L.F. at 390.

C. Instruction 6 failed to distinguish between visits or interactions.

Plaintiff presented evidence at trial of Dr. Pilapil's care and treatment of Plaintiff from December 17, 2012 until around September 2013:

Date	Event
December 17, 2012	Plaintiff's first visit with Dr. Pilapil; Dr. Pilapil performs neurologic exam, diagnoses Plaintiff with anxiety and depression, and increases Prozac dosage
January 11, 2013	Plaintiff's second visit with Dr. Pilapil, a brief follow-up, no changes in medication or diagnosis
January 11, 2013-May 13, 2013	Dr. Pilapil has no contact with Plaintiff
May 13, 2013	Plaintiff's third visit with Dr. Pilapil; Plaintiff developed resting right-hand tremor; Dr. Pilapil believed symptoms were medication-related and lowered dosage of Prozac
May 28, 2013	Plaintiff emails Dr. Pilapil saying she had worsening symptoms; Dr. Pilapil tells Plaintiff to stop taking Prozac for a week to see if symptoms subside
June 3, 2013	Plaintiff emails Dr. Pilapil saying her anxiety and other symptoms were worsening; Dr. Pilapil tells Plaintiff the symptoms may be due to anxiety and she prescribes a different anti-depressant, Celexa
June 14, 2013	Plaintiff emails Dr. Pilapil saying that Celexa was working better and that Plaintiff was shaky but not as bad; Plaintiff asks if dosage should be increased; Dr. Pilapil advises that the dosage can be increased
June 28, 2013	Plaintiff's fourth and final visit with Dr. Pilapil; Plaintiff continued to have tremors, had fallen five times, and her finger was extending involuntarily; Dr. Pilapil performs comprehensive neurologic exam, notes that Plaintiff performed "very excellent"; Dr. Pilapil still believes the tremors are anxiety-related; Mrs. Williams asks for an MRI

July 1, 2013	Plaintiff emails Dr. Pilapil saying her symptoms are better, though not perfect; Dr. Pilapil tells Plaintiff to keep her updated and that Plaintiff's medication can be increased as needed
July 8, 2013	Plaintiff emails Dr. Pilapil saying that the medication helped her shakiness, but her friends tell her she appears "high" when taking the medication; Dr. Pilapil explains it could be a side effect of Klonopin
July 21, 2013	Plaintiff emails Dr. Pilapil saying that she stopped taking Celexa because it was not working, but was seeing a counselor, and that her anxiety was still a problem; Dr. Pilapil responded saying that Plaintiff should take the anxiety-medication, Klonopin, as needed, and that she was glad Plaintiff was seeing a counselor
July 23, 2013	Plaintiff emails Dr. Pilapil telling her Plaintiff would be home that weekend and asking Dr. Pilapil to schedule an appointment with a neurologist that week; Dr. Pilapil responds that appointments cannot be scheduled that quickly, but that she would order an MRI
July 26, 2013	Plaintiff's EEG is performed
July 29, 2013	Plaintiff emails Dr. Pilapil requesting an MRI be scheduled for Friday, August 2, 2013; Dr. Pilapil responds that she put in an order for an MRI
July 31, 2013	Plaintiff meets with neurologist Dr. Oghlakian who stated that his neurologic exam of Plaintiff was "normal", but told Plaintiff to contact him after she received the MRI results
August 8, 2013	MRI is performed; Dr. Pilapil informs Plaintiff Wilson's disease is suspected
August 19, 2013	Plaintiff begins taking trientine pursuant to Dr. Askari's recommendation
September 26, 2013	Plaintiff admitted to hospital and trientine is immediately stopped

Despite all of these visits, emails, and calls on various dates, Plaintiff's damages and causation evidence was based on a more limited set of interactions. Plaintiff's causation expert and life care planner, Dr. Fischer and Dr. Belz, testified that, had Plaintiff been properly diagnosed and treated for Wilson's disease before May 2013, she would have been "normal or essentially normal." Tr. at 1035-1036, 1115-1116. The only interactions Dr. Pilapil had with Plaintiff before May 2013 were the December and January office visits. Plaintiff's counsel advised the court that Dr. Belz's life care plan was based on a hypothetical world in which Plaintiff was diagnosed in December or January, "when [Plaintiff's] medical doctors say the breach of the standard [of] care is." Tr. at 1024. Plaintiff presented no evidence as to what her damages or condition would have been if Dr. Pilapil was negligent only in or after May 2013.

Instruction 6 nevertheless fails to distinguish between the December and January visits and the later interactions between Dr. Pilapil and Plaintiff, or contain any timeframe or dates whatsoever. As a result, it allowed the jury to consider every interaction between Dr. Pilapil and Plaintiff in the evidence in finding that Dr. Pilapil was negligent and awarding Plaintiff damages. Rather than narrowing the jury's focus to the relevant visits, the instruction permitted the jury to sift through the evidence and consider every interaction between Plaintiff and Dr. Pilapil, even if those interactions and visits were not causally related to Plaintiff's injuries, and even though her damages evidence was based on negligence during the December or January visits. The submission of Instruction 6 was therefore error and Mercy was prejudiced as a result.

An instruction is a "roving commission" when it assumes a disputed fact or submits an abstract legal question that allows the jury "to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability." *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 482 (Mo. banc 2005). "A jury instruction may also be considered a roving commission when it is too general or where it submits a question to the jury in a broad, abstract way without any limitation to the facts and law developed in the case." *Coon v. Dryden*, 46 S.W.3d 81, 93 (Mo. App. 2001).

Where an instruction's words, or lack thereof, make actionable the aggregate of all of the defendant's conduct, the instruction is prohibited and amounts to a roving commission. *See Minze v. Missouri Dep't of Public Safety*, 437 S.W.3d 271, 277 (Mo. App. 2014) (citing *Scanwell*, 162 S.W.3d at 482). In *Minze*, the challenged instruction allowed the jury to find for the plaintiff if they believed that "Defendant . . . took adverse action against her." *Id.* at 276. The court held that the use of only the words "adverse action" impermissibly enlarged the scope of conduct for the jury's consideration beyond what was actionable. *Id*. at 278. As a result, the jury was given no guidance as to what factual determinations it had to make to enter a verdict in the plaintiff's favor. *Id.* Therefore, the instruction was a roving commission and its submission was error.

The same rationale should apply to this case, where evidence was presented at trial of Dr. Pilapil's care and treatment of Plaintiff over approximately eight months, but Plaintiff's damages were based on only two visits at the outset of the relationship, not the entire scope of treatment. The failure to direct the jury to specific dates and visits enlarged the scope of conduct for the jury's consideration beyond what was actionable.

Plaintiff's causation expert, Dr. Fischer, first testified at trial, "It is my opinion that had the condition been diagnosed in late 2012, earlier in 2013, even getting up to as far as maybe May of 2013, [Plaintiff] would be normal or essentially normal." Tr. at 1115. In his deposition, Dr. Fischer testified that he was "very secure" in his opinion that Plaintiff would have been normal if she had been treated in December or January, but was "less certain" that she would have been normal if treated in March or later. S.L.F. at 146. He later revised his opinion at trial and testified that the damages Plaintiff suffered would have been reversible if she was diagnosed and treated any time before June 28, 2013 – the date of Plaintiff's last visit to Dr. Pilapil. Tr. at 1163.

Putting aside the impermissibility of Dr. Fischer's departure from his deposition testimony, which is addressed below in Point V, his trial testimony that the damages Plaintiff suffered would have been reversible if diagnosed and treated up until June 28, 2013, is contrary to Plaintiff's life care planner, Dr. Belz, who testified before Dr. Fischer and stated that ***his life care plan was based on Dr. Fischer's deposition testimony that***

Plaintiff would have been normal if diagnosed before May 2013. Tr. at 1035-1036, 1567-1568. Dr. Belz testified that he reviewed Dr. Fischer's deposition and confirmed that Dr. Fischer's opinion was that if Plaintiff was properly treated in December of 2012, January of 2013, on through March, and maybe up until May of 2013, she would "not have needed the [damages in the life care plan]." Tr. at 1035-1036. This was consistent with the representation of Plaintiff's counsel to the court that the damages in the plan were based on a hypothetical world where Plaintiff was referred to a neurologist in December 2012 or January 2013. Tr. at 1024.

Accordingly, although Dr. Fischer's (impermissible) trial testimony regarding causation was that Plaintiff's damages were reversible until June 28, 2013, Dr. Belz's life care plan (which served as the basis for Mr. Ellison's damages calculations) was based on Dr. Fischer's deposition testimony that Plaintiff would have been normal if diagnosed and treated before May 2013. Thus, the only relevant interactions between Dr. Pilapil and Plaintiff were the December 2012 and January 2013 office visits. The jury should have been limited in its verdict director to these dates.

Rather than limiting the jury to consideration of those two visits, Instruction 6 permitted the jury to find Dr. Pilapil negligent based on ***any*** interaction she had with Plaintiff, including appointments on May 13 and June 28, and emails from May 28 through June 28, 2017. This is similar to *Scanwell*, in which this Court considered a verdict director that allowed a jury to consider matters beyond those that were relevant: "It may well be then, that the jury, in arriving at its verdict, took into consideration not only evidence relating to the lease and confidential information, but also evidence of other plans and preparations that were not actionable. It is in this way that the jury was given a roving commission." 162 S.W.3d at 482. Instruction 6 permitted the jury to consider Dr. Pilapil's treatment of Plaintiff after May 2013, which under Plaintiff's damages evidence was not actionable.

Because Plaintiff's theory of the case and damages evidence were unequivocally based on Dr. Fischer's deposition testimony that Plaintiff needed to have been diagnosed and treated before May 2013, Plaintiff did not present evidence that Dr. Pilapil's post-

May 2013 conduct was causally related to her damages. All medical malpractice cases require proof of a plaintiff's injury or damages and a causal link between the defendant and those injuries. *See Edgerton v. Morrison*, 280 S.W.3d 62, 68 (Mo. banc 2009). The lack of testimony regarding a causal link between Dr. Pilapil's actions during and after May 2013 and Plaintiff's injuries makes Dr. Pilapil's actions during and after May 2013 non-actionable, and the submission of Instruction 6 error.

Moreover, even if Dr. Pilapil's conduct after December and January was actionable, Plaintiff's counsel candidly admitted that her damages were based on a hypothetical world in which Plaintiff was diagnosed in December 2012 or January 2013. Tr. at 1024. No expert testified what Plaintiff's damages would have been if diagnosed during or after May 2013. This was particularly important because Dr. Askari testified that Wilson's disease is a slow-developing, progressive disease, meaning that Plaintiff's potential outcome changed as more time went by. P.Ex.205 at p.25. Because the only damages evidence presented to the jury was based on negligence in December or January, Instruction 6 should have clearly limited the jury to consideration of what occurred during those visits. The failure to do so was reversible error.

D. Instruction 6 was a roving commission.

In cases such as this, where a doctor is alleged to have negligently failed to diagnose a patient, but the care and treatment of the patient occurred over the course of several visits or interactions, verdict directors should be date-specific, especially if damages are based on diagnosis or treatment by a certain date or time.

For example, in *Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635 (Mo. App. 2005), the patient alleged his doctor was negligent in failing to timely diagnose and treat his spinal cancer. In holding that the instructions given were not roving commissions, the court specifically cited the fact that a separate instruction was given for each date the patient visited the doctor. *Id*. at 652 & nn.12-13. The patient visited his doctor five times between April 20, 1999, and June 1, 1999. The patient submitted five nearly identical jury instructions, only distinguishing between the date of the visit. *Id*. In

doing so, the instructions allowed the jury to assess each visit distinctly and determine whether, on that particular visit, the doctor was negligent.

In *Vest v. City National Bank & Trust Co.*, 470 S.W.2d 518, 520-21 (Mo. 1971), this Court held that a damages instruction that allowed the jury to award damages sustained "as a direct result of the occurrence mentioned in the evidence" was a roving commission because there were multiple occurrences that produced the plaintiff's injury, with the defendant being responsible for only one. *Vest* noted that, based on the wording in the instruction, the jury could have believed the plaintiff was entitled to recover for all of his injuries, even those that were not causally related to the defendant's conduct. *Id.* at 522. Similarly, because the plaintiff's theories of recovery were submitted disjunctively, the jury could have found that plaintiff was entitled to recover on only one of the grounds and yet have awarded damages for all injuries the plaintiff sustained. *Id.* This Court held that the instruction "should have employed descriptive terms which would have limited recovery to an occurrence attributable to the defendants for which the jury would find defendants liable." *Id.*

The rationale in *Vest* applies here. The failure of Instruction 6 to separate Dr. Pilapil's conduct based on her dates of interaction with Plaintiff, combined with the calculation of Plaintiff's damages as if she had been misdiagnosed by Dr. Pilapil before May 2013, improperly permitted the jury to take into account all interactions between Dr. Pilapil and Plaintiff while awarding damages that were calculated based on negligence in December 2012 or January 2013. The jurors could have believed that Dr. Pilapil was not negligent in her care and treatment of Plaintiff in December or January, but nevertheless have awarded the same amount of damages based on their belief that Dr. Pilapil was negligent during or after May 2013. Thus, as in *Vest*, Instruction 6 permitted the jury to award damages based on actions that were not causally related to Plaintiff's injuries.

This is the precise type of instruction that should not have been submitted, and the trial court erred in submitting Instruction 6.

E. Mercy was prejudiced by Instruction 6.

"When an erroneous instruction is given and the trial results in favor of the party at whose instance it was given, the presumption is that the error was prejudicial." *Grindstaff*, 655 S.W.2d at 74. Where an instruction is a roving commission in that it does not give a jury proper direction, or where it is misleading and confusing, the submission of that instruction is prejudicial to the party seeking reversal of the jury verdict. *Id.*; *see also Todd v. Watson*, 501 S.W.2d 48, 50 (Mo. 1973).

Instruction 6 allowed the jury to find Mercy liable for acts that were outside the scope of Plaintiff's causation and damages testimony. There is no way to know ***when*** the jury found Dr. Pilapil negligent. The jury was authorized to find that Dr. Pilapil was not negligent before May 2013, but then to find Mercy liable based on post-May 2013 conduct, while nevertheless awarding damages as if Dr. Pilapil had been negligent before May 2013. Mercy was prejudiced by the submission of Instruction 6. The trial court's judgment and remand with instructions to grant a new trial.

II. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6 AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE SUBPART "B" OF INSTRUCTION 6 IS VAGUE AND CONFUSING IN THAT THERE WAS NO CLEAR DEFINITION OF WHAT THE PHRASE "FAILED TO ADEQUATELY CONSIDER EMILEE WILLIAMS' MEDICAL CHART" MEANT OR WHAT DOCUMENTS OR RECORDS CONSTITUTED PLAINTIFF'S "MEDICAL CHART."

In addition to the deficiencies identified in Point I, subpart "b" of Instruction 6 allowed the jury to find Dr. Pilapil negligent if it concluded that she failed "to adequately consider Emilee Williams' medical chart as part of her comprehensive review." App 11; S.L.F. at 390. This allowed the jurors to find Dr. Pilapil negligent despite no clear explanation of (1) what records comprised Plaintiff's "medical chart" or (2) how Dr. Pilapil "failed to adequately consider" the chart. Submission of Instruction 6 was reversible error.

The standard of review and preservation statement are the same as for Point I.

Because Instruction 6 is disjunctive, each subpart must be submissible, able to stand on its own, and supported by substantial evidence. *See Ladish v. Gordon*, 879 S.W.2d 623, 628 (Mo. App. 1994).

An instruction is a roving commission if it is "too general or . . . is submitted in a broad, abstract way without any limitation to the facts and law developed in the case." *Centerre Bank of Kansas City, Nat'l Ass'n v. Angle*, 976 S.W.2d 608, 617 (Mo. App. 1998). "A jury's verdict will be reversed if the average juror would not correctly understand the applicable rule of law and if the offending instruction misdirected, misled, or confused the jury." *Coon*, 46 S.W.3d at 93.

A. "Medical chart" was vague, confusing, and undefined.

The evidence presented at trial gave the jury no direction in determining whether Dr. Pilapil failed to consider Plaintiff's "medical chart." The jury was never given a clear definition of what constituted Plaintiff's "medical chart." The term "medical chart" used in the instruction was mentioned exactly once in the testimony at trial, by Frances Cologna, a nurse and paralegal for Plaintiff's attorneys. Tr. at 666. Ms. Cologna testified

there were over "20,000 pages" in Plaintiff's medical chart, but this "medical chart" appears to be something created in preparation for trial and not evidence in and of itself. *Id*. The term was also mentioned during Mercy's closing statements in going through Instruction 6 with the jury. Tr. at 1721.

None of Plaintiff's witnesses clearly defined what is included in a "medical chart." Although Plaintiff's witnesses, attorneys, and exhibits referred to a variety of "charts" and records, it is unclear whether the term "charts" was given the same meaning by each witness, nor is it clear precisely what documents each chart consisted of.

As an example, during Dr. Pilapil's testimony, Plaintiff's counsel asked: "And the accuracy of records is so important that Mercy has a policy if you find an -- well, first of all, you are supposed to read it over before you enter it in ***the chart***, right?" Tr. at 1304-1305 (emphasis added). "And then, if a patient says, 'I can't do that,' then you note that in ***your chart*** and you move on and try to find another date, correct?" Tr. at 1312 (emphasis added). Later in her testimony, Dr. Pilapil testified that "whenever I have a patient, I look at ***their chart***." Tr. at 1321 (emphasis added). Even in these few lines of testimony, the word chart appears to be used to refer to different documents.

Similarly, Dr. Frey testified that Dr. Pilapil should have described and recorded the tremors in "the chart," Tr. at 599, but again, it is unclear exactly what document or documents he is referring to.

Ten of Plaintiff's exhibits are labeled as "charts." P.Ex.98, 99, 100, 101, 102, 103, 193, 276, 277, 280, 315. All of those charts appear to have been created in preparation for trial, not documents maintained by Mercy or Dr. Pilapil. Two in particular, exhibits 193 (Diagnoses and Treatment Visits Chart) and 276 (Symptoms Chart for June, July & Aug 2013), are related to Plaintiff's symptoms, diagnosis, and treatment. Based on the lack of clarity in the definition of "medical chart," it is entirely possible that the jury considered these charts in finding that Dr. Pilapil "failed to adequately consider" Plaintiff's medical chart.

B. "Failed to adequately consider" was vague, confusing, and undefined.

In the context of this case, the phrase failed "to adequately consider" is also vague and constitutes a roving commission, as demonstrated by closing argument. At one point, Plaintiff's counsel stated: "So did she take an adequate history. No. Did she properly review the medical records, and by properly review the prior medical records, that means take into account and consider in proper medical knowledge what's in them. No." Tr. at 1683. Assuming that Plaintiff's counsel was referring to Plaintiff's "medical chart" as "medical records," Plaintiff's counsel seemed to argue that Dr. Pilapil was negligent because she failed to ***understand*** Plaintiff's medical records. Yet subpart "b" instead vaguely requires the jury to enter a verdict in favor of Plaintiff if Dr. Pilapil did not "adequately consider" Plaintiff's medical chart, not if she failed to "consider in proper medical knowledge" what was in Plaintiff's chart.

Thus, rather than clarifying exactly what the jury needed to find under subpart "b," counsel further confused the issue by articulating an entirely different theory and standard than submitted in subpart "b."

Counsel appeared to agree that Dr. Pilapil had reviewed and considered Plaintiff's medical records, and ultimately argued that Dr. Pilapil was negligent because she failed to appreciate the significance of the information in those records, which resulted in not referring Plaintiff to a neurologist. Tr. at 1679-1681. But subpart "d" of Instruction 6 separately submitted the failure to make a referral to the jury, so subpart "b" necessarily must have been referring to something else. App 11; S.L.F. at 390.

If subpart "b" was meant to submit the theory that Dr. Pilapil failed to apply "proper medical knowledge" to her treatment of Plaintiff (which itself would be vague and undefined), the language employed failed to do so. The language of subpart "b" strongly implies that there was some specific "chart" that Dr. Pilapil should have considered but did not. Counsel's closing argument distorted the language of the instruction and demonstrated the inherent vagueness that renders subpart "b" a roving commission by suggesting that subpart "b" was submitting the theory that Dr. Pilapil failed to apply appropriate medical knowledge to the information before her.

C. The submission of subpart "b" was error.

In *Grindstaff v. Tygett*, 655 S.W.2d 70, 72-73 (Mo. App. 1983), the court held a verdict director submitting the line, "First, defendant performed a midforceps rotation delivery when such procedure was not medically proper," was a roving commission in that the phrase "not medically proper" did not submit the ultimate facts to define for the jury plaintiffs' specific theory of negligence. The court reasoned that the phrase "was not medically proper" gave the jury no factual guideline or standard to determine negligence because it left the jury to speculate and determine on its own why and in what manner the midforceps rotation procedure was "not medically proper." *Id*. at 74.

Subpart "b" allowed the jury to speculate and determine on its own what the phrases "medical chart" and "failed to adequately consider" meant. "A jury's verdict will be reversed if the average juror would not correctly understand the applicable rule of law and if the offending instruction misdirected, misled, or confused the jury." *Coon*, 46 S.W.3d at 93. Subpart "b" did just that and, therefore, was a roving commission. Instruction 6 is disjunctive, so the submission of Instruction 6 as a whole was also error.

"When an erroneous instruction is given and the trial results in favor of the party at whose instance it was given, the presumption is that the error was prejudicial." *Grindstaff*, 655 S.W.2d at 74. Where an instruction is a roving commission in that it does not give a jury proper direction, or where it is misleading and confusing, the submission of that instruction is prejudicial to the party seeking reversal of the jury verdict. *Id*.; *see also Todd v. Watson*, 501 S.W.2d 48, 50 (Mo. 1973). The Court should reverse this judgment and remand for a new trial.

III. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION 6 AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND THAT DR. PILAPIL'S FAILURE TO TAKE AN ADEQUATE HISTORY OF PLAINTIFF'S TREMORS OR HER FAILURE TO CONSIDER PLAINTIFF'S MEDICAL CHART INDEPENDENTLY CAUSED PLAINTIFF'S INJURIES.

Plaintiff did not present sufficient evidence of a causal link between her damages and Dr. Pilapil's failure to either adequately consider her medical chart or take an adequate history of her tremors — two of the four subparts submitted in Instruction 6. App 11; S.L.F. at 390. Because Instruction 6 is disjunctive, and because there was insufficient evidence to establish the causal relevance of two of the theories submitted, the trial court erred in submitting Instruction 6 and this Court should reverse the judgment and remand for a new trial.

A. Standard of review and preservation.

As with Points I and II, whether a jury was properly instructed is a question of law that this Court reviews *de novo*. *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo. banc 2010). While the Court reviews the record in the light most favorable to the submission of the instruction, any issue submitted to the jury in an instruction must be supported by substantial evidence from which the jury could reasonably find for the plaintiff on such issues. *Id*.; *see also Kader v Board of Regents of Harris-Stowe State University*, 2018 WL 326519, at *4 (Mo. App. 2018). If the instruction is not supported by substantial evidence, there is instructional error, which warrants reversal if the error resulted in prejudice that materially affects the merits of the action. *Hayes*, 313 S.W.3d at 650.

Further, because Instruction 6 is disjunctive, each subpart must stand on its own and be supported by substantial evidence. *Ross-Paige v. Saint Louis Metro. Police Dep't*, 492 S.W.3d 164, 172 (Mo. banc 2016). This requires a showing that the actions in each subpart are independently causally related to Plaintiff's injuries. *See, e.g.*, *Baker v. Guzon*, 950 S.W.2d 635, 647-648 (Mo. App. 1997).

Mercy preserved this point on appeal by objecting to subparts "a" and "b" at the instruction conference and renewed its objection in its post-trial motions. Tr. at 1614-1629; L.F. at 488-496, 1306-1308.

B. There was insufficient evidence of a causal link between the conduct submitted in subparts "a" and "b" and Plaintiff's injuries.

Subparts "a" and "b" of Instruction 6, respectively, allowed the jury to render a verdict for Plaintiff if it found that Dr. Pilapil "failed to take an adequate history in regards to Emilee Williams' tremor" or "failed to adequately consider Emilee Williams' medical chart as part of her comprehensive review," and in doing so was negligent. App 11; S.L.F. at 390. Because Instruction 6 is disjunctive, in order to make a submissible case under either subpart "a" or subpart "b," Plaintiff must have presented evidence that the failures submitted in those subparts independently caused her injuries. She did not.

Plaintiff's primary liability theory was that Dr. Pilapil should have, but did not, refer Plaintiff to a neurologist in December 2012 or January 2013, whereupon she would have been diagnosed and treated. Tr. at 1024. Indeed, Plaintiff submitted this theory (albeit without the necessary time limitation) in subpart "d" of Instruction 6, which instructed the jury to return a verdict in favor of Plaintiff if Dr. Pilapil negligently failed "to timely refer Emilee Williams for a neurological consultation." App 11; S.L.F. at 390.

Dr. Pilapil's alleged failure to take an adequate history or adequately consider Plaintiff's medical chart are simply reasons why Plaintiff claimed that Dr. Pilapil failed to make a timely referral. This was confirmed by counsel's statements during closing argument: "So the first one and the last one kind of go together because failing to take an adequate history leads to the decision or it should lead to the decision to refer immediately to a neurologist." Tr. at 1679. Plaintiff's counsel similarly identified subpart "a" as a reason Dr. Pilapil made an improper diagnosis during the instruction conference. *See* Tr. at 1622.

However, because Instruction 6 was disjunctive, each subpart had to have been independently sufficient, which means that the conduct in each must have independently caused Plaintiff's injuries. Plaintiff did not attempt to prove that Dr. Pilapil's alleged

failure to take an adequate history or adequately consider Plaintiff's medical chart caused Plaintiff's injuries independent of the failure to refer. Instead, her case focused on whether the failure to timely refer (subpart "d") caused her injuries. *See* Tr. at 1684-1685 (framing the issue as whether the delayed referral and subsequent diagnosis caused or contributed to cause Plaintiff's injuries).

Nor was there sufficient evidence from which the jury could conclude that the alleged failure to take an adequate history or adequately consider Plaintiff's medical chart independently caused her injuries. Plaintiff's only causation expert, Dr. Fischer, focused solely on when a diagnosis needed to have been made. Tr. at 1115-1116, 1163.

First, as to taking an adequate history in subpart "a", Plaintiff's witnesses gave two reasons why taking such a history is important: (1) to assist that doctor in making a diagnosis and to assist that doctor in follow-up visits and (2) so that if the doctor refers the patient to a specialist or if the doctor is unavailable that specialist or subsequent doctor has detailed notes from the first doctor to assist in adequately treating and diagnosing the patient. Tr. at 379, 594-596, 1300, 1303.

The latter reason, however, is irrelevant to causation in this case because it is undisputed that Dr. Pilapil did not refer Plaintiff to a neurologist after the December or January visits and that Plaintiff was diagnosed with Wilson's disease after she was referred to Dr. Oghlakian in July or August of 2013. Therefore, Dr. Pilapil's failure to take an adequate history could not have caused Plaintiff's damages because there was no follow-up with a specialist or other doctor after the December or January visits, and no showing that Dr. Pilapil's notes had any negative effect on Dr. Oghlakian's examination and treatment.

The former reason is also insufficient. There was no evidence presented that had Dr. Pilapil asked more questions, elicited more information, or taken better notes with regard to Plaintiff's tremors, she would have done anything different in her diagnosis or treatment of Plaintiff. There is no testimony by Dr. Pilapil, or anyone else, that had she received information (assuming she did not) regarding which hand the tremors were in,

whether they were unilateral or bilateral, or when they started, that she would have made a different diagnosis or pursued a different course of action.

Second, with respect to subpart "b," Plaintiff's standard-of-care experts testified that reviewing prior medical records is important because it aids in a correct diagnosis. Tr. at 591-596. Again, however, the disjunctive nature of Instruction 6 required a showing that Dr. Pilapil's failure to "adequately consider" some unspecified medical chart independently caused Plaintiff's injuries. And, again, there was simply no evidence that any such failure caused Plaintiff's injuries apart from the failure to make a referral, or that Dr. Pilapil would have done anything differently if she had "adequately considered" the unspecified medical chart.

In sum, Plaintiff's primary liability theory was that Dr. Pilapil failed to timely refer Plaintiff to a neurologist. Because that theory was already contained in subpart "d" and because Instruction 6 is disjunctive, Plaintiff was required to establish an independent causal connection between subparts "a" and "b" and her injuries. She did not do so, and, therefore, subparts "a" and "b" were not supported by substantial evidence. The submission of Instruction 6 as a whole was therefore error.

IV. THE TRIAL COURT ERRED IN DENYING MERCY'S MOTIONS FOR MISTRIAL AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE ADMISSION OF THE TESTIMONY OF DR. BELZ CONCERNING THE 2017 MRI, THE CONCEPT OF NECROSIS, AND CAUSATION ISSUES VIOLATED RULE 56.01(E) AND A PRE-TRIAL ORDER IN THAT THE TESTIMONY MATERIALLY DIFFERED FROM HIS PRIOR DEPOSITION TESTIMONY, IN WHICH DR. BELZ STATED THAT THE SCOPE OF HIS RETENTION WAS TO PREPARE A LIFE CARE PLAN AND DID NOT DISCUSS THE 2017 MRI OR NECROSIS.

Missouri's discovery rules permit parties to discover the facts and opinions held by experts through deposition. To prevent surprise, parties are obligated to notify the other side when an expert changes his or her opinion or the bases for the opinion following the expert's deposition. Where surprise testimony is offered, trial courts are given discretion to fashion appropriate sanctions.

Drs. Belz offered new, surprise opinions and bases for his opinions after Plaintiff advised Mercy that the basis for much of this testimony had no use at trial and after Mercy's principle expert had already testified. This testimony substantially prejudiced Mercy's defense and, in these circumstances, the only meaningful remedy was declaring a mistrial or ordering a new trial. The trial court erred in not granting this relief.

A. Standard of review and preservation.

Rulings on the admissibility of evidence are reviewed for abuse of discretion. *Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470, 474 (Mo. App. 2002). A trial court abuses its discretion when its decision is so arbitrary and unreasonable as to shock one's sense of justice and to indicate a lack of careful consideration. *Id.* A trial court's decision denying a motion for a new trial is reviewed with less deference than a decision granting such a motion. *Id.*

Mercy preserved its arguments concerning the admission of Dr. Belz's new opinion testimony by objecting at trial, moving for a mistrial when the opinions were offered, and renewing its arguments in timely post-trial motions. Tr. at 981-987, 1099-1110, 1131-1138, 1147-1151, 1168-1176; L.F. at 475-488, 1306-1308.

B. Dr. Belz offered causation opinions for the first time at trial.

At his deposition in December 2016, Dr. Belz agreed that the scope of his retention was to prepare a life care plan. S.L.F. at 99, 103. Dr. Belz's only reference to causation was when he mentioned that he sometimes does such analysis. S.L.F. at 104-105, 113. At the end of the deposition, Plaintiff's counsel advised that Dr. Belz would discuss medical bills, but did not mention any other topics. S.L.F. at 111.

Shortly before trial, after the court barred the parties from offering undisclosed expert testimony, Plaintiff's counsel sent defense counsel an email disclosing that Dr. Belz had recently ordered a second MRI to determine whether there was additional damage that might affect his life care plan. S.L.F. at 91-95. The email represented that Dr. Belz had reviewed the MRI, the results were the same, it did not affect his opinions, and "there is no use to use it at trial." S.L.F. at 91.

Dr. Belz nevertheless opined on the 2017 MRI and its reference to "subacute necrosis," which he testified meant cell death within the last three months. Tr. at 980, 987-988. Based on this language, he testified that if an MRI had been taken in December 2012 or January 2013, it would not have looked the same as the one taken in August 2013. Tr. at 980. He was permitted to testify that his life care plan was based on Dr. Fischer's causation opinions, and that his research was consistent with those opinions. Tr. at 1035-1036, 1075. This testimony plainly went to the issue of causation, and none of it was discussed at Dr. Belz's deposition.

The surprise did not end there. After its objections were overruled, Mercy attempted to establish the unremarkable proposition that the costs in Dr. Belz's life care plan would be the same no matter when brain damage occurred because they were based on the care Plaintiff presently needed. Dr. Belz took this opportunity to repeatedly inject his undisclosed opinions that Plaintiff did not suffer brain damage until May 2013 and that trientine did not cause any brain damage, even after defense counsel stated he was not asking Dr. Belz's opinion on the issue. Tr. at 1076-1082.

C. The court erred in refusing to grant a mistrial or a new trial.

The facts and opinions held by an expert may be discovered through deposition. Rule 56.01(b)(4). A party must seasonably amend its prior discovery responses if it learns that its responses are materially incomplete. Rule 56.01(e). This requires parties to advise the opposition when an expert has changed his or her opinion or bases opinions on new or different facts. *See, e.g., Snellen ex rel. Snellen v. Capital Region Med. Ctr.*, 422 S.W.3d 343, 353 (Mo. App. 2013); *Gassen v. Woy*, 785 S.W.2d 601, 603-04 (Mo. App. 1990).

The purpose of this rule is to prevent surprise at trial. *Sherar v. Zipper*, 98 S.W.3d 628, 633-34 (Mo. App. 2003). Surprise exists when "an expert witness suddenly has an opinion where he had none before, renders a substantially different opinion than the opinion disclosed in discovery, uses new facts to support an opinion, or newly bases that opinion on data or information not disclosed during the discovery deposition." *Id.* at 634.

There can be no serious dispute that Dr. Belz offered new opinions where he had none before and offered entirely new bases for his opinions. Dr. Belz stated that the scope of his retention was to prepare a life care plan, and said nothing at his deposition about subacute necrosis or when the damage to Plaintiff's brain allegedly occurred. Moreover, Plaintiff counsel's pretrial email represented that the 2017 MRI had no use at trial. S.L.F. at 91. Dr. Belz's trial testimony, particularly his unsolicited responses to questions during cross-examination, is exactly the sort of surprise Missouri's discovery rules are intended to prevent.

Trial courts have broad discretion to select a remedy in response to the nondisclosure of expert testimony. *Green v. Fleishman*, 882 S.W.2d 219, 222 (Mo. App. 1994). Each case must be determined on its own peculiar facts "which bear on the question of whether that discretion has been abused." *Gassen*, 785 S.W.2d at 604.

"Untimely disclosure or nondisclosure of expert witnesses is so offensive to the underlying purposes of the discovery rules that prejudice may be inferred." *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 649 (Mo. banc 1997). While *Wilkerson* involved the wholesale failure to disclose an expert, its rationale is even more compelling when

undisclosed opinions are offered for the first time ***in the middle of trial***. "To allow an expert to change his opinion after deposition and before trial without notice to the opposing party would frustrate the purpose of Rule 56.01(b)(4)(b). Allowing such changes in opinion after an opening statement relying on the deposition opinion, without sanction, would prevent a party from discovering by deposition the actual facts and opinions to which the expert is expected to testify." *Bailey v. Norfolk & Western Ry. Co.*, 942 S.W.2d 404, 415 (Mo. App. 1997).

Dr. Belz's new opinions were extremely prejudicial. Mercy had no reason to anticipate the changes in opinion flowing from use of the 2017 MRI. Mercy had prepared its defense and begun trying the case based on Dr. Fischer's deposition testimony, in which he agreed that the administration of trientine caused additional neurological damage to Plaintiff and that any negligence after March 2013 was of questionable relevance. S.L.F. at 125-126, 130-131, 134, 136, 145-146.

Plaintiff may argue that permitting Mercy to recall Dr. Frucht remedied any prejudice from the admission of these opinions. It did not. The surprise testimony in this case was particularly prejudicial specifically because Mercy had already called its principle witness out of order. This is not merely a case in which opening statements had occurred, *Bailey*, 942 S.W.2d at 415, but a case in which Plaintiff's experts fundamentally altered their opinions after Mercy had put on much of its defense based on their deposition testimony. Permitting Mercy to recall Dr. Frucht several days later did not give Mercy's counsel—who were in the middle of actually trying the case—sufficient time to prepare a defense to undisclosed theories.

Plaintiff may also argue that Mercy opened the door to some of this surprise testimony because defense counsel asked Dr. Frucht about the 2017 MRI, or that it should have taken a more substantial deposition of Dr. Belz. Neither argument has merit. Dr. Frucht merely mentioned that the second MRI had been taken and that it showed damage to the same areas of the brain. Tr. at 740. This testimony was insignificant, consistent with the pre-trial email, and there was no objection. Nor was it an invitation

for Dr. Belz to offer entirely new opinions. Because Dr. Belz agreed that he was retained to design a life care plan, there was no reason to question him about causation issues.

In sum, the new opinions of Dr. Belz should have been excluded, and permitting Mercy to recall Dr. Frucht did not remedy the prejudice to its defense caused by this surprise testimony. This Court should reverse the judgment and remand for a new trial.

V. THE TRIAL COURT ERRED IN DENYING MERCY'S MOTIONS FOR MISTRIAL AND IN DENYING MERCY'S MOTION FOR A NEW TRIAL BECAUSE ADMISSION OF THE TESTIMONY OF DR. FISCHER CONCERNING THE 2017 MRI, THE CONCEPT OF NECROSIS, AND STANDARD-OF-CARE ISSUES VIOLATED RULE 56.01(E) AND A PRE-TRIAL ORDER IN THAT THE TESTIMONY MATERIALLY DIFFERED FROM HIS PRIOR DEPOSITION TESTIMONY, IN WHICH DR. FISCHER DISCLAIMED STANDARD-OF-CARE OPINIONS AND DID NOT DISCUSS THE 2017 MRI OR NECROSIS.

The standard of review and preservation statement are the same as Point IV, above. Like Dr. Belz, Dr. Fischer revised his causation opinions, supplied new factual bases for those opinions, and offered standard-of-care opinions for the first time at trial.

At his deposition, Dr. Fischer represented that he had covered all of his opinions and the bases for them. S.L.F. at 148-149. His trial testimony significantly deviated from his deposition testimony.

First, Dr. Fischer unequivocally stated at his deposition that administration of trientine had caused neurological damage to Plaintiff. S.L.F. at 125-126, 130-131. At trial, he testified that trientine likely ***had not*** caused neurological damage based on his review of the 2017 MRI. Tr. at 1177-1181. Counsel's pre-trial email did not mention that Dr. Fischer had reviewed the 2017 MRI, or that it had any relevance to his opinions. S.L.F. at 91.

This was a highly material change in position. One of Mercy's defenses was that trientine had caused much of Plaintiff's neurological decline and would have done so regardless of administration date. Plaintiff's own causation expert agreed in his deposition that trientine had caused substantial decline and then changed his opinion.

Second, Dr. Fischer revised his opinions about when Plaintiff needed to have been treated and offered new bases for his opinion that Plaintiff's outcome would have been better if she had been treated earlier. At his deposition, he believed that Plaintiff's copper burden would have been lower in December and January, but that her exact copper levels at that time were pure speculation. S.L.F. at 135. He agreed that Plaintiff was experiencing dystonia and needed to be treated with trientine as early as March 2013.

S.L.F. at 133-134, 136. While acknowledging that Plaintiff may have had an adverse reaction had she been treated in March, he did not think her decline would have been as severe. *Id.* He did not quantify how much Plaintiff's risk of adverse reaction to trientine increased between March and August, and could not articulate the degree to which her condition would be better if she had been treated in March. *See* S.L.F. at 134, 136, 145-146. While he was "very secure" in his opinion that Plaintiff would have been normal if she had been treated in December or January, he was "less certain" that she would be normal if treated in March or later. S.L.F. at 146.

At trial, Dr. Fischer opined that patients who suffer from severe dystonia have structural brain damage. Tr. at 1146-1147. He further testified that Plaintiff would have been normal if she had been diagnosed and treated before cell death occurred. Tr. at 1151-1152. Cell death and necrosis were never mentioned during his deposition. S.L.F. at 153-170. He significantly revised his opinions by testifying that Plaintiff was just beginning to display dystonia at the June 28, 2013 visit, and that the damage to her brain was reversible until that time. Tr. at 1162-1163.

This was also a substantial and prejudicial change in testimony. Before trial, Dr. Fischer acknowledged uncertainty about Plaintiff's outcome if she had been treated after March 2013. This effectively limited the time period when any negligence on the part of Dr. Pilapil could have been causally relevant to the December and January visits. He then testified at trial that Plaintiff's condition was largely reversible until late June, substantially enlarging the time when Dr. Pilapil's alleged negligence might have mattered to Plaintiff's outcome. *Id.*

Third, Dr. Fischer stated several times in his deposition that he would not offer standard-of-care testimony. S.L.F. at 130, 148. He never discussed the distinction between unilateral and bilateral tremors. S.L.F. at 153-170. Nevertheless, Dr. Fischer was permitted to testify at trial about unilateral and bilateral tremors and their relevance to diagnosis. Tr. at 1131, 1137-1138.

For the same reasons set forth in Point IV, the trial court should have ordered a mistrial or a new trial. *See, e.g.*, *Snellen*, 422 S.W.3d at 353; *Gassen*, 785 S.W.2d at 603-04; *Sherar*, 98 S.W.3d at 633-34.

Dr. Fischer's testimony was surprising. He openly admitted changing his opinion about whether trientine caused brain damage based on an MRI that did not exist when he was deposed. Tr. at 1177-1181, 1190-1191. He stated at trial that Plaintiff did not begin displaying dystonia until late June, despite previously stating she had experienced dystonia as early as March. S.L.F. at 133-134, 136; Tr. at 1162-1163. He then opined that Plaintiff's brain damage was reversible until late June, whereas he had previously indicated uncertainty as to whether Plaintiff's condition could have been improved after March. S.L.F. at 146; Tr. at 1162-1163. And, apparently believing that her two standard-of-care experts were insufficient, Plaintiff elicited testimony concerning the relevance of unilateral tremors to a diagnosis from Dr. Fischer, despite his representation that he would not offer such opinions. S.L.F. at 130, 148; Tr. at 1131, 1137-1138.

Dr. Fischer's new opinions were extremely prejudicial. Mercy had no reason to anticipate the changes in opinion flowing from use of the 2017 MRI. Moreover, Mercy had prepared its defense and begun trying the case based on Dr. Fischer's deposition testimony, in which he agreed that the administration of trientine caused additional neurological damage to Plaintiff and that any negligence after March 2013 was of questionable relevance.

For the same reasons set forth in Point IV, permitting Mercy to recall Dr. Frucht was not an adequate remedy, and Mercy did not open the door to this surprise testimony by asking Dr. Frucht about the 2017 MRI. This Court should reverse the judgment and remand for a new trial.

VI. THE TRIAL COURT ERRED IN ENTERING ITS JUNE 23, 2017 JUDGMENT REQUIRING PAYMENT OF $11,000,000 IN FUTURE MEDICAL DAMAGES BY LUMP SUM BECAUSE THE TRIAL MISINTERPRETED THIS COURT'S HOLDING IN *WATTS V. LESTER E. COX MEDICAL CENTERS* IN THAT *WATTS* AND SECTION 538.220.2 REQUIRE THAT A TRIAL COURT ASSIGN ALL FUTURE MEDICAL DAMAGES TO PERIODIC PAYMENTS UNLESS A PLAINTIFF MAKES A SHOWING THAT HE OR SHE HAS A SPECIFIC MEDICAL NEED THAT REQUIRES A PORTION OF THE FUTURE MEDICAL DAMAGES TO BE PAID BY LUMP SUM, AND PLAINTIFF DID NOT MAKE SUCH A SHOWING IN THIS CASE.

The trial court erred in ordering Mercy to pay $11,000,000 of Plaintiff's future medical damages by lump sum based on a misinterpretation of this Court's opinion in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012). *Watts* recognized that the plain language of section 538.220.2 treats future medical damages in medical malpractice cases differently from other damages. Due to constitutional concerns, the Court also interpreted the statute to give trial courts discretion to consider specific medical needs of the plaintiff in determining whether to assign a portion of future medical damages to a periodic payment schedule. But *Watts* did not declare the statute unconstitutional.

Some language in *Watts* is difficult to reconcile with the plain language and intent of section 538.220. As a result, trial courts (including the one in this case) have struggled to properly apply the statute. Mercy respectfully suggests that the Court should clarify its holding in *Watts* in a manner that can be reconciled with the statute's plain language. To do this, *Watts* should be interpreted as giving trial courts discretion to depart from the mandatory payment scheme set forth in section 538.220 only where a plaintiff submits evidence establishing that use of the statutorily mandated payment scheme would render a plaintiff unable to actually pay for specific medical needs. Because Plaintiff submitted no such evidence, *Watts* did not authorize a departure from the mandatory payment scheme. The trial court committed an error of law by interpreting *Watts* to give it discretion to ignore the plain language of the statute in the absence of such a showing.

To the extent that *Watts* is interpreted to give trial courts carte blanche discretion to ignore the mandatory payment scheme in the absence of such a showing, Mercy respectfully suggests that the decision cannot be reconciled with the plain language of the statute and should be reconsidered.

A. Standard of review and preservation.

A trial court's entry of, or refusal to enter, a periodic payment schedule is reviewed for abuse of discretion. *Sanders v. Ahmed*, 364 S.W.3d 195, 206 (Mo. banc 2012). However, statutory interpretation is an issue of law that this Court reviews *de novo*. *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008). A trial court necessarily abuses its discretion where its decision is based on a misunderstanding of the law. *Stidham v. Stidham*, 136 S.W.3d 74, 78 (Mo. App. 2004).

Mercy preserved its arguments concerning application of section 538.220 by moving to amend the trial court's judgment consistent with section 538.220, L.F. at 503-505, and renewing its motion after the June 23, 2017 judgment, L.F. at 1306-1308.

B. Section 538.220 requires periodic payment of future medical damages.

The plain and unambiguous language of section 538.220 requires a trial court, upon request of any party, to assign all future medical damages awarded by the jury to periodic payments. In 2005, statutory amendments added the bold and underlined language to section 538.220.2 as follows:

> At the request of any party to such action made prior to the entry of judgment, 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, as determined by the court, based solely on the evidence of such life expectancy presented by the plaintiff at trial. 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 no greater than the coupon issue yield equivalent, as determined by the Federal Reserve Board, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills settled immediately prior to the date of the judgment. The judgment shall state the applicable interest rate.** The parties shall be afforded the opportunity to agree on the manner of payment of future damages, including the rate of interest, if any, to be applied, subject to court approval. However, in the event the parties cannot agree, the unresolved issues shall be submitted to the court for resolution, either with or without a post-trial evidentiary hearing which may be called at the request of any party or the court. If a defendant makes the request for payment pursuant to this section, such request shall be binding only as to such defendant and shall not apply to or bind any other defendant.

App 12.

Before 2005, the statute simply referred to "future damages," without any specific reference to "future ***medical*** damages." This Court interpreted the pre-2005 version of the statute to give trial courts, in the absence of agreement between the parties, wide discretion in establishing a future periodic payment plan with two exceptions. *Vincent by Vincent v. Johnson*, 833 S.W.2d 859, 866 (Mo. banc 1992). First, all past damages, per section 538.220.1, must be paid in full. *Id*. Second, it is presumed in the statute that, absent agreement, the attorney's contingent fees will be paid at the time of the judgment. *Id*. The Court interpreted section 538.220.2 as giving the trial court discretion to craft a future payment plan for all future damages largely as it saw fit. *Id.*

The 2005 amendments must be understood in the context of Chapter 538 as a whole. *See Cousin's Advertising, Inc. v. Bd. of Zoning Adjustment of Kansas City*, 78 S.W.3d 774, 780 (Mo. App. 2002). Before 2005, section 538.215, RSMo, required (and still requires) the trier of fact to itemize five separate damages categories when awarding damages to a medical malpractice plaintiff: (1) past economic damages; (2) past noneconomic damages; (3) future medical damages; (4) future economic damages, excluding future medical damages; and (5) future noneconomic damages. Similarly,

section 538.205(8), RSMo, defines medical damages as a distinct category of damages. App 14.

The legislature is presumed to intend that amendments to a statute have some effect. *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992). Had the legislature intended for trial courts to continue to have complete discretion to determine what portion of future medical damages are subject to periodic payment, it would not have created a detailed payment structure applicable only to such damages, pursuant to which the trial court must determine the amount of each future medical payment by dividing "the ***total*** amount of future medical damages" by the total number of periodic payments. § 538.220.2, RSMo (emphasis added); App 12. Moreover, the statute makes clear that when such a request is made, the trial court "shall specify a future medical periodic payment schedule." *Id*. Thus, whereas the pre-2005 version of section 538.220 generally gave trial courts discretion over how to handle all future damages categories, the 2005 amendments plainly were intended to circumscribe trial courts' discretion with respect to the payment of future medical damages.

C. *Watts* did not permit ignoring the plain language of section 538.220.2.

In *Watts*, this Court considered whether the trial court had abused its discretion by ordering that approximately half of the plaintiff's future medical damages be paid pursuant to a periodic payment plan. 376 S.W.3d at 635. The Court concluded that the trial court abused its discretion because it had failed to consider whether periodic payment of future medical damages would permit the plaintiff to pay for his medical needs. *Id.* at 648.

In reaching that conclusion, the Court recognized that the 2005 amendments treated future medical damages differently by directing the trial court to use a particular payment scheme and interest rate. *Id.* at 647. However, the Court further noted that where two interpretations of a statute are possible, it will select the one that renders the statute constitutional. *Id.* Without stating what constitutional provision requiring trial courts to subject all future medical damages to a periodic payment plan might implicate, the Court relied on this principle to interpret section 538.220.2 so as not to "remove from

the court its authority to determine what part of the future medical damages shall be subject to the payment schedule." *Id.* The Court interpreted the statute "to permit the trial court to consider the needs of the plaintiff and the facts of the particular case in deciding what portion of future medical damages will be paid in a lump sum and what portion will be paid out over a periodic payment schedule." *Id.*

The concerns animating the *Watts* decision are clear. First, the Court was concerned with the extremely low statutory interest rate applicable at that time. *See id.* at 648. Second, and relatedly, the plaintiff had submitted testimony from two economists who explained that use of the periodic payment schedule in combination with that interest rate guaranteed that the plaintiff would be unable to afford his medical care. *Id.* Third, the Court was concerned that use of the statutory interest rate would not account for medical inflation. *Id.*

Properly understood, *Watts* did not interpret section 538.220.2 to mean that trial courts may always ignore the plain language of the statute and choose what portion of future medical damages should be included in a periodic payment plan. Rather, the Court interpreted the statute so as to give trial courts discretion to subject something less than all future medical damages to periodic payment where there is evidence that the plaintiff's medical needs are such that a periodic payment plan will not properly cover them: "Some injured parties may require surgery or other extensive care in the period immediately following trial, while others may have only minimal immediate medical needs because their condition is chronic or the onset of some symptoms will not reach their peak for some years." *Id.* at 647.

In short, the plain language of section 538.220.2 provides that upon request the trial court ***shall*** enter a future medical periodic payment schedule, which ***shall*** be for the plaintiff's remaining life expectancy, and each payment ***shall*** be calculated by dividing the ***total*** amount of future medical damages by the number of periodic payments.

Watts permits trial courts to depart from this mandatory payment scheme only when necessary to avoid constitutional concerns that would arise if such a payment plan would prevent the plaintiff from paying his or her medical bills. *Watts* did not declare the

statute facially unconstitutional; thus, a departure from the statutory terms requires evidence establishing that the payment scheme would render a plaintiff unable to pay particular bills.

When *Watts* is viewed in light of the clear legislative intent underlying the 2005 amendments to section 538.220, the decision should not be interpreted to grant trial courts absolute discretion to decide what portion of future medical damages is to be assigned to periodic payments, absent a showing by the plaintiff of a specific medical need that would not be covered under the statutory payment scheme. This Court should clarify *Watts* as holding that, while the trial court has discretion to consider the specific medical needs of a plaintiff, if there is no showing by the plaintiff that such needs will not be met, all future medical damages must be assigned to periodic payments pursuant to section 538.220.2, and the trial court abuses its discretion in failing to do so.

Under this understanding of *Watts*, once a party requests a periodic payment schedule for future damages, the trial court should make a determination whether the plaintiff has a medical need that will not be covered if future medical damages are paid in the manner mandated by statute. If the plaintiff fails to show such a need, the trial court ***shall*** specify a future medical payment schedule, which ***shall*** be determined by dividing the ***total amount of future medical damages*** by the number of future medical periodic payments as required by section 538.220.2.

This interpretation of section 538.220 and *Watts* comports with the statute's plain language and legislative purpose, as well as with the statute's requirements that (1) all past damages shall be payable in a lump sum and (2) the lump sum damages awarded should be sufficient to pay the plaintiff's attorney's fees. *See Vincent*, 833 S.W.2d at 866. To harmonize these requirements, a trial court should first award all past damages payable in a lump sum payment. Second, if the past damages do not cover the amount of the plaintiff's attorney's fees, the trial court should first award future non-medical damages payable in lump sum to cover the balance of the attorney's fees. If there are any future non-medical damages left over, the trial court retains discretion whether to award them on a lump sum or periodic basis. The trial court should assign all future medical

damages to periodic payment using the method specified in the statute, except to the extent that invading future medical damages may be necessary to cover the plaintiff's attorney's fees.

D. The trial court erred in applying the statute.

In this case, the jury itemized Plaintiff's damages as follows:

Past economic damages	$511,000
Past non-economic damages	$1,000,000
Future medical damages	$21,000,000
Future economic damages (excluding future medical damages)	$3,200,000
Future non-economic damages	$3,200,000
TOTAL DAMAGES	$28,911,000

L.F. at 447.

Plaintiff presented no evidence of substantial immediate medical needs or special periodic needs during her remaining life, and the court did not find any. It is undisputed that the costs of attendant care make up approximately 93% of Plaintiff's future medical damages. P.T. Tr. at 50. These are fixed costs that Plaintiff will incur on an annual basis to pay a nurse to supervise her. *See* Pl. Ex. 197; App 18. The remainder of Dr. Belz's life care plan largely consists of ongoing therapy, home care services, and medication that Plaintiff will need, or infrequent equipment costs. *See id.* Dr. Belz did not include the cost of surgeries in his life care plan. Tr. at 1038-1039, 1060, 1067-1068; P. Ex. 197, 200; App 18-43.

At the post-trial hearing, Mr. Tucek testified that Plaintiff's attendant care costs could be fully covered with substantial surpluses if all of Plaintiff's future medical damages we paid pursuant to a periodic payment plan. P.T. Tr. at 49-54; L.F. at 768-769. Plaintiff did not present any contrary evidence, arguing instead that section 538.220 was unconstitutional and that there would be a shortfall in the $56,404,000 future damages figure Mr. Ellison calculated if periodic payments were ordered. *See* P.T. Tr. at 25-30. Additionally, Mr. Ellison accounted for medical inflation before discounting Plaintiff's future medical damages to present value. P.T. Tr. at 21-23. Because Plaintiff did not

submit any evidence establishing that application of the payment scheme set forth in section 538.220.2 would prevent her from covering any specific, immediate medical needs or special periodic payment needs, there was no basis for the trial court to depart from that payment scheme.

Pursuant to the contingency fee between Plaintiff and her attorneys, her attorney's fees were 40% of the damages awarded ($11,564,400). P.T. Tr. at 18-19, 28. Under section 538.220, the trial court should have first ordered all past damages ($1,511,000) payable in lump sum. Since Plaintiff's attorney's fees were not covered by the award of past damages, the trial court should have then ordered all future non-medical damages payable in lump sum ($6,400,000). The trial court was then permitted to dip into the future medical damages award to make up for the remaining $3,653,000 in attorney's fees. The remaining $17,347,000 in future medical damages should have been allocated to future periodic payments.

In its final judgment on June 23, 2017, the trial court improperly designated $11,000,000 of the $21,000,000 in future medical damages payable by lump sum. L.F. at 1303-1305. Because Plaintiff did not make the necessary showing under *Watts*, the trial court should have ordered lump sum payment of future medical damages only insofar necessary to cover Plaintiff's attorney's fees that remained after lump sum payment of past damages and future non-medical damages ($3,653,000), leaving $17,347,000 in future medical damages to be paid in future periodic payments pursuant to section 538.220.2. The trial court therefore abused its discretion as a matter of law by failing to apply the plain language of section 538.220.2.

To the extent this Court does not remand for a new trial on Mercy's Points I-V, this Court should reverse the trial court's judgment and remand with instructions that the trial court properly apply section 538.220.

E. Alternatively, *Watts* should be overruled.

If this Court determines that the only possible interpretation of *Watts* is one that gives the trial court complete discretion to require the immediate payment of any amount

of future medical damages, this Court should overrule that portion of *Watts* as it conflicts with the plain language and legislative intent behind section 538.220.2.

Such an interpretation of *Watts* cannot be reconciled with Chapter 538's general purpose of reducing the cost of medical malpractice, and section 538.220's specific purpose of spreading that cost over time "to guard against squandering of the judgment while reducing future burdens on government social services." *Vincent*, 833 S.W.2d at 867. *Watts* would not ensure furtherance of those goals if it were construed to permit trial courts to assign a minimal portion of the judgment to periodic payments.

The concerns articulated in *Watts* do not support an interpretation of the statute that gives trial courts unfettered discretion over the handling of future medical damages. As noted, while *Watts* noted that where more than one interpretation of a statute is available, "this Court will interpret a statute in a manner that renders it constitutional," 376 S.W.3d at 647, the decision never explained why a legislative requirement that a trial court assign all future medical damages to a periodic payment schedule would be unconstitutional. The Court noted that because it was resolving the issue on statutory grounds, it would not reach the plaintiff's constitutional challenge to section 538.220. *Id.* at 635 n.2.

The plain language and legislative intent behind section 538.220.2 require a trial court to assign all future medical damages to periodic payments. A trial court cannot have complete discretion over what portion of future medical damages to assign to a periodic payment schedule and comply with the statute's unambiguous command to calculate the future medical payment by dividing the total amount of future medical damages by the plaintiff's remaining life expectancy. Thus, to the extent that *Watts* could be misread to give a trial court complete discretion over what portion of future medical damages to assign to a payment schedule, the decision should be reconsidered.

VII. PLAINTIFF'S POINT I SHOULD BE DENIED.

In her first point, Plaintiff is mistaken in arguing that the trial court abused its discretion in entering the June 23 judgment on the theory that the periodic payment plan will not provide for her future medical needs, and that it should have allocated even more of the judgment to lump sum payment. The trial court heard considerable evidence on whether a periodic payment plan would allow Plaintiff to cover her medical expenses. Regardless of how *Watts* is interpreted, the trial court did not abuse its discretion by refusing to assign ***less*** of Plaintiff's future damages to a periodic payment schedule.

Plaintiff correctly states that this Court reviews the entry of a section 538.220 payment plan for abuse of discretion. *Watts*, 376 S.W.3d at 637. However, she fails to discuss any of the evidence Mercy submitted.[3] She asserts that "the evidence at the March 16, 2017 post-trial hearing proved that if the entire $21,000,000 in future medical damages were subject to periodic payments at a 1.2% interest rate, it would result in a shortfall of $39,986,439." Appellant's Brief at 43. This is incorrect.

In crafting a periodic payment plan, courts may conduct a post-trial evidentiary hearing. § 538.220.2, RSMo; App 12. This court did so. L.F. at 735-736. While Plaintiff presented testimony to the effect that subjecting all future medical damages to a payment schedule would result in a shortfall of the future damages figure calculated by Mr. Ellison, *see* P.T. Tr. at 25-30, Mercy presented expert testimony to the contrary.

Mr. Tucek explained that the portion of future medical damages attributable to future attendant care well exceeded what Plaintiff would actually need to cover such expenses, which constituted about 93% of future medical damages. P.T. Tr. at 49-50; L.F. at 772. For one thing, the costs in Dr. Belz's life care plan vastly exceeded what

[3] As to this and the remaining points, Plaintiff is the appellant and bears the burden of demonstrating that the trial court erred. Plaintiff was likewise required to set forth the facts supporting the trial court's judgment. Whereas Mercy argues in Point VI that the trial court erred as a matter of law by misinterpreting section 538.220 and *Watts*, Plaintiff argues only that the trial court abused its discretion on the facts presented.

Plaintiff was historically billed and paid for attendant care. P.T. Tr. at 49, 54-56; L.F. at 765, 771-772. For another, Mr. Ellison applied an improper growth rate in calculating the future value of such costs that (1) was based on historically high inflation levels unlikely to reoccur and (2) included higher growth rates applicable to professionals that do not provide attendant care. P.T. Tr. at 46-48, 50; L.F. at 762-765. Mr. Tucek explained that if the correct growth rate were applied to the figures in Dr. Belz's life care plan, all future medical damages could be paid periodically and Plaintiff would receive ***surpluses*** over the amounts necessary to cover her attendant care costs for 48 of the 57 years of the plan totaling $5.5 million. P.T. Tr. at 49-54; L.F. at 768. The trial court plainly credited this testimony to some degree. *See* L.F. at 1302.

Plaintiff argues the trial court abused its discretion because there was no evidence that subjecting $10 million to periodic payments complied with *Watts* or the goals of section 538.220. To the contrary, Mercy presented evidence that ***all*** future medical damages could be paid periodically while more than covering Plaintiff's medical needs. The purpose of section 538.220 is to reduce the costs of medical malpractice and prevent the squandering of judgments. *Vincent*, 833 S.W.2d at 867. Under *Watts*, the trial court must also consider the plaintiff's present and future medical needs in crafting the payment schedule. 376 S.W.3d at 647.

The trial court considered these factors. It decided to subject approximately half of the future medical damages to periodic payment. Plaintiff presented no evidence that she had substantial immediate medical needs or special periodic needs during her remaining life span. Under *Watts*, if the judgment is not reversed for the reasons set forth in Mercy's points relied on, the trial court did not abuse its discretion in crafting the periodic payment schedule in the June 23 judgment given the evidence before it.

Plaintiff essentially argues that subjecting any future medical damages to periodic payment is always an abuse of discretion if the statutory interest rate is different from the interest rate a plaintiff's expert uses to calculate present value. In support, she relies on the following language from *Watts*: "The requirement that future medical damages be discounted to present day value necessarily means that full compensation for those future

damages is, in large part, dependent on the statutory interest rate being the same as the rate of health care inflation over the course of the payment schedule." *Id.* at 648. If accepted, Plaintiff's argument would violate section 538.220 by directing experts to use an interest rate different than the one prescribed in the statute. The Court should reject this argument.

Moreover, the evidence demonstrates that the cited language in *Watts* is inapplicable in this case. Ms. Liggett and Mr. Ellison made clear that they calculated the present value of Plaintiff's future medical damages in three steps. First, they ascertained the present cost of Plaintiff's medical needs, which they obtained from Dr. Belz's life care plan. P.T. Tr. at 21. Second, they calculated the future value of those costs for the entirety of the life care plan by applying medical inflation rates, arriving at a future value of $56,404,000. *Id.* Third, they reduced the grown figures back to present value by determining how much money Plaintiff would need to invest today, at long-term investment rates, to earn enough interest to obtain the future value when it was needed, arriving at a present value of $17,758,161. P.T. Tr. at 21-22, 32.

Because this is how present value was calculated, the quoted language from *Watts* is inapposite. Here, medical inflation was entirely accounted for because Plaintiff's experts grew the costs in the life care plan using medical inflation rates ***before*** determining present value. Indeed, it was more than accounted for because Mr. Ellison used an improperly high inflation rate. P.T. Tr. at 46-48, 50; L.F. at 762-765.

In reality, Plaintiff is complaining that the interest rate mandated by section 538.220 is lower than the interest rates her experts used to reduce the grown costs back to present value. That, however, is not a problem with the statute, constitutionally or otherwise. It is the legislature's prerogative to specify the applicable interest rate, not the prerogative of a plaintiff's experts. *See Mackey v. Smith*, 438 S.W.3d 465, 481 (Mo. App. 2014) (holding that the legislature clearly intended to eliminate post-judgment interest and pre-judgment interest in medical malpractice cases); *Miller v. Miller*, 309 S.W.3d 428, 436 n.2 (Mo. App. 2010) (Rahmeyer, J., concurring) (noting that question of post-judgment interest is best left to the legislature).

Plaintiff's experts could, and should, have reduced their grown figures to present value using the payment structure and interest rate clearly mandated by the statute. The fact that they chose to use a different methodology cannot render application of the statute an abuse of discretion. Nor is their use of a different methodology a reason to order Mercy to pay the vast majority of the judgment by lump sum, thereby subverting the legislative intent behind section 538.220.

Setting aside the fact that medical inflation was entirely accounted for in this case, the overarching concern in *Watts* was that using different rates would result in a plaintiff's being unable to actually pay future medical bills. 376 S.W.3d at 648. Yet, this Court did not invalidate the statute or hold any application of the statute to be a per se abuse of discretion, as Plaintiff argues the Court should do here. Instead, *Watts* remanded the case to the trial court to consider the plaintiff's medical needs and enter a new payment schedule to cover those needs while furthering the goals of section 538.220.

This case differs from *Watts* in several important respects. First, *Watts* involved an exceedingly low statutory interest of 0.26%. *Id.* Here, the applicable interest rate is 1.2%, more than four times higher. L.F. at 1305. Second, the trial court ***did*** consider Plaintiff's medical needs and how periodic payments will affect her ability to cover them. Mercy presented credible expert testimony that the cost figures and growth rate used to calculate the present value of Plaintiff's attendant care needs were vastly inflated. Unlike in *Watts*, there was evidence before the trial court that Plaintiff's future medical damages can be paid periodically while ensuring that her medical needs are covered.

Plaintiff submitted no evidence that she would be unable to cover specific medical bills. Nor did she challenge the basis for Mr. Tucek's testimony. Instead, she argued that there would be a shortfall in the future damages figure Mr. Ellison reduced to present value. P.T. Tr. at 25-30. The court obviously found Mr. Tucek's testimony persuasive. Plaintiff now argues that the trial court's periodic payment plan is error under the factors this Court articulated in *Vincent*, but she cites nothing in the record that the trial court failed to consider. The fact that her experts used an interest rate different than the one specified in the statute does not make the trial court's judgment an abuse of discretion.

In sum, the trial court heard persuasive testimony that Plaintiff's medical needs would be covered if all future medical damages were paid periodically. After considering all the evidence, it subjected roughly half of the future medical damages to periodic payment. Thus, under *Watts*, the trial court did not abuse its discretion by refusing to subject even more of the judgment to lump sum payment and this Court should reject Plaintiff's first point on appeal.

VIII. PLAINTIFF'S POINT II SHOULD BE DENIED.

In her second point, Plaintiff repackages her abuse-of-discretion argument and contends that section 538.220, as interpreted in *Watts*, is unconstitutional and that the trial court therefore erred in subjecting ***any*** portion of future medical damages to periodic payment. She contends that the statute violates her right to due process under Article I, Section 10 of the Missouri Constitution. Her theory appears to be that using a statutory interest rate different than the rate her experts used to calculate present value deprives her of the full value of the jury's verdict, violating her right to trial by jury.

The basis for Plaintiff's argument is unclear. She first characterizes her argument as one of "substantive due process." *See* Appellant's Brief at 47 (citing Article I, Section 10 and *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006)). She also expressly invokes rational-basis review. *Id.* Under that standard, a statute need only be rationally related to a legitimate state interest and will be upheld "if any state of facts reasonably may be conceived to justify it." *Doe*, 194 S.W.3d at 844-45 (citations omitted).

However, Plaintiff then cites *Watts* and appears to contend that section 538.220 violates her right to a trial by jury. Appellant's Brief at 47. Yet, Plaintiff never cites to Article I, Section 22(a) of the Missouri Constitution, and nowhere in her brief does she undertake the analysis necessary to determine whether a statute violates that provision. *See Watts*, 376 S.W.3d at 637-41 (discussing and applying a two-step framework to assess claims that the right to trial by jury has been violated). Adding to the confusion, Plaintiff initially states that the constitutionality of section 538.220 appears to be "subject to its application," but then argues that the statute is facially unconstitutional in every application. Appellant's Brief at 46-50.

Plaintiff's argument is premised almost entirely on *Watts*, but *Watts* did not find section 538.220 to be unconstitutional. Instead, as discussed above, the Court interpreted section 538.220 to give trial courts discretion, when a plaintiff shows an immediate or special medical need, to assign something less than all future medical damages to a

periodic payment schedule. Based on that interpretation, the Court in *Watts* never reached the plaintiff's constitutional arguments. 376 S.W.3d at 635 n.2.

The primary thrust of Plaintiff's argument is that because section 538.215 requires future medical damages to be discounted to present value, the requirement in 538.220.2 that those damages then be paid periodically at the statutory interest rate effectively double discounts them. App 16. She contends that this is the case because her experts used long-term investment rates higher than the rate mandated by statute to calculate present value. As discussed in the preceding point, however, an expert's decision to use an interest rate different than the one required by statute cannot possibly render the trial court's payment plan an abuse of discretion. And it is certainly not grounds for overcoming the strong presumption that the statute is constitutional. *See Jackson Cty. Sports Complex Auth. v. State*, 226 S.W.3d 156, 160 (Mo. banc 2007). Plaintiff expressly invokes rational basis review. Plaintiff is attempting to manufacture a constitutional problem out of her experts' disregard for the methodology set out in the statute.

Recognizing this problem, Plaintiff attempts to justify why her experts could not simply follow the statute. Without any citation to the record or controlling authority, she proclaims that economists "must use long term treasury rates." Appellant's Brief at 48. In an effort to bolster her position, she argues that section 490.065, RSMo, required her experts to use a methodology reasonably relied upon by economists, and concludes—without explanation—that use of the statutory interest rate is not an accepted economic methodology, "and jurors will know this is inappropriate." *Id.* at 49-50.

Plaintiff's lack of citation for these propositions is unsurprising. It cannot possibly be improper for an expert economist to apply the interest rate that is ***required by statute***. Nor would jurors think that use of the interest rate mandated by law is somehow improper. Ms. Liggett demonstrated at the post-trial hearing that she and Mr. Ellison could have used the statutory interest rate to calculate present value. P.T. Tr. at 32.

Plaintiff's alternative suggestion that use of the statutory interest rate would require impermissible explanation of the statute to the jury is likewise without merit. She

cites no authority in support of this argument. An economist can certainly state that he or she calculated present value using the interest rate payable by law.

There is no substance to Plaintiff's constitutional challenge to section 538.220, regardless of how *Watts* is construed. Under rational basis analysis, the statute need only be rationally related to a legitimate state interest. *Doe*, 194 S.W.3d at 844-45. The aims of Chapter 538 in general and section 538.220 in particular to reduce the costs of medical malpractice, prevent the squandering of judgments, and spread payments over time, are plainly legitimate state interests. Plaintiff fails to explain how section 538.220 is not rationally related to these interests, because it is. Her second point should be rejected.

IX. PLAINTIFF'S POINT III SHOULD BE DENIED.

In her third point, Plaintiff asserts that the trial court erroneously applied section 538.220.4 because it did not "require Mercy to pay the attorney's fees portion of the $10,000,000 periodic payments allocated to the June 23, 2017 Amended Judgment in lump sum." Appellant's Brief at 51. For the reasons set forth in Mercy's Point VI, the trial court erred in assigning anything more than past damages and a sufficient amount to cover the remainder of Plaintiff's attorney's fees to lump sum payment. For that reason, Plaintiff's argument must fail. And, regardless of how *Watts* is construed, the trial court was not required to extract the entire amount of attorney's fees from future damages, as Plaintiff seems to argue. Plaintiff's argument is directly contrary to section 538.220.4, which states:

> If a plaintiff and his attorney have agreed that attorney's fees shall be paid from the award, as part of a contingent fee arrangement, it shall be presumed that the fee will be paid at the time the judgment becomes final. If the attorney elects to receive part or all of such fees in periodic or installment payments from future damages, the method of payment and all incidents thereto shall be a matter between such attorney and the plaintiff and not subject to the terms of the payment of future damages, whether agreed to by the parties or determined by the court.

§ 538.220.4; App 12.

The key words are clear -- "the method of payment and all incidents thereto shall be a matter between such attorney and the plaintiff and not subject to the terms of the payment of future damages." Plaintiff's attorney's fees are a matter between her and her lawyer, not the Court or her adversary. Plaintiff asks the Court to interpret the statute to require the trial court to specify that a portion of the future award be designated to pay her attorney's fees, thus making those fees "subject to the terms of the payment of future damages" in direct contravention of the statute.

Plaintiff's argument appears to be that the trial court was required to award her past damages in lump sum payment and to take all of her attorney's fees out of the $21,000,000 in future damages ***before*** allocating any future damages to periodic

payment. Plaintiff's exact request is unclear, however, because her brief fails to state what portion of the $10,000,000 the trial court assigned to periodic payment should not have been so assigned. Her post-trial motion likewise failed to specify the amount she claimed was improperly subjected to periodic payment. L.F. at 1317-1318. For this reason alone, her third point should be denied. *See* Rule 78.07(c).

Plaintiff relies on several decisions that she contends establish that attorney's fees must always be taken out of future damages before such damages are subjected to periodic payment. Those decisions are not binding, did not go as far as Plaintiff suggests, and, to the extent they did, are inconsistent with the plain text of section 538.220.4.

In *Long v. Missouri Delta Medical Center*, 33 S.W.3d 629 (Mo. App. 2000), the defendant asked the trial court to order that attorney's fees be paid in periodic installments. *Id.* at 646. The trial court declined, stating: "[T]he statute says you have to pay [attorney's fees] up front plus the past non-economic damages and past damages. . . . [Attorney's fees] plus the past damages would be the initial payments." *Id.* The Court of Appeals affirmed, stating that the trial court had "properly interpreted the statute in determining that attorneys' fees are to be paid when the judgment becomes final." *Id.* It did not go so far as to approve the trial court's (erroneous) suggestion that attorney's fees must be taken out of future rather than past damages. *Id.* It did note that several other courts had approved judgments that deducted attorney's fees from future damages before ordering periodic payments. *Id.*

In *Baker v. Guzon*, 950 S.W.2d 635 (Mo. App. 1997), the defendant requested that future damages be paid periodically. *Id.* at 640. The trial court granted the request, but ordered that each item of damages be reduced on a pro rata basis to cover the plaintiff's attorney's fees and costs. *Id.* at 641. The Court of Appeals held that the trial court had not erred in first deducting attorney's fees from future damages before ordering periodic payments. *Id.* at 648. It did not hold that a trial court must always do so.

In *Roesch v. Ryan*, 841 F. Supp. 288 (E.D. Mo. 1993), a dispute arose concerning a periodic payment plan. The plaintiffs argued they should receive a lump sum payment of all past damages, plus attorney's fees and costs taken from future damages. *Id.* at 291.

The defendant argued the lump sum payment should include only past damages, which the plaintiffs would turn over to their attorneys, and that the remaining attorney's fees should be taken out of the periodic payments of future damages until satisfied. *Id.* The district court rejected the defendant's position, reasoning that taking all of a plaintiff's lump sum payment to cover attorney's fees would be unjust, and that the intent of the statute was that "attorney's fees on the total judgment should be paid initially along with any past damages." *Id.* at 292.

None of these cases are binding on this Court. Neither *Long* nor *Baker* mandate that attorney's fees must be taken from any particular item of damages. While *Roesch* could conceivably be read that way, any such holding would conflict with the plain language of section 538.220, which does not require trial courts to award a plaintiff past damages and take all attorney's fees out of future damages. Indeed, such a reading would conflict with the purpose of section 538.220, which is to reduce the costs of medical malpractice by spreading the cost of judgments over time. *Watts*, 376 S.W.3d. at 646.

As discussed above in Point VI, section 538.220 requires that all future medical damages be paid periodically over the course of a plaintiff's lifetime. Because the statute still requires that attorney's fees be paid in lump sum, the most natural reading of the statute is that a plaintiff should receive past damages, plus enough of the future damages to cover her remaining attorney's fees, starting with future non-medical damages. All other future medical damages should be allocated to periodic payment. If there are any other future non-medical damages remaining, the trial court retains discretion over how they should be paid.

In this case, the trial court awarded Plaintiff more than enough money to cover her attorney's fees. Plaintiff's attorney's fees are $11,564,400. P.T. Tr. at 27-28. Under the June 23 judgment, she is to receive a lump sum payment of $18,911,000. L.F. at 1305. Accordingly, she will receive enough to pay her attorneys, with $7,347,000 left over. Thus, no matter how *Watts* is understood, the June 23 judgment fully complies with the requirements of section 538.220.4, and does not raise any of the concerns at issue in the cases upon which Plaintiff relies. Mercy maintains its argument made in Point VI, that it

was an abuse of discretion and contrary to the language of section 538.220 to award this much in lump sum payments when the intent of the statute is to make sure that this money is available to Plaintiff over time.

Plaintiff's counsel referred to their 40% contingency fee as the "300 pound gorilla in the room" at the post-trial evidentiary hearing. P.T. Tr. at 18. This is an issue between Plaintiff and her counsel. Contingency fees exist in many cases and are not a reason to ignore the plain language of section 538.220.4. While it may be necessary to pay some portion of future medical damages by lump sum to cover the balance of attorney's fees, courts should not disregard the legislature's intent that future medical damages should be paid over a plaintiff's lifetime to the extent practical. Nor should they craft payment schedules on an ad hoc basis depending on the particular fee arrangement.

Plaintiff's third point should be denied.

X. PLAINTIFF'S POINT IV SHOULD BE DENIED.

In her fourth point, Plaintiff argues the trial court lacked authority to remove post-judgment interest in its June 23 judgment because Mercy did not challenge its inclusion within 30 days. However, it is undisputed that post-judgment interest is barred by statute in medical malpractice actions. Its inclusion was thus correctable as plain error pursuant to Rule 78.08. Moreover, because the court indisputably had jurisdiction to amend the March 20 judgment in response to Mercy's timely post-trial motion, and because the amended judgment was "a new judgment for all purposes" pursuant to Rule 78.07(d), the court also had authority to further modify the judgment to remove post-judgment interest once it granted that motion.

A. Procedural background.

Judgment was first entered on March 8, 2017. L.F. at 453-454; App 1. Mercy immediately moved to set that judgment aside to request application of section 538.220. L.F. at 455-457. After setting the first judgment aside and considering the parties' evidence the court entered an amended judgment, drafted and submitted by Plaintiff, on March 20. L.F. at 811-818; App 3. Thereafter, Mercy filed several timely post-trial motions. L.F. at 475-505. Because the trial counsel did not realize that Plaintiff had improperly included post-judgment interest in the judgment, and because Plaintiff did not inform the Court and opposing counsel that the proposed judgment was contrary to the controlling authority of section 538.300, Mercy's initial post-trial motions did not raise the issue. App 17.

On April 27, more than 30 days after entry of the amended judgment, Mercy again moved to amend the judgment, challenging the interest award. L.F. at 819-820. On June 20, Mercy filed a brief arguing, *inter alia*, that the inclusion of interest could be corrected as plain error. L.F. at 1267-1270. Both counsel for Mercy and Plaintiff argued the post-judgment issue at a hearing held on June 21, 2017.

On June 22, the court ruled on Mercy's post-trial motions: "Defendant's alternative motion to amend the judgment pursuant to § 538.220 is sustained in part. As a

result, an amended judgment will be entered. Defendant's second motion to amend judgment is sustained." *Id.* L.F. at 1302; App 6. The order stated that inclusion of post-judgment interest was improper: "The Court's amended judgment corrects this oversight and plain error." *Id.* On June 23, the court entered the second amended judgment, which removed post-judgment interest. L.F. at 1303-1305; App 7.

B. The trial court correctly removed post-judgment interest.

Plaintiff's sole argument is that the trial court lacked authority to remove post-judgment interest under Rule 75.01 on the theory Mercy failed to timely raise the issue. Plaintiff correctly states that once thirty days have elapsed, a trial court's jurisdiction is generally limited to granting relief requested by one of the parties in a timely post-trial motion. *See, e.g.*, *Marks v. Marks*, 203 S.W.3d 729, 733 (Mo. App. 2006). Plaintiff's argument nevertheless fails for three reasons.

First, the issue was briefed, argued, and submitted to the trial court within the time over which it had control of the judgement and the trial court ruled on the issue. This alone has been considered sufficient for preservation purposes. *G & G Mechanical Constructors, Inc. v. Jeff City Indus., Inc.*, 2018 WL 1384503, at *1 (Mo. App. 2018).

Second, Rule 78.08 provides that the trial court may correct plain errors: "Plain errors affecting substantial rights may be considered at a hearing on motion for a new trial, in the discretion of the court, though not raised in the motion or defectively raised, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Mercy argued that inclusion of post-judgment interest was plain error, and the trial court agreed. L.F. at 1302. Plaintiff does not even address this aspect of the court's ruling nor argue how it was an abuse of discretion.

"Rule 78.08 permits the trial court to review post trial matters, which affect substantial rights, pursuant to plain error, when the court finds that manifest injustice or miscarriage of justice has resulted." *Giddens v. Kansas City S. Ry. Co.*, 937 S.W.2d 300, 306 (Mo. App. 1996). Appellate courts can likewise review unpreserved claims of error for plain error if the trial court "committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice." *In re Adoption of C.M.B.R.*,

332 S.W.3d 793, 808-09 (Mo. banc 2011), *abrogated on other grounds by S.S.S. v. C.V.S.*, 529 S.W.3d 811 (Mo. banc 2017); *see also* Rule 84.13(c).

The trial court held a hearing on, among other things, Mercy's motion for a new trial. L.F. at 738. The inclusion of post-judgment interest in the amended judgment was plain error because section 538.300 explicitly prohibits post-judgment interest in medical malpractice actions. *See Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 431 (Mo. banc 2016); App 17. The award of interest in direct contravention of controlling law is a clear and obvious error correctable on plain error review. *See Union Elec. Co. v. Pfarr*, 375 S.W.2d 1, 9 (Mo. 1964).

Under the March 20 judgment, the damages not subject to periodic payment would have accrued interest at a rate of nearly $4,000 per day. L.F. at 818; App 3. Awarding a litigant a windfall recovery that is indisputably barred by statute or common law is a miscarriage of justice correctable under plain error review, as Missouri courts have repeatedly recognized.

In *Union Electric*, this Court modified a judgment under plain error review where the plaintiff was permitted to recover interest on money paid to the court and awarded to the defendant when such interest was precluded by statute and case law. *Id.*

In *McGuire v. Kenoma, LLC*, 375 S.W.3d 157 (Mo. App. 2012), the court reversed a judgment awarding the plaintiff double recovery for the same wrong under plain error review because it is established that a plaintiff may recover only once.[4] *Id.* at 176-77.

In *Student Loan Marketing Association v. Raja*, 878 S.W.2d 830 (Mo. App. 1994), the court remanded a judgment to the trial court for recalculation because the judgment awarded duplicative interest, even though neither party had noticed the error. *Id.* at 832.

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[4] Plaintiff's reliance on this Court's later decision in *McGuire v. Kenoma, LLC*, 447 S.W.3d 659 (Mo. banc 2014), is misplaced. *McGuire* merely held that the failure to ***include*** post-judgment interest could not be corrected by nunc pro tunc judgment under Rule 74.06. *Id.* at 667. *McGuire* said nothing about whether an award of interest barred by statute can be corrected under plain error review pursuant to Rule 78.08 or otherwise.

In *Ball v. American Greetings Corp.*, 752 S.W.2d 814 (Mo. App. 1988), the court set aside a judgment awarding punitive damages barred by statute on plain error review where the defendant had failed to preserve the issue. *Id.* at 819-20.

As these cases make clear, the award of post-judgment interest in this case would have resulted in a windfall to which Plaintiff was not entitled and a miscarriage of justice. The trial court properly concluded that the inclusion of post-judgment interest was plain error that had to be corrected, as expressly allowed by Rule 78.08. L.F. at 1302. Plaintiff has effectively waived any argument that the trial court erred in correcting the judgment under plain error review by failing to address the issue in her brief.

Third, even if the trial court could not remove post-judgment interest under plain error review, it nevertheless had authority to do so once it decided to grant Mercy's motion to amend the judgment concerning the application of section 538.220. In arguing that the trial court erred in removing the interest award, Plaintiff simply ignores the procedural ramifications of the trial court's other rulings.

Unless it specifies otherwise, "an amended judgment shall be deemed a new judgment for all purposes." Rule 78.07(d). When an amended judgment is entered, parties have thirty days to file additional post-trial motions, and the trial court has jurisdiction to modify the judgment pursuant to Rule 75.01 for an additional thirty days. *See Dangerfield v. City of Kansas City*, 108 S.W.3d 769, 774 (Mo. App. 2003); *Koppenaal v. Dir. of Revenue*, 987 S.W.2d 446, 449 (Mo. App. 1999), *both abrogated by Blue Ridge Bank & Trust Co. v. Hart*, 152 S.W.3d 420 (Mo. App. 2005).

The court in this case entered an amended judgment in response to Mercy's motion concerning application of section 538.220. L.F. at 1302-1305. While Plaintiff challenges the substance of the amended judgment, it is undisputed that the court had authority to enter it because Mercy's post-trial motion was filed within thirty days and the trial court acted within ninety days. The June 23 judgment does not specify that it is not a new judgment for all purposes. L.F. at 1303-1305. Accordingly, the trial court was free to further modify the judgment for 30 days, which it did when it removed post-judgment interest. *Koppenaal*, 987 S.W.2d at 449. The fact that the court took both

actions at the same time is irrelevant. Requiring the court to first enter an amended judgment in response to Mercy's timely post-trial motion and to then further modify the amended judgment to remove post-judgment interest would exalt form over substance and serve no useful purpose. Because the court had authority to enter the amended judgment, it was also free to correct the erroneous award of interest at the same time.

Notably, these events arose only because Plaintiff submitted a proposed judgment that included post-judgment interest in contravention of section 538.300. L.F. at 811-818. It was improper for Plaintiff to submit the proposed judgment without also informing the court that section 538.300 was directly on point and adverse to Plaintiff's proposed judgment. Because the inclusion of interest was plain error and because the trial court had authority to further modify its June 23 judgment, Plaintiff should not be permitted to recover a self-created improper windfall by including post-judgment interest in a judgment where it is plainly prohibited.

XI. PLAINTIFF'S POINT V SHOULD BE DENIED.

In her final point, Plaintiff argues the trial court erred in refusing to award post-judgment interest because section 538.300 is unconstitutional. This Court has already largely upheld the constitutionality of this statute in *Dieser v. St. Anthony's Medical Center*, 498 S.W.3d 419 (Mo. banc 2016), and Plaintiff presents no basis for deeming the statute unconstitutional.

A. Section 538.300 does not implicate equal protection concerns.

Plaintiff argues that section 538.300 violates her right to equal protection under Article I, Section 2 of the Missouri Constitution. She asserts that the statute is subject to strict scrutiny because it interferes with her fundamental right to property and further argues that the statute lacks a rational basis. This argument fails for many reasons.

This Court employs a two-step analysis to equal protection claims. First, it determines whether the statute disadvantages a suspect class or impinges on a fundamental right. *Id.* at 432. If so, the statute is subject to strict scrutiny. *Id.* If not, it is subject to rational-basis review. *Id.* Second, the Court applies the appropriate level of scrutiny. It is Plaintiff's burden to prove that section 538.300 clearly and undoubtedly violates the Constitution. *Id.*

Medical malpractice plaintiffs are not a suspect class. *Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 911-12 (Mo. banc 2015). Accordingly, Plaintiff's assertion that strict scrutiny applies depends on her claim that section 538.300 impinges on her "fundamental right to property."

"The fundamental rights requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the constitution." *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 331-32 (Mo. banc 2015). As in *Labrayere*, Plaintiff fails to cite any cases standing for the proposition that statutes regulating private property are subject to strict scrutiny. *Id.* at 332. Similar to the unpreserved claim this Court declined to consider in *Dieser*, her theory appears to be that

the statute is an unconstitutional taking of her alleged property interest in post-judgment interest. 498 S.W.3d at 432.

Plaintiff does not cite any authority holding that there is a fundamental right to recover post-judgment interest. There is no such right. In *Dieser*, this Court rejected the claim that section 538.300 violated the right to trial by jury. It made clear that the right to post-judgment interest is purely statutory because at common law there was no right to interest on any type of damages. *Id.* at 434. If the right to post-judgment interest is purely statutory, it is not a fundamental right. What the legislature grants, it may take away. *See Tevis v. Foley*, 30 S.W.2d 68, 69 (Mo. 1930) ("The right of appeal being purely statutory, the Legislature may give it or take it away."); *Paddleford v. Dunn*, 14 Mo. 517, 520 (1851) ("If the Legislature has a right to extend, it has also the right to restrict . . . .").

The fact that there was no right to post-judgment interest at common law also undermines any notion that the right to post-judgment interest is a right that is "'objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty.'" *Ambers-Phillips*, 459 S.W.3d at 911 (quoting *Doe*, 194 S.W.3d at 842). Further undercutting Plaintiff's argument that there is a fundamental right to post-judgment interest is the fact that "unlike prejudgment interest, postjudgment interest is awarded as a penalty for delayed payment of the judgment ***rather*** than as compensation for damages." *Benoit v. Missouri Highway & Transp. Comm'n*, 33 S.W.3d 663, 674 (Mo. App. 2000).

B. Section 538.300 is subject to and satisfies rational basis review.

Even if the removal of post-judgment interest could be considered a taking (it cannot), this Court has previously rejected attempts to apply strict scrutiny to such claims. The Missouri Constitution creates a right to be free from ***arbitrary*** governmental interference with property. *Labrayere*, 458 S.W.3d at 332. If every statute touching on property rights in some way were subject to strict scrutiny, the government would have to justify essentially every regulation of property through a showing that the regulation is necessary to achieve a compelling government interest. *Id.* However, takings cases have historically required a showing only that the regulation substantially advances a

legitimate state interest. *Id.* For this reason too, Plaintiff's claim is subject to, at most, rational-basis review.

Plaintiff's cited cases are not to the contrary. In *Benoit*, this Court merely held that, as a matter of statutory interpretation, the legislature had not subjected post-judgment interest to sovereign immunity damages caps. 33 S.W.3d at 674-76. It noted that the legislature could have expressly included post-judgment interest in the damages cap but chose not to do so. *Id.* at 676. Here, the legislature did expressly eliminate post-judgment interest in malpractice actions in section 538.300. App 17.

Seaboard Air Line Railway Co. v. United States, 261 U.S. 299 (1923), is not on point either. There, the Court concluded that the constitutional requirement that the government pay "just compensation" in condemnation cases includes a requirement that the individual whose property is taken receive the full value of the property, including interest for the time in which he is deprived of its use. This is, of course, not a condemnation case. *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), is similarly inapposite because it likewise concerned takings jurisprudence, which is inapplicable as discussed above.

Thus, section 538.300 is subject to rational-basis analysis. The statute need only bear a rational relationship to a legitimate state interest. *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014). The Court presumes that a rational basis exists, and it is Plaintiff's burden to overcome that presumption through a clear showing that the statute is arbitrary and irrational. *Id.*

Plaintiff has not carried her burden. The overarching purpose of Chapter 538 is to reduce the cost of medical malpractice. *Watts*, 376 S.W.3d at 646. That is plainly a legitimate state interest. Section 538.300 is rationally related to that interest because it permits a medical provider to be held liable for the damages it causes, while preventing substantial additional costs from accruing until the judgment is paid, including during the pendency of appeal. This is particularly true since the purpose of post-judgment interest is to penalize, rather than to compensate. *Benoit*, 33 S.W.3d at 674. The Court should reject Plaintiff's final point on appeal.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and this Court should remand for a new trial or, this alternative, entry of a judgment to complying with section 538.220 as to future payments.

By: /s/ *William Ray Price, Jr.*
William Ray Price, Jr. #29142
Jeffery T. McPherson #42825
Alexander C. Barrett #68695
Paul L. Brusati #67975
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314-621-5070 FAX 314-621-5065
wprice@armstrongteasdale.com
jmcpherson@armstrongteasdale.com
abarrett@armstrongteasdale.com
pbrusati@armstrongteasdale.com

ATTORNEYS FOR MERCY CLINIC SPRINGFIELD COMMUNITIES

CERTIFICATE OF SERVICE AND COMPLIANCE

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/s/ *William Ray Price, Jr.*