

IN THE SUPREME COURT OF MISSOURI

EMILEE WILLIAMS,)	
)	
Appellant/Cross-Respondent,)	Supreme Court No.: SC96547
)	
vs.)	Court of Appeals No.: SD35044,
)	SD35051, and SD35158
MERCY CLINIC SPRINGFIELD)	
COMMUNITIES, F/K/A ST. JOHN’S)	Circuit Court No.: 1531-CC00861 and
CLINIC, INC.)	1531-CC00861-01
)	
Respondent/Cross-Appellant.)	

APPELLANT/CROSS RESPONDENT’S INITIAL BRIEF

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INTRODUCTION

This is an appeal from a medical negligence trial. The jury returned a verdict in favor of Appellant/Cross-Respondent Emilee Williams, (hereinafter “Emilee”) and against Respondent/Cross-Appellant Mercy Clinic Springfield Communities (hereinafter “Mercy”). After the verdict, the circuit court entered three judgments, Appellant contends the final judgment rendered on June 23, 2017 (hereinafter “2nd Amended Judgment”) contained legal and constitutional errors. In a nutshell, the twice amended judgment should be stricken and either the original judgment entered on March 8, 2017 or the March 20, 2017 judgment should be reinstated. The 2nd Amended Judgment should be stricken because part of the judgment was entered without jurisdiction to do so and further if the future payments section is allowed to stand Emilee will not receive what the jury determined was needed for her future care and in fact will not have money to pay for her future needs.

Appellant does not believe there was any error, no less prejudicial error, in the trial of this matter. The jury listened to nine days of testimony and concluded that Mercy was responsible for Emilee’s catastrophic injuries. The jury awarded \$28,911,000 for the damages Emilee has and will suffer over the remaining 57 years of her life. Approximately 85% of the award was for economic damages. One of the primary issues on appeal is the future periodic payments schedule for the \$21,000,000 in future medical costs the jury awarded. The future medical costs were calculated and presented to the jury as present value numbers. The jury found that this money and the money it earns through safe investment will be needed to pay others to care for this badly brain damaged young lady

while taking into account medical inflation and returns on long term government bonds. In the 2nd Amended Judgment, \$10,000,000 of the future medical costs are ordered to be paid in the future with a 1.2% interest rate. The only evidence at trial and before the 2nd Amended Judgment was entered was that if these future cost are paid as ordered there will be insufficient funds to pay for the future care the jury awarded Emilee. Appellant contends that § 538.220, RSMo 2016, is unconstitutional because (a) requiring reduction to present value while then providing for future payments assures inadequate funding of future care needs and/or (b) the circuit court abused its discretion in the allocation in that the periodic payments must “ensure that [plaintiff] will receive the benefit of the jury’s award for future medical care.” *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 648 (Mo. banc 2012).

Further, the 2nd Amended Judgment entered by the circuit court does not require Mercy to pay the attorney’s fee portion of the judgment in lump sum. This is contrary to § 538.220(4), RSMo 2016, as well as all case precedent addressing this issue. *Vincent v. Johnson*, 833 S.W.2d 859 (Mo. banc 1992); *Long v. Mo. Delta Med. Center*, 33 S.W.3d 629 (Mo. App. S.D. 2000); *Baker v. Guzon*, 950 S.W.2d 635 (Mo. App. E.D. 1997); *Roesch v. Ryan*, 841 F.Supp. 288 (E.D. Mo. 1993). Thus the circuit court erred in failing to follow the unanimous law that the attorney’s fees portion of the future periodic payments award must be paid in lump sum.

Also at issue on this appeal is the failure to award post-judgment interest. Appellant contends that there are both procedural, case specific, errors and constitutional issues that (a) prohibited the court from amending its first judgment and second judgment granting

post-judgment interest and (b) prohibit the wholesale denial of post-judgment interest to victims of medical malpractice. Procedurally, post-judgment interest was granted in both the March 8, 2017 and March 20, 2017 judgments entered by the Court but later taken away in the 2nd Amended Judgment of June 23, 2017. Mercy did not object to the grant of post-judgment interest within 30 days of either the March 8, 2017 judgment or the March 20, 2017 judgment being entered. This failure deprived the circuit court of jurisdiction to remove post-judgment interest pursuant to Rules 75.01, 78.04, & 81.05(a)(2).

Constitutionally, the failure to include post-judgment interest on a jury verdict amounts to a taking of Emilee's fundamental property rights. Absent post-judgment interest, Emilee will not receive the value of the judgment rendered by the jury due to the time value of money lost between trial and payment of her verdict. Emilee contends that this amounts to an unconstitutional taking of her fundamental right to her property, the full value of the jury's verdict. Mo. Const. art. I, § 2.

For these reasons, Appellant requests this Court to remand the action to the circuit court to enter a Judgment that is compliant with Missouri law and the Missouri Constitution.

JURISDICTIONAL STATEMENT

Article V, section 3 of the Missouri Constitution provides the Supreme Court of Missouri with exclusive appellate jurisdiction in all cases involving the validity of a state statute. Mo. Const. art. V, § 3. This Court has exclusive jurisdiction over this appeal, which concerns the validity of Missouri Statutes §§ 538.220 and 538.300, RSMo 2016. This Court also has jurisdiction over any other issue that may be present, even if these issues, standing alone, would not otherwise be directly appealable to this Court. *See State ex rel. Union Elec. Co. v. Public Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985).

The constitutional questions presented in this case are real and substantial. These questions were properly preserved for appellate review. Emilee presented her constitutional objections to these Missouri statutes in her motion to strike Mercy's answer at the pleading stage of the litigation and re-asserted those constitutional issues as soon as the statutes were relevant to the lawsuit. L.F. V3, pgs. 462-73; V6, pgs. 759-802; V9, pgs. 1309-19; A5-7. *Dodson v. Ferrara*, 491 S.W.3d 542, 553 (Mo. banc 2016). In this case, Emilee did not have any constitutional issues to raise by either the March 8, 2017 Judgment or the March 20, 2017 Judgment. Emilee was first damaged by the unconstitutional statutes when the circuit court granted an unauthorized post trial motion on June 23, 2017. The circuit court lost jurisdiction to remove post-judgment interest on April 8, 2017, which was 30 days after the original Judgment was entered. Immediately thereafter, Emilee moved to amend said judgment on June 29, 2017, specifically referencing that the periodic payments schedule, as applied, violated Article I, sections 2 & 10 of the Missouri Constitution. Further, the June 29, 2017 Motion to Amend specifically referenced that § 538.300, RSMo

2016, violated Article I, section 2 of the Missouri Constitution. The circuit court lost jurisdiction of all matters relating to the case on July 6, 2017, which was 90 days after the last timely filed post-trial motion. Rule 78.06. On June 30, 2017, Emilee timely filed her notice of appeal with this Court re-asserting the Constitutional issues.

STATEMENT OF THE FACTS

Although this Appeal deals with damage issues, counsel feels it is difficult to understand the damage issues absent an understanding of the facts leading to the damage award. Emilee filed this suit on July 14, 2015, in the circuit court of Greene County, Missouri. Legal File V1, pgs. 31-36 (hereinafter “L.F.”). In her complaint, she alleged that she sustained catastrophic brain damage because her doctor failed to promptly refer her to a neurologist when she presented on multiple occasions with abnormal neurological issues. L.F. V1, pgs. 31-36. These failures resulted in a nine-month delay in treating her condition known as Wilson’s Disease. Because of this delay, Emilee lost the ability to walk, talk, swallow, or move her extremities. L.F. V1, pgs. 31-36. She remained in a locked-in state for approximately 2.5 years, after which she slowly made some recovery. Trial Transcript V3, pgs. 350-60; V8, pgs. 852-60, 896-910; V12, pgs. 1231-42 (hereinafter “T.T.”). Despite some recovery, Emilee’s brain damage requires her to have 24/7 observation for the remaining 57 years of her life. T.T. V8, pgs. 852-60; V9, pgs. 995-97; V10, pgs. 1047-55. Most of the money provided by the jury was to assure that Emilee receives needed and appropriate future medical care. L.F. V3, pgs. 453-54. T.T. V15, pgs. 1595-1605. Trial Exhibit 245. (hereinafter “T.Ex.”)

Wilson’s Disease is an inherited metabolic disorder that affects a person’s ability to digest copper. T.Ex. 205, pgs. 11-21; T.Ex. 210, pgs. 15-23. Wilson’s Disease commonly begins to show symptoms in a patient when they are in their late teens and early 20s. T.Ex. 205, pgs. 11-21; T.Ex. 210, pgs. 15-23. Early symptoms often include liver abnormalities and psychiatric symptoms such as depression and anxiety. T.Ex. 205, pgs. 11-21; T.Ex.

210, pgs. 15-23. The early outward physical symptoms of this disease include neurological symptoms, such as a unilateral hand tremor. T.Ex. 205, pgs. 11-21; T.Ex. 210, pgs. 15-23.

Neurologists are acutely aware of Wilson's Disease. T.Ex. 210, pgs. 19-24. They are taught to be on the lookout for Wilson's Disease because if it is timely diagnosed and treated when symptoms are minimal, the disease can be managed conservatively and the patient can live a normal, productive, life. T.T. V11, pgs. 1138-47. Managing the early diagnosis of Wilson's Disease primarily consists of eating a low copper diet and taking a zinc supplement. T.T. V11, pgs. 1138-47. T.Ex. 205, pgs. 26-33. One of Emilee's treating physicians was Dr. Fred Askari. Dr. Askari runs the University of Michigan – Wilson's Disease Center of Excellence. T.Ex. 205, pg. 8. He explained that if diagnosed early, the patient will have few if any impairments and lead a normal and productive life. T.Ex. 205, pgs. 25-28. He gave the example of a young resident at the University of Michigan School of Medicine that he diagnosed and treated early. T.Ex. 205, pgs. 25-28. The resident became a successful orthopedic surgeon. T.Ex. 205, pgs. 25-28. Dr. Askari compared Wilson's Disease to high blood pressure or diabetes, if left untreated, it is deadly, but relatively easy to manage if caught early. T.Ex. 205, pgs. 25-28.

Likewise, because the disease is easily treatable if diagnosed early, internal medicine doctors learn about Wilson's Disease and are tested on it when they take their boards. T.T. V3, pgs. 406-07; V13, pgs. 1306-07. T.Ex. 205, pgs. 25-28. In fact, textbooks warn doctors that Wilson's Disease is a "can't miss" diagnosis because it is easy to diagnose by testing and very treatable if diagnosed early. T.T. V7, pgs. 749-58. T.Ex. 210, pgs. 12-24

If Wilson's Disease is allowed to progress untreated, the result can be permanent and catastrophic. T.T. V11, pgs. 1138-47. If Wilson's Disease is left completely untreated, it is 100% fatal. T.Ex. 205, pgs. 11-21; T.Ex. 210, pgs. 15-23. As the copper in a patient's body accumulates due to the patient's impaired ability to metabolize the copper, it builds in the liver until the liver can take no more, at which point it overflows into the blood stream and courses through the brain. T.T. V9, pgs. 968-81, 987-88; V11, pgs. 1144-47. Similar to other heavy metal poisoning, the copper deposits into the deep brain where the metabolic activity in the brain is most active. T.T. V9, pgs. 968-81, 987-88; V11, pgs. 1144-47. The deep brain is the control center for the entire brain. T.T. V9, pgs. 968-81, 987-88. T.Ex. 210, pgs. 34-35. The deep brain controls movement, speech, swallowing, emotions, logic, behavior, thinking, judgment, and nearly every vital activity of the body. T.T. V9, pgs. 968-81, 987-88; V11, pgs. 1144-47.

From the fall of 2010 through 2012, Emilee was seeing her pediatrician for physical issues related to an enlarged liver and unexplained depression and anxiety. T.T. V3, pgs. 287, 293-304. When she started suffering unilateral tremors of the right hand the family went to Dr. Elene Pilapil an internal medicine specialist for a second opinion. T.T. V3, pgs. 304-06. Emilee was a senior in college and had been accepted to a physical therapy doctorate program. T.T. V3, pgs. 301-06. Her family wanted to ensure she received care from a specialist before starting. T.T. V3, pgs. 301-06.

The negligent conduct in this case stems from three separate office visits that Emilee had with her internal medicine specialist, Dr. Elene Pilapil. These visits occurred on December 17, 2012, January 11, 2013, and May 13, 2013. T.T. V3, pgs. 369, 379-88, 392-

409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26. In each of the December, January, and May visits, Dr. Pilapil failed to follow the standard of care as outlined by the experts for both Emilee and Mercy. T.T. V3, pgs. 369, 379-88; 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26. Emilee submitted this case to the jury on four separate submissions of ultimate facts, including that Dr. Pilapil: (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. L.F. Verdict Director. A104. The submissions directly tracked the expert testimony in this case. T.T. V3, pgs. 369, 379-88, 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26.

December 17, 2012 Office Visit

Emilee's first visit with Dr. Pilapil was on December 17, 2012. T.T. V3, pgs. 385-88, 392-409; V4, pgs. 414-17; V5, pgs. 594-608. T.Ex. 4. Emilee saw Dr. Pilapil for a second opinion, largely because her mother, Theresa Williams, was worried about a tremor she developed in her right hand. T.T. V3, pgs. 304-09. Theresa was concerned because her daughter, a 20 year-old straight A student and competitive soccer player, suddenly developed a marked personality change and a right-hand tremor. T.Ex. 4; T.T. V3, pgs. 300-09. Theresa was particularly concerned because she believed Emilee's tremor looked similar to her childhood priest who had Parkinson's Disease. T.T. V3, pgs. 305-09.

Theresa voiced her concern to Dr. Pilapil and requested a full neurological work-up. T.T. V3, pgs. 300-09; V13, pgs. 1338-46.

Dr. Pilapil's pretrial memory of the December 17, 2012 visit was that she had no memory of this visit or any other visit other than reflected in her medical record, which she changed with "new" memories at trial. T.T. V13, pgs. 1338-46. In Dr. Pilapil's record, she noted a history of tremor, recorded the tremor on her review of system, and noted the tremor on her exam. T.Ex. 4. T.T. V3, pgs. 385-88, 392-409; V4, pgs. 414-17; V5, pgs. 594-608; V13, pgs. 1331-33. On the exam portion of the record, it particularly states "no tremors of rest, fine tremor on purpose." T.Ex. 4; T.T. V3, pgs. 385-88, 392-409; V4, pgs. 414-17; V5, pgs. 594-608. Tremors are commonly classified as fine or course, which are descriptors used for tremors. T.Ex. 4. T.T. V3, pgs. 385-88, 392-409; V4, pgs. 414-17; V5, pgs. 594-608. A purpose tremor or an intention tremor occurs when someone moves a body part with intent or on purpose. T.T. V3, pgs. 393-95; V13, pg. 1362. Dr. Pilapil's records did not note what body part or parts were experiencing tremors, whether they were bilateral or unilateral, or any specifics that experts agreed should have been obtained and recorded. T.Ex. 4. T.T. V3, pgs. 385-88; V4, pgs. 414-17; V5, pgs. 594-608; V13, pgs. 1338-46; V14, pgs. 1481-96.

Dr. Pilapil diagnosed Emilee's condition as anxiety and depression. T.Ex. 4. T.T. V3, pgs. 385-88, 392-409; V4, pgs. 414-17; V5, pgs. 594-608. In response to Theresa's concern about a serious neurological issue and request for a complete neurological work-up, Dr. Pilapil explained to Emilee and her mother and noted in her record that this was not a neurological issue because "a neurological issue should be constant (sic) not come and

go”. T.Ex. 4. T.T. V3, pgs. 300-09; V13, pgs. 1338-46. Emilee and her mother were relieved that Emilee did not have a neurological condition because her right-handed tremor did come and go. T.T. V3, pg. 307.

Emilee called two standard of care witnesses at trial. A8-94. T.T. V3, pgs. 369; V5, pgs. 579-80. Dr. Lisa Shah, a practicing physician and professor at John Hopkins University School of Medicine and Georgetown University School of Medicine and Dr. Donald Frey, a professor at Creighton University School of Medicine. T.Ex. 150 and 156. Both physicians testified that Dr. Pilapil’s conduct during all three visits fell below the standard of care in many respects. T.T. V3, pgs. 369, 379-88, 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26.

First, Dr. Pilapil’s history in regards to Emilee’s tremor was inadequate. T.T. V3, pgs. 369, 379-88, 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26. Dr. Pilapil did not learn what body part or parts were having tremors, did not know if the tremors were unilateral or bilateral, the frequency of the tremors, or what made the tremors better or worse. T.T. V3, pgs. 392-409; V4, pgs. 414-26; V5, pgs. 589-613; V6, pgs. 618-26. Dr. Shah and Dr. Frey both testified that seeing a young 20-year old with a tremor is very rare and very serious, therefore a detailed history is critical. T.T. V3, pgs. 392-409; V4, pgs. 414-26; V5, pgs. 589-613; V6, pgs. 618-26. They both testified that the history is one of, if not the most important part of diagnosing any illness and particularly important for a young patient presenting with tremors. T.T. V3, pgs. 369, 379-88, 383, 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26. Mercy’s experts both admitted that Dr. Pilapil took an inadequate history of Emilee’s tremor, particularly so because a

unilateral tremor in a young person can be a sign of something very serious. T.T. V7, pgs. 780, 795; V14, pgs. 1481-1496.

Emilee's experts also testified that a doctor following the appropriate standard of care, especially when dealing with a young person experiencing tremors, should review the patient's prior medical history. T.Ex. 4; T.Ex. 11B. T.T. V3, pgs. 369, 379-88, 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26. Dr. Pilapil did not mention reviewing Emilee's prior records in her history and at deposition had no memory of doing so. T. T. V13, pgs. 1322-23. Dr. Pilapil felt that if the past physical problem isn't present at the time of her visit, then she isn't going to worry about it. T.T. V13, pgs. 1322-26. Dr. Frey explained that had Dr. Pilapil looked back at the prior records, she would have noted multiple concerning aspects of Emilee's past that are clearly not related to anxiety, such as elevated liver enzymes, bilateral swelling of the feet, chest pain, irregular heartbeats, headaches, and abnormal blood labs, which are all abnormal in an otherwise healthy 20-year old girl. T.T. Vol. 5, pgs. 595-96.

Emilee's experts were very critical of the "medical advice" that Dr. Pilapil gave Emilee and her mother. Every expert, plaintiff and defense, testified that neurological conditions classically do "come and go". T.T. V3, pgs. 384, 402-404; V5, pgs. 602-606; V6, pgs. 622, 633; V7, pgs. 769-771. Mercy's neurologist expert agreed that the advice given was simply wrong. T.T. V7, pgs. 757, 769-771. This statement was incorrect because very serious neurological conditions present with neurological symptoms that come and go such as multiple sclerosis, Parkinson's and brain tumors. T.T. V3, pgs. 384, 394-95, 406-08; V5, pgs. 602-606. With all neurological diseases, patients have good days

and bad days. T.T. V3, pgs. 394-95; V5, pgs. 597-99; V7, pgs. 769-71. Dr. Frey testified that giving false medical advice to a patient is extremely dangerous similar to giving the wrong medication. T.T. V5, pgs. 605-06. The patient will rely on that information to their detriment. T.T. V3, pgs. 379-88, 402-405; V5, pgs. 602-06. Emilee and her mother remembered Dr. Pilapil making this statement and feeling a sense of relief that Emilee did not have a neurological disease. T.T. V3, pg. 307. They did not seek another opinion because Dr. Pilapil assured them that Emilee did not have a neurological disease since her tremors came and went and were not constant. T.T. V3, pgs. 301-11; V12, pgs. 1249-51; V13, pgs. 1338-46.

Drs. Shah and Frey opined that given Emilee's young age and the fact she had a unilateral tremor, Dr. Pilapil should have referred Emilee to a neurologist after the first visit. T.T. V3, pgs. 369, 379-88, 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26. This is because internal medicine doctors are not trained to manage or treat a patient's tremor. T.T. V3, pgs. 369, 379-88, 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26. Mercy's expert, Dr. Michael Lefevre, the head of family practice at the University of Missouri, agreed with this as well. T.T. V14, pgs. 1490-96. Dr. Lefevre testified that even with his experience and credentials he would not attempt to treat a patient such as Emilee who presented with unilateral tremors. T.T. V14, pgs. 1490-96. All of the liability experts, both plaintiff and defense, agreed that a unilateral tremor in a 20 year-old, essentially a child, is a very dangerous abnormal neurological finding. T.T. V3, pgs. 369, 379-88, 392-409; V4, pgs. 414-26; V5, pgs. 579-80, 589-613; V6, pgs. 618-26; V14, pgs. 1490-96. Dr. Frey described a unilateral tremor in a 20 year-old as a

“red flag” that must be urgently investigated. T.T. V5, pgs. 597-608. The reason that a unilateral tremor in a young person is particularly concerning is that the differential diagnosis for a unilateral tremor includes many deadly diseases, including a brain tumor, multiple sclerosis, Parkinson’s, amyotrophic lateral sclerosis (ALS and/or Lou Gehrig’s disease), and as here, Wilson’s Disease. T.T. V3, pgs. 384,394-95, 406-08; V5, pgs. 602-06. T.Ex. 213, pgs. 20-22. T.Ex. 106

January 11, 2013 Office Visit

Emilee’s next visit with Dr. Pilapil was on January 11, 2013. T.T. V4, pgs. 417-22. T.Ex. 5. This visit and its record were very brief. T.Ex. 5. Emilee’s liability experts were critical of this visit since Dr. Pilapil failed to follow-up on Emilee’s tremors in any way. T.T. V4, pgs. 417-22; V5, pgs. 608-13. T.Ex. 5. Drs. Shah and Frey testified that this visit fell below the standard of care in that Dr. Pilapil failed to take any history in regards to Emilee’s tremor, failed to perform a neurological exam, and importantly, failed to have any plan to address the tremors and failed to refer Emilee to a neurologist. T.T. V4, pgs. 417-22; V5, pgs. 608-13. Dr. Frey explained that when dealing with a unilateral tremor in a 20-year old, this is a “red flag” issue that absolutely requires follow-up, notably a referral to a neurologist. T.T. V5, pgs. 594 – 613, V6, pgs. 618-26. Dr. Pilapil should have been looking at Emilee’s prior medical history to attempt to fit all of the abnormal issues she was having together. T.T. V5, pgs. 594 – 613, V6, pgs. 618-20. If this had been done, Dr. Pilapil would have known that these worrisome symptoms could not be explained by anxiety, but instead needed a specialist referral immediately. T.T. V6, pgs. 626-27.

After the January 11, 2013 visit, Dr. Pilapil advised Emilee to come back four months later in May when she finished school. T.Ex. 5. T.T. V3, pgs. 310-11. Emilee followed Dr. Pilapil's advice and returned on May 13, 2013. T.Ex. 6. In the four months between the two visits, Emilee's condition continued to deteriorate. T.Ex. 6. T.T. V3, pgs. 311-19. Emilee and Theresa believed her ongoing problems were simply anxiety, because her tremors were not constant but came and went and thus according to Dr. Pilapil meant they were not neurological. T.T. V3, pgs. 311-19.

May 13, 2013 Office Visit

By May 13, 2013, Emilee's tremors progressed to the point of a resting tremor that impacted her ability to write. T.Ex. 6, T.T. V4, pgs. 421-26; V5, pg. 613; V6, pgs. 618-24. On top of this, Emilee was constantly fidgeting and felt weak. T.Ex. 6. Drs. Shah and Frey found that Dr. Pilapil's May 13, 2013 office visit fell below the standard of care. Dr. Pilapil did not document any review of systems on this visit. T.Ex. 6, T.T. V4, pgs. 421-26; V5, pg. 613; V6, pgs. 618-24. Dr. Pilapil still had not taken a thorough history to even identify what part or parts of the body Emilee was experiencing tremors in. T.T. V6, pg. 620. Dr. Pilapil failed to work-up a diagnosis for Emilee's red flag issue, her tremor. T.T. V4, pgs. 421-26. Dr. Pilapil failed to rule-out any life-threatening causes of her right hand tremors. T.T. V6, pgs. 621-26. Dr. Frey, Dr. Shah, and Mercy's liability experts agreed that neither medication nor anxiety cause unilateral tremors. T.T. V4, pgs. 421-26; V6, pgs. 621-26; V14, pgs. 1484-89. Diagnosing Emilee's unilateral (right hand) tremors as related to anxiety or medications made no medical sense because anxiety/medication cause systemic and bilateral tremors. T.T. V4, pgs. 421-26; V6, pgs. 621-26; V14, pg. 1489.

Drs. Shah and Frey opined that this visit again fell below the standard of care for the same reasons as the other visits, those being poor history, no reference to prior records, incorrect medical advice, and no referral to a neurologist. T.T. V4, pgs. 421-26; V5, pg. 613; V6, pgs. 618-26.

Emilee continued to email Dr. Pilapil about her worsening symptoms after the May 13, 2013 visit. T.Ex. 3A and 3B. On May 28, 2013, Emilee advised Dr. Pilapil that her symptoms were worsening, her tremors were worse, she had shakes, fidgets, muscle spasms, sweating, lack of balance, twitch, and she could not write or cut things. T.Ex. 3A. Dr. Pilapil told Emilee to stop taking her Prozac. T.Ex. 3B. A week later, on June 3, 2013, Emilee emailed Dr. Pilapil again. T.Ex. 3C. Emilee explained that it was her first day in physical therapy school and the symptoms she described on the May 28th email continued to worsen, she had trouble concentrating, and felt tired all the time. T.Ex. 3C. In response, Dr. Pilapil stated that “maybe the symptoms you have could be anxiety.” T.Ex. 3C.

June 28, 2013 Office Visit

Emilee’s final visit with Dr. Pilapil prior to the Wilson’s Disease diagnosis was on June 28, 2013. T.Ex. 7. Emilee’s condition continued to worsen. T.Ex. 7. By this visit Emilee was falling, acting like she was drunk, had fatigue, couldn’t sleep, had trouble writing because of tremors, had trouble cutting meat, and her fifth finger seemed to extend outwards. T.Ex. 7. Emilee’s symptoms would occur one day and she would be symptom free the next. T.Ex. 7. Dr. Pilapil explained again to Emilee and Theresa that since the symptoms wax and wane, she believed Emilee’s problems were caused by anxiety, not something neurological. T.Ex. 7. Emilee and her mother specifically asked to be sent to a

neurologist, but Dr. Pilapil insisted the problem was anxiety. T.Ex. 7. T.T. V3, pgs. 326-27, 332-35.

In mid-July 2013, Emilee continued to worsen dramatically. T.Ex. 15. Emilee sent an email to her boyfriend where she explained her symptoms. T.Ex. 15. T.T. V8, pgs. 876-79. Emilee's physical therapy professors noticed that Emilee had trouble with fine motor skills, which was obvious when she tried to take a patient's vital signs. T.Ex. 216, Pgs. 11-17. Her physical therapy professors also noticed that she had trouble with standing from a seated position, difficulty walking, had balance problems, and her voice seemed to be high and pitchy. T.Ex. 216, pgs. 11-17. Emilee's physical therapy professors expressed their concern to Emilee. T.Ex. 216, pgs. 11-17. Emilee told her professors that she had seen a doctor and her doctor told her it was anxiety. T.Ex. 216, pgs. 11-17. Emilee's professors told Emilee that her problems appeared to be neurologic and that she needed to see a neurologist. T.Ex. 216, pgs. 11-17.

In late July 2013, Emilee was forced to withdraw from the physical therapy doctorate program due to her deteriorating condition. T.T. V3, pgs. 337-38. T.Ex. 3G; T.Ex. 210, pgs. 17-22. Emilee deteriorated to the point that her hands and feet were clawing up and her lips were curling out. T.Ex. 10A. Dr. Pilapil told Emilee to breath into a brown bag when she heard this. T.Ex. 10B. Emilee sent emails demanding that Dr. Pilapil order an MRI and refer her to a neurologist. T.Ex. 3M. After Emilee demanded to see a neurologist and get an MRI, Dr. Pilapil placed the order. T.Ex. 3M.

Diagnosis and Treatment of Wilson's Disease

On July 31, 2013, Emilee saw Dr. Oghlakian, a Mercy neurologist. T.Ex. 8. Dr. Oghlakian noted her movement disorder and wanted to rule out serious causes. T.Ex. 213, pgs. 54-58. T.Ex. 8. An MRI was performed on August 8, 2013. T.Ex. 13. Within minutes of the MRI, she was diagnosed with Wilson's Disease. T.Ex. 13. T.T. V3, pgs. 340-41. Dr. Pilapil initially ordered a drug called Penicillamine to treat Emilee's Wilson's Disease. If this drug was given, it would have killed Emilee. T.Ex. 206, pgs. 13-18. T.T. V14, pgs. 1427-28. Fortunately, Emilee's parents researched and found the University of Michigan – Wilson's Disease Center of Excellence that advised not to order Penicillamine as it was extremely dangerous. T.Ex. 206, pgs. 13-18.

Dr. Askari and Dr. Lorincz began treating Emilee at the University of Michigan. T.Ex. 205, pgs. 7-8; T.Ex. 210, pg. 6. Both testified that with Wilson's Disease, early treatment is essential, it is a disease where time is of the essence. T.Ex. 205, pgs. 30-31; T.Ex. 210, pgs. 15-24. In this case, the nine-month delay in treating Emilee caused catastrophic injuries. T.T. V11, pgs. 1138-47. The evidence at trial was that early diagnosis and treatment is critical. T.T. V7, pgs. 745-58; T.T. V11, pgs. 1138-47. T.Ex. 205, pgs. 25-30; T.Ex. 206, pgs. 34-38; T.Ex. 210, pgs. 15-24.

Emilee's expert neurologist, Dr. Ken Fischer, testified that had Emilee been diagnosed and treated in December 2012 or January 2013, she would have led a normal life. T.T. V11 pgs. 1138-47. If she would have been diagnosed and treated in May or June 2013, she would have had some minor physical issues but she could have finished school, had a family, and worked as a physical therapist. T.T. V11, pgs. 1138-47. This is because

Emilee had no severe dystonia until July/August. T.T. V13, pg. 1372. Dr. Pilapil admitted there was no dystonia when she examined Emilee on her June 28, 2013 neurological exam. T.T. V13, pg. 1372; T.Ex. 7. There is no medical documentation of dystonia until Emilee's visit with Dr. Oghlakian on July 31, 2013. T.Ex. 8.

The diagnostic delay not only caused Emilee's condition to deteriorate, but also made treatment far more dangerous. T.T. V11, pgs. 1138-47. T.Ex. 205, pgs. 27-33. Wilson's Disease can be treated when diagnosed early simply by removing copper from the diet and taking a zinc supplement that allows the body to slowly excrete the copper. T.T. V11, pgs. 1138-47. T.Ex. 205, pgs. 27-33.

By the time Emilee was sent to a neurologist and the condition was diagnosed, she was in very bad shape. T.Ex. 8 & 105. She had tremors, transient weakness in the extremities, dystonic posturing, tonic posturing, a pitchy voice, constant fidgeting, her hands and toes would claw in, and her lips would curl out. T.Ex. 3, 8, & 105. Since Emilee's diagnosis was delayed, her copper burden was extensive. T.T. V11, pgs. 1138-47. T.Ex. 205, pgs. 27-33. Emilee was suffering a rapid neurological decline, so her physicians had to start aggressive treatment using a drug called Trientine to remove the copper; however, a risk of the aggressive treatment is further neurological decline. T.T. V11, pgs. 1138-47. T.Ex. 205, pgs. 27-33. After treatment began her rapid decline continued either due to the natural advance of the disease or as a reaction to the drug. T.Ex. 206, pgs. 27-32; T.Ex. 210, pgs. 26-29. Either way, the treatment and decline were a direct result of the delay in diagnosis. T.T. V11, pgs. 1138-47.

Had the condition been diagnosed timely, Emilee would not have needed Trientine and, had it been given, she would not have had a reaction to it, if, in fact her decline was related to Trientine. T.T. V11, pgs. 1138-47. Drs. Lorincz and Fischer both discussed how late diagnosis of Wilson's Disease can cause a worse reaction to Trientine due to excessive copper burden but in Emilee's case her ongoing decline may well have been the natural progression of the disease due to the late diagnosis. T.T. V11, pgs. 1138-47. T.Ex. 211, Pgs. 11-14. In short, if diagnosed earlier more treatment options would have been available to Emilee and she would not have had a reaction to Trientine, if, in fact, she did. T.T. V11, pgs. 1138-47. T.Ex. 211, pgs. 11-14.

Emilee's Catastrophic Damages

Despite aggressive treatment to remove the copper from Emilee's brain and body, Emilee continued to deteriorate to the point that she could no longer walk, talk, swallow, or move any of her extremities. T.T. V3, pgs. 346-60; V8, pgs. 898-910; V12, pgs. 1231-42. Emilee was awake but in a locked-in state, unable to move or speak. T.T. V3, pgs. 354-60; V8, pgs. 898-910; V12, pgs. 1231-42. Emilee was in severe pain as all of the muscles in her body were seized in contractors. T.Ex. 210, pgs. 30-36. She communicated with eye blinks while her family pointed to letters on a letter board spelling out words letter by letter, blink by blink. T.T. V3, pgs. 350-58; V8, pgs. 895-897. Emilee remained in this condition for approximately two and a half years. T.T. V3, pgs. 354-60; V8, pgs. 898-910; V12, pgs. 1231-42. Emilee was fed through a peg tube for a year and half. T.T. V3, pgs. 354-60; V8, pgs. 852-60, 898-910.

As a result of hard work and sacrifices by Emilee, her family, and her rehabilitation caregivers, Emilee made a partial recovery by the time of trial. T.T. V9, pgs. 995-97; V10, pgs. 1047-55. Emilee was able to hobble into the courtroom and testify in front of the jury, albeit with garbled speech that was at times difficult to understand. T.T. V15, pgs. 1529-58. Although Emilee can currently walk and talk in a very impaired manner, the evidence was that she will continue to need 24/7 care for the rest of her life. T.T. V10, pgs. 1047-55. T.Ex. 210, pgs. 45-46, 55-61. The deep centers of Emilee's brain that were destroyed by the failure to diagnose and treat Emilee are the areas that separate adults from children. T.T. V9, pgs. 966-81. When destroyed, the person lacks executive functioning, judgment and control. T.T. V9, pgs. 966-81. T.Ex. 210, pgs. 50-51

The deep brain processes the information from the rest of the brain. T.T. V9, pgs. 966-81. It allows us to move in a normal manner. T.T. V9, pgs. 966-81. Emilee has an awkward swinging gate due to the damage to this area of her brain and falls. T.T. V9, pgs. 966-81. The deep brain controls judgment. T.T. V9, pgs. 976-77. Emilee doesn't know the difference between right and wrong because she cannot process the effects of her actions. T.T. V9, pgs. 976-77.

Part of the deep brain is the caudate nucleus. T.T. V9, pg. 977. The caudate nucleus allows us to have sound judgment. T.T. V9, pg. 977. In experiments on mice, when the caudate nucleus is damaged, a mouse will act like a cat is its mother, which is obviously dangerous for the mouse. T.T. V9, pg. 977. The same goes with Emilee. With her severe brain damage, she no longer recognizes the dangers of promiscuity or unsafe social situations, and has an inappropriate "attraction-affection response". T.T. V9, pgs. 977-78.

The evidence at trial regarding Emilee's mental state is that she is now angry, impulsive, and cruel. T.T. V3, pgs. 362-63; V8, pgs. 854-60. T.Ex. 210, pgs. 50-51. She will scream and become violent for no reason, she will threaten to run away, she has no safety awareness, she cannot pay attention, and cannot calculate basic monetary transactions. T.T. V3, pgs. 362-63; V8, pgs. 854-60. Examples at trial included Emilee getting online and inviting strangers to her family home at night, physically and verbally assaulting family members, grabbing the steering wheel and trying to wreck a moving car, and jumping out of a car while it was moving. T.T. V3, pgs. 362-63; V8, pgs. 854-60.

Emilee's sister, Alaina, quit her professional career to live with and care for Emilee. T.T. V8, pg. 885. She described trying to live with Emilee now as being in an abusive relationship. T.T. V8, pgs. 854-60. Alaina could not handle living with Emilee and asked her parents to take her back. T.T. V8, pgs. 854-60. Emilee's mother, Theresa, describes Emilee as a totally different person now. T.T. V3, pgs. 362-63. Emilee went from a sweet, loving straight A student, to being labile and angry. T.T. V3, pgs. 362-63. Emilee will curse her family out for no reason. T.T. V3, pgs. 362-63. One of Emilee's aids, Brent Crawford, who spent 100s of hours working with Emilee, describes Emilee as a 12-year-old stuck in a 24-year-old body. T.T. V12, pgs. 1232-36. Emilee has no filter. T.T. V12, pgs. 1232-36. She has no idea if she is hurting someone else's feelings by what she says. T.T. V12, pgs. 1232-36. Emilee simply does not comprehend her actions. T.T. V12, pgs. 1232-36. Emilee, at times, will physically attack her mother. T.T. V12, pg. 1235.

The significant physical and mental impairments that exist are expected to worsen over time. T.T. V9, pgs. 954-57. Absent appropriate and ongoing observation and

treatment, her decline will be much steeper and much sooner. T.T. V9, pgs. 957-59; V10, pgs. 1037-42. Large portions of Emilee's deep brain are dead and will not return. T.T. V9, pgs. 954-57. One of the primary issues with Emilee is that her remaining brain cells are doing triple-duty. T.T. V9, pgs. 954-57. As Emilee gets older, the cells working and doing the work of three cells will die, resulting in three times the damage. T.T. V9, pgs. 954-57. This was commonly seen in post-polio patients, a medical phenomenon known as neuroplasticity. T.T. V9, pgs. 954-57. As Emilee ages, her condition will worsen dramatically. T.T. V9, pgs. 954-57. Emilee will never be able to safely drive, work, or be independent due to her physical, mental, and psychiatric conditions. T.T. V9, pgs. 968-81, 987-95; V10, pgs. 1047-55.

The only evidence at trial concerning past and future economic loss was that her past medical bills totaled \$848,541.15, and \$462,715.21 was paid to satisfy those bills. Her pre-trial lost earnings were \$43,759. Her future lost earnings are \$3,186,752. The present value of her future medical costs total \$17,758,161. T.Ex. 194 & 245. It was uncontested that Emilee would never have meaningful employment in the future. T.Ex. 218, pgs. 42 - 48. The evidence at trial was that the uncontested economic damages were very conservative. T.T. V10, pgs. 1037-42. Dr. Belz described how his plan is a preventative plan and that an ounce of prevention is worth a pound of cure. T.T. V10, pgs. 1037-42. The life care plan does not factor in falls, surgeries, contractures, or the myriad of complications she will likely endure due to her condition. T.T. V10, pgs. 1037-42. If Emilee were to take a bad fall, it would be devastating to her and would set her back miles, but he did not factor those costs into the plan. T.T. V10, pgs. 1037-42. Essentially, the

life care plan assumes that she is perfectly compliant and that there are no unforeseen complications. T.T. V10, pgs. 1037-42. There was no competing evidence as to the life care plan or the economic damages Emilee sustained.

Jury Verdict

On March 3, 2017, the jury returned a verdict in favor of Emilee and against Mercy in the total amount of \$28,911,000. L.F. V3, pgs. 447-48. Approximately 85% of the jury's award was for economic damages. L.F. V3, pgs. 447-48. The jury awarded \$511,000 in past medical and wage loss, \$1,000,000 in past non-economic damages, \$21,000,000 to fund Emilee's future medical cost, \$3,200,000 in future wage loss, and \$3,200,000 in future non-economic damages. L.F. V3, pgs. 447-48.

March 8, 2017 Judgment

On March 8, 2017, Appellant submitted a proposed judgment. L.F. V3, pgs. 449-52. This proposed judgment mirrored the jury's verdict and included post-judgment interest. L.F. V3, pgs. 449-52. There was no objection to the proposed judgment and there was no application to apply future periodic payments made prior to the entry of judgment. L.F. V3, pgs. 449-52. On March 8, 2017, the circuit court entered judgment. L.F. V3, pgs. 453-54. On March 9, 2017, the circuit court set-aside the judgment to hear evidence concerning the application of § 538.220.2, RSMo 2016. L.F. V3, pg. 474. Emilee opposed this motion and raised her constitutional concerns regarding § 538.220, RSMo 2016, with specificity. L.F. V3, pgs. 462-73, V6, pgs. 744-45.

Periodic Payment Hearing

On March 16, 2017, the court heard evidence as to the application of periodic payments and future medical damages. L.F. V6, pg. 803. March 16, 2017 Post-Trial Hearing (hereinafter “P.T.Hr.”) pgs. 19-34. Evidence was presented that if all of the future medical damages are subjected to periodic payments at the statutorily required rate, Emilee would be approximately \$40 million short of what she needs to fund her life care plan. P.T.Hr., pgs. 19-34. The economist explained that that the present value figures the jury heard were discounted by rates up to 5.18%. P.T.Hr., pgs. 19-34. If the economist’s present value figure is used as the periodic payment figure, then Emilee’s future payments will be grossly insufficient and she will not have nearly enough money to pay for her future medical needs. P.T.Hr., pgs. 19-35.

In short, ordering future payments from funds already discounted to present value results in double discounting. P.T.Hr., pgs. 19-34. First by the present value discount analysis at trial, then again by applying an interest rate far below what was used in the present-value analysis. P.T.Hr., pgs. 19-34. Appellant argued that subjecting the future medical damages to an interest rate contrary to the interest rate used in the present-value analysis by definition deprived Emilee of the full value of the jury’s award. L.F. V3, pgs. 462-73, V6, pgs. 747-58. P.T.Hr., pgs. 19-34. Importantly, this will leave Emilee unable to pay for her future medical expenses into the future. L.F. V6, pgs. 747-58. P.T.Hr., pgs. 19-34. At no time during the hearing, or by motion, did Mercy object to post-judgment interest. P.T.Hr., pgs. 19-57.

March 20, 2017 Judgment

On March 20, 2017, the court again entered judgment. L.F. V6, pgs. 816-18. As to periodic payments of future medical damages, the court required that \$17,758,161 be paid in lump sum, which was the present value of the future medical care needed to fund the life care plan. L.F. V6, pgs. 816-18. The circuit court required that \$3,241,839 be paid in periodic payments. L.F. V6, pgs. 816-18. On all amounts to be paid in future periodic payments, the judgment also required Mercy to pay the attorney's fee portion of the future periodic payments in lump sum pursuant to § 538.220.4, RSMo 2016. L.F. V6, pgs. 816-18. Further, the judgment included post-judgment interest to accrue at 5.75%. L.F. V6, pgs. 816-18.

Post-Judgment Motions Filed within 30 days

On April 7, 2017, Mercy filed post-trial motions to amend the judgment, for remittitur, and for judgment notwithstanding the verdict. L.F. V3, pgs. 475-505. In these motions, there was no objection to post-judgment interest that was included in the March 20, 2017 Judgment. L.F. V3, pgs. 475-505.

Post-Judgment Motions beyond 30-days

On April 27, 2017, more than 30 days after the March 20, 2017 or the March 8, 2017 Judgments, that both included post-judgment interest, Mercy moved to amend the judgment objecting to the inclusion of post-judgment interest. L.F. V6, pgs. 819-23. Appellant moved to strike this motion since it was untimely and the trial court lacked authority to remove post-judgment interest. L.F. V6, pgs. 826-29.

June 23, 2017 Judgment Entered (2nd Amended Judgment)

On June 21, 2017, the circuit court heard argument on the pending motions. L.F. V9, pg. 1301. On June 23, 2017, the circuit court signed an amended judgment and ruled on all outstanding motions. L.F. V9, pgs. 1302-05; Appendix A1-4 (hereinafter “A”). The circuit court sustained the second motion to amend the judgment that was filed more than 30 days after judgment was entered, and removed post-judgment interest from the judgment. L.F. V9, pg. 1302; A4. The circuit court further modified the future periodic payments schedule by now allocating \$10,000,000 to future periodic payments at an interest rate of 1.2%, which was far less than the discount rate used by Emilee’s economist at trial. L.F. V9, pgs. 1303-05; A1. T.T. V15, pgs. 1590, 1595-1605; P.T.Hr. 20-35. T.Ex. 245. Further, the amended judgment does not require the attorney’s fees portion of the periodic payments to be paid in lump sum. L.F. V9, pgs. 1303-05; A1.

On June 29, 2017, Emilee moved to amend the judgment objecting to the periodic payment schedule, the failure to require attorney’s fees to be paid in lump sum, and the failure to include post-judgment interest in the Amended Judgment. L.F. V9, pgs. 1309-19. On June 30, 2017, Emilee filed a notice of appeal in the circuit court seeking appellate review in this Court. L.F. V10, pgs. 1375-1477. The circuit court lost jurisdiction over the judgment on July 6, 2017, 90 days after the last authorized post-trial motion was filed. L.F. V3, pgs. 475-505; Rule 78.06.

POINTS RELIED ON

I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT’S REQUEST TO APPLY PERIODIC PAYMENTS OF THE FUTURE MEDICAL DAMAGES BECAUSE THE PERIODIC PAYMENT SCHEDULE ESTABLISHED BY THE COURT REQUIRING \$10,000,000 TO BE PAID IN EQUAL MONTHLY INSTALLMENTS OVER THE NEXT 57 YEARS AT AN INTEREST RATE OF 1.2% IS UNREASONABLE, ARBITRARY, AND AN ABUSE OF DISCRETION IN THAT ORDERING PAYMENT OF FUTURE MEDICAL DAMAGES IN PERIODIC PAYMENTS AT AN INTEREST RATE BELOW THAT USED TO DISCOUNT TO PRESENT VALUE ASSURES THAT APPELLANT WILL NOT RECEIVE THE FULL VALUE OF THE VERDICT AS IS REQUIRED BY *WATTS V. LESTER E. COX*.

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

Vincent v. Johnson, 833 S.W. 2d 859 (Mo. banc 1992)

Section 538.220, RSMo 2016

II. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT’S REQUEST TO APPLY PERIODIC PAYMENTS OF THE FUTURE MEDICAL DAMAGES BECAUSE § 538.220.2, RSMo 2016, VIOLATES DUE PROCESS IN THAT IT IS FUNDAMENTALLY IRRATIONAL AND ILLOGICAL TO PERMIT RESPONDENT TO PAY FUTURE MEDICAL DAMAGES PERIODICALLY THAT WERE REDUCED TO PRESENT

VALUE PURSUANT TO § 538.215.2, RSMo 2016, OVER 57 YEARS AT A MUCH LOWER AND CONTRARY INTEREST RATE THAN WAS USED TO COMPUTE THE PRESENT-VALUE OF THE JURY'S AWARD.

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

Vincent v. Johnson, 833 S.W. 2d 859 (Mo. banc 1992)

Mo. Const. art. I, § 10.

III. THE TRIAL COURT ERRED IN ENTERING THE JUNE 23, 2017 JUDGMENT BECAUSE THE JUDGMENT DOES NOT FOLLOW THE REQUIREMENTS OF § 538.220.4, RSMo 2016, CONCERNING ATTORNEY'S FEES IN THAT THE \$10,000,000 ALLOCATED TO BE PAID IN PERIODIC PAYMENTS IN THIS JUDGMENT DOES NOT REQUIRE MERCY TO PAY THE ATTORNEY'S FEE PORTION IN LUMP SUM AS REQUIRED BY § 538.220.4, RSMo 2016, AND EVERY CASE INTERPRETING THE STATUTE.

Vincent v. Johnson, 833 S.W. 2d 859 (Mo. banc 1992)

Long v. Mo. Delta Med. Ctr., 33 S.W.3d 629 (Mo. App. 2000)

Roesch v. Ryan, 841 F.Supp. 288 (E.D. Mo. 1993)

Baker v. Guzon, 950 S.W.2d 635 (Mo. App. 1997)

Section 538.220.4, RSMo 2016

IV. THE TRIAL COURT ERRED IN AMENDING THE JUDGMENT TO TAKE OUT POST-JUDGMENT INTEREST BECAUSE THE TRIAL COURT LOST JURISDICTION TO ALTER THE POST-JUDGMENT INTEREST IN THAT MERCY FAILED TO RAISE THE ISSUE WITHIN 30 DAYS OF THE ENTRY OF EITHER JUDGMENT THAT GRANTED POST-JUDGMENT INTEREST AND AS SUCH THE JUDGMENT WAS FINAL PURSUANT TO RULE 78.04.

Seitz v. Seitz, 107 S.W.3d 478 (Mo. App. 2003)

McGuire v. Kenoma, LLC, 447 S.W.3d 659 (Mo. banc 2014)

Mo. R. Civ. P. 75.01

Mo. R. Civ. P. 78.04

Mo. R. Civ. P. 78.07

Mo. R. Civ. P. 81.05

V. THE TRIAL COURT ERRED IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES APPELLANT'S FUNDAMENTAL PROPERTY RIGHTS AS GUARANTEED BY ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT THE FAILURE TO AWARD POST-JUDGMENT INTEREST AMOUNTS TO AN UNLAWFUL TAKING OF THE FULL VALUE OF EMILEE'S VERDICT DUE TO THE TIME VALUE OF MONEY.

Seaboard Air Line Ry Co. v. U.S., 261 U.S. 299, 306 (1923)

Labrayere v. Bohr Farms, 458 S.W.3d 319, 331 (Mo. banc 2015)

Dieser v. St. Anthony's Med. Ctr., 498 S.W.3d 419 (Mo. banc 2016)

Mo. Const. art. I, § 2.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ENTERING THE JUNE 23, 2017 AMENDED JUDGMENT BECAUSE THE PERIODIC PAYMENT SCHEDULE ESTABLISHED BY THE COURT REQUIRING \$10,000,000 TO BE PAID IN EQUAL MONTHLY INSTALLMENTS OVER THE NEXT 57 YEARS AT AN INTEREST RATE OF 1.2% IS UNREASONABLE, ARBITRARY, AND AN ABUSE OF DISCRETION IN THAT ORDERING PAYMENT OF FUTURE MEDICAL DAMAGES IN PERIODIC PAYMENTS AT AN INTEREST RATE BELOW THAT USED TO DISCOUNT TO PRESENT VALUE ASSURES THAT APPELLANT WILL NOT RECEIVE THE FULL VALUE OF THE VERDICT AS IS REQUIRED BY *WATTS V. LESTER E. COX*.

a. Standard of Review

This Court reviews a circuit court order on periodic payment for abuse of discretion. *Watts* at 637. “A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Id.* (internal citations and quotation marks omitted).

b. Analysis

The June 23, 2017 judgment applies a periodic payment interest rate contrary and lower than the interest rate used in the present-value and medical inflation analysis presented at trial. This guarantees that inflation in health care costs will result in Emilee

having insufficient funds to pay her future medical costs. Furthermore, this assures that Emilee will not receive the full value of the verdict granted her by the jury which is violative of this Court's holding in *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. Banc 2012) and violative of § 538.220, RSMo 2016, because it will create a future burden on government social services.

Appellant acknowledges this Court has applied § 538.220, RSMo 2016, to give the circuit court discretion to order periodic payments in "whole or part" but the payment schedule must provide the full value of the verdict to Emilee. *Watts*, 376 S.W.3d at 648. It is undisputed that the 2nd Amended Judgment applies a contrary interest rate than was used at trial, and therefore, by definition deprives Emilee of the full value of what the jury awarded and forces her to seek State assistance, as she is now.

Section 538.220.0 states:

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.

This Court interpreted § 538.220.2, RSMo 2016, to mean that circuit courts have “discretion to make ‘whole or part’ of the future damages award subject to future periodic payments.” *Watts*, 376 S.W.3d at 646-647; *Vincent v. Johnson*, 833 S.W.2d 859, 866 (Mo. banc 1992) (“The language of § 538.220.2 is a general grant of equity powers to the circuit court.”). The circuit court is “expressly left the issue of how to pay future damages and at what interest rate.” *Watts*, 376 S.W.3d at 647. The trial court is granted discretion to determine an appropriate periodic payment scheduled based on the plaintiff’s future medical needs. *Id.*

The intent of chapter 538 “is to [1] reduce the cost of medical malpractice, [2] to spread that cost over time and [3] to guard against squandering the judgment while **reducing future burdens on government social services.**” *Id.* at 646-647, *relying on Vincent*, 833 S.W.2d at 868 (emphasis added). “Each plaintiff’s future medical costs will be spread out over vastly differing time horizons.” *Watts*, 376 S.W.3d at 646 – 647. “The legislature did not intend that ... a potentially hostile opposing party decide whether an injured person will receive sufficient funds to pay for medical needs in a timely manner.” *Id.* The trial court must “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 lump sum and

what portion will be paid out over a periodic payment schedule.” *Id.* at 647.

Since future medical damages are required to be reduced to present value by § 538.215, RSMo 2016, the periodic payment schedule cannot use a contrary interest rate. *Id.* at 647. “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 the interest rate used in the periodic payments schedule is contrary to the inflation in health care costs, this “virtually guarantee[s]” a plaintiff, like the plaintiff in *Watts*, will have “insufficient funds to pay his future medical costs.” *Id.* When this occurs, the future medical payments schedule provides “none of the financial security intended by the statute.” *Id.*

This Court specifically held that “once a present value reduction was made, use of an inconsistent future damages interest rate guaranteed that the jury’s damages award would not actually cover [plaintiff’s] future medical damages and, therefore, would **take from him the full value of the jury’s award.**” *Id.* (emphasis added). If the full value of the jury’s award is taken from the plaintiff such that they can no longer afford their future medical care, that application of § 538.220, RSMo 2016, is arbitrary and unreasonable. *See Id.*

The June 23, 2017 Judgment applies an interest rate to future medical damages contrary to the present value interest rate, which is by definition arbitrary and unreasonable. *Id.* At trial, and as explained in the March 16, 2017 post-trial hearing, Emilee’s future medical damages were reduced to present value by long-term investment rates given that

her damages spanned 57 years. P.T.Hr. pgs. 20-35. For long-term rates, the economist discounted the future medical damages by up to 5.18%. P.T.Hr., pg. 26. This is a reasonable discount rate given the length of time the money will be invested and allowed to grow, if paid in lump sum, so that it can cover the future medical costs factoring in future medical inflation. *Id.* The June 23, 2017 Judgment subjects \$10,000,000 to a much lower interest rate of 1.2%, as required by § 538.220, RSMo 2016. By definition, if the present value figure was reduced by 5.18% but is only grown by 1.2%, there will not be sufficient funds to pay for Emilee's medical care into the future. Indeed, 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% rate, it would result in a shortfall of \$39,986,439. P.T.Hr., pg. 30. This shortfall will ultimately be born by the State because the June 23, 2017 Judgment guarantees Emilee will be forced back on state assistance and thus will create a massive state liability.

There is absolutely no evidence in the record that subjecting \$10,000,000 to periodic payments complies with *Watts* or any of the aims of § 538.220, RSMo 2016. The \$10,000,000 figure is completely arbitrary. There was no evidence presented at trial by Mercy or after that allowing \$10,000,000 in periodic payments at a 1.2% interest rate would cover Emilee's future medical needs. The evidence at trial and at the hearing showed that Emilee's future medical cost factoring in inflation total over \$56 million before reducing to present value. P.T.Hr., pgs. 21-22, T.T. V 15, pgs. 1590-1603. Logically, since \$21 million being subject to periodic payments creates a \$40 million shortfall, subjecting \$10 million to periodic payments would create approximately a \$20 million shortfall. P.T.Hr.,

pg. 30.

Originally, the circuit court correctly complied with *Watts* by requiring Mercy to pay \$17,758,161 in lump sum, which was the undisputed present value amount that it would take to fund Emilee's future medical needs. P.T.Hr. pgs. 19-35; T.Ex. 245. Appellant asserts that the only possible way to comply with § 538.220, RSMo 2016, and *Watts*, is to require the entire amount of the present value calculation for future medical damages be paid in lump sum or use the grown cost of approximately \$56 million and subject that amount to periodic payments. P.T.Hr., pgs. 19 – 35. The circuit court was given this option, and originally correctly decided to require \$17,758,161 be paid in lump sum in the March 20, 2017 judgment. L.F. V6, 816-18.

Important questions to ask in determining a future payment schedule include: (1) are there funds from a settlement with another party to meet immediate payment requirements; (2) what are the current and future needs of the injured plaintiff; (3) what alternatives exist to guarantee that those future needs are met; (4) what are current prudent investment practices in terms of length of investment and interest rates; and (5) what is the federal tax status of the future payments. *Vincent*, 833 S.W.2d at 868.

In reviewing the factors from *Vincent*, it is evident that the June 23, 2017 Judgment is completely arbitrary and unreasonable. *Vincent*, 833 S.W.2d at 868. Indeed, there is no settlement with another party to pay for immediate medical needs. At this point, Emilee's family and the State are shouldering this burden. The evidence at trial is that Emilee will need 24/7 care from now until the end of her life, which represented the vast amount of her future medical needs. Emilee has no other alternatives, other than relying on family and

governmental services, to provide for her 24/7 care. And finally, no prudent financial advisor would recommend that Emilee place money that she needs decades into the future in a rate that has a full maturity in one year, as is required by § 538.220, RSMo 2016. The June 23, 2017 Judgment requires Emilee to seek State assistance, which is directly contrary to the aims of § 538.220, RSMo 2016. The legislature did not intend for the State to shoulder Mercy's negligence.

There is absolutely no evidence, logic, or reason as to how subjecting \$10 million to periodic payments would in any way pay for Emilee's future medical needs or give any security to the State that Emilee will no longer rely on the State for services. Critical to Emilee, the 2nd Amended Judgment prevents her from having sufficient funds to pay for 24/7 care, a life or death aspect of the life care plan. T.T. V10, pgs. 1047-55. Instead, Emilee is now guaranteed to not have sufficient funds to pay for her future medical care, which will require her to seek governmental social services. Subjecting \$10 million to future periodic payments violates *Watts* by arbitrarily taking from her the full value of the verdict, but it also makes it far more likely Emilee will continue to have to stay on governmental social services.

Appellant requests the case be remanded to the circuit court with instructions to amend the judgment to ensure that Emilee receives the benefit of the jury's award for future medical care.

II. THE CIRCUIT COURT ERRED IN ENTERING THE JUNE 23, 2017 AMENDED JUDGMENT BECAUSE § 538.220.2, RSMo 2016, VIOLATES DUE PROCESS IN THAT IT IS FUNDAMENTALLY IRRATIONAL AND ILLOGICAL TO PERMIT RESPONDENT TO PAY FUTURE MEDICAL DAMAGES PERIODICALLY OVER 57 YEARS THAT WERE REDUCED TO PRESENT VALUE AT A CONTRARY INTEREST RATE THAN WAS USED TO COMPUTE THE PRESENT VALUE OF THE JURY'S AWARD.

a. Standard of Review

The constitutional challenge to a statute is reviewed de novo by this Court. *Watts*, 371 S.W.3d at 637. If a statute clearly contravenes a constitutional provision it will be held unconstitutional, overcoming the presumption it is valid. *Id.*

b. Analysis

The constitutionality of § 538.220, RSMo 2016, was questioned in *Watts* and not ultimately resolved. In *Watts*, this Court found that the application of the periodic payments was arbitrary and unreasonable by subjecting half of the future medical damages award to periodic payments at a contrary interest rate than was used in the present value analysis, which prevented the plaintiff from receiving the full value of his jury award. The Court attempted to read the statute in a manner consistent with the Missouri Constitution. Under *Watts*, it appears that the constitutionality of § 538.220, RSMo 2016, is subject to its application. Appellant contends that if the plain language of § 538.220, RSMo 2016, is applied, it is blatantly unconstitutional as it requires all future medical damages to be doubly discounted, one in the present value analysis and then again by application of

§ 538.220, RSMo 2016.

Section 538.220, RSMo 2016, runs afoul of Article I, section 10 of the Missouri Constitution because it is legislation that deprives Emilee of the full value of the damages she was awarded. Article I, section 10 provides that no person shall be deprived of life, liberty or property without due process of law. Mo. Const. art. I, § 10. Due process requires that a legitimate legislative purpose be furthered by rational means. *See generally Doe v. Phillips*, 194 S.W.3d 833, 844-45 (Mo. banc 2006). A fundamental right is a right “explicitly or implicitly guaranteed by the Constitution”. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991). Hostile legislation cannot impede on a right guaranteed by the Constitution. *Watts*, 376 S.W.2d at 633; *Missouri Alliance for Retired Am. v. Dept. of Labor and Indus. Relations*, 277 S.W.3d 670, 682 (Mo. banc 2009) (a statute may not infringe on a constitutional right; if the two are in conflict, then it is the statute rather than the constitution that must give way). Emilee has the right for a jury to determine her damages and that right must “remain inviolate”. *Watts*, 376 S.W.3d at 637-646.

Appellant contends that while § 538.220, RSMo 2016, has been interpreted to give the circuit court discretion to allocate future medical damages in “whole or in part”, this does not save the statute from its constitutional failures because any “part” of a present value award paid in the future is taking from the victim. The “part” of future medical damages that are subject to the statutory interest rate required to be used in § 538.220, RSMo 2016, will always deprive the plaintiff the full value of her award since it by design is unrealistically low and far below recognized medical inflation.

Section 538.220, RSMo 2016, requires that future medical damages be paid as follows:

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.

Section 538.220.2, RSMo 2016.

The constitutional deprivation and resultant unfairness of applying § 538.220, RSMo 2016, to future medical payments is conceptually easy to see. In order to honestly reduce future cost to present value, as required, an economist must use long term treasury rates taking in to account the ultimate year of need. Long term rates are virtually always much higher than short term rates. Thus the malpractice victim's future damages are reduced by a large long term rate, when the court then applies periodical payments applying much lower short term rates, the future funding will be insufficient with 100% mathematical certainty.

The interest rate that is required to be used in § 538.220, RSMo 2016, by definition takes the full value of the jury's award away since it requires a one-year rate to be applied to any future medical damage, no matter how far into the future those damages fall. Section 538.215.2, RSMo 2016, requires that the future damages be calculated and presented in

present value numbers while § 538.220.2, RSMo 2016, requires the trial court to ignore the interest rate used in the present value analysis, and instead use the fifty-two-week United States Treasury bill (“Yearly T Bill Rate”). The Yearly T Bill Rate is the amount of interest the government will guarantee for a **one-year time frame**. The Yearly T Bill Rate ignores the amount of medical inflation that will occur in the future and ignores the interest rate used to compute the present value analysis at trial.

This case epitomizes why the rate required to be used in § 538.220, RSMo 2016, is unconstitutional. Consistent with § 538.215.2’s, RSMo 2016, statutory requirement, Appellant’s economist at trial explained medical inflation growth rates and how those rates were discounted to present value. P.T.Hr. pgs. 19-35. Missouri law required the economist to use a methodology that is “reasonably relied upon by experts in the field” and must otherwise be “reasonably reliable”. Section 490.065, RSMo Supp. 2017. The economist at trial did not use the Yearly T Bill Rate to discount damages that would occur 57 years in the future as that is economically irrational, although that would create far higher damages, precisely the opposite of what § 538.220, RSMo 2016, intends. Instead, the future medical damages were discounted in a reasonably reliable manner based on a laddered interest rate depending on when the funds would need to be used throughout the 57 remaining years of Emilee’s life. If Emilee had a medical need in five years, a five year federal funds rate was used, if the cost was in twenty years, a twenty year federal funds rate was used, etc. P.T.Hr. pgs. 19-35; Ex. 245; T.T. V15, pgs. 1590-1603. The economist discounted Emilee’s future medical damages by reasonable long-term rates up to 5.18%. P.T.Hr. pgs. 19-35.

Applying § 538.220, RSMo 2016, to this case in effect doubly discounts the value of future medical damages, thereby ensuring that Emilee will *never* receive the full value of her award. Emilee's future medical damages were already discounted in the present value analysis, to then discount the same damages again strips the full value of the jury's award and makes it far more likely Emilee will go to the State for assistance.

It is anticipated that Mercy will claim that the statute is not unconstitutional claiming that plaintiffs can simply use the yearly T Bill Rate in their present value analysis. This is simply incorrect. The economist must use a generally accepted economic method in order for his/her testimony to be admissible. Section 490.065, RSMO Supp. 2017. Using short term rates to reduce long term future payments is not a generally accepted economic method and jurors will know this is inappropriate. The only other option would be to explain the legislation to the jury or instruct the jury on the legislation neither of which is allowed by this statute, MAI or general case authority.

What Mercy wants is exactly what occurred here. Have the economist discount using sound and accepted economic modeling and then apply for periodic payments requesting a lower rate after the verdict. The practical and unconstitutional result of this double discounting is a victim of medical malpractice is left with inadequate medical funding which endangers their life and the State's finances.

III. THE TRIAL COURT ERRED IN ENTERING THE JUNE 23, 2017 JUDGMENT BECAUSE THE JUDGMENT DOES NOT FOLLOW THE REQUIREMENTS OF § 538.220.4, RSMo 2016, CONCERNING ATTORNEY'S FEES IN THAT THE \$10,000,000 ALLOCATED TO BE PAID IN PERIODIC PAYMENTS IN THIS JUDGMENT DOES NOT REQUIRE MERCY TO PAY THE ATTORNEY'S FEE PORTION IN LUMP SUM AS REQUIRED BY § 538.220.4, RSMo 2016, AND EVERY CASE INTERPRETING THE STATUTE.

a. Standard of Review

The interpretation of a Missouri statute is a question of law that this Court reviews de novo. *McGuire*, 447 S.W.3d at 659. When there is no factual dispute, the application of the statute is also reviewed de novo. *Id.*

b. Analysis

The trial court erred in failing to 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. The March 20, 2017 Judgment correctly required lump sum payments of all attorney's fees that were part of the periodic damages award. The law is unanimous amongst Missouri statute, Missouri cases, and Federal court precedent that when future medical damages are subject to periodic payments, attorney's fees are supposed to be paid in lump sum, then periodic payments are taken out of the remainder. Section 538.220.4, RSMo 2016, states in pertinent part:

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.

Section 538.220.4, RSMo 2016.

Missouri Courts have dealt with this precise issue multiple times and always complied with the plain meaning of the statute that the attorney's fee portion of future medical payments must be paid in lump sum when the judgment becomes final. One example is *Long v. Missouri Delta Med. Ctr.*, 33 S.W.3d 629 (Mo. App. S.D. 2000), (abrogated, in part, on other grounds by *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d, 146 (Mo. banc. 2003)). In *Long*, the defendant argued that requiring the attorney's fees be paid out of the initial lump sum payment created an unjust result, in that attorney's fees could be paid based on future damage awards that never will be received if the plaintiff dies. *Id.* at 646; *see also* § 538.220.5, RSMo 2016. The Southern District rejected this argument and held that the trial court properly interpreted the statute in determining that attorney's fees are to be paid when the judgment becomes final because "[o]f course, most of the legal work had been done at that time". *Long*, 22 S.W.3d at 646-648.

Likewise, in *Baker v. Guzon*, 950 S.W.2d 635 (Mo. App. 1997), the defense argued that the attorney's fee portion of future medical periodic payments should not be paid in lump sum. The Eastern District rejected this argument, holding that "[w]e find that the trial court did not err in entering an order that first deducted attorney's fees from the future damages award before ordering periodic payments." *Id.* at 648. Likewise, the Eastern

District held that since the statute expressly requires attorney’s fees to be paid in lump sum, it is § 538.220’s, RSMo 2016, intent to have expenses paid in lump sum as well. *Id.*

Federal precedent applying Missouri law is likewise unanimous that attorney’s fees must be paid in lump sum. In *Roesch v. Ryan*, 841 F.Supp. 288 (E.D. Mo. 1993), the District Court held “the statute makes clear that funds for payment of attorney’s fees must be available from the initial payment and should not, as suggested by defendant, be paid over time, even though the future damages are paid over time.” *Id.* at 292. The District Court relied on this Court’s analysis in *Vincent v. Johnson*, 833 S.W.2d 859, 866 (Mo. banc 1992), wherein the Court outlined which damages would be paid in lump sum versus those in future periodic payments:

The provisions of § 538.220 give the Circuit Court, in the absence of a court approved agreement between the parties, discretion in establishing the plan for future payments – with two exceptions. First, all past damages must be paid in lump sum at the time of the judgment. Section 538.220.1. Second, it is presumed that absent the attorney’s agreement, attorneys’ contingent fees will be paid at the time of judgment. Section 538.220.4. The statute does not require any other amounts to be apportioned to future payments.

Id. Relying on *Vincent* and the plain language of §538.220.4, RSMo 2016, the court explained how the calculation should be done, that the attorney’s fees portion of periodic payments are paid in lump sum and the remainder is subject to periodic payments. *Id.*

Every case facing this precise issue has unanimously held that attorney’s fees must be paid in lump sum when the judgment becomes final. This is a plain reading of the statute, the case law, and common sense in that Appellant’s attorneys will likely not be alive in 57 years. Accordingly, the trial court erred in failing to require Mercy to pay the attorney’s fees portion of the \$10,000,000 subjected to periodic payments in lump sum.

The judgment should be amended such that any amounts applicable to future periodic payments must have attorney's fees (40%) deducted and ordered to be paid in lump sum.

IV. THE TRIAL COURT ERRED IN REMOVING POST-JUDGMENT INTEREST FROM THE JUNE 23, 2017 JUDGMENT BECAUSE THE TRIAL COURT LOST JURISDICTION TO ALTER POST-JUDGMENT INTEREST IN THAT MERCY FAILED TO RAISE THE ISSUE WITHIN 30 DAYS OF THE ENTRY OF EITHER JUDGMENT THAT GRANTED POST-JUDGMENT INTEREST AND AS SUCH THE JUDGMENT WAS FINAL PURSUANT TO RULE 78.04.

a. Standard of Review

“[T]he rules of the Supreme Court of Missouri are reviewed de novo because this Court interprets its rules by applying the same principles used for interpreting statutes.” *McGuire*, 447 S.W.3d at 662 (internal citations and quotation marks omitted).

b. Analysis

The circuit court erred by sustaining the “second motion to amend judgment”, which was not timely filed and/or authorized under the Missouri Rules of Civil Procedure, which renders the Amended Judgment void. Given that Mercy failed to raise post-judgment interest in a timely authorized post-trial motion, the trial court lost authority over that portion of the Judgment under clear Missouri Rules. Rules 75.01, 78.04, & 81.05(a)(2).

Missouri Rules are abundantly clear on this issue. Authorized post-trial motions must be filed within 30 days of the entry of judgment. Rule **75.01 – Judgments, Control by Trial Court** states in pertinent part:

The trial court retains control over judgments during the **thirty-day period after entry of judgment** and may, after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend, or modify its judgment within that time...

Id. (emphasis added).

Rule **78.04 – Motion for New Trial – Time for Filing** states in pertinent part:

Any motion for new trial and any **motion to amend the judgment** or opinion shall be filed **not later than thirty days after the entry of judgment**.

Id. (emphasis added).

Rule **78.07 - After-Trial Motion – Allegations of Error Required**, states in pertinent part:

In jury tried cases... allegations of error **must** be included in a motion for a new trial in order to be preserved for appellate review...

In all cases, allegations of error relating to the **form or language of the judgment, including the failure to make statutorily required findings**, must be raised in a motion to amend the judgment in order to be preserved for appellate review.

Id. (emphasis added).

Rule **81.05 – Judgments, When Final** states in pertinent part:

A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed...

If a party timely files an authorized after-trial motion, the judgment becomes final at the earlier of...

- A. Ninety days from the date the last timely motion was filed, on which date all motions not ruled shall be deemed overruled, or
- B. If all motions have been ruled, then the date of ruling of the last motion to be ruled or thirty days after entry of judgment, whichever is later.

Missouri Courts have dealt with this precise issue many times and the law is patently clear – the circuit court only has jurisdiction over the Judgment for matters specifically

raised in timely filed after trial motions. *Seitz v. Seitz*, 107 S.W.3d 478 (Mo. App. 2003); *Colley v. Tipton*, 657 S.W.2d 268, 271 (Mo. App. 1983) (“the court’s jurisdiction to grant relief was limited to the reasons stated in [defendant’s] motion for new trial”).

In *Seitz*, the court explained that Rule 81.05(a)(2) extends the time the trial court has jurisdiction of a judgment “[i]f a party *timely files* an authorized after-trial motion, the judgment becomes final... [n]inety days from *the date the last timely motion was filed*, on which date all motions not ruled shall be deemed overruled.” *Id.* (emphasis in opinion). After trial motions must be filed within thirty days after entry of judgment to be timely. *Id.* **“Once the thirty day period in Rule 75.01 expires, a trial court’s authority to grant relief is constrained by and limited to the grounds raised in a timely filed, authorized after-trial motion.”** *Id.* at 488 *relying on Massman Const. Co. v. Mo. Hwy. & Transp. Comm’n*, 914 S.W.2d 801 (Mo. banc 1996) (“Once the thirty-day period in Rule 75.01 expires, a trial court’s authority to grant relief is constrained by and limited to the grounds raised in a timely filed, authorized after-trial motion.”).

In *McGuire v. Kenoma, LLC*, 447 S.W.3d 659 (Mo. banc 2014), this Court explained the effect of failing to timely raise post-judgment interest issues timely. In *McGuire*, the only point on appeal concerned whether the circuit court had authority to revise the judgment to add post-judgment interest after the judgment became final. *Id.* at 662. This Court explained the powers a circuit court has in either amending a judgment or making a *nunc pro tunc* ruling. *Id.* at 663. “Under Rule 75.01, within 30 days after issuing the judgment a trial court may, ‘after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend, or modify its judgment within that time.’” *Id.*

at 663 (emphasis added). “[T]he omission of the mandatory statutory language in a judgment is mere error, correctable by either a motion pursuant to Rule 75.01 or Rule 78.07”. *Id.* at 667.

Despite the plaintiff in *McGuire* being statutorily entitled to post-judgment interest, this Court found that the plaintiff could not recover since a request to include post-judgment interest was not made within 30 days after issuing the judgment. *Id.*; see Rule 75.01; see also Rule 78.07(c) (“In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review.”).

Judgment was entered on this matter on March 8, 2017. L.F. V3, pgs. 453-54. The March 8, 2017 Judgment included post-judgment interest. L.F. V3, pgs. 453-54. Given that Mercy did not timely file an application to apply § 538.220, RSMo 2016, periodic payment of damages (said application must be prior to the entry of judgment), the circuit court graciously set the Judgment aside on March 9, 2017 to entertain Mercy’s motion to apply periodic payments. L.F. V3, pg. 474. A hearing was held on March 16, 2017. L.F. V6, pg. 803. There was no objection to post-judgment interest being included in the judgment at the hearing, in motion, or at the time the proposed judgment was submitted to the circuit court. L.F. V6, pgs. 811-13. P.T.Hr. pgs. 1-70.

Judgment was re-entered on March 20, 2017. L.F. V6, pgs. 816-18. The Judgment included post-judgment interest on all amounts other than the portions of the judgment that were allocated to periodic payments. L.F. V6, pgs. 816-18. On April 7, 2017, Mercy filed

its authorized post-trial motions. L.F. V3, pgs. 475-505. In said motions, Mercy did not raise any objection to the inclusion of post-judgment interest. L.F. V3, pgs. 475-505. On April 27, 2017, Mercy filed its Second Motion to Amend the Judgment, which was an **unauthorized** post-trial motion given that it was filed more than 30 days after **either** the March 8, 2017 Judgment or the March 20, 2017 Judgment was entered. L.F. V6, pgs. 819-23. The 30 days started to run on March 8, 2017, at the time the original Judgment was entered. Rules 75.01 & 78.07.

Missouri law is unanimous that the circuit court only retained jurisdiction of the March 20, 2017 judgment for the matters raised by authorized post-trial motions. The Judgment became final in all other respects. Mercy did not raise any issue as to post-judgment interest within the time allowed under Missouri law, and as such, the circuit court lost jurisdiction to modify that portion of the judgment.

Appellant requests this Court remand the Amended Judgment to the circuit court to re-insert post-judgment interest given that the circuit court lacked authority to remove post-judgment interest.

V. THE TRIAL COURT ERRED IN NOT AWARDING POST-JUDGMENT INTEREST BECAUSE DENYING POST-JUDGMENT INTEREST VIOLATES APPELLANT'S FUNDAMENTAL PROPERTY RIGHTS TO EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT THE FAILURE TO AWARD POST-JUDGMENT INTEREST AMOUNTS TO AN UNLAWFUL TAKING OF THE FULL VALUE OF EMILEE'S VERDICT DUE TO THE TIME VALUE OF MONEY.

a. Standard of Review

The constitutional challenge to a statute is reviewed de novo by this Court. *Watts*, 371 S.W.3d at 637. If a statute clearly contravenes a constitutional provision it will be held unconstitutional, overcoming the presumption it is valid. *Id.*

b. Analysis

The trial court erred substantively in removing post-judgment interest from the March 20, 2017 Judgment in that it violates Emilee's rights to equal protection under the law. The denial of post-judgment interest violates Emilee's fundamental, constitutional property right in her court judgment. § 538.300, RSMo 2016, violates equal protection of the laws guaranteed by Article I, Section 2 of the Missouri Constitution, which states in pertinent part:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of

government, and that when government does not confer this security, it fails in its chief design.

Mo. Const. art. I, § 2. A legislative prohibition of interest on a court judgment to victims of medical negligence is a violation of this provision.

There are two steps to an equal protection analysis. *Labrayere v. Bohr Farms*, 458 S.W.3d 319, 331 (Mo. banc 2015). The first step requires a court to identify the classification at issue to ascertain the appropriate level of scrutiny. *Id.* “If the challenged law draws a distinction on the basis of a suspect classification or curtails the exercise of a fundamental right, then strict scrutiny applies. If there is not a suspect classification or fundamental right at issue, a court will apply rational-basis review to determine whether the challenged law is rationally related to some legitimate end.” *Id.*

An equal protection violation occurs when a “statute contains a classification that operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.” *Amber-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 909 (Mo. banc 2015); *see also Dieser v. St. Anthony’s Med. Ctr.*, 498 S.W.3d 419, 432 (Mo. banc 2016). The Supreme Court holds that many types of property interests of nearly all kinds are protected. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (“the types of interests protected as ‘property’ are varied and, as often as not, intangible, relating ‘to the whole domain of social and economic fact.’”).

It is without question “that individuals have a fundamental [Missouri] constitutional right to use and enjoy property free from arbitrary governmental interference.” *Labrayere*, 458 S.W.3d at 332. The United States Supreme Court has recognized post-judgment

interest as part of the “just compensation” guarantee of the U.S. Constitution for government takings of private property. *Seaboard Air Line Ry. Co. v. U.S.*, 261 U.S. 299, 306 (1923) (“It is obvious that the owner’s right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right.”); *see also* *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 – 236 (2003) (recognizing that there is a valid property right in interest and that a taking can occur when there is an adverse economic impact on investment-backed expectations).

Missouri Courts recognize that post-judgment interest is recoverable against the State above the caps in the sovereign immunity statute. *See Benoit v. Mo. Hwy. & Transp. Comm’n*, 33 S.W.3d 663, 676 (Mo. App. 2000). These cases recognize that when the State becomes a judgment debtor, it should be treated as all similarly situated judgment debtors. The same analysis should apply when the judgment debtor is a health care provider that causes catastrophic losses.

Strict scrutiny applies in this case because the legislative denial of post-judgment interest unreasonably impinges on Emilee’s fundamental right to her property. The denial of post-judgment interest equates to a taking, in that Emilee has a property interest in her court judgment that should be free from any arbitrary governmental interference. A judgment arises from a citizen’s successful pursuit of her rights in state court under state law. Emilee’s interest in her judgment should be protected as a fundamental property right under Article I, Section 2, and as such, legislation impinging on the full value of a court judgment should be strictly scrutinized. The fact that inflation exists and there is a time-value of money is beyond dispute. This case is a prime example of this fact since the stock

market has gone up over 20% since the time of the verdict. Mercy has been able to earn on the money that it owes Emilee while Emilee is not even entitled to interest on the money she is owed.

Even if strict scrutiny is not applied, there is no rational basis or legitimate state interest in denying post-judgment interest on only part of an award, in particular the past due amounts while allowing it on future periodic payments, albeit in a gravely inadequate amount. When § 538.300, RSMo 2016, is read in combination with § 538.220(2), RSMo 2016, it is clear that post-judgment interest is denied on all past-due amounts that must be paid in lump sum, but allowed (at an arbitrarily low rate) on future medical damages. Regardless of the level of scrutiny applied to § 538.300, RSMo 2016, by totally denying post-judgment interest on past due amounts, the statute irrationally deprives Emilee of her property interest and is therefore a violation of Article I, Section 2 of the Missouri Constitution. Is it rational to allow a health care provider that is actively and fully capable of making money to make money on money it owes a disabled patient while depriving the patient even a portion of the money earned on the patient's money? Allowing a judgment debtor to delay payment without compensating Emilee for years of delay devalues her judgment without compensation and is unconstitutional.

CONCLUSION

For the reasons discussed herein, the Court should remand the case to the circuit court to institute an appropriate Judgment that ensures that Emilee can pay for her future medical expenses, that attorney's fees be paid in lump sum, and that requires post-judgment interest.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, ALONG WITH THIS Certificate of Service, Mo.R.Civ.P. 84.06(c) Certificate of Compliance, and the Appendix to Appellants' Brief, were served upon the attorneys of record for each of the parties to the action on January 26, 2018, by electronically filing the foregoing document with the Clerk of the Court using the CM/ECF system, which sent notification to the following counsel of record:

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MO. R.CIV.P. 84.06 (c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Appellant’s Brief complies with the limitations contained in Mo.R.Civ.P. 84.06(b). There are 15,969 words in 13-point Times New Roman font in the foregoing brief, according to Microsoft® Office Word 2016 word count, the word processing software used to prepare the foregoing brief. The foregoing Appellant’s Brief, along with the Certificate of Service, and Mo.R.Civ.P. 84.06(c) Certificate of Compliance were served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system.

STRONG-GARNER-BAUER, P.C.

/s/ Steve Garner _____