IN THE SUPREME COURT OF MISSOURI

EMILEE WILLIAMS,	)	
	)	
Appellant/Cross-Respondent,	)	
	)	
vs.	)	**Supreme Court No.: SC96547**
	)	
MERCY CLINIC SPRINGFIELD COMMUNITIES, F/K/A ST. JOHN'S CLINIC, INC.	)	
	)	
Respondent/Cross-Appellant.	)	

APPELLANT/CROSS RESPONDENT'S REPLY TO BRIEF OF RESPONDENT/CROSS-APPELLANT AND REPLY TO INITIAL BRIEF OF APPELLANT/CROSS-RESPONDENT

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REPLY STATEMENT OF FACTS

Mercy's Statement of Facts contains some inaccurate facts and other facts that are incomplete and thus misleading. The errors are not by design but rather almost assuredly due to appellate counsel's attempt to deal with a very large record on a trial that counsel did not prepare or try. It is therefore necessary to clarify some of the facts asserted and hopefully set forth relevant pertinent facts while summarizing the parties' respective positions at trial in a manner that is easier to digest and apply the pending legal issues.

DR. PILAPIL'S MISDIAGNOSIS

For roughly nine (9) months Dr. Pilapil misdiagnosed Emilee Williams ("Emilee") as having run of the mill anxiety and depression despite the fact that she was showing symptoms of a serious neurological diseases. Emilee first saw Dr. Pilapil for a second opinion on December 17, 2012. She came to her for a "Comprehensive review of medical history and problems". T.Ex. 4. Emilee had been a very healthy, active, and athletic young lady who had in recent years started experiencing concerning symptoms that she and her mother feared were all related and potentially serious. T.T. V3, pp. 285-309. She had unexplained leg swelling, elevated liver enzymes, swelling of her liver and spleen, heart issues, abnormal blood work and now was suffering from depression, anxiety, occasional weakness and had developed a tremor in her right hand. *Id.*

For a period of roughly nine (9) months, Dr. Pilapil assured Emilee and her mother that Emilee's condition was not neurologic because her tremors were intermittent. T.T. V3, pp. 285-341. T.Ex. 4. They were told the tremors were nothing to worry about and that they were either due to anxiety or the antidepressants she was taking. *Id.*

After repeated request by the family to send Emilee for a neurological consult, Dr. Pilapil finally agreed in late July 2013 and sent Emilee to a neurologist for "spells". T.Ex. 8. T.Ex. 213, pp. 36-37. After referral, Emilee was diagnosed with Wilson's Disease. T.T. V3, pp. 338-340; V15, pp. 1543-45. Wilson's Disease is a very treatable disease if treated before symptoms advance. T.T. V7, pp. 749-58; V11, 1115-17, 1127-29. T.Ex. 205, pp. 25-28. T.Ex. 206, pp. 16, 34-35, 37-38. T.Ex. 210, pp. 14-15, 23-24. T.Ex. 211, pp. 16-17. The liability issue for the jury was simple - did Dr. Pilapil violate the standard of care for an internist because she misdiagnosed Emilee.

STANDARD OF CARE EVIDENCE

As background, each expert agreed that seeing a young person with a tremor was a very rare occurrence. T.T. V3, pp. 392-409; V4, pp. 414-26; V5, pp. 589-613; V6, pp. 618-26; V12, p. 1221. In Dr. Lefevre's and Dr. Frey's combined 75 or more years of experience neither had ever seen or treated a young person with a tremor. T.T. V5, pp. 589-613; V6, pp. 618-63; V14, pp. 1495-96. Doctors are taught that a tremor in a young person is often a sign of a serious medical condition and thus warrants a prompt and thorough work up and/or immediate referral. T.T. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26. Each fault expert agreed that seeing a patient with a unilateral tremor like Emilee presented with is a huge warning sign of an extremely serious life-threatening condition. T.T. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26; T.Ex. 106.

Emilee's experts testified that there were four (4) reasons why Dr. Pilapil misdiagnosed Emilee, which violated the standard of care, which are as follows: (1) failed

to take an adequate history of Emilee's tremor; (2) failed to adequately consider Emilee's medical chart as part of her comprehensive review; (3) provided Emilee incorrect medical advice in regards to her tremors; and (4) failed to timely refer Emilee for a neurological consultation. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26. Emilee's experts testified that Dr. Pilapil violated the standard of care for these reasons on three office visits that occurred on December 17, 2012, January 11, 2013, and May 13, 2013. *Id.*

As far as specific standard of care opinions, each fault expert agreed that failing to take an adequate history breaches the standard of care expected of an internist. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26; V14, p. 1482. T.Ex. 280. They further agreed as to what an adequate history meant in relation to treating a young patient with a tremor. *Id.* When treating a patient with a history of tremors, the experts agreed that an adequate history requires the physician to identify the part or parts of the body suffering from tremors, determine when they began, what if anything causes the tremors to begin, what makes them better or worse and what are the characteristics of the tremors. *Id.* It is of particular importance to learn if the tremors are unilateral or bilateral. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26. T.Ex. 106. Drs. Shah, Frey and Lefevre were all uniform in their opinion that an internal medicine doctor should promptly refer a young patient with a unilateral tremor to a neurologist. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26; V14, pp. 1490-95. As Dr. Frucht explained, a tremor in itself is a movement disorder that neurologists are trained to diagnose and treat. T.T. V7, pp. 753.

In addition to taking a proper history about the tremor, the experts were likewise in general agreement as to the doctor's duty to review prior medical records. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26. Emilee's experts felt this to be especially true in this case where Dr. Pilapil was seeing a new patient seeking a comprehensive medical review due to an ongoing history of unusual medical issues. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26. T.Ex. 4. Finally, the experts all agreed that a doctor breaches the standard of care if they give false medical advice to a patient. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26. These same basic standards of care apply to each visit where the doctor is attempting to diagnose and treat a young patient with tremors. *Id.*

The experts supported their opinions with medical literature. Appendix App 257-265 (hereinafter "App"). For example, Dr. Frucht warned physicians years ago in his book that any patient under the age of fifty who has one or more signs or symptoms of a movement disorder such as a tremor should be screened for Wilson's Disease. T.T. V7, pp. 749-756. Dr. Frucht's writing was consistent with literature shown or read to the jury that warned physicians to be on the lookout for Wilson's Disease in young people because it is treatable. *Id.* Dr. Frucht testified that medical literature had been warning physicians for over 20 years to look out for Wilson's Disease in a young person with symptoms of a movement disorder. T.T. V7, p. 807. Dr. Shah likewise testified that every article she was aware of that educated doctors about diagnosing a tremor in younger people list Wilson's Disease as well as other significant life ending diseases. T.T. V4, pp. 408-409, 470-471. T.Ex. 106.

As mentioned, Emilee's liability experts limited their standard of care criticisms to three visits Emilee had with Dr. Pilapil. V3, pp. 369, 379-409; V4, 414-26; V5, pp. 579-80, 589-613; V6, pp. 618-26. These visits occurred on December 17, 2012, January 11, 2013, and May 13, 2013. *Id.* As to each visit the breaches were the same failing to take an adequate history about the tremors, failing to properly consider the prior medical chart, providing false medical advice, and not referring Emilee to a neurologist. *Id.* They based their opinions on the medical records and Dr. Pilapil's deposition testimony that she recorded the history pertinent to her and she remembered nothing other than what was contained in her medical chart. *Id.* Emilee's experts opined that Dr. Pilapil did not take an adequate history by not determining where Emilee was experiencing tremors, when they started, the frequency, what made the tremors better or worse, and most importantly not finding out that the tremors were unilateral. *Id.*

Further, Dr. Frey testified as to Dr. Pilapil's failure to review Emilee's prior medical records that showed a number of physical issues not typically found with an otherwise healthy 20-year-old. V5, pp. 579-80, 589-613; V6, pp. 618-26. He testified that these issues could not be explained by a diagnosis of anxiety or depression. *Id.* The experts agreed that Dr. Pilapil's ongoing assurances to Emilee that her condition was not neurologic since her symptoms came and went was false as was the advice that her unilateral tremors were due to medication or anxiety. V4, 421-26; V5, pp. 599-600; V6, pp. 621-26; V14, p. 1489. The fault experts agreed that neither anxiety nor antidepressant medication cause unilateral tremors. V4, 421-26; V5, pp. 599-600; V6, pp. 621-26.

CAUSATION

The background for understanding the expert causation testimony was supplied by the experts called to trial and by Emilee's treating physicians. Emilee's treaters at the University of Michigan – Wilson's Disease Center for Excellence are the foremost experts in the field, having written extensively about the disease, treatment methods, and treatment results. T.Ex. 55; 114; 205-pp. 6-14, 72-73; 206-pp. 7-13, 83-84; 210-pp. 6-16, 21-29, 63-71; 211-pp. 5-10, 56-57. Dr. Askari and Dr. Lorincz described Wilson's Disease as a disease that progresses very slowly. T.Ex. 205-pp. 11-14, 24-27; 206-pp. 47-49; 210-pp. 14-15, 18-19; 211-pp. 36-37. Dr. Fischer called it an indolent disease. T.T. V11, 1204-05. Given the slow progression, early detection and treatment can reverse symptoms and allow patients to lead a normal life. T.Ex. 205-pp. 14, 26-27, 30; 206-pp. 16, 34-38; 210-pp. 14-15, 23-29; 211-pp. 16-17, 56-57. Dr. Askari testified that when treating Wilson's Disease months matter. T.Ex. 205-pp. 25-28. Their work showed that the success of treatment largely depended on how far the disease and the resultant physical symptoms had progressed. T.Ex. 205-pp. 14, 26-27, 30; 206-pp. 16, 34-38; 210-pp. 14-15, 23-29; 211-pp. 16-17, 56-57. Symptoms such as anxiety, depression, and intermittent tremors were consistent with both low levels of copper in the brain and successful treatment. T.Ex. 205-pp. 15-17, 60-61; 206-pp. 50-51; 210-pp. 16-18, 50-51, 61-68; 211-pp. 35-36, 42.

Emilee's expert, Dr. Fischer, contrary to Mercy's misstatement, testified in both deposition and trial that had Emilee been diagnosed and treatment begun as late as late June 2013 her symptoms were reversible and she would be able to lead a normal life.

T.T. V11, pp. 1115-16, 1138-58; Pp. 80-2, 115-116; App 161-195. His opinion was based upon his experience and longstanding medical literature discussing treatment outcomes for patients with Wilson's Disease. He explained that early treatment is imperative because (1) when detected early it can be treated with zinc therapy only and (2) chelating agents, if needed, work better due to the lower copper load in the patient's brain. T.T. V11, pp. 1115-16, 1138-58, 1166-67, 1197. Very simply, Wilson's Disease is like a multitude of other medical diseases and conditions, if diagnosed early the outcome is good. T.T. V11, pp. 1115-16, 1138-58. If diagnosed early, Wilson's Disease can be managed with a zinc supplement and diet modifications and the patient will live symptom free. *Id.*

The medical underpinnings of Dr. Fischer's opinions were as follows: Patients with Wilson's Disease accumulate copper through their lifetime. T.T. V11, 1205-06. The copper is held in the liver. T.T. V11, 1128-29. When the liver fills up the copper starts moving to the brain. T.T. V11, 1128-29, 1144. Copper in the brain causes irritation and symptoms. T.T. V11, 1147. The initial symptoms when the brain is being irritated by copper are often depression, anxiety, and intermittent tremors. T.T. V11, 1151. If treatment is begun in the irritation phase, the patient's health is restored. T.T. V11, 1205-06. If treatment is not begun and copper continues to accumulate in the brain, irritated areas of the brain begin to die and the symptoms increase. T.T. V11, 1147. As the brain cells die from lack of treatment, patients often progress to widespread dystonia. T.T. V16, pp. 1644-1648. Dystonia was described as an involuntary muscle spasm that results in abnormal movements of the extremities, also as tonic and clonic movements. T.T. V11, pp. 1164-65. T.Ex. 213, p. 42. As brain cells die, the patients also experience impaired mental

functioning as well as bowel and bladder issues. T.T. V11, pp. 1181-82. When treatment is begun after the patient is showing signs of widespread dystonia, the chances for a return of function decrease because areas of the brain have died. T.T. V11, pp. 1166-67.

Dr. Fischer supported his opinion that into June of 2013 Emilee remained in the reversible/curable class of patients based on several facts contained in the medical records and depositions. T.T. V11, pp. 1115-16, 1138-58. The jury heard extensively about Emilee's condition from December 2012 through June 2013, as well as the marked deterioration she experienced in late June through August 2013 when she was diagnosed. Significantly, Emilee made a 3.9 GPA her last semester of school that ended in May. T.T. V3, p. 292. T.Ex. 76A. This indicated that her brain and reasoning were working very well. Her symptoms through the may visit were primarily anxiety, depression, and an intermittent tremor. T.T. V3, pp. 311-316. In her May 2013 exam, Dr. Pilapil noted a resting tremor but saw no signs of dystonia. V13, p. 1372. T.Ex. 6. Dr. Pilapil recorded her May neurologic exam as normal and testified that she was showing no signs of dystonia. *Id.* Likewise, in the June exam, although her symptoms had progressed, she had not become dystonic and her tremors remained intermittent. T.T. V13, pp. 1390-97. T.Ex. 7. In fact, Dr. Pilapil noted the exam to be extremely excellent. *Id.*

In July the situation changed drastically. T.Ex. 3. When Emilee was sent for an EEG, the technician observed tremors and eye fluttering. T.Ex. 28; 213-p. 33. Dr. Lorincz identified eye flutters as a common Wilson's symptom. T.Ex. 206-pp. 20-21. On July 31, 2013, the neurologist, Dr. Oghlakian observed tonic and clonic movements, which Dr. Frucht confirmed to be dystonia of the upper extremities. T.Ex. 29; 30; 213-p. 42. T.T.

V7, pp. 784-785. Mercy has pointed out that Dr. Oghlakian recorded his neurologic exam as normal, but it fails to mention the testimony by Drs. Frucht, Fischer and Frey that Dr. Oghlakian observed and recorded dystonic movements during his exam. To each of these doctors, these observations indicated anything but a normal neurologic exam. T.T. V6, pp. 630-633; V7, pp. 729-732, 784-785; V11, pp. 1161-67.

Dr. Fischer also discussed other physical evidence indicating that copper had not invaded and damaged Emilee's brain to any significant extent prior to her progression to widespread dystonia. Specifically, Dr. Fischer pointed to two separate eye exams. T.T. V11, pp. 1153-59. The first in January of 2013 and the second in September of 2013. T.T. V11, pp. 1153-59. T.Ex. 32 and 33. Both Dr. Fischer and Dr. Askari testified that when there are large deposits of copper in the brain the patient will almost always have what are called Kayser-Fleischer rings around their eyes. T.T. V11, pp. 1153-59. T.Ex. 205-pp. 19-23. Both Drs. Fischer and Askari testified that looking into the eyes was akin to looking at copper in the brain. *Id.* In January of 2013, Emilee did not have Kayser-Fleischer rings. T.Ex. 32. In September of 2013, she went back to the same optometrist who performed the same exam and at this time she did have prominent Kayser-Fleischer rings. T.Ex. 33. Dr. Fischer testified that the physical symptoms and eye exams were consistent in that the physical symptoms into June showed a low level of copper in the brain that was irritating the brain cells and treatable. T.T. V11, pp. 1152-53. Since the disease was not diagnosed and treated prior to the copper burden increasing in the brain, cell death resulted causing the drastic acceleration of symptoms and Kayser-Fleischer rings were found. T.T. V11, pp. 1114-86. This case was a case where months mattered.

Defendant contended that administration of Trientine caused Emilee's brain damage. T.T. V7, pp. 741-45, 811-12. Dr. Fischer's opinion as to this was that (a) had she been diagnosed earlier she could have been treated with zinc only and (b) had she been treated earlier before she became dystonic she would not have had a reaction to Trientine if in fact this is what happened. T.T. V11, pp. 1138-59. His testimony was based on literature and was consistent with Dr. Lorincz's testimony. *Id.* Further, he pointed out that the only studies discussing Trientine reactions were involving patients given two to three times the amount of Trientine that Emilee received. *Id.* There were no studies ever showing patients could react to the low doses Emilee was given. T.T. V11, pp. 1151-1152. Dr. Fischer further acknowledged the testimony of Drs. Askari and Lorincz who both testified that Emilee's decline may simply have been a progression of the disease due to its late diagnosis and treatment versus a reaction to Trientine. T.Ex. 206-pp. 27-32; 211-pp. 10-14, 51-52. Trial Exhibit 276 listed a number of physical issues that had developed before the Trientine was administered including wide based gait, bowel and bladder dysfunction, dystonic and tonic posturing, voice issues, fingers and toes curling, tremor, balance issues and falling, transient weakness, and rabbit face. T.Ex. 276.

DR. FRUCHT'S CAUSATION OPINION

Dr. Frucht opined that the delay in diagnosis did not change Emilee's outcome. The basis for his opinion was that Emilee had been storing copper for 20 years and nine months would not have made a difference. T.T. V7, pp. 741-42. The fact that Emilee was showing minor physical symptoms until late June 2013 and no medical record of dystonia until July 31, 2013 was immaterial to him. T.Ex. 8. Emilee's symptoms did not matter because in

Dr. Frucht's opinion, there is no harm in delaying the diagnosis. T.T. V7, pp. 760-61. In his opinion, if Emilee were diagnosed and treated in December 2012, she would have been just as devastated. T.T. V7, p. 810.

To reach this opinion, Dr. Frucht refused to consider or read the multiple articles written on the subject by Drs. Askari and Dr. Lorincz, and instead, relied on unpublished studies from outside the United States. T.T. V7, pp. 759-62. He did recognize that Dr. Askari and Lorincz were the most experienced doctors in the world on the subject of treating Wilson's Disease and its outcome. *Id.* He also acknowledged that he had selected Dr. Brewer, Dr. Askari and Dr. Lorincz's colleague at the University of Michigan to write the chapter on Wilson's Disease in his book on Movement Disorder Emergencies. In Dr. Frucht's text, he classified Wilson's Disease as a "don't miss" disease because it is a treatable condition and if caught early patients can live symptom free. T.T. V7, pp. 749-51. The "don't miss" classification was intended as a warning to other doctors to test for Wilson's Disease in young people with signs of a movement disorder. T.T. V7, pp. 747-59. As to the opinion that since she had accumulated copper for 20 years and thus was unsalvageable, Dr. Frucht conceded that many other patients with Wilson's Disease when treated prior to significant dystonia, recover exceedingly well. T.T. V7, pp. 751-53. He further agreed that that no published article has ever recommended delaying treatment in Wilson's Disease, as that would be unethical. T.T. V7, pp. 795-97.

Dr. Frucht injected the second MRI done on February 2017 into the trial for the first time. T.T. V7, p. 740. He testified that the August 2013 MRI and the February 2017 MRI showed damage to the same areas of the brain. *Id.* Dr. Frucht further opined that had an

MRI been taken in December 2012, it would have looked the same as the August 2013 pre-Trientine MRI even though Emilee displayed very limited neurologic symptoms in December 2012. T.T. V7, p. 715. Dr. Frucht further testified for the first time at trial, that a unilateral tremor could be caused by an anti-depressant medication such as a B-agonist. T.T. V7, pp. 738-740.

Dr. Frucht testified again as the last witness in the trial. He addressed two primary subjects. One subject was the word "subacute" which was in an MRI report interpreting the MRI that Mercy performed on Emilee in August 2013 before Trientine. T.Ex. 13 and 50D. The Wilson's Disease experts at Michigan read the MRI as showing "subacute" brain damage. T.Ex. 50D. Dr. Frucht's testimony was that subacute was not a defined term and could mean damage up to six to nine months. T.T. V16, pp. 1654-57. Dr. Frucht did not have any literature to support his opinion that "subacute" could be six to nine months. T.T. V16, pp. 1654-57. He acknowledged that in stroke literature, subacute brain damage was within one-to-three weeks. T.T. V16, pp. 1654-57.

Dr. Frucht's second opinion was also a new opinion. Dr. Frucht originally claimed the August 2013 and February 2017 MRI's looked the "same" but changed his opinion when he was allowed to testify a second time claiming that the February 2017 MRI showed worsening scar damage that he attributed to Trientine. T.T. V7, p. 740; V16, pp. 1638-45. Dr. Frucht conceded that one would expect the brain damage shown in the 2013 MRI that was pre-Trientine to scar over time, precisely what the 2017 MRI showed. T.T. V16, pp. 1638-44.

DR. BELZ'S DEPOSITION

While ordinarily a pretrial deposition not read into evidence is not relevant; however, given the claims of impropriety and error leveled on appeal, Dr. Belz's deposition is relevant. Dr. Belz was disclosed to testify about causation and future medical needs/cost caused by the claimed neglect in this case. App 005-33. Since his plan set forth damages caused by the claimed late diagnosis, causation was an essential part of his opinion. He had reviewed all 20 thousand pages of medical records page by page. T.T. V10, p. 1073. He reviewed the MRI films and examined Emilee two times prior to deposition. T.T. V9, pp. 941-1013; V10, pp. 1018-74; App 103-120. He had read all the depositions in the case and had spoken to Dr. Fischer. T.T. V9, pp. 944-947; V10, pp. 1033-1092. L.F. 1034-1036. He also did independent research on Wilson's Disease to confirm in his mind that Dr. Fischer's opinions were medically supported. *Id.* This is significant and this section is included in this Reply Statement of Facts because many things that Mercy blames plaintiff and the trial judge for were matters Dr. Belz was never asked about in his deposition.

Dr. Belz was not asked whether all of the future damages were caused by the claimed neglect of Dr. Pilapil. App 103-120. Since he was not asked if he was of the opinion that all of the life care plan was needed due to neglect, he was not asked the basis for the opinion[1]. App 103-120. He was not asked if this opinion was based solely on Dr.

[1] Counsel is not being critical of opposing counsel. Everyone has their own method. Plaintiff's counsel has read many depositions that he took and recognized large holes that opposing counsel could drive a truck through. In that instance, counsel does not blame opposing counsel. He recognizes it is his job to ask the needed questions since witnesses are at a deposition to answer questions and not volunteer information.

Fischer's testimony. He was not asked if he did independent study aside from Dr. Fischer in arriving at his opinion. App 103-120. Dr. Belz was not asked about the cost that would have been incurred had Emilee been treated in March or April or May or on any date. App 103-120. Further, Dr. Belz brought his complete file to the deposition that he was not asked about. App 103-120. He was not asked to identify all items in his file or the items he relied upon and the significance of each item to his opinion. App 103-120. There is no claim that Dr. Belz failed to answer the questions asked and Dr. Belz was not impeached with a single piece of his deposition testimony at trial because his opinions did not change. T.T. V9, pp. 941-1013; V10, pp. 1018-93.

After Dr. Belz's deposition, Dr. Belz conducted a third exam of Emilee. T.T. V10, pp. 1084. After this exam, Dr. Belz ordered an MRI of Emilee's brain to see if the brain damage had worsened. T.T. V9, pp. 962 - 63, 988. T.Ex. 261. Dr. Belz's third exam notes and report from the 2017 MRI were immediately supplemented to Mercy's counsel. L.F. 1037-1040. Counsel advised Mercy's counsel that the 2017 MRI did not change Dr. Belz's opinions or any item in his life care plan. *Id.*

Mercy's claim that Dr. Belz limited his testimony up to May as to when damages could have been averted is factually incorrect. Not only did Dr. Belz rely on Dr. Fischer's deposition wherein he opined that treatment into June would have reversed brain irritation then existing, at trial, Dr. Belz's actual testimony was "if this were treated in December of 2012, January of 2013 on through March and May of 2013." T.T. V10, p. 1035.

AGREEMENT AS TO EXPERTS

As with any case, experts will read additional depositions after their deposition, including depositions of the opposing experts. Given this, as counsel explained to the trial court, plaintiff's understanding of the agreement with Mercy's counsel was that experts could rely on this additional information. T.T. V11, pp. 1099-1113. If the material changed the expert's ultimate opinions counsel would be notified. *Id.* As counsel explained to the trial judge absent such an agreement, discovery would never end. *Id.*

Counsel also knew this was a trial and no trial goes on as scripted. Counsel therefore did not object when Dr. Pilapil changed her testimony that she remembered nothing about her office visits other than what is reflected in the records, to suddenly at trial having a complete and detailed memory of all interactions with Emilee and her mother that came to her the night before she testified. T.T. V13, pp. 1332-33, 1340-45. Counsel did not object to Dr. Frucht's testimony about the 2017 MRI or about unilateral tremors, or other variances in his testimony from deposition. If the variance was significant, he was cross-examined and impeached about the change. Likewise, counsel did not object to Dr. Lefevre's changes in opinion. He was simply impeached with his prior testimony. This was a two-week trial and no witness will testify exactly word for word as they did in their deposition.

DAMAGES

Since there are no claims of excessiveness or the jury's damage assessment being unsupported nothing further is added.

INTRODUCTION

Throughout the two-week trial, the trial court and jury diligently listened to the evidence and came to a just verdict on the evidence presented. The case was conceptually easy for the jury to understand since it was a straight-forward misdiagnosis case. The reasons for the misdiagnosis were submitted in Instruction 6 and the causative time frame was explained by experts and again in closing argument. Further, the evidentiary rulings made by the trial judge were appropriate when considered under the full facts, and importantly, no claim of error by Mercy was remotely prejudicial as Mercy was allowed to present its causation expert before and after plaintiff's experts. By the end of trial, the jury was well aware of the facts, understood plaintiff's theory, and rendered a just verdict intended to compensate Emilee for the life she lost and give her the financial resources to cover her future medical expenses so that she can live with dignity.

Throughout the brief portion of this response, we will consider Mercy's claims of error as: (1) whether the error was preserved; (2) whether there was error; and (3) whether the error was prejudicial. At times responding to Mercy's brief was difficult as in nearly every point Mercy raises multiple alleged trial court errors in a single point and much of Mercy's claimed error was not preserved or raised in the trial court.

APPELLANT/CROSS-RESPONDENT'S REPLY TO RESPONDENT/CROSS-APPELLANT'S BRIEF

I. MERCY'S POINT I SHOULD BE DENIED SINCE MERCY FAILED TO PRESERVE THIS POINT AND INSTRUCTION 6 WAS PROPER.

At trial Mercy made a very general roving commission objection as to dates and absolutely no objection about there being a roving commission due to causation. To the extent the Court finds Mercy preserved any instructional error, their claims as to Instruction 6 fail substantively. Mercy claims the trial court erred by submitting Instruction 6 without date modifiers in the instruction. Mercy is incorrect because the dates of claimed neglect were limited to the three visits from December to May. Furthermore, counsel clearly limited the claims to these three visits in closing argument. T.T. V17, pp. 1686-88; 1739-41. Instruction 6 was properly submitted since it follows Rule 70.02, which requires jury instructions to be simple, brief, and submit ultimate facts to the jury. Evidentiary facts underpinning the ultimate facts in the jury instruction are to be argued in closing arguments, not submitted in the instruction.

Point I wrongly asserts that Emilee's entire claim was based on the two visits in December 2012 and January 2013. While those visits were deficient, the evidence at trial was that Emilee's condition could have been reversed through May and even into June. T.T. V11, pp. 1115-16, 1138-47. The jury was told during closing argument that the claims of neglect for consideration went only through May 31, 2013. T.T. V17, pp. 1686-88, 1739-41. Counsel's path was conservative because there was evidence that Emilee would have been near normal if the treatment began on the June 28, 2013 appointment. T.T. V11, pp. 1115-16, 1138-47.

Finally, Mercy was not prejudiced by the verdict director since it appropriately framed plaintiff's theory of the case. The timeframe of plaintiff's claims was well known to the jury and further, reiterated in closing statement. The instruction and counsel's argument explaining the instruction is exactly in accord with MAI and Missouri Case authority.

a. MERCY FAILED TO PRESERVE ITS OBJECTION.

i. POINT I IS MULTIFARIOUS AND PRESERVES NOTHING FOR REVIEW.

Point I refers to multiple alleged trial court errors in one point. As best as counsel can glean, Mercy claims error concerning four separate subparagraphs "a"-"d", although Mercy never states what date or time-period should have been included in the jury instruction. Mercy was required to have separate points of appeal for each claim of error. A point relied on claiming the circuit court erred at separate times and in separate ways is multifarious and preserves nothing for review. *Spence v. BNSF Railway*, --- S.W.3d ---, 2018 WL 2308334, at *7 n. 13 (Mo. banc May 22, 2018). As will be explained below, combining the points into one "general" objection is precisely why Mercy failed to preserve this point on appeal at the instruction conference and in briefing.

ii. MERCY FAILED TO PRESERVE ITS GENERAL ROVING COMMISSION OBJECTION.

Mercy failed to preserve its roving commission argument given that it failed to state the grounds for this objection at trial. Mercy did not mention "causation" as grounds for its objection when referencing its roving commission objection at trial and cannot expand on its objection in Supreme Court briefing. Missouri's Supreme Court Rule and case law

require specific objections to be made distinctly. The reason for this rule is so that a trial judge is not accused of error for an objection that was not made at trial. Further, a specific and distinct objection is needed for opposing counsel to address whether the objection has merit. Mercy's counsel failed to object specifically or distinctly to any roving commission objection at trial, and thereby waived the same.

"In order to assign as error the giving or failure to give an instruction, a party 'must make *specific* objections to the giving or failure to give instructions before the jury retires to consider its verdict; the objections and grounds therefore must be stated *distinctly* on the record, and the objections must also be raised in the motion for new trial." *Berra v. Danter*, 299 S.W.3d 690, 702-703 (Mo. App. E.D. 2009) (internal citations and quotation marks omitted) (emphasis in original). Rule 70.03 states in pertinent part:

> Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objections. Counsel need not repeat objections already made on the record prior to delivery of the instructions. The objections must also be raised in the motion for new trial in accordance with Rule 78.07.

"The rationale behind making objections is to avert error and allow the trial court to make an intelligent ruling." *Gill Const., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699, 718 (Mo. App. W.D. 2004); *citing Gamble v. Bost*, 901 S.W.2d 182, 188 (Mo. App. W.D. 1995). "Further, a point on appeal must be based upon the theory voiced in the objection at trial and a defendant cannot expand or change on appeal the objection as made." *Id. citing Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 387 (Mo. App. E.D. 2000); *Anderson v. Boggs*, 219 S.W.3d 818, 819 (Mo. App. S.D. 2007) *citing Goralnik v. United Fire and*

Cas. Co., 240 S.W.3d 203, 210 (Mo. App. E.D. 2007). When the point on appeal contends that an instruction is erroneous on a different ground than was asserted in the objection made at trial, the appellate court may not review that error on appeal. *Id.*

A vague, general objection preserves nothing for review because it does not allow the trial court to make an informed ruling on the validity of the objection. *Berra*, 299 S.W.3d at 702 *citing Sparkman*, 271 S.W.3d at 624. "The trial court has no obligation to ferret out specificity, which a party chooses not to distinctly articulate in its objection, in order to make an informed ruling on a general objection." *Sparkman,* 371 S.W.3d at 625.

Missouri law is unanimous that an objection must be more than a general objection, it must explain the grounds or the "why" behind the objection. *Id.*; *see also Berra*, 299 S.W.3d at 703. In *Berra*, defense counsel objected to the instructions stating "I don't think that there has really been given any evidence on this point and I think it might confuse the jury. It's not an MAI. I don't think it's supported by any case law." 299 S.W.3d at 703. The court held that an objection that the instruction "might confuse the jury" was not specific enough as required by Rule 70.03. *Id.* The Court explained that an objection to an instruction as confusing must explain why counsel believed the instruction to be misleading:

> If plaintiff thought the instruction in this case was wanting in clarity and might be misunderstood so that the jury would be mislead to his prejudice, he should have objected to the instruction on that ground at the time it was tendered, pointing out wherein he regarded the instruction as misleading.

Id. quoting Coogan v. Nighthawk Freight Service, Inc., 193 S.W.2d 388, 390 (Mo. App. E.D. 1946). Counsel must explain precisely why the instruction is confusing and/or

misleading to allow the trial court to make an intelligent ruling on the objection and consider deleting or modifying the language before the instruction is submitted to the jury. *Id. citing Sparkman*, 271 S.W.3d at 624-625.

In the instance of multi-element instructions, as we have here, a general objection to all of the subparts preserves nothing for appellate review. *Sparkman*, 271 S.W.3d at 625 ("In the absence of an objection directing the trial court's attention to a specific element in a proffered multi-element instruction which the objecting party claims is not supported by evidence in the record and why in the context of the evidence presented during the trial the specified element is not supported by the evidence, a general objection to the entire instruction that is not supported by the evidence preserves nothing for appellate review.").

The **only** objection in regards to a "roving commission" made at trial was globally to subparagraphs "a"-"d" of Instruction 6, which was as follows:

> Lastly, Judge, globally as to all the subparts, I believe that they provide the jury with a roving commission in that they do not adequately focus the jury on the particular time period or particular visit of the alleged negligent acts, and therefore, are not sufficiently specific to be properly given as a jury instruction.

T.T. V16, pp. 1626-27.

Mercy's objection was defective since it objected "globally" to all of the subparts of Instruction 6. General objections preserve nothing for appeal. *Sparkman*, 271 S.W.3d at 625. Mercy was required to give specific objections to each element that Mercy believed was inappropriately submitted by the trial court. *Id.* Mercy failed to give the grounds with specificity as to how each element of the instruction was improper. *Id.* Mercy did not object to any of the four subparts *specifically* as to a roving commission or give the *grounds*

as to why it was a roving commission. Mercy's "global" objection preserves nothing for appeal. *See Id.*

Mercy was required to make *distinct* objections specifically stating the *grounds* of the objection. Rule 70.02. Mercy vaguely claimed that the submission needed to be more focused on a time period, without enumerating *why* those time periods were important or needed. T.T. V16, 1626-27. Mercy failed to make any reference as to *what dates* or *which office visits* should be included or why those dates should be included for each individual submission. Mercy failed to explain why dates were necessary as they related to each individual subpart. Indeed, Mercy did not reference a single subpart, or explain what timeframe should have been included in that subpart. Mercy preserved nothing for appeal and cannot expand on the trial court objection.

Critical to preservation, Mercy did not make any mention of its current *causation* argument in the objection at trial, which is the entire basis for Mercy's first point on appeal. Mercy is not allowed to expand on the objection made at trial, which is precisely what Mercy is attempting to do in its brief. *Goralnik*, 240 S.W.3d at 210 (On appeal, a party "may not enlarge or change the objection made at trial."). When objecting to the jury instructions for a roving commission, Mercy failed to say anything about causation. Since Mercy failed to raise its causation argument to the trial judge, it has waived this objection for appeal. In defense of trial counsel there is usually a reason why counsel makes a general roving commission argument. That reason, as discussed next, is that counsel knows, given the evidence at trial and expected arguments of counsel explaining the instructions, that the instruction was proper. In fact, as defense counsel would expect, plaintiff's counsel

repeatedly told the jury in argument that the claims related only to those three visits before May 31, 2013. T.T. V17, pp. 1686-88, 1739-41.

Accordingly, Mercy failed to give the trial court an opportunity to appropriately consider Mercy's objection, and thereby, waived any argument as to a roving commission on appeal.

b. STANDARD OF REVIEW.

Appellate courts review whether the jury was properly instructed *de novo*. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010). To reverse a jury verdict for instructional error, the party challenging the instruction must show: (1) that the instruction as submitted misled, misdirected, or confused the jury; and (2) that prejudice resulted from the instruction. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 90–91 (Mo. banc 2010). "An issue submitted by an instruction must be supported by evidence." *Spence,* 2018 WL 2308334 at *5; *quoting Oldaker v.* Peters, 817 S.W.2d 245, 251 (Mo. banc 1991). "In making this determination as to a particular instruction, this Court views the evidence in the light most favorable to its submission" and "if the instruction is supportable under any theory, then its submission is proper." *Id.; Klotz*, 311 S.W.3d at 766. A trial court has the best opportunity to determine whether a jury instruction is confusing or misleading. *Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466, 478 (Mo. App. S.D. 2001). When reviewing jury instructions, "we must credit jurors with ordinary intelligence, common sense, and average understanding of the English language." *Id.*

If a party fails to object at trial, the only available means for redress is plain error review. Rule 84.13(c). The court will only reverse for plain error if there was "manifest

injustice or miscarriage of justice has resulted therefrom." *Id.* Plain error will rarely provide the basis for overturning the judgment of the trial court in civil cases. *Davolt v. Highland*, 119 S.W.3d 118, 135–36 (Mo. App. W.D. 2003). Plain error review places a much greater burden on the party claiming error because plain error is more than an assertion of prejudicial error. *Id.* at 136.

c. THERE WAS NO ERROR IN INSTRUCTION 6 BECAUSE IT FOLLOWED RULE 70.02(B), MAI, PLAINTIFF'S THEORY OF THE CASE, AND COUNSEL'S ARGUMENT CLARIFIED THE CAUSATIVE TIME PERIOD.

Mercy claims the trial court erred by submitting the ultimate facts that explained plaintiff's theory to the jury without a date modifier. Mercy is incorrect since the Missouri Approved Jury Instructions ("MAI") requires the court to submit ultimate facts that present plaintiff's theory to the jury in a simple and brief format. MAI and the case law that followed explain that detailed evidentiary facts do not clarify the jury instructions, but instead confuses them. The appropriate place to explain the evidentiary underpinnings of the jury instructions is in closing argument.

The fallacy in Mercy's point is that it completely ignores closing argument, wherein the jury instructions were explained. Because of this, Mercy wrongly claims that plaintiff's damages were only based on the negligent acts committed by Dr. Pilapil in December 2012 and January 2013. In fact, the trial judge, trial counsel and the jury, knew that (a) plaintiff's experts had testified that Dr. Pilapil violated the standard of care on each of the three visits from December 2012 through May 2013 and (b) Dr. Fischer testified that Emilee's brain would have been saved if she were diagnosed and treated through May and even into June. T.T. V11, pp. 1115-16, 1138-47. In closing argument, counsel repeatedly explained to the

jury that as long as Dr. Pilapil would have done her job prior to May 31, 2013, Emilee would have been saved such that each of the negligent visits was causative to Emilee's demise. T.T. V17, pp. 1686-88, 1739-41. Mercy's entire point is misguided since it ignores the evidence and argument at trial.

Since the beginning of the MAI, the primary goal was to simplify instructions that would be easily understood by the average juror. MAI—1963 Report to Missouri Supreme Court, XXXIX. The goal was to cut the instructions down to the "bare essentials." *Id.*

> Justice Cardozo once wrote that too much detail obscures rather than clarifies. His observation is demonstrated by a good many verdict directing instructions which, playing it safe, hypothesize every conceivable fact… Lawyers are now required to chart a course between the Scylla of inadequate fact hypothesization and the Charybdis of commenting on the evidence. The legal coast is littered with the wreckage of cases navigated by those who could not find this elusive channel.

Id. The committee went on to explain how brevity and clarity is what is needed and warned against evidentiary facts.

> Hypothesizing failure to keep a lookout which would have averted a collision is also accepted as an adequate submission although barren of evidentiary detail. There is no indication that juries so instructed have been handicapped by the brevity. In these cases **evidentiary detail has simply been left to argument, and this is where it belongs**.

Id. (emphasis added).

The issue of how much detail is too much detail in the jury instructions was recently explored in *Blanks v. Flour Corp.*, 450 S.W.3d 308, 395-96 (Mo. App. E.D. 2014) wherein the Court explained that less is better. In *Blanks*, the case concerned children from Herculaneum, Missouri that were exposed to lead from the defendant's smelter. *Id.* at 323-24. On appeal, the defendants argued the circuit court committed instructional error in

allowing the verdict director to contain the phrase "allowed plaintiff… to be exposed to unsafe levels of lead." *Id.* at 394. Defendants contended this phrase was too open-ended and vague, and left it to the whim of the jurors to decide for themselves the conduct they could consider in deciding whether to hold defendants liable. *Id.* Defendants insisted that the instructions should have *specified* what defendants did or did not do to allow the exposure or make them liable to the children. *Id.* at 395. The Court explained that when evaluating instructional error, "the issue is whether the phrase as used in the verdict director was misleading in the context of the evidence at trial." *Id. quoting Klotz*, 311 S.W.3d at 766 (emphasis added). The Court held that the "sought-after additions—specific negligent acts—constitute evidentiary details." *Blanks*, 450 S.W.3d at 395. The Court explained that "[s]implicity is the key component to instructing a jury in Missouri." *Id. citing* 2 Mo. Prac., Methods of Prac: Litigation Guide § 15.2 (4th ed. Updated 2012). "It is expected that **lawyers will supply in their closing arguments all of the details of the evidence** and how those details fit into the legal framework given to the jury by the court." *Id.* at 396 *citing* Mo. Civ. Tr. Prac. § 12.1; 2 Mo. Prac. § 15.2 (emphasis added).

Missouri courts unanimously hold that specific evidentiary details underlying an instruction are appropriate for argument and should not be contained in the jury instructions. In *Stone v. Duffy Distrib., Inc.*, 785 S.W.2d 671, 677-79 (Mo. App. S.D. 1990), the plaintiff complained that a jury instruction was a "roving commission" concerning a converse instruction that stated the plaintiff "failed to follow the instructions of his doctors." *Id.* at 678. The plaintiff submitted that this was too broad as it failed to submit the ultimate facts of what plaintiff failed to do. *Id.* The Court rejected this argument

because there "was **detailed evidence concerning what the doctors told [plaintiff] to do or not to do**". *Id.* (emphasis added). Once again, the Court held that "MAI contemplates that the jury will be properly advised by the argument of counsel concerning details." *Id. quoting Bayne v. Jenkins*, 593 S.W.2d 519, 531 (Mo. banc 1980).

In *Kampe v. Colom,* 906 S.W.2d 796, 799 (Mo. App. W.D. 1995), the Court dealt with a similar situation as here, in that the medical negligence was not confined to one office visit, but was prevalent throughout a 17-year history. The basic theory of the case was that a psychiatrist continued to prescribe medication to a patient that was not suitable for his treatment, failed to monitor the medications, and failed to warn the dangers of taking the medications with alcohol. *Id.* at 803-04. The jury instruction submitted did not contain any dates. The defendant objected claiming the jury instruction was confusing as it did not contain any dates. *Id.* at 805-806. The jury asked during deliberations whether the instruction applies to "all 17 years?". *Id.* at 805. The Court found that despite the jury's question, it did not taint the instruction. *Id.* at 805-06. The court found that the evidence presented at trial through experts supported the theory of recovery and the instruction was compliant with Rule 70.02(b) because the subparagraphs were "simple, brief, impartial, and did not require the jury to make findings of detailed fact." *Id.* at 806. As such, the instruction was proper. Unlike *Kampe* with a 17-year history, this case dealt with only three dates. The jury after having listened to evidence over a two-week trial knew the dates at issue and counsel's argument consistently stressed May 31, 2013 as the end date.

Trial courts are required to follow MAI if there is an instruction on point. Rule 70.02(b); *Spence*, 2018 WL 2308334 at *7 n. 13. A circuit court may, however, approve

"a not-in-MAI instruction if no MAI instruction is on point, but that instruction must 'be simple, brief, impartial, free from argument, and shall not submit to the jury or require finding of detailed evidentiary facts.'" *Id. quoting Johnson v. Auto Handling Corp.*, 523 S.W.3d 452, 463 (Mo. banc 2017).

In medical negligence actions, MAI 21.01 is the approved jury instruction for actions against health care providers. MAI 21.01 offers the following guidelines:

> Your verdict must be for the plaintiff if you believe:
>
> First, defendant (*here set out act or omission complained of; e.g., "failed to set plaintiff's broken leg bones in natural alignment," or "left a sponge in plaintiff's chest after performing an operation," or "failed to administer tetanus antitoxin"*), and
>
> Second, defendant was thereby negligent, and
>
> Third, as a direct result of such negligence plaintiff sustained damages.

MAI 21.01 [1988 Revision]. MAI 21.01 should be modified by MAI 21.02, as it was in this case, when there are multiple negligent acts. At no point does MAI suggest needlessly complicating the jury instructions by inputting dates of each office visit or treatment.

Since the trial court heard substantial evidence supporting each submission in Instruction 6, it was required to allow plaintiff to pursue her theory of negligence as outlined by the experts. The plaintiff has "the right to choose any theory that was supported by the evidence." *Cignetti v. Camel*, 692 S.W.2d 329, 338 (Mo. App. E.D. 1985). "The purpose of the verdict directing instruction is to hypothesize propositions of fact to be found or rejected by the jury." *Ostrander v. O'Banion*, 152 S.W.3d 333, 337 (Mo. App. W.D. 2004) *quoting Lasky v. Union Elec. Co.*, 936 S.W.2d 797, 800 (Mo. banc 1997).

"Only disputed ultimate facts are presented to the jury, as opposed to evidentiary facts." *Ostrander*, 152 S.W.3d at 337. MAI was "designed to preclude the submission of detailed evidentiary facts and to limit the submission only to issues of ultimate fact." *Coon v. Dryden*, 46 S.W.3d 81, 93 (Mo. App. W.D. 2001).

The *Ostrander* Court explained that the ultimate facts to be decided by the jury are framed by the expert's testimony:

> In professional negligence cases, including actions against doctors, the specific duty is defined by the profession, itself. That is, an expert witness is generally necessary to tell the jury what the defendant should or should not have done under the particular circumstances of the case and whether the doing of that act or the failure to do that act violated the standards of care of the profession (and, thus, constituted negligence). See MAI 11.06. Thus, what is the ultimate fact is the act or omission (required to be stated by the expert) that constitutes negligence.

Ostrander, 152 S.W.3d at 338-39.

If the jury instructions submit the ultimate facts as explained by expert testimony, it is not a roving commission since the instruction is given "flesh and meaning" by the evidence. *Williams v. Daus*, 114 S.W.3d 351, 371 (Mo. App. S.D. 2003). "When the plaintiff's theory is supported by the evidence and the instruction submits the ultimate facts that define the plaintiff's theory for the jury, the instruction is not a roving commission." *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 595 (Mo. App. W.D. 2008); *see also Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635, 651-52 (Mo. App. E.D. 2005); *Wilson v. Lockwood*, 711 S.W.2d 545, 553 (Mo. App. W.D. 1986); *Kampe*, 906 S.W.2d at 805; *Lashmet v. McQueary*, 954 S.W.2d 546, 553 (Mo. App. S.D. 1997).

Mercy cites to *Lindquist* for apparent support of its position that dates should be included in the instruction, although *Lindquist* does not remotely hold this. In *Lindquist*, the appellate court reversed the trial court's grant of a new trial wherein the trial court found the jury instructions were a roving commission since the instructions were too general and not specific enough. *Lindquist*, 168 S.W.3d at 653. Similar to Mercy, the defendant claimed the word "adequate" was confusing. *See Id.* at 652-53. The Court reversed the trial court and reinstated the verdict emphasizing that jury instructions were appropriate since they were simple, brief, and did not require findings of detailed evidentiary facts. *Id.* "When, on the other hand, a plaintiff's theory of the case is supported by the evidence and the instruction submits ultimate facts which define for the jury the plaintiff's theory of negligence, the instruction is not a roving commission." *Id. citing Lashmet*, 954 S.W.2d at 553. The Court went on to hold that the term "adequate" is not a scientific term because "this jury's ordinary intelligence and common sense were sufficient to allow a determination of whether Dr. Weis asked Mr. Lindquist sufficient questions, listened to Mr. Lindquist's complaints and examined Mr. Lindquist's body, that is, whether Dr. Weis 'failed to take an adequate history' or 'failed to perform an adequate physical examination.'" *Id.* at 653. While the instructions at issue did contain dates, the Court made no mention or in any way held that dates were needed in the instruction. *See id.* The Court's holding was that there was no roving commission because the instruction "submitted ultimate facts which defined for the jury Plaintiff's specific theory of negligence" that was supported by the evidence. *Id.*

Instruction 6 follows MAI and Rule 70.02(b)'s instruction by presenting simple, brief, ultimate facts explaining plaintiff's theory of the case. Unlike some medical malpractice cases, this case was conceptually simple. Plaintiff's claim was that Emilee was misdiagnosed by Dr. Pilapil for a period of months. The reason for the misdiagnosis were submitted in the jury instructions. T.T. V3, pp. 369, 379-409; V4, pp. 414-40, 469-71; V5, pp. 570-80, 589-613; V6, pp. 618-63. Plaintiff's evidence was that if Emilee was diagnosed and treated by May 31, 2013, she would have led a normal life. T.T. V11, 1115-16, 1138-47. Dr. Pilapil chose to see Emilee three times during the relevant time period. Plaintiff's experts testified that she was negligent on each visit and this negligence cased the original and ongoing misdiagnosis. T.T. V3, pp. 369, 379-409; V4, pp. 414-40, 469-71; V5, pp. 570-80, 589-613; V6, pp. 618-63. Instruction 6 submitted plaintiff's theory of the case, as outlined by experts, which is proper.

Like any lawsuit, there were disputes about facts and opinions. Emilee and Mercy had vastly different theories of causation and the jury was tasked with determining which it believed. Plaintiff's causation expert based his opinions as to the cure date by looking at symptoms and literature.[2] T.T. V11, pp. 1115-16, 1138-47. His opinion was that through May, and actually into June, her symptoms showed small levels of copper reversible irritation to the brain, as did the absence of Kayser-Fleisher rings around her eyes.

[2] Mercy claims Dr. Fischer's opinion as to Emilee recovering if diagnosed in June 2013 was "new", "surprising", and "impermissible". Mercy's assertions should be disregarded since Dr. Fischer testified identically in his deposition. Pp. 79-82, 115-116, App 161-195. ("I think she would be – she wouldn't be normal, June 28th, but closer to it. I think by May, had that same process been followed, Emilee would be almost normal").

T.T. V11, p. 1115-16. His testimony about reversibility was supported by literature and the testimony of Drs. Askari and Lorincz regarding at what stages Wilson's Disease symptoms could be reversed. T.Ex. 205, pp. 25-31; T.Ex. 206, pp. 34-38; T.Ex. 210, pp. 14-24. Mercy's expert refused to even read the literature from the United States and opined that she had the same levels of copper in the brain in December as August. His claim was contrary to the literature, the progression of the symptoms, and his previous writings. The jury found plaintiff's evidence more believable and found for plaintiff.

Given the substantial evidence that the three visits at issue made a causative difference to Emilee's demise, Instruction 6 was absolutely proper. It is undisputed that the jury instructions stated plaintiff's theory of the case as explained by expert testimony. Mercy's only argument concerning a roving commission concerns causation; however, this argument is not supportable. In addition to the presumption that the jury has listened to and remembered the evidence, counsel explained in closing argument that Emilee's condition was treatable if caught by May 31, 2013. T.T. V17, pp. 1686-88, 1739-41. The place for evidentiary facts is in argument, not in the jury instructions. The jury was confined by the instructions, evidence at trial, and counsel's argument such that Instruction 6 was not a roving commission.

Accordingly, the jury was properly instructed on plaintiff's theory of the case and rendered a just verdict pursuant to the evidence.

d. MERCY WAS NOT PREJUDICED BY INSTRUCTION 6.

The party asserting instructional error must prove the allegedly improper instruction misdirected, misled, or confused the jury. *Eisenmann v. Podhorn*, 528 S.W.3d 22, (Mo.

App. E.D. 2017). The party asserting error must not only prove there was prejudice but further must show that the prejudice materially affected the merits of the case. *Id.* at 37.

The jury is presumed to follow the jury instructions. *Barlow*, 537 S.W.2d at 422. MAI 3.01, which was submitted as Instruction No. 5 at trial, required the jury to reach a verdict based on the "facts you believe after considering all the evidence" and in so doing the jury "must consider only the evidence and the reasonable conclusions you draw from the evidence." MAI 3.01. Emilee's experts testified that Dr. Pilapil breached the standard of care on three separate office visits from December 2012 to May 2013. T.T. V3, pp. 369, 379-409; V4, pp. 414-40, 469-71; V5, pp. 570-80, 589-613; V6, pp. 618-63. Plaintiff's evidence also showed that had Emilee been treated before May 31, 2013, her symptoms were reversible and Emilee would lead a normal life. T.T. V11, pp. 1115-16, 1138-47. Further, counsel explained in closing argument that the timeframe in question as to fault and causation was up until May 31, 2013. T.T. V17, pp. 1686-88, 1739-41. The jury was neither confused or misguided by the instructions, the evidence, or counsel's argument. In fact, the issues for decision could not have been more clearly set forth.

Accordingly, not only were the court's instructions proper given the evidence and arguments of counsel, there is no conceivable possibility of prejudice. Mercy's Point I should be denied.

II. MERCY'S POINT II SHOULD BE DENIED AS MERCY FAILED TO PRESERVE THIS OBJECTION AND SUBPARAGRAPH "B" WAS NOT CONFUSING.

Mercy claims the trial court erred by failing to define the terms "medical chart[3]" and "adequate". The first time Mercy raised this argument was in briefing before this Court. Mercy failed to preserve its objection to the terms "medical chart" and/or "adequate[4]" since it failed to object to these terms in the instruction conference at trial. T.T. V15, pp. 1614-15; V16, pp. 1621-29. If Mercy contended that these terms were confusing or needed a definition, it was Mercy's burden to request the same. There was no objection at trial because everyone knew precisely what subparagraph "b" referred to, so there was no need for a definition.

There was nothing confusing about the term medical chart. During Dr. Pilapil's testimony, she referred to the medical records as the "chart" multiple times. T.T. V13, pp. 1321, 1337; V14, pp. 1424, 1435, 1440, 1445. Mercy's counsel referred to the medical records as the "medical chart" in the instruction conference and specifically explained that the term medical chart means the older medical records in closing statement. V16, p. 1623; V17, p. 1721. Mercy's late claim of error was conjured up long after trial by reading a cold transcript.

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[3] It is somewhat interesting that Mercy, at this late juncture, is claiming it is confused by the term "medical chart". On Mercy's website, it advertises that electronic records are "Making Paper Medical Charts Extinct". https://www.mercy.net/newsroom/2013-07-12/making-paper-medical-charts-extinct/. App 312-315.

[4] Mercy claims the term "adequate" is confusing, yet in Point I cites to *Lindquist*, which specifically held that adequate was not a scientific term or confusing.

There was nothing confusing about the term adequate, which has been endorsed by multiple Missouri Courts. Although not a scientific term needing a definition, the term was given flesh and meaning by Emilee's experts. Everyone at trial knew what was meant by subparagraph "b" because at Emilee's first visit with Dr. Pilapil, Emilee's "Chief Complaint" was: "Comprehensive review of medical history and problems". T.Ex. 4. Subparagraph "b" stated that Dr. Pilapil "Failed to adequately consider Emilee Williams' medical chart as part of her comprehensive review". App 275. Emilee's expert, Dr. Frey, testified that Dr. Pilapil was negligent in each visit for failing to adequately consider Emilee's prior medical problems, such as her elevated liver enzymes, enlarged liver, enlarged spleen, heart issues, swollen feet, and abnormal blood work. T.T. V3, pp. 369, 379-409; V4, pp. 414-40, 469-71; V5, pp. 570-80, 589-613; V6, pp. 618-63. If Dr. Pilapil would have considered these issues, she should have known that anxiety is not a reasonable explanation. *Id.* Dr. Pilapil admitted that she did not consider at all, no less adequately consider, Emilee's prior medical chart at any of the three visits in question. T.T. V13, pp. 1319-33, 1346-54, 1360-72. This instruction was not confusing, and was in fact admitted.

Mercy was not prejudiced by subparagraph "b" since it appropriately framed plaintiff's theory and was supported by substantial evidence.

a. MERCY FAILED TO PRESERVE ITS OBJECTION TO THE TERM "MEDICAL CHART" OR "ADEQUATE".

i. POINT II IS MULTIFARIOUS AND PRESERVED NOTHING FOR REVIEW.

Point II refers to two trial court errors that were never raised at trial. Mercy claims that the trial court, on its own initiative, should have clarified the terms "medical chart" and "adequate". Mercy asserts these separate claims of error in one point relied upon. Mercy was required to have separate points of appeal for each claim of error. A point relied on claiming the circuit court erred at separate times and in separate ways is multifarious and preserves nothing for review. *Spence,* 2018 WL 2308334 at *7 n. 13.

ii. MERCY FAILED TO RAISE THIS OBJECTION AT TRIAL.

Mercy failed to preserve any objection to the term "medical chart" or "adequate" since it failed to object to these terms at trial. Mercy was required to make specific and distinct objections during the instruction conference. There was no objection to the terms "medical chart" or "adequate" during the instruction conference, and in particular, there was no claim that those terms constituted a roving commission. T.T. V15, pp. 1614-15; V16, pp. 1621-29. During the instruction conference, Mercy did not object or make any of the arguments it now makes in its brief.

To the contrary, during the instruction conference, Mercy's counsel referred to medical records as the "medical chart", wherein counsel stated, "I believe Dr. Pilapil testified that she, in fact, did review the relevant past medical chart." T.T. V16, pp. 1623-26. There was no confusion for those at trial as to subparagraph "b" since this is common nomenclature that medical chart, medical record, and/or medical note are commonly used

synonyms, which is precisely why it was not objected to at trial. Indeed, it would have been suspect had Mercy's counsel claimed he was confused by the term "medical chart" after he just used it in a sentence. *Id.*

If at trial Mercy contended the term "adequate" or "medical chart" was confusing, which it did not do, it was Mercy's obligation to object and offer an instruction containing a definition of those terms. *Gill Const. Inc.*, 157 S.W.3d at 720 *citing Seidel v. Gordon A. Gundaker Real Estate Co.*, 904 S.W.2d 357, 364 (Mo. App. E.D. 1995). In *Seidel* the Court succinctly stated:

> Where a party contends that a term in an instruction needs definition, it is that party's duty to request and offer an instruction containing a definition of that term. Absent such a request and offer, that party cannot complain on appeal of the trial court's failure to define the term.

Seidel, 904 S.W.2d at 364. Mercy not only failed to object to either of the terms at trial, but it likewise failed to offer an instruction containing a definition of these terms. *See Id.*

Mercy's late objection to these terms was not preserved. Mercy did not object to these terms at trial, actually used the same terms during the instruction conference, and failed to offer or request a definition of these terms if it contended that they were vague, confusing, or misleading. Mercy failed to give the trial court an opportunity to clarify these terms if Mercy truly believed they were confusing, and thereby, waived any objection to the same.

b. STANDARD OF REVIEW.

Since Mercy claims subparagraph "b" is a roving commission, the standard of review from Point I applies.

c. THE TERMS "MEDICAL CHART" AND "ADEQUATE" WERE NOT CONFUSING TO THE PARTICIPANTS AT TRIAL.

The terms "medical chart" and "adequate" were not confusing to anyone at trial. Medical records or medical notes are commonly referred to as the medical chart. This is why Mercy's counsel referred to Emilee's prior medical records as the "medical chart" in in the instruction conference and specifically explained this term in closing argument. T.T. V16, p. 1623; V17, p. 1721. Subparagraph "b" was given flesh and meaning by Emilee's experts, wherein they described how Dr. Pilapil's failure to review or properly consider Emilee's prior medical chart contributed to her initial and ongoing misdiagnosis. Had Dr. Pilapil reviewed Emilee's medical chart, she should have recognized that Emilee's problems could not be explained by anxiety/depression and could not be fixed with a pill, which is what Dr. Pilapil continually pushed on Emilee.

Multiple Missouri Courts have endorsed use of the term "adequate" in medical negligence cases. *Lindquist*, 168 S.W.3d at 653 (specifically holding that the term "adequate" is not a technical term). In *Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466, 478-80 (Mo. App. S.D. 2001), the court specifically found that the term "adequate" was appropriate in a jury instruction in a case involving the delay by emergency medical technicians getting oxygen to a patient. The plaintiff submitted that the defendant failed to "timely establish and maintain an adequate airway." *Id.* at 477 n. 7. The only evidence supporting the term "adequate" was Dr. Bennoch, the plaintiff's expert physician, stating that the defendant "didn't get enough oxygen down there, and they didn't do it the right way". *Id.* at 478. The Court found that "adequate" does not need expert testimony to

define the term for the jury. *Id.* at 478-80; *see also Lashmet*, 954 S.W.2d at 552 (specifically holding that the words "adequately inform and instruct" were ultimate facts which defined plaintiff's specific theory of negligence and did not grant the jury a roving commission). The Court held that the instruction was proper as it submitted ultimate facts, which defined for the jury plaintiff's theory of negligence. *Id.* at 553.

In *Laws v. St. Luke's Hosp.*, 218 S.W.3d 461, 470 (Mo. App. W.D. 2007), the Court specifically found that the term "adequately communicate" was an appropriate verdict director submission. The Court reiterated that the appellate court looks at the sufficiency of the evidence in the light most favorable to the submission of the instruction. *Id.* at 471. If the instruction is supportable under any theory, then it was properly submitted. *Id.* at 470. The defense claimed the term gave the jury a "roving commission" to find negligence. *Id.* The Appellate Court disagreed. *Id.* at 470-71. The Court reasoned that the phrase was "given flesh and meaning by the evidence presented at trial". *Id.* at 470. "Where the word or phrase is not a scientific word, which requires a definition from an expert to aid the jury, a roving commission is not created." *Id.* As such, "the jury was not given free reign by the instruction to roam through the evidence to choose any facts it likes to reach a verdict." *Id.* at 471.

Missouri appellate courts commonly use the term "medical chart" interchangeably with medical record or medical note since these are well known terms in the English language. *Corbet v. McKinney*, 980 S.W.2d 166, 168 (Mo. App. E.D. 1998) (referring to the medical records as the "medical chart"); *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 194-95 (Mo. App. W.D. 2012) (using the terms medical record and medical chart

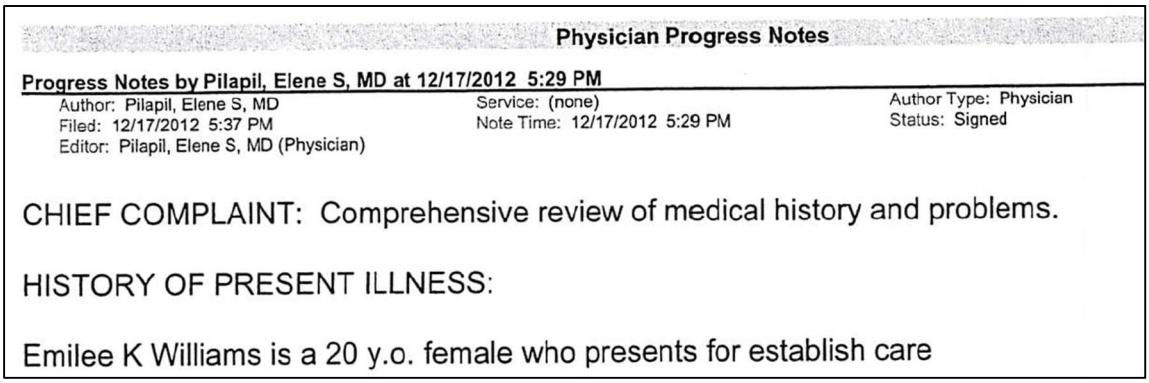
interchangeably); *Koenke v. Eldenburg*, 803 S.W.2d 68, 71 (Mo. App. W.D. 1990) (appellate court approved the trial court's denial of the jury's request for the "chart" from a physician since it was not in evidence); *Ploch v. Hamai*, 213 S.W.3d 135, 137 (Mo. App. E.D. 2006) (referring to the medical records as the "medical chart"); *McKinley v. Vize*, 563 S.W.2d 505, 508 (Mo. App. E.D. 1978) (same); *Robinson v. Ahmad Cardiology, Inc.*, 33 S.W.3d 194, 196 (Mo. App. E.D. 2000) (same); *Pemiscot County Memorial Hosp. v. Mo. Labor & Ind. Relations Com'n*, 897 S.W.2d 222, 228 (Mo. App. S.D. 1995) (same); *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 421 (Mo. App. W.D. 2000) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) (same). There was no confusion in the case law or at trial as to what "medical chart" means.

Subparagraph "b" was not confusing to the participants at trial since there was testimony in regards to the specific portions of the medical chart that Dr. Pilapil should have reviewed, but admittedly failed to do in evidence. During the instruction conference, Mercy's counsel referred to prior medical records as the "medical chart". T.T. V16, pp. 1623-26. Despite Mercy's claimed confusion on appeal as to which portions of the medical chart subparagraph "b" refers to, Mercy's counsel explained precisely the medical records that Dr. Pilapil failed to consider while inappropriately attempting to allocate fault to an empty chair – Dr. Haverstick in closing argument:

> Dr. Shah came in. Dr. Frey came in. They say, you know what, there was something going on because if you look at these different pieces of history, the swelling of the legs, the heart monitor, the abnormal liver test and then she had a scan that showed an enlarged liver, an enlarged spleen that caused you to think there's something going on besides something else going on in the background. But Dr. Haverstick is not sitting over here.

T.T. V17, p. 1718. Immediately after explaining this, Mercy's counsel clarified precisely what subparagraph "b" referred to by reminding the jury: "**B, failed to consider her medical chart. Okay. That's those older records, remember**." T.T. V17, p. 1721. Despite Mercy's representation in appellate briefs, counsel at trial was fully aware of what subparagraph "b" meant.

The jury was well-aware that "medical chart" referred to Dr. Pilapil's admitted failure to consider Emilee's prior medical records that described an ongoing pattern of health issues that were unusual for a healthy 20-year-old. Emilee and her mother thought these issues were related, which is why they went to Dr. Pilapil for a second opinion. The jury was well aware of this since in Emilee's first visit with Dr. Pilapil, the reason for the visit was to conduct a "Comprehensive review of medical history and problems":



Physician Progress Notes

Progress Notes by Pilapil, Elene S, MD at 12/17/2012 5:29 PM

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CHIEF COMPLAINT: Comprehensive review of medical history and problems.

HISTORY OF PRESENT ILLNESS:

Emilee K Williams is a 20 y.o. female who presents for establish care

T.Ex. 4.

Despite Emilee presenting to Dr. Pilapil for the purpose of a comprehensive review of Emilee's prior medical problems, Dr. Pilapil admitted no memory of looking at prior medical records and that she was not going to concern herself with Emilee's prior medical chart. T.T. V13, pp. 1318-24. Dr. Pilapil plainly stated "I'm not going to worry about"

her prior medical issues. *Id.* Dr. Pilapil conceded that she did not consider those issues despite Emilee's mother being extremely concerned. *Id.*

Significantly, when discussing this exact issue with Dr. Pilapil at trial, Dr. Pilapil also referred to the prior medical records that she did not consider as the patient's "chart" multiple times. T.T. V13, pp. 1321, 1337; V14, pp. 1424, 1435, 1440, 1445. Essentially, Dr. Pilapil admitted that she ignored the reason for Emilee obtaining care with her by failing to review Emilee's medical chart. T.T. V13, pp. 1318-33, 1346-54, 1360-72. The evidence was undisputed that in the three negligent visits, Dr. Pilapil failed to consider Emilee's prior medical issues contained in her medical chart.

Emilee's experts further explained precisely why Dr. Pilapil's failure to consider the prior medical records was negligent. T.T. V3, pp. 369, 379-409; V4, pp. 414-40, 469-71; V5, pp. 570-80, 589-613; V6, pp. 618-63. Dr. Frey testified, in no uncertain terms, that one of Dr. Pilapil's breaches of the standard of care was that she failed to adequately review and consider Emilee's prior medical chart. T.T. V5, pp. 589-613; V6, pp. 618-63. Dr. Frey explained in detail why it was extremely important to review a patient's prior medical chart so she would know how significant her current symptoms were, including but not limited to, a new onset unilateral tremor. *Id.* Dr. Frey explained that when you look at Emilee's prior medical records, Dr. Pilapil should have considered her prior leg swelling, heart issues, blood clotting, platelet issues, enlarged liver, enlarged spleen, abnormal blood labs, and elevated liver enzymes. *Id.* This evidence was important because had Dr. Pilapil considered Emilee's prior issues, she should be thinking "I really can't make sense of all this". *Id.* The prior medical issues, if considered, showed that Emilee's problem was not

anxiety that could be fixed by giving her pills. *Id.* Anxiety does not explain the constellation of symptoms Emilee presented with, particularly when the prior medical chart is considered with her current symptoms of tremor and anxiety. *Id.* Dr. Pilapil admittedly either did not look at prior medical records or ignored all of these issues because Emilee was not complaining of them at that time. T.T. V13, pp. 1319-24. All of these issues should have led Dr. Pilapil to do appropriate testing and imaging, and would lead to a specialist referral. *Id.*

Likewise, Dr. Shah specifically stated it was standard practice to review and consider a patient's prior medical history in detail at a patient's first exam, which Dr. Pilapil failed to do. T.T. V3, pp. 379-409; V14, pp. 414-40, 469-71. Dr. Shah explained that Emilee's clinical picture, particularly given her prior records, could not be explained by "anxiety", which is what Dr. Pilapil attributed all of Emilee's problems to, up until her MRI on August 8, 2013. *Id.*

The standard of care requiring a doctor to review a patient's prior medical records was not limited to plaintiff's expert testimony. Mercy's expert, Dr. Frucht, admitted that it is standard practice to review a patient's prior medical records. T.T. V7, pp. 777-80. The evidence that Dr. Pilapil failed to adequately consider Emilee's prior medical chart was admitted by Dr. Pilapil and Mercy's expert at trial, yet Mercy somehow claims this submission was error.

There was no confusion as to what subparagraph "b" meant at trial. Mercy's counsel summed up subparagraph "b" well by explaining to the jury that failing to adequately consider the medical chart as part of Dr. Pilapil's comprehensive review was referring to

the prior medical records. T.T. V17, p. 1721. Dr. Pilapil referred to Emilee's prior medical records as the medical "chart" when she was explaining how she did not consider those records. T.T. V13, p. 1321. Dr. Frey and Shah identified precisely why those prior records would be important to a physician and why Dr. Pilapil was negligent for failing to consider those prior issues. Since Dr. Pilapil admitted she did not consider Emilee's prior medical issues despite specific request by Emilee and her mother, she negligently failed to consider the cause of Emilee's problems resulting in catastrophic damage. Subparagraph "b" was not confusing to any participant at trial.

d. MERCY WAS NOT PREJUDICED BY SUBPARAGRAPH "B" OF INSTRUCTION 6.

The party asserting instructional error must prove the allegedly improper instruction misdirected, misled, or confused the jury. *Eisenmann*, 528 S.W.3d at 36-37. The party asserting error must not only prove there was prejudice but further must prove that the prejudice materially affected the merits of the case. *Id.*

Mercy cannot prove any prejudice given that Mercy's counsel admitted in closing statement he knew exactly what was meant by subparagraph "b" and made sure to explain it to the jury. T.T. V17, p. 1721. Further, the evidence in the case described precisely what information Dr. Pilapil should have considered, but admittedly failed to do leading to months of diagnosing Emilee with anxiety and depression. If Mercy claimed these terms were confusing, it was Mercy's obligation to raise it with the Court and suggest a definition, which it failed to do. As such, Mercy was not prejudiced by a proper instruction that explained Emilee's theory of the case.

Accordingly, Mercy's Point II should be denied.

III. MERCY'S POINT III SHOULD BE DENIED SINCE MERCY FAILED TO PRESERVE THIS POINT AND THERE WAS SUBSTANTIAL EVIDENCE OF CAUSATION.

Mercy claims the trial court erred in that there was not substantial causative evidence linking Dr. Pilapil's errors to Emilee's catastrophic brain damage. Mercy is incorrect since there was substantial evidence that Dr. Pilapil's failure to take a thorough history of Emilee's unilateral tremor caused Dr. Pilapil to misdiagnose Emilee and to attribute the tremor to anxiety or medication rather than investigate the pathological cause. Had Dr. Pilapil realized that the tremor was only in Emilee's right hand, she should have known that this was a red flag for a serious neurological issue.

Likewise, had Dr. Pilapil adequately considered Emilee's prior significant medical issues, she should have known that anxiety does not cause abnormal liver enzymes, leg swelling, heart palpitations, and abnormal blood work, such that she should have known to investigate further with testing, imaging, and/or referrals. Since Dr. Pilapil failed to take an adequate history and failed to consider Emilee's prior medical chart, she misdiagnosed Emilee. Defendant's experts likewise agreed with these principles. This misdiagnosis resulted in catastrophic harm.

Mercy essentially argues that subparagraph "a" and "b" were duplicitous theories, although it does not use that word because it failed to preserve this point. Mercy's argument fails because the fact that a "result may be the same", the separate acts committed by Dr. Pilapil may be separately considered and are not the same. *See Kampe*, 906 S.W.2d at 806. Simply because a defendant is negligent in many ways resulting in the same harm

does not limit the plaintiff's ability to submit each negligent act resulting in harm. There was substantial evidence that Dr. Pilapil's repeated and at times admitted negligence caused her ongoing misdiagnosis and Emilee's catastrophic injuries, which is precisely why subparagraphs "a" and "b" were proper.

a. MERCY FAILED TO PRESERVE POINT III

i. POINT III IS MULTIFARIOUS AND PRESERVED NOTHING FOR REVIEW.

Point III refers to two separate trial court errors, in that it claims subparagraph "a" and "b" were not causative to damages. Mercy was required to have separate points of appeal for each claim of error. A point relied on claiming the circuit court erred at separate times and in separate ways is multifarious and preserves nothing for review. *Spence,* 2018 WL 2308334, at *7 n. 13.

ii. MERCY FAILED TO PRESERVE ITS OBJECTIONS BECAUSE IT FAILED TO OBJECT AT TRIAL DURING THE INSTRUCTION CONFERENCE.

Mercy failed to preserve this point since it failed to specifically object giving the grounds therein during the jury instruction conference. During the instruction conference, Mercy did not make any objection to Instruction 6, subparagraph "a" in reference to it not being causally related. T.T. V15, pp. 1614-15; V16, p. 1621-29. Mercy objected to subparagraph "a" on the basis of it not being supported by the evidence but the ground for that objection was that Mercy argued that Dr. Pilapil did take an adequate history in regards to Emilee's unilateral tremor. T.T. V16, pp. 1621-23. Mercy did not make any objection

claiming that the submission was not causally related to Emilee's injuries and thereby waived the this claim of error. T.T. V16, p. 1621-23.

As to subparagraph "b", the objection only concerned whether there was substantial evidence to show that had Dr. Pilapil considered the prior medical this would have caused her to alter her plan of treatment. T.T. V16, pp. 1623-25. Mercy did not object there was no causality, only that we could not prove Dr. Pilapil would've altered her treatment pathway. Plaintiff presented substantial evidence in this case that had Dr. Pilapil considered Emilee's prior issues and acted in accordance with the standards of care she should have realized that "anxiety" does not fit the total clinical picture. T.T. V3, pp. 379-409; V4, pp. 414-40, 469-71; V5, pp. 589-613, V6, pp. 618-63. This failure resulted in the initial misdiagnosis of Emilee's condition and continuing misdiagnosis of her condition as simple anxiety. Not only was this the opinion of Emilee's experts, Dr. Pilapil admitted that she was aware that the prior records set forth common symptoms of Wilson's Disease.

Given that Mercy raised multiple claims of error in one point and failed to object at trial, Mercy preserved nothing for appeal.

b. STANDARD OF REVIEW.

While plaintiff agrees whether the jury was properly instructed is a *de novo* review, "[i]n determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Giddens,* 29 S.W.3d at 818. "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative

fact to support the jury's conclusion." *Id.* "The jury is the sole judge of the credibility of witnesses and the weight and value of their testimony and may believe or disbelieve any portion of that testimony." *Moran,* 178 S.W.3d at 609 (internal citations and quotation marks omitted).

c. SUBPARAGRAPHS "A" AND "B" WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Emilee's case was simple. Dr. Pilapil failed to follow basic medicine. Medicine 101 requires a doctor to take a thorough history of the patient's complaints and review the prior medical chart in order to properly diagnose a patient's current status. Dr. Pilapil failed in this regard, which resulted in Dr. Pilapil blaming Emilee's condition on anxiety, rather than looking for the pathologic cause. This failure led to a catastrophic result for Emilee. Mercy asks this Court to rewrite the causation standard in Missouri, which can be shown through experts, circumstantial evidence, and inference. Mercy makes this request since there is really no dispute that plaintiff's experts testified that Dr. Pilapil's failures contained in subparagraphs "a" and "b" caused Dr. Pilapil to misdiagnose Emilee with anxiety, rather than look for a pathological cause.

"Causation may be shown through expert testimony, circumstantial evidence or favorable inferences drawn from all the evidence. To establish causation in a medical malpractice action, the plaintiff must show that the physician's conduct was the cause-in-fact and the proximate cause of the plaintiff's damages." *Ploch*, 213 S.W.3d at 141. "Conduct can constitute the proximate cause of any harm which is its natural and probable result." *Id.* (internal citations and quotation marks omitted). In reviewing the record on

appeal, the court is not confined by plaintiff's theory or plaintiff's evidence, the court may look at defendant's witnesses and be allowed the benefit of reasonable inferences from all of the evidence. *Stallman v. Robinson*, 260 S.W.2d 743, 749 (Mo. 1953). Missouri courts "have generally said that the injury must be a reasonable and probable consequence of the act or the omission of the defendant." *Sanders v. Ahmed*, 364 S.W.3d 195, 209 (Mo. banc 2012) *citing Callahan v. Cardinal Glenn Hosp.*, 863 S.W.2d 852, 865 (Mo. banc 1993). "When a physician or nurse acts negligently in the treatment of a patient, later harm arising from that injury is naturally foreseeable." *Id.* (emphasis added).

A similar argument to Mercy's was made in *Kampe*, 906 S.W.2d at 799. *Kampe* concerned a psychiatrist that was prescribing medications for 17 years to a patient with longstanding alcohol abuse. *Id.* at 803-04. The psychiatrist alleged the jury instruction was duplicitous in that one paragraph alleged the psychiatrist was negligent because he "prescribed medications for plaintiff Carl Kampe at a time when he knew plaintiff Carl Kampe was consuming alcohol" and another submission alleged that the psychiatrist "gave alcoholic beverages to plaintiff Carl Kampe when he knew that plaintiff Carl Kampe was taking medications which should not be taken with alcohol". *Id.* at 806. The Court held that the "result may be the same, the act the jury was required to find to have been committed by [defendant] was not the same." *Id.* Since each submission was specific and supported by substantial evidence, the fact that the two submissions came to the same result was immaterial and not duplicitous. *Id.*

Likewise, in *Lindquist*, which Mercy relies on in Point I, the jury instructions stated:

> Failed to take an adequate history, or

Failed to perform an adequate physical examination, or

Failed to order MRI of his thoracic spine.

168 S.W.3d at 652. Mercy would claim this instruction is clear error. Under Mercy's argument, an adequate history or an adequate physical exam would lead to the order for an MRI, such that the plaintiff should only be able to submit on failure to order an MRI. Mercy claims that each negligent act must not contribute to another negligent act. Mercy's argument is plainly contrary to every multi-submission case since as long as each independent negligent act causally contributed to the damages, the submission is proper.

In this case, Mercy makes the argument that since Dr. Pilapil's failure to take an appropriate history in regards to Emilee's tremor and failed to review Emilee's prior medical chart were "simply reasons" why she failed to make a timely referral, they were not independently submissible. Mercy's Brief, p. 48. What Mercy is essentially claiming is that each submission must cause separate damages, which is not the law. *See Kampe*, 906 S.W.2d at 806. The argument Mercy makes is that if Dr. Pilapil failed to take an adequate history and/or failed to review the prior medical chart, this would contribute to lead to a failure to timely refer to a neurologist, so those cannot be separate negligent acts. Mercy is mistaken as it confuses separate negligent acts that cause the same damage, with separate negligent acts that cause different damages. Since each negligent act contributed to cause the ongoing misdiagnosis and treatment of Emilee's disease and was supported by expert testimony, each submission was proper.

Mercy's argument is not accepted when instructing on any type of case with multiple negligent acts. For example, if a plaintiff is struck by a car head-on in their lane

and receives a head injury, the plaintiff is only injured one time, but there could have been multiple negligent acts leading to the wreck. For this example, we will assume at trial that there was sufficient evidence to support multiple negligent acts, such as a defendant looking at his phone, driving over the speed limit, and drifting into oncoming traffic causing the wreck. MAI 17.02 illustrates this exact example, which states in pertinent part:

> Your verdict must be for the plaintiff if you believe:
>
> First, either:
>
> defendant failed to keep a careful lookout, or
>
> defendant drove at an excessive speed, or
>
> defendant's automobile was on the wrong side of the road, and
>
> Second, defendant in any one or more of the respects submitted in paragraph First, was thereby negligent, and
>
> Third, as a direct result of such negligence, plaintiff sustained damage.

MAI 17.02. Based on Mercy's logic, MAI 17.02 would always be erroneous since the first two submissions contributed to the third. Mercy would claim that failing to keep a careful lookout and driving at an excessive speed are not independent acts of negligence, since that conduct contributed to the defendant being on the wrong side of the road resulting in the wreck. Mercy would claim that plaintiff's "primary liability theory" was that defendant was on the wrong side of the road, and as such, negligent acts leading to the defendant being on the wrong side of the road cannot be separately submitted. *See Mercy's Brief*, pp. 48-51. Mercy's logic fails because the plaintiff does not have to only submit her "primary liability theory", instead, the law gives plaintiff "the right to choose any theory that was

supported by the evidence." *Cignetti*, 692 S.W.2d at 338. MAI clarifies this further by the "any one or more" language used therein.

Importantly, although Mercy claims plaintiff's "primary theory" was the failure to timely refer to a neurologist, the jury heard substantial evidence of other pathways to diagnose Wilson's Disease. First, excluding Wilson's Disease can easily be done by ordering a blood test called a serum ceruloplasmin. T.T. V7, pp. 775-81. This blood test can effectively exclude a patient from having Wilson's Disease. T.Ex. 205, pp. 20-21. T.Ex. 210, pp. 24-25. The evidence at trial was substantial, including an article from uptodate.com on "Overview of Tremors", which stated:

> Routine laboratory evaluations of tremor should include tests of thyroid function, diagnostic studies to exclude Wilson's and screening for heavy metal poisoning, such as mercury or arsenic. Wilson's disease should be suspected in anyone under the age of 40 who has a tremor or other involuntary movement or posture.

T.Ex. 21; T.T. V6, pp. 662-63. Mercy's expert, Dr. Frucht, wrote the same thing in his book, wherein he wrote that Wilson's Disease is a "can't miss" diagnosis because it will lead to irreparable harm if not diagnosed and should be ruled out with any person under 50 years-old that presents with a tremor. T.T. V7, pp. 747-59. When Dr. Frucht encountered a patient similar to Emilee, a 19 year-old with a right-handed tremor, he ordered a serum ceruloplasmin to determine if the patient had Wilson's Disease and wrote an article about his diagnosis. *Id.* Dr. Frucht admitted that if Dr. Pilapil ordered a serum ceruloplasmin in December 2012, January 2013, or anytime thereafter, it would have indicated that Emilee had Wilson's Disease. T.T. V7, pp. 776-777.

Dr. Pilapil admitted that she was aware that common symptoms of Wilson's Disease are anxiety, depression, tremor, heart issues and liver issues. T.T. V14, pp. 1422-23. Since Dr. Pilapil never reviewed or considered that Emilee had many of the known symptoms of Wilson's Disease because she failed to consider Emilee's medical chart, she did not search for a pathological cause of Emilee's problems. T.T. V13, pp. 1318-24. As Dr. Frey explained, even if a doctor is not thinking Wilson's Disease, Emilee's prior and current physical issues do not support a diagnosis of anxiety. T.T. V5, pp. 589-613; V6, pp. 618-663.

Likewise, the jury could consider that Emilee was diagnosed with Wilson's Disease based on an MRI. T.Ex. 3, 13, & 50D. Dr. Shah testified that given Emilee's findings, an MRI should have been timely ordered in conjunction with the neurologist referral. T.T. V4, pp. 414-15. The jury heard evidence and could consider the multiple pathways that would have led to a timely diagnosis.

The evidence that Dr. Pilapil's failure to take an adequate history was negligent and caused damage was not limited to plaintiff's experts. T.T. V14, pp. 1475-1509. Mercy hired the head of the family practice at the University of Missouri School of Medicine, Dr. Lefevre. Dr. Lefevre admitted that he would not manage a young patient with a unilateral tremor, a fact that should be gleaned during a thorough history. T.T. V14, pp. 1475-1509. He conceded that when you have a patient with a unilateral tremor, particularly a young

patient, this should lead the physician down a different pathway than a bilateral tremor[5]. *Id.* The reason that a unilateral tremor leads to different medical pathway is that a unilateral tremor cannot be explained by anxiety or an adverse reaction to medication, both of which are systemic issues, versus an isolated neurological one. *Id.* Dr. Lefevre admitted that in his decades of medical practice, he has never encountered an adolescent with a tremor. *Id.*

Further, one of Dr. Frey's assertions of neglect concerned Dr. Pilapil's failure to consider Emilee's prior medical chart and failure to follow up on the "red flag" issue – Emilee's tremor. T.T. V5, pp. 589-613; V6, pp. 618-63. Dr. Frey has practiced medicine for 40 years and he has never see a 20 year-old with a true tremor. *Id.* Dr. Frey's opinion on each of the three negligent visits was "very similar". *Id.* Dr. Frey discussed how Dr. Pilapil failed to take a thorough history of Emilee's tremor from visit to visit, which prevented her from knowing the severity of Emilee's tremor or even knowing it was only in her right hand, whether it was better, worse, changing, etc. *Id.* Dr. Frey explained how Emilee's tremor needed to be considered in light of Emilee's past medical issues such as her heart condition, leg swelling, liver issues, and abnormal blood tests. *Id.* When confronted with the information that Dr. Pilapil had available but did not consider, Dr. Pilapil should have been thinking, "This just doesn't make sense. Something else has to be going on here…. Look, we've got to get to the bottom of this, and the next step would be a referral at that point." *Id.* Dr. Frey opined that a reasonable doctor would have taken

[5] As is apparent in the trial transcript, Dr. Lefevre attempted to walk back his deposition testimony, but as is the appropriate remedy at trial, Dr. Lefevre was repeatedly impeached with his deposition transcript.

a thorough history of the tremor, monitored it, considered it in conjunction with Emilee's past prior medical issues, and gotten to the cause of the tremor. *Id.* It was negligent for Dr. Pilapil to sit on this "red flag" issue for months. *Id.*

Subparagraphs "a" and "b" appropriately framed plaintiff's theory of the case and plaintiff had every right to submit that theory to the jury. Mercy's basic claim in Point III is that Emilee can only submit on a "primary liability theory". There is nothing in the case law or Supreme Court rules that supports Mercy's theory on Point III. Mercy cites no law in this regard. Mercy argues that since Dr. Pilapil's negligent history and her failure to consider Emilee's prior medical issues both contributed to Dr. Pilapil's failure to timely refer Emilee to a neurologist, these cannot be separate negligent acts, which is nonsensical in any multi-submission case. Further, the jury heard substantial evidence that subparagraphs "a" and "b" were causative, as well as multiple pathways that would lead to a diagnosis, including blood tests, an MRI, close monitoring, as well as a referral to a neurologist. Any of which would have saved Emilee's brain.

Accordingly, since there was substantial causative evidence of subparagraphs "a" and "b", Mercy cannot prove prejudice. Mercy's Point III should be denied.

IV. MERCY'S POINT IV SHOULD BE DENIED AS MERCY FAILED TO PRESERVE ITS OBJECTION, THE TRIAL COURT PROPERLY RULED, AND IN AN ABUNDANCE OF CAUTION, THE TRIAL COURT REMEDIED ANY ERROR BY ALLOWING REBUTTAL TESTIMONY.

Mercy claims the trial court erred on multiple issues concerning the testimony of Dr. Belz. Mercy's claims are unavailing because:

A. Mercy's claim of surprise is due solely to Mercy's abbreviated deposition of Dr. Belz that did not ask questions concerning all of his opinions, all of the topics he was designated to testify concerning, or the basis for his opinions.

B. Mercy failed to preserve any current claims of error since its sole objection was hearsay concerning who wrote the term "subacute necrosis". A term found in an exhibit that was admitted without objection.

C. Mercy injected the issue of the February 2017 MRI into the case through its expert, Dr. Frucht, which invited further comment by Dr. Belz and Dr. Fischer.

D. Mercy was not prejudiced by Dr. Belz testimony regarding the 2017 MRI since he and Dr. Frucht both claimed it showed the same damage as the August 2013 MRI. This testimony was further cumulative of the Exhibit 261, which was admitted without objection.

E. Whatever error Mercy alleged was cured by allowing Dr. Frucht to testify a second time as the last witness when he addressed Dr. Belz's testimony about the definition of subacute necrosis even though defining a medical term is not a new opinion.

a. MERCY FAILED TO PRESERVE ANY OBJECTION TO DR. BELZ'S TESTIMONY SINCE IT FAILED TO OBJECT AT TRIAL.

i. POINT IV IS MULTIFARIOUS AND PRESERVED NOTHING FOR REVIEW.

Point IV refers to multiple alleged trial court errors in one point, which makes it difficult to respond in a cohesive manner to the buckshot approach to Point IV. As best as counsel can glean, Mercy claims error as to the following all in one point relied on: (1) admitting testimony of Dr. Belz concerning the 2017 MRI; (2) admitting testimony

regarding subacute necrosis, which was found in the 2013 MRI report; (3) violating a pretrial order; (4) violating Rule 56.01(E); and (5) overruling Mercy's Motion for Mistrial. Mercy was required to have separate points of appeal for each claim of error. A point relied on claiming the circuit court erred at separate times and in separate ways is multifarious and preserves nothing for review. *Spence,* 2018 WL 2308334, at *7 n. 13.

ii. MERCY FAILED TO OBJECT AT TRIAL AND PRESERVED NOTHING FOR APPEAL.

Mercy failed to preserve any objections to Dr. Belz's testimony at trial. Mercy completely ignores the trial transcript in its claim of error regarding Dr. Belz's testimony. When the transcript is reviewed, it is apparent that the trial court properly overruled an objection that concerned hearsay in regard to a medical record admitted without objection. T.T. V9, pp. 954-89. T.Ex. 50D. The remaining issues Mercy had with Dr. Belz's testimony were not preserved for appeal as there was no objection made at trial during the testimony.

To preserve an issue on appeal, a party is required to object at trial to the introduction of the evidence and to reassert the objection in post-trial motions. *Peters v. Gen. Motors Corp.*, 200 S.W.3d 1, 15 (Mo. App. W.D. 2006); *Enos v. Ryder Auto. Operations, Inc.*, 73 S.W.3d 784, 788-89 (Mo. App. E.D. 2002) ("To preserve evidentiary questions for appeal, there must be an objection giving the grounds at the time the evidence is sought to be introduced, and the same objection must be set out in the motion for new trial then carried forward in the appeal brief.").

Where evidence is admitted without objection, "the party against whom it is offered waives any objection to the evidence, and it may be properly considered even if the evidence would have been excluded upon a proper objection." *Host v. BNSF Ry. Co.*, 460 S.W.3d 87, 106 (Mo. App. W.D. 2015) (internal citations and quotation marks omitted). "[T]he objection must be specific, and the point raised on appeal must be based upon the same theory." *Discover Bank v. Smith*, 326 S.W.3d 120, 125 (Mo. App. S.D. 2015); *see also R&J Rhodes, LLC v. Finney*, 231 S.W.3d 183, 190 (Mo. App. W.D. 2007) ("To preserve for appellate review an error regarding the admission of evidence, a timely objection must be made when the evidence is introduced at trial. If the objection is not made at the time of the incident giving rise to the objection, the objection may be deemed waived or abandoned.") *quoting Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 168 (Mo. App. W.D. 1997).

Under the invited error doctrine, a party cannot claim prejudice to evidence that it stipulated would be admitted. "[A] party cannot complain on appeal of any alleged error in which, by his or her own conduct at trial, he or she joined in or acquiesced to." *Eltiste v. Ford Motor Co.*, 167 S.W.3d 742, 754 (Mo. App. 2005) (*quoted in Eckelkamp v. Burlington Northern Santa Fe Ry. Co.*, 298 S.W.3d 548, 553-554 (Mo. App. 2009)); *see also Powderly v. S. Cnty. Anesthesia Assoc., Ltd.*, 245 S.W.3d 267, 273 (Mo. App. E.D. 2008) ("When evidence of one of the issues in the case is admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may be properly considered even if the evidence would have been excluded upon a proper objection.").

Mercy failed to preserve any objection other than to "hearsay", which was not raised in post-trial motions or on appeal. At trial, the question objected to was whether the term "subacute necrosis"[6] was Dr. Belz's term or what was written by the interpreting radiologist at the University of Michigan. T.T. V9, pp. 954-89; T.Ex. 50D. The trial court re-affirmed in chambers exactly what the question was and the precise grounds for the objection. T.T. V9, pp. 981-88. After confirming the actual question and objection, Mercy's counsel withdrew the objection, stating "I'll let you answer that." T.T. V9, p. 984. Despite Mercy withdrawing the objection, the Court went on to overrule the objection based on the question asked and the specific grounds for the objection at trial. T.T. V9, pp. 981-88.

Mercy claims in Point IV that the plaintiff violated a pretrial order. As Mercy is well-aware, a pretrial ruling on a motion in limine is interlocutory and preserves nothing for appeal. *State v. Mickle*, 164 S.W.3d 33, 54-55 (Mo. App. W.D. 2005) ("The salutary purpose of a motion in limine is to point out to the court and to opposing counsel which anticipated evidence might be objectionable. . . . a motion in limine preserves nothing for appeal.") (internal citations and quotation marks omitted). Neither motion in limine or the court's order on the motion in limine cited to any specific testimony and certainly, as explained below, does not allow a party to ask next to nothing in deposition and then

[6] Mercy disliked the term "subacute necrosis" because it by definition means that the damage to Emilee's brain occurred within three months of the August 8, 2013 MRI, and thus, Emilee's brain was damaged after May 2013. T.T. V16, pp. 1654-57. Mercy's expert, Dr. Frucht, conceded that "subacute" commonly means from one to three weeks so the damage to Emilee's brain occurred in July 2013. *Id.*

attempt to inappropriately limit the expert testimony. This form of sandbagging has been expressly denounced by Missouri Courts.

Critical to preservation, Mercy failed to preserve any argument for appeal. The question asked concerned who wrote "subacute necrosis" and the objection at trial was hearsay, although withdrawn in conference. The trial court properly overruled the objection since the exhibit was already in evidence without objection. Mercy failed to raise any other objection during the testimony, and therefore, failed to preserve the grounds for its objection that it raises on appeal.

b. STANDARD OF REVIEW.

A trial court's discretion in ruling on a motion for new trial is given considerable discretion and will only be disturbed if the ruling was against the logic of the circumstances such that it shocks the conscious. *Wagner v. Mortgage Info. Serv., Inc.*, 261 S.W.3d 625, 636 (Mo. App. 2008) *quoting Andersen v. Osmon*, 217 S.W.3d 375, 377 (Mo. App. W.D. 2007). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances before the court at the time and is so unreasonable and arbitrary that it shocks one's sense of justice and indicates a lack of careful consideration. *Id.* We will reverse the trial court's denial of a motion for new trial only if we find a "substantial or glaring injustice." *Sterbenz v. Kansas City Power & Light Co.*, 333 S.W.3d 1, 7 (Mo. App. W.D. 2010); *Beverly v. Hudak*, --- S.W.3d ---, 2018 WL 707471 at *2 (Mo. App. W.D. Feb. 6, 2018), *reh'g and/or transfer denied* (Mar. 22, 2018).

c. THE TRIAL COURT PROPERLY RULED ON EVIDENTIARY OBJECTIONS SINCE DR. BELZ WAS DESIGNATED AS A CAUSATION EXPERT BUT WAS NOT ASKED A SINGLE QUESTION ABOUT CAUSATION IN HIS DEPOSITION.

Mercy claims the trial court erred in regards to the "surprise" testimony of Dr. Belz. Mercy waived any error to Dr. Belz's testimony by failing to make a timely objection at trial. Nevertheless, there was no error in Dr. Belz's testimony. Dr. Belz was disclosed as an expert preparing a life care plan and as an expert on causation in this case. His designation as a causation expert was deliberate and not boilerplate. In order for Dr. Belz to prepare a life care plan of future medical cost caused by the neglect in this case, Dr. Belz had to have a basis for saying what damages were due to the misdiagnosis and delayed treatment. As Dr. Belz testified at trial, he did rely upon Dr. Fischer but he also had confirmed Dr. Fischer's opinion with his own research and experience with heavy metal poisoning. T.T. V9, pp. 942-944; 951-54; V10, pp. 1035-36. Dr. Belz had significant experience treating patients with heavy metal exposure. *Id.* Mercy chose not to ask him about what, if any, portion of the plan was due to the misdiagnosis and resultant delay in treatment. It further did not ask Dr. Belz the basis for his opinion that the delay in treatment caused the need for the treatment and cost in the life care plan. Counsel is not critical of Mercy given that the logical assumption would be Dr. Belz is presenting damage evidence caused by the claimed neglect and Mercy's plan was to attack the plan and not its basis. Likewise, Mercy should not be critical when Dr. Belz explains the basis and foundation of his plan when Mercy chose not to ask about this.

Mercy's basic claim in Point IV is that since Mercy barely asked any questions in deposition, it could unilaterally limit Dr. Belz's testimony. Missouri law does not support

this contention. In Missouri's adversarial system, it is incumbent upon counsel to glean the opinions and underlying factual support from an expert at the expert's deposition. *Sherar v. Zipper*, 98 S.W.3d 628, 634 (Mo. App. W.D. 2003) *citing Blake v. Irwin*, 913 S.W.2d 923, 931 (Mo. App. W.D. 1996); *see also State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835 (Mo. banc 2000); Rule 56.01(b)(4) ("A party may discover by deposition the facts and opinions to which the expert is expected to testify"). "The attorney deposing the witness must ask for the expert's opinion and/or the underlying facts or data". *Hudak*, 2018 WL 707471 at *3 *quoting Sherar*, 98 S.W.3d at 634.

An attorney cannot "manufacture" surprise by failing to ask questions during a deposition. *Id.* at *2. "A party cannot claim surprise based on 'new opinions' as to matters about which the expert has not been asked during discovery." *Id.* As was explained in *Sherar*, to conclude otherwise:

> Would open the door to serious concerns. Specifically, a fundamental hazard arising from the position advocated by … counsel is the promotion of a form of sandbagging by counsel. Under his arguments, deposition counsel could ask general questions regarding the nature of an expert's opinion, yet refrain from asking "ultimate issue" questions of the expert… Then, when the time comes for trial…, counsel could claim "surprise" and seek to have the testimony excluded.

98 S.W.3d at 634. The principle requiring a party to disclose when an expert witness changes an opinion is not intended as a mechanism for contesting every variance between discovery and trial testimony. Impeachment of the witness will accomplish that goal. *Id.*

Mercy's claim of "surprise" was manufactured by its own doing since Mercy did not ask a single question about causation or the basis for Dr. Belz's opinions, which included the 2013 MRI finding with the term "subacute necrosis". App 103-120. Dr. Belz

was specifically designated as a causation expert because his opinion that the delay in treatment caused the horrific brain damage requiring his life care plan required a causation basis. App 005-33. Despite Dr. Belz's designation as a causation expert for more than six (6) months prior to his deposition, Mercy failed to ask Dr. Belz anything in regards to causation in his deposition. App 103-120. There was not one question about causation or a single question about any of the thousands of pages of medical records that Dr. Belz reviewed for his IME and life care plan, including any that he thinks are particularly pertinent. App 103-120. There were similarly no questions asked about his IME reports wherein he examined Emilee and determined which injuries were caused as a result of the delay in diagnosis, which is the entire purpose of an IME and life care plan. App 103-120.

In deposition, Dr. Belz explained that he based his opinion on the medical records, which included the 2013 MRI report. Pp. 22-23, App 103-120. Dr. Belz explained that he reviewed the depositions of multiple other witnesses and consultants, which included Dr. Fischer, Dr. Askari, and Dr. Lorincz's depositions. App 103-120. Despite Dr. Belz volunteering this information to Mercy's counsel, even though not asked, there was not a single follow-up question. *Id.* There was no question asking which records he found to be significant. There were no questions asking which depositions were significant to his plan. *Id.* There were no questions asking at what point in time in the delayed diagnosis was the plan based on. *Id.* There were no questions asked about his medical exam of Emilee, which was voluminous. App 121-160. There were no questions asked about his abbreviated file, which contained notes of significance. App 103-120. L.F. 1034-1036. There was not even a general catchall question of "are these all of your opinions and have

we covered the basis for your opinions", which is a standard question asked in expert depositions. *Id.*

Dr. Belz did not change a single opinion from his deposition testimony to his trial testimony. The only questions he was asked about in deposition concerned his life care plan, which did not change in any way from the time of the deposition to the time of trial. The only reason there was "surprise" at trial was because Mercy failed to ask Dr. Belz the fundamental questions: Is this due to the delayed treatment and what basis do you have for saying that. It is not Emilee's counsel's job to take her own expert's deposition for the benefit of Mercy. Mercy hired counsel for that. "A party cannot claim surprise based on 'new opinions' as to matters about which the expert has not been asked during discovery." *Hudak*, 2018 WL 707471, *2. Mercy's claim of "surprise" is completely manufactured due to its failure to ask Dr. Belz all of his opinions and the basis for his opinions in deposition. Mercy's claimed surprise was likely not surprise at all, but simply trial strategy to attempt to inappropriately limit an effective witness that Mercy's counsel has hired on multiple occasions. T.T. V10, pp. 1072-73. Although Mercy failed to preserve this issue, there was no error committed by the trial court.

d. THE TRIAL COURT PROPERLY RULED IN REGARDS TO THE 2017 MRI SINCE MERCY INJECTED THE MRI INTO THE CASE.

The trial court properly ruled on the 2017 MRI that Mercy injected into the case. Mercy claims error in regards to the February 2017 MRI even though Mercy's expert, Dr. Frucht, first injected this issue into the case. T.T. V7, pp. 740-41. Oddly, Mercy claims error even though Mercy's expert, Dr. Frucht and Emilee's expert, Dr. Belz, both testified

that the August 2013 MRI and the February 2017 MRI were the "same"[7]. T.T. V7, pp. 740-41; V9, p. 988. As such, Mercy's claim of "error" is that Dr. Belz agreed with Mercy's expert, Dr. Frucht and each expert felt it supported their opinion.

"A party that has introduced evidence concerning a certain fact may not on appeal complain that his opponent was allowed to introduce related evidence in rebuttal or explanation." *Bowles v. Scarborough,* 950 S.W.2d 691, 702 (Mo. App WD 1997) (internal citations and quotation marks omitted); *see also Bushong vs. Marathon Elec. Mfg. Corp,* 719 S.W.2d 828, 841 (Mo. App. SD 1986) ("plaintiff may not complain of the admission into evidence as a result of the blood test because plaintiff's counsel himself conveyed that information to the jury during his opening statement"); Am. Jur. 2d, § 716, p. 163.

Some background is needed as Mercy misconstrues the facts in its brief in its attempt to manufacture error. Dr. Belz was deposed in December 2016, a few months before trial. App 103-120. At that time, Dr. Belz brought his entire file to the deposition pursuant to the deposition notice, which contained the August 2013 MRI report[8] that used the term "subacute necrosis". T.Ex. 50D. Mercy was already in possession of the August 2013 MRI Report as it was taken at Mercy Hospital and then over-read at the University of Michigan. T.Ex. 13, 50D.

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[7] Dr. Frucht recanted this testimony when he was allowed to testify a second time, wherein he claimed the 2017 MRI was much worse and the radiologist interpreting the 2017 MRI committed malpractice. T.T. V16, pp. 1638-45.

[8] Mercy misconstrues in its brief that the 2017 MRI referenced "subacute necrosis". Mercy's Brief, p. 52. The 2013 MRI Report that was scanned at Mercy and over-read by the University of Michigan contains this term, not the 2017 MRI Report. T.Ex. 13; T.Ex. 50D.

Mercy made the decision as to what questions it wanted to ask Dr. Belz. The only questions asked during deposition of Dr. Belz concerned items in his life care plan, and the vast majority of the deposition discussed "potential" issues. App 103-120. In preparation for trial, Dr. Belz performed a third exam of Emilee to determine her current status to make sure there were no updates needed for the life care plan. T.T. V9, pp. 961-63, 988-92. T.Ex. 261. As a result of this visit with Emilee, Dr. Belz ordered an MRI to determine if Emilee's brain damage had improved or worsened. T.T. V9, pp. 961-63, 988-92. The February 2017 MRI Report and Third IME of Emilee were supplemented to Mercy's counsel prior to trial. L.F. 1037-1040. The February 2017 MRI report indicated that Emilee's brain damage was the same as it was in August 2013. T.Ex. 261. The February 2017 MRI and the third IME did not change any of Dr. Belz's opinions, which is why counsel indicated the same in an email to defense counsel. L.F. 1037-1040.

At trial, in an effort to be cooperative, Emilee's counsel allowed Mercy to call its causation expert, Dr. Steven Frucht, in the middle of plaintiff's case, prior to plaintiff's causation experts Dr. Belz and Dr. Fischer. Thus, Mercy was allowed to present its causation defense prior to (and after) Emilee presenting her case in regards to causation. During Mercy's direct exam of Dr. Frucht, Mercy's counsel inquired about the February 2017 MRI, thereby injecting the 2017 MRI into the case. T.T. V7, p. 740. Dr. Frucht testified that the August 2013 MRI was the "same" as the February 2017 MRI[9]. T.T. V7,

[9] Dr. Frucht changed this opinion when he was allowed to be called as the last witness at trial. After first claiming at trial that the two MRI's were the same, he changed his opinion and claimed the February 2017 MRI looked worse. T.T. V16, pp. 1640-45. Dr. Frucht's constantly changing opinions were simply a matter for the jury to decide.

pp. 740. He further opined that had there been an MRI in December 2012, it would look the same as the August 2013 MRI and the February 2017 MRI did not change, but instead supported his causation opinion.

After Dr. Frucht testified, Dr. Belz was called to the stand. During Dr. Belz's exam, the August 2013 MRI was admitted into evidence without objection. T.T. V9, pp. 961-63; T.Ex. 13 & 50D. Further, the February 2017 MRI, which was referenced previously in Mercy's questioning of Dr. Frucht, was admitted into evidence without objection. T.T. V9, pp. 961-63; T.Ex. 261. As a physician retained to do an independent medical exam, opine on causation, and a life care plan as a result of the delay in diagnosis, Dr. Belz explained how the delay in diagnosis contributed to cause the need for the significant future medical needs contained in his life care plan. T.T. V9, 941-1013; V10, pp. 1033-73. He based his opinion on the medical literature as well as Dr. Fischer's deposition, wherein Dr. Fischer stated Emilee would be normal if treated through May and near normal if treated in June 2013. T.T. V10, pp. 1035-36. A161-191, pp. 80-81, 115-16. In regards to the February 2017 MRI, Dr. Belz had an identical opinion to Dr. Frucht, that the August 2013 MRI looked the "same" as the 2017 MRI and both testified it supported their opinion. T.T. V7, p. 740; V9, pp. 987-89. This was also the opinion of the interpreting radiologist. T.Ex. 261.

As to the term "subacute necrosis", which was found in the 2013 MRI, Dr. Belz testified that this term refers to cell death that occurred between one to three months. T.T. V9, p. 981. Once again, Dr. Belz was not asked any questions about any medical records in depositions. When Dr. Frucht was asked about the same term, he testified that in stroke

cases, "subacute necrosis" generally refers to one to three weeks. T.T. V16, pp. 1654-55. The 2013 MRI was performed on August 8, 2013. As a result, Dr. Frucht's definition of "subacute necrosis" lined up identically with plaintiff's expert's theory that Emilee's brain was damaged irreparably after June 28, 2013. T.T. V11, pp. 1115-16. Importantly, Dr. Belz was defining a term found in the medical records that the jury would be unfamiliar with. Dr. Belz did not change any of his opinions. Physicians are commonly asked to define terms, such as what is a sprain, what is a herniation, or what is a fusion. The reason physicians testify at trial is to explain complex medical terms to the jury.

There was absolutely no error in Dr. Belz's testimony since (1) counsel sent the February 2017 MRI and Third IME to Mercy's counsel prior to trial; (2) Mercy injected the February 2017 MRI into the case; and (3) the February 2017 MRI was admitted into evidence without objection. Since Mercy injected the February 2017 MRI into evidence and further consented to it being admitted as an exhibit, plaintiff had the right to discuss this evidence.

Accordingly, there was no error in Dr. Belz's trial testimony. Mercy's claim of error is completely misguided. First, Mercy failed to preserve its objection to Dr. Belz's testimony. Second, Mercy cannot complain of surprise when Mercy's counsel failed to inquire as to Dr. Belz's opinions. Further, Mercy injected the February 2017 MRI into the case, and thus, cannot turn around and complain that plaintiff's counsel explored this topic. The fact that Mercy chose to put its expert on in plaintiff's case and inject new issues into the case is a problem of Mercy's making. Finally, there cannot be prejudicial error since

both Dr. Belz and Dr. Frucht testified consistently explaining that the two MRIs looked the "same".

e. MERCY WAS NOT PREJUDICED BY ANY ALLEGED ERROR.

This is likely the first case in the history of medical negligence trials where a defendant's expert was allowed to testify in plaintiff's case and as the last witness at trial, yet the defendant still claims prejudicial error. Any alleged error in regards to Dr. Belz's testimony was remedied by the trial court in allowing defendant's expert to testify a second time.

Trial courts have broad discretion to select a remedy in response to the nondisclosure of expert testimony and/or if an expert changes his testimony. *Green v. Fleishman*, 882 S.W.2d 219, 221-22 (Mo. App. W.D. 1994); *Hudak*, 2018 WL 707471 at *2 *citing Beaty v. St. Luke's Hosp.*, 298 S.W.3d 554, 560 (Mo. App. W.D. 2009) ("if an expert provides different testimony from that disclosed in discovery, that the trial court is vested with discretion to determine how to remedy the situation."). The principle requiring a party to disclose when an expert witness changes an opinion "is not intended as a mechanism for contesting every variance between discover and trial testimony. Impeachment of the witness will accomplish that goal." *Hudak*, 2018 WL 707471 at *4 *quoting Sherar*, 98 S.W.3d at 634.

There was no error in Dr. Belz's testimony and the trial court correctly ruled on Mercy's hearsay objection, although it was withdrawn. It is telling that Dr. Belz was not impeached on the stand and Mercy does not point out any deposition testimony that actually changed. The reason is that Dr. Belz did not change his testimony. Dr. Frucht

was allowed to testify as the last witness in the trial. He addressed both subjects that Mercy claimed surprise about albeit surprise of their own making.

Mercy's claim of error is particularly onerous since Dr. Belz had an identical opinion about the MRI to Dr. Frucht albeit felt it supported different opinions. "'A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence.'" *Martin v. Mercy Hosp. Springfield*, 516 S.W.3d 403, 406 (Mo. App. S.D. 2017) (quoting *Saint Louis Univ. v. Geary*, 321 S.W.3d 282, 292 (Mo. banc 2009)). Dr. Belz's testimony also mirrored the radiologist's findings on the 2017 February MRI, wherein the radiologist stated that it is the same as the August 2013 MRI. T.Ex. 261. Even though Dr. Belz's opinions were not new or a "surprise", there can be no error as this testimony was cumulative of Dr. Frucht's trial testimony.

Mercy's claim of error is groundless, but even if there was some error in Dr. Belz's testimony, the trial court used proper discretion to give Mercy the benefit of the doubt by allowing Dr. Frucht to testify again.

Accordingly, Point IV should be denied.

V. MERCY'S POINT V SHOULD BE DENIED SINCE DR. FISCHER WAS SPECIFICALLY ALLOWED TO REBUT DR. FRUCHT'S TESTIMONY.

Mercy claims the trial court erred in regards to three different portions of Dr. Fischer's testimony. Mercy first claims Dr. Fischer's testimony in regards to Trientine causing a neurological decline changed from deposition to trial. In fact, his opinion did not change he simply said that subsequent evidence cast doubt on the opinion. Mercy ignores the procedural history of the case, in that Mercy successfully struck Emilee's

rebuttal expert. The trial court's ruling however specifically allowed Dr. Fischer to rebut the opinions of Dr. Frucht and allowed Dr. Askari and Dr. Lorincz to be deposed a second time to rebut Dr. Frucht's claims that they committed malpractice. After having the benefit of these depositions and the 2017 MRI, which was injected into the case by Mercy and admitted as an exhibit prior to his testimony, Dr. Fischer conceded that his original statement was called into doubt. Mercy had the opportunity to cross-examine Dr. Fischer and call its expert a second time, such that any alleged error was not prejudicial.

Mercy next claims that the trial court erred because it alleges Dr. Fischer changed his opinion as to "timing". Mercy failed to preserve this point but the point fails substantively. Dr. Fischer's testimony did not change from deposition to trial. In both instances, he testified that if Emilee were treated in May and even into June she would have been normal, or close to it. T.T. V11, pp. 1138-47. Pp. 81-82, 114-116, App 161-195. Mercy simply ignores relevant portions of Dr. Fischer's deposition.

Finally, Mercy claims Dr. Fischer voiced standard of care opinions about the unilateral vs. bilateral issue. There were no such opinions voiced. Dr. Fischer responded to Dr. Frucht's new opinion that a B-agonist can cause unilateral tremors. His testimony was directly in rebuttal and did not concern standard of care. The admission of this rebuttal testimony was previously ordered by the court in lieu of allowing a separate rebuttal expert. Further, any alleged error was not prejudicial as this testimony was cumulative since Dr. Frey, Dr. Shah, and even Mercy's expert, Dr. Lefevre agreed that medications and anxiety do not cause unilateral tremors.

Accordingly, there was no error during Dr. Fischer's testimony, and if there was, it was not prejudicial.

a. POINT V IS MULTIFARIOUS AND PRESERVES NOTHING FOR APPEAL.

Point V refers to multiple alleged trial court errors in one point. As best as counsel can glean, Mercy claims error as to the following all in one point relied on: (1) denying Mercy's motion for a new trial; (2) admitting testimony regarding the 2017 MRI; (3) admitting testimony regarding the concept of "necrosis"; (4) standard of care issues; (5) violating Rule 56.01(E); and violating the pretrial order. *Id.* Mercy was required to have separate points of appeal for each claim of error. A point relied on claiming the circuit court erred at separate times and in separate ways is multifarious and preserves nothing for review. *Spence,* 2018 WL 2308334 at *7 n. 13.

b. STANDARD OF REVIEW.

The standard of review and the applicable law on expert testimony is the same as Point IV.

c. THE TRIAL COURT PROPERLY RULED THE MULTIPLE CLAIMS OF ERROR REGARDING DR. FISCHER'S TESTIMONY

i. MERCY'S "FIRST" CLAIM OF ERROR IN POINT V.

Mercy's "first" claim of error in regards to Dr. Fischer concerned its allegation that he changed his opinion in regards to Trientine causing neurological deterioration. Dr. Fischer did not change his opinion that had Emilee been treated earlier she would have been normal due to her lower copper burden. This opinion remained the same. Dr. Fischer simply conceded that a statement he made in deposition was called into doubt by the

testimony of Dr. Askari, Dr. Lorincz, and the 2017 MRI. Dr. Fischer was cross-examined extensively on this just as plaintiff's counsel did when Mercy's experts altered their testimony. Further, Mercy was allowed rebuttal testimony on this precise issue.

Some background is needed as it is relevant to Mercy's claim of error and omitted from Mercy's brief. After Dr. Fischer testified in deposition, a second deposition was taken of Dr. Askari and Dr. Lorincz. T.Ex. 206 & 211. The reason a second deposition was taken of the Michigan physicians was because Dr. Frucht, in deposition, accused Dr. Askari of malpractice. Pp. 52-53, App 196-254. Plaintiff designated an additional expert to rebut Dr. Frucht's opinions. App 092-99. Mercy moved to strike plaintiff's expert. L.F. 144-148. The Court granted Mercy's motion to strike plaintiff's rebuttal expert, but stated that Dr. Fischer could rebut Dr. Frucht's testimony and additional depositions could be taken of Dr. Askari and Dr. Lorincz. L.F. 185. *Am. Family Mut. Ins. v. Coke*, 413 S.W.3d 362, 372-73 (Mo. App. E.D. 2013) *citing Aliff v. Cody*, 26 S.W.3d 309, 315 (Mo. App. W.D. 2000) (The trial court is specifically vested with the discretion to allow rebuttal testimony to disprove points newly raised by an opposing party.)

In his deposition, Dr. Frucht claimed that Dr. Askari committed malpractice because he failed to timely stop Trientine after Emilee continued to decline. Pp. 58-63, App 196-254. In their second depositions played at trial, Dr. Askari and Dr. Lorincz explained given the delay in treatment and Emilee's rapid decline after June it is impossible to differentiate whether the rapid progression of the disease was causing Emilee's continued decline or whether the Trientine caused additional neurological deterioration. T.Ex. 206, pp. 27-32; T.Ex. 211, pp. 10-14, 51-52. Both physicians testified unequivocally that they had to give

Trientine due to Emilee's severely disabled condition upon diagnosis or Emilee would have died. T.Ex. 206, pp. 14-18, 34-35, 97-98.

Dr. Fischer reviewed these depositions as well as the 2017 MRI prior to trial, and at trial, conceded the 2017 MRI and testimony from the Michigan experts cast doubt on his original statement in deposition. T.T. V11, pp. 1177-81, 1189-91. Dr. Fischer did not deny his original opinion, he simply recognized the evidence that cast doubt upon it. *Id.* Dr. Fischer was certainly impeached for doubting his own opinion during cross-examination just as plaintiff's counsel impeached Dr. Pilapil, Dr. Frucht and Dr. Lefevre about their changes in testimony. T.T. 1189-91. Since Dr. Fischer was specifically allowed to rebut the testimony of Dr. Frucht, there was no error in this statement and if it was, it was not prejudicial.

Most importantly, his opinions were the same in deposition and trial. Dr. Fischer's opinion was that if the Trientine been administered earlier, the copper burden would have been lower and Emilee would not have experienced the decline. T.T. V11, pp. 1115-16, 1138-47; Pp. 80-82, 115-116, App 161-195. He specifically testified in deposition that if Emilee were treated in May or June 2013, her neurological decline would have been minimal and she would have recovered. Pp. 80-82, 115-16, App 161-195. His opinion that the neurological decline would not have happened had Emilee been diagnosed and treated timely, whether the decline was from the disease or Trientine, was the same in deposition and trial. *Id.* Mercy's claim of error is simply nitpicking immaterial variances on issues that were already prevalent in the case through the testimony of Dr. Frucht, Dr.

Askari, Dr. Lorincz, and the 2017 MRI. T.Ex. 13 & 261. The appropriate remedy for such variances is in cross-examination. *Hudak*, 2018 WL 707471 at *5.

There was no error in Dr. Fischer casting doubt on a statement he made in deposition. Any alleged prejudice was remedied by cross-examination and Dr. Frucht being allowed to testify a second time, wherein Dr. Frucht changed his original trial testimony. Further, the statement was cumulative of the testimony of Drs. Askari and Lorincz, and as such, cannot be prejudicial error.

ii. MERCY'S SECOND CLAIM OF ERROR IN POINT V.

As an initial matter, Mercy failed to object at trial as it relates to Dr. Fischer's opinions as to "timing". T.T. V11, pp. 1139-51. Mercy objected to Dr. Fischer using the term "necrosis" but nothing about the actual opinion of Emilee's outcome at certain time intervals because his opinion as to time intervals was identical from deposition to trial. Dr. Fischer used the term "necrosis" one time, a term that was already discussed at trial, and was contained in the 2013 MRI Report, which was admitted without objection and contained in Dr. Fischer's file at the time of his deposition. T.T. V11, p. 1100. T.Ex. 50D. Pp. 20-22, App 161-195. The 2013 MRI report was in Dr. Fischer's file at the time of his deposition and he specifically stated that he reviewed the 2013 MRI images and report. Pp. 20-22, App 161-195. Mercy's claim that Dr. Fischer using a term found in an admitted exhibit is groundless.

Mercy next claims that Dr. Fischer changed his opinions in regards to Emilee's outcome had she been treated earlier. Mercy is completely incorrect as Dr. Fischer's opinions in regards to timing did not change from deposition to trial. In deposition, Dr.

Fischer testified that Emilee would be normal if she were treated by the end of May 2013 and close to normal if treated on June 28, 2013. T.T. V11, pp. 1138-58. Pp. 80-82, 115-116, App 161-195. Dr. Fischer, at deposition and trial, testified that based upon Emilee's symptoms while her brain was being irritated by the copper the copper burden was not significant enough to have caused cell death. *Id.*

There were no substantial or prejudicial changes to Dr. Fischer's opinions since his opinions as to when Emilee's brain damage was reversible was the same in deposition and trial. His opinion that Emilee would not have reacted to Trientine had she been treated earlier remained the same. The battle between experts was whether the jury believed that early intervention mattered or did not. The other claims made by Mercy are simply not material given Mercy's theory at trial that delaying the diagnosis did not matter.

Any alleged error was remedied by cross-examination and the benefit of Dr. Frucht testifying a second time at trial, both before and after Emilee's causation experts. The trial court appropriately ruled on the testimony.

iii. MERCY'S "THIRD" CLAIM OF ERROR IN POINT V.

Mercy's third claim of error is that Dr. Fischer briefly discussed the significance of a unilateral vs. a bilateral tremor, an issue that was discussed multiple times throughout the case prior to Dr. Fischer's testimony. T.T. V11, pp. 1131-38. The unilateral vs. bilateral issue was a new issue brought up by Dr. Frucht on direct and rebutted by Dr. Fischer. T.T. V7, pp. 738-40, 772-75; V11, pp. 1137-38. Dr. Fischer said nothing about standard of care, negligence, or in any way criticized Dr. Pilapil's care. Indeed, Mercy does not

point to a single segment of testimony wherein Dr. Fischer voiced "standard of care" and/or negligence opinions.

Not only did the Court order allow Fischer to rebut Frucht, under the invited error doctrine, "A party that has introduced evidence concerning a certain fact may not on appeal complain that his opponent was allowed to introduce related evidence in rebuttal or explanation." *Bowles v. Scarborough,* 950 S.W.2d 691, 702 (Mo. App WD 1997) (internal citations and quotation marks omitted). Further, plaintiff had the right to rebut a new opinion from Dr. Frucht by case law and court order. *Coke*, 413 S.W.3d at 372; *Aliff*, 26 S.W.3d at 315.

The question to Dr. Fischer regarding unilateral vs. bilateral tremors was directly in response to Dr. Frucht's statement that a B-agonist can cause a unilateral tremor. T.T. V7, pp. 738-740. Dr. Fischer was asked a very brief question about unilateral tremors in explaining why they are significant to a neurologist, not a family care doctor. T.T. V11, pp. 1137-38. Dr. Fischer simply testified that B-agonists causing unilateral tremors was not his experience. T.T. V11, p. 1138. Dr. Fischer said absolutely nothing about negligence or anything in regards to Dr. Pilapil violating the standard of care.

"A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence." *Saint Louis Univ. v. Geary*, 321 S.W.3d 282, 292 (Mo. banc 2009) (internal citations and quotation marks omitted). The issue of unilateral vs. bilateral was discussed at length multiple times at trial prior to Fischer's testimony and in fact Mercy's expert Dr. Lefevre agreed 100% with what Drs. Shah, Frey and Fischer said. T.T. V3, pp. 390-395, 405-408; V4, pp. 464; V5, pp. 598-600, 607-608;

V6, pp. 621-623, 646-647, 659-60; V7, pp. 738-740, 772-773, 785, 795, V14, pp. 1485-99, 1509-12. The issue of unilateral vs. bilateral was cumulative and not remotely error.

Mercy claims this "error" is prejudicial, but it should be noted that trial counsel did not cross examine Dr. Fischer on this issue. The reason is obvious, Mercy's counsel knew that its expert Dr. Lefevre would express the same opinion, that antidepressants do not cause unilateral tremors and as an internist he refers patient to a neurologist if that patient had a unilateral or focal tremor.

Mercy's claim should be denied because (a) the ruling was not error given that it was responsive to the point first raised by Frucht; (b) Mercy was aware that Dr. Fischer would be allowed to rebut Dr. Frucht since plaintiff was denied a rebuttal expert and (c) the comment was not prejudicial given the fact that it was cumulative of Frey, Shah, and Mercy's expert, Lefevre.

Accordingly, Mercy's Point V should be denied.

VI. MERCY'S POINT VI CLAIMING THE TRIAL COURT ERRED BY NOT SUBJECTING ALL OF THE FUTURE MEDICAL DAMAGES TO PERIODIC PAYMENTS SHOULD BE DENIED SINCE THAT WILL THWART THE INTENT OF THE JURY AND LEAVE EMILEE WITH INADEQUATE FUNDS TO PAY FOR HER FUTURE MEDICAL NEEDS.

Mercy contends the trial court misapplied *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012) by requiring Mercy to pay $11,000,000 out of the $21,000,000 award in lump sum. Mercy suggests the trial court should have followed one of two options, neither of which has any support in the case law or § 538.220.[10] First,

[10] All Statutory citations are to RSMo 2016.

Mercy claims the trial court should only allocate portions to lump sum if the plaintiff proves there is "evidence of substantial immediate needs or special periodic needs" for those funds. Alternatively, Mercy claims the trial court should have subjected every penny of the future medical damages award to periodic payments. Finally, since options one and two are contrary to the holding in *Watts* and the plain language of § 538.220, Mercy asks this Court to overturn *Watts*. Mercy's argument does not further the goals of § 538.220 or comply with *Watts*. The only purpose for Mercy's proposed rule change is to save it money, now and in the future, at the cost of the victim of its malpractice, which will burden the state that will have to pay for the victim. The solution Mercy seeks by definition leaves inadequate funds to care for Emilee, which thwarts the clear intent of the jury's verdict.

Mercy couches its argument claiming that the *Watts* holding needs "clarification"; however, the holding in *Watts* is simple and straight-forward. The plain language of § 538.220 vests the trial court with discretion to order any future damages in "whole or in part in periodic or installment payments." Section 538.220.2; *see also Davolt*, 119 S.W.3d at 138. *Watts* recognized that the plain language of § 538.220 "expressly left the issue of how to pay future damages and at what interest rate in the hands of the court." *Watts*, 376 S.W.3d at 647. As the Court explained, the trial court has discretion to vary the interest rate for all future damages other than future medical damages. *Id.* For future medical damages, the Court has discretion whether to award those damages in "whole or in part", but the interest rate is set by statute with zero regard for the present value analysis used at trial or expected medical inflation. *Id.*

Watts recognized the inherent inequity and potential for § 538.220 to be applied in an unconstitutional manner if it is used to diminish the full value of the jury's verdict. *Id.* Under the Missouri Constitution Article I, section 22, it is the jury's role as the fact finder to decide the amount in present day dollars how much the future medical costs will be for the plaintiff and double-discounting the jury's damage award that was already reduced to present value would be plainly unconstitutional. *Id.* This would not only deprive the plaintiff of her constitutional right to the jury deciding her damages, it would also leave an insufficient amount to fund her future medical expenses, which would force the state to pay for Mercy's negligence. *Id.*

Rather than allow § 538.220 to veer into unconstitutional waters, the Court decided that §538.220 can be Constitutional upon application by forbidding trial courts from using an interest rate in periodic payments contrary to the medical inflation growth rate used at trial. *Id.* Since the trial court is hamstrung by § 538.220's required interest rate, which pales in comparison to medical inflation, the only constitutional application of § 538.220 is to allocate the "part" of the damages to be paid in lump sum to be equal to the present value of the future medical damages. *Id.* at 648. To do otherwise, would contravene the jury's verdict's finding of damages.

Rather than comply with *Watts*'s constitutional application of § 538.220, Mercy asks this Court to completely re-write the statute and have it applied in an unconstitutional manner. Mercy claims that after a verdict is entered, the plaintiff must prove her case a second time to the judge showing an "immediate medical need or special periodic need" that will not be met if the periodic payment schedule is applied to all of the future medical

damages awarded by the jury. Such an assertion of the Court required finding of an "immediate medical need" is not written anywhere in § 538.220 or stated in *Watts*. Indeed, Mercy's brief is bereft of any law in support of this assertion. Such an assertion is the antithesis of a jury deciding the plaintiff's damages. *Id.* at 642 ("[b]ecause the constitutional right to a civil jury trial is contingent upon there being an action for damages, statutory limits on those damages directly curtail the individual right to one of the most significant constitutional roles performed by the jury—the determination of damages"). Mercy, in no uncertain terms, wants to violate the jury's findings of future medical damages for Emilee to prevent it from paying what it owes Emilee.

Watts acknowledged this constitutional dilemma of allowing plaintiff's future medical damages to be discounted at trial, and then again by application of § 538.220. Double discounting the jury's award deprives the plaintiff of the full value of the jury's award. It is this precise reason that *Watts* remanded the case to "ensures that Naython will receive the benefit of the jury's award for future medical care." *Id.* at 648. The only way to prevent § 538.220 from depriving the plaintiff of the full value of the jury's award is for the trial court to do one of two things. The logical application of *Watts* is that when the plaintiff reduces the future medical damages award to present value, that amount must be paid in lump sum by the tortfeasor. The other option, since Mercy is claiming the trial judge should thwart the jury's present value analysis, is to have the judge disregard the

jury's present value reduction, and apply periodic payments to the grown future medical damages prior to being discounted to present value[11].

Mercy claims that § 538.220's use of the term "total" in regards to future medical damages means that the entire amount of future medical damages must be subject to periodic payments. Mercy's request in this regard is plainly contrary to the statute and every case interpreting § 538.220. If Mercy's argument was taken literally, it would invalidate the first sentence of the statute, which gives the trial court discretion to determine if periodic payments will be in "whole or in part", and further invalidate the second-to-last sentence that requires an evidentiary hearing. *Id.* at 647-48. Indeed, why would the legislature specifically allow the trial court to allocate "in whole or part" of the future damages to future medical payments if it did not mean what it wrote. The legislature could have removed "in whole or in part" from the statute had that been its intent[12]. Further, there is no need for an evidentiary hearing if the judge has no discretion. The clear intent of the statute is to give the trial judge discretion as to whether to order future medical damages in "whole or part". *Id.* The "total" amount of the "part" that is allocated to future medical damages must be calculated pursuant to the statutory method. *Id.*

[11] As explained in the post-trial hearing, this would require Mercy to apply periodic payments to approximately $58,000,000 and require Mercy to pay over $70,000,000 over the next 58 years. Post-Trial Hearing (hereinafter "P.T.Hr.") pp. 19-35. Unsurprisingly, Mercy only argues for a double-reduction in Emilee's damages rather than a fair application of the statute. If Mercy would prefer periodic payments, it must have the appropriate numerator and denominator.

[12] Plaintiff would submit that if the legislature removed the "in whole or in part" language, it would prohibit the constitutional application of § 538.220 as proposed by *Watts*.

Even though Mercy claims that the plaintiff must show an immediate medical need is found nowhere in § 538.220 or any case interpreting it, the only evidence at trial was that Emilee's needs are immediate, life-threatening, and ongoing for 58 years. T.T. V9, pp. 944-1013; V10, pp. 1033-93. Dr. Belz explained how the plan is a preventative plan and detailed how if the plan is not followed to the letter or if she has complications, which are common, the plan will be inadequate to fund Emilee's future medical needs. T.T. V9, pp. 944-1013; V10, pp. 1033-93. Further, the only evidence the jury considered in regards to the present value application of the plan was from Larry Ellison. T.T. V15, pp. 1566-1607. He likewise explained that to have sufficient funds to pay for Emilee's future care, given medical inflation and the time value of money, $17,758,161 must be deposited in her trust in lump sum at the time of trial. *Id.* Brooke Liggett, Larry Ellison's partner that assisted in preparing the economic damages report, explained that if the reduced to present value figure ($17,758,161) is spread out over 58 years, Emilee's plan would be approximately $40 million short. P.T.Hr. 19-35. This approximate $40 million deficit would be borne by the State, which is precisely what Mercy wants, for anybody but Mercy to be responsible for its wrongdoing. Although Emilee was under no burden to prove an "immediate medical necessity" as Mercy alleges, Emilee did show that applying periodic payments to the present value figure would result in a catastrophic shortfall of nearly $40 million. T.Ex. 315.

Applying a Constitutional interpretation of § 538.220 to the jury's verdict is simple and straight-forward. The jury awarded Emilee $21,000,000 in future medical damages. L.F. 447-448. As mentioned, the jury heard that the present value of Emilee's medical

damages was $17,758,161 if paid in lump sum. T.Ex. 245. The jury heard evidence concerning medical inflation, growth rates, and the discount rates used and logically concluded that plaintiff's experts were overly conservative in their present value analysis and awarded Emilee $21,000,000 in future medical damages. *Id.* *Vincent by Vincent v. Johnson*, 833 S.W.2d 859, 865 (Mo. banc 1992) ("Projections by economists that any economic trends will continue in the future are not entitled to automatic acceptance by the jury even when uncontradicted. A jury may disbelieve parts of an expert's testimony, and, when the expert gives an opinion on a matter of general experience, the jury may weigh that testimony against their general experience.") There was no contrary evidence other than the $17,758,161 being conservative. T.T. V9, pp. 941-1013; V10, pp. 1033-94; V15, pp. 1566-1611. Since $17,758,161 was reduced to present value, subjecting any portion of that amount to future periodic payments violates *Watts* and would leave Emilee devastated when her trust runs out of money to pay for her future care.

On March 20, 2017, the trial court complied with *Watts*'s direction by entering judgment requiring Mercy to pay $17,758,161 in lump sum and subjected the remaining $3,241,839 to periodic payments at the statutorily prescribed interest rate. L.F. 816-818. Plaintiff would submit that although unfair to Emilee and possibly unconstitutional, it likely complied with the tenets of *Watts*. Although Plaintiff vigorously believes that the jury should decide all damages, the trial court had an easy decision in this limited case to comply with the purpose of § 538.220 by subjecting $3,241,839 to be paid periodically, a significant sum that complies with the purpose of § 538.220 to spread costs over time. Further, requiring $17,758,161 to be paid in lump sum assured that Emilee's care would

not burden the State since the life care plan would be fully funded and placed in trust. If there was any error in the Judgment entered, it was in amending the judgment by subjecting $10,000,000 to be periodically, rather than $3,241,839.

Mercy's basic argument that the trial court erred is requesting that the trial court should have believed Mercy's expert, Mr. Tucek, and disregarded the jury's finding of fact. Counsel feels compelled to note the irony of Mercy dedicating pages of its brief to Mr. Tucek's testimony. This is ironic because Mercy also commits dozens of pages of its brief claiming error in Dr. Belz and Dr. Fischer's testimony, two experts that were disclosed and deposed long before trial. To the contrary, Mr. Tucek was **not** disclosed as an expert at any time prior to or after trial. Mr. Tucek did not testify in front of the jury. Mr. Tucek's report was first disclosed to Emilee's counsel at the March 16, 2017 hearing. Surely if Mercy thought Mr. Tucek's testimony was credible and persuasive, Mercy would have designated him as an expert and had him testify before the jury. Mercy consciously chose not to present any such evidence and should not be allowed a second bite at the apple in a post-trial hearing. Mercy's request is for the trial court to disregard the jury's verdict based on evidence not presented at trial.

Mercy's request to have a judgment entered contrary to the jury verdict, based on evidence that was not before the jury, is the antithesis of Article I, Section 22's Constitutional right to a jury deciding the damages in a case. Mercy's confusing framework as to how the jury's finding should be manipulated to save Mercy money is contrary to the plain language of § 538.220, *Watts*, and requests a blatantly unconstitutional interpretation of the statute.

Plaintiff respectfully requests this Court deny Point VI since Mercy's request invites an unconstitutional application of § 538.220.

APPELLANT/CROSS-RESPONDENT'S REPLY TO HER INITIAL BRIEF

I. POINT 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*.

The periodic payment scheduled adopted by the trial court guarantees that Emilee will not have sufficient funds to pay for her future medical expenses, precisely what the jury awarded. The edict of *Watts* is very clear that § 538.220 can be applied in a constitutional manner as long as the "part" of the future medical damages awarded required to be paid in lump sum is equal to the present value of the jury's future medical damages award. *Watts*, 376 S.W.3d at 647-48. This is the obvious inference from the holding since trial courts have no discretion on interest but have discretion deciding which "part" is subject to lump sum vs. periodic payments. *Id.*

Rather than comply with *Watts*, the trial court fell into the same trap as the trial court in *Watts*, which is largely due to the fact that the statute is confusing. Like Cox Medical did in *Watts*, Mercy requested that all of Emilee's future medical damages be subjected to periodic payments. The trial court essentially split-the-baby by ordering approximately half of the future medical damages be paid periodically, which is precisely the same error the trial court committed in *Watts*. The trial court abused its discretion by failing to comply

with *Watts* since the $10,000,000 in damages paid periodically is subject to an "inconsistent future damages interest rate" than was used in the present value reduction. *Id.* at 648. The June 23, 2017 Judgment is directly contrary to the holding in *Watts.* The fact that the interest rates are inconsistent is not in dispute, Mercy simply wants to re-litigate the facts underpinning the jury's verdict on appeal by claiming that the interest rates used in the present value analysis at trial were incorrect. Mercy's had an opportunity at trial to present whatever evidence it felt relevant, but consciously chose not to contest plaintiff's economic damages.

Mercy's opposition to Point I is primarily a claim that the jury erred in rendering a verdict consistent with the plaintiff's evidence. Mercy claims that Dr. Belz's plan "vastly exceeded" what was needed and that Mr. Ellison applied an "improper growth rate" in calculating the future value of Emilee's medical needs. Mercy's Brief, p. 68. Mercy's argument is really one for remittitur or a verdict that is against the weight of the evidence, two issues not raised on appeal. Mercy is attempting to undermine the jury's verdict by relying on information that was not presented to the jury and is unpersuasive.

As previously discussed, the irony is thick that Mercy complains about "nondisclosure of opinions" but bases its response to Point I solely on an undisclosed expert that did not testify at trial. P.T.Hr. pp. 11-42. If Mercy thought Mr. Tucek could credibly withstand cross-examination at trial and had valid attacks on Larry Ellison's economic calculations - then why was he not designated or called as a witness at trial? The reason is simple, Mercy made the calculated decision to produce no contrary evidence to Emilee's economic damages at trial. Mercy made this decision since it likely did not want

to put a "floor" on Emilee's economic damages or potentially because Mr. Tucek makes a poor witness and would cost Mercy credibility. Whatever Mercy's reason was for not presenting any evidence contrary to Dr. Belz or Larry Ellison, the entire notion that the full value of the jury verdict can undermined by an expert that did not testify in front of the jury is unheard of in trial practice.

In the June 23, 2017 Judgment, the error by the trial court was identical to the error in *Watts*. Essentially, it is clear from the record that the trial court struggled with interpreting § 538.220 and settled on subjecting approximately half of the future medical damages to periodic payments. P.T.Hr. pp. 4-16, 60-70. App 001-003. In *Watts*, the trial court committed the same error, which is why remand to comply with *Watts* is necessary.

Watts held that a trial court abuses its discretion in using an inconsistent future damages interest rate than what the jury awarded in present value dollars. *Id.* This guarantees that plaintiff will not "receive the benefit of the jury's award for future medical care." *Id.* The June 23, 2017 Judgment applied an interest rate of 1.2% to the future medical damages, which is plainly contrary to the present value reduction of up to 5.18%. P.T.Hr., pp. 25-26. As complicated as Mercy tries to make the constitutional application of § 538.220 and the *Watts* holding, this is simple math. Indeed, Mercy does not even contest the fact that the current judgment takes from Emilee the full value of the jury's award.

The catastrophic result to Emilee is that she is deprived of the full value of the jury's award, which will prevent her from paying for her care into the future and likely force her to seek assistance from the state, which is what she currently relies on. There was no

evidence in the trial of this matter that any value other than the present value figure of $17,758,161 paid in lump sum would fund Emilee's future medical needs. As the Judgment currently stands, Emilee is guaranteed to not have sufficient funds to pay for her future medical care and she will be forced to seek governmental social services.

Similar to *Watts*, Emilee requests that the case be remanded to the trial court with instructions to amend the judgment to ensure that she receives the benefit of the jury's award for future medical care.

II. POINT 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.

Plaintiff's Point II is to illustrate the inherent unconstitutionality of the "part" of any future medical damages subjected to periodic payments that employs an unrealistic interest rate that by definition takes the full value of the jury's verdict from the plaintiff. Mercy's opposition acknowledges that application of § 538.220 will indeed prevent Emilee from receiving the full value of her jury award, but that is Emilee's fault for not using one-year interest rate found in the statute. The fallacy in Mercy's argument comes down to simple math.

As explained to the jury at trial, the purpose of present value is to determine how much money in today's dollars needs to be invested to cover future medical expenses in

the future. T.T. V15, pp. 1566-1611; P.T.Hr. pp. 19-35. The entire premise of any present value analysis is that the funds will be paid in lump sum so that the money can be invested and grown at a safe rate to pay for future medical expenses. *Id.* If the funds are not paid in lump sum, it renders any present value calculation obsolete since the funds will not be allowed to grow and pay for future medical expenses. *Id.*

Requiring periodic payments defeats the entire premise of present value. They are mutually exclusive concepts. *Id.* If funds are represented in present value to pay for future medical needs, if anything less than the present value figure is invested it will be insufficient to pay for the future medical needs. *Id.* As explained in the post-trial hearing, the effect of this statute requires an already reduced number to be double discounted resulting in a $ 40 million short fall. *Id.* This burden will be felt by Emilee and the state that will be required to pay for her services. *Id.*

Plaintiff believes that § 538.220 and § 538.215 cannot co-exist in a constitutional manner if any "part" of a plaintiff's damages are subjected to periodic payments. Periodic payments defeat the premise of present value. The only way to apply periodic payments in a fair manner that does not diminish the full value of the jury's verdict is to apply periodic payments to the grown figure. This would lead to higher jury awards, as in this case, the grown cost of Emilee's future medical damages is approximately $58,000,000. If this amount is paid periodically and the one year federal funds rate is applied to it, the total amount paid would be approximately $73,000,000. P.T.Hr. pp. 19-35. Mercy does not argue for a fair interpretation of the two statutes, but only one that saves it money at the expense of Emilee and the state.

III. POINT 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.

The trial court erred by failing to allocate 40% of the $10,000,000 allocated to periodic payments in lump sum. Under § 538.220.4, the legislature acknowledged that attorneys in medical negligence cases work on contingency fees. Given that subjecting damages to periodic payments, a phenomena not present in any other civil verdict, makes the contingent fee relationship difficult, the legislature remedied the problem by specifically requiring that the attorney's fee portion of the award shall be paid at the time the judgment becomes final. *Id.* ("it shall be presumed that the fee will be paid at the time the judgment becomes final."). Every case that interpreted the plain language of this statute has held that the attorney's fee portion of any amount subject to periodic payments must be paid in lump sum. Mercy does not cite to a single case that agrees with its interpretation of § 538.220.4 since it is contrary to the plain language in the statute.

In *Vincent by Vincent v. Johnson*, 833 S.W.2d 859 (Mo. banc 1992) this Court held that absent agreement, attorney's contingent fees will be paid at the time of judgment, which states:

> 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 judgment. Second, **it is presumed that, absent the attorney's agreement, attorney's contingent fees will be paid**

> **at the time of judgment**. That statute does not require any other amounts to be apportioned to future payments.

Id. at 866 (emphasis added). The plain language of the statute requires the trial court to allocate the portion of future periodic payments that are subject to attorney's fees be paid in lump sum, unless the attorney's agreement states otherwise. *Id.*

Mercy claims that "attorney's fees are a matter between her and her lawyer, not the Court or her adversary". Mercy's Brief, p. 76. While generally this is true, it is not in the instance where, unlike most cases, future damages are subject to periodic payments such that the attorneys cannot be compensated for their efforts for decades. Given this obvious inequity, the legislature required that all attorney's fees be paid at the time of judgment, even if a portion of those fees are subject to periodic payments. A reading contrary to this would render § 538.220.4 meaningless. If attorney's fees do not have to be paid in lump sum, why did the legislature include § 538.220.4.

Mercy's tortured interpretation of § 538.220.4 violates the plain language of the statute. The portion of § 538.220.4 that Mercy relies on, which states "the method of payment and all incidents thereto shall be a matter between such attorney and the plaintiff" only modifies that sentence. Mercy conveniently ignores everything prior to the comma. The sentence at issue states "If the attorney elects to receive part or all of such fees in periodic or installment payments from future damages, the method of payment and all incidents thereto shall be a matter between such attorney and the plaintiff". Plaintiff agrees that if counsel agreed to receive part of the fees in periodic payments, that is between

Emilee and her counsel. There is no such agreement here so the fees shall be paid at the time the judgment becomes final.

Plaintiff asks the case be remanded to the trial court with instructions to require any portion of the verdict that is allocated to periodic payments have the 40% attorneys' fees deducted and paid in lump sum pursuant to § 538.220.4. *See Vincent by Vincent*, 833 S.W.2d at 866; *Long v. Missouri Delta Med. Ctr.*, 33 S.W.3d 629, 646 (Mo. App. S.D. 2000) *overruled on others grounds by State Bd. of Registration for Healing Arts v. McDonagh*; *Baker v. Guzon*, 950 S.W.2d 635, 648 (Mo. App. E.D. 1997), and *Roesch v. Ryan*, 841 F.Supp. 288, 292 (E.D. Mo. 1993). In other words, plaintiff asks that the statute be applied according to the plain language and as it has been applied in every case that has ever dealt with this provision.

IV. POINT 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.

Missouri law is clear that once a trial court loses jurisdiction over a judgment, any action the trial court takes is void. The finality of a judgment and the obligation on a party to timely contest any finding in a judgment, statutory or otherwise, is an important principle in the law. If Mercy's view of the supreme court rules is upheld, then a trial court would essentially never lose jurisdiction to alter a judgment.

One thing that is clear from Mercy's response is that the parties are in agreement that Mercy failed to timely raise the issue of post-judgment interest until after the trial court

lost jurisdiction of that portion of the judgment. Mercy's only substantive claim in response to Point IV is that its saving grace is Rule 78.08, but no court has ever held that Rule 78.08 allows a trial court to assume jurisdiction after it has already been lost. Further, plain error review "may not be invoked to excuse mere failure to timely and properly object." *Snapp v. Ryder*, 713 S.W.2d 630, 632 (Mo. App. W.D. 1986); *Brown v. Boyd*, 422 S.W.2d 639 (Mo. 1968). Nor may it be used as a refuge for the "maladroit or neglectful.". *Id.* citing *Stevens v. Wetterau Foods, Inc.*, 501 S.W.2d 494, 499 (Mo. App. W.D. 1973).

Plaintiff agrees that the trial court had plain error review to amend the judgment as he saw fit; however, he only had that authority for 30 days. Mercy's argument to the contrary renders the Supreme Court Rules meaningless since the trial court could retain jurisdiction over the judgment indefinitely. Missouri Supreme Court rules and case law are directly contrary to Mercy's request.

Indeed, in *SKMDV Holdings, Inc.*, the Eastern District voided a judgment that added proper post judgment interest award because the trial court lost jurisdiction over that part of the judgment at the expiration of 30 days from the judgment being entered. 494 S.W.3d at 563. Like here, the trial court had jurisdiction over other parts of the judgment due to timely filed authorized motions. Rule 75.01. In *SKMDV*, the trial court entered judgment. The judgment did not include post-judgment interest despite the plaintiff admittedly being entitled to the same. After authorized post-trial motions were filed that did not contain any reference to post-judgment interest, the Court consequently amended the judgment to add post-judgment interest. The Court explained that even though mandated by statute, the

award of post-judgment interest must be included in the original judgment to which it applies or in a *timely amendment to that judgment*. *Id.* at 561. The Court reiterated longstanding Missouri law that "a trial court is… empowered to amend, vacate, reopen or modify upon its motion for [thirty] days after entry of judgment." *Id.* quoting *In re Marriage of Cochran*, 340 S.W.3d 638, 646 (Mo. App. S.D. 2011). "Following the expiration of the initial thirty-day period, however, the trial court is limited to acting upon the range of remedies suggested in the parties' post-trial motions." *Id.*; *In re Marriage of Cochran*, 340 S.W.3d at 646. The court noted that a court, even on its own motion, has no authority to amend the judgment outside the grounds of those suggested in authorized post-trial motions:

> The power of a court to correct, amend, vacate, reopen or modify a judgment upon its own motion (and for good cause) is limited to thirty days after entry of the judgment. After that thirty-day period the court's jurisdiction is limited to granting relief sought by one of the parties in its after trial motions for reasons stated in that motion. (internal citations omitted).

Antonacci v. Antonacci, 892 S.W.2d 365, 368 (Mo. App. E.D. 1995) *quoting L.J.S. v. V.H.S.*, 514 S.W.2d 1, 10 (Mo. App. W.D. 1974). The court noted that if the trial court amends the judgment outside the relief requested in authorized post-trial motions, **even if on the court's own motion for good cause**, the relief requested in the amended judgment is void. *SKMDV Holdings, Inc.*, 494 S.W.3d at 563. The Court unequivocally held:

> Although Appellant filed a motion to amend the judgment within thirty days of the original judgment, and thus, filed an authorized after-trial motion in accordance Rule 78.04, Appellant did not make a specific request for post-judgment interest…The trial court's power was limited to correct, amend, vacate re-open or modify [the original judgment] upon its own motion (and for good cause) to thirty days after entry of the judgment. Because the asserted error regarding post-judgment interest was not raised in the parties'

> post-trial motions filed with the court, the trial court was not authorized to grant relief of post-judgment interest after the initial thirty-day period ended from the date of the original judgment. We find the amended judgment awarding post-judgment interest, without having such request in an authorized post-trial motion, untimely, and therefore void.

Id. at 532-563. Dealing with the precise issue of authorized after trial motions, post-judgment interest, and whether the trial court has jurisdiction over the judgment beyond 30 days, even on its own motion for good cause, the court held the trial court did not have jurisdiction to amend that portion of the judgment. *Id.*

SKMDV Holdings, Inc., is directly contrary to Mercy's assertion that the trial court could act on plain error review under Rule 78.08. In this case, the trial court was authorized, under plain error review, to remove post-judgment interest within 30 days of the original judgment being entered. Once that time elapsed without any authorized post-trial motions objecting to post-judgment interest, whether the trial court was granting an unauthorized post-trial motion by Mercy or acting on its own under plain error review, the trial court lost jurisdiction to act, rendering that portion of the judgment void.

It is telling that Mercy has no substantive response to Point IV, so it is left claiming that Emilee is receiving a "windfall" and/or that it is plaintiff's counsel's fault, not Mercy's, for failing to raise an authorized post-trial motion. Plaintiff's counsel had no intention of representing Mercy's interest after the verdict, and in fact, was hired to do the opposite. Emilee's counsel is required to zealously represent her interests. Counsel believes that the denial of post judgment interest is unquestionably unfair to the victim of medical neglect by delaying compensation for years, encouraging needless appeals, and that it is an unconstitutional taking of Emilee's property interest in her verdict. Indeed, in order to

preserve the constitutional post-judgment interest issue, counsel had to include post-judgment interest in any Judgment or Mercy would argue counsel waived the same. There was nothing improper about the Judgment submitted to the trial court. Mercy, as usual, is simply trying to shift blame for its failure to timely object, which is a recurring theme throughout this appeal.

As far as Emilee Williams seeking a windfall, given her disability and future years of suffering and decline, no amount of money would be a windfall to Emilee.

Accordingly, Emilee requests remand to the trial court to enter a judgment re-instating post-judgment interest as that trial court's removal of post-judgment interest was void due to Mercy's failure to timely raise the issue.

CONCLUSION

This case was a 2-week medical malpractice case tried in front of a very experienced trial judge. Unlike many medical cases, the liability issues were simple and straightforward. The standards of care applicable to this case were generally agreed upon by all fault experts and the jury simply had to assess whether Dr. Pilapil met these standards on three separate visits. The causation issues were likewise submitted in a straightforward manner with the jury listening to two experts who clearly identified the issues. In addition to the competing experts, the jury also heard from Emilee's two treating doctors who are world leaders in Wilson's Disease research and treatment. The jury was well aware of plaintiff's theories of liability and knew which dates plaintiff claimed to be neglectful and causative. Not only did they know this from the evidence, they knew it very clearly from plaintiff's closing argument, during which, plaintiff's counsel outlined the evidence and the end causation date that they were to consider.

The life care plan presented by Dr. Belz was not contested by any expert testimony and the claims of surprise were not preserved by appropriate objections at trial. Furthermore, any surprise suffered by Mercy was due to not ever asking Dr. Belz his opinions or the basis for these opinions. As to the objections concerning Dr. Fischer, they are without merit because he was, by order, specifically allowed to rebut the testimony of Dr. Frucht in return for the trial court striking plaintiff's rebuttal expert. In an abundance of caution, the trial court allowed Mercy to recall Dr. Frucht as the last expert witness in the trial. He was allowed to testify about anything Mercy felt it was "surprised" about.

The instructions given followed the edicts of MAI and the cases interpreting MAI and utilized terms that have been approved in other medical malpractice cases. Defendant's objections to the instructions were neither preserved nor meritorious, given the evidence identifying the issues for dispute and plaintiff's counsel's closing arguments which defendant, by omission, clearly recognizes to be appropriate and defining. A thorough review of the record will show this to be one of the cleanest 2-week trials probably presented for a decision to this court. There was no error and, certainly, no prejudicial error.

After trial, the court entered its order allowing for post-judgment interest. That order stood without objection for over 30 days and the trial court lacked jurisdiction to change that order. The jury's award of future medical costs was reduced to present value at trial as required by statute. The court's subsequent order requiring future payments bearing a roughly 1% interest rate, an interest rate much less than future medical inflation, will assure that plaintiff does not receive the full benefit of the award provided by the jury. As such, it will leave huge medical costs uncompensated and potentially borne by Missouri taxpayers.

The current statutory scheme which requires double discounting of future medical damages is unjust and should not stand because it, by definition, takes actual damages found by a jury to be due and owing a plaintiff away from that plaintiff. Given the testimony at trial about the discount rate and the reduction to present value, the trial judge was required to exercise its discretion and order no future payments at the statutory rate pursuant to the *Watts* opinion.

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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 Complaince, and the Appendix to Appellants' Brief, were served upon the attorneys of record for each of the parties to the action on June 20, 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 complies with the limitations contained in Mo.R.Civ.P. 84.06(b). There are 30,418 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 Complaince were served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system.

STRONG-GARNER-BAUER, P.C.

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