IN THE SUPREME COURT OF MISSOURI

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

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT MERCY CLINIC SPRINGFIELD COMMUNITIES

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

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For the reasons set forth in Mercy's opening brief, the judgment of the trial court should be reversed and this Court should remand for a new trial or, in the alternative, entry of a judgment complying with section 538.220 as to future payments.

Initially, this Court should reject Plaintiff's argument that five out of six of Mercy's points relied on are multifarious and preserve nothing for review. Mercy's points relied on are not multifarious, but rather identify one action by the trial court in each point, and give several ***reasons*** why that action was error. If this Court accepted Plaintiff's argument, Mercy would be required to include over ***twenty*** points relied on. This is not required by the rules.

Instead, Mercy's points relied on comply with this Court's rules by identifying the specific trial court ruling or action Mercy challenges, stating the legal reasons why that ruling or action is error, and explaining why those legal reasons support reversal. *See* Rule 84.04(d)(1). For example, Point I challenges the trial court's action in submitting Instruction 6 because the instruction is a roving commission in that the instruction, as a whole, failed to narrow the jury's focus on specific dates or interactions that were the focus of Plaintiff's damages and causation experts' testimony.

In every multifarious argument, Plaintiff unpersuasively cites this Court's decision in *Spence v. BNSF Railway Company*, 2018 WL 2308334 (Mo. banc 2018), where the Court found a point relied on multifarious where it challenged the trial court's actions in (1) admitting certain evidence, (2) refusing to allow appellant to call an expert, and (3) overruling the motion for a new trial based on opposing counsel's improper opening statements.

Unlike *Spence*, Mercy's points identify specific trial court actions and give reasons why those actions were error. Plaintiff's multifarious arguments should be ignored.

I. Instruction 6 was a roving commission.

In a medical negligence case alleging failure to refer or diagnose a progressive disease over the course of several patient interactions spanning eight months, and with differing damages arising from those differing dates, focusing the jury only on the exact

actions of the doctor that are supported by causation and damages evidence is necessary. Unlike a medical negligence case involving one negligent action taken by a doctor during surgery and one time of injury, a failure to diagnose or refer over the course of eight months involves numerous potentially negligent actions by the doctor. If there is no evidence that every one of those actions or interactions caused all or part of a plaintiff's damages, those actions should be excluded by the jury instructions.

This was the failure of Instruction 6 here. Plaintiff's damages testimony was based on her causation expert's opinion that Plaintiff would not have suffered the damages she did if Plaintiff was diagnosed ***before*** May 2013. Plaintiff, however, presented evidence of Dr. Pilapil's treatment of Plaintiff during May through June and into July, 2013. But these actions were not supported by either causation or damages evidence.

Nonetheless, Instruction 6 did not limit the jury's consideration to only pre-May 2013 actions by Dr. Pilapil, but rather, allowed the jury to find Dr. Pilapil negligent for any actions taken during her treatment of Plaintiff—including actions taken during and after May 2013. Therefore, because Instruction 6 did not contain any limitations, it is possible that the jury found Dr. Pilapil ***only*** negligent for post-May 2013 actions—actions not supported by either causation or damages evidence—but awarded Plaintiff damages as if Dr. Pilapil was negligent before May 2013. As a result, the submission of Instruction 6 was prejudicial error.

Plaintiff's causation expert, Dr. Fischer, gave inconsistent and unclear opinions in both his deposition and trial testimony as to when Plaintiff suffered her damages:

- "I think she would be – ***she wouldn't be normal***, June 28, but closer to it. I think ***by May***, had that same process been followed, Emliee would be almost normal." S.L.F. at 138.

- "Q: If there's some diagnosis ***in December of 2012 or January 2013***, [Plaintiff] would be just as normal as she can be? A: Yes." S.L.F. at 146.

- "I feel very secure in telling you that in ***December and January***, she'd be normal. She ***might be*** – she'd be closer to normal in ***March, May and June***, but ***I'm not certain she'd be normal.***" S.L.F. at 146.

- "It is my opinion that had the condition been diagnosed in late 2012, earlier in 2013, even getting up to ***as far as maybe*** May of 2013, Ms. Williams would be normal or essentially normal." Tr. at 1115.

- "I will submit to you that had in May and June treatment been started, ***probably*** Emilee would be much better than she is today. ***I don't think she would be normal***." Tr. at 1141.

- "Q: So timewise as far as the articles on reversibility that you have discussed go from ***December until [June 28, 2013]*** when there is a reference to dystonia, would you consider ***the damage in here to be reversible***? A: Yes." Tr. at 1163.

- [During Plaintiff's counsel's closing argument]: "[Dr. Fischer] said if [Plaintiff gets in] in ***December, January, February***, complete reversal of symptoms by late May." Tr. at 1688.

Indeed, even Plaintiff's damages expert, Dr. Belz, could not consistently articulate Dr. Fischer's opinion, but he based his life care plan on Dr. Fischer's deposition opinion that Plaintiff would not have suffered the damages she did if she was diagnosed ***before*** May of 2013:

- "A: Dr. Fischer's thoughts were that if this were treated in December of 2012, January of 2013 on through March and May of 2013, then this plan only covers that treatment which is necessary after the diagnosis and

treatment of March '13 ***to*** May of 2013.

…

Q: So essentially, it was Dr. Fischer's essential opinion that as long as this was caught ***by around May of 2013***, she would not have needed the stuff in this plan. Is that kind of what you're saying? A: That is correct." Tr. at 1036.

- [Plaintiff's counsel's summary of Dr. Belz's testimony] "Dr. Belz … has calculated the damages as they would be had [Plaintiff] gotten treatment back here … where our medical doctors say the breach of the standard of care is …. [Dr. Belz's] damage model is based upon, which he's said a couple times is based upon had she gotten treatment ***back here in January [2013] or December [2012]***, what her condition would have been." Tr. at 1024.

This was the only expert damages evidence the jury heard. Therefore, the jury awarded damages based on Dr. Belz's opinion of Plaintiff's damages as if she had been diagnosed and treated in December 2012 or January 2013. Yet, Instruction 6 did not limit the jury's consideration of Dr. Pilapil's negligence to only her actions in December or January. Rather, Instruction 6 contained no limitation on which of Dr. Pilapil's actions the jury could consider.

Importantly, Plaintiff introduced evidence of Dr. Pilapil's actions during Plaintiff's visits in May and June 2013, and her emails with Dr. Pilapil throughout June and into July. Therefore, it is possible that the jury found that Dr. Pilapil ***was not*** negligent in December 2012 or January 2013, and yet awarded Plaintiff damages as if she was, based on Dr. Pilapil's negligence ***after*** January, even into July, which was not supported by either causation or damages evidence.

Given the progressive nature of Wilson's disease, Plaintiff's injuries (and therefore damages) would vary based on when she was diagnosed and received treatment. By not narrowing the jury's focus, Instruction 6 permitted the jury to award damages that

were not supported by either causation or damages testimony. Instruction 6 was a roving commission and its submission prejudicial error.

While Plaintiff argues that Mercy ignores Plaintiff's counsel's closing argument, where counsel "stressed May 31, 2013 as the end date," unsworn statements by an attorney during closing are not evidence. *Kettler v.* Hampton, 365 S.W.2d 518, 523 (Mo. 1963). Likewise, Plaintiff cites no authority that closing argument by counsel can cure an instructional error. Even so, the closing argument is undercut by Dr. Fischer's inconsistent and unclear causation testimony and Dr. Belz's life care plan basing damages on Plaintiff having been diagnosed in December 2012 or January 2013.

Further, although Plaintiff's counsel mentioned the May 31 date, the closing argument is not as cut and dried as Plaintiff's brief alleges. For example, Plaintiff's counsel, without specifying any exact date, initially argued that "***up until*** that May time frame … [Plaintiff] is a very, very salvageable patient." Tr. at 1686. Later, counsel argued that Dr. Fischer's opinion was that "until May, until late May, she is a salvageable patient …. He said ***if you get in December, January, February***, complete reversal of symptoms by late May." Tr. at 1688. Thus, rather than clarifying, Plaintiff's counsel's own closing argument is confused about Dr. Fischer's causation opinion.

Regardless, even if Plaintiff presented evidence of causation and damages through May 31, 2013, Plaintiff presented evidence to the jury of Dr. Pilapil's alleged negligence ***after*** May 31, 2013, including Dr. Pilapil's emails with Plaintiff and her treatment of Plaintiff during the June 28, 2013 visit. *See* Mercy's Initial Brief at p. 35-36. Yet, by failing to specify any relevant time frame or interactions, Instruction 6 allowed the jury to consider these visits and interactions, find Dr. Pilapil negligent and award damages based on actions that were not supported by causation or damages testimony.

A jury instruction is a roving commission where "it submits a question to the jury in a broad, abstract way without any limitation to the facts" developed throughout the case. *Coon v. Dryden*, 48 S.W.3d 81, 93 (Mo. App. 2001). Consequently, Instruction 6 was a roving commission and the submission of the instruction resulted in prejudicial error. *See Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 482 (Mo. banc

2005).

Finally, Mercy preserved this point relied on by specifically objecting to Instruction 6's lack of timeframe during the instructions conference and renewing its objection in its post-trial motions as required by Rule 70.03. Tr. at 1626-1627; L.F. at 488-496, 1306-1308. During the instructions conference, Mercy argued that Instruction 6 was a roving commission in that the subparts "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." Tr. at 1626-1627.

Contrary to Plaintiff's argument, this was not a general objection, but one specifically arguing that the lack of timeframe anywhere in Instruction 6 would result in a roving commission for the jury. Mercy further objected, in detail, in its post-trial motions. L.F. at 488-496, 1306-1308. This issue was properly before the trial court and Mercy preserved this point for appeal.

II. The submission of subpart "b" in Instruction 6 was error.

Under Rule 70.03, Mercy objected to subpart "b" during the instructions conference, objected to Instruction 6 as a whole, and, in response to an argument by Plaintiff's counsel, Mercy noted that the use of the term "adequately" was part of its objection to Instruction 6, Tr. at 1623-1627. Further, Mercy renewed these objections in more detail in its post-trial motions. L.F. at 488-494, 1306-1308. Mercy, thus, preserved this point for review.

The phrase "failed to adequately consider" and the term "medical chart" used in subpart "b" of Instruction 6 were vague, confusing, and undefined. Instruction 6 was a roving commission and the submission of the instruction was error.

None of Plaintiff's witnesses clearly defined what records made up Plaintiff's "medical chart," and "medical chart" was referred to in different contexts throughout trial. As mentioned in Mercy's initial brief, on cross-examination of Dr. Pilapil, Plaintiff's counsel referred to "***the*** chart," Tr. at 1304, "***your*** chart," Tr. at 1312, and "***their*** chart," Tr. at 1321.

Although some Missouri courts have held that the term "adequate" in a jury instruction is proper, in this case, the term "adequately consider" was vague and confusing for the jury. In closing, Plaintiff's counsel referenced Dr. Pilapil's actions and argued "Did she properly review the medical records, and by properly review the prior medical records, that means take into account and consider in proper medical knowledge what's in them. No." Tr. at 1683.

Plaintiff's argument appears to imply that Dr. Pilapil should not only have looked at Plaintiff's "medical chart," but also known that, based on what was in her chart, Plaintiff had Wilson's disease or at least needed to see a neurologist. But Plaintiff submitted the failure or Dr. Pilapil to timely refer Plaintiff to a neurologist in subpart "d" of Instruction 6, so subpart "b" must have been submitting something different. S.L.F. at 390; App 11. The term "adequately consider" in subpart "b" was not clearly defined for the jury.

The testimony presented by Plaintiff's own experts never clearly defines what Plaintiff's "medical chart" consists of. While Plaintiff argues that Dr. Frey testified "in no uncertain terms" that Dr. Pilapil breached the standard of care when she failed to adequately review and consider Emilee's prior medical chart, Cross-Respondent's Brief at 50, Plaintiff's brief continues to reference "medical records" instead of "medical chart," and the term "medical chart" was never clearly defined as Plaintiff's medical records by Dr. Frey or any other expert.

For example, in the testimony Plaintiff cites from Dr. Frey, Dr. Frey mentions that had Dr. Pilapil observed tremors during Plaintiff's visit, she should have recorded it in "the chart," implying this was a chart kept by Dr. Pilapil. Tr. at 599. Similarly, while Dr. Frey mentioned "medical records," he makes no connection of those records to "Plaintiff's medical chart."

Accordingly, the submission of subpart "b" was error, and, therefore, because Instruction 6 is disjunctive, the submission of the instruction as a whole was error.

III. No causal link between subparts "a" and "b" of Instruction 6.

Mercy preserved this point by objecting to subparts "a" and "b" during the instructions conference and renewing these objections in its post-trial motions. Tr. at 1621-1625; L.F. at 488-496, 1306-1308. Specifically, Mercy argued that there was not "sufficient proof that [Dr. Pilapil's failure to adequately consider Plaintiff's medical chart] alone was causally related to any damages the Plaintiff may have sustained or changed the manner in which this patient would have or should have been managed by Dr. Pilapil." Tr. at 1623. In other words, Mercy argued that even if Dr. Pilapil had adequately considered Plaintiff's medical chart—assuming she had not—that additional information "is not something that would have caused or should have caused Dr. Pilapil to have altered her plan of treatment." *Id.*

This was sufficient to preserve this challenge to subpart "b" on appeal. While Mercy may not have objected as specifically to subpart "a," it argued that subpart "a" was not supported by substantial evidence, and renewed the objection in its post-trial motions. Tr. at 1621; L.F. at 488-496, 1306-1308. This was sufficient to preserve this challenge because whether a plaintiff has presented evidence of causation is encompassed in whether the plaintiff has presented substantial evidence overall. *See Tompkins v. Kusama*, 822 S.W.2d 463, 465 (Mo. App. 1991).

Plaintiff did not establish a causal link between Dr. Pilapil's actions submitted in subparts "a" and "b" of Instruction 6 and Plaintiff's damages. Instruction 6 listed four actions allegedly taken by Dr. Pilapil and asked the jury to find Dr. Pilapil negligent if she took any of the four actions. App 11; S.L.F. at 390. Instruction 6 is disjunctive, and, therefore, each of these subparts must stand on its own and be supported by substantial evidence. *Ross-Paige v. Saint Louis Metro. Police Dep't*, 492 S.W.3d 164, 172 (Mo. banc 2016). The phrase "substantial evidence" includes the requirement of proving a causal connection between the action submitted and the injury. *Tompkins*, 822 S.W.2d at 465.

Here, Instruction 6 asked the jury whether Dr. Pilapil failed to take an adequate history of Plaintiff's tremors or failed to adequately consider Plaintiff's medical chart,

and in doing so was negligent and caused the Plaintiff's injuries. App 11; S.L.F. at 390. Thus, Plaintiff must have presented evidence that, under the circumstances of this case, had Dr. Pilapil taken an adequate history or adequately considered Plaintiff's medical chart, Plaintiff would not have suffered the injuries she did. Plaintiff did not establish this causal link.

Plaintiff's argument that she did establish a causal connection between each of these four subparts and Plaintiff's injuries is confusing. First, Plaintiff argues that there was evidence that had Dr. Pilapil ordered a simple blood test in December or January, it would have shown that Plaintiff had Wilson's disease. Cross-Respondent's Brief at 60. But this theory was not even submitted in any subpart of Instruction 6—or any other jury instruction—was not mentioned in closing, and is therefore irrelevant to Mercy's argument that the subparts submitted were not supported by causal evidence.

Plaintiff's brief also cites expert testimony regarding why taking an adequate history and adequately considering medical charts is ***generally*** good practice, but never makes the connection that had Dr. Pilapil done either, Plaintiff would not have suffered damages.

Indeed, Plaintiff cites Dr. Pilapil's admission that she was aware that anxiety, depression, tremors, heart issues and liver issues were common symptoms of Wilson's Disease, and implies that because Dr. Pilapil failed to take an adequate history or consider the medical chart, she failed to consider these symptoms, which would have caused Dr. Pilapil to either diagnose Plaintiff with Wilson's Disease or refer her to a neurologist, preventing Plaintiff's injuries. Cross-Respondent's Brief at 61. This argument fails, however, because Dr. Pilapil's notes from Plaintiff's first visit in December 2012—offered by both Plaintiff and Mercy—show that Dr. Pilapil noted that Plaintiff suffered from anxiety, depression, tremors, and an irregular heartbeat—four out of the five symptoms Plaintiff argues Dr. Pilapil failed to "adequately consider." P.Ex.4; D.Ex.501.

Logically then, if Dr. Pilapil's notes showed that she at least wrote down these symptoms after Plaintiff's first visit, subparts "a" and "b" must not have been submitting

Dr. Pilapil's failure to simply note these symptoms, but rather, her failure to give them proper medical weight, causing Dr. Pilapil's failure to refer Plaintiff to a neurologist. But the failure to refer, as mentioned, was submitted in subpart "d," and, consequently, the actions in subparts "a" and "b" must have been distinct from the failure to refer, and supported by independent causal evidence. Neither was.

Because Instruction 6 is disjunctive, the instruction fails as a whole and the Court should reverse the judgement and remand for a new trial.

IV. Dr. Belz's improper causation testimony.

Although Dr. Belz stated in his deposition that the scope of his retention was only to prepare a life care plan for Plaintiff, Dr. Belz gave undisclosed causation opinions during his trial testimony. Plaintiff even concedes that Dr. Belz offered opinions on causation at trial. Cross-Respondent's Brief at 75. These undisclosed opinions were improper and should have been excluded.

At trial, Plaintiff's counsel asked Dr. Belz to opine on whether a hypothetical MRI taken of Plaintiff in December 2012 or January 2013 would have looked the same as the one taken in August 2013. Tr. at 980-981. This was an invitation to opine on causation issues and rebut the testimony of Dr. Frucht, who had testified—out of order—that Plaintiff would have suffered the same injuries if trientine had been administered in December or January. *See* Tr. at 706-707, 715, 718. That is exactly what Dr. Belz did, testifying that the August 2013 MRI referenced "subacute changes," meaning changes within the last three months, which in turn meant that "cells were not dying in January of 2013 or in December of 2013." Tr. at 981.[1]

Plaintiff's counsel then asked whether the words "subacute stages of necrosis" were Dr. Belz's words or someone else's. Tr. at 981. At this juncture, Mercy objected on

[1] Mercy's opening brief mistakenly attributed the "subacute necrosis" language to the 2017 MRI. It came from the 2013 MRI. *See* Tr. at 980-981. This does not change the fact that Dr. Belz's causation testimony was improper because he stated at his deposition that his role was to prepare a life care plan.

two grounds: that the question called for hearsay and because this testimony was "going to causation issues which is not what this witness was tendered to do." *Id.* A sidebar followed, during which the court overruled Mercy's objections. Tr. at 981-987. The court noted, however, that Dr. Belz was Plaintiff's "life care guy" and "need[ed] to start talking about a life care plan." Tr. at 985.

Following this exchange, Dr. Belz was asked about the 2017 MRI, and testified that there was "no change" between this MRI and the August 2013 MRI. Tr. at 988. Pressed further, he stated that the 2017 MRI confirmed that once brain cells died, they do not come back. *Id.* This testimony was intended to further Plaintiff's argument that trientine was not a cause of Plaintiff's injuries on the theory that the 2017 MRI established that all brain damage occurred prior to administration of the drug, a theme that was picked up on by Dr. Fischer. *See* Tr. at 1146-1151, 1177-1181. Plaintiff's counsel likewise advanced this position in closing argument. *See* Tr. at 1734, 1741. During cross-examination, Dr. Belz again repeatedly injected his unsolicited causation opinions. Tr. 1076-1083.

Neither Dr. Belz nor Plaintiff disclosed any of these opinions before trial. All of this testimony was improper and in violation of Rule 56.01(e), as well as the trial court's pre-trial order barring undisclosed opinions. Litigants are required to advise the opposition when an expert has changed his or her opinions or the factual bases for those opinions following a deposition. *See, e.g.*, *Snellen ex rel. Snellen v. Capital Region Med. Ctr.*, 422 S.W.3d 343, 353 (Mo. App. 2013); *Gassen v. Woy*, 785 S.W.2d 601, 603-04 (Mo. App. 1990). This rule exists to prevent surprise at trial when, for example, "an expert witness suddenly has an opinion where he had none before." *Sherar v. Zipper*, 98 S.W.3d 628, 634 (Mo. App. 1990). That is what happened here.

Plaintiff suggests that Mercy failed to preserve this argument because it only raised a hearsay objection to Dr. Belz's testimony. As discussed above, however, Mercy also objected on the ground that Dr. Belz was improperly discussing causation issues. Tr. at 981. Plaintiff similarly fails to mention that Mercy moved for a mistrial on this ground,

supported by numerous exhibits, following Dr. Belz's testimony. Tr. at 1099-1111; S.L.F. at 91-364. Mercy properly raised and preserved its arguments.

Plaintiff also contends Dr. Belz's testimony was proper because his designation listed a host of potential topics, including causation, and argues that Mercy should be precluded from complaining about Dr. Belz's testimony because it did not question him about causation issues at his deposition. In Missouri, a party may discover the facts and opinions held by an expert through deposition. Rule 56.01(b)(4)(B). An interrogatory response need only state the "general nature of the subject matter on which the expert is expected to testify." Rule 56.01(b)(4)(A).

One of the first questions Dr. Belz was asked at his deposition was: "[T]he scope of your retention is to perform what's called a life care plan. Is that about correct?" S.L.F. at 103. He responded: "That's correct. A life care plan also known as a preventive medicine plan." *Id.* The remainder of the deposition generally focused on what he included in the plan and the likelihood that various items would be added. S.L.F. at 103-111. Dr. Belz was asked what he had looked at to determine the things Plaintiff would need in the future. S.L.F. at 108-109. He stated that he had reviewed medical records, his discussions with Plaintiff and her family, and deposition testimony. *Id.* He did not suggest that he had based his decision about what to include on the time brain damage occurred. *Id.*

Because Dr. Belz stated that his role in this case was to develop a life care plan, there was simply no reason to question Dr. Belz about whether any delay in diagnosis caused Plaintiff's brain damage, regardless of the general designation in Plaintiff's interrogatory responses.

While Plaintiff claims that Mercy somehow opened the door to Belz's causation testimony because Dr. Frucht discussed the 2017 MRI, Dr. Frucht was merely asked what the second MRI showed. Tr. at 740. Plaintiff fails to explain how this limited testimony opened the door for her ***life care planner*** to opine on causation. It did not.

The fact that the MRIs were admitted without objection also did not justify Dr. Belz's new causation opinions. At the time the 2017 MRI was admitted, Dr. Belz was

discussing background information and his examination of Plaintiff. *See* Tr. at 962. He explained that the primary reason he ordered the MRI was to examine Plaintiff's jaw, and that her brain was imaged at the request of Plaintiff's family. Tr. at 962-963. Mercy certainly did not "invite" Dr. Belz's causation opinions by not objecting at that time.

Finally, permitting Mercy to recall Dr. Frucht was not an adequate remedy under the circumstances in this case. For months, Mercy prepared its defense based on Dr. Belz's deposition testimony that his only role was to prepare a life care plan for Plaintiff. While trial courts have broad discretion to select a remedy for the non-disclosure of expert opinions, *Green v. Fleishman*, 882 S.W.2d 219, 222 (Mo. App. 1994), there was simply no remedy, short of declaring a mistrial, that could repair the extreme prejudice of Dr. Belz's new opinions. The Court should remand for a new trial.

V. Admission of Dr. Fischer's undisclosed changes in opinion.

Underlying Instruction 6's problems challenged in Mercy's point I is Dr. Fischer's unclear and ever-changing causation opinion. These new opinions at trial should have been excluded.

Dr. Fischer testified at his deposition that Plaintiff would have been normal if she had been diagnosed in December 2012 or January 2013. S.L.F.at 146. He further testified: "I think she would be – she wouldn't be normal, June 28, but closer to it. I think by May, had that same process been followed, Emilee would ***almost*** be normal." S.L.F. at 138. He summed his opinions up, stating: "I feel very secure in telling you that in December and January, she'd be normal. She might be – she'd be closer to normal ***in March***, May and June, but ***I'm not certain she'd be normal***." *Id.*

Dr. Fischer agreed at his deposition that the administration of trientine made Plaintiff's condition worse. S.L.F. at 125-126, 130-131. He further agreed that Plaintiff was experiencing dystonia and needed to be treated with trientine as early as March 2013. S.L.F. at 133-134, 136. This was significant because it is undisputed that Dr. Pilapil had no contact with Plaintiff between January 11 and May 13, 2013.

Dr. Fischer could not quantify the degree to which Plaintiff's condition would have improved if she had been treated between March and August. *See* S.L.F. 134, 136,

145-146. He based his opinion that Plaintiff would have had a better outcome prior to August 2013 on: (1) the estimated amount of copper in Plaintiff's brain, and (2) the symptoms Plaintiff was displaying. S.L.F. at 145-146. When asked if there were any other reasons, he stated there were not. *Id.*

At trial, however, Dr. Fischer testified that a patient displaying dystonia "probably ha[s] structural permanent damage in her brain." Tr. at 1146-1147. He then testified that "once the brain is permanently damaged, you have the dropping out of the cells and necrosis, then you have permanent damage." Tr. at 1147. Mercy objected to further testimony on this topic because Dr. Fischer had not discussed necrosis or cell death at his deposition. Tr. at 1147-1151. Mercy noted that it had raised this concern in moving for a mistrial after Dr. Belz's testimony, and that it was concerning that both Dr. Belz and Dr. Fischer were bringing up necrosis and cell death for the first time after Dr. Frucht's testimony. *Id.* The trial court overruled the objection. Tr. at 1150-1151. Mercy subsequently renewed the objection. Tr. at 1155-1156.

Dr. Fischer was then permitted to testify that Plaintiff would have been normal if she had been diagnosed and treated before cell death occurred, in the early stages of her illness. Tr. at 1151-1152. He later tied this testimony to Plaintiff's June 28, 2013 visit to Dr. Pilapil, testifying that she was just beginning to display dystonia at that time. Tr. at 1162-1163; *see id.* at 1146-1147.

Dr. Fischer also changed his opinion regarding the effects of trientine, testifying that it likely had not caused neurological damage to Plaintiff, despite his deposition testimony that Plaintiff's condition significantly worsened after administration of trientine. Tr. at 1177-1181 *compare* S.L.F. at 125-126, 130-131 (deposition testimony). He based this new opinion on his review of the February 2017 MRI (which post-dated his deposition). *Id.* But these new opinions were never disclosed before trial. The trial court overruled Mercy's objection to this testimony, but advised that "other than this issue, [it was] likely to start sustaining objections to anything that is outside what is contained in the deposition testimony." Tr. at 1176-1177.

Like the new causation opinions of Dr. Belz, these changes in opinion were highly prejudicial. Mercy had no reason to anticipate needing to defend against the new assertion that Plaintiff's MRIs allegedly established both that no permanent structural brain damage had occurred before Plaintiff's last visit to Dr. Pilapil in late June 2013 and that all brain damage occurred before the administration of trientine.

Plaintiff's argument that Dr. Fischer merely conceded that his opinion on trientine was "called into doubt" by the later testimony of Drs. Askari and Lorincz and the February 2017 MRI is one of semantics. The ***reason*** that Dr. Fischer came to doubt his deposition opinion and therefore changed it is irrelevant. The critical point is that he ***did*** change his opinion and Plaintiff did not disclose that fact before trial in violation of Rule 56.01(e). *See Snellen*, 422 S.W.3d at 353; *Sherar*, 98 S.W.3d at 634; *Gassen*, 785 S.W.2d at 603-604.

Plaintiff's contention that Dr. Fischer was "specifically allowed to rebut the testimony of Dr. Frucht" is both incorrect and irrelevant. The court did not "specifically allow" Dr. Fischer to offer new testimony to rebut Dr. Frucht's opinions, it merely noted that Dr. Fischer had ***already*** addressed this issue:

> "It appears to the Court that Plaintiff's expert, Dr. Kenneth Fischer, defends Dr. Askari's treatment of the Plaintiff in his deposition testimony. Therefore, it is reasonable to assume he would do the same at the time of trial. Moreover, Plaintiff may wish to call Dr. Askari live, in person, at trial, or live, in person, by video, at the time of trial."

L.F. at 144-148. Even if Dr. Fischer had been permitted to offer rebuttal opinions, Plaintiff still had an obligation under Rule 56.01(e) to disclose them, which she did not do. The trial court confirmed this in its pre-trial order. *See* L.F. at 409.

Plaintiff maintains that Mercy failed to preserve its argument that Dr. Fischer changed his opinion about when Plaintiff needed to be treated and the basis therefor because Mercy only objected to use of the term "necrosis." Plaintiff also maintains that Dr. Fischer did not actually change his opinion. The Court should reject both arguments.

Concerning the former argument, Mercy objected to Dr. Fischer's testimony on the ground that he had not identified necrosis, cell death, the 2017 MRI, or anything else other than symptomatology and hypothetical copper levels as a basis for his opinions. Tr. at 1147-1151, 1167-1177. All of Dr. Fischer's changed opinions, including those concerning the time at which Plaintiff needed to have been treated, flowed from his improper reliance on these undisclosed bases. Mercy properly made and preserved its objections.

As to the latter argument, while Dr. Fischer did say at his deposition that Plaintiff's condition would have potentially been ***better*** had she been diagnosed in May or June, S.L.F. at 137-138, he also made clear that he could not say with certainty that she would have been normal if treated in March, April, or May as opposed to December or January, S.LF. at 138, 146. At trial, however, he relied on the concept of necrosis to opine that Plaintiff did not suffer irreversible brain damage until June 28, 2013 or later. Tr. at 1146-1147, 1162-1163. This was plainly a change in both his opinion and the bases therefor.

As with Dr. Belz's new opinions, the Court should reject Plaintiff's suggestion that there was no error just because the 2013 MRI containing the word necrosis was admitted into evidence without objection. Plaintiff acknowledges that Dr. Fischer had access to the 2013 MRI at the time of his deposition. Cross-Respondent's Brief at 83. Indeed, he referenced it at his deposition. *See* S.L.F. at 123. Yet Dr. Fischer never suggested that he held any opinion on the MRI's reference to necrosis, despite purportedly identifying all of his opinions. S.L.F. at 148-149.

Given the critical nature of timing in this case involving multiple office visits and interactions and a progressive disease, Dr. Fischer's change in causation testimony was particularly prejudicial to Mercy. For these reasons, the Court should reverse and remand for a new trial.

VI. Future medical damages.

As Mercy previously explained, certain aspects of *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012), are difficult to reconcile with the plain

language and history of section 538.220, which has led to difficulties in applying the statute. To resolve these tensions, Mercy respectfully suggests that the Court clarify *Watts* to make clear that a trial court may only depart from section 538.220's mandatory methodology for calculating future medical payments if a plaintiff demonstrates that periodic payment of such damages would render her unable to cover her medical needs.

Plaintiff offers several counter-arguments in an effort to persuade the Court to invalidate section 538.220 in its entirety, something *Watts* declined to do. The Court should reject Plaintiff's arguments and clarify *Watts* in the manner suggested by Mercy. If the Court concludes that the only possible interpretation of *Watts* is one that gives trial courts complete discretion in the allocation of future medical damages, *Watts* should be overruled for being in irreconcilable conflict with the statute's text.

A. *Watts* appears to conflict with section 538.220.

Plaintiff insists that *Watts*' holding is "simple and straight-forward," and accuses Mercy of attempting to manufacture difficulty with its application. Plaintiff claims that it is instead section 538.220 that is confusing. But the trial court clearly identified the difficulty it had: "I have struggled with reconciling the statute and what the language is in *Watts*." P.T. Tr. at 6.

Section 538.220 sets out clear guidelines for how the trial court should calculate future medical payments. Its plain language provides that upon request the trial court ***shall*** enter a future medical periodic payment schedule, which ***shall*** be for the plaintiff's remaining life expectancy, and each payment ***shall*** be calculated by dividing the total amount of future medical damages by the number of periodic payments. § 538.220.2 RSMo. The statute further specifies the applicable interest rate. *Id.* There is no discretion left to the trial court.

Watts, however, can be read to suggest that a trial court always retains discretion to decide what portion of a plaintiff's future medical damages (along with other future damages) should be allocated to periodic payment. *See* 376 S.W.3d at 647. It is this aspect of the holding that needs clarification. It is simply not possible for a trial court to retain complete discretion over what portion of future medical damages should be

allocated to periodic payment and simultaneously adhere to section 538.220's mandatory scheme for calculating periodic payments. Further underscoring the confusion, Plaintiff seems to read *Watts* to require a trial court to ignore all portions of section 538.220 concerning the payment of future medical damages other than the mandated interest rate, but then argues that use of that interest rate is also impermissible. *See* Cross-Respondent's Brief at 87-88.

Other provisions of Chapter 538 and the legislative history of section 538.220 confirm the conflict between *Watts*' broad language and the statute's text. Plaintiff does not dispute that future medical damages are a distinct category of damages in medical malpractice cases. *See* §§ 538.215 and 538.205(8) RSMo. Construing *Watts* as Plaintiff suggests would impermissibly render the statute's detailed payment scheme meaningless. *See Hyde Park Housing P'ship v. Director of Revenue*, 850 S.W.2d 82 (Mo. banc 1993) (courts presume legislature does not include superfluous language in statutes).

B. *Watts* can be harmonized with section 538.220's plain language.

Importantly, *Watts* did not declare section 538.220 unconstitutional. *See* 376 S.W.3d at 635 n.2, 647. Instead, it interpreted the statute to permit trial courts "to consider the needs of the plaintiff and the facts of the particular case in deciding what portion of future medical damages" to allocate to periodic payments in "accord[] with the parameters set out in the statute." *Id.* at 647. For the reasons discussed above, if there are no constraints on, or prerequisites to, the exercise of this discretion, then *Watts* effectively invalidated large portions of section 538.220.2 without saying so.

Not every application of the statute will raise the concerns present in *Watts*. There, the Court was concerned with the particularly low applicable interest rate. *Id.* at 648. Further, the *Watts*' plaintiff submitted evidence that periodic payments under the applicable interest rate would prevent him from covering his medical costs based on the way present value had been calculated in that case. *Id.* at 648. That concern is not present here because Plaintiff's experts unquestionably accounted for medical inflation ***before*** reducing to present value. *See* Tr. at 1588-1602; P.T. Tr. at 21-23.

Because *Watts* did not declare section 538.220 facially unconstitutional and because the facts of every case will differ, *Watts* should not be interpreted to give trial courts carte blanche discretion to ignore section 538.220's mandatory future medical payment methodology in the absence of a showing by the plaintiff that the concerns that gave rise to the constitutional concerns in *Watts* are present.

To give meaning to section 538.220 while accounting for the concerns discussed in *Watts*, the holding should be clarified to require a trial court to first determine whether the plaintiff has a medical need that will not be covered if future medical damages are paid in the manner mandated by statute. If the plaintiff does not show such a need, the trial court should apply section 538.220 as written. If the plaintiff shows such a need, only then may the trial court exercise discretion to set a future medical payment schedule that will permit the plaintiff to cover her medical needs. The trial court would always retain discretion over how other future damages are paid.

Plaintiff contends that this interpretation of *Watts* has no support in the "case law" or section 538.220. To the contrary, the only relevant "case law" is *Watts*, and Mercy's interpretation is both based on that decision and necessary to reconcile it with the plain language of section 538.220. Plaintiff focuses on the portion of section 538.220.2 providing that "future damages" shall be paid "in whole or in part" by periodic payment and argues that trial courts retain discretion over how ***all*** future damages should be paid and the applicable interest rate. Cross-Respondent's Brief at 87, 90 (citing *Watts*, 376 S.W.3d at 647). But even *Watts* acknowledged that the plain language of the statute treats "future medical damages" differently by "requir[ing] that payments be spread out in equal payments over the recipient's life expectancy and determined by reference to a particular interest-rate benchmark." 376 S.W.3d at 647. It is this very tension that needs clarification.

C. The trial court erred in determining periodic payments.

Because Plaintiff did not present evidence that the concerns at issue in *Watts* were present in this case, the trial court erred in not applying section 538.220 as written.

It is undisputed that the statutory interest rate in this case is more than four times higher than the one at issue in *Watts*. L.F. at 1305. Additionally, Plaintiff did not demonstrate at the post-trial evidentiary hearing that she had any specific medical need that would not be covered if her future medical damages were paid in installments. The overwhelming majority (93%) of Plaintiff's future medical damages is for attendant care, a fixed annual cost. P.T. Tr. at 50; P.Ex. 197. Plaintiff's response brief does not identify any major medical needs (*e.g.*, surgeries) that would not be covered. Finally, Plaintiff's experts made clear that they accounted for medical inflation ***before*** calculating present value.

Plaintiff nevertheless contends that applying section 538.220 consistent with its plain language would deprive her of her right to have a jury determine damages. Plaintiff did not clearly develop this argument in her initial briefing and her response brief similarly fails to explain how application of the statute as written would be unconstitutional. The only authority Plaintiff cites in support of this argument is *Watts*, which did not hold, or even imply, that section 538.220 violated the right to a jury trial. *See* 376 S.W.3d at 635 n.2 (noting plaintiff had challenged section 538.220 on due process and equal protection grounds but declining to address either argument).

Application of section 538.220's plain language would not violate Plaintiff's right to have a jury determine damages. The jury in this case ***did*** determine Plaintiff's damages. The sole issue is whether those damages are to be paid by lump sum or by periodic payment with statutory interest.

In support of this argument, Plaintiff asserts that *Watts* "forb[ade] trial courts from using an interest rate in periodic payments contrary to the medical inflation growth rate used at trial." Br. at 88. But *Watts* said no such thing, which would cause the constitutionality of the statute to turn on whether a plaintiff's experts choose to apply the statutory interest rate in calculating her damages. This Court merely noted that, based on the facts before it, there was concern that the plaintiff would be unable to cover his medical expenses under a periodic payment scheme using a 0.26% interest rate. 376

S.W.3d at 648. As noted above, Plaintiff's experts fully accounted for medical inflation, which is a separate issue from the interest rate that is used to calculate present value.

In this case, Plaintiff's experts chose to calculate present value using an interest rate based on long-term investments rather than the interest rate mandated by section 538.220. That choice does not render the statute unconstitutional. Furthermore, nothing prevented Plaintiff's experts from calculating present value using the interest rate in section 538.220. It is the legislature's prerogative to specify applicable interests rates, not that of a plaintiff's experts. *See Mackey v. Smith*, 438 S.W.3d 465, 481 (Mo. App. 2014) (holding that the legislature clearly intended to eliminate post-judgment interest and pre-judgment interest in medical malpractice cases); *Miller v. Miller*, 309 S.W.3d 428, 436 n.2 (Mo. App. 2010) (Rahmeyer, J., concurring) (noting that question of post-judgment interest is best left to the legislature).

At the post-trial evidentiary hearing, Plaintiff simply argued that allocation of anything to periodic payments was impermissible because her experts had calculated present value using long-term investment rates. *See* P.T. Tr. at 25-30. Addressing this issue, Mr. Tucek explained that paying the entire future damages award in periodic installments would nevertheless amply cover Plaintiff's medical needs because Mr. Ellison had applied vastly inflated growth rates to the numbers in Dr. Belz's life care plan. P.T. Tr. at 46-48, 50; L.F. at 762-765.

Plaintiff offered no rebuttal to Mr. Tucek's analysis at the evidentiary hearing and offers none now, other than to argue that any reliance on his testimony also violates her right to a jury trial. Again, this argument is not clearly developed. The trial court was authorized to hold a post-trial evidentiary hearing to determine the effect of allocating future damages to periodic payments. § 538.220.2 RSMo. Mercy did not ask the court to rely on Mr. Tucek's testimony to award Plaintiff damages in an amount less than what the jury determined. Mercy simply explained that given the realities of the jury's damages award, Plaintiff's medical needs would be covered if the award was paid over time – with interest – rather than by lump sum. There was nothing unconstitutional about this.

For the foregoing reasons, the trial court erred by not adhering to section 538.220's mandatory future payment scheme and instead allocating only $11,000,000 in future medical damages to periodic payments. For reasons previously explained, the trial court should have ordered that all past damages ($1,511,000), all future non-medical damages ($6,400,000), and enough future medical damages to cover the remainder of Plaintiff's attorney's fees ($3,653,000) be paid in lump sum. All other future medical damages ($17,347,000) should have been allocated to periodic payments.

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

CONCLUSION

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

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on August 3, 2018.

This brief includes the information required by Rule 55.03 and complies with Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,738 excluding the cover, signature block, and this certificate.

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/s/ *William Ray Price, Jr.*