NO. SC98362

MISSOURI COURT SUPREME COURT

LINDSEY SETZER AND MICHAEL SETZER,

Plaintiffs – Respondents/Cross-Appellants

vs.

SSM HEALTH CARE ST. LOUIS,

Defendant – Appellant/Cross-Respondent.

Appeal from the Circuit Court of the County of St. Louis

Circuit Court No. 16SL-CC03273

Hon. Michael T. Jamison

RESPONDENTS' SUBSTITUTE BRIEF AND CROSS-APPEAL

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JURISICTIONAL STATEMENT

This Court has jurisdiction of this appeal from the judgment of the Circuit Court of St. Louis County, Cause No. 16SL-CC03273 through its grant of transfer pursuant to Rule 83.04 and Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

This is an appeal of a judgment entered upon jury verdict. Plaintiff-respondent Lindsey Setzer brought suit against defendant-appellant SSM St. Clare Health Center for personal injuries she sustained from medical care she received. Plaintiffs-respondents Lindsey Setzer and Michael Setzer brought their joint claim for the wrongful death of Baby Boy Setzer incurred during the same treatment. The facts most favorable to the verdicts are as follows:

Pregnant Lindsey Setzer Goes to the ER

Lindsey Setzer was 14-weeks pregnant on July 30, 2012. (Pl. Ex. 1, p. 12). She was "ecstatic" to be pregnant: "It was just incredible to think that I was carrying another life and growing my own – my own child. It's just a feeling that you . . . can't really describe. It was an amazing feeling." (Tr.176)

Lindsey was 24 years old and was in the first year of her marriage with Michael Setzer. (Tr.167, 174-75). She was "very healthy" with only a minor history of kidney stones. (Tr.87; 175; 247).

Lindsey worked as a receptionist at a Mercy Hospital-affiliated pediatrician's office. (Tr.170-71; 173). She was a certified medical assistant. (Tr.170). She would later complete nursing school and become a registered nurse working at Mercy Hospital in the pediatric ward. (Tr. 167)

Lindsey began experiencing back and stomach pain in the early evening of July 30, 2012. (Tr.176-77.) The symptoms "came on really strong." (***Id.***) She started

throwing up from the pain. (***Id.***). The pain felt like her past kidney stone episodes. (***Id.***) She was anxious about whether her condition would harmful to her baby. (***Id.***)

Michael and Lindsey planned on going to Mercy Hospital. (Tr.178) However, the pain increased enroute -- "it hit, like, 10 out of 10 . . . that horrible, horrible pain." (Tr.178 -79). They diverted to St. Clare Hospital Health Center ("St. Clare Hospital") since it was closer. (***Id.***). Defendant-Appellant SSM Health Care St. Louis ("SSM") owned and operated St. Clare Hospital. (Doc. 4, para. 8).

Lindsey arrived at the ER at 7:38 p.m. on July 30, 2012. (Pl. Ex. 1, p. 12). Lindsey's complaints were recorded as "right [abdominal], groin and flank pain similar to past kidney stones. 14 weeks pregnant" (***Id.***) "[The quality of the pain is described as aching and severe. The pain is at a severity of 8/10. The pain is severe." (Pl. Ex. 1, p. 13). Lindsey's symptoms also included "heartburn, nausea, vomiting, abdominal pain, constipation and anorexia [loss of appetite]" (Pl. Ex. 1, p. 14).

James R. Taylor, MD undertook Lindsey's care at the ER. (Pl. Ex. 1, p. 12) He ordered, *inter alia*, a urinalysis. (Tr. 522) The urine sample was collected via a "clean catch" at 9:00 p.m. (Pl. Ex. 1, p. 23, 36) The urinalysis came back positive for Nitrites and blood. (Pl. Ex. 1, p. 16, 28-29; Tr.523-24). The urinalysis further showed the presence of bacteria at a level of 2+. (Tr.523; Pl. Ex. 1, p. 16, 28-29)

Dr. Taylor recorded his clinical impression that Lindsey suffered right flank pain, kidney stone, and "unspecified complication of pregnancy, antepartum." (Pl. Ex. 1, p. 16).

Lindsey Assigned Dr. Herrmann and Admitted to the Hospital

Dr. Taylor wanted Lindsey admitted to the St. Clare OB ward and have an ultrasound on the following morning. (Pl. Ex. 1, p. 16). Lindsey's OBGYN Dr. Super was not on staff at St. Clare Hospital. (***Id.***) Dr. Taylor therefore called the St. Clare Hospital on-call OB to undertake Lindsey's care. (***Id.***; Tr. 517).

Dr. Joseph Herrmann was the on-call OB. (Tr.516; Pl. Ex. 1, p. 16). Dr. Herrmann served as the on-call OB for St. Clare Hospital once or twice a year in exchange for admissions rights. (Tr.518). Dr. Herrmann agreed to abide by SSM's policies and procedures which were designed to assure the medical standard of care was met. (Tr.460) SSM scheduled Dr. Herrmann as the on-call OB. (Tr.517; 518-19).

Dr. Herrmann did not make regular rounds at St. Clare Hospital. (Tr.525) He rounded only when he had an admitted patient. (Tr.525). Dr. Herrmann could not recall admitting any patients in 2012. (***Id.***). Dr. Herrmann believed he had been to St. Clare Hospital before but "had no idea when the timing was." (Tr.526).

Dr. Taylor called Dr. Herrmann to transfer Lindsey's care. (Pl. Ex. 1, p. 16; Tr. 517). Dr. Herrmann did not want to admit Lindsey. (***Id.***) He wanted her transferred to another hospital out of his care. (***Id.***). Dr. Taylor warned that such a transfer would be a violation of "EMTALA" (Emergency Medical Treatment & Labor Act, 42 U.S.C. 1395dd). (Pl. Ex. 1, p. 16).

Dr. Herrmann admitted Lindsey into St. Clare Hospital at 12:05 a.m. on July 31, 2012 as her admitting and attending physician. (Pl. Ex. 1, p. 1; Tr. 517-18; 519).

Thereafter Dr. Herrmann was her admitting and attending doctor in the hospital. (Tr.515; 517-18).

Lindsey did not choose Dr. Herrmann. (Tr.515). She never saw Dr. Herrmann at his private office before or after the admission. (Tr.515–16;517-18) SSM assigned Dr. Herrmann as its on-call OB. (***See id.***)

The Worsening Course of Lindsey's Condition During her Admission

Lindsey was given morphine to control her pain. (Pl. Ex. 1, pp. 5-7, 25, 29) She had difficulty sleeping and had a great deal of pain. (Tr.183; Pl. Ex. 1, p. 19)) Her biggest concern remained the well-being of her baby. (Tr.182; 183; 184). Lindsey made multiple requests to have her baby checked. (***Id.***; Tr.186; 62)

Lindsey had Dr. Taylor's order ultrasound of her kidneys taken at approximately 9:51 a.m. on July 31. (Pl. Ex. 1, p. 25) The right side was reported as having hydronephrosis (enlarged kidney by liquid) and hydroureter (enlarged ureter by liquid). (***Id.***) Two kidney stones were identified in the right kidney. (***Id.***)

Lindsey finally received a fetal ultrasound in the early afternoon. (Tr.186; Pl. Ex. 1, p. 31, 35-36) Lindsey could see the baby and hear his heartbeat. (Tr.186). She felt happy as the baby seemed to be doing well. (***Id.***). This was the last time Lindsey would hear her baby's heartbeat.

Lindsey's medical condition continued to deteriorate. She had several episodes of troubled breathing. (Tr.185) Her breathing would become rapid and she had difficulty catching her breath. (***Id.***) She also felt her heart beat really fast. (***Id.***) As the day wore

on, she began to feel worse including feeling feverish. (Tr.188-89) She continued to feel nauseous. (Tr.189-90)

Lindsey's mother, Cindy Nilica, stayed with Lindsey most of her admission. She stayed with Lindsey until shortly after Midnight on the 30th of July. (Tr.82). She returned between 9:30 and 10:30 a.m. on the morning of the 31st. (Tr 61; 83; 85) She stayed with Lindsey until 6 or 6:30 on the 31st. (Tr.62; 85).

Mrs. Nilica witnessed episodes of trouble breathing and her condition becoming worse. (Tr.62; 63-64) Lindsey was always in pain. (***Id.***) Lindsey felt warm to her touch "like she had a fever." (***Id.***)

Lindsey reported her worsening conditions to her nurses. (Tr.189-90; 257; 258; 259) She reported her shortness of breath (Tr. 257; 258), the rapid heart rate (Tr.258), and feeling feverish (Tr.195; 258, 259). The nursing records state that Lindsey rated her pain a 7 out of 10 at 1:05 a.m., 3:45 a.m., 7:30 a.m., and 11:30 a.m. (Pl. Ex. 1, p. 75).

Lindsey's vital signs were taken and recorded four times. Her temperature and pulse rate progressively worsened and increased:

Table 1 – Temperature and Pulse Rate Recordings

Time Recorded (July 31, 2012)	Temperature	Pulse Rate
0105 Hours (1:05 a.m.)	98.1 °F	96 BPM
0612 Hours (6:12 a.m.)	98.8 °F	107 BPM
1130 Hours (11:30 a.m.)	98.8 °F	108 BPM
1142 Hours (11:42 a.m.)	99.7 °F	115 BPM
1633 Hours (4:33 p.m.)	100.1 °F	141 BPM

(Pl. Ex. 1, pp. 45-46)

Dr. Herrmann's Absent Medical Care

Dr. Herrmann may not have ever seen Lindsey. Lindsey denies Dr. Herrmann ever saw her. (Tr.183). Mrs. Nilica denied seeing Dr. Herrmann while she was with Lindsey. (Tr.60-61;66-67, 83) The charge nurse for the floor Amy Farr, R.N. testified that she did not see Dr. Herrmann on July 31, 2012. (Farr Depo., p. 46) Nurse Farr did not know if Dr. Herrmann had ever met Lindsey. (Farr Depo., p. 33) The charge nurse is above the floor nurse in the nurse hierarchy. (Farr Depo., p. 88)

The medical record shows no in-take record, no physician's medical assessment, no medical history, no physical examination, no medical plan, and no discharge summary. (***See*** Pl. Ex. 1) Dr. Herrmann admitted that he generated no record of being at the hospital on July 31, 2012. (***See*** Tr.520) He agreed that making a written record was not only important for all other health care providers to follow to let them know what he did and what his evaluation was. (***Id.***) Dr. Herrmann testified that failing to make a written record was a breach of the standard of care he owed Lindsey. (***See*** Tr.521).

Dr. Herrmann admitted he did not perform a physical examination. (Tr.522) There is no record that he looked at her lab results. (Tr.522) He admitted he did not look at ultrasounds of Lindsey. (Tr.530). Dr. Herrmann did not write any assessment or plan regarding Lindsey. (Tr.522)

Nurse Farr's Discharge of Lindsey

At 5:44 p.m. on July 31, 2012, Dr. Herrmann ordered the discharge of Lindsey. (Pl. Ex. 1, p. 32) The discharge diagnosis was kidney stones. (***Id.*** at p. 9) Dr. Herrmann prescribed ondansetron (Zofran) for nausea/vomiting and oxycodone-acetaminophen for pain. (***Id.***) Lindsey was directed to see her doctor in one day. (***Id.***) The discharge was completed at 6:40 p.m. (Pl. Ex. 1, p. 10).

Nurse Farr handled the discharge of Lindsey. (Farr Depo, p 36). She could not recall why she was asked but she would occasionally help with discharge if the nurses caring for a patient were busy. (***Id.*** at p. 23, 29).

Nurse Farr discussed the function of a nurse in the care of a patient. Nursing is a medical profession. (Tr.99). Nurses are not mere "handmaidens" to the physicians. (Tr.99, 112) A nurse acts as an independent professional along with the physicians. (***Id.***) A nurse should not blindly follow the orders of a physician. (Tr.100). The nurse should make his or her own nursing assessment and nursing judgment. (***Id.***) It was her responsibility to determine whether it was appropriate to perform a physician's order to discharge a patient. (Farr Depo., p. 112)

Nurse Farr testified that a nurse serves as an advocate for and protector of the patients. (Tr.99, 100) A nurse's first responsibility is to the patient. (Tr.101) If a nurse has doubt about a physician's order, the nurse is to question the physician. (Tr. 101-02) If the physician does not respond appropriately to the concerns, it is the nurse's responsibility to pursue the issue up the chain of command. (Farr Depo, p. 112: Tr.102) In the instance of Lindsey's care, the chain of command would go from Dr. Herrmann to

the team leader, then the house supervisor, and finally the administrator on call. (Farr Depo, p. 16)

These principles of nursing were unanimously affirmed by the nursing experts. (***See*** Nurse Lyerla (Tr.309, 337-38); Dr. Pearse (Tr.441, 474); Setzer (Tr.232, 234, 238-39, 254); Nurse Beckman (Beckman Depo., pp. 78, 91, 92-93, 96, 97-98)).

Nurse Farr did not review Lindsey's chart. (Farr Depo., p. 40) She did not recall discussing Lindsey's care with the floor nurses. (Farr Depo., p. 24, 36) She did not know Lindsey's allergies. (Farr Depo., p. 42; 70) She did not know what medications Lindsey had been given. (Farr Depo, p. 70) She was not "made aware" of whether Lindsey was in pain. (Farr Depo., p. 129) She did not know Lindsey had ultrasounds or the results. (Farr Depo., p. 107) She did not know Lindsey had bacteria in her urine. (Tr.119) She did not discuss Lindsey's case with any of the emergency department care providers. (Farr Depo, p. 107) She did not look at any prior records of Lindsey other than the last vital signs, including her prior pulse rates. (Farr Depo., p. 102, 110, 114; Tr.118) Nurse Farr did not know whether Lindsey's condition had improved or become worse during her admission. (Farr Depo., p. 110)

Nurse Farr admitted she had a responsibility to know Lindsey's medical condition:

> Q. [Plaintiff's counsel] You're the charge nurse; right?
> A. [Nurse Farr] Yes.
> Q. You're the one who's supposed to know what's going on with patients, you're supposed to be helping with the patients?
> A. Helping with the patients, yes.

(Farr Depo, p. 88)

Nurse Farr saw that Lindsey's last vital sign taken at 4:33 p.m. showed her pulse rate to be 141. Nurse Farr recognized this as abnormal know as tachycardia. (Farr Depo, p. 77; 110 p. 79; Tr.118-19). She knew tachycardia could indicate an infection. (Farr Depo, p. 79; Tr.119-20)

Nurse Farr called Dr. Herrmann at 6:40 p.m. to report the abnormal vital signs. (Farr Depo., p. 84) Dr. Herrmann recalled being called at his office at the end of his day. (Tr.527, 554)

Nurse Farr did not know Dr. Herrmann, had not spoken with him before, did not know anything about him, did not know about his ability to care for patients from her own experience, and had not worked with him before. (Farr Depo, p. 33-34; Tr.108, 112; ***see also*** Tr.527, 554).

Nurse Farr gave information to Dr. Herrmann limited to the most recent vital signs exactly as they appeared in her notes. (Tr.110) She did not tell Dr. Herrmann that Lindsey possibly has an infection. (Farr Depo, p. 98) Nurse Farr mistakenly told Dr. Herrmann that Lindsey did not have a fever. (Tr. 527,528)

Nurse Farr's medical entry for the call states: "Dr. Herrmann notified of vitals. Wants to continue with discharge." (Pl. Ex. 1, p. 19). According to Nurse Farr, Dr. Herrmann simply told her to continue with the discharge. (Tr.110-11) Nurse Farr finalized the discharge. She did not raise her concerns up the chain of command. (***See e.g.*** Tr.113)

Nurse Farr did not recall Dr. Herrmann offering any explanation to allay her concerns regarding the abnormal vital signs. (Tr.112-13):

Q. [Plaintiff's counsel] Okay. So as you sit here today and you're talking to this jury, you are telling them that you were concerned about these vital signs after Herrmann, an hour earlier at 5:44, had told you to discharge her, you call him back. You don't know a thing about him. And you go ahead and continue discharging this patient after he tells you: Well, just continue discharging the patient. I heard the vital signs. That's what happened?

A. [Nurse Farr] In a nutshell.

(Tr.113)

Nurse Farr explained she discharged Lindsey with "life-threatening tachycardia," based on Dr. Herrmann's mere order: "There's a professional respect that comes with the medical field that I followed with." (Tr. 112)

Dr. Herrmann stated that it would be a deviation of the standard of care if he did not know the temperature and pulse trend at the time of discharge. (Tr.540) Dr. Herrmann claimed that he knew Lindsey's history of vitals because he "would have asked" Nurse Farr. (Tr. 535) Nurse Farr did not review the prior vitals. (Tr.110) She specifically denied telling Dr. Herrmann about Lindsey's earlier pulse readings. (Farr Depo, p. 88)

Dr. Herrmann stated that if Lindsey was febrile that was a possible sign of an infection. (Tr.528). Dr. Herrmann testified that Nurse Farr told him that Lindsey was afebrile (no fever temperature) (Tr.527)

Dr. Herrmann agreed that the presence of bacteria and Nitrites in Lindsey's urine sample could have been an indication of an infection. (Tr.548) Dr. Herrmann testified that a normal pulse goes up to 100. (Tr.534) He agreed that Lindsey's 141 pulse rate was potentially life-threatening. (Tr. 546)

Dr. Herrmann admitted Lindsey could have had a urinary tract infection ("UTI") during her admission. (Tr. 550) Dr Herrmann conceded that UTI symptoms can be muted in pregnant women. (Tr.551) He opined that UTI should have been in his differential diagnosis. (Tr.550; 553-53) Dr. Herrmann explained that infection could lead to sepsis and septic shock. (Tr. 529). He stated that an infection should be treated before sepsis develops. (Tr.520-30, 550) A urinary tract infection ("UTI") should be treated with antibiotics. (Tr.553)

The 6:40 p.m. telephone call between Nurse Farr and Dr. Herrmann concluded with the discharge order in place. (Pl. Ex. 1, p. 19) Over two hours had passed since the last reading of Lindsey's vital signs at 4:33 p.m. (***Id.***) Neither Dr. Herrmann nor Nurse Farr requested or performed a final vital sign reading on Lindsey. (Tr.116-17; 549) The Setzers presented expert testimony that failing to update the information prior to discharge was a deviation from the standard of care. (Tr.270)

Nurse Farr had an additional opportunity to have a physician review Lindsey's condition prior to discharge. Nurse Farr met with the St. Clare Hospital house OB physician Dr. Brian Scott Gosser to sign the prescriptions. (Farr Depo., p. 65) Having Dr. Gosser sign the scripts saved Dr. Herrmann from coming in to do so. (Farr Depo, p. 69) Nurse Farr did not request Dr. Gosser's input or apprise Dr. Gosser of Lindsey's troubling medical conditions. (Farr Depo., p. 65)

Undiagnosed Infection Hours after Discharge

Plaintiffs' presented evidence that at SSM's St. Clare hospital Lindsey was "evolving into a grave picture of sepsis". (Tr.139, Dr. Heller depo. p.104) Dr. Heller

testified that Lindsey should have been aggressively managed, "not discharged". (Tr. 139, Dr. Heller depo. p. 110)

Lindsey returned home and continued to have a lot of pain, nausea and difficulty breathing. (Tr. 193-94) Shortly after midnight, she was unable to catch her breath and drenched in sweat. (***Id.***) She took her own temperature of 103°F or 104°F. (***Id.***) Michael rushed her to Mercy Hospital where she was quickly admitted into the ICU. (***Id.***, Tr.203-04)

Less than 8 hours after being discharged from St. Clare Hospital, Lindsey was in Mercy Hospital's ICU with full-blown sepsis.

Dr. Herrmann testified that Lindsey had a UTI that went undiagnosed and untreated at St. Clare Hospital. (Tr. 553-54) He explained the UTI developed into sepsis. (Tr.554; 555) Dr. Herrmann conceded he sent Lindsey home even though UTI was in differential diagnosis. (Tr. 554-555)

Plaintiffs' Retained Nursing Expert

Claudia Beckman, Ph.D provided opinion testimony to assist the jury as the plaintiffs' retained expert. Dr. Beckman is a nursing expert who currently serves as a professor and associate dean in the School of Nursing at Camden Rutgers University.

A nurse is required to evaluate patients for potential infection. (Tr.78-79) Nurse Farr had a duty to the patient to assess her conditions which included increasing pulse, increasing temperature, and the presence of bacteria and blood in the urine sample. (Tr.91)

Dr. Beckman opined that Lindsey's medical condition should have been evaluated by Nurse Farr as a possible infection. (Tr.91, 92-92, 96, 97). Nurse Farr breached the standard of care by letting Lindsey take a step out of the hospital without first being evaluated by a physician. (***Id.***)

Dr. Beckman opined that Nurse Farr's discharge was a breach of the standard of care. (Tr.90-91) Dr. Beckman stated that Nurse Farr should have questioned Dr. Herrmann why Lindsey was being discharged without an antibiotic. (Tr.92) Nurse Farr further breached the standard of care by not informing Dr. Gosser of Lindsey's vital signs and obtaining his authorization for medication without informing him of Lindsey's medical condition. (Tr.92, 93-94).

Dr. Beckman stated the standard of care required that Nurse Farr work her way up the chain of command when Dr. Herrmann failed to appropriately address the serious medical concerns regarding Lindsey. (T.96, 97-98)

SSM's Retained Experts Support Negligence

In addition to Nurse Farr and Dr. Herrmann providing opinions in defense of their own actions, SSM also presented the testimony of experts that provided opinions in support of the negligence of Dr. Herrmann and Nurse Farr.

Dr. Pearse Testimony

Dr. Carlton S. Pearse is medical doctor with a specialty in obstetrics and gynecology. (Tr.418) He believed admitting Lindsey into the hospital was appropriate. (Tr.469).

Dr. Pearse conceded that Dr. Herrmann was "negligent in documentation" of Lindsey's chart. (Tr.466). Dr. Pearse admitted that the lack of documentation hampered his analysis of the care: "It's very difficult for me to give you any opinions on Dr. Herrmann's care because there's no documentation, other than orders." (Tr.466)

Dr. Pearse acknowledged that Lindsey's vitals at discharge included tachycardia. (Tr.457) A high pulse rate is consistent with a patient who is septic. (Tr.440) He stated: "If there are other signs and symptoms, then you have to assume that tachycardia is from infection." (Tr.440)

Dr. Pearse admitted certain signs of a urinary tract infection such as urgency and frequency can be muted in pregnant women. (Tr.437) Pregnant women with bladder infections can have "very few or no symptoms." (Tr.437)

Dr. Pearse conceded that Lindsey had numerous symptoms at discharge. Her urinalysis showed nitrites which "can mean" there is a bacterial infection. (Tr.455; 457) He stated the blood in Lindsey's urine is a condition that "[s]hould not be ignored." (Tr.456; 457) The bacteria found in Lindsey's urine was also an abnormal finding. (Tr.456).) Her temperature was increasing. (Tr.458)

Dr. Pearse agreed that an increased pulse, vomiting, low grade temperature, pain and weakness are all non-specific clues of an infection. (Tr. 469-70) He stated that a urinary tract infection should have been included in the differential diagnosis for Lindsey at St. Clare Hospital. (Tr.472)

Dr. Pearse advised that if an infection is not treated early it can lead to other complications. (Tr. 471) Antibiotics are the first line of treatment for a urinary tract infection. (Tr.471)

Dr. Pearse, who was a friend of Dr. Herrmann, reluctantly admitted that Lindsey had a UTI that went undetected and undiagnosed at St. Clare Hospital. (Tr.472) Dr. Herrmann unwillingly agreed that the UTI was missed. (Tr.554) The urinary tract infection from E-Coli caused Lindsey's sepsis. (Tr. 473).

Dr. Matlaga Testimony

Dr. Brian Matlaga is a urologist. (Tr.464) Dr. Matlaga reported that Lindsey's urinalysis was positive for nitrites. (Tr.609) He agreed the presence of nitrite "alerts you that there may be the presence of bacteria in the urine." (Tr.609) With Lindsey, this test was positive "which would be consistent with having bacteria in urine." (Tr.609)

Dr. Matlaga also reported the urinalysis was positive for bacteria. (Tr.611) He explained that "means that on the urinalysis, there were bacteria present, and that's also consistent with nitrites being positive." (Tr.611).

Dr. Matlaga explained that the presence of bacteria triggered the lab to begin a culture of the urine automatically. (Tr.612, 613) The positive urinalysis made a urinary tract infection a medical concern: "So, urinary tract infection would be considered if you have a patient with bacteria in urine, yes." (Tr.621)]

Dr. Lyerla Testimony

Frank Lyerla, Ph.D. is a licensed nurse. (Tr.299-300) Dr. Lyerla testified that he teaches nursing students about sepsis and its signs. (Tr.315) He agreed that sepsis is an

infection and that it is preferable to treat the infection before it develops into sepsis. (Tr.323)

Dr. Lyerla stated there are a variety of different symptoms and that "[e]very patient is going to be a little bit different." (Tr.315) Dr. Lyerla conceded that Lindsey had signs of infection at the time of discharge, she had "some symptoms that you would say, okay, these are things you would see with infection." (Tr.324). This included Lindsey's tachycardia. (Tr.324) Infection can cause tachycardia. (Tr.355)

He agreed that Lindsey had a fever at the last evaluation before her discharge. (Tr.349) Her temperature had risen from her admission from 98.1°F to 100.1°F. (Tr.350) Dr. Lyerla associated such a fever to sepsis: "[I]f you're looking at sepsis, usually it's going to be 100 degrees Fahrenheit or higher. So that's what would be a temperature that I would associate with developing sepsis." (Tr.314-15).

The Aftermath

Lindsey was hospitalized at Mercy for a total of 10 days. (Tr. 215) She spent the first seven days in the ICU. (Tr. 211) She lapsed into a coma for two days. (Tr.203-04) She was hooked up to a lot of machines and had a breathing tube. (Tr.70-71) She was near death. (Tr.71)

When Lindsey ultimately recovered enough to be discharged from Mercy Hospital, she could barely walk. (Tr. 211) She had a lot of pain. (T. 211) Her body was "extremely swollen". (T. 211) The swelling caused deep purple scars and stretch marks on her inner thighs. (Tr.212) Those marks are painful and sensitive to touch. (Tr. 212)

Lindsey was discharged with a PICC line requiring in-home nursing to maintain. (T. 72, 216) Lindsey was extremely weak and needed physical assistance. (Tr.72, 215) She moved in with her mother to care for her. (Tr.71, 215)

Lindsey lost "three-fourths" of her hair. (Tr.217) She underwent treatment from a dermatologist for her hair loss. (Tr 217)

Lindsey was out of work for six weeks following discharge from Mercy. (Tr.217) She had to re-arrange her life plans by withdrawing from nursing school for the semester. (Tr.217) Her nursing career was put off six months. (Tr.217)

Lindsey has resulting "granuloma scar tissue" on her vocal cord. (Tr.215) Lindsey testified she suffers "coughing spells where it would just take your breath away, that cough where you cannot get rid of it, and it feels like your throat, it felt like my throat was, like, closing up". (Tr.213) During the coughing spells Lindsey cannot "breathe in." (Tr.213) She finds it "very scary." (Tr.213) She sees an ENT for her coughing. (Tr.213) The coughing spells occur approximately "once a week." (Tr.214)

Lindsey has frequent nightmares of her hospitalizations. (Tr.216) Her energy level has decreased tremendously. (Tr.216) Both Lindsey and her mother describe how Lindsey has changed and is not the same person anymore. (Tr.74, 216) She is sadder, more withdrawn and has difficulty speaking about her sepsis experience. (Tr.74).

Lindsey learned she lost her baby while she was still in the ICU. (Tr.206):

> I remember my mom telling me because I asked. I remember asking several times, you know, if my baby was okay, if my baby was okay. And even the few times that I was kind of coming back and forth with the tube, I

remember asking, pointing and asking. My mom was the one that told me when I --you know, when I finally -- I guess that it really sank in.

(Tr.206)

She discovered the baby she lost was a boy. (Tr.209) Lindsey described her array of emotions. She felt angry, hurt, horrible, devastated, and extremely empty. (Tr.207) She explained the "heartbreaking" finality when she was presented with the documentation for arranging her son's burial. (Tr.210) The documents recorded her son's date of birth -- and death -- as August 1, 2012. (Tr.209)

Cross Appeal Point Relied On I

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION TO AMEND JUDGMENT ON COUNT I OF PLAINTIFFS' PETITION TO INCLUDE WRONGFUL DEATH DAMAGES CONTAINED IN §537.090, RSMO SETTING THE PRESUMPTIVE ANNUAL PECUNIARY LOSS FOR THE DEATH OF A MINOR AS THE AVERAGE OF THE PARENTS' ANNUAL INCOME BECAUSE THE STATUTORY PRESUMPTION WAS NOT PROPERLY REBUTTED IN THAT DEFENDANT'S EXPERT ATTEMPTED TO REBUT THE PRESUMPTION ON AN INCORRECT BASIS.

- §537.090 RSMo.
- ***Mansil v. Midwest Emergency Med. Servs.***, 554 S.W.3d 471 (Mo.App. 2018)
- ***Sanders v. Ahmed***, 364 S.W.3d 195 (Mo. 2012)
- ***Martinez v. State***, 24 S.W.3d 10 (Mo. App. 2000)

SSM's Point I should be denied.

Standard of Review

Whether a jury was properly instructed is a question of law reviewed *de novo*. ***Bach v. Winfield-Foley Fire Prot. Dist.***, 257 S.W.3d 605, 608 (Mo. 2008). "Review is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by any theory, then its submission is proper. ***Id.*** (***citing Oldaker v. Peters***, 817 S.W.2d 245, 251–52 (Mo. banc 1991)). Instructional errors are reversed only if the error resulted in prejudice that materially affected the merits of the action. ***Id.*** To reverse a jury verdict on the ground of instructional error, the party challenging the instruction must show that: (1) the instruction as submitted misled, misdirected, or confused the jury; and (2) prejudice resulted from the instruction. ***Fleshner v. Pepose Vision Inst., P.C.***, 304 S.W.3d 81, 90–91 (Mo. 2010).

With respect to SSM's complaint regarding the verdict form, "when a party contends that the verdict form is confusing or misleading, the trial court resolves the issue 'in the exercise of its discretion.'" ***Pickel v. Gaskin***, 202 S.W.3d 630, 635 (Mo. App. 2006). "Because the trial court is in the best position to evaluate the effect of the verdict form, we will not disturb the decision of the trial court absent an abuse of discretion." ***Id.*** "The party claiming prejudicial error must show that the offending instruction misdirected, misled or confused the jury." ***Id.***

ARGUMENT

SSM's multifarious first point alleges instructional error in (1) giving Instruction 2; and (2) using Verdict Form B. SSM's point I is multifarious because it involves two standards or review based on a jury instruction and a verdict form. Both relate to the medical malpractice claim resulting in the death of Baby Setzer. SSM claims the instruction and verdict form failed to provide the proper measure of damages for the wrongful death of Baby Boy Setzer under §537.090, RSMo. SSM's point is without merit for numerous reasons.

Instruction 21 was tendered by plaintiffs and modeled after MAI 21.05. MAI 21.05 defines five categories of damage for actions against health care providers. It provides definitions for past economic damage, past noneconomic damage, future medical damages, future economic damage and future noneconomic damage.

SSM made general, non-specific objections to plaintiffs' submission of the MAI 21.05 arguing that "Plaintiffs are using the stock 21.05, which is totally improper in a death action". (T. 761) SSM tendered no alternative instructions to either the instruction or the verdict forms. (T. 761-778.)

SSM's blanket objection to Instruction 21 asserted that the damages available in a statutory wrongful death action are inconsistent with the defined elements of damage for a general action against a medical care provider in MAI 21.05.

SSM's argument is wrong. §538.215.1, RMSo mandates that juries itemize five categories of damage in *all* cases involving the rendering of health care. MAI 21.05 is the instruction that explains and illustrates the five categories of damage for the jury.

i. The Statutorily Mandated Categories of Damage Apply to Wrongful Death Medical Malpractice Claims

Chapter 538[1] governs all medical malpractice actions. §538.215.1, RSMo, requires juries itemize its damage awards in medical malpractice actions. The jury is required to separate the damages into five categories: past economic damages, past noneconomic damages, future medical damages, future economic damages excluding medical damages, and future noneconomic damages.

The statute reads in full:

> 538.215. Damage itemization by trier of fact--excess noneconomic damages to be reduced by court
>
> 1. In any action against a health care provider for damages for personal injury ***or death*** arising out of the rendering of or the failure to render health care services, any damages found shall be itemized by the trier of fact as follows:
>
> (1) Past economic damages;

[1] Chapter 538 has undergone two major revisions over the lifetime of the Setzers' claim. The first was effective August 27, 2015 and the second effective on August 27, 2017. For this point on appeal, SSM appears to agree that the applicable version is prior to the first revision of August 27, 2015. All statutory quotations and citations are to the statute as of the time the claim arose in 2012.

(2) Past noneconomic damages;

(3) Future medical damages;

(4) Future economic damages, excluding future medical damages; and

(5) Future noneconomic damages.

§538.215.1, RSMo. [emphasis added]

The itemization mandate allows, *inter alia*, the trial court to identify the noneconomic damage award and, if necessary, reduce the judgment from a verdict in excess of the statutory cap on noneconomic damage.

The Missouri Approved verdict forms for medical malpractice actions set forth each of the five categories of damage for the jury to complete in the event it finds liability. (***See generally*** MAI 36.20-.22). The verdict form B used with respect to the Setzers' wrongful death claim of Baby Boy Setzer was modelled after MAI 36.20. (D53, p.28). MAI requires the jury to complete an entry for all five items of damage set forth in §538.215.1, RSMo. (***Id.***). "A verdict form, however, is not an 'instruction,' but merely 'the medium to record the decision of the jury.' " ***Edgerton v. Morrison***, 280 S.W.3d 62, 67 (Mo. 2009) citing ***Mathes v. Sher Express, LLC***, 200 S.W.3d 97,105 (Mo.App. 2006)

SSM made no specific objection to other than to comment that "the plaintiff is submitting claims for damages based on the definition in 21.05, which is improper in a death action". Verdict Form B. (***See generally*** Tr. 770). SSM's comment was followed by the statement "there is no question that you have to do that". (T. 770)

To assist the jury to understand the verdict form and the five categories of damage, the Supreme Court has adopted MAI 21.05. MAI 21.05 provides the jury with guidance

as to the meaning of each category of damage it will encounter on the verdict form. The instruction gives a short definition of each category and followed by illustrations of the type of damage that could fall in that category.

MAI 21.05 is *not* the instruction defining damages for a jury. MAI 5.01 instructs the jury on the damages available in a wrongful death. MAI 5.01 is similar to MAI 21.03 which was in the medical malpractice claim of Lindsey, except 5.01 related to the death. The jury was properly instructed on the damages it was entitled to award in Instruction 20 that followed MAI 5.01. (D53, p.25).

SSM confuses the purpose of MAI 21.05. It incorrectly assumes MAI 21.05 defines the damages. It does not. It provides guidance for the jury to complete the categories of damage on the verdict form required by Missouri law.

SSM argues that there are two type of medical malpractice claims for instructional purposes – those that fall under §538.215.1, RSMo and those that fall exclusively under wrongful death §537.090, RSMo. The distinction does not survive the plain language of the statutes.

On its face, §538.215.1, RSMo applies to "any action against a health care provider for damages for personal injury or *death*." ***Id.*** (emphasis added). §538.305 specifies "The provisions of this act, except for section 512.099, shall apply to all causes of action filed after August 28, 2005."

If the explicit language is insufficient, the rules of statutory construction bolster the applicability of Chapter 538 to Chapter 537 wrongful death claims. §538.215, RSMo was more recently enacted than §537.090, RSMo. "It is presumed that the General Assembly legislates with knowledge of existing laws." ***Roesing v. Dir. of Revenue***, 573 S.W.3d 634, 639 (Mo. 2019). A later-enacted statute, which functions in a specific manner, will prevail over an earlier-enacted statute of a general nature. ***Parktown Imports, Inc. v. Audi of Am., Inc.***, 278 S.W.3d 670, 673 (Mo. 2009)(***citing Goldberg v. State Tax Com'n***, 639 S.W.2d 796, 805 (Mo. banc 1982)).

Additionally, a specific statute controls over a more general statute where both statutes purport to address the same issue. ***Id.*** (***citing State ex rel. Fort Zumwalt School Dist. v. Dickherber***, 576 S.W.2d 532, 536–37 (Mo. banc 1979)). §538.215, RSMo is more specific than the general wrongful death statute of §537.090, RSMo. "[T]he doctrine of in *pari materia* recognizes that statutes relating to the same subject matter should be read together, but where one statute deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails over the general statute." ***State ex rel. Hillman v. Beger***, 566 S.W.3d 600, 606 (Mo. 2019)(quotations and citations omitted).

Accordingly, the intent of the legislature is unambiguous. The mandate of §538.215, RSMo applies to wrongful death claims. The use of MAI 21.05 was correct to aid the jury to understand the verdict form and the categories of damage. "Whenever Missouri Approved Instructions contains an instruction applicable in a

particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." Mo. Sup. Ct. R. 70.02.

At its core, SSM does not trust juries to follow the plain language of the MAI. The jury was given the damage Instruction 20 (based on MAI 5.01) describing the permissible damages that could be awarded. MAI 21.05 was drafted to instruct the jury on how to itemize the damages it found pursuant to the damage instruction into the categories required by §538.215, RSMo and set forth in the verdict form. This is well within in the comprehension of a jury and has been properly adopted by the MAIs.

The illustrations in MAI 21.05 contain types of damage that may not be relevant to the claim at issue. In how many medical malpractice cases would run the scope of damages from dental, to custodial to rehabilitation to disfigurement? But the point of MAI 21.05 is not to define the available damages but to aid the jury in categorizing the damages it properly finds.

SSM gave no alternative at trial or on appeal. If SSM's approach were followed, the jury would encounter the damage categories for the first time when turning to the verdict form. It would have no guidance as to the meaning of the categories. SSM seeks to add confusion and uncertainty that committee adopted MAI 21.05 to eliminate. "Further, the jury was instructed according to MAI 2.03, which states that the jury should harmonize instructions, considering and applying

them as a whole. It must be assumed that the jury did so here." ***Edgerton v. Morrison***, 280 S.W.3d 62, 68 (Mo. 2009).

No Prejudice

SSM has made no argument that it was prejudiced by Instruction 21 or Verdict Form B. It has pointed to no argument by the Setzers to the jury for an award outside the scope of allowed in a wrongful death claim. The damage instruction (Instruction 20) defined the damages available in a wrongful death. It was given to the jury.

The is point is without merit and should be denied.[2]

[2] SSM claims that it would be entitled to a new trial if it somehow prevailed on this point citing ***Cova v. Am. Family Mutual Ins. Co.*** 880 S.W.2d 928, 931 (Mo.App.E.D. 1994). ***Cova*** does not stand for this proposition of law. The instructional error in ***Cova*** related to the verdict director. Liability was not properly established in ***Cova.***

SSM made this same argument to the court of appeals citing to different cases, neither of which stood for the proposition. On the contrary, in ***Ball v. Allied Physicians Grp., LLC***, 548 S.W.3d 373 (Mo.App,.E.D. 2018), the court of appeals found that an element of damage was unsupported by the evidence and remanded only those damages for new trial and affirmed the judgment in all other respects.

SSM's Point II should be denied.

Standard of Review

"The standard of review of a trial court's denial of a motion for JNOV is whether the plaintiff submitted legal and substantial evidence to support each fact essential to liability." ***Merseal v. Farm Bureau Town & Country Ins. Co. of Missouri***, 396 S.W.3d 467, 470 (Mo. Ct. App. 2013)(***citing Sanders v. Ahmed***, 364 S.W.3d 195, 208 (Mo. banc 2012)). Whether plaintiff made a submissible case is a question of law; therefore, review is de novo. ***Id. (citing D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co.***, 316 S.W.3d 899, 905 (Mo. banc 2010)).

The evidence is viewed in the light most favorable to the jury's verdict. ***Id.*** The plaintiff is given the benefit of all reasonable inferences, and evidence and inferences that conflict with the verdict are disregarded. ***Id.; Sanders v. Ahmed***, 364 S.W.3d 195, 208 (Mo. 2012). Granting a motion for JNOV is a "drastic action." ***Merseal***, 396 S.W.3d at 470. It should only be granted when reasonable persons could not differ on the correct disposition of the case. ***Id.*** A jury's verdict will be reversed for insufficient evidence only where there is a complete absence of probative facts to support the jury's conclusion. ***Id.***

Alleged Error in JNOV Ruling not Preserved

Upon transfer to the Supreme Court, a party is permitted to file a substitute brief. Rule 83.08(b). The Rule mandates that the substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." ***Id.*** A party "may not raise claims for the first time" in the Supreme Court. ***J.A.R. v. D.G.R.***, 426 S.W.3d 624, 629

(Mo. 2014). Where an appellant "altered the basis of his claim with respect to this argument, it is not preserved for review." ***State v. Prince***, 534 S.W.3d 813, 818 (Mo. 2017).

SSM did not challenge the trial court's denial of its motion for JNOV in the appellate court. This issue is raised for the first time in its substitute brief.

SSM's Point on Appeal I in the appellate court related to SSM's claims of error with respect to the written release between the Setzers and non-SSM parties. Point on Appeal I was multifarious. It listed eight (8) separate trial court rulings SSM claimed were erroneous. The trial court's denial of SSM's motion for JNOV was not among the eight challenged rulings raised in the court of appeals. Contrary to Supreme Court Rules, this claim of error in denying the JNOV appears for the first time in SSM's substitute brief.

Similarly, SSM's substitute brief raises legal arguments and bases not raised in the court of appeals. For the first time, SSM's substitute brief cites and relies on ***SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP***, 128 S.W.3d 534 (Mo. Ct. App. 2003), concepts of Accord and Satisfaction, and Section 537.060, RSMo. These citations raise entirely new legal bases not raised in the court of appeals.

SSM's Point II raises claims of error for the first time and alters the bases of its arguments at the court of appeals. This point is not preserved for review. Rule 83.03(b); ***Prince, supra.***; ***J.A.R., supra.***

ARGUMENT

SSM argues that the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV). SSM claims that a release agreement between the Setzers and non-SSM parties operated as a release of the claims against it. SSM's point is without merit for multiple reasons.

SSM's Point Logically Flawed

A motion for JNOV challenges the sufficiency of plaintiff's evidence supporting the essential elements of a claim. ***See Mersail, supra.*** SSM makes no such challenge. SSM makes no reference to plaintiff's evidence or alleged evidentiary deficiencies. SSM does not mention the substantial evidence supporting the claims, including the appalling evidence of pregnant Lindsey Setzer's worsening illness, the shocking dereliction of care and want of common sense exercised by her medical care providers in failing to treat and protect her from a serious medical condition, or the tragic loss of health – and life -- that resulted.

Rather, SSM purports the denial of its motion for JNOV is based on a written release between the Setzers and non-SSM parties (hereinafter "Release"). SSM contends the Release operated as a shield from its own liability.

The Release was not admitted into evidence at trial. It is devoid of evidentiary value. It is incapable of effecting the calculus of whether the plaintiffs submitted sufficient evidence to make a submissible case.

Even if the Release fell within the orbit of evidence the trial court could consider in resolving SSM's motion for JNOV, under the standards of the motion, "evidence and

inferences that conflict with the verdict are disregarded." ***Mersail, supra.***; ***Sanders, supra.***

The Release cannot abrogate the substantial evidence supporting each element of the Setzers' claims. The trial court committed no error under denying the motion for JNOV that challenges the sufficiency of that evidence.

Release did not Shield SSM from its Liability

SSM's theory that the Release shields its liability is substantively without merit in the first place. Both the plain language of the Release and Missouri law defeat this contention.

By its title, the Release is a "limited" confidential release of claims. (D.31, p. 1). The Release is a contract between Lindsey and Michael Setzer (identified as "Releasors") and Joseph G. Herrmann (and his insurer as well as its related companies) (identified as "Released Parties"). (***Id.***) SSM has never taken the position that it is included as a "Released Parties." The plain language of the Release prohibits such construction.

By the explicit terms of the release, the principle agreement is the receipt by the Releasors of settlement money in exchange for a release, acquittal and discharge of the Released Parties from legal claims. (***Id.***)

SSM is not a party to the Release. SSM is not identified as either the Releasors or Parties Released. SSM gave no promises and did not otherwise obligate itself to any performance in the Release. SSM was not a signatory to the Release. SSM did not provide consideration for the release. SSM did not assist in the drafting or making of the release.

The Release confines its scope as an agreement between the Releasors and the Released Parties. (***Id.*** at p. 2 ("This Release contains the entire agreement *between* the Releasors and Released Parties with regard to the matters set forth in it"(Emphasis added)).

SSM is a stranger to the Release. The terms of the Release explicitly sought to prohibit SSM's knowledge of, or involvement in, the terms of the Release. The Release was confidential between the parties to the Release. "The parties understand and agree that the confidentiality of the settlement is essential to, and forms a material part of this agreement." (***Id.*** at p. 4).

The exclusion of SSM from the scope of the confidentiality is made explicit. The Release obligated Dr. Herrmann's attorneys to protect the confidentiality of the Release from SSM: "In the event that SSM Health Care of St. Louis attempts to discovery the confidential details of this agreement, the attorneys for Robert G. Herrmann, M.D. will cooperate in defending such efforts of SSM Health." (***Id.***).

The Release cannot avail SSM under the law. "Only parties to a contract and any third-party beneficiaries of a contract have standing to enforce that contract." ***Verni v. Cleveland Chiropractic Coll.***, 212 S.W.3d 150, 153 (Mo. 2007). A non-party to a release "has standing to litigate the meaning of its terms only if it could demonstrate that it is a third-party beneficiary of the release." ***Seeck v. Geico Gen. Ins. Co.***, 212 S.W.3d 129, 135 (Mo. 2007)

SSM is not a party to the Release. It has never maintained that it is a third-party beneficiary -- not before the trial court, the court of appeals, nor in the substitute brief to this Court. SSM has waived any such argument.

The facts prohibit SSM from meeting the burden to show it is a third-party beneficiary of the Release entitled to enforce its terms.

To be a third-party beneficiary, the question of intent is "paramount." ***Laclede Inv. Corp. v. Kaiser***, 596 S.W.2d 36, 41 (Mo.App. 1980). "To be bound as a third-party beneficiary, the terms of the contract must clearly and directly express intent to benefit that party." ***Klenc v. John Beal, Inc.,*** 484 S.W.3d 351, 355 (Mo. Ct. App. 2015). SSM must show it was for its "primary benefit the contracting parties intended." ***Fuller v. Partee***, 540 S.W.3d 864, 869–70 (Mo. Ct. App. 2018)(quotations omitted). "The matter is resolved by examining the contract's language." ***Verni***, 212 S.W.3d at 153. "[A]n agreement must 'clearly express an intent to benefit' a third-party in order for the third-party to attain third-party beneficiary status." ***Seeck***, 212 S.W.3d at 135.

"Inasmuch as people usually contract and stipulate for themselves and not for third person, a strong presumption arises that such was their intention, and the implication to overcome the presumption must be so strong as to amount to an express declaration." ***Kaiser***, 596 S.W.2d at 42.

The contract in its totality is settlement and release of claims between the Setzers and Dr. Herrmann (i.e. "Parties Release.") (D.31, p. 1). The only explicit operative language providing for a release of legal claims is between the Setzers and Dr. Herrmann. (***Id.,*** p. 1).

SSM gloms onto those provisions of the Release wherein the Setzers promised Dr. Herrmann not to bring a claim against SSM based on his vicarious liability. SSM incorrectly contends that these provisions confer a legally enforceable benefit to it. This abuses the intent of the parties to the Release as construed from its plain language.

The Release unambiguously discloses the Setzers' intent to pursue legal claims against SSM:

> The undersigned Releasors do not release and hereby reserve all rights they have against SSM Health Care of St. Louis as herein provided. Releasors reaffirm that they intend to prosecute their separate claims against SSM Health Care St. Louis d/b/s St. Clare Hospital and its agents and employees for those injuries and damages allegedly sustained in the lawsuit styled, Lindsey Setzer and Michael Setzer v. Joseph G. Herrmann, M.D., filed in the Circuit Court of St. Louis County bearing Cause No. 14SL-CC01021.

(D.31, p. 1)(Emphasis in original).

The Release explains that SSM denied Dr. Herrmann was its agent and/or employee. (D.31, p. 1-2) Based on these representations, which turn out to be false, the Setzers agreed with Dr. Herrmann not to sue SSM based on his vicarious liability. (D.31, p. 2).

The intent to benefit Dr. Herrmann is clear. The parties sought to exclude Dr. Herrmann's involvement in future and expected litigation with SSM. Dr. Herrmann would benefit by avoiding the loss of time and frustration of being involved in SSM's litigation. The agreement would further cultivate his professional relationship with SSM where he was on staff.

SSM speculates that the vicarious liability term was included in the Release to address the application of Section 537.600, RSMo. According to SSM, through a gap in

this statute, Dr. Herrmann would be exposed to an indemnity claim from SSM if its liability was based on his vicarious liability. SSM argument eviscerates the position that SSM was intended to be a third-party beneficiary. If true, the term was intended to deny SSM a means of indemnity, the very opposite of a benefit.

The plain language of the Release does not support it was a gift to, or for the benefit of, SSM. The Release acknowledged the intent of the Setzers to sue SSM. The agreement to exclude Dr. Herrmann was made on the specific condition that he was not an agent or employee of SSM (which proved false) and therefore had no vicarious liability to pursue.

Even more telling are the confidentiality provisions. The Release prohibited the parties from disclosing its terms to SSM. Dr. Herrmann's attorneys were bound to defend the confidentiality of the Release *from SSM* in court.

Dr. Herrmann was not SSM's Secret Santa. Neither he, nor the Setzers, intended the vicarious liability provision as a gift to SSM. The intent was to benefit Dr. Herrmann.

The Release does not contain explicit language to overcome the strong inference that a third-party beneficiary was not intended. ***Verni, supra.*** The benefit to SSM, if any, was merely incidental. Accordingly, SSM had no right to enforce the Release under Missouri law. ***Id.***

Moreover, SSM would not be entitled to enforce the Release provision even if it were an intended third-party beneficiary. "[A] 'covenant not to sue' extinguishes no

liability, even of the party to whom it is given." ***Aherron v. St. John's Mercy Med. Ctr.***, 713 S.W.2d 498, 501 (Mo. 1986)

> A covenant not to sue is a valid way to remove one or more parties from further participation in the dispute without abandonment of a claimed right as against any party not a signatory to the covenant. It does, however, bring to a close the dispute as between the parties to the covenant under the provision of circuity of actions. It is not a release of all claims, and a reservation of rights over and against remaining parties can be and are preserved

Branick v. Nat'l Site Acquisition, Inc., 585 S.W.2d 305, 308 (Mo. App. 1979)

SSM's point II is without merit. The Release to which SSM was a stranger did not shield it from liability.

No Prejudice

Even if SSM overcame all the issues discussed above, it cannot demonstrate it was prejudiced by the trial court's denial of the motion for JNOV with respect to the Release. SSM was found liable through two vicarious means, both Dr. Herrmann and Nurse Farr. SSM remains liable under the judgment for the conduct of Nurse Farr regardless of the finding with respect to Dr. Herrmann. No prejudice would exist even if the trial court erred on this point.

SSM's Point III should be denied.

Standard of Review

"A trial court enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal." ***Lozano v. BNSF Ry. Co.***, 421 S.W.3d 448, 451 (Mo. 2014)(quoting ***Moore v. Ford Motor Co.***, 332 S.W.3d 749, 756 (Mo. banc 2011) (quotation marks excluded)). A trial court abuses its discretion only where its ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. ***Id.*** (*quoting* ***In re Care & Treatment of Donaldson***, 214 S.W.3d 331, 334 (Mo. banc 2007)).

Issue not Preserved for Review

SSM improperly raises this point for this first time in Supreme Court.

At the court of appeals, SSM raised issues regarding the Release in its Point Relied On I. That point was multifarious on its face as it included seven (7) separate trial court actions SSM was challenging. ***See*** Memorandum Supplementing Order Affirming Judgment Pursuant to Ruel 84.16(b)(5), p. 4 ("The majority of SSM's fourteen points are multifarious. SSM has assigned error to multiple actions or rulings by the trial court, and then conglomerated these into a single point on appeal. For instance, in Point I, SSM assigned error to seven trial court rulings.")

The court of appeals found SSM's numerous briefing violations prohibited appellate review:

> Points containing multiple claims of error fail to give notice to this Court and the Setzers of the exact issue presented on appeal. SSM has placed the Setzers and this Court in the inappropriate position of having to unravel SSM's points, if possible, in order to respond to, or review the alleged errors.

Id. (citation omitted).

The court of appeals concluded: "SSM's multifarious points are not preserved for review and constitute grounds for dismissal." ***Id.*** at p. 5. Nonetheless, the court of appeals exercised its discretion to "briefly review, *ex gratia*, SSM's points on appeal that we can decipher without becoming SSM's advocate." ***Id.*** at 7.

With respect to the specific evidentiary error raised in this Court in SSM's Point Relied On III, SSM failed to present it for review in the court of appeals – at least not in a meaningful and effective way to preserve the issue for review.

SSM's subpart E of Point Relied On I made only a vague and indefinite reference to error in "Excluding Defendant's Evidence in its Offer of Proof from being Admitted to Evidence." No court ruling was identified or cited. The court of appeals found SSM's briefing and other deficiencies on this issue failed to preserve it for review:

> Next, SSM alleges the trial court erred in excluding evidence from SSM's offer of proof. SSM did not indicate which offer of proof. Moreover, SSM did not assign this claim as a point of error requiring a new trial in its post-trial motion. ***Kerr v. Missouri Veterans Comm'n***, 537 S.W.3d 865, 877 (Mo. App. W.D. 2017)(noting that to preserve claim, a party must include it in its motion for new trial; failure to do so can lead to denial of review of the claim on appeal).

Id. at p. 9.

Accordingly, SSM's Point Relied On III was not preserved for review in the court of appeals. SSM may not raise the point for the first time in this Court. ***J.A.R. v. D.G.R.***, 426 S.W.3d 624, 629 (Mo. 2014).

ARGUMENT

In its Point III, SSM argues in the alternative that the trial court erred in excluding the "Limited Confidential Release of Claims" ("Release")(D.31) from evidence at trial. For multiple reasons, this point fails.

The Trial Court did not Abuse its Discretion in Excluding the Release

Whether a party has standing to enforce the terms of a contract as a third-party beneficiary is a matter of law. ***Verni v. Cleveland Chiropractic College***, 212 S.W.3d 150, 153 (Mo. 2007); ***see also e.g. State ex rel. William Ranni Assocs., Inc. v. Hartenbach***, 742 S.W.2d 134, 140-41 (Mo. 1987)(construing third-party beneficiary status as a matter of law.)

The Court makes the determination of whether a contract has an intended third-party beneficiary by examining the contract's language. ***Id.*** The court is permitted to look outside the four corners of the contract to resolve uncertainty or ambiguity. ***Laclede Inv. Corp. v. Kaiser***, 596 S.W.2d 36, 41 (Mo.App. 1980). However, the intent of contracting parties to gift a benefit to a third party must be clearly expressed. ***Id.*** at 42.

As was exhaustively discussed in the argument to Point Relied On II, the clear language of the Release fails to support an intent to make SSM a third-party beneficiary.

The obligations in the contract are specific to the parties to the contract. No language in the contract demonstrates an explicit intent to gift a benefit to SSM. On the contrary, the Release explicitly acknowledges and preserves the intent of the Setzers to bring medical malpractice claims against SSM. All the terms of the Release were to be kept confidential from SSM, including a specific provision requiring counsel for Dr. Herrmann to protect the confidentiality *from SSM* in court. The vicarious liability clause relied upon by SSM was for Dr. Herrmann's benefit. Whatever benefit those terms gave to SSM were merely incidental. SSM was not invested by the parties with the right to enforce the contract. ***Verni***, 212 S.W.3d at 153 ("Furthermore, a mere incidental benefit to a third party is insufficient to bind that party.")

SSM's offer of proof added nothing to the plain language of the Release. SSM's offer of proof was limited to asking whether the plaintiffs signed the release. (T. 686) Lindsey was merely asked by SSM to identify the Release and acknowledge signatures. ((T. 686). The offer of proof made no mention of intent. (T. 686).

An offer of proof must be adequate to preserve the intended issue. ***Moore v. Ford Motor Co***., 332 S.W.3d 749, 766 (Mo. 2011). "An offer of proof must demonstrate the relevancy of the testimony offered, must be specific, and must be definite." ***Karashin v. Haggard Hauling & Rigging, Inc***., 653 S.W.2d 203, 205 (Mo. 1983). SSM's offer of proof fails to meet these standards. As to the release, the offer of proof was limited to the foundation in identifying the release. But the authenticity of the release was not only undisputed it was also stipulated to on the record.

The trial court appropriately ruled that SSM had failed its burden to demonstrate the explicit intent of the parties to the Release to gift a benefit to SSM. SSM had no standing to enforce the terms of the Release. Exclusion of the Release from evidence was appropriate as it was not relevant and risked undue prejudice and confusion.

SSM's point relies on ***State ex. Rel. Normandy Orthopedics, Inc. v. Crandall***, 581 S.W.2d 829 (1979). This case is inapposite.

Crandall involves a unique species of settlement where a plaintiff gives a general release of claims acknowledging full compensation for the injuries incurred. Such a general release bars claims against non-settling tortfeasors "on the principle that a plaintiff may recover only once for his injuries." ***Id.*** at 831.

SSM complains that the trial court prevented it from showing the jury that the Release (1) "was intend to discharge it, or (2) the plaintiff was made whole." (SSM's Brief, p. 50).

SSM's argument defies credulity. No language in the Release implies it is a general release of all claims or receipt of full compensation. The plain language is to the contrary wherein the parties acknowledge the intent of the Setzers to bring claims against SSM. SSM was not deprived of any defense with respect to a general release of all claims because the plain language of the Release shows that it is not such a release.

SSM's reliance on ***Crandall*** and its directives regarding general releases has no pertinence here. SSM is a stranger to the Release and may not enforce it as a matter of law. ***Verni, supra.***

SSM's claim that it was entitled to have the jury instructed under MAI 32.21 (wholly unpreserved for appeal) is equally outlandish. As the Notes on Use explain, this instruction is given "only when there is a disputed issue as to whether plaintiff gave a release." The actual instruction makes clear that this refers to the actual physical exchange between the settling parties:

> Your verdict must be for defendant if you believe:
>
> First, plaintiff signed and delivered the release to defendant, and
>
> Second, plaintiff was paid $_____ for such release.

(MAI 32.21).

The Setzers gave a release . . . but not to SSM. Even if SSM proffered MAI 32.21 as an instruction (which it did not), the instruction would have no meaning under these circumstances. SSM was not a party to the Release. SSM was not a third-party beneficiary of the Release. SSM was not entitled to enforce the Release as a matter of law. And, the Release does not release SSM of its wrongdoing.

Again, SSM fails to acknowledge that it is also liable based on the negligence of Nurse Farr. No resolution of this point would affect SSM's liability.

SSM's Point IV should be denied.

Standard of Review

The Setzers adopt by reference its standard of review for instructional and verdict form error set forth in Point I.

ARGUMENT

SSM alleges the trial court erred in submitting Instruction 7 using MAI 13.06, and using the term "agency" in Instructions 9 and 16, because the instructions misstated the law on exposure of health-care providers for the conduct of employees. SSM alleges the trial court so erred because under Section 538.210, claims against health care providers must be based upon employment status rather than agency status, and under the 2017 revision to Section 538.205, there must be proof of direct compensation paid by the corporate employer to the claimed employee.

Retrospective application of §538.210.4, RSMo is not constitutionally permitted. "The general rule is that statutes are not applied retroactively." ***Stark v. Missouri State Treasurer***, 954 S.W.2d 645, 647 (Mo. Ct. App. 1997)(quoting ***In re Estate of Wilkinson***, 843 S.W.2d 377, 382 (Mo.App.1992)); ***see also*** Article I, Section 13 Mo. Const.

Exceptions to the rule are when the legislature "shows an intent for retroactive application," or "where the statute is procedural only and does not affect any substantive rights of the parties." ***Id.***

The 2017 amendment to Chapter 538 does not include explicit or implicit language supporting an intent of retrospective application. On the contrary, the 2017 amendment was a radical revision of Missouri medical malpractice law. The amendment

declare it is a statutory replacement of the prior common law medical malpractice cause of action. Section 538.210.1, RSMo. On its face, the amendment is a "re-do," not a tweak to prior existing law.

The amendment is clearly not procedural. "A law is procedural only and not retrospective, although it is retroactive, if it does not affect a substantive right of a party." ***State ex rel. Webster v. Myers***, 779 S.W.2d 286, 289 (Mo. Ct. App. 1989). Though a statute may modify or abolish a cause of action that had been recognized by common law or by statute, it may not operate retrospectively to deny an existing claim that accrued under the common law. ***See Elliot v. Kesler***, 799 S.W.2d 97, 102 (Mo. Ct. App. 1990)

The 2017 amendments to Chapter 538 would materially change the substantive rights of the parties. The amendment limits vicarious liability to a narrowly defined class of employee and wholly eliminate vicarious liability based on agency. "[S]ubstantive law relates to the rights and duties giving rise to the cause of action." ***Goad v. Treasurer of State***, 372 S.W.3d 1, 7 (Mo. Ct. App. 2011). Application of the 2017 amendments to Chapter 538 would be retrospective and therefore unconstitutional.

The trial court properly instructed the jury utilizing the appropriate law applicable to the claim relying on ***Jefferson ex rel. Jefferson v. Missouri Baptist Med. Ctr.***, 447 S.W.3d 701 (Mo. Ct. App. 2014). (***See*** Tr.728-29)

In ***Jefferson***, this Court rejected an argument that the term "employee" precludes reference to the law of agency. On the contrary, the Court determined the plain meaning of the word invokes agency law and the fulcrum feature of both – the right of the principal to control the conduct of the employee or agent. ***Id.*** at 710-711. As this Court

noted, "The Restatement (Third) of Agency defines the term "employee" as "an agent whose principal *controls or has the right to control* the manner and means of the agent's performance of work." ***Jefferson***, 447 S.W.3d at 709 (citing Restatement (Third) of Agency section 7.07(3)(a))(emphasis added in original))

The ***Jefferson*** Court held: "the central rule is that the more control the principal may exercise over the agent, the more likely the agent is an employee." ***Id.*** at 711. In the context of legislative use of the terms, the distinction between the terms is ignored. "In fact, they often use the words 'agent' and 'employee' interchangeably in that context." ***Id.*** "Thus, the technical distinction between an 'agent' and an 'employee' is of relatively minor significance." ***Id.*** In the context of medical malpractice, reliance on principles of agency as opposed to employment was appropriate. ***Id.***

Given this clear guidance, the trial court appropriately instructed the jury using MAI 13.06 agency instruction.[3] No prejudice could have arisen given the near interchangeability of the terms "agent" and "employee." ***Jefferson, supra.*** SSM has not alleged or articulate any prejudice. This point should be denied.

[3] SSM requested this Court take judicial notice of a circuit court's instruction in another case. The instructions were not made part of the record on appeal and therefore may not be considered.

Point Relied On V

Standard of Review

The Setzers adopt by reference the standard of review for instructional error in its opposition to Point I.

ARGUMENT

Substantial Evidence as to Factual Contentions of Negligence

Instruction 11 (based on MAI 21.01) was the verdict director for Lindsey Setzer's medical malpractice and personal injury claim. Instruction 18 (based on MAI 20.02) was given as the verdict director for the wrongful death of Baby Boy Setzer.

SSM contends that no expert opinions supported a breach of the standard of care (i.e. negligence) with respect to four of the five factual contentions in the paragraphs First of both instructions. SSM's point is without merit as the instruction was supported by substantial evidence.

The trial court did not err in giving Instructions 11 and 18. Each challenged factual contention from Instructions 11 and 18 was supported by substantial evidence.

Summary

The entire trial – both plaintiff and defense evidence – regarding Nurse Farr were directed to these issues in the instructions. The experts unanimously agreed that nurses are not mere handmaidens. Nurses owe a duty to patients to perform professional nursing assessments. Within this duty is the logical requirement that nurse review and remain informed of a patient's medical course. An informed assessment is possible only with information. The nurse is then charged with a duty to act upon the informed assessment.

The nurse is to serve as the patient's advocate to protect the patient from inappropriate medical orders. The advocacy role includes informing physicians of a patient's condition, challenging the physician to justify an order contrary to medical conditions presented, and, if necessary, go up the chain of command to assure the patient's safety.

The evidence demonstrated Nurse Farr critically failed to meet these medical standards. She was willfully ignorant of Lindsey's worsening condition. She failed to inform Dr. Herrmann of the worsening condition. She accepted Dr. Herrmann's discharge order despite the last vital signs indicating a serious health condition. She failed to utilize the chain of command to protect Lindsey and her unborn child.

A nurse is a patient's last line of defense. A nurse is supposed to advocate for the patient and provide protective oversight. Nurse Farr failed her duties to tragic consequence.

The trial court did not err in giving the instructions. Each contention of fact related directly to the evidence or a reasonable formulation of the evidence. Each listed fact was directly supported by expert testimony and its reasonable inferences. SSM made only inconsequential quibbles. Its conclusory objections at the instruction conference served only to create grounds for appeal and delay justice. SSM's failure to offer the trial court alternatives underscores that lack of genuineness to its challenge.

As an abundance of caution, and at the risk of belaboring the issue, we briefly address the factual bases of each contention:

i. "Failed to know each of Lindsey Setzer's recorded vital signs and urinalysis prior to discharge"

SSM's discussions of the facts and evidence are deceptive and vastly incomplete. SSM has failed to inform this Court that Lindsey had an undiagnosed urinary tract infection (UTI) which developed into sepsis at SSM's St. Clare Hospital. In the time period Lindsey was admitted to St. Clare, which was less than 24 hours, she became progressively worse. SSM's retained Ob/Gyn expert Dr. Pearse, who was a friend of Dr. Herrmann, reluctantly admitted that Lindsey had a UTI that went undetected and undiagnosed at St. Clare Hospital. (Tr.472) Dr. Herrmann unwillingly agreed that the UTI was missed. (Tr.554) Dr. Herrmann also admitted that the UTI became worse and developed into urosepsis. (Tr.555)

The UTI, in the bacterial form of e. coli, is what led to and caused Lindsey's sepsis. (Tr.473) Plaintiffs' presented evidence that at SSM's St. Clare hospital Lindsey was "evolving into a grave picture of sepsis". (Tr.139, Dr. Heller depo. p.104)

Dr. Pearse testified that there were clinical signs, referred to as clues, that infection was present. (Tr.469) These clues included bacteria in the urine, blood in urine, tachycardia, right flank pain, abdominal pain, nausea, hydronephrosis, hydroureter, nitrites in the urine, increasing temperature, increasing respiratory rate, sweating, kidney stones, and increasing pulse. These clues were not realized by Nurse Farr because she never conducted a meaningful review of the medical record. But Nurse Farr admitted she "was supposed to know what is going on with the patients." (Farr Depo. p. 88).

The expert evidence at trial was unanimous that nurses provide a critical role in the assessment and treatment of patients. Nurse Farr acknowledge that it was her separate responsibility to determine whether it was appropriate to discharge Lindsey. (Tr.97; Farr depo. P. 112) Nurse Farr characterized herself as a "partner" in the discharge decision. (Tr.119)

To conform with the standard of care Nurse Farr needed to know the diagnosis and treatment of Lindsey. (Tr.140; Beckman depo. p. 77) Nurse Farr needed to know the diagnosis and medical progress of Lindsey to make informed medical decisions. (Tr.140: Beckman depo. p. 77-78). Nurses are required to utilize patient medical information to make interdependent and independent professional decisions. (T. 140: Beckman depo. p. 77-78). This required Nurse Farr to piece together the available medical information from the medical chart and determine if there was a potential infection. (Tr.140: Beckman depo. p. 78-798).

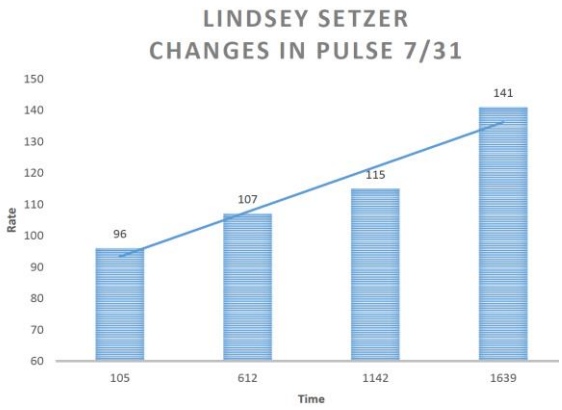
To meet the standard of care Nurse Farr needed to know the diagnosis, lab and test results and clinical history of Lindsey. (Tr.234) . However, Nurse Farr acknowledged that she didn't "review anything in depth". (Tr 97, Farr. Depo. p. 40) Nurse Farr never looked at Lindsey's prior records from the emergency room and did not know that information. (Tr.97; Farr depo. p. 103,114). Nurse Farr did not know the lab results and did not know that Lindsey had bacteria in her urine. (Tr.119) When a patient has bactria in the urine, urinary tract infection must be considered. (T. 621) Nurse Farr did not know the ultrasound results. (Tr.97; Farr depo. p. 108) Nurse Farr's lack of intellectual curiosity to consider why Lindsey's pulse rate was alarmingly abnormal may

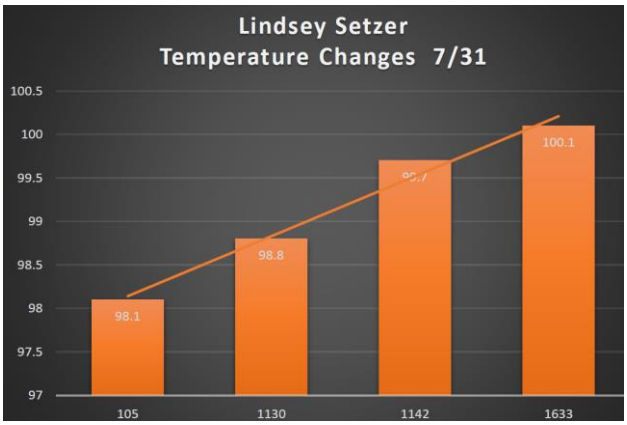
be explained by the fact that the discharge decision at 6:40 occurred minutes before the end of Nurse Farr's shift at 6:45.

Nurse Farr testified that she did not know and did not review earlier vital signs with Dr. Herrmann. (Tr.97,118; Farr depo. p. 88) SSM's expert nurse witness Lyerla opined that in order to conform with the standard of care Nurse Farr needed to know Lindsey's prior vital signs. (Tr.363) She did not.

Nurse Farr did not update and did not know Lindsey's vitals at the time of discharge. Instead Nurse Farr was negligently content with a stale, two-hour old pulse rate of 141. But even with that information, a pulse rate of 141 for a patient lying dormant in a hospital bed is "unbelievably abnormal". (T. 139; Heller depo. p. 107) Nurse Farr, as the discharging nurse, needed to get updated and fresh vital signs for Lindsey's to meet the standard of care. (T. 235) She did not meet this standard.

Of the four vital signs consisting of heart rate, blood pressure, respiratory rate and temperature, three of the four were detected as abnormal in Lindsey at SSM. Lindsey had a dangerously high pulse rate of 141. (Tr.139; Dr. Heller dep. P. 107) Lindsey had an increased respiratory rate. (Tr.139; Dr. Heller dep. P. 111). Lindsey also had a fever. (Tr.349) Nurse Farr erroneously told Dr. Herrmann Lindsey did not have a fever. (Tr.527,528) Nurse Farr needed to know each of these vital signs and their trends prior to discharge to meet the standard of care. (Tr.234, 363) Plaintiffs' trial exhibit 18, reproduced below, demonstrates the undeniable reason why it was important to know each of the vital signs and trend. (T. 90)





In the 21 hours she was at SSM, Lindsey got worse, not better. At the time of discharge, Lindsey was "shocked" to learn she was being discharged. (Tr.188) Lindsey was concerned about her fever and the health and welfare of her baby. (Tr.184, 188-189, 195) She had not seen a doctor. (Tr.183,184-185) Lindsey felt worse than when she arrived at the hospital. (Tr.189-190) Lindsey should have been aggressively managed, "not discharged". (Tr.139, Dr. Heller depo. p. 110)

The Setzers's nursing expert Dr. Claudia Beckman was in agreement. She testified that nurses are "required" to make independent assessments of patients. (Beckman Depo. p. 78) A nurse is required to assess a patient for the risk of infection. (***Id.*** pp 78-79). A nurse is required to learn the vital trends of a patient. (***Id.*** 89-90). In order to know the trends, the nurse needs to know the data.

Dr. Beckman concluded that Nurse Farr breached the standard of care by discharging Lindsey without (a) an assessment under the developing vital signs and urinalysis. (***Id.*** at 90-91); (b) by failing to provide Dr. Herrmann with Lindsey's

"historical data" (***Id.*** at 92); and (c) not providing Dr. Gosser with this information. (***Id.*** R 94).

Nurse Farr had no idea if Lindsey had improved or become worse during her stay at the hospital. (Farr Depo. p. 114). The tragic consequences are easy to trace and amply supported by expert testimony.

SSM's complaint focuses on the use of the word "each" in the instruction. The expert testimony required knowledge of the developing vital signs, trends and historical data. "Each" is reasonably inferable from the substantial evidence of knowing and analyzing the available information in discharge of the described nursing duties.

SSM's objection to the instructions did not object to the wording of the first bullet point in paragraph first. (T. 741). SSM's objection was "there was no plaintiff expert that that was her duty and responsibility, much less an M.D. that said there's any causation for that." (T. 741). There was ample evidence, not only from plaintiffs' experts but from defense experts, including two M.D.'s, as well. It should be noted that Plaintiffs agreed to and the Court changed other parts of the instruction in which specific objections were made. (Tr.741-743) SSM's point is without merit.

ii. "Failed to inform Dr. Herrmann of the trends of Lindsey Setzer's recorded vital signs and urinalysis prior to discharge."

Evidence amply supported the second submission. Plaintiff's nursing expert Dr. Beckman specifically testified that Nurse Farr breached the standard of care by failing to provide Dr. Herrmann with Lindsey's significant historical data:

> Q. [Plaintiff's Counsel] And in order to conform with the standard of nursing care, should Nurse Farr have questioned the doctor as to the reason he was discharging the patient without an antibiotic?
>
> A. [Nurse Beckman] Yes, but she **should have also provided him with historical data**, the increasing heart rate and temperature.

(**Beckman Depo.**, p. 92)(Emphasis added).

SSM provides no support that the jury was confused or misled by use of the phrase "vital sign trend." Lindsey's upward trend in pulse rate and temperature was discussed throughout the trial. (Plaintiffs' exhibit 18). SSM offers no reason why this phrase is confusing in the context of the evidence or how it may have been prejudiced. "MAI contemplates that the lawyers may explain the precise meaning of the instructions in closing arguments." ***Callahan v. Cardinal Glennon Hosp.***, 863 S.W.2d 852, 863 (Mo. 1993)(citing MAI, Why and How to Instruct a Jury, p. LXVII at XCIV)

iii. "Failed to obtain a medically reasonable explanation from Dr. Joseph Herrmann regarding Lindsey Setzer's heart rate and temperature prior to complying with Dr. Herrmann's order to discharge her."

SSM could not be more off base. This issue was thoroughly examined and discussed throughout the trial by experts on both sides.

Nurse Farr testified that a nurse's duty is to obtain an explanation from a physician to satisfy the nurse's independent assessment:

> Q. [Plaintiff's Counsel] Your primary commitment was to the patient in this case; correct?
>
> A. [Nurse Farr] For this situation we're speaking of, my role for that day.

Q. Great. And if you had any doubt or concern that a doctor's order could put Lindsey in danger, you were required to question that doctor; correct?

A. Yes, I would.

Q. And if you had any continued concern after talking to the doctor, you could do what is known as work your way up the chain of command; correct?

A. Yes.

(Tr. 101-02)

The opinion testimony was unanimous that a nurse is required to use the chain of command where a physician's order fails to adequately address the nurse's concern of patient safety. For instance, Nurse Farr testified as follows:

Q. [Plaintiff's Counsel] That's right. And so when -- And part of your responsibility as a nurse is if the patient is getting worse instead of getting better, when she was admitted, that you should point that out to your doctor first; right?

A. [Nurse Farr] If concerns, yes.

Q. Okay. And then if the doctor does not respond appropriately to your concerns that the patient is getting worse rather than getting better during the admission, then you can work your way up the chain of command that we've already discussed; correct?

A. Correct.

(Farr Depo p. 112); ***see also*** Beckman Depo. p. 96, 97-98.

SSM's challenge is focused on the phrase "medically reasonable explanation." Again, SSM did not make this specific objection at trial. (T. 742) SSM did not offer different wording or language other than the general argument "nurses don't decide whether something is medically reasonable". (T. 742) SSM offered no alternative

language. SSM has not explained or demonstrated how the use of this phrase was misleading, confusing or resulted in prejudice. "[T]he trial judge allowed this instruction to be used with the benefit of firsthand knowledge of how the evidence was presented at trial and, without indications to the contrary, it should not be assumed that he did so carelessly." ***Edgerton v. Morrison***, 280 S.W.3d 62, 67 (Mo. 2009).

SSM's reliance on ***St. Joseph's Hosp. of Kirkwood v. Schierman***, 829 S.W.2d 4, 6 (Mo. Ct. App. 1991), opinion adopted and reinstated after retransfer (June 10, 1992) is misplaced. In the context of that case, the phrase "failed to adequately communicate" was found to be a generalized theory of negligence susceptible to multiple reasonable interpretations. In the context of the case, there were two specific theories of negligence that would fit within the phrase.

SSM makes no argument as to how "medically reasonable explanation" could lead to jury confusion. The plain meaning of the words fairly and adequately conforms with the opinions expressed by the experts. We are not dealing with a term of art or science with a specific meaning outside ken of its ordinary meaning. "MAI contemplates that the lawyers may explain the precise meaning of the instructions in closing arguments." ***Callahan***, ***supra.***

iv. "Failed to provide protective oversight"

SSM complains about the jury instructions use of the phrase "protective oversight." SSM provides patients with a list of patient's rights. Among the rights listed by SSM is the right to "Receive **protective oversight** while a patient in the hospital". (Tr.222; Plaintiff's ex. 20, pg. 2)(emphasis added). The phrase in the instruction was

utilized because it is used by SSM in its literature advising its patients of their rights. SSM did not see the need to define protective oversight for its patients in the patient's rights pamphlet.

SSM admits its own retained expert testified that "a nurse should use protective oversight when treating a patient." (SSM Substitute brief, p. 19,71). Examining the testimony of Dr. Pearce shows the phrase was fully defined:

> Q. (Plaintiff's Counsel) I think I left off with my question that a patient is entitled to protective oversight; correct?
>
> A. [Dr. Pearce] Yes.
>
> Q. And that means that somebody has to keep an eye on her or him; correct?
>
> A. Yes.
>
> Q. And, in fact, somebody has to know the clinical picture that we have kind of talked about; right?
>
> A. Yes.
>
> Q. And a patient should be informed of the plan of care given to the patient; correct?
>
> A. Yes.

(Tr. 463)

Nurse Farr admitted that it was her responsibility to act as an "advocate for the patient" and act as a "protector for the patient". (Tr.99, 100). The jury heard evidence that it was the nurse's responsibility to be the patient's advocate. (Tr.232)

SSM's argument that "the term 'protective oversight' was vague and confusing to the jury" is false. Had [SSM] believed the phrases were unclear, [SSM] should have

objected at trial and offered an instruction defining those phrases. ***Williams v. Mercy Clinic Springfield Communities***, 568 S.W.3d 396, 415 (Mo. 2019), reh'g denied (Apr. 2, 2019).

Where, as here, "the testimony presented at trial sufficiently explained and thereby gave meaning to the language of the verdict director, the instruction is not a roving commission." ***Lowe v. Mercy Clinic E. Communities***, 592 S.W.3d 10, 22 (Mo. Ct. App. 2019), transfer denied (Feb. 18, 2020)(quoting ***Bell v. Redjal***, 569 S.W.3d 70, 95 (Mo.App.E.D. 2019) (***citing Klotz v. St. Anthony's Med. Civ.***, 311 S.W.3d 752, 767 (Mo.banc 2010)) ; ***see also Williams v. Mercy Clinic Springfield Communities***, 568 S.W.3d 396, 413 (Mo.banc 2019) ("When determining whether a roving commission occurred, a jury instruction should be considered in the context of the trial as a whole.").

As detailed in each subsection, the evidence was replete that Nurse Farr failed to provide protective oversight. There is no requirement that each disjunctive instruction be supported by independent, or different evidence. ***Lowe***, 592 S.W.3d at 21 (citing ***Stewart v. Sioux City & New Orleans Barge Lines, Inc.***, 431 S.W.2d 205, 209 (Mo.banc 1968) (finding each of two disjunctive theories of recovery, negligence and unseaworthiness of a vessel, was supported by substantial evidence of the condition of the cables on a boat's deck)).

v. "Failed to utilize the chain of command."

As SSM admitted in its brief, the chain of command instruction "was supported by expert testimony." (SSM Substitute Brief, p. 69).

Nurse Farr and plaintiff's retained nurse expert Beckman both testified about a nurse's duty of care to work the way up the chain of command if the treating physician does not address the nurse's concerns for the patient. (Tr. 102; **Farr Depo.**, p. 16; **Beckman Depo.**, p. 96).

> Q. [Plaintiff's Counsel] All right. So what you're saying to me is that if you, from a nursing perspective, came to the conclusion with an individual patient that the care and treatment not being provided to a patient by a physician was not appropriate, and the physician was not responding to your concerns, you could work your way up the chain of command?
>
> A. [Nurse Farr] Yes.

(**Farr Depo.**, p. 18).

Nurse Farr testified that the first person in her chain of command was the team leader. (**Farr Depo.**, p. 22). She admitted she did not contact her team leader in her discharge of Lindsey. (***Id.*** at 104). Going up the chain of command would have prolonged the discharge. It would have required an additional, independent evaluation of Lindsey and her medical condition.

Within a few short hours of discharge Lindsey, while at home trying to sleep, could not catch her breath. (Tr.193) By 1:00 a.m. she was shaking and drenched in sweat and started to throw up. (Tr.193) Even though Lindsey had taken the prescribed Percocet, which helps reduce fever, Lindsey had a temperature of 103. (T. 193) Every nurse witness who testified about the chain of command testified that when they have utilized the chain of command, it worked in resolving the concerns.

SSM disingenuously argues that since Nurse Farr contacted Dr. Herrmann, she did utilize the chain of command pursuant to Dr. Pearce's description of the chain of command.

This is not an instructional error argument. It was a factual issue for the jury to determine.

No Prejudice

This Court need not reach the issue of prejudice because Instructions 11 and 18 were supported by substantial evidence. However, the point can also be denied on the lack of prejudice.

SSM has not articulated any argument in the court of appeals or before this Court that the alleged instructional error led to prejudice or an unfair trial. The court of appeals *ex gratia* summarily denied this point on that ground. (Memorandum in Support of Order Affirming Judgment Pursuant to Rule 84.16(b)(5), p. 17).

For the first time in this appeal, SSM asserts that the burden shifts to the submitting party to show no prejudice resulted from an erroneous instruction. SSM cites only ***Doe 1631 v. Quest Diagnostic, Inc.*** 395 S.W.3d 8, 15 (Mo.banc 2013) for this proposition of law. This citation is in error.

The Missouri cases are too numerous to list that instructional error will not result in reversal unless prejudice is shown. "To reverse a jury verdict on the ground of instructional error, the party challenging the instruction must show that: (1) the instruction as submitted misled, misdirected, or confused the jury; and (2) prejudice resulted from the instruction." ***Stevens***, 454 S.W.3d at 880 (quotations omitted).

The ***Quest Diagnostic*** decision cites two cases to support the language regarding shifting burden, neither of which supports the proposition. ***First Bank v. Fischer & Frichtel, Inc.***, 364 S.W.3d 216 (Mo. 2012) states that prejudice will be presumed where an applicable MAI is not followed. ***Id.*** at 219. ***Hayes v. Price***, 313 S.W.3d 645 (Mo. 2010) follows the general rule that prejudice must be shown: "If the instruction is not supported by substantial evidence, there is instructional error, which warrants reversal *only* if the error resulted in prejudice that materially affects the merits of the action." ***Id.*** at 650 (quotations omitted)(emphasis added).

The ***Quest Diagnostic*** decision did not address the merits of the rule at issue or otherwise indicate an intent to change or alter existing law. The citation is dicta. "Generally, this Court presumes, absent a contrary showing, that an opinion of this Court has not been overruled *sub silentio*. *Sub silentio* is defined as 'without notice being taken or without making a particular point of the matter in question.'" ***State v. Honeycutt***, 421 S.W.3d 410, 422 (Mo. 2013), as modified (Dec. 24, 2013)(citations omitted).

Under Missouri law, it is SSM's burden to show it was prejudiced by an erroneous instruction. ***Odaker, supra.*** It has made no attempt to do so. The point should be denied.

SSM's Point VI should be denied.

Standard of Review

The Setzer adopt by reference the standard of review for instructional error set forth in opposition to point I.

ARGUMENT

Summary

SSM alleges additional instructional error with respect to Instructions 11 and 18 in the Point VI. SSM claim is directed to the first two factual contentions of the instructions regarding (1) the failure of Nurse Farr to learn the data about Lindsey's admission course, and (2) failure of her to disclose that information to Dr. Herrmann at the time of discharge. SSM argues that these facts lack "but for" causation because Dr. Herrmann testified he knew the underlying data.

SSM's argument is entirely constructed on an underlying factual presumption of Dr. Herrmann's knowledge. However, what Dr. Herrmann knew is a question of fact for the jury. SSM may not establish this fact by fiat, and the standard of review requires that the record be viewed in the light most favorable to the judgment.

Substantial and compelling evidence supported a finding contrary to the one relied upon by SSM. This evidence showed that Dr. Herrmann was absent from Lindsey's care and ignorant of her critically deteriorating condition. Applying the correct standard of review, the "but for" causation follows simple logic. Nurse Farr could have saved Baby Boy Setzer and prevented the injuries to Lindsey "but for" her the derogation of her duty in failing to inform Dr. Herrmann of Lindsey's degrading course of medical condition.

Substantial Evidence Supported "But For" Causation

SSM contends that because Dr. Herrmann testified that he knew the vitals and had enough information to order discharge then Nurse Farr's failure to inform him of that information could not have been a cause of Dr. Herrmann's tragic discharge order. (***See generally*** SSM Substitute Brief, p.75-76). To SSM, this conclusively establishes Dr. Herrmann's knowledge as a fact.

SSM flips the standard of review on its head. Instead of viewing the evidence in the light most favorable to submission of the instruction and disregarding all contrary evidence, SSM argues that only its evidence should be considered. ***Oldaker, supra.*** SSM gives Dr. Herrmann's testimony conclusive effect on a contested issue of fact.

Under Missouri law "[t]he jury is permitted to draw such reasonable inferences from the evidence as the evidence will permit and may believe or disbelieve all, part, or none of the testimony of any witness." ***State v. Hineman***, 14 S.W.3d 924, 927 (Mo. banc 1999) "All decisions as to what evidence the jury must believe and what inferences the jury must draw are left to the jury, not to judges deciding what reasonable jurors must and must not do." ***Robinson v. Langenbach***, No. SC 97940, 2020 WL 2392488, at *6 (Mo. May 12, 2020)(***citing State v. Jackson***, 433 S.W.3d 390, 399 (Mo. banc 2014)).

Substantial evidence supported the trial court's giving of Instructions 11 and 18. Dr. Herrmann admitted that his medical records breached the standard of care. The medical records contain no entry to support Dr. Herrmann received or reviewed Lindsey's medical progress, including the vitals and urinalysis. The nursing records do

not reflect regular communication with Dr. Herrmann to relate Lindsey's worsening conditions.

Dr. Herrmann did not want to treat Lindsey. One of his few documented actions with respect to Lindsey was his attempt to have her transferred to another hospital and out of his care. Dr. Herrmann admitted that there is no record that he ever assessed Lindsey. (Tr.522)

Lindsey testified that Dr. Herrmann never saw her and did not perform any examination of her. (Tr.522) Nor did anyone else in the hospital see Dr. Herrmann during Lindsey's admission. Dr. Herrmann did not have computer or remote access to patient records, including Lindsey's. There is no entry in Lindsey's medical record from Dr. Herrmann. (Tr.519)

Nurse Farr admitted that she had never spoken with (or seen) Dr. Herrmann prior to the telephone call where he discharged Lindsey. (Farr Depo., pp. 33,34).

Dr. Herrmann's discharge order also supports the inference that Dr. Herrmann was ignorant of her alarming progress because it does not make medical sense in light of her worsening condition.

The evidence supporting the instructions is the only evidence permitted to be considered in this review. ***Oldaker, supra.*** This substantial evidence supports a jury finding that Dr. Herrmann was an absentee physician. It supports the belief that Dr. Herrmann was not informed of, nor did he seek, information regarding Lindsey's progress. In short, the evidence completely supports a finding Nurse Farr's failure to learn about and relate Lindsey's medical progress to Dr. Herrmann was a "but for" cause

of the tragic discharge order. SSM's point is completely without merit when the correct methods of review are employed.

SSM's reliance on ***Callahan v. Cardinal Glennon Hosp.***, 863 S.W.2d 852 (Mo.banc 1993) is misplaced as it actually supports the trial court's submission of Instructions 11 and 18.

Callahan was a medical malpractice case in which the defendant sought to read in a "substantial factor" into "but for" causation. ***See generally Callahan***, 863 S.W.2d at 862.

The Court rejected a "substantial factor" test. In doing so, the Supreme Court examined four hypothetical circumstances. ***Id.*** at 862. The third hypothetical mirrors the present circumstance: where a treating nurse fails to inform the treating physician of the condition of a patient before discharge where the physician is not otherwise informed. In dicta, the Supreme Court held that such failure satisfied "but for" causation of patient being released without proper treatment. ***Id.***

SSM erroneously relies on the fourth hypothetical. That hypothetical assumes the treating physician is aware of the patient's condition before discharge. ***Id.*** But, as described above, the evidence supported a finding that Dr. Herrmann did not know Lindsey's worsening condition. "An appellate court views the evidence in the light most favorable to the verdict and disregards evidence to the contrary." ***Stewart v. Partamian***, 465 S.W.3d 51, 57 (Mo. 2015). SSM's argument about what Dr. Herrmann knew is irrelevant to the review of this issue. The jury was free to disbelieve any part of his testimony.

The evidence in this case further distinguishes SSM's misapplication of ***Callahan.*** The evidence described additional duties of a nurse to protect a patient than were assumed in the ***Callahan*** hypotheticals. The unanimous evidence here established Nurse Farr was an independent medical care provider who served as the patient's advocate and safety net. Nurse Farr had the duty to protect Lindsey and the unborn child through means other than communication with the treating physician. This included independently assessing Lindsey's condition, challenging the orders of the physician inconsistent with the patient's medical condition, and utilizing the chain of command where the treating physician's care is inadequate. ***Callahan*** did not address these duties.

Additionally, the three unchallenged factual contentions in Instructions 11 and 18 concern nursing duties not present in the ***Callahan*** hypotheticals. Each of these three contentions survive "but for" scrutiny regardless of the jury's finding on the first two contentions. Under the evidence of this case, Nurse Farr had a duty to protect Lindsey under these circumstances independent of Dr. Herrmann's knowledge. Instructions 11 and 18 were proper and presented logical "but for" causation. SSM's point should be denied.

SSM's point VII should be denied.

Standard of Review

SSM is claiming error in as to multiple trial court rulings in a single point relied on. SSM claims error in both Instruction No. 14 and Verdict Form A. Point VII is multifarious in violation of Rule 84.04(d). Separate errors are required to be stated in separate points. ***In re Marriage of Fritz***, 243 S.W.3d 484, 487 (Mo. App. E.D. 2007). Combining multiple rulings or grounds into a single point results in a point that contains multiple legal issues, which runs afoul of the rule**.** ***Fritz***, 243 S.W.3d at 487; ***In re Marriage of Erickson***, 419 S.W.3d 836, 845 (Mo. App. S.D. 2013); ***Wolf v. Midwest Nephrology Consultants PC***, 487 S.W.3d 78, 84 (Mo. App. W.D. 2016).

Additionally, SSM failed to preserve any issue regarding Verdict Form A as it did not make an objection to it at trial. At the jury instruction conference, SSM requested some changes to the Verdict Form which were made. (Tr.768) SSM's counsel then stated: "So the format, I think I'm comfortable with." (Tr.767). Defendant does not cite preservation of error as required by Rule 84.04(e).

Supreme Court Rule 84.04(e) plainly states that "[t]he argument shall be limited to those errors include in the "Points Relied On". In subpart B of Point VII SSM states that Jury Instruction 14 was improperly given contending that there was no "expert support" for (1) "future economic damages" or (2) "future medical damages". These objections were not made at trial and have been waived. (Tr. 747-748).

SSM's objection to "future" damages was limited to vague objections to submission of "future non-economic damages" and "future medical damages". T. 748) "[A] vague, general objection preserves nothing for appellate review." ***McCrainey v. Kansas City Mo. Sch. Dist.***, 337 S.W.3d 746, 755 (Mo. App. W.D. 2011)(s***ee also SKMDV Holdings, Inc. v. Green Jacobson, P.C.***, 494 S.W.3d 537, 559 (Mo. App. 2016)).

Issues on appeal not properly briefed "shall not be considered in any civil appeal." Rule 84.13(a).

SSM's Point VII asks for plain error review under Rule 30.20 (sic). Missouri Supreme Court Rule 30.20 does not exist. SSM's table of authorities does not contain a citation for Rule 30.20 nor does SSM's appendix contain a copy of Rule 30.20.

In the event the Court reviews this matter *ex gratia*, the Setzers adopt the standards of review set forth in opposition to point I for the standards applicable to preserved review for instructional and verdict form allegations of error, and the following argument is presented.

ARGUMENT

SSM complains that the instructions omit the definition of the term "future economic damages". The jury was instructed on the meaning of "past" economic damages. Thus, according to defendant, the jury would be unable to differentiate the meaning of the words "past" and "future". This argument is without merit even if it had not been waived.

Jurors are credited with ordinary intelligence, common sense and an average understanding of the English language. ***Graham v. Goodman***, 850 S.W.2d 351, 355 (Mo. 1993). "This is true when considering whether a word or phrase in an instruction must be defined." ***Nelson v. State***, 521 S.W.3d 229, 234 (Mo. 2017), cert. denied sub nom. ***Kirk v. Missouri***, 138 S. Ct. 982, 200 L. Ed. 2d 261 (2018). "The test of correctness of an instruction is how the instruction will naturally be understood by the average juror." ***Minze v. Missouri Dep't of Pub. Safety***, 437 S.W.3d 271, 278 (Mo. App. 2014) (not error for jury instructions to omit the words "rents and profits");(***See also Huelskamp v. Patients First Health Care,*** LLC, 475 S.W.3d 162, 175 (Mo. App. 2014)).

"Long continuance of conditions existing at trial is sufficient to warrant giving an instruction on damages for future pain and suffering." ***Chaussard v. Kansas City S. R. Co.***, 536 S.W.2d 822, 828–29 (Mo. App. 1976). Lindsey's chronic injuries and resulting medical conditions were six years old at the time of trial. She testified about seeing an ENT for her throat granuloma. (Tr.213) She also sees a dermatologist as a result of her injuries. (Tr.217) Moreover, Lindsey is a nurse and capable of assessing her medical condition. No objection was made to her testimony concerning her permanent damages.

Lindsey's sustained permanent injuries and damages. Permanent injuries warrant the jury's determination as to future damages. See ***Henderson v. Dolas,*** 217 S.W.2d 554, 560 (Mo. 1949) – "All of the evidence concerning plaintiff's injury, its extent and duration, was fully submitted and the evidence was such that the jury could draw an

inference as to the duration of the condition shown, even to the extent of finding it to be permanent."

"Generally, the issue of damages is primarily for the jury to decide. ***Emery v. Wal-Mart Stores, Inc.,*** 976 S.W.2d 439, 448 (Mo. 1998). The jury and the trial court is in a superior position to evaluate injuries and other damages. Id. This Court in ***Swartz v. Gale Webb Transp. Co***., 215 S.W.3d 127,132 (Mo. 2007) characterized future damages under Missouri law as "traditional, simple, and easy-to-apply approach of allowing the jury to consider all evidence of past and present injuries, including the increased risk of future injury that those present injuries create, as well as evidence of future injuries that the jury finds are reasonably certain to occur". Id. at 132. That is precisely what the jury reviewed and decided here.

It is reasonable for the jury to conclude that if Lindsey injuries had not fully recovered in six years, she is not likely to fully recover. The inference is that the injuries presented at trial are permanent. Future damages for permanent injuries are for the jury. ***Burns v. Kansas City Pub. Serv. Co.,*** 273 S.W.2d 184 (Mo. 1954); ***Brock v. Gulf, M. & O. R. Co.,*** 270 S.W.2d 827, 835 (Mo. 1954)

SSM has not alleged or shown that the instruction regarding this damage element misled, misdirected, or confused the jury. Defendant's argument in point VII is both waived and without merit. It should be denied.

SSM's Point VIII

Standard of Review

In Point VIII, SSM alleges that "the circuit court erred in denying appellant's motion for JNOV . . . ." pertaining to the agency relationship between SSM and Dr. Herrmann. This issue has not been preserved and is not properly before this Court.

Upon transfer to the Supreme Court, a party is permitted to file a substitute brief. Rule 83.08(b). The Rule mandates that the substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." ***Id.*** A party "may not raise claims for the first time" in the Supreme Court. ***J.A.R. v. D.G.R.***, 426 S.W.3d 624, 629 (Mo. 2014). When an appellant has "altered the basis of his claim with respect to this argument, it is not preserved for review." ***State v. Prince***, 534 S.W.3d 813, 818 (Mo. 2017).

SSM did not challenge the trial court's denial of its motion for JNOV in the appellate court. This point is raised for the first time in this court in its substitute brief. Accordingly, SSM's point VIII should not be considered. See ***Essex Contracting, Inc. v. Jefferson Cty.***, 277 S.W.3d 647, 656 (Mo. 2009) – ("This argument appeared nowhere in the brief to the court of appeals, and that portion of the substitute brief will not be considered by this Court.")

The Setzers adopt by reference the standard of review for the denial of a motion for JNOV set forth in opposition to point II as the general standard for preserved review.

ARGUMENT

Even *ex gratia* review will not avail SSM as there was sufficient evidence presented at trial -- which has been discernably omitted by SSM in its briefing -- establishing a vicarious relationship between SSM and Dr. Herrmann.

SSM Controlled the Physician Treating Lindsey

Lindsey's regular OB/GYN was Dr. Super. He was not on staff and did not have privileges at St. Clare. (Tr.31) Because Dr. Super was not on staff, SSM would not allow Dr. Super to treat Lindsey in the hospital. (T. 32) Nor did SSM involve or inform Dr. Super of Lindsey's hospital care. SSM controlled what physicians saw Lindsey as well as what physicians did not see Lindsey.

SSM's controls over Dr. Herrmann

The medical records show that Lindsey was admitted into SSM's hospital "to the house OB" Dr. Herrmann. (Plaintiffs Exhibit 1) Lindsey did not know Dr. Herrmann. She had never been seen him professionally and Dr. Herrmann did not know anything about her. Lindsey had no control, input or agency in the selection by SSM of Dr. Herrmann. It was SSM who chose Dr. Herrmann. Lindsey had no say in what doctor she was provided with at St. Clare.

SSM controlled those physicians authorized to see patients at its St. Clare hospital through its credentialing of its hospital staff. (Tr.150-151) SSM's bylaws were enacted with the stated purpose to "establish a framework for Medical Staff activities and

accountability". (Tr.151) SSM required staff to "assume all the functions and responsibilities of membership on the Active Medical Staff, including teaching assignments, clinic patient care assignments, disaster care assignments and emergency service care and consultation assignments." (Tr.152) SSM required a contractual relationship with hospital staff, which included Dr. Herrmann. (Tr.152) SSM directed continuing qualifications for staff. (Tr.153). SSM adopted a strict code of conduct for its staff. (Tr.153) Acceptance to the medical staff required the physician to "abide by the Code of Conduct, Health Center policies, Medical Staff policies, the Ethical and Religious Directives for Catholic Health Care Services, and the SSM Health Care compliance program." (Tr.154)

In accepting staff privileges Dr. Herrmann was required to "provide emergency care and rotate on the Emergency Department call service as determined by the Department Chairperson." (Tr. 154) In exchange for staff privileges, Dr. Herrmann was required to periodically take call. SSM controlled several treatment protocols required of Dr. Herrmann. Under SSM bylaws Dr. Herrmann was required by SSM to perform a complete medical history and physical examination of Lindsey. (Tr.154) SSM's bylaws mandated that Dr. Herrmann complete and document an updated examination of Lindsey. (T. 155)

Plaintiffs exhibit 25, consisting of St. Clare Health Center rules and regulations, was admitted into evidence. (Tr.155-156) Plaintiffs' counsel read parts of exhibit 25 to

the jury which consisted of extensive and substantial controls placed over hospital staff pertaining to patient care. (Tr.155–163)

Plaintiffs introduced and read to the jury defendant SSM's answer to interrogatory 11 which states that Dr. Herrmann was acting as its employee in referring Lindsey to Dr. Super. (Tr.165) Plaintiffs read to the jury SSM's answer to interrogatory number 20 which indicates that Dr. Gosser, SSM's in-house ob/gyn was supervised by Dr. Herrmann. (Tr.165) Finally, SSM's answer to interrogatory states that SSM's employee Nurse Farr was supervised by Dr. Herrmann. (Tr.165-166).

SSM does not raise the contention that ***Jefferson ex rel. Jefferson v. Missouri Baptist Med. Ctr.***, 447 S.W.3d 701 (Mo. App. 2014) was incorrectly decided. Nor should it as ***Jefferson*** was properly decided. Rather, SSM argues that the Setzers did not present sufficient evidence of control. But SSM's brief fails to detail any of the evidence of control. Without discussing plaintiffs' evidence in a light most favorable to the jury's verdict, SSM prohibits meaningful review.

In ***Jefferson***, the Court rejected an argument that the term "employee" precludes reference to the law of agency. On the contrary, the Court determined the plain meaning of the word invokes agency law and the fulcrum feature of both – the right of the principal to control the conduct of the employee or agent. ***Id.*** at 710-711. As the Court noted, "The Restatement (Third) of Agency defines the term "employee" as "an agent whose principal *controls or has the right to control* the manner and means of the agent's

performance of work." ***Jefferson***, 447 S.W.3d at 709 (citing Restatement (Third) of Agency section 7.07(3)(a))(emphasis added in original))

The Court held: "the central rule is that the more control the principal may exercise over the agent, the more likely the agent is an employee." ***Id.*** at 711. In the context of legislative use of the terms, the distinction between the terms is ignored. "In fact, they often use the words 'agent' and 'employee' interchangeably in that context." ***Id.*** "Thus, the technical distinction between an 'agent' and an 'employee' is of relatively minor significance." ***Id.*** In the context of medical malpractice, reliance on principles of agency as opposed to employment was appropriate. ***Id.***

While SSM failed to preserve this point, it is without merit. The record contains ample evidence to support SSM's vicarious liability under Missouri law for the conduct of its employee/agent Dr. Herrmann. This Point should be denied.

SSM's Point IX should be denied.

ARGUMENT

SSM argues that the trial court erred in (1) not holding an evidentiary hearing on its request for a periodic payment schedule for future damages pursuant to §538.220, RSMo. This assertion is factual incorrect. The trial court held a post-trial hearing on October 4, 2018. (T. 848) The post-trial hearing was on the record. (T. 848) The hearing was initially scheduled for September 11, 2018 but reset to October 4, 2018 upon application and motion by SSM. [LF 1] At the post-trial hearing, SSM was free to present whatever evidence it desired. No evidence was presented by SSM. (Tr.848 – 880)

Additionally, a hearing is not required by the plain language of the statute. §538.220.2, RSMo explicitly empowers the trial court may makes its determination "either with or without a post-trial evidentiary hearing." §538.220.2, RSMo.

SSM conspicuously fails to identify how it was prejudiced by the alleged trial error in not holding a hearing. SSM does not indicate what evidence it wished to adduce, how it was prevented from adducing that evidence by motion, or what difference such evidence would have to the outcome.

SSM erroneously presumes that a periodic payment schedule as to all future damages is a right upon timely request. This is not the law.

The trial court is given wide latitude to fashion a future or periodic payment schedule that matches the circumstances of the case. §538.220 states that "future

damages be paid in whole *or in part* in periodic or installment payments." (***Id.***)(Emphasis added). This sentence necessarily permits a trial court to decide that some, none or all of future damages may be paid according to some schedule.

In ***Vincent by Vincent v. Johnson***, 833 S.W.2d 859, 866 (Mo. 1992) this Court declared the purpose of the statute: "The language of §538.220.2 is a general grant of equity powers to the circuit court. The circuit court is, thus, entitled to fashion relief in the best interests of the parties, subject to review only on the basis of its arbitrariness." ***Id.***; ***see also Watts v. Lester E. Cox Med. Centers***, 376 S.W.3d 633, 647 (Mo. 2012)("This Court, therefore, interprets the statute to permit the trial court to consider the needs of the plaintiff and the facts of the particular case in deciding what portion of future medical damages will be paid in a lump sum and what portion will be paid out over a periodic payment schedule that accords with the parameters set out in the statute.").

It should be noted that SSM does not suggest in its brief how the statute should be applied to medical malpractice case of Lindsey (Count II) as compared to the wrongful death case of Baby Setzer (Count I). Nor does SSM present any argument regarding how the statutory language "the life expectancy of the person to whom such services were rendered", would apply to decedent Baby Setzer.

By contrast, at the trial court level, SSM argued that the judgment should include a provision that future periodic payments should end with the death of Lindsey Setzer. That would be unjust to Michael Setzer if he survived her. Michael would have an unequal interest in the judgment for the wrongful death of his son.

The trial court acted within the equitable mandate of the statute. Point IX should be denied.

SSM's Point X should be denied.

Standard of Review

Removal of a juror is reviewed for abuse of discretion. ***See Yaeger v. Olympic Marine Co.***, 983 S.W.2d 173, 187 (Mo. Ct. App. 1998)(***citing State v. Naucke***, 829 S.W.2d 445, 461 (Mo.banc 1992)("The substitution of an alternate juror for a regular juror during trial is a matter entrusted to the discretion of the trial court.").

ARGUMENT

SSM seeks a new trial claiming the trial court error by refusing to remove Juror #6. SSM makes no claim that Juror #6 was biased or otherwise unfit to serve as a juror. No juror misconduct is asserted.

Juror #6 submitted a question regarding the maximum size of kidney stone that can pass naturally. (Tr.704; D77). SSM concedes, "Juror #6 had obviously been listening to the medical evidence." (**Substitute Brief**, p.97).

Juror #6 was sworn and questioned by the trial court regarding the question. Juror #6 stated he asked the question because the Court's instructions said he could. (Tr.711, 713). He denied reviewing any outside sources. (Tr.711) All his information came from testimony. (***Id.***) Juror #6 testified he had not spoken with any other jurors about his question. (Tr. 711-12). Juror #6 even concealed his written question from other jurors. (Tr.713). The trial court denied SSM's request for a new trial and to substitute Juror #6. SSM claims the failure to remove Juror #6 resulted in an unfair trial. "[t]he question posed would permit the Plaintiffs' counsel to highlight that medical issue in closing argument and gain an improper advantage over the defense." (Substitute Brief, p. 97).

SSM claims plaintiffs' counsel pressed this advantage by highlighting the issue in closing argument. The record shows plaintiffs' counsel made two passing references to kidney stones not passing naturally in the entirety of the closing argument. (***See*** Tr.824, 831).

SSM's argument is frivolous. SSM makes no citation remotely supporting its position. ***State v. Rudolph***, 456 S.W.3d 506 (Mo.App.E.D. 2015) prohibits "unauthorized" communication between a juror and counsel for a party. No such communication occurred between Juror #6 and plaintiffs' counsel. ***Milam v. Vestal***, 671 S.W.2d 448 (Mo.App. 1984) is inapposite as there is no basis to believe Juror #6 made inappropriate deliberative communication with other jurors or had a bias.

"A trial court also has the discretion to permit or deny jurors the privilege of asking questions." ***Hancock v. Shook***, 100 S.W.3d 786, 795 (Mo. 2003); ***see also Callahan v. Cardinal Glennon Hosp.***, 863 S.W.2d 852, 867 (Mo. 1993). Rule 69.04 ("The trial judge is in the best position to determine whether a juror's question prejudiced a litigant.").

The Setzers had no advantage over SSM. SSM learned of Juror #6's question by the same means and at the same time as the Setzers. The playing field was even.

The trial court is in the best position to determine whether a juror will be able to effectively discharge his duties. ***Yaeger v. Olympic Marine Co.***, 983 S.W.2d 173, 187 (Mo. Ct. App. 1998). By SSM's own admission, Juror #6 was attentive to the evidence. This point is pointless.

SSM's Point XI should be denied.

Standard of Review

SSM's Point Relied On XI does not identify the trial court ruling being challenged. SSM does not show or assert that it objected to the admission of the Setzers' tax returns at trial. SSM refers only to its motion *in limine* regarding the admission of the tax records. (SSM substitute brief, p. 99)

The court of appeals held that SSM violated Rule 84.04(d)(1)'s requirement that a point relied on identify the trial court ruling or action being challenged. (Memorandum Supporting Order Affirming Judgment Pursuant to Rule 84.16(b)(5), p.3-4). The court of appeals specifically identified SSM's violation with respect to this Point Relied On (formerly Point Relied On XIII). (***Id.*** at FN. 1). SSM has made no effort to correct its substitute brief.

SSM failure to object preserves nothing for review. It has not asked for "plain error" review.

A properly preserved challenge of a trial court's admission or exclusion of evidence is reviewed for an abuse of discretion. ***Frazier v. City of Kansas***, 337, 338 (Mo.App.W.D. 2015). A trial court abuses its discretion mandating reversal where the error in the evidentiary ruling would have materially affected the merits of the cause of action. ***Williams v. Trans States Airlines, Inc.***, 281 S.W.3d 854, 872 (Mo.App.E.D. 2009).

ARGUMENT

The trial court did not abuse its discretion or commit error in admitting the Setzers' tax returns. The tax returns were admissible for multiple reasons including evidence of past and future economic damages.

Section 537.090, RSMo (the wrongful death statute) creates a statutory presumption that the annual pecuniary loss arising from the death of a minor is determined by "the average of the two incomes" of the parents. ***Id.*** The tax returns were directly relevant to establish this statutory presumption.

The tax returns were further admissible with respect to Lindsey Setzer's personal injury claim. Lindsey missed six weeks of work and one semester of school when she was working to obtain her nursing degree. (Tr.217) The tax returns show her wages and wage rate. Those damages for lost wages were recoverable as she had to exhaust her collateral benefits to be compensated. ***Siemes v. Englehart***, 346 S.W.2d 560 (Mo.App. 1961). Point XI should be denied.

Point Relied On XII

In the circuit court the Setzers agreed and stipulated to a credit for the amount of their settlement with Dr. Herrmann pursuant to §537.060, RSMo.

SSM then sought obtain the credit through a motion for remitter which lumped together several requests for remitter to substantially reduce the judgment. (See e.g. D69, pp. 24-26). The trial court correctly balked at SSM's procedural method of enforcing §537.060, RSMo. because §538.300, RSMo, explicitly excludes application of the remittitur statute for claims based on health care (§538.205 to §538.230, RSMo). Remittitur was not an available tool in medical malpractice claims. ***Id.***

"A reduction under section 537.060 is a *satisfaction* of an amount owed." ***Sanders v. Ahmed***, 364 S.W.3d 195, 211 (Mo. 2012)(***quoting Norman v. Wright***, 100 S.W.3d 783, 785 (Mo. banc 2003)). The settlement credit should appropriately applied as part of the satisfaction of the judgment amount, not a reduction in the judgment total. ***See id.***

Cross-Appeal Point Relied On I

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION TO AMEND JUDGMENT ON COUNT I OF PLAINTIFFS' PETITION TO INCLUDE WRONGFUL DEATH DAMAGES CONTAINED IN §537.090, RSMO SETTING THE PRESUMPTIVE ANNUAL PECUNIARY LOSS FOR THE DEATH OF A MINOR AS THE AVERAGE OF THE PARENTS' ANNUAL INCOME BECAUSE THE STATUTORY PRESUMPTION WAS NOT PROPERLY REBUTTED IN THAT DEFENDANT'S EXPERT ATTEMPTED TO REBUT THE PRESUMPTION ON AN INCORRECT BASIS

Standard of Review and Preservation of Error

The meaning of a statute is reviewed de novo. ***White v. Tariq***, 299 S.W.3d 1,3 (Mo.App. 2009). The jury's verdict was zero ($0.00) for "future economic damages excluding future medical damages." Plaintiffs timely moved to amend the judgment post trial**.** (D.74,1) Plaintiffs' post -trial motion preserved the challenge to the jury's zero ($0.00) award for "future economic damages excluding future medical damages".

ARGUMENT

In Missouri claims for wrongful death are wholly statutory. The Missouri Supreme Court has "reaffirmed time and time again that 'a claim for damages for wrongful death is statutory; it has no common-law antecedent.'" ***Sanders v. Ahmed***, 364 S.W.3d 195, 203 (Mo. 2012) (quoting ***State ex rel. Diehl v. O'Malley***, 95 S.W.3d 82, 88 (Mo. banc 2003)).

The Missouri legislature exercised this right by defining the remedies available to a wrongful death claimant in §537.090, RSMo. The statute authorizes the trier of fact to

award "such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned." § 537.090, RSMo.

The statute requires that regard be given to the pecuniary losses suffered

> by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss.

Id.

The statute sets out a presumption of the amount of this pecuniary loss where the decedent is below the age of 18, as applied to the present case, "the calculation shall be based on the average of the two [parent's] incomes." §537.090, RSMo .

Here, the undisputed evidence fixes the presumed annual pecuniary loss provided in § 537.090, RSMo. The decedent Baby Setzer died prior to birth and therefore under the age of 18. The presumed annual pecuniary loss therefore applies.

> This Court is to apply statutory language in a way that promotes the apparent object of the legislative enactment. The Wrongful Death Act is a remedial statute, and therefore the courts must construe section 537.090 liberally to promote the statute's purpose.

Mansil v. Midwest Emergency Med. Servs., 554 S.W.3d 471 (Mo.App. 2018)(citations omitted)

As indicated, the parents of decedent have an average of $21,577 of annual income.

"[T]he starting point of a jury's consideration of the latter sentence of section 537.090 is to base the pecuniary loss upon the annual income of the deceased minor's parent or parents, subject to the opportunity to rebut that number in an upward or downward manner with rebuttal evidence and argument." ***Mansil, supra.***

Dr. Summary did not start her computation with the statutory presumption as directed by case law. (Tr.393-395) She ignored the statute.

Dr. Summary's attack of the statutory presumption was facile. She improperly attempted to usurp the province of the legislature and apply a purely economic analysis to a remedial provision with a precise starting point.

Nothing in the statute implies that the average annual income of the parents is to equate to the annual income of the child. This was a central presumption made by Dr. Summary. (Tr.385, 388, 407) Nothing in the statute implies that deceased child would have contributed all earnings to his or her parents. This was a central presumption made by Dr. Summary. (Tr.389)

The statute is remedial in nature. Precise calculation of pecuniary loss is made impossible by the negligence of defendants. All the potential of the child – good and bad—shall remain forever unknown because the conduct of a wrongful death defendant killed the child. The statutory attempts to form a remedy in these difficult circumstances.

On its face, the legislature did not attempt to form the remedy based on economic principles alone. It did not attempt to determine the deceased child's future earnings or contributions to wrongful death class members. It begins

running the pecuniary loss as of the date of the minor which defies economic principle – but not remedial principle.

Accordingly, it must be recognized that the legislature sought to fix a remedy on a basis separate from a pure economic loss analysis.

Allowing an economist to testify that there is no basis in economics to award future losses for the death of a minor renders the statute meaningless. The Supreme Court has held statutes that are remedial in nature are to be liberally construed so as to affect their beneficial purpose. ***Martinez v. State***, 24 S.W.3d 10, 19 (Mo. App. 2000)(citing ***Abrams v. Ohio Pacific Express***, 819 S.W.2d 338, 341 (Mo.banc 1991)).

Statutory interpretation is focused on ascertaining the intent of the legislature from the language used in the statute, considering the words in their plain and ordinary meaning, and giving effect to that intent. ***Mansfield v. Horner***, 443 S.W.3d 627, 659 (Mo. App. 2014)(quoting ***Hervey v. Missouri Dep't of Corr***., 379 S.W.3d 156, 163 (Mo. 2012)). The court is to apply statutory language in a way that promotes the apparent objective of the legislature enactment. ***Id*** at 661. Because § 537.090, RSMo is a remedial statute, the courts must construe it liberally to promote the statutes purpose. ***Poage v. Crane*** Co., 523 S.W.3d 496, 526 (Mo. Ct. App. 2017).

Missouri's wrongful death statute has the general purpose of compensating plaintiffs for their loss, ensuring tortfeasors pay for their actions and deterring harmful conduct which may lead to death. ***O'Grady v. Brown***, 654 S.W.2d 904, 909 (Mo. 1983) (evaluating the evolution of §537.090, concluding the legislature intended to broaden

actionable claims by allowing recovery for nonpecuniary damages). Therefore, the overall purpose of §537.090, RSMo is to provide plaintiffs more opportunities to hold tortfeasors accountable for their actions when they have caused the death of an individual and gives the court great discretion when determining what type of relationship existed.

The statutory presumption serves a valuable remedial purpose of relieving survivors of a proof rendered difficult by the defendant's malfeasance.

Dr. Summary's testimony fatally fails to address or acknowledge the underpinnings of the statutory presumption, the "starting point" under ***Mansil***. Her opinions were flawed as she ignored the statutory presumption and disregarded its remedial purpose. She applied economic principles to a non-economic scheme, apples to oranges.

Since the jury was prohibited from reading and knowing of the statutory presumption, the trial court should have sustained plaintiffs' post trial motion and amended the judgment. (D74, 1) The judgment on Count I should be amended by adding the sum of $646,455.26 in place of the zero future economic damages found by the jury. The judgment of $364,000.00 on Count I should be amended to the amount of $1,010,455.26.

The Court of Appeals Reasoning

The court of appeals denied the Setzers' cross appeal finding:

> We need not reach the question of whether SSM properly rebutted the statutory presumption. Section 537.090 sets forth the remedies available to a wrongful-death claimant. In pertinent part, the statute provides that "the trier of the facts ***may*** give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and

> loss thus occasioned....” (Emphasis added). The statute authorizes an award of damages, but does not mandate an award. We presume the jury duly considered the testimony, followed the trial court’s instructions, and made a determination based upon that consideration. We deny this point.

(Memorandum Supporting Order, p.25).

The court of appeals reasoning is flawed. While it is true that the general rule that use of word “may” in a statute is permissive and “shall” as mandatory. ***State ex rel. Robison v. Lindley-Myers,*** 551 S.W.3d 468, 474 (Mo. 2018). However, a statute’s use of such term is ultimately is a “function of context and legislative intent.” ***Id.*** (***quoting Bauer v. Transitional Sch. Dist. of City of St. Louis***, 111 S.W.3d 405, 408 (Mo. banc 2003)). “In ascertaining legislative intent, the statute should be read in *pari materia* with related sections, and the [licensing] statutes should be construed in context with each other.” ***Street v. Dir. of Revenue***, 361 S.W.3d 355, 358 (Mo. banc 2012).

Nothing in the context of the wrongful death statute suggests that a trial court “may” withhold an award of damages in a wrongful death case. Such construction flies in the face of remedial nature of the statute and the rule that construction of the statute should liberally promote this purpose. ***Mansil, supra.*** Counsel can find no precedent for completely denying an allowable element of wrongful death damages based on the discretionary “may” language of the statute.

Under the circumstances here, there is no grounds to believe the trial court excluded the evidence on the basis of statutory discretion. Not even SSM advocated the position that the Setzers should be denied their damages. The court of appeals constructs in hindsight a rationale that did not exist at the time. “Rationale” is used loosely as no

rationale has been advanced to deny the Setzer allowable damages. Such a ruling (if the authority exists) would be arbitrary and capricious as applied here.

Reliance on the presumption that the jury heard the evidence, followed the instructions and made a determination based on proper consideration is unavailing. The jury was prohibited from knowing or reading the statutory presumption by the trial court. It was logically impossible for the jury to have made its determination regarding the statutory presumption of which it had no knowledge.

CONCLUSION

For the reasons stated above, all twelve (12) points appealed by SSM should be denied.

With respect to the cross-appeal, statutes that are remedial in purpose should be construed broadly and liberally to effectuate the remedial purpose. Section 537.090 is such a remedial statute. Lindsey and Michael Setzer were entitled to the statutory remedial presumption pertaining to the death of their unborn son. SSM's attempts to rebut the presumption were irrelevant in that SSM attempted to turn a remedial calculation into a purely economic evaluation. The judgment of $364,000.00 on Count I should be amended to the amount of $1,010,455.26.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief was completed in compliance with Rule 84.06 and Local Rule 360 and using Microsoft Word, Office 365, in Times New Roman size 13-point font, double-spaced, with margins of 1 inch. Excluding the cover page, and the appendix, the brief contains 23,010 words (as determined by the "word count" function of the Microsoft Word software).

By____/S/*Gregory G. Fenlon*_____

CERTIFICATE OF SERVICE

The undersigned hereby that this brief was electronically filed on this 26th day of June, 2020, using the Missouri Court's electronic filing system. The legal file was filed in .pdf format. Service of the Legal File on counsel for Respondent SSM Health Care is made through, and pursuant to, the electronic filing system.

By____/S/*Gregory G. Fenlon*_____