IN THE SUPREME COURT OF MISSOURI

Appeal No. SC98362

LINDSEY SETZER and MICHAEL SETZER,
Plaintiffs-Respondents
v.
SSM HEALTH CARE ST. LOUIS,
Defendant-Appellant

Appeal from the Circuit Court of St. Louis County
Cause No. 16SL-CC03273

Eastern District of Missouri
Appeal No. ED107369, consolidated with ED107392

SUBSTITUTE BRIEF OF APPELLANT
SSM HEALTH CARE ST. LOUIS

SANDBERG PHOENIX & von GONTARD P.C.

Kenneth W. Bean, #28249
Benjamin R. Wesselschmidt, #66321
Timothy C. Sansone, #47876
600 Washington Avenue — 15th Floor
314-231-3332 | 314-241-7604 (Fax)
kbean@sandbergphoenix.com
bwesselschmidt@sandbergphoenix.com
tsansone@sandbergphoenix.com

Attorneys for Defendant–Appellant
SSM Health Care St. Louis

TABLE OF CONTENTS

13475083.1

TABLE OF AUTHORITIES

Cases

13475083.1

13475083.1

Statutes and Rules

13475083.1

JURISDICTIONAL STATEMENT

In this Appeal, Defendant-Appellant SSM Health Care St. Louis ("Appellant")[1] appeals the Judgment of Judge Michael Jamison of the Circuit Court of St. Louis County entered following a jury trial in favor of Plaintiff-Respondents Lindsey Setzer ("Respondent Lindsey Setzer" or "Ms. Setzer") and Michael Setzer (collectively "Respondents"). (D57 p. 1-2); Appendix ("A"), 1-2. The Circuit Court's Judgment disposed of all claims and issues involving Appellant and Respondents. *Id.*

Appellant appealed this matter to the Missouri Court of Appeals, Eastern District, ED107369. Respondents submitted a cross-appeal, ED107392, and the two matters were consolidated on appeal. The Court of Appeals entered an opinion affirming in part and reversing and remanding in part the Circuit Court's judgment on December 24, 2019.[2] (A71-76). The Court of Appeals further issued a per curium memorandum as to the points affirmed. (A77-102). The Court of Appeals denied Appellant's motion for rehearing and/or transfer on January 28, 2020 (A103), and Appellant filed a timely application for transfer in this Court, which this Court granted on April 28, 2020. This Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 10 of the Missouri Constitution.

[1] SSM Health Care St. Louis was also a cross-respondent before the Court of Appeals, but no party has sought review of the Court of Appeals decision as to the cross-appeal. Accordingly, this brief uses only "Appellant" and "Respondents" to describe the parties.

[2] The Court of Appeals reversed the Circuit Court's judgment in favor of Appellant as to the statutory reduction required by RSMO §537.060. No party has sought review of that opinion or the affirmance as to the claims asserted by Respondent in their cross-appeal.

STATEMENT OF FACTS

A. *Medical Background:*

Respondent Lindsey Setzer was a private patient of obstetrician-gynecologist Dr. David Super with a history of kidney stones. (D2 p.5). On the evening of July 30, 2012, Ms. Setzer developed symptoms consistent with past experience of kidney stones and presented to the Emergency Department at SSM St. Clare Health Center, a facility operated by Appellant. (D2 p.6). Ms. Setzer was seen by the Emergency Department physician who then obtained a consult from the on-call obstetrician-gynecologist, Dr. Joseph Herrmann, because her obstetrician-gynecologist, Dr. Super, did not have privileges at the hospital. (D2 p.6). Dr. Herrmann initially believed that the patient did not need hospital admission and that she could be discharged to be seen the following day by Dr. Super. (TR498). However, the Emergency Department physician insisted that she be admitted, so Dr. Herrmann admitted her to a medicine floor where patients with kidney stones are typically admitted. (TR628). Ms. Setzer was fourteen weeks pregnant at the time. (TR13). She arrived on the floor at approximately 1:20 a.m. (TR16).

There is a factual dispute over whether Dr. Herrmann saw the patient the following morning on rounds. Dr. Herrmann testified that he did see the patient, but Ms. Setzer said that he did not visit her. (TR499-500; TR183). Dr. Herrmann did not chart a visit. (TR132-133, Deposition of Dr. Robert Herrmann, July 15, 2015, p. 46). Plaintiff's mother, Ms. Nilika testified that she did not see Dr. Herrmann when she was visiting her daughter and Nurse Farr said she never saw Dr. Herrmann. (TR 60-61).

The Emergency Room physician ordered the urinalysis, multiple labs, and a renal ultrasound. (TR483, 506). On the morning of July 31, 2012, Dr. Herrmann issued a variety of new orders, including an obstetric ultrasound. (TR501). The renal ultrasound demonstrated kidney stones and the OB ultrasound confirmed the fourteen week pregnancy. The hospital chart and testimony from Dr. Herrmann confirm that the day shift nurse gave Dr. Herrmann an update at approximately 11:16 a.m. (TR502). At roughly 5:44 p.m., Dr. Herrmann gave an order to the day shift nurse to discharge the patient with instructions that she follow up with Dr. Super the following morning. (TR504).

At approximate 6:30 p.m., SSM Nurse Amy Farr, the Clinical Nurse Manager for the unit, called Dr. Herrmann to advise him of the most recent set of vital signs which showed a high heart rate. (TR109-110, 506, 527). There were actually two phone calls between Dr. Herrmann and Nurse Farr confirmed in both the chart and the testimony of the two witnesses. (TR108-109, 505-506). During the course of these two phone calls, Dr. Herrmann agreed: (a) he was told of the vital signs from that entire day, (b) he was aware of all of the lab data, and (c) he was aware of the two ultrasound reports. (TR506). Dr. Herrmann testified that following his calls with Nurse Farr, he confirmed his prior discharge order. (TR506). The plaintiff offered evidence that her vitals deteriorated from the time she presented to the emergency room to her discharge. (TR90; Pl. Ex. 1; p.45-46).

Ms. Setzer went home and went to sleep. (TR193). She woke up the following morning with additional pain and drove to Mercy Hospital in St. Louis where she was admitted and remained for several weeks. (TR193-196, 211-212). The patient was diagnosed with a urinary tract infection, kidney stones, and sepsis. (TR295). During the course of a urologic procedure, she lost the baby. (TR296).

B. *Procedural Background:*

Respondents filed their first lawsuit in St. Louis County on March 14, 2014, against Dr. Joseph Herrmann and Appellant, Cause No. 14SL-CC01021. After considerable discovery, Respondents dismissed their claims against Appellant without prejudice and settled their claims against Dr. Herrmann. (D31 p.1-7). Respondents and Dr. Herrmann entered into a Release,[3] which provided, in part:

> [Respondents] do hereby release, acquit and forever discharge Joseph G. Herrmann, M.D., Missouri Professionals Mutual, MPM-PPIA, their respective agents, servants, employees, successors, insureds, insurers, administrators, and all parent and subsidiary corporations, or entities, whomsoever, past and present, (the "Released Parties"), of and from any and all actions, causes of action, claims, demands, and damages, whether or not known or unknown, of whatever name or nature, in any manner arising, or to arise, from the provision of any medical care by the Released Parties to Lindsey Setzer at any time, including, but not limited to those alleged acts or omissions which were, or which could have been, the subject matter of that certain 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-CC02021.
>
> The undersigned Releasors do not release and hereby preserve all rights they have against SSM as herein provided. Releasors affirm that they intend to prosecute their separate claims against SSM Health Care St. Louis d/b/a St. Clare Hospital and its agents and employees for those injuries and damages allegedly sustained in the lawsuit styled Lindsey Setzer and Michael Setzer vs Joseph G. Herrmann, MD filed in the Circuit Court of St.

[3] The Release was first introduced in redacted form as an Exhibit to Appellant's Motion for Partial Summary Judgment, then was also introduced at trial through an Offer of Proof. (D31 p.3-4)(*See* D31 p.1-7 and TR675-676, 684-687 for Full Release).

> Louis County bearing cause number 14SL-CC01021. In said lawsuit, in answer to pleadings during discovery, SSM Health Care affirmatively represented that in 2012 there was no employment relationship between SSM Health Care St. Louis and Joseph G. Herrmann, MD. SSM further represented that there was no legal agency between SSM and Dr. Herrmann to support recovery based upon agent / principal or respondeat superior. In reliance on the representations of SSM, Releasors [Respondents] further agree *they will not prosecute any action arising out of the medical issues which are the subject matter of this Release and the lawsuit styled Lindsey Setzer and Michael Setzer v. Joseph G. Herrmann, M.D., wherein such action would include a theory or cause of action for recovery whereby some other person or entity, is vicariously liable, in whole or part, or, in any way, responsible for the acts or omission of the Released Parties, including but not limited to, Dr. Joseph G. Herrmann*. By entering into this Limited Confidential Release of All Claims Against the Released Parties, the Releasors do not forego or release any right thy may have to pursue any and all claims against SSM Health Care St. Louis, their agents, and employees, or any other unreleased party, arising out of the medical issues which are the subject matter of this Release and the lawsuit styled Lindsey Setzer and Michael Setzer v. Joseph G. Herrmann, M.D., *so long as those claims do not premise liability arising out of the vicarious relationship and conduct of Dr. Joseph G. Herrmann.*

(D31, p 3-4) (italics added for emphasis, underline in original).

After executing the Release, Respondents filed the instant suit against Appellant, including claims for medical negligence by Respondent Lindsey Setzer and for the wrongful death of the fetus by both Respondents. (D2 p.1-17). Appellant asserted multiple affirmative defenses including that the claim was barred by the release, accord and satisfaction. (D4 p.5).[4]

C. Pertinent trial testimony

Respondent Lindsey Setzer testified about the sequence of events and her history of kidney stones. (TR175, 179-180, 189-190). She agreed that her symptoms here

[4] Later in the litigation, SSM also filed a motion for partial summary judgment on the basis of the Release (D33 p.1-3), which the trial court denied (D38 p. 1).

matched those from prior episodes which led to ED visits, but never to a hospital admission. (TR180). She testified that Dr. Herrmann did not visit her in the hospital. (TR183). Ms. Setzer described going home but still feeling ill. (TR188-190). The following morning she was worse and was driven to Mercy Hospital where she had a two week admission with much of it spent in the ICU. (TR193-94, 197, 211-12). Ms. Setzer testified that she lost the baby during a urology procedure at Mercy. (TR206-07).

Ms. Setzer also testified about her current medical problems, which she attributed to the sepsis to include stretch marks on her thighs, a sore throat and coughing spells from being intubated, and a granuloma on her vocal cord. (TR211-215). Also over defense objection, Ms. Setzer testified about her tax returns in an effort to utilize the rebuttable presumption found in RSMO. §537.090. (TR241, 242, 246). However, Ms. Setzer testified she used paid sick leave during the time she was at Mercy and did not have any lost wages. (TR246, 265).

Respondents did not offer medical expert testimony on any work disability, the need for current or future medical care, and did not present an economist to attempt to calculate any potential lost wage or lost pecuniary support from the death.

Regarding liability, Respondents offered two outside experts: Claudia Beckmann, an obstetric nurse educator on the faculty at the Rutgers University School of Nursing (TR140, Deposition of Claudia Beckmann, May 14, 2018, p.5), and Dr. Ross Heller, an Emergency Room physician. (TR138, Deposition of Dr. Ross Heller, November 25, 2015 p.10). Neither appeared live at trial, but Respondent presented portions of their deposition testimony. (TR137-140).

Nurse Beckmann testified that Nurse Farr was negligent and should have refused to follow the discharge order and gone up the "chain of command" to get another physician to overrule Dr. Herrmann. (TR139-140, Deposition transcript of Claudia Beckmann, May 14, 2018, p.26-28). Beckman agreed she could not predict what the individuals up the chain would have done if consulted. (TR139-140, Deposition of Claudia Beckmann p.26-28, 41-47). In fact, Nurse Beckmann specifically stated that she had no opinion as to what different result may have been if other persons up the "chain of command" had been consulted. *Id.*

Dr. Heller testified Dr. Herrmann was negligent in failing to properly diagnose and treat Respondent Lindsey Setzer and in prematurely discharging Ms. Setzer from the hospital. Dr. Heller explained that kidney stones can be very dangerous and the labs and vitals suggested Ms. Setzer was developing sepsis a serious medical problem. (TR137-139, Deposition transcript of Dr. Ross Heller, November 25, 2015, p. 124-126). Dr. Heller reviewed only the St. Clare Health Center chart and portions of the Mercy Hospital chart. (TR137-139, Deposition transcript of Dr. Ross Heller, November 25, 2015, p.6). Dr. Heller had not reviewed any medical bills. *Id.* Dr. Heller testified that he was not offering testimony about prognosis or damages. (TR137-139, Deposition of Dr. Ross Heller, November 25, 2015, p.120). Dr. Heller did opine that Dr. Herrmann's negligence led to the loss of the fetus. *Id.* Dr. Heller testified that the kidney stones were greater than 5mm in size and that meant they would not pass naturally. (TR 137-39, Deposition of Ross Heller, TR138, Deposition of Dr. Ross Heller, November 25, 2015, p. 91). Dr. Heller testified he had no opinions about the quality of the nursing care, other than Nurse Farr's use of the chain of command. (TR137-139, transcript of Dr. Ross Heller, November 25, 2015, p.126).

Over objection, Respondents read to the jury portions of the Medical Staff By-Laws and Rules and Regulations of the hospital. (TR150-163). In particular Respondent read the By-Laws preamble, the section regarding the purpose of the bylaws, Paragraph 8.1 defining "Active Medical Staff," Paragraph 8.5.1 defining "Practitioners and Providers with Contractual Relationships with Health Care for Clinical Services," Paragraph 9.1.1 regarding the composition of the medical staff and code of conduct, and Paragraph 9.1.5 providing for patient medical history and physical examination. (TR150-155). Respondent further read the Rules and Regulations regarding patient admission, staff admitting privileges, patient discharge, patient rights, medical records, physical examination, diagnostic and therapeutic orders, clinical observations, and "on call" practitioners. (TR155-163).

Respondents offered the bills from Mercy Hospital into evidence, over Appellant's objection and without any expert support. (TR226-229). Because the Circuit Court admitted the bill containing the billed amounts only, Appellant subsequently offered the bill into evidence containing the *paid* amount. (TR692).

Appellant called Nurse Farr to discuss her care and four outside experts: (a) Dr. Carl Pearse, the Chair of the OB-GYN Department at St. Luke's Hospital, (b) Frank Lyerla, PhD, a nurse on the Faculty at Southern Illinois University, (c) Dr. Brian Matlaga, a Professor of Urology and Director of Stone Disease at Johns Hopkins Medical

Institution, and (d) Professor Rebecca Summary, an economist on the Faculty at Southeast Missouri State University. (TR414-675).

Dr. Pearse said kidney stones can be successfully treated on an outpatient basis and supported the care of Dr. Herrmann. TR428, 440). Dr. Pearse also testified the nurses acted properly and that discharge decisions were made by physicians not nurses. (TR442-43). On cross, Pearse did agree that when the urine culture came back the day after discharge from St. Clare that it showed a urinary tract infection that in "retrospect" the urinary tract infection had not been diagnosed. (TR471). Pearse also agreed that nurses should notify the treating physician of an abnormal vital sign such as an elevated pulse (TR474-75). On cross, Dr. Pearse also agreed that nurses should exercise "protective oversight" for patients. (TR 463) Dr. Pearse agreed that Dr. Herrmann was negligent in his charting which hampered his review of Dr. Herrmann's care. (TR 466) .

Professor Lyerla testified that the nurses met the standard of care and that nurse Farr did go up the chain of command by calling Dr. Herrmann with the final vitals and getting his confirmation of the order to discharge the patient. (TR309-311).

Dr. Matlaga described in detail the formation of kidney stones and the renal ultrasound findings. (TR571-72, 576-77). Dr. Matlaga had published on the treatment of kidney stones in pregnancy. (TR569). He testified that kidney stones can be successfully treated on an outpatient basis, usually pass naturally, and in pregnant women it would be rare to attempt to manually remove the stone. (TR585-86, 600, 606). Dr. Matlaga also testified that even if Dr. Herrmann had consulted him from the hospital, he would have said discharge her with routine follow up with her private OB-GYN. (TR615). Dr.

Matlaga testified that at St. Clare there was no evidence of a urinary tract infection or urosepsis and that antibiotics were not needed when the patient was at St. Clare or on discharge. (TR601, 613).

There was cross examination of Dr. Herrmann, Dr. Pearse and Dr. Matlaga about the significance of the urinalysis results available to Dr. Herrmann, and whether it was a contaminated specimen or showed evidence of a bacterial infection. (See e.g. TR455, 473, 609). This testimony is not relevant to the legal issues presented in this appeal so is not expanded here.

Appellant presented the economic expert testimony of Professor Summary. (TR414-675). Prof. Summary explained that under the published literature, children do not support their parents and there was no economic justification to conclude that children would earn what their parents did and contribute it to the parents. (TR388-91).

Nurse Farr testified that she recognized the change in vitals and called Dr. Herrmann to report those and confirm his discharge order. (TR631).

Appellant called Dr. Herrmann who testified he was a private obstetrician and solo practitioner. (TR494). Dr. Herrmann testified that he had no contracts with Appellant, received no compensation from Appellant, and received no benefits from Appellant. (TR495-96). He was an on-call OB-GYN, meaning that he was required to accept calls for Emergency Department patients who had no private physician on staff. (TR497). Dr. Herrmann testified that he had hospital privileges at multiple St. Louis area hospitals including Missouri Baptist Medical Center, Mercy Hospital, St. Luke's Hospital, and St. Clare. (TR496). Dr. Herrmann further testified that all those hospitals, with the exception of Mercy, had Emergency Department call schedules similar to those set up at Appellant St. Clare Health Center. (TR496). Dr. Herrmann testified that the hospital did not control his medical judgment and that when he elected to discharge the patient, he did so exercising his own independent medical judgment. (TR495). Dr. Herrmann confirmed that every hospital where he had medical staff privileges had Medical Staff Bylaws similar to those in use at St. Clare Health Center. (TR423-24).

Appellant made an offer of proof through Ms. Setzer on multiple topics to include the identification of the Release, her signature on the Release, and that she was represented by counsel at the time she signed it. (TR675, 685-687; Appellant's Exhibit L). The Circuit Court denied the offer of proof and again barred the introduction of the Release (TR687).

Motions for directed verdict were filed at the close of the plaintiff's evidence and at the close of all evidence. (D49; D50). The Motions included the argument that the Release barred the vicarious liability claims against SSM for the conduct of Dr. Herrmann and that there was insufficient evidence to support a finding of employment / agency for his conduct. (D49 p.3; D50 p.4).

Following the close of evidence, Respondents submitted personal injury and wrongful death claims to the jury with separate verdict directors based upon the conduct of Dr. Herrmann as the hospital's agent and Nurse Farr. (Instructions 9, 11, 16, and 18; D53 p.10,12,14, 22). On their wrongful death claim, Respondents submitted the stock MAI 21.05 definitions of the different elements of damage without any modifications to delete those elements that are not compensatory under the Wrongful Death Act.

(Instruction 21; D53 p.25). There was an instruction conference with multiple objections discussed in more detail below in the Points dealing with the jury instructions. (TR723 through 772).

On Instructions No. 14 and 21 setting out the various elements of damages, Respondents' counsel stated the "dirty copies" were from MAI and did not note any modification. However, both Instructions were modified, because they did not contain the definition of "future economic damages."[5] (D53 p.17, 25-30). Appellant's counsel did not recognize the modifications to instruction 14 and 21 or inconsistency with the verdict forms until the verdicts were read at which point defense counsel approached the Bench and requested that the jury be returned to correct their verdict. (TR844-47). Respondent's counsel objected, and the jury was discharged. *Id*.

Judgment was entered on July 20, 2018, and on August 17 and 20, 2018, Appellant filed a timely post-judgment motion and amended motion (respectively) for judgment notwithstanding the verdict or for new trial. (D1; D57; D62; D64; D69). In particular, Appellant's counsel requested the Court apply the credit for the prior settlement paid by Dr. Herrmann (D62 p.3), set out a periodic payment scheduled for the future damages as required by RSMO § 538.220. (D62 p.19-22), order a judgment notwithstanding the verdict ("JNOV") on the claims against SSM for the conduct of Dr. Herrmann due to a lack of evidence and the bar set out in the release (D69 p.6-7), and order a New trial on the claim against SSM for the conduct of Nurse Farr due to multiple

[5] The deleted MAI definition provides: "The phrase 'future economic damages' means those damages arising in the future from pecuniary harm such as lost earnings and lost earning capacity." MAI 21.05.

evidentiary problems and instructional error. (D69 p. 9-22). Further Appellant requested that the trial court vacate the judgment on those elements included in the award not supported by the evidence and in conflict with the jury instructions. (D69 p25-26).

Prior to trial, Respondent's counsel stipulated to the prior settlement amount received from Dr. Herrmann and that the Appellant would be entitled to a set off in that amount on any adverse judgment. (D4 p.5; TR 6-8,). The same stipulation was made by plaintiff's counsel at the hearing on the post-trial motions. (TR869).

Respondents also filed various post-trial motions, including a motion for additur and prejudgment interest on past economic damages. (TR863-869; D74-76). The trial court heard argument on the post-trial motions on October 4, 2018, and took them under submission. (TR848-878).

The Circuit Court failed to issue a ruling within the 90-day time period specified in Rule 78.06, therefore deeming all the post-trial motions denied. Therefore, the Circuit Court's Order and Judgment in favor of Plaintiffs is final for this Court's review.

Appellant appealed this matter to the Missouri Court of Appeals, Eastern District, ED107369. Respondents submitted a cross-appeal, ED107392, and the two matters were consolidated on appeal. The Court of Appeals entered an opinion affirming in part and reversing and remanding in part the Circuit Court's judgment on December 24, 2019. (A71-76). Specifically, the Court of Appeals reversed the judgment and remanded for application of RSMO section 537.060 to allow a credit for the settlement amount paid by Dr. Herrmann, but affirmed in all other respects and denied Respondent's cross appeal. The Court of Appeals issued a per curium memorandum as to the points affirmed. (A77-

102). After the Court of Appeals denied Appellant's motion for rehearing and/or transfer on January 28, 2020, Appellant filed a timely application for transfer in this Court, which this Court granted on April 28, 2020.

POINTS RELIED ON

I. THE CIRCUIT COURT ERRED IN SUBMITTING INSTRUCTION NO. 21 BUILT ON MAI 21.05 AND VERDICT B TO THE JURY, OVER DEFENSE OBJECTION, BECAUSE INSTRUCTION 21 DID NOT STATE THE PROPER MEASURE OF DAMAGES IN WRONGFUL DEATH ACTIONS UNDER RSMO §537.090 IN THAT IT PERMITTED AN AWARD FOR ITEMS SUCH AS DENTAL SERVICES, CUSTODIAL SERVICES, PAIN AND SUFFERING, PHYSICAL IMPAIRMENT, DISFIGUREMENT, LOST EARNINGS, AND MENTAL ANGUISH.

Hervey v. Missouri Dept. of Corr., 379 S.W.3d 156, 159 (Mo. banc 2012).

MAI 21.05, Comment C.

RSMO §537.090

II. THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JNOV AS TO THE SUBMISSION OF THE CASE TO THE JURY BASED UPON THE CONDUCT OF DR. HERRMANN, BECAUSE THERE WAS A FULL RELEASE OF APPELLANT FROM VICARIOUS LIABILITY FOR THE CONDUCT OF DR. HERRMANN IN THAT RESPONDENTS HAD ALREADY SETTLED WITH DR. HERRMANN AND RELEASED APPELLANT FROM ANY CLAIM "ARISING OUT OF THE VICARIOUS RELATIONSHIP AND CONDUCT OF DR. HERRMANN."

State ex rel. Normandy Orthopedics, Inc. v. Crandall, 581 S.W.2d 829, 834 (Mo. 1979).

Glidewell v. S.C. Mgmt., Inc., 923 S.W.2d 940, 960 (Mo. App. S.D. 1996)

Ensminger v. Burton, 805 S.W.2d 207, 217 (Mo. App. W.D. 1991).

Damon Pursell Cons. Co. v. Missouri Highway and Transp. Com'n, 192 S.W.3d 461, 476 (Mo. App. W.D. 2006).

III. THE CIRCUIT COURT ERRED IN EXCLUDING EVIDENCE OF THE RELEASE BECAUSE IF THE RELEASE WAS NOT A LEGAL BAR TO THE VICARIOUS LIABILITY CLAIM AGAINST APPELLANT FOR THE CONDUCT OF DR. HERRMANN, IT BECAME A QUESTION OF FACT IN THAT THE RELEASE WAS PLEADED AS AN AFFIRMATIVE DEFENSE AND UNDER MAI 32.21 BECAUSE A SUBMISSIBLE ISSUE.

State ex rel. Normandy Orthopedics, Inc. v. Crandall, 581 S.W.2d 829, 834 (Mo. 1979).

Gibson v. City of St. Louis, 349 S.W.3d 460, 466 (Mo. App. E.D. 2011);

IV. THE TRIAL COURT ERRED WHEN IT SUBMITTED INSTRUCTION NO. 7 USING MAI 13.06, AND USED THE TERM "AGENCY" IN VERDICT DIRECTING INSTRUCTION NO. 9 AND 16, OVER DEFENSE OBJECTION, BECAUSE IT VIOLATED THE PROVISIONS OF RSMO §538.210 GOVERNING MEDICAL NEGLIGENCE CLAIMS AGAINST HEALTH CARE PROVIDERS IN THAT IT PERMITTED AN AWARD BASED UPON AN AGENCY RELATIONSHIP WHEN THE LAW REQUIRES AN EMPLOYMENT RELATIONSHIP AND CURRENTLY ONE BASED UPON DIRECT COMPENSATION.

MAI 13.05

MAI 13.06

RSMO §538.205 (2017)

RSMO §538.210

V. THE SUBMISSION OF INSTRUCTIONS NO. 11 AND 18 FOR THE CONDUCT OF NURSE FARR WAS ERRONEOUS BECAUSE THEY WERE NOT SUPPORTED BY THE EVIDENCE AND A ROVING COMMISSION IN THAT THERE WAS NO EXPERT TESTIMONY TO SUPPORT THE CLAIM THAT NURSE FARR HAD A DUTY TO KNOW ALL THE VITALS, BREACHED A DUTY TO KNOW THE

RESULTS OF THE URINALYSIS, BREACHED A DUTY TO TELL DR. HERRMANN ABOUT THE VITAL SIGN TREND, BREACHED A DUTY TO TELL DR. HERRMANN OF THE URINALYSIS RESULTS, BREACHED A DUTY TO OBTAIN A REASONABLE MEDICAL EXPLANATION FOR THE DISCHARGE FROM DR. HERRMANN, OR BREACHED A DUTY OF PROTECTIVE OVERSIGHT.

Doe 1631 v. Quest Diagnostics, Inc., 395 S.W.3d 8 (Mo. banc 2013).

VI. THE SUBMISSION OF INSTRUCTIONS NO. 11 AND 18 FOR THE CONDUCT OF NURSE FARR WAS ERRONEOUS BECAUSE THERE WAS NO "BUT FOR" CAUSATION FOR THE SUBMISSION IN THAT A NURSE IS NOT OBLIGATED TO DISCLOSE KNOWN FACTS AND IN THAT DR. HERRMANN ADMITTED KNOWING THE VITAL SIGNS, LAB RESULTS AND RADIOLOGY STUDY RESULTS AND, THUS, HIS CONDUCT WAS AN INTERVENING ACT.

Harvey v. Washington, 95 S.W.3d 93, 96 (Mo. banc 2003)

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 862 (Mo. banc 1993)

VII. THE TRIAL COURT ERRED WHEN IT SUBMITTED INSTRUCTION NO. 14 AND VERDICT FORM A TO THE JURY, OVER DEFENSE OBJECTION, BECAUSE (A) VERDICT FORM A INCLUDED THE DAMAGE ELEMENT FOR "FUTURE ECONOMIC DAMAGES" AND AS PLAIN ERROR UNDER RULE 30.20 IN THAT SUCH ELEMENT WAS NOT DEFINED FOR THE JURY IN INSTRUCTION NO. 14 AND OMITTED BY RESPONDENT'S COUNSEL IN VIOLATION OF RULE 70.02, AND (B) INSTRUCTION 14 INCLUDED FUTURE ECONOMIC DAMAGES AND FUTURE MEDICAL DAMAGES IN THAT THERE WAS NO EXPERT SUPPORT FOR SUCH DAMAGE ELEMENTS.

Wright v. Edison, 619 S.W.2d 797, 802 (Mo. App. E.D. 1981).

Lampe v. Taylor, 338 S.W.3d 350, 360 (Mo. App. S.D. 2011).

Williams v. Jacobs, 972 S.W.2d 334, 342 (Mo. App. W.D. 1998).

Ball v. Allied Physicians Grp., L.L.C., 548 S.W.3d 373 (Mo. App. E.D. 2018).

VIII. THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JNOV ON THE VERDICTS ARISING FROM THE CONDUCT OF DR. HERRMANN BECAUSE THERE WAS NO EVIDENCE OF HIS EMPLOYMENT OR CONTROL OF HIS CONDUCT BY APPELLANT IN THAT MEDICAL STAFF BYLAWS DO NOT CREATE CONTROL, AND DR. HERRMANN TESTIFIED THAT HE WAS NOT EMPLOYED BY APPELLANT AND EXERCISED HIS OWN INDEPENDENT MEDICAL JUDGMENT WHEN TREATING RESPONDENT LINDSEY SETZER.

Hefner v. Dausmann, 996 S.W.2d 660, 667 (Mo. App. S.D. 1999).

Wilcox v. Lake Regional Health System, 2016 WL 5939351 at *3, No. 2:16-cv-05058-MDH (W.D. Mo. Oct. 12, 2016).

Jefferson ex rel. Jefferson v. Missouri Baptist Medical Center, 447 S.W.3d 701 (Mo. App. E.D. 2014)

IX. THE TRIAL COURT ERRED IN DENYING APPELLANT'S POST-TRIAL MOTION TO MODIFY THE JUDGMENT TO PERMIT APPELLANT TO PAY FUTURE DAMAGES IN PERIODIC PAYMENTS, WITHOUT HEARING, IN THAT THERE WAS A TIMELY REQUEST FOR PERIODIC PAYMENTS AND THE FUTURE DAMAGES EXCEEDED THE THRESHOLD SET OUT IN RSMO §538.220.

RSMO § 538.220.2

Williams v. Mercy Clinic Springfield Communities, 568 S.W.3d 396 (Mo. banc 2019).

X. THE CIRCUIT COURT ERRED IN FAILING TO REMOVE JUROR #6 AND SEAT AN ALTERNATE BECAUSE JUROR #6 SUBMITTED A QUESTION TO THE BAILIFF BEFORE THE EVIDENCE CLOSED IN THAT THE QUESTION WAS READ TO COUNSEL AND PERMITTED RESPONDENTS' COUNSEL TO FOCUS ON THAT ISSUE IN CLOSING ARGUMENT.

State v. Rudolph, 456 S.W.3d 506 (Mo. App. E.D. 2015)

Milam v. Vestal, 671 S.W.2d 448 (Mo. App. S.D. 1984)

XI. THE CIRCUIT COURT ERRED IN PERMITTING RESPONDENTS TO OFFER EVIDENCE OF LOST FINANCIAL SUPPORT BY WAY OF TAX RETURNS IN AN EFFORT TO UTILIZE THE REBUTTABLE PRESUMPTION FOUND IN RSMO §537.090 BECAUSE RESPONDENTS HAD NO ECONOMIC EXPERT, AND ANY ALLEGED PRESUMPTION HAD BEEN REBUTTED, IN THAT THE APPELLANT'S ECONOMICS EXPERT HAD OPINED ON THE LACK OF AN ECONOMIC BASIS TO SUPPORT THE CLAIM.

Mansil v. Midwest Emergency Medical Services, P.C., 554 S.W.3d 471, 477 (Mo. App. W.D. 2018)

XII. THE CIRCUIT COURT ERRED IN NOT REDUCING THE JUDGMENT BY THE AMOUNT OF THE SETTLEMENT BETWEEN RESPONDENTS AND DR. HERRMANN BECAUSE APPELLANT WAS ENTITLED TO THE REDUCTION UNDER RSMO §537.060 IN THAT RESPONDENTS HAD PREVIOUSLY SETTLED WITH JOINT TORTFEASOR, DR. HERRMANN, AND RESPONDENTS' COUNSEL STIPULATED TO THE REDUCTION / CREDIT.

RSMO section 537.060

Delacroix v. Doncasters, Inc., 407 S.W.3d 13, 39 (Mo. App. E.D. 2013)

ARGUMENT

I. THE CIRCUIT COURT ERRED IN SUBMITTED INSTRUCTION NO. 21 BUILT ON MAI 21.05 AND VERDICT B TO THE JURY, OVER DEFENSE OBJECTION, BECAUSE INSTRUCTION 21 DID NOT STATE THE PROPER MEASURE OF DAMAGES IN WRONGFUL DEATH ACTIONS UNDER RSMO §537.090 IN THAT IT PERMITTED AN AWARD FOR ITEMS SUCH AS DENTAL SERVICES, CUSTODIAL SERVICES, PAIN AND SUFFERING, PHYSICAL IMPAIRMENT, DISFIGUREMENT, LOST EARNINGS, MENTAL ANGUISH.

Standard of Review

Whether or not a jury was given proper instructions is a question of law that the courts review *de novo*. *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156, 159 (Mo. banc 2012). There must be sufficient evidence to support an issue submitted by any given instruction. *Hollis v. Blevins*, 927 S.W.2d 558, 564 (Mo. App. SD 1996)("Determination of whether the evidence is sufficient to submit the issue to a jury is a legal question and not a matter of judicial discretion.") When the evidence is insufficient to support the submission, and the offending instruction affected the merits of the action, reversal is required. *Ploch v. Hamai*, 213 S.W.3d 135, 139 (Mo. App. E.D. 2006).

A jury instruction is also prejudicial if it provides a "roving commission" or is "misleading and confusing." *Grindstaff v. Tygett*, 655 S.W.2d 70, 74 (Mo. App. E.D. 1983). "When an erroneous instruction is given and the trial results in favor of the party at whose instance it was given, the presumption is that the error was prejudicial." *Id.* Prejudice arises to the level of reversible error on the basis of instructional error when the error materially affects the merits and outcome of the case. *Kader v. Bd. of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182, 186 (Mo. banc 2019).

Generally, "[w]henever Missouri Approved Instructions contains an instruction applicable to the facts of a case, such instruction shall be given to the exclusion of any other instructions on the same subject." Rule 70.02(b). However, "if a particular MAI does not state the substantive law accurately, it should not be given." *Hervey*, 379 S.W.3d at 159; *see also Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224, 226 (Mo. banc 1994)("An instruction must be a correct statement of the law."); *Clark v. Missouri & Northern Arkansas R.R. Co.*, 157 S.W.3d 665, 672 (Mo. App. W.D. 2004)("If an instruction following MAI conflicts with the substantive law, any court should decline to follow MAI").

Argument

Instruction No. 21 was built on MAI 21.05 and set out the definitions of the categories of damages sought by plaintiff (D53 p. 25):

INSTRUCTION NO. 21

In these instructions, you are told to itemize any damages you award by the categories set forth in the verdict form B.

The phrase "past economic damages" means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services and or past lost earnings and for past lost earning capacity.

The phrase "past non-economic damages" means those damages arising in the past from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

The phrase "future medical damages" means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services.

The phrase "future non-economic damages" means those damages arising in the future from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

Verdict Form B on the wrongful death claim was built on MAI 36.20, but omitted the category for "future medical damages" that had been defined in Instruction No. 21 and included the category "future economic damages" that had not been defined in Instruction No. 21.[6] (D53 p28-29).

VERDICT B

[6] Note the jury did not award any damages for the future economic damage submission.

We, the undersigned jurors, assess the damages of plaintiffs Lindsey Setzer and Michael Setzer as follows:

For past economic damages including past medical damages	$__________
For past non-economic damages	$__________
For future economic damages excluding future medical damages	$__________
For future non-economic damages	$__________
TOTAL DAMAGES	$__________

(D53 p.28). At the jury instruction conference Appellant objected to Instruction 21 as "wrongful death actions are statutory creature" containing specifically enumerated damages types, and "the stock 21.05 . . . is totally improper in a death action" because, for example, it included past economic damages, physical impairment, disfigurement, inconvenience, and future medical damages. (TR760-61). Appellant also pointed out that the instruction permitted an award for pain and suffering not allowed and in conflict with the language of MAI barring an award for grief and bereavement. (TR761-61) Respondent asserted the case was "governed by the medical malpractice statute, 538.215, and that says you have to do it this way." (TR770). The Circuit Court agreed Appellant's analysis regarding non-collectible damages categories was "completely correct," but determined it would use the stock instruction and verdict form "in the absence of another MAI instruction[.]" (TR762, 771).

The instruction 21 and verdict Form B were prejudicially erroneous because they permitted awards of damages not permitted by law under RSMO §537.090 which states the permissible damage elements in a death action:

> In every action brought under section 537.080, 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, having regard 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. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable. If the deceased was not employed full time and was at least fifty percent responsible for the care of one or more minors or disabled persons, or persons over sixty-five years of age, there shall be a rebuttable presumption that the value of the care provided, regardless of the number of persons cared for, is equal to one hundred and ten percent of the state average weekly wage, as computed under section 287.250. If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

Wrongful death is a statutory cause of action created by RSMO §537.080. As a statutory claim, available damages are limited to certain specified categories enumerated in RSMO §537.090. This section provides, in relevant part, the trier of fact may award a plaintiff "such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned," including: (1) pecuniary losses suffered by reason of the death, (2) funeral expenses, and (3) the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which the plaintiffs have been deprived by reason of the decedent's death. *Id.* The mitigating or aggravating circumstances attending the death may be considered by the trier of fact, but damages for grief and bereavement by reason of the death are not be recoverable. *Id.*

In the context of alleged medical negligence, the law also requires that the types and categories of damages must be defined for the jury. RSMO §538.215.

MAI 21.05 sets forth the definitions for the categories of damages available under a RSMO §538.210.1 action. It contains definitions for "past economic damages," "past non-economic damages," "future medical damages," "future medical damages," and "future non-economic damages." Significantly, the MAI definitions contain categories of damage permissible for a personal injury action under RSMO §538.210.1, but which are not permissible for a wrongful death action under RSMO §537.090, including pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

Here, Respondents submitted a wrongful death claim against Appellant for the loss of the fetus. (D2 p.5-6). At trial, Respondents' counsel represented to the Court and Appellant's counsel at the jury instruction conference that Respondents had submitted a stock, unmodified MAI 21.05. (TR759-763; D53 p.25). During the instruction conference, Appellant objected and pointed out that most of the elements in MAI 21.05 are not permitted in death actions and permitted awards for things like pain and suffering.

RSMO §537.090. (TR760-761, 770-771). Respondents' counsel asserted only that he was required to use the stock MAI.

The instruction and verdict form should have been modified to reflect the permissible elements / categories of damages. Rule 70.02 states in part: "Where an MAI must be modified to fairly submit the issues in a particular case… then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts." The Notes on Use for MAI 36.20 (4) state: "Do not submit any category of damages that is not supported by the evidence."

Comment C to MAI 21.05 explicitly recognizes this conflict. It provides (emphasis added):

> By its terms, RSMO § 538.210.1 provides for applicability of Chapter 538 to both personal injury and wrongful death claims arising out of negligent health care. *However, the definitions provided by § 538.205 only relate to actions for personal injury. Compare the elements of damage for which recovery is allowed under § 537.090 in wrongful death actions.* Case law has not yet discussed or determined whether modification of MAI 21.05 is necessary in a wrongful death action against a health care provider.

The jury instructions tendered by Respondents here plainly illustrate this problem and the resulting prejudice to Appellant, as Respondents were permitted to submit damages instructions for impermissible damages categories. For example, Instruction 21 permitted an award for dental care, past lost earnings, past lot earnings capacity, past and future physical impairment, disfigurement, loss of capacity to enjoy life, pain and suffering and mental anguish none of which are permissible in death actions and certainly not applicable to a death claim involving a fetus.

Further Instruction 21 permitted awards for past and future non – economic damages to include: “pain suffering mental anguish, inconvenience, physical impairment, disfigurement loss of capacity to enjoy life.” While RSMO section 537.090 might permit in proper circumstances an award of the pain endured by the decedent between the negligence and the death, Instruction 21 does not so limit the pain to the fetus. Further the Instruction ignores the later admonition in Jury Instruction 20 that the jury could not award damages for grief and bereavement. (D53 p.25). The jury awarded $36,000 for this category of damages in Verdict B.

Respondents were required to tender an instruction that matched the provisions of RSMO §537.090 and failed to do so. *Barth v. St. Jude Medical, Inc.*, 559 S.W.3d 923, 926 (Mo. App. E.D. 2018) (where plaintiff wishes to submit an instruction, “the plaintiff has the duty to provide the correct … definition to the court”). Appellant properly objected and the objections were overruled. (TR760-763, 770-771). As a consequence the jury was permitted to award damages (and did so) on Verdict B for damages that are not proper under the law. This error was specifically raised in Appellants’ post-trial motion. (D69 p.9-10).

Further the instruction permitted an award for pain and suffering which might be permitted in certain limited circumstances for the pain of the decedent between the negligent act and death but that was not proven and the language is in conflict with MAI 36.20 precluding an award for grief and bereavement.

Instruction No. 21 submitted a claim for future non-economic damages defined to include damages for “pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement and loss of capacity to enjoy life." (D53 p.25). Again those elements are not proper in a death action under RSMO section 537.090. There can be no award for future damages for pain and suffering to the decedent or the parents of the decedent. There can be no award for inconvenience, disfigurement or physical impairment in the future for a decedent or the parents of the deceased child. The jury awarded $300,000 for this category of damages.

Finally, the submission of erroneous instructions was prejudicial. Use of the stock MAI is appropriate where the MAI is applicable and "does not violate the substantive law." *Gorman v. Wal-Mart Stores, Inc.*, 19 S.W.3d 725, 731 (Mo. App. W.D. 2000). Where an instruction does not instruct the jury about the substantive law of the claim, the instruction is erroneous and per se prejudicial. *See, e.g.; Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 468 (Mo. banc 1995) (it is critical to give the jury "appropriate guidance" via instruction for wrongful death claim, and "[t]he failure of the instruction to give necessary guidance to the jury was error"). Here, for all of the reasons set forth above, the stock MAI instruction and verdict form contain damages elements not permitted by the substantive law governing wrongful death claims. It permitted the jury to consider and award impermissible damages categories, demonstrating prejudicial juror confusion. *Eisenmann v. Podhorn,* 528 S.W.3d 22, 38-39 (Mo. App. E.D. 2017)(prejudice resulted from erroneous instruction, because jury confusion led to inconsistent verdicts). Therefore, MAI or not, the instruction and verdict director were erroneous. *Bennett*, 896 S.W.2d at 468. Erroneous instructions require a new trial on all issues. *Cova v. Am. Family Mutual Ins. Co.*, 880 S.W.2d 928, 931 (Mo. App. E.D. 1994) (reversing trial court's determination that erroneous instruction was not prejudicial because instruction which fails to submit an essential element is "fatally defective").

II. THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JNOV AS TO THE SUBMISSION OF THE CASE TO THE JURY BASED UPON THE CONDUCT OF DR. HERRMANN, BECAUSE THERE WAS A FULL RELEASE OF APPELLANT FROM VICARIOUS LIABILITY FOR THE CONDUCT OF DR. HERRMANN IN THAT RESPONDENTS HAD ALREADY SETTLED WITH DR. HERRMANN AND RELEASED APPELLANT FROM ANY CLAIM "ARISING OUT OF THE VICARIOUS RELATIONSHIP AND CONDUCT OF DR. HERRMANN."

Standard of Review

In reviewing a trial court's denial of motions for JNOV, the reviewing Court determine "whether the plaintiff made a submissible case." *Med. Plaza One, LLC v. Davis*, 552 S.W.3d 143, 153 (Mo. App. W.D. 2018) (citation and internal quotation marks omitted). Whether the plaintiff made a submissible case is a question reviewed *de novo*. *Ford v. Ford Motor Co.,* 585 S.W.3d 317, 331 (Mo. App. W.D. 2019). "In order to make a submissible case a plaintiff must present substantial evidence for every fact essential to liability." *Davis*, 552 S.W.3d at 153 (citation and internal quotation marks omitted).

A case may not be submitted unless each and every fact essential to liability is predicated on legal and substantial evidence. *Ford*, 585 S.W.3d at 331. A motion for JNOV should be granted if the defendant shows that at least one element of the plaintiff's case is not supported by the evidence. *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014); *Holmes v. Kansas City Pub. Sch. Dist.,* 571 S.W.3d 602, 611 (Mo. App. W.D. 2018).

Argument

Following their settlement with Dr. Herrmann in Cause No. 14SL-CC01021, Respondents filed this suit, naming only Appellant as defendant. (D2). As indicated, the Release provides Respondents agreed to release Dr. Herrmann from all liability arising out of his medical care. (D31 p.3). Respondents explicitly retained their right to (D31 p.3-4, underline original and italics added for emphasis):

> The undersigned Releasors do not release and hereby preserve all rights they have against SSM as herein provided. Releasors affirm that they intend to prosecute their separate claims against SSM Health Care St. Louis d/b/a St. Clare Hospital and its agents and employees for those injuries and damages allegedly sustained in the lawsuit styled Lindsey Setzer and Michael Setzer vs Joseph G. Herrmann, MD filed in the Circuit Court of St. Louis County bearing cause number 14SL-CC01021. In said lawsuit, in answer to pleadings during discovery, SSM Health Care affirmatively represented that in 2012 there was no employment relationship between SSM Health Care St. Louis and Joseph G. Herrmann, MD. SSM further represented that there was no legal agency between SSM and Dr. Herrmann to support recovery based upon agent / principal or respondeat superior. In reliance on the representations of SSM, Releasors [Respondents] further agree *they will not prosecute any action arising out of the medical issues which are the subject matter of this Release and the lawsuit styled Lindsey Setzer and Michael Setzer v. Joseph G. Herrmann, M.D., wherein such action would include a theory or cause of action for recovery whereby some other person or entity, is vicariously liable, in whole or part, or, in any way, responsible for the acts or omission of the Released Parties, including but not limited to, Dr. Joseph G. Herrmann.* By entering into this Limited Confidential Release of All Claims Against the Released Parties, the Releasors do not forego or release any right thy may have to pursue any and all claims against SSM Health Care St. Louis, their agents, and employees, or any other unreleased party, arising out of the medical issues which are the subject matter of this Release and the lawsuit styled Lindsey Setzer and Michael Setzer v. Joseph G. Herrmann, M.D., *so long as those claims do not premise liability arising out of the vicarious relationship and conduct of Dr. Joseph G. Herrmann.*

Despite this language, Respondents' Petition in this matter included allegations that Appellant was liable "by reason of the acts and omissions of agents and/or employees of SSM…including… Joseph G. Herrmann, M.D." (D2 p.3). These claims had been released and violated Respondent's agreement in the Release. Accordingly, Appellant asserted in its Answer and Affirmative Defenses that claims against SSM arising out of the conduct of Dr. Herrmann were barred by the Release. (D4 p.5).

This issue arose throughout the life of the litigation. First, Appellant filed a Motion for Partial Summary Judgment on the vicarious liability claims based on the conduct of Dr. Herrmann.[7] Respondents filed an untimely motion to strike, in which they made a judicial admission, stating specifically: "Defendant's motion for partial summary judgment is moot as the petition does not allege, nor rely upon, a vicarious relationship between Dr. Herrmann and SSM Health Care St. Louis." (D37 p.5). Despite failure to properly respond to the Motion for Summary Judgment and this judicial admission, the trial court denied the defense motion. (D38).

Next, Appellant moved in limine to bar all evidence of any alleged employment relationship between Appellant and Dr. Herrmann based upon the Release (D40 p.3-4), which the Circuit Court denied. (D43). Respondents filed a motion in limine to bar the defense from using the Release at trial, which the Circuit Court granted over Appellant's motion. (D44).

[7] Appellant also submitted a Statement of Uncontroverted Material Facts in support of its Motion. (D28, 30-31, 33). Respondents failed to timely respond and, therefore, under Rule 74.04, SSM's Statements of Uncontroverted Material Facts should have been deemed admitted. Rule 74.04(c)(2); *State v. Spilton*, 315 S.W.3d 350, 356 (Mo. banc 2010); *see also Reverse Mortg. Sols., Inc. v. Estate of Hunter*, 479 S.W.3d 662, 667 (Mo. App. W.D. 2015).

On the first day of trial, Appellant filed a brief relating to the use of the Release at trial and asked the Circuit Court to reconsider its Order granting Respondents' Motion in Limine to bar the Release being introduced into evidence at trial. (D47; TR5-6). The Circuit Court also denied this and at trial, Appellant made an offer of proof with testimony of Ms. Setzer about the prior settlement and Release. (TR5-6; TR675, 685-687; Defendant's Exhibit L, and *see* D31 p.1-7). Respondent Lindsey Setzer confirmed the settlement, admitted her signature on the release, and admitted she had counsel at the time she signed the release. (TR675, 685-687). The Circuit Court denied the offer of proof. (TR675, 685-687).

At trial, the plaintiff offered the deposition testimony of their expert Dr. Heller who testified as to the negligence of Dr. Herrmann and the casual relationship between that negligence and the injuries. (TR137-139, Deposition transcript of Dr. Ross Heller, November 25, 2015, p. 120, 124-126). Appellant objected to Dr. Heller's testimony, because he testified as an emergency room physician expert, but offered testimony on Dr. Herrmann's obstetric care. (TR135-36).

Ultimately, at the close of evidence, despite the clear language of the Release and the judicial admission (D37 p.5), Respondents submitted vicarious liability claims against Appellant for the conduct of Dr. Herrmann as set out in Instructions No. 7, 9, and 16, and Verdict Forms A and B (discussed below in Point III), and the jury erroneously entered two verdicts for the Respondents based on Dr. Herrmann's conduct. Both Verdict Forms permitted the jury to hold Appellant liable "based on the actions of Joseph Hermann [sic], M.D.:

VERDICT A

NOTE: Complete this form by writing in the name required by your verdicts.

On the claim of plaintiff Lindsey Setzer for personal injury against SSM Health Care St. Louis based on the actions of Joseph Hermann, M.D., we, the undersigned jurors, find in favor of:

Plaintiff Lindsey Setzer

(Plaintiff Lindsey Setzer) OR (Defendant SSM Health Care St. Louis)

On the claim of plaintiff Lindsey Setzer for personal injury against SSM Health Care St. Louis based on the actions of Nurse Amy Farr, we, the undersigned jurors, find in favor of:

Plaintiff Lindsey Setzer

(Plaintiff Lindsey Setzer) OR (Defendant SSM Health Care St. Louis)

(D100 p. 29). Verdict B used identical language.

VERDICT B

NOTE: Complete this form by writing in the name required by your verdicts.

On the claim of plaintiffs Lindsey Setzer and Michael Setzer for wrongful death of Baby Setzer against SSM Health Care St. Louis based on the actions of Joseph Herrmann, M.D., we, the undersigned jurors, find in favor of:

Plaintiff Lindsey Setzer and Michael Setzer

(Plaintiff Lindsey Setzer and Michael Setzer) OR (Defendant SSM Health Care St. Louis)

On the claim of plaintiffs Lindsey Setzer and Michael Setzer for wrongful death of Baby Setzer against SSM Health Care St. Louis based on the actions of Nurse Amy Farr, we, the undersigned jurors, find in favor of:

Plaintiff Lindsey Setzer and Michael Setzer

(Plaintiff Lindsey Setzer and Michael Setzer) OR (Defendant SSM Health Care St. Louis)

(D100 p.31).

Accord and satisfaction and release are affirmative defenses. *Ensminger v. Burton*, 805 S.W.2d 207, 217 (Mo. App. W.D. 1991). Appellant preserved the defense in its Answer, and at multiple points throughout the litigation, including via Appellant's offer of proof on the Release. (TR675-676, 684-687). Further, Appellant preserved the issue via its motion for directed verdict and post-trial motion for JNOV. (D51 p.4; D69 p.6). Where a claim of error on appeal is the failure to direct a verdict because of proof of an affirmative defense, the moving party is entitled to a directed verdict if that party proved its affirmative defense as a matter of law. *Damon Pursell Const. Co. v. Missouri*

Highway & Transp. Comm'n, 192 S.W.3d 461, 475 (Mo. App. W.D. 2006). Because the Release expressly barred claims against Appellant for Dr. Herrmann's conduct, Respondents failed to make a submissible case against Appellant for Dr. Herrmann's conduct as a matter of law. Therefore, the Circuit Court erred in denying Appellant's motion for JNOV in relation to the Release.

Finally, the Circuit Court's decision to allow Respondents to purse relief against Appellant for Dr. Herrmann's tortious conduct via vicarious liability negates the purpose of the Release and has the effect of creating duplicative and wasteful litigation. A settling defendant must get a general release as well as bar claims against others for his / her / its conduct in order to fully buy peace. The statutory language in RSMO §537.060 is as follows (emphasis in original):

> **Contribution between tort-feasors — release of one or more, effect. —** Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tort-feasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tort-feasor. The term **"noncontractual indemnity"** as used in this section refers to indemnity between joint tort-feasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

Under this statute, without the bar on vicarious liability claims against SSM for the conduct of Dr. Herrmann, Appellant is still permitted to file suit against him for contribution or indemnity. *SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP*, 128 S.W.3d 534, 540-41 (Mo. App. E.D. 2003) (hospital may seek indemnity for vicarious liability damages from non-employee agent physician). *See* also RSMO §§ 537.065 and 537.060; MAI 30.02, 36.06. For a physician-defendant, in order to settle a malpractice claim, the physician must obtain release of any claims the plaintiff has arising out of their conduct or they are not truly buying their peace. *See Glidewell v. S.C. Mgmt., Inc.*, 923 S.W.2d 940, 960 (Mo. App. S.D. 1996); *see also Manar v. Park Lane Med. Ctr.*, 753 S.W.2d 310, 314 (Mo. App. W.D. 1988)("[W]here the suit proceeds against the non-settling and vicariously liable employer, the latter's right to indemnity survives the settlement reached by the employee whose responsibility is released only to the extent of his payment"). The failure to enforce the terms of the Release will chill settlement and force corporate health care providers to file formal cross-claims in every action.

The language of the Release is clear. Respondents retained the right to pursue relief against Appellant, *only* so far as "those claims do not premise liability arising out of the vicarious relationship and conduct of Dr. Joseph G. Herrmann." (D31 p.4).

The erroneous submission resulted in prejudice to Appellant. The Circuit Court permitted the submission of Verdict Form A and Verdict Form B "based on the actions" of Dr. Herrmann, and the jury expressly found Appellant liable for Dr. Herrmann's released conduct. One erroneous submission taints both verdicts, because as submitted, the verdict forms allowed the jury to hold Appellant liable for *either* Nurse Farr's conduct, *or* Dr. Herrmann's (released) conduct. Because Respondents elected to submit the Verdict Forms allowing the jury to hold Appellant liable for both individuals, there is no way to ascertain whether the jury would have found Appellant liable for Nurse Farr's conduct alone. Where a submission is disjunctive, "each submission must be supported by substantial evidence." *Lowe v. Mercy Clinic E. Communities*, 592 S.W.3d 10, 21 (Mo. App. E.D. 2019); *see also*; *Berra v. Union Elec. Co.*, 803 S.W.2d 188, 190 (Mo. App. E.D. 1991). Further, the Verdict Forms contained a single damages award for the conduct of *both* individuals. There is likewise no way to ascertain whether the damages award would have been different absent the erroneous submission.

This Court should reverse the judgment against SSM for the conduct of Dr. Herrmann and remand for a new trial on the claims against SSM for the conduct of Nurse Farr only due to the prejudice and how the plaintiffs evidence against Dr. Herrmann tainted the entire trial. Where at least at least one element of the plaintiff's case is not supported by the evidence, remand and retrial is required. *Ellison*, 437 S.W.3d at 768; *Holmes*, 571 S.W.3d at 611.

III. THE CIRCUIT COURT ERRED IN EXCLUDING EVIDENCE OF THE RELEASE BECAUSE IF THE RELEASE WAS NOT A LEGAL BAR TO THE VICARIOUS LIABILITY CLAIM AGAINST APPELLANT FOR THE CONDUCT OF DR. HERRMANN, IT BECAME A QUESTION OF FACT IN THAT THE RELEASE WAS PLEADED AS AN AFFIRMATIVE DEFENSE AND UNDER MAI 32.21 BECAUSE A SUBMISSIBLE ISSUE.

Standard of Review

A trial court's admission and exclusion of evidence is reviewed for an abuse of discretion. *Frazier v. City of Kansas*, 467 S.W.3d 327, 338 (Mo. App. W.D. 2015). A trial court abuses its discretion mandating reversal based on the exclusion of evidence where the excluded evidence 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

Alternatively, if this Court rejects Point 2 that the Release was a legal bar to the vicarious liability claim against Appellant for the conduct of Dr. Herrmann, then the Circuit Court erred by excluding evidence of the release to be submitted to the jury as an affirmative defense under MAI 32.21. *Id.* at 476; *see e.g.,* MAI 32.21 (for submitting affirmative defense of release). Logically, the Release is either an absolute bar to the vicarious liability claims against Appellant for Dr. Herrmann's conduct or a question of fact for the jury under MAI 32.21.

This Court addressed this question in *State ex rel. Normandy Orthopedics, Inc. v. Crandall,* 581 S.W.2d 829, 834 (Mo. 1979). In that case, this Court held the effect of an injured party's general release regarding an original tortfeasor as to the party's action against subsequent tortfeasors for alleged malpractice in the treatment of the original injuries is an issue of fact. *Id.* Relying on a decision from the Kansas Supreme Court, this Court held:

> When a general release discloses on its face that it has been given to named releases who denied liability but made payment by way of compromise and settlement, then and in that event other alleged wrongdoers who were not parties to the release and made no payment toward satisfaction can fairly be called upon to show that either the release which they rely on was intended to discharge them or that the releasor has received full compensation.

Id. at 834 (internal citations and emphasis deleted). Therefore, the non-contributing defendant has the burden to show either (1) the release was intended to discharge it, or (2) the plaintiff has been made whole. In either case, the release itself is the most relevant piece of evidence. Appellant did this with a Motion for Partial Summary Judgment and the offer of proof at trial.

In accordance with the rule of law set forth in *Crandall*, the MAI has specific instructions related to on the affirmative defense of release. *See* MAI 32.21. Here, because the Circuit Court denied Appellant's motion for partial summary judgment in relation to the Release, the effect of the Release became a question of fact for the jury. Pursuant to *Crandall* and MAI 32.21, Appellant was therefore entitled to present evidence of the Release to the jury to assert it was intended to discharge the claims alleged against it for the conduct of Dr. Herrmann.

Respondents asserted prior to trial and before the Court of Appeals that the Release should have been excluded from evidence due to its prejudicial value and because Appellant was and is entitled set-off of the amount paid by Dr. Herrmann in settlement. These are separate issues; the Release bars the claim against Appellant for the conduct of Dr. Herrmann and the amount paid must reduce any verdict against SSM. *See, e.g., Gibson v. City of St. Louis*, 349 S.W.3d 460, 466 (Mo. App. E.D. 2011); *see also Brown v. Kneibert Clinic*, 871 S.W.2d 2, 3 (Mo. App. E.D. 1993); RSMO §537.060.

Based on this language, the Circuit Court should have excluded all evidence regarding the tortious conduct of Dr. Herrmann from trial. Alternatively, because the Circuit Court allowed Dr. Heller to testify regarding Dr. Herrmann's negligence, the Circuit Court should have allowed Appellant to present its evidence regarding the Release and its effect on Respondents' claims for vicarious liability arising from Dr. Herrmann's tortious conduct. This issue was preserved in the Answer, and at multiple points throughout the litigation, including via Appellant's offer of proof on the Release. (TR675-676, 684-687). The issue was further addressed in the motion for directed verdict and in the post-trial motions, discussed elsewhere (D51 p.4; D69 p.6).

The Circuit Court therefore erred in denying Appellant's offer of proof regarding the release, and Appellant was actually prejudiced by the entry of two erroneous verdicts for Dr. Herrmann's released conduct. These prejudicial evidence decisions had a material effect on the outcome of the trial and warrant a new trial.

IV. THE TRIAL COURT ERRED WHEN IT SUBMITTED INSTRUCTION NO. 7 USING MAI 13.06, AND USED THE TERM "AGENCY" IN VERDICT DIRECTING INSTRUCTION NO. 9 AND 16, OVER DEFENSE OBJECTION, BECAUSE IT VIOLATED THE PROVISIONS OF RSMO §538.210 GOVERNING MEDICAL NEGLIGENCE CLAIMS AGAINST HEALTH CARE PROVIDERS IN THAT IT PERMITTED AN AWARD BASED UPON AN AGENCY RELATIONSHIP WHEN THE LAW REQUIRES AN EMPLOYMENT RELATIONSHIP AND CURRENTLY ONE BASED UPON DIRECT COMPENSATION.

Standard of Review

Whether or not a jury was given proper instructions is a question of law that the courts review *de novo*. *Ross-Paige v. St. Louis Metro. Police Dep't,* 492 S.W.3d 164, 172 (Mo. banc 2016). If the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction, then the jury verdict must be reversed on the grounds of instructional error. *Hervey,* 379 S.W.3d at 159. Prejudice arises to the level of reversible error on the basis of instructional error when the error materially affects the merits and outcome of the case. *Kader*, 565 S.W.3d at 186.

Generally, "[w]henever Missouri Approved Instructions contains an instruction applicable to the facts of a case, such instruction shall be given to the exclusion of any other instructions on the same subject." Rule 70.02(b). However, "if a particular MAI does not state the substantive law accurately, it should not be given." *Hervey*, 379 S.W.3d at 159 ; *see also Kansas City Area Transp. Auth.,* 873 S.W.2d at 226 ("[a]n instruction must be a correct statement of the law"); *Clark,* 157 S.W.3d at 672.

Argument

At Respondents' request, and over the Appellants' objections, the Court submitted Instruction No. 7 based upon MAI 13.06, which read as follows:

INSTRUCTION NO. 7

Acts were within the "scope and course of agency" as that phrase is used in these instructions if:

1. they were performed by Joseph Herrmann, M.D. to serve the interests of SSM Health Care St. Louis according to an express or implied agreement with SSM Health Care St. Louis, and

2. SSM Health Care St. Louis either controlled or had the right to control the physical conduct of Joseph Herrmann, M.D.

(D53 p.10; A16). The verdict directors, Instructions No. 9 and 16 also then improperly used the word "agency." (D53 p. 12, 19; A18, A25). Objections were made to Instructions No. 9 and 16 for that reason. (TR731-37, 750-54).

INSTRUCTION NO. 9

Your verdict must be for the plaintiff Lindsey Setzer for personal injury and against defendant SSM Health Care St. Louis for the actions of Dr. Joseph Herrmann, if you believe:

First, Dr. Joseph Herrmann's care and treatment of Lindsey Setzer was in the scope and course of agency for defendant SSM Health Care St. Louis, and

Second, Dr. Joseph Herrmann either:

- Prematurely discharged Lindsey Setzer from St. Clare hospital on the evening of July 31, 2012, or
- failed to communicate a differential diagnosis of urinary tract infection, or
- failed to compose a medical record of his care and treatment of Lindsey Setzer ; and

Third, Dr. Joseph Herrmann, in any one or more of the respects submitted in Paragraph Second, was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause damage to Lindsey Setzer.

(D53 p. 12; A18).

INSTRUCTION NO. 16

Your verdict must be for the plaintiffs Lindsey and Michael Setzer for the death of Baby Setzer and against defendant SSM Health Care St. Louis for the actions of Dr. Joseph Herrmann, if you believe:

First, Dr. Joseph Herrmann's care and treatment of Lindsey Setzer was in the scope and course of agency for defendant SSM Health Care St. Louis, and

Second, Dr. Joseph Herrmann either:

- discharged Lindsey Setzer from St. Clare hospital on the evening of July 31, 2012, or
- failed to communicate a differential diagnosis of urinary tract infection, or
- failed to compose a medical record of his care and treatment of Lindsey Setzer; and

Third, Dr. Joseph Herrmann, in any one or more of the respects submitted in Paragraph Second, was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause the death of Baby Setzer.

(D53 p.19; A25). The instructions were erroneous because they misstated the law on vicarious liability for health care providers. Effective 2005, RSMO §538.210.2(3) provided: "No individual or entity whose liability is limited by the provisions of this chapter shall be liable to any plaintiff based on the actions or omissions of any other entity or person who is not an employee of such individual or entity whose liability is limited by the provisions of this chapter." At that time Chapter 538 included a definition of "physician employee" but not of employee. This was the issue primarily addressed by the court in *Jefferson ex rel. Jefferson v. Missouri Baptist Medical Center*, 447 S.W.3d 701 (Mo. App. E.D. 2014). In 2017 the Legislature changed the definition of "employee" found in RSMO §538.205 to read "'Employee', any individual who is directly compensated by a health care provider for health care services rendered by such individual and other nonphysician individuals who are supplied to a health care provider by an entity that provides staffing[.]" The definition of who is an employee also changed in 2017. RSMO §538.205 (2017).

Instruction No. 7 was erroneous for three reasons: (a) provider defendants can only be responsible for the conduct of employees not agents, (b) it used MAI 13.06 rather than MAI 13.05 on employment, and (c) it failed to comply with the 2017 statutory amendments requiring proof of direct compensation between the provider corporation and the claimed employee. The verdict directors contained in Instructions No. 9 and 16 therefore permitted an erroneous finding against Appellant for the conduct of Dr. Herrmann in his capacity as an agent, rather an employee.

At trial and before the Court of Appeals, Respondents relied upon *Jefferson ex rel. Jefferson* to support their use of MAI 13.06 over MAI 13.05. *Jefferson* does not control the result here, because the *Jefferson* opinion addressed only the old statutory definitions of "employee" as used in Chapter 538. 447 S.W.3d at 707-08. While the *Jefferson* opinion permits use of concepts like control for the purpose of evaluating "employment" status, the *Jefferson* Court did not address jury instructions, as that case involved review of summary judgment. *Id.* at 704. Further, and more importantly, as the *Jefferson* Court noted, a hospital defendant can only be liable for the conduct of "employees," within the meaning of the statutory definition. *Id.* at 707 ("Here, section 538.210.2(3)'s plain language is clear. It provides that MBMC is not liable to the Jeffersons for the actions of

13475083.1

Dr. Mosher if Dr. Mosher is not MBMC's 'employee'"). Accordingly, the Circuit Court erred by using MAI 13.06, as opposed to MAI 13.05, which Appellant tendered at trial. (TR854).

Appellant preserved this issue at trial with objections at the jury instruction conference to use of MAI 13.06 rather than 13.05, cited RSMO 538.205(3) (2017) to the trial court and even tendered MAI 13.05. (TR726). This matter was also presented in the Appellant's Motion for New Trial. (D69 p.11-12).

In the alternative, even if this Court determines that the use MAI 13.06 was not in error, then the Circuit Court was obligated to substitute the word "employment" or "employee" for the word "agent" in the instruction, as suggested by Appellant at trial and in the post-trial motion in order to conform with the statutory amendments to RSMO §538.205. (TR726-727; D69 p. 11-12). Appellant advised the Circuit Court that other trial courts have permitted use of MAI 13.06, but required the plaintiff to substitute the word "employment" for the word "agency." *See, e.g.*, *Wilkes – Booker v. SSM Orthopedics*, Cause No. 12SL-CC04799, St. Louis County Circuit Court, Hon. Coleen Dolan, Jury Instruction #9. (D64, p. 11).

The third issue is that effective August 28, 2017, the Missouri Legislature amended RSMO §538.205, governing vicarious liability in medical malpractice actions, to further clarify that an "employee" within the meaning of the statute includes only any individual who is "directly compensated by a health care provider for health care services rendered by such individual and other non-physician individuals who are supplied to a health care provider by an entity that provides staffing." Appellant presented this objection at trial and via post-trial motion. (TR726-727; D69 p.11-12). Dr. Herrmann testified that he received no compensation from SSM for his care provided to Ms. Setzer. (TR495-96). The amended definition illustrates that the Legislature intended to limit the application of *respondeat superior* liability to compensated employees, not private physicians such as Dr. Herrmann.

The 2017 amendments to RSMO §538.210 should have applied to Respondents' claims because they serve to define the remedy for the cause of action and define the proper parties to the suit.[8]

As noted above, since 2005 a corporate health care provider has only faced exposure for the conduct of employees. In 2015 the Legislature adopted a new statutory structure for malpractice claims, but Appellant is not trying to enforce that new statutory format to this claim. Rather, Appellant is trying to apply the new statutory definition of the work "employee" from the 2017 modification of the statute. Amendments to remedial statutory provisions apply retroactively to pending cases. *Leutzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W.2d 591, 594 (Mo. App. E.D. 1995). This includes application of retroactive amendments to "all pending cases—that is, those cases not yet reduced to a final, unappealable judgment." *State ex*

[8] Appellant notes this Court has recently addressed the very similar amendments to the definition of "employer" and causation standard under the Missouri Human Rights Act that took effect on the same day as the statutory amendment at issue here. *Lampley v. Missouri Comm'n on Human Rights*, 570 S.W.3d 16, 29 n.4 (Mo. banc 2019) (Wilson, J., concurring) ("the Court need not – and, therefore, does not – decide whether the change … brought about in 2017 by amendments … would apply to this case.") Accordingly, pursuant to Missouri Supreme Court decision, the retroactivity of the amendment is undecided.

rel. Faith Hosp. v. Enright, 706 S.W.2d 852, 854 (Mo. banc 1986). In fact, this Court has held a statutory provision that is remedial *must* be applied retroactively unless the legislature expressly states otherwise. *Vaughan v. Taft Broad. Co.*, 708 S.W.2d 656, 661 (Mo. banc 1986). The only constitution limit on retroactive application of amendments is contained in Article I, Section 13 of the Missouri Constitution, which prohibits the application of "ex post facto" and "retrospective" laws. This provision provides:

> That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

The term "ex post facto" is applicable only to criminal law; the "retrospective" applies to civil rights and remedies. *Missouri Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010). The terms "retroactive" and "retrospective" are not synonymous under Missouri law. *Id.* "A law is 'retroactive' in its operation when it looks or acts backward from its effective date; however, a law is 'retrospective' "if it has the same effect as to *past* transactions or considerations as to future ones...." *Id.* (quoting *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo. banc 1971), emphasis added). In other words, "[t]he constitutional inhibition against laws retrospective in operation…does not mean that no statute relating to past transactions can be constitutionally passed, but rather, that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of parties interested." *Fisher v. Reorganized Sch. Dist. No. R–V of Grundy County*, 567 S.W.2d 647, 649 (Mo. banc 1978).

Therefore, a law is retrospective in operation (i.e. unconstitutional) if (1) it takes away or impairs vested or substantial rights acquired under existing law, or (2) imposes new obligations, duties, or disabilities with respect to past transactions. *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 769 (Mo. banc 2007). Conversely, when a law makes a procedural or remedial change, it is not retrospective and *must* be applied retroactively. *Id*. Remedial changes apply retroactively even in the absence of express language or legislative intent indicating it should apply retroactively. *Pierce v. State, Dep't of Soc. Servs.*, 969 S.W.2d 814, 822 (Mo. App. W.D. 1998).

"[A] statute is not retrospective because it merely relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or *because it fixes the status of a person for the purpose of its operation*." *State ex rel. Sweezer v. Green*, 232 S.W.2d 897, 900 (Mo. 1950) (emphasis added). The prohibition against retrospective laws does not and cannot apply procedural or remedial laws, which may "prescribe[ ] a *method of enforcing rights* or obtaining redress for their invasion" or "substitute a *new or more appropriate remedy* for the enforcement of an existing right." *Pierce*, 969 S.W.2d at 822 (citations omitted; emphasis added). "No person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights, and where a new statute deals only with procedure it applies to all actions including those pending or filed in the future." *Vaughan*, 708 S.W.2d at 660 (holding that the Legislature's repeal of punitive damages provision was remedial and applied retroactively).

Here, the statutory amendment to the definition of the word "employee" is procedural, not substantive, within the meaning of this retrospective law doctrine, because it defines the type and extent of a future remedy, not a previously existing right. The statutory amendment leaves Respondents' substantial right to seek redress intact, and merely "substitute[s] a new or more appropriate remedy for the enforcement of [Respondents'] existing right." *Pierce*, 969 S.W.2d at 823. Further, this amendment relates to a statutory definition for a person. As a matter of well-established Missouri constitutional law, a statutory amendment is not retrospective where it "fixes the status of a person for the purpose of [the statute's] operation." *State ex rel. Sweezer*, 232 S.W.2d at 900.

On that point, this Court has specifically held that procedural amendments to pending actions include those clarifying the parties to a cause of action, as is the case here. In *Hess*, 220 S.W.3d at 769, this Court held that a statutory amendment broadening the class of potential plaintiffs by including a new private right of action constituted a procedural change. *Id.* It reasoned that "[t]he operative facts that give rise to [defendant's] liability are the same both before and after the amendment…." *Id.* It stands to reason that if expanding the class of potential plaintiffs for a cause of action amounts to a remedial change, then redefining the class of potential defendants is as well.

Relatedly, the "employee" amendment at issue is within the definitions section of the statute. Missouri Courts have also specifically held that amendments to the definitions sections of statutes are remedial and may be applied retroactively. *Leutzinger*, 895 S.W.2d at 594 (amendments that changed the definition of "industrial disability" in the Worker's Compensation statute were to be applied retroactively, even though the new definition directly impacted a claimant's potential award).

The Missouri Court of Appeals for the Western District addressed similar circumstances in *Pierce*, involving an amendment to RSMO §208.215, which governs debts owed to the Missouri Department of Social Services as reimbursements for payments made by the Department where the recipient received recovery from a liable third party. *Pierce*, 969 S.W.2d at 822. Under the prior version of the statute, the recipient was responsible to repay the entire benefit provided by the Department from the third party award; under the amendment, the trial court received discretion to reduce the Department's portion of the recovery based on new factors enumerated in the statute. *Id.* at 823. The Court held the statute did apply retroactively, and was not an unconstitutional retrospective law, because the amended statute preserved the Department's substantial right to redress, and merely "substituted a new or more appropriate *remedy* for the enforcement of the Department's existing right." *Id.* (emphasis added). Therefore, the statute was remedial. *Id.*

The circumstances are substantially similar here. The amendment in *Pierce* preserved the plaintiff's (the Department's) substantive right to a remedy – where it paid benefits to a recipient who later recovered from a liable third party, it was entitled to recoup those payments. The amendment merely addressed the *remedy*, not the *right* itself, by granting the trial court authority to adjust the amount of its recovery. It was therefore remedial, and applied retroactively to payments it made prior to the effective date of the amendment. *Id.* Under the facts here, just as in *Pierce*, the amendment restricting vicarious liability for the acts of an "employee" affects future recovery for a right that arose in the past. Respondents' claims arose prior to the amendment, but the "employee" amendment relates solely to the future remedy. The amendment does not relate to or affect the previously existing substantive right; it merely addressed the method by which Plaintiff may seek a remedy for that right, and the remedy he may seek to vitiate that right.

Based on the foregoing, the failure to utilize MAI 13.05 on employment or modify MAI 13.06 to use the word "employment" was prejudicial error as it permitted Plaintiffs to submit a claim against SSM for the conduct of Dr. Herrmann as an agent, in direct violation of RSMO §538.210. Additionally, the jury instruction should have been submitted with the amended definition of employee set forth in the RSMO §538.205 (2017).

Appellant was prejudiced by the erroneous instructions, warranting a new trial. A misdirection in a jury instruction is prejudicial and arises to the level of reversible error when it materially affects the merits and outcome of a case. *Hervey,* 379 S.W.3d at 159 (Mo. banc 2012); *see also*, *Cova*, 880 S.W.2d at 930 (Mo. App. E.D. 1994)(reversal due to misstatement of the law). Here, Instructions No. 7, 9 and 16 were prejudicial because they allowed the jury to enter two verdicts against Appellant "based on the actions" of Dr. Herrmann as an "agent" of SSM in violation of the law. (D100 p. 29, 31).

Because the jury actually entered two verdicts against Appellant based vicarious liability for Dr. Herrmann's released conduct, Appellant was prejudiced. Respondent sought and received a verdict against Appellant using the erroneous instructions. It is impossible to know whether the jury would have entered a verdict against Appellant for Nurse Farr's conduct alone, because Respondents elected to pursue vicarious liability as to both Nurse Farr (not released) *and* Dr. Herrmann (released). The only fact which is certain is that the jury actually did enter a verdict against Appellant for Dr. Herrmann's released conduct. Plaintiff's evidence about Dr. Herrmann's conduct and its arguments to smear SSM for the conduct of Dr. Herrmann permeated the entire trial.

Because the instruction failed to inform the jury of the essential facts and substantive law regarding the employment relationship as it applied to Respondents' claims, the instructions were erroneous and prejudicial. *Bennett*, 896 S.W.2d at 468 ("[t]he failure of the instruction to give necessary guidance to the jury was error"); *Eisenmann*, 528 S.W.3d at 38-39 (Mo. App. E.D. 2017)(prejudice resulted from erroneous instruction, because jury confusion led to inconsistent verdicts). Accordingly, a new trial is warranted.

V. THE SUBMISSION OF INSTRUCTIONS NO. 11 AND 18 FOR THE CONDUCT OF NURSE FARR WAS ERRONEOUS BECAUSE THEY WERE NOT SUPPORTED BY THE EVIDENCE AND A ROVING COMMISSION IN THAT THERE WAS NO EXPERT TESTIMONY TO SUPPORT THE CLAIM THAT NURSE FARR HAD A DUTY TO KNOW ALL THE VITALS, BREACHED A DUTY TO KNOW THE RESULTS OF THE URINALYSIS, BREACHED A DUTY TO TELL DR. HERRMANN ABOUT THE VITAL SIGN TREND, BREACHED A DUTY TO TELL DR. HERRMANN OF THE URINALYSIS RESULTS, BREACHED A DUTY TO OBTAIN A REASONABLE MEDICAL EXPLANATION FOR THE DISCHARGE FROM DR. HERRMANN, OR BREACHED A DUTY OF PROTECTIVE OVERSIGHT.

Standard of Review

Whether or not a jury was given proper instructions is a question of law that the courts review *de novo*. *Hervey,* 379 S.W.3d at 159. There must be sufficient evidence to support an issue submitted by any given instruction. *Hollis,* 927 S.W.2d at 564 ("Determination of whether the evidence is sufficient to submit the issue to a jury is a legal question and not a matter of judicial discretion"). When the evidence is insufficient to support the submission, and the offending instruction affected the merits of the action, reversal is required. *Ploch*, 213 S.W.3d at 139. It is error for a verdict director to assume a disputed fact. *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 463 (Mo. banc 1998); *Lasky v. Union Elec. Co.*, 936 S.W.2d 797, 800 (Mo. banc 1997); *Spring*, 873 S.W.2d at 226. The verdict is reversed if the offending instruction misdirected, misled, or confused the jury, resulting in prejudicial error. *See Seitz*, 959 S.W.2d at 463.

A jury instruction is also prejudicial if it provides a "roving commission" or is "misleading and confusing." *Grindstaff*, 655 S.W.2d at 74. "When an erroneous instruction is given and the trial results in favor of the party at whose instance it was given, the presumption is that the error was prejudicial." *Id.*

Argument

To establish liability against Appellant for the conduct of Nurse Farr, Respondents were required to prove through expert testimony: "(1) that defendant's act or omission failed to meet the requisite standard of care; (2) proof that the act or omission was performed negligently; and (3) proof of a causal connection between the act or omission and the injury sustained by the plaintiff." *Klaus v. Deen*, 883 S.W. 2d 904, 907 (Mo. App. E.D. 1994); *see also*, *Tompkins v. Cervantes*, 917 S.W. 2d 186, 189 (Mo. App. E.D. 1996).

As a matter of law, "a case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Washington by Washington v. Barnes Hospital*, 897 S.W. 2d 611, 615 (Mo. banc. 1995). Furthermore, "whether there is sufficient evidence to submit an issue to the jury is a legal question in which the jury has no discretion." *Uhle v. Tarlton Corp.*, 938 S.W. 2d 594, 597 (Mo. App. E.D. 1997).

Respondents tendered Instruction No. 11 on the medical negligence claim Instruction No. 18 and on the wrongful death claim, each relating to the conduct of Ms. Farr. (D53 p.14, 22; A20, A27). The instructions as tendered provided:

INSTRUCTION NO. 11

Your verdict must be for the plaintiff Lindsey Setzer and against defendant SSM Health Care St. Louis for the actions of Nurse Amy Farr if you believe:

First, Amy Farr either:

- Failed to know each of Lindsey Setzer's recorded vital signs and urinalysis prior to discharge, or
- Failed to inform Dr. Joseph Herrmann of the trends of Lindsey Setzer's recorded vital signs and urinalysis prior to discharge, or
- Failed to obtain a medically reasonable explanation from Dr. Joseph Herrmann regarding Lindsey's Setzer's heart rate and temperature prior to complying with Dr. Herrmann's order to discharge her, or
- Failed to exercise protective oversight for Lindsey Setzer, or
- Failed to utilize the chain of command to address concerns regarding Lindsey Setzer's condition prior to discharge, and

Second, Nurse Amy Farr, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to Lindsey Setzer.

(D53 p.14; A20).

INSTRUCTION NO. 18

Your verdict must be for the plaintiffs Lindsey and Michael Setzer for the death of Baby Setzer and against defendant SSM Health Care St. Louis for the actions of Nurse Amy Farr if you believe:

First, Amy Farr either:

- Failed to know each of Lindsey Setzer's recorded vital signs and urinalysis prior to discharge, or
- Failed to inform Dr. Joseph Herrmann of the trends of Lindsey Setzer's recorded vital signs and urinalysis prior to discharge, or
- Failed to obtain a medically reasonable explanation from Dr. Joseph Herrmann regarding Lindsey's Setzer's heart rate and temperature prior to complying with Dr. Herrmann's order to discharge her, or
- Failed to exercise protective oversight for Lindsey Setzer, or
- Failed to utilize the chain of command to address concerns regarding Lindsey Setzer's condition prior to discharge, and

Second, Nurse Amy Farr, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause the death of Baby Setzer.

(D53 p.22; A27). The alleged negligent acts were identical in the two instructions. *Id.* At the jury instruction conference, Appellant objected to these instructions for multiple reasons including lack of evidentiary support, vagueness, roving commission, and lack of causation, which were carried forward to Appellant's Amended Post-Trial Motion. (TR741-743, 757; D69 p.16-17). Instructions No. 11 and 18 were erroneous because they were vague, without expert support, and a roving commission. Overall, the instructions contained five submissions of neglect each, and only one (chain of command) was supported by expert testimony.

First, plaintiff nurse expert Beckmann detailed her complaints in her deposition read to the jury as follows: (1) Nurse Farr should have informed Dr. Herrmann of Respondent's increase in pulse and trend of increased pulse; (2) Nurse Farr should have evaluated prior pulses; (3) Nurse Farr should not have discharged Respondent when ordered by Dr. Herrmann, (4) Nurse Farr should have questioned Dr. Herrmann as to why he was discharging Respondent without an antibiotic; (5) Nurse Farr should not have allowed another physician, Dr. Gosser, to sign a prescription order on Respondent's discharge without examining her; (6) Nurse Farr should have informed Dr. Gosser of Respondent's vital signs; and (7) Nurse Farr should have taken her concerns about Respondent's discharge and Dr. Gosser's failure to examine Respondent up the chain of command to the team leader, director of nursing, and/or vice-president of nursing. (TR139-140, Deposition transcript of Claudia Beckmann, May 14, 2018, p.90-98). Plaintiff expert Dr. Heller offered no opinions on the nurses beyond Nurse Farr's use of the chain of command. (TR137-139). As the Court can see, the submissions did not follow the testimony of plaintiff expert Beckman or any of the testimony of the defense experts and contained 4 "new" unsupported submissions.

Instructions No. 11 and 18 both allege that Nurse Farr "[f]ailed to know each of Plaintiff Lindsey Setzer's recorded signs and urinalysis prior to discharge." (D53 p.14, 22). Plaintiffs' nursing expert, Nurse Beckmann, never testified that Nurse Farr had a duty to know ***each*** of Ms. Setzer vital signs before she was discharged. (TR137-140, Deposition transcript of Claudia Beckmann, May 14, 2018, p.22, 54, 58, 91). Ms. Beckman only testified that Nurse Farr had a duty to know Respondent's pulse and pulse trend. (TR139-140, Deposition transcript of Claudia Beckmann, May 14, 2018, p.90-92). There was no evidence that Nurse Farr had a duty to know the results of the urinalysis.

Next, Instructions No. 11 and 18 both allege that Nurse Farr "[f]ailed to inform Dr. Herrmann of the trends of Lindsey Setzer's recorded vital signs and urinalysis prior to discharge." (D53 p.14,22). This allegation was not supported by the testimony of Plaintiffs' experts. Ms. Beckman only testified that Nurse Farr had a duty to know Respondent's pulse and pulse trend, and to report those to Dr. Herrmann and Dr. Gosser. (TR139-140, Deposition transcript of Claudia Beckmann, May 14, 2018, p.90-98). Additionally, the evidence adduced demonstrates Nurse Farr testified that she did tell Dr. Herrmann about the last two sets of vitals and Dr. Herrmann testified that he knew about the vital sign trend when he made his decision. (TR634, 640-641).

Next, Instructions No. 11 and 18 both allege that Nurse Farr "[f]ailed 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[.]" (D53 p.14, 22). This allegation was not supported by the testimony of Plaintiff's experts and it was vague and roving commission. Neither of plaintiffs' experts ever used the term "medically reasonable explanation" in their deposition testimony presented at trial. (TR137-140). Absent appropriate expert testimony, the layperson jury has no way of knowing what would be considered a "medically reasonable explanation." *See, St. Joseph's Hosp. of Kirkwood v. Schierman*, 829 S.W.2d 4, 6 (Mo. App. E.D. 1991).

Additionally, neither of Plaintiffs' experts testified there was any such duty nor that there was any violation of that duty. *Id.* Rather, the evidence showed Nurse Farr called Dr. Herrmann twice about the discharge. (TR634, 640-641). Dr. Herrmann testified he had the proper information for discharge, gave orders for discharge, and for Respondent Lindsey Setzer to follow up with her private obstetrician, Dr. Super, in the morning. (TR504, 510-511). Nurse Farr testified these were common discharge orders. (TR640).

Next, Instructions No. 11 and 18 both allege that Nurse Farr "[f]ailed to exercise protective oversight for Lindsey Setzer[.]" (D53 p.14,22). This allegation was not supported by the testimony of Respondents' experts and it was a vague, roving commission not supported by the evidence. Neither of Plaintiffs' experts ever used the term "protective oversight" in their deposition testimony read at trial. (TR137-140). Therefore, the jury had no way of knowing what "protective oversight" is or what it means to fail to exercise protective oversight.

Appellant's expert, Dr. Pearse, did testify that a nurse should use protective oversight when treating a patient. (TR463). However, Dr. Pearse also testified that Nurse Farr was not negligent in any fashion. (TR432). Therefore, the *only* evidence arguably regarding this term provided Nurse Farr did not breach this duty. In order to submit a claim of professional negligence to the jury, the plaintiff must prove a duty, a breach, and causation in fact. *Klaus,* 883 S.W. 2d at 907. Here, Respondents adduced no evidence of a breach or causation for this submission. The term "protective oversight" was vague and confusing to the jury. (D53 p.14, 22).

Both instructions submitted that Nurse Farr "failed to utilize the chain of command" before discharge. (D53 p.14, 22). While Nurse Beckmann testified at length about this, there was never any testimony about how the persons in the chain of command would have acted if consulted or how that would have changed the outcome. (TR137-140). Further, Nurse Farr did utilize the chain of command when she addressed her concerns over the increased pulse with Dr. Herrmann as he is the first person in the "chain." (TR139-140, Deposition of Claudia Beckmann p.26-28; and TR309-310).

The law is clear that an instruction submitted without evidentiary support is reversible error. *Doe 1631 v. Quest Diagnostics, Inc.*, 395 S.W.3d 8, 11 (Mo. banc 2013).

Instructions No. 11 and 18 each presented a laundry list of allegedly negligent conduct not supported by substantial evidence, indeed not supported by any evidence whatsoever. The Court of Appeals held, in essence, that no prejudice resulted from the submission of an erroneous instruction not supported by evidence. The effect of this holding permits a plaintiff to submit multiple disjunctive submissions of neglect to the jury, and as long as one of them is supported by the expert testimony, the plaintiff can avoid reversal. This is not permitted by Missouri law. "In the case of a disjunctive instruction, each submission must be supported by substantial evidence." *Lowe*, 592 S.W.3d at 21; *see also*; *Berra*, 803 S.W.2d at 190. If no evidence supports a submission, the submission is improper, and the burden shifts to the submitting party, here Respondents, to demonstrate that *no* prejudice resulted from their erroneous and unsupported submission. *Quest Diagnostics*, 395 S.W.3d. at 15 ("Instruction No. 9

directed the jury to consider a nonexistent written authorization, and was, therefore, improper. Because the instruction was improper, the burden shifts to Quest to show that Mr. Doe was not prejudiced as a result.").

Based on the foregoing, the Circuit Court erred in submitting these instructions and in denying Appellant's post-trial motion for a new trial. This Court should reverse and remand for a new trial.

VI. THE SUBMISSION OF INSTRUCTIONS NO. 11 AND 18 FOR THE CONDUCT OF NURSE FARR WAS ERRONEOUS BECAUSE THERE WAS NO "BUT FOR" CAUSATION FOR THE SUBMISSION IN THAT A NURSE IS NOT OBLIGATED TO DISCLOSE KNOWN FACTS AND IN THAT DR. HERRMANN ADMITTED KNOWING THE VITAL SIGNS, LAB RESULTS AND RADIOLOGY STUDY RESULTS AND, THUS, HIS CONDUCT WAS AN INTERVENING ACT.

Standard of Review

Whether or not a jury was given proper instructions is a question of law that the courts review *de novo*. *Hervey*, 379 S.W.3d at 159. There must be sufficient evidence to support an issue submitted by any given instruction. *Hollis,* 927 S.W.2d at 564 ("Determination of whether the evidence is sufficient to submit the issue to a jury is a legal question and not a matter of judicial discretion"). When the evidence is insufficient to support the submission, and the offending instruction affected the merits of the action, reversal is required. *Ploch*, 213 S.W.3d at 139. It is error for a verdict director to assume a disputed fact. *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 463 (Mo. banc 1998); *Lasky v. Union Elec. Co.*, 936 S.W.2d 797, 800 (Mo. banc 1997); *Spring*, 873 S.W.2d at 226. The verdict is reversed if the offending instruction misdirected, misled, or confused the jury, resulting in prejudicial error. *See Seitz*, 959 S.W.2d at 463.

Argument

In addition to the lack of evidentiary support described above in Point IV, the submission of Instructions No. 11 and 18 was also in error because Respondents did not establish a submission case of "but for" causation. Specifically, Instructions 11 and 18 submitted that Nurse Farr was negligent for failing to know the recorded vitals and urinalysis prior to discharge and failed to inform Dr. Herrmann of the vital sign trend and the urinalysis prior to discharge.

Dr. Herrmann testified at trial that he knew all the vitals and had enough information for him to order the discharge. (TR505, 509). There cannot be any causation for the failure of a nurse to know all the vital signs without any link to the discharge or the claimed injury. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. banc 1993). The circumstances in *Callahan* are remarkably similar to those here. In *Callahan*, the patient was seen by a nurse practitioner, who then conferred with a supervising physician, but that the physician never personally saw the patient. *Id*. at 857. The Court set forth a lengthy discussion of causation, ultimately concluding that a nurse, such as Nurse Farr in this case, cannot be liable where the physician already has knowledge of the underlying facts (*Id*. at 862.):

> [I]f the doctor had another source of information as to [the patient's] presence and condition at the hospital, such as the medical records, then the doctor's negligence would have been independently sufficient to cause the injury to [patient]. In this circumstance, [the nurse practitioner's] conduct would not have met the "but for" causation test because, if the doctor already knew of [patient's] condition, then [the nurse practitioner's] failure to tell the doctor something that he already knew would not be causal…[.]

Contrary to the holding in *Callahan*, jury instructions 11 and 18 required a verdict in favor of Plaintiffs if Nurse Farr either failed to know each of Lindsey Setzer's vital signs or failed to inform Dr. Herrmann of the trends and vitals and of the urinalysis. Contrary to Plaintiff's assertions, the evidence adduced at trial clearly shows that Dr. Herrmann had access to and knew all of Lindsey Setzer's vitals at the time of her discharge from SSM. (TR505-506, 509, 535, 538-539). Dr. Herrmann testified he knew the results of the urinalysis and the two ultrasounds. (TR 504, 509, 511-12). Respondents failed to adduce any evidence Nurse Farr had a duty to know all vitals and the urinalysis results or that the outcome would have been different if she had known all those items. *Tompkins*, 917 S.W. 2d at 189.

Dr. Herrmann also testified that he already knew about the results of the urinalysis. (TR504, 511-12). Nurses have no duty to disclose to physicians what they already know. *Harvey v. Washington*, 95 S.W.3d 93, 96 (Mo. 2003). In *Harvey*, the plaintiff submitted a verdict director that one of the physician defendants "failed to advocate for dialysis treatment", similar to the submission that Nurse Farr failed to know all the vitals and failed to exercise protective oversight. *Id*. at 95 Instruction 11 (D53 p.14; A20). This Court, citing *Callahan,* held that there was no "but for causation" because the codefendant kidney specialist who was also managing the patient was aware that the patient's seizures could reflect kidney failure requiring dialysis. *Harvey,* 95 S.W. 3d at 97. Here the application is that Dr. Herrmann's conduct was an independently sufficient intervening cause for the injury. There can be no but-for causation for this alleged error. *Id; see also Schierman*, 829 S.W.2d at 6 (Mo. App. E.D. 1991).

There must be sufficient evidence to support an issue submitted by any given instruction. *Hollis,* 927 S.W.2d at 564 ("Determination of whether the evidence is sufficient to submit the issue to a jury is a legal question and not a matter of judicial discretion"). When the evidence is insufficient to support the submission, and the offending instruction affected the merits of the action, reversal is required. *Ploch*, 213 S.W.3d at 139. If no evidence supports a submission, the submission is improper, and the burden shifts to the submitting party, here Respondents, to demonstrate that *no* prejudice resulted from their erroneous and unsupported submission. *Quest Diagnostics*, 395 S.W.3d. at 15.

VII. THE TRIAL COURT ERRED WHEN IT SUBMITTED INSTRUCTION NO. 14 AND VERDICT FORM A TO THE JURY, OVER DEFENSE OBJECTION, BECAUSE (A) VERDICT FORM A INCLUDED THE DAMAGE ELEMENT FOR "FUTURE ECONOMIC DAMAGES" AND AS PLAIN ERROR UNDER RULE 30.20 IN THAT SUCH ELEMENT WAS NOT DEFINED FOR THE JURY IN INSTRUCTION NO. 14 AND OMITTED BY RESPONDENT'S COUNSEL IN VIOLATION OF RULE 70.02, AND (B) INSTRUCTION 14 INCLUDED FUTURE ECONOMIC DAMAGES AND FUTURE MEDICAL DAMAGES IN THAT THERE WAS NO EXPERT SUPPORT FOR SUCH DAMAGE ELEMENTS.

Standard of Review

Whether or not a jury was given proper instructions is a question of law that the courts review *de novo*. *Hervey,* 379 at 159. There must be sufficient evidence to support an issue submitted by any given instruction. *Hollis,* 927 S.W.2d at 564. When the evidence is insufficient to support the submission, and the offending instruction affected the merits of the action, reversal is required. *Ploch*, 213 S.W.3d at 139.

A jury instruction is also prejudicial if it provides a "roving commission" or is "misleading and confusing." *Grindstaff*, 655 S.W.2d at 74. "When an erroneous instruction is given and the trial results in favor of the party at whose instance it was given, the presumption is that the error was prejudicial." *Id.*

Argument

This Point relates to the damage instruction and verdict Form B submitted by Respondents on Ms. Setzer's individual personal injury claim.

1. *Future economic damages excluding future medical damages*

Respondents submitted to the trial court their proposed Instruction No. 14, and the "dirty" copy stated "MAI 21.05 Submitted by plaintiff." Rule 70.02 governs the procedure for instructions to juries and states that instructions shall be tendered to the court and each party with notations "MAI No. ___" or "MAI No. ___ modified" or "Not in MAI" as the case may be. Rule 70.02(a). Respondent's counlse violated Rule 70.02 because they modified MAI 21.05 because it deleted the definition of "future economic damages excluding medical damage" while keeping that damage element in Verdict A. (D53 p.17; A23, A31-A32). As submitted, Instruction No. 14 provided:

INSTRUCTION NO. 14

In these instructions, you are told to itemize any damages you award by the categories set forth in the verdict form A.

The phrase "past economic damages" means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services and or past lost earnings and for past lost earning capacity.

The phrase "past non-economic damages" means those damages arising in the past from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

The phrase "future medical damages" means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services.

The phrase "future non-economic damages" means those damages arising in the future form non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

MAI 21.05

Submitted by plaintiff

(D53, p.17; App.23).

Verdict A included an award of $239,712 "[f]or future economic damages excluding future medical damages" when that term was never defined for them in Instruction 14. (D53 p.26-27; A31-32).

Verdict A:

For past economic damages including past medical damages	$ 100,000
For past non-economic damages	$ 180,000
For future medical damages	$ 175,000
For future economic damages excluding future medical damages	$ 239,712
For future non-economic damages	$ 300,000
TOTAL DAMAGES	$ 994,712

(D100 p.30).

Appellant's counsel objected to the inclusion of future medical expense in Instruction No. 14 because there was no evidence that Ms. Setzer needed future medical care due to neglect and no medical expert testimony to support such a submission. (TR747-48). Defendant did not object to Verdict Form A because it was straight out of MAI and plaintiff's counsel had not marked his dirty copy of Instruction No. 14 showing that it had been modified.

To the extent Appellant's objection during the instruction conference did not object to Verdict Form A, Appellant requests review under the plain error doctrine in Rule 30.20. A court may review a point on appeal under the plain error doctrine where the trial court's error results in "manifest injustice or a miscarriage of justice." *Flood ex rel. Oakley v. Holzwarth*, 182 S.W.3d 673, 676 (Mo. App. S.D. 2005) (internal quotation and citation omitted). Here, plain error review is warrant, to the extent the point was not preserved by Appellant's objections during the instruction conference, because Respondents revisions to the instructions were not apparent, due to Respondents' failure to indicate "modified" or "Not in MAI" as required by Rule 70.02.

The erroneous instruction and verdict form clearly and demonstrably confused jury. During deliberations, the jury submitted the question: "Is it possible for the foreperson to ask the judge a face-to-face question regarding votes for verdict that is complex to explain without using the jury packet as a visual?" (TR838-839). The Court responded the jury would have to be guided by the instructions the Court had given them. *Id.* This question demonstrates the jury was confused by the lack of instruction on the omitted definition for the damage category. *Id.* A jury's question may be considered to determine whether an instruction is proper, but it is not conclusive. *Kampe v. Colom*, 906 S.W.2d 796, 806 (Mo. App. W.D. 1995).

Missouri courts have previously emphasized the prejudice that may result from an omitted instruction. For example, in *Wright v. Edison*, in reviewing a verdict-directing instruction, this Court found that the instruction offered by the plaintiff was prejudicially erroneous because it failed to define the term "trespass." 619 S.W.2d 797, 802 (Mo. App. E.D. 1981). The Court reasoned that while the meaning of nontechnical, readily understandable phrases need not be explained, "where technical legal terms are used in instructions, they *must* be defined therein." *Id.* (emphasis added). In the instant case, legal terms of art such as "future economic damages," (like the term "trespass" at issue in *Wright*) are technical legal terms that ***must*** be defined to properly instruct the jury.

There was also no evidence to support an award of future economic damages excluding medical damages. Respondents offered no expert testimony on work disability and no economist testified for Respondents. Respondents' only physician expert testified that he had *no opinions* on Respondent Lindsey Setzer's then-current condition and offered no testimony as to disability, damages, or medical bills. (TR137-139, Deposition transcript of Dr. Ross Heller, November 25, 2015, p.121; D.70 p.6) Respondent Lindsey Setzer's only testimony was that she had stretch marks on her legs, a sore throat, coughing spells and a granuloma on her vocal cords. (TR211-215). Accordingly, Appellant objected Instruction No. 14 using MAI 21.05 and the lack of supporting evidence. (TR746-749).

When the verdict was read, Appellant noticed the inconsistent verdicts and immediately brought the matter to the court's attention and requested that the jury should have be instructed to go back and re-deliberated, using correct instructions. (TR844-847). Respondents objected to this and the Court released the jury. (TR844-847). Appellant is entitled to a new trial because Respondent Lindsey Setzer awarded of $239,712 in damages for a category of damages that was not defined for the jury, where no evidence to support the submission. (A1-A2; A31-A34). The error was clearly prejudicial, amounting to reversible error under *Wright*, 619 S.W.2d at 802; Rule 30.20 Should the Court deny the request for a JNOV or new trial, then in the alternative, this Court should vacate that portion of the award for this damage element. *Ball v. Allied Physicians Grp., L.L.C.*, 548 S.W.3d 373, 382 (Mo. App. E.D. 2018).

2. *For past economic damages including past medical damages*

Instruction No. 14 included the following damage category: “the phrase ‘past economic damages’ means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services and or past lost earnings and for past lost earning capacity.” (D53 p.17, 25). The erroneous instruction prejudiced Appellant, because the jury awarded $100,000 for this category of damages. (D110 p.30).

To recover for medical expenses, a plaintiff bears the burden of “proving the necessity and reasonableness of those expenses.” *Lampe v. Taylor*, 338 S.W.3d 350, 360 (Mo. App. S.D. 2011). The plaintiff must show substantial evidence that the charges were reasonable and represent services “reasonably necessary to treat, alleviate, or cure injuries sustained as a result of the incident.” *Williams v. Jacobs*, 972 S.W.2d 334, 342 (Mo. App. W.D. 1998). While there was evidence that the medical care was reasonable, the issue is whether the bills were incurred due to the claimed medical neglect. *Id.* In order for bills to be admissible as relevant, the proponent must prove that the bills were incurred due to the neglect of the defendant and that the charges were reasonable and necessary. *Hughes v. Palermo*, 911 S.W.2d 673, 675 (Mo. App. E.D. 1995).

Here, Respondents offered the bills from SSM St. Clare and Mercy Hospitals. (TR223-225; Respondents’ Exhibit 2; TR226-229; Respondents’ Exhibit 4). Appellant objected to the admission of the bills because Respondents offered no medical expert support for the bills, but the objection was overruled. (TR223-229). Neither of Appellants’ experts saw the medical bills or offered testimony on the bills. (TR137-140).

Appellant renewed its objection during the jury instruction conference to "past economic damages" being included on the jury instruction (TR747-748, 759-763) because no expert testified the bills were due to medical neglect. Appellant's counsel pointed out that even Respondents' expert testified that Ms. Setzer needed to be in the hospital for treatment of her kidney stones and infection. (TR747-48). Because there was no expert testimony that the hospital bills were reasonable and necessary, it was error to submit this evidence to the jury. *See, e.g., Lampe*, 338 S.W.3d at 360. While defense expert Dr. Pearse said the care at Mercy was reasonable, he did not opine that it was due to the negligent conduct submitted to the jury.

The term past economic damages also included past lost wage, but Ms. Setzer testified that she did not lose any wages. (TR 246).

The submission of past economic damages was not supported by the evidence and the award of $100,000 for this category was erroneous and warrants a new trial.

3. For future medical damages

In Instruction No. 14 , the jury was instructed that "the phrase 'future medical damages' means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitation services." (D53 p.17,25). The jury awarded $175,000 for this category on Verdict A for the medical negligence count. (D53 p.26-29; TR841). Appellant objected to the inclusion of this damage element because there was no medical evidence or expert testimony that Ms. Setzer needed any future medical care. (TR748).

To recover for future medical expenses, a plaintiff must show either (a) there is an increased risk of suffering possible future consequences, or (b) that a future injury is reasonably certain to occur. *Ball*, 548 S.W.3d at 382. Respondent Lindsey Setzer testified at trial that her injuries were stretch marks on her thighs, a sore throat and coughing spells from being intubated, and a granuloma on her vocal cord. (TR211-215). However, she offered no testimony as to specific planned follow up treatment for any of these injuries. *Id*. The bills presented were for her initial hospital stays back in 2012. (TR223-225; Plaintiff's Exhibit 2; TR226-229; Plaintiff's Exhibit 4). Respondents' only physician expert, Dr. Heller, stated in his deposition that "I am not offering opinions" on her current condition and did not offer any testimony about the need for future medical treatment. (TR137-139, Deposition transcript of Dr. Ross Heller, November 25, 2015, p. 121; D.70 p.6).

In *Ball*, the plaintiff sued a doctor when a hypodermic needed broke during an injection and the needle became lodged in her back. 548 S.W.3d at 378. At trial, the jury found in favor of the plaintiff and she was awarded $507,000 including $185,000 for future medical damages. To prove her damages, the *Ball* plaintiff presented expert testimony that the needle migrated approximately six inches from its initial location, where it became lodged and immobilized by scar tissue close to the patient's spine. *Id*. at 380. The scar tissue itself could grow, causing further complications, in the event of ongoing inflammatory problems, but would otherwise likely remain static. *Id*. However, the patient reported no current pain in the location of the needle and surgical intervention would only be necessary if the migrated further, which would occur in the event of a trauma, such as a car accident or bad fall. *Id.*

The appellate court reversed this portion of the award and noted that neither Ball nor her expert witness testified that she needed "drugs, therapy, or any of the listed services, including surgery." *Id.* at 383. The *Ball* court then vacated this portion of the award on appeal as not supported by the evidence.

Similar to *Ball*, in the instant case, Respondents presented no medical expert testimony Ms. Setzer would require future medical care. Although Respondent Lindsey Setzer described her injuries, she did not testify as to any future treatment that had been recommended to her. (TR211-215). Furthermore, Respondents' physician expert, Dr. Heller, said specifically that he had no opinions on Lindsey Setzer's then-current medical condition. (TR137-139, Deposition transcript of Dr. Ross Heller, November 25, 2015, p. 121; D.70 p.6).

While Ms. Setzer described the medical problems she attributed to her delayed diagnosis (TR211-215), she and her experts never testified that future care was needed for those conditions. *Ball,* 548 S.W.3d at 382. Accordingly, based on the instruction given to the jury, there was no evidentiary basis for the award of the $175,000 in Verdict A for future medical damages. Therefore, again the instruction was prejudicial as it allowed the jury to enter an award against Appellant without an evidentiary basis. "When an erroneous instruction is given and the trial results in favor of the party at whose instance it was given, the presumption is that the error was prejudicial." *Grindstaff*, 655 S.W.2d at 74.

Appellant preserved the issue via its post-trial motion. (D69 p.9,12). When the evidence is insufficient to support the submission, and the offending instruction affected the merits of the action, reversal is required. *Ploch*, 213 S.W.3d at 139. Further, when the instructional error goes to issues beyond damages, it is proper to reverse and grant a new trial on all issues. *S. Missouri Bank v. Fogle,* 738 S.W.2d 153, 159 (Mo. App. S.D. 1987); *see Schoor v. Wilson*, 731 S.W.2d 308, 314 (Mo. App. W.D. 1987)("Where the facts pertaining to damages and liability are so interwoven and liability is contested, it is prejudicial to not award a new trial on all issues."); *Thomas v. Durham Motors, Inc.*, 389 S.W.2d 412, 416 (Mo. App. W.D. 1965)("Where the facts pertaining to damages and liability are so interwoven that a retrial on the issue of damages only would prejudice a party the trial court should not limit the retrial to the damage issue. The issue must be clearly severable from the other issues in the case and not so blended or interwoven as to make it unfair or prejudicial to try them separately"); *see e.g. Rider v. The Young Men's Christian Ass'n of Greater Kansas City*, 460 S.W.3d 378, 385 (Mo. App. W.D. 2015) (erroneous submission of comparative fault instruction prejudiced plaintiff and thus required reversal of judgment reducing plaintiff's damages by percentage of comparative fault). This Court should reverse and remand for a new trial.

VIII. THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JNOV ON THE VERDICTS ARISING FROM THE CONDUCT OF DR. HERRMANN BECAUSE THERE WAS NO EVIDENCE OF HIS EMPLOYMENT OR CONTROL OF HIS CONDUCT BY APPELLANT IN THAT MEDICAL STAFF BYLAWS DO NOT CREATE CONTROL, AND DR. HERRMANN TESTIFIED THAT HE WAS NOT EMPLOYED BY APPELLANT AND EXERCISED HIS OWN INDEPENDENT MEDICAL JUDGMENT WHEN TREATING RESPONDENT LINDSEY SETZER.

Standard of Review

This Court reviews the denial of a motion for JNOV under the same standard as the denial of a motion for directed verdict; i.e., to determine whether substantial evidence supports each and every fact essential to liability. *Sanders v. Ahmed*, 364 S.W.3d 195, 208 (Mo. banc 2012). The Court views the evidence in a light most favorable to the verdict reached by the jury, and will reverse only when there is a complete absence of probative evidence supporting the jury's verdict. *Id*. The Court will reverse a jury's verdict for insufficient evidence only when there are no probative facts to support the jury's conclusion. *Merseal v. Farm Bureau Town & Country Ins. Co. of Mo.*, 396 S.W.3d 467, 470 (Mo. App. E.D. 2013).

Argument

The verdict must be reversed because there was a complete absence of probative facts supporting it with respect to Respondents' expert evidence and testimony. As stated, Respondents submitted a vicarious liability claim against Appellant for the conduct of Dr. Herrmann as the "agent" of the hospital. While the issue of the Release and jury instructions are covered elsewhere (Points II and III), Respondents' claims also must fail because they failed to adduce probative facts supporting that theory of liability.

Specifically, there was insufficient evidence of any agency or employment relationship to even permit the vicarious liability submission.

The mere affiliation between a hospital and third party physician does not create vicarious liability for the hospital arising from the third party physician's malpractice. *Hefner v. Dausmann*, 996 S.W.2d 660, 667 (Mo. App. S.D. 1999). The plaintiff/patient has the burden to establish facts sufficient to support a finding of agency. *Id*. ("the record would not support a reasonable legal opinion that a case could be made against [the hospital]"). Similarly, the mere fact a third party physician has privileges to use a hospital's facility or admit patients at the hospital is insufficient to create an employment or agency relationship with the hospital. *Wilcox v. Lake Regional Health System*, 2016 WL 5939351 at *3, No. 2:16-cv-05058-MDH (W.D. Mo. Oct. 12, 2016). The fact the hospital's records may refer to the physician as "on staff" is also insufficient to create an agency relationship as a matter of law. *Id*. (granting summary judgment). Rather, in analyzing the hospital-physician relationship, "the central rule is that the more control the principal may exercise over the agent, the more likely the agent is an employee." *Id*. (quoting *Jefferson ex rel. Jefferson*, 447 S.W.3d at 711).

Here, the evidence presented was insufficient to establish an employment / agency relationship between Dr. Herrmann and Appellant necessary to support the verdicts based on his conduct. Respondents' only evidence on this point was that Dr. Herrmann was on the St. Clare Medical staff, agreed to be bound by the Medical Staff Bylaws, and had an obligation to accept call from the emergency room for patients with no private physician on the medical staff. (TR496).

Dr. Herrmann expressly testified that he was employed by his own corporation, had no contract with Respondent, was not paid by Respondent and that Respondent did not control his medical decision making. (TR494-97). As it relates to medical staff bylaws, Dr. Herrmann also testified that he was on the medical staffs of various other area hospitals, including Mercy, Missouri Baptist Medical Center, and St. Luke's Hospital, each of which had similar medical staff bylaws. (TR496). He further testified that he is required to take calls from the emergency department like he did here at both Missouri Baptist and St. Luke's Hospital. (TR496).

The evidence even when viewed in the light most favorable to the Respondents were insufficient to establish an employment relationship under Missouri law, because Respondents adduced no evidence whatsoever to demonstrate Appellant exercised control over Dr. Herrmann. His staff privileges and the bylaws alone are insufficient as a matter of law. *Hefner*, 996 S.W.2d at 667; *Wilcox*, 2016 WL 5939351 at *3. Appellant preserved this issue on appeal by setting it forth in its post-trial motion for JNOV. (D69 p.24-25). The error resulted in prejudice to Appellant because, as described, the judgment entered in accordance with the jury's verdicts found Appellant vicariously liable for Dr. Herrmann's conduct, a finding not supported by any probative facts to support the jury's conclusion. *Merseal*, 396 S.W.3d at 470. The fact that the jury also entered a verdict for Nurse Farr's conduct does not negate the prejudicial effect of the erroneous submission, because "each submission must be supported by substantial evidence." *Lowe*, 592 S.W.3d at 21; *see also*; *Berra*, 803 S.W.2d at 190. This Court should reverse and remand, granting Appellant a JNOV on the claims arising from the conduct of Dr. Herrmann.

IX. THE TRIAL COURT ERRED IN DENYING APPELLANT'S POST-TRIAL MOTION TO MODIFY THE JUDGMENT TO PERMIT APPELLANT TO PAY FUTURE DAMAGES IN PERIODIC PAYMENTS, WITHOUT HEARING, IN THAT THERE WAS A TIMELY REQUEST FOR PERIODIC PAYMENTS AND THE FUTURE DAMAGES EXCEEDED THE THRESHOLD SET OUT IN RSMO §538.220.

Standard of Review

Entry of, or refusal to enter, a periodic payment schedule is reviewed for abuse of discretion. *Williams v. Mercy Clinic Springfield Communities*, 568 S.W.3d 396, 408 (Mo. banc 2019). The requirement that the Court hold an evidentiary hearing in determining whether to enter a plan is set forth in section 538.220.2, RSMO., which states in relevant part that "in the event the parties cannot agree [on the schedule], the unresolved issues shall be submitted to the court for resolution, either with or without a post-trial evidentiary hearing which may be called at the request of any party or the court." *See also Vincent by Vincent v. Johnson*, 833 S.W.2d 859, 867 (Mo. banc 1992).

Argument

The judgment entered in this case contains the following categories of damages: On Verdict A the jury awarded Respondent Lindsey Setzer: (1) $175,000.00 in future medical damages ; (2) $239,712 in future economic damages excluding medical; and (3) $300,000 in future non-economic damages. On Verdict B the jury awarded Respondents $300,000 in future non-economic damages. Therefore, the judgment contains awards of three types of future damages all subject to the provisions of RSMO §538.220.2.

For all awards of future damages, medical or non-medical, RSMO §538.220.2 requires that upon request by any party, in entering any award for medical malpractice, the court "shall" include a requirement the damages be paid in whole or in part in periodic payments. Procedurally, the parties "shall" be afforded the opportunity to agree on the manner and interest rate of future damages subject to court approval. *Id*. If there is no agreement, the unresolved issues must be submitted to the court for resolution. *Id*. Any party has the right to request a post-trial evidentiary hearing on this submission. *Id*.; see also *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 646-47 (Mo. banc 2012) (discussing that these provisions of section 538.220.2 apply to all types of future damages).

Appellant included a request for periodic payments in its Answer (D4 p.4), restated its request on the record prior to the jury returning with its verdict (TR839-40) and again in the post-trial motion (D54 p.1). Pursuant to the statute, the trial court should have set a payment schedule, including the recipient, the amount of each payment, the interval between payments, and the number of payments. *Id*.

As stated, the statute further directs that the parties themselves "shall be afforded" the opportunity to agree on the manner of payments and interest. *Id*. In the event the parties cannot agree, the statute further directs the court to resolve the issue, for which all parties have the right to request an evidentiary hearing. *Id*.; *Vincent by Vincent*, 833 S.W.2d at 866. Once a party invokes the terms of the statute, trial courts are "required to follow the dictates" of the statute. *Lowe*, 592 S.W.3d at 29.

Respondents introduced the Social Security Administration's 2014 Life Expectancy Table, showing Respondent Lindsey Setzer had an additional 52.06 years of life expectancy. (TR240, 245, Plaintiff Ex 14). Therefore, the Circuit Court should have set the duration of periodic payments at 52.06 years. The trial court is obviously invested with discretion to decide what portion of the future awards should be paid up front and what portion is due counsel, but the court's order must set forth the schedule of future payments according to a "schedule of *unvarying*, *equal* payments. *Id*. (emphasis in original, reversing trial court's order requiring future payments be made in varying, unequal annual amounts).

The Circuit Court erroneously failed to hold a hearing and enter a proper schedule for payment of future damages. *Vincent by Vincent*, 833 S.W.2d at 866. Respondents and Appellant submitted competing orders on periodic payments and did not agree on how to apply the statute. (D74, D79).

Accordingly, should this Court reject all points on appeal and affirm the Judgment, then it should also remand to the trial court for a full hearing on periodic payments.

X. THE CIRCUIT COURT ERRED IN FAILING TO REMOVE JUROR #6 AND SEAT AN ALTERNATE BECAUSE JUROR #6 SUBMITTED A QUESTION TO THE BAILIFF BEFORE THE EVIDENCE CLOSED IN THAT THE QUESTION WAS READ TO COUNSEL AND PERMITTED RESPONDENTS' COUNSEL TO FOCUS ON THAT ISSUE IN CLOSING ARGUMENT.

Standard of Review

It is axiomatic that civil litigants have a constitutional right to a fair and impartial jury of twelve qualified jurors. Mo. Const. Art. I, Sec. 22(a); *Williams By and Through Wilford v. Barnes Hosp*., 736 S.W.2d 33, 36 (Mo. banc 1987). The substitution of an alternate juror for a regular juror during trial is reviewed for abuse of discretion. *Yaeger v. Olympic Marine Co.*, 983 S.W.2d 173, 187 (Mo. App. E.D. 1998). However, "Replacement of a juror with an alternate is an appropriate remedy when there is a *possibility* of bias." *Hudson v. Behring*, 261 S.W.3d 621, 624 (Mo. App. E.D. 2008) (emphasis in original). *See also*; *Piehler v. Kansas City Public Service Co.*, 211 S.W.2d 459, 463 (Mo. 1948).

Argument

Juror #6, Jason Nowak, was seated and qualified. On the fifth day of trial, the bailiff informed the Court that Juror #6 had submitted a written question using the forms traditionally used during deliberations. The juror was brought to the court room and his question was: "What is the maximum size stone that doctors expect a patient to be able to pass naturally? I believe one witness stated that anything over 6 millimeters is too large to pass naturally, but Lindsey had a 13-millimeter stone in her kidney which is over one-half inch in diameter, wouldn't that block the urethra if she tried to pass it naturally?" (TR704; D77). Appellant immediately moved for a mistrial which was denied. (TR705-715). Appellant's counsel then moved to remove the juror and seat an alternative because the question posed would permit the Respondents' counsel to highlight that medical issue in closing argument and gain an improper advantage over the defense. (TR716-717). The Circuit Court denied that request also. (TR717). During the closing argument, Respondents' counsel on two different occasions mentioned the size of the kidney stone and argued that it would *not* pass naturally. (TR824, 831). Appellant's urology expert Dr. Matlaga testified that this kidney stone could be safely treated on an out-patient basis and would pass naturally and that this was the proper treatment for pregnant or non-pregnant patients with kidney stones. (TR586).

Juror #6 had obviously been listening to the medical evidence and was comparing the testimony of the experts on the size of the kidney stone and whether it would pass naturally which would be proper if expressed during deliberation. However, in this case the juror submitted this question prior to closing, and therefore allowed Respondents' counsel to understand the juror's internal thought processes *during* the ongoing trial. "The courts presume prejudice when a non-juror has an unauthorized communication with jurors." *State v. Rudolph*, 456 S.W.3d 506, 509 (Mo. App. E.D. 2015).[9] On that basis, Missouri Courts have held that a juror's speculation on the evidence or drawing unwarranted conclusions may suggest juror bias, for which the appropriate remedy is

---

[9] Although these circumstances arise more commonly in criminal litigation, the reasoning is not limited to criminal concerns.

removal of the juror. *Milam v. Vestal*, 671 S.W.2d 448, 453 (Mo. App. S.D. 1984) (removal of a juror was warranted in a motor vehicle accident case after the juror was overheard speculating on the evidence with two other jurors). The circumstances are even more severe here, because the question was communicated to Respondents' counsel, who highlighted that issue during closing argument.

The Circuit Court erred in failing to remove Juror #6 and seat an alternate and erred in denying SSM's motion for mistrial. This error was prejudicial and SSM is entitled to reversal and a new trial. *Rudolph*, 456 S.W.3d at 509.

XI. THE CIRCUIT COURT ERRED IN PERMITTING RESPONDENTS TO OFFER EVIDENCE OF LOST FINANCIAL SUPPORT BY WAY OF TAX RETURNS IN AN EFFORT TO UTILIZE THE REBUTTABLE PRESUMPTION FOUND IN RSMO §537.090 BECAUSE RESPONDENTS HAD NO ECONOMIC EXPERT, AND ANY ALLEGED PRESUMPTION HAD BEEN REBUTTED, IN THAT THE APPELLANT'S ECONOMICS EXPERT HAD OPINED ON THE LACK OF AN ECONOMIC BASIS TO SUPPORT THE CLAIM.

Standard of Review

A trial court's admission and exclusion of evidence is reviewed for an abuse of discretion. *Frazier v. City of Kansas*, 467 S.W.3d 327, 338 (Mo. App. W.D. 2015). A trial court abuses its discretion mandating reversal based on the exclusion of evidence where the excluded evidence 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

Prior to trial, Respondents filed a Motion for Partial Summary Judgment seeking to have the trial court find that there was evidence of pecuniary loss under the rebuttable presumption found in RSMO §537.090. (D6). Defendant timely responded with an affidavit from defense economist Professor Rebecca Summary. (D15). The Court denied the Respondents' motion. Prior to trial, Appellant moved in limine to bar Plaintiffs from asserting any pecuniary losses as a result of the death and that motion was denied. (D40, 43). At trial, Respondents offered tax returns and Respondents' counsel introduced that evidence by asserting that they claimed the damages from the death could be calculated using the parents' income. (TR241, 246). Then in closing argument, Respondents' counsel asserted that they claimed pecuniary losses from this presumption. (TR787).

All of Respondents' evidence and arguments should have been precluded as Respondents introduced no expert economic testimony. The only evidence presented on this issue was presented by Appellant to rebut any alleged lost pecuniary support. (D15). While the Western District in *Mansil* recognized the statute, it also noted that the parties had a fair opportunity to debate the economic validity of the presumption and there was no trial court error. *Mansil v. Midwest Emergency Medical Services, P.C.*, 554 S.W.3d 471, 477 (Mo. App. W.D. 2018). Also note that in the *Mansil* case, the plaintiff did have an economics expert and the defense did not. *Id*. at 475, n. 5. Here there was no debate; Respondents had no expert and adduced no competent testimony. The jury then awarded $28,000 in past economic damages in Verdict B. (D100 p.32). This evidence error warrants a new trial on the death claims.

XII. THE CIRCUIT COURT ERRED IN NOT REDUCING THE JUDGMENT BY THE AMOUNT OF THE SETTLEMENT BETWEEN RESPONDENTS AND DR. HERRMANN BECAUSE APPELLANT WAS ENTITLED TO THE REDUCTION UNDER SECTION 537.060 RSMO IN THAT RESPONDENTS HAD PREVIOUSLY SETTLED WITH JOINT TORTFEASOR, DR. HERRMANN, AND RESPONDENTS' COUNSEL HAD STIPULATED TO THE CREDIT / REDUCTION.

Standard of Review

Denial of a motion to reduce a judgment based on settlements entered between a plaintiff and other tortfeasors is reviewed de novo when there are no factual issues submitted and trial court ruled on the issue as a matter of law. *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 39 (Mo. App. E.D. 2013).

Argument

In the alternative, if the verdicts and judgment are not reversed in their entirety, Appellant is entitled to a reduction in the judgment in the amount of the settlement paid by Dr. Herrmann.[10] RSMO section 537.060. Appellant raised this issue in its Answer and Affirmative Defenses. At trial, the Respondent's counsel stipulated that Appellant was entitled to the set off and confirmed this at the argument on the post-trial motions. (D4 p.5; TR6-8, 869). The request was also included in the Appellant's post-trial motion. (D62). Appellant is entitled to a reduction in the judgment in the amount of the settlement between Respondents and Dr. Herrmann pursuant to the plain terms of RSMO section 537.060 and Respondents' stipulations on the record..

[10] The Court of Appeals correctly reversed and remanded the Circuit Court's judgment on this issue. However, that mandate has been stayed by this Court's acceptance of transfer and the pendency of this matter.

CONCLUSION

As explained in Points I-XI above, there were multiple prejudicial errors in this trial.

For these reasons, Appellant seeks a JNOV on all counts. Should the court deny that request, then this Court should reverse and remand for a new trial on all nursing issues and preclude vicarious liability claims against Appellant for the conduct of Dr. Herrmann. Should that request be denied, then Appellant requests that this Court reveres those awards not supported by the evidence (Point V) and remand to the Circuit Court for hearing regarding the appropriate payment schedule for the periodic payment of future damages and to reduce the judgment in the amount of the settlement by Dr. Herrmann.

SANDBERG PHOENIX & von GONTARD P.C.

By: *<u>/s/Kenneth W. Bean</u>*

Kenneth W. Bean, #28249
Timothy C. Sansone, #47876
Benjamin R. Wesselschmidt, #66321
600 Washington Avenue - 15th Floor
St. Louis, MO 63101-1313
314-231-3332
314-241-7604 (Fax)
kbean@sandbergphoenix.com
csettlemoir@sandbergphoenix.com
tsansone@sandbergphoenix.com
bwesselschmidt@sandbergphoenix.com

Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify this brief complies with the provisions of Rules 55.03 and 84.06(b). This brief contains 22,989 words, excluding the cover, certificate of compliance and service, signature block, and substitute appendix. Counsel has relied upon the word-counting utility of Microsoft Word in making this certification.

I further certify that a copy of this brief was filed electronically on May 28, 2020 using the Court's electronic filing system, causing automated delivery to counsel of record in this matter.

/s/Kenneth W. Bean