

WD83485

---

IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

---

MARIA DEL CARMEN ORDINOLA VELAZQUEZ  
APPELLANT-RESPONDENT,

vs.

JENNIFER REEVES, M.D., ET AL.,  
RESPONDENTS.

CASE NO. 1716-CV20186

---

APPEAL FROM THE CIRCUIT COURT OF  
JACKSON COUNTY, MISSOURI  
DIVISION NO. 14  
HONORABLE JOHN M. TORRENCE, CIRCUIT JUDGE

---

REPLY BRIEF OF RESPONDENTS JENNIFER REEVES, M.D., KRISTEN FRIED,  
M.D., SHILPA BABBAR, M.D., KATHRYN GOINS, M.D., KENT BURK, M.D., AND  
UNIVERSITY PHYSICIAN ASSOCIATES

---

Timothy M. Aylward                      MO # 30274  
Robert Givens                              MO # 67423  
Horn Aylward & Bandy, LLC  
2600 Grand Boulevard, Suite 1100  
Kansas City, MO 64108  
(816) 421-0700  
[taylward@hab-law.com](mailto:taylward@hab-law.com)  
[rgivens@hab-law.com](mailto:rgivens@hab-law.com)

**ATTORNEYS FOR RESPONDENTS  
JENNIFER REEVES, M.D., KRISTEN  
FRIED, M.D., SHILPA BABBAR, M.D.,  
KATHRYN GOINS, M.D., AND KENT  
BURK, M.D.**

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....5

ARGUMENT.....6

I. The trial court erred in refusing to instruct the Jury regarding the burden of proof because the argument misstated Missouri Law and improperly shifted the burden of proof from Ms. Ordinola’s to Respondents, in that Ms. Ordinola’s counsel improperly argued in closing that Respondents had the “burden to convince them” and allowing the argument in without a corrective instruction was an abuse of discretion.....6

A. Respondents supplied the Court with the necessary record to determine the question whether Appellant’s counsel’s argument was improper and necessitated the specifically requested instruction.....6

B. The trial court failed to give the requested instruction, which would have directly addressed Appellant’s counsel’s improper argument.....7

C. Respondents suffered prejudice from Appellant’s misstatement of Missouri law to the jury at the last possible time to address the jury.....9

II. The trial court erred in overruling Respondents’ objection to Ms. Ordinola’s use of a recording of Respondent Kent Burk, M.D., at trial, because this evidence should not have been admitted in that Ms. Ordinola failed to disclose the recording during discovery and the use of that recording caused extreme prejudice to Respondent Dr. Burk by denying him adequate opportunity to prepare and explain the context of the recording.....10

A. Respondents complied with Rule 84.04 in their initial brief.....10

B. The trial court erred in overruling Respondents’ objection to Appellant’s counsel’s use of the transcript at issue during her questioning of Dr. Burk...11

C. Respondents did not waive their objection to this issue at trial.....14

III. The trial court correctly reduced the total noneconomic damages awarded to the plaintiff under R.S.Mo. 538.210 because that statute does not violate the right to trial by jury guaranteed by the Missouri Constitution. (Responds to Ms. Ordinola’s Point Relied on 1).....15

IV. The trial court erred in denying the Motion for Periodic Payments of Future Non-Economic Damages because the court had a duty to allocate damages properly on a pro rata basis, in that the court incorrectly applied all of Ms. Ordinola’s Attorneys’ Fees to the future damages portion of the judgment, rather than applying the attorneys’ fees pro-rata to past and future damages, and that error caused prejudice by artificially reducing the future damages award.....16

    A. Respondents preserved this matter for appellate review.  
    .....16

    B. Respondents’ point is sufficient and the trial court erred in not ordering the future non-economic damages payable in periodic payments pursuant to Missouri statute.....16

V. The trial court erred in denying the motion for remittitur because the judgment applied the “catastrophic injury” cap on non-economic damages rather than the standard cap on non-economic damages in that the evidence did not establish that Ms. Ordinola suffered an irreversible failure of an organ system as defined by Section 538.205.....18

    A. The trial court erred in finding the evidence presented established Appellant suffered a “catastrophic” injury to her bladder or urinary organ system.  
    .....18

VI. The trial court erred in denying Respondents’ motion for remittitur because the court applied the incorrect statutory cap, in that the court applied the cap in effect in calendar year 2019 (the year the case was tried), rather than calendar year 2015 (the year the cause of action accrued) and thereby improperly gave retroactive effect to a substantive change in the law, in violation of *Klotz v. St. Anthony Medical Center*.....20

    A. The trial court erred in denying Respondents’ request to apply the cap in effect at the time of the care at issue.  
    .....20

CONCLUSION.....21

RULE 84.06 CERTIFICATE.....23  
CERTIFICATE OF SERVICE.....24

**TABLE OF AUTHORITIES**

**Cases**

*Daniels v. Griffin*, 769 S.W.2d 199, 201 (Mo. Ct. App. S.D. 1989).....6  
*Hess v. Chase Manhattan Bank USA, N.A.*, 2006 WL 768513, 6 (Mo.Ct.App. W.D. 2006).....20  
*Klotz v. St. Anthony Medical Center*, 311 S.W.3d 752 (Mo. banc. 2010).....20, 21

**Jury Instruction**

Missouri Approved Instruction 3.01.....7, 8

**Statutes**

R.S.Mo. § 538.205.....18  
R.S.Mo. § 538.210.....15, 20  
R.S.Mo. § 538.220.....16, 17  
Missouri Rule of Civil Procedure 56.01.....13  
Missouri Rule of Civil Procedure 81.12.....6, 7

## ARGUMENT

- I. The trial court erred in refusing to instruct the Jury regarding the burden of proof because the argument misstated Missouri Law and improperly shifted the burden of proof from Ms. Ordinola’s to Respondents, in that Ms. Ordinola’s counsel improperly argued to the jury in closing that Respondents had the “burden to convince them” and allowing the argument in without a proper corrective instruction was an abuse of discretion.**
- A. Respondents supplied the Court with the necessary record to determine the question whether Appellant’s counsel’s argument was improper and necessitated the specifically requested instruction.**

The record on appeal shall contain all of the record necessary to the determination of the question presented to the appellate court for decision. Mo. R. Civ. P. 81.12(a). Some portions of the record can be omitted if not relevant to the point on appeal. *Daniels v. Griffin*, 769 S.W.2d 199, 201 (Mo. Ct. App. S.D. 1989).

Appellants argue that Respondents presented only a “narrow slice of the record necessary to review the context of the remark, any possible prejudicial effect, and the appropriateness of the court’s curative instruction.” *See* Appellant’s Response-Reply Brief, p. 12. This assertion ignores the actual remark made, the claimed prejudicial effect and the transcript submitted on appeal.

During the argument at issue, Appellant’s counsel stated, “This is something **they have to convince you** that Maria Ordinola was not stable or that she was stable.” (A283). Appellant now contends this comment theoretically was used to reply to a portion of Respondent’s closing argument, and Respondent’s failure to include this portion of closing in the transcript runs afoul of Missouri law.

Practically speaking, Appellant's counsel's remark to the jury is significant, independent of any argument presented by Respondents, and created undue prejudice. Respondents' record on this issue contained the comment at issue, multiple pages of a sidebar conference with the trial court discussing the full context of the comment, Respondents' counsel's request for relief and the trial court's eventual ruling. Respondents respectfully suggest this record complies with Missouri Rule 81.12 in that it presents to this Court all the information necessary to make a decision on the question.

**B. The trial court failed to give the requested instruction, which would have directly addressed Appellant's counsel's improper argument.**

Right before the improper argument, Appellant's counsel argued to the jury Respondents' preference for mean arterial pressure versus blood pressure was disingenuously created after the fact and for the purpose of trial. (A283). She specifically mentioned the preference of Dr. Burk, who received a majority of the liability from the jury, for mean arterial pressure to determine a patient's stability. (A282-283). She punctuated this argument, and the undue prejudicial nature of it, by stating Respondents had to "convince" the jury of Appellant's condition during the morning hours at issue. (A283).

Respondents' counsel objected to that remark, which objection was sustained by the trial court. (A285). Respondent's counsel asked the Court to instruct the jury that "the burden of proof is on the plaintiff and the defendants don't have to convince them of anything." (A285). The Court refused that request for a curative instruction and instead directed the jury's attention the burden of proof instruction (M.A.I. 3.01). (A285-287).

When the Court refused Respondents' request for the curative instruction, he indicated he would refer the jury to Instruction No. 5 and how that instruction "directs how they determine who has the burden to prove what in this case." (A285). However, the Court only directed the jury to the burden of proof instruction, without any reference to plaintiff's counsel's remarks. (A285).

As a backdrop to this issue, Respondents had objected to the giving of M.A.I. 3.01 – the burden of proof instruction – at the instruction conference because they believe the wording of M.A.I. 3.01, referring to parties relying on "disputed facts" rather than claims, renders the instruction vague and confusing to a lay jury. (A275). The current version of Missouri's burden of proof instruction, M.A.I. 3.01, is set out verbatim:

"Your verdict will depend on the facts you believe after considering all the evidence. The party who relies upon **any disputed fact has the burden to cause you to believe that such fact is more likely true than not.** In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence."

M.A.I. 3.01 (2016) (emphasis added).

If a defendant testifies that he "did not violate the standard of care" in a medical negligence case, that sounds to a jury like a disputed fact upon which the defendant relies. Based on the wording of M.A.I. 3.01, the jury would understand that to mean the defendant has the burden to prove he did not violate the standard of care. That is not the law, but it is a conclusion a jury could logically reach based on the wording of the burden of proof instruction. Despite the shortcomings of M.A.I. 3.01, the only relief the trial court was willing to give, in the face of such a blatant misrepresentation of the law, was to direct the jury back to an instruction which talks about the burden being on the party whose depends



on that “disputed fact.” That decision by the Court compounded the damage by not making it crystal clear that what plaintiff’s counsel had argued to the jury was improper.

The discussion of the grounds for Respondents’ objection, and the Court’s ruling on that objection, all occurred at the bench, out of the hearing of the jury, the jury was never given any useful direction about what they had just heard. What the jury heard was Appellant’s attorney tell them the Respondents had to “convince” them of a disputed fact; they heard Respondents’ attorney make an objection to that remark, and then, after a sidebar conference out of their hearing, they heard the Court refer them to Instruction No. 5. The basis of Respondents’ objection, the Court’s official ruling sustaining the objection, and Respondents’ request for curative relief were not heard by the jury.

Such a blatant misstatement of the law required a more fulsome instruction by the Court than simply referring the jury to the burden of proof instruction. The Court’s failure to go the extra mile was prejudicial error under the circumstances.

**C. Respondents suffered prejudice from Appellant’s misstatement of Missouri law to the jury at the last possible time to address the jury.**

Appellant’s counsel asserts the remark at issue was an “interrupted and incomplete statement” that was not repeated. (Appellant’s Response-Reply Brief, p. 15). The transcript of Appellant’s counsel’s rebuttal argument reflects that she made the inappropriate misstatement of the law not once, but twice. (A2831-283) It punctuated an extended portion of her argument that improperly insinuated Respondents had an obligation to prove Appellant’s condition during the morning of September 5, 2015. (A281-3). Appellant’s counsel’s remarks regarding who had the obligation to “convince” the jury was a clear

misstatement of the law, attempting to mislead the jury into believing that Respondents had a burden of proof which they did not under Missouri law.

Having opposing counsel advise the jury that defendants bear the burden of proof when they do not is patently prejudicial. Taking into account both the content and timing of the remarks, during rebuttal, make the misstatements of law all the more prejudicial in their effect. Appellant's counsel misrepresented a bedrock principle of the common law. One can scarcely fathom a more blatant misstatement of the law that could be made. Fresh off that misstatement of the law, the jury retired to their deliberations.

**II. The trial court erred in overruling Respondents' objection to Ms. Ordinola's use of a recording of Respondent Kent Burk, M.D., at trial, because this evidence should not have been admitted or even referenced at trial, in that Ms. Ordinola failed to disclose the existence of the recording during discovery and the use of that recording caused extreme prejudice to Respondent Dr. Burk by denying him adequate opportunity to prepare and explain the context of the recording.**

**A. Respondents complied with Rule 84.04 in their initial brief.**

Appellant argues that Respondents "repeatedly" violated Rule 84.04 by not including the requisite cites to the Record on Appeal. (Appellant's Response-Reply Brief, p. 18). The "facts" that Appellant point to as evidence of these violations were either general background information on Dr. Burk or not facts necessitating cites. Specifically, the third paragraph of Respondents' Argument in support of Point II draws conclusions as to why Dr. Burk did not particularly remember the substance of the secret recording. These contested "facts" are actually argument asserted by counsel.

**B. The trial court erred in overruling Respondents' objection to Appellant's counsel's use of the transcript at issue during her questioning of Dr. Burk.**

In their brief, Appellants incorrectly assert "the trial court never ruled on Respondents' objection to the recording, leaving no adverse ruling to appeal." (Appellant's Response-Reply Brief, p. 19). At trial and right before Appellant's counsel began to question Dr. Burk about the secretly recorded meeting, undersigned counsel objected to the anticipated line of questioning. (A175). During that sidebar, the Appellant's discovery violations were fully discussed before the trial court overruled the objection, finding "defendants have had this information an adequate amount of time and have been aware of what it is for an adequate period of time such that there's no prejudice from it getting past the discovery objection." (A194-5).

During the subsequent questioning, Appellant's counsel asked Dr. Burk multiple times about Appellant's post-operative bi-manual exams. (A203-4). Appellant's counsel specifically questioned him on the timing of these bimanual exams and who performed them. (A204). She also questioned Dr. Burk about the timing of these bi-manual exams in conjunction with receiving blood transfusions. (A204). Notably, these specific topics were discussed between Appellant and Respondent Dr. Burk during the secretly record meeting. (A200).

A critical factual issue in this case was *when* Appellant began to bleed internally. At trial, Appellant generally advanced a theory the bleeding occurred sometime during the early morning hours of September 5, 2015. Conversely, Respondents argued it occurred shortly after a third-party provider's bi-manual examination hours later, at 11:00 a.m. The

timing and sequence of events was important because there were bi-manual exams of Ms. Ordinola's pelvis on three separate occasions. (A204). The question was: Which exam dislocated the suture and caused the bleeding?

Appellant's counsel noted that in the recording, Dr. Burk told Ms. Ordinola that her bleeding started after a doctor came in and pressed firmly on her abdomen and that she received blood *shortly thereafter*. (A288-289) Appellant's were trying to pin Dr. Burk to an earlier bi-manual exam as the point when bleeding started by referencing when blood was given.

Appellant's counsel's subsequently asked Dr. Burk seven questions about the timing of bi-manual exams and four questions regarding blood transfusions. (A203-4). These questions related to previous statements Dr. Burk made to Appellant during the secretly recorded meeting between Dr. Burk and Appellant. These questions and responses were directly relevant to a material factual issue in the case. Dr. Burk's testimony responding to these questions contained in the secretly recorded meeting's transcript went directly to Dr. Burk's credibility.

Appellant manipulated this critical evidence by hiding the existence of a statement by a defendant. She did this (1) by swearing falsely in her interrogatory answer that she did not have any statements from defendants, only a statement from Dr. Anuj Shah, a non-party (D. 119, p. 11); (2) by denying in her response to document requests that she had a statement from any defendant (again, only from Dr. Shah) (D. 118, p. 2), and (3) by never supplementing either of her false discovery responses on that issue at any time before trial. (A189-190).

During discovery, a misidentified audio recording was produced to Respondents' counsel in a "zip" folder. (D. 118, p. 2). A transcript of the actual recording of Dr. Shah was produced at Dr. Shah's deposition (D. 121). The audio recording of Dr. Shah was never produced. Respondents' counsel was provided with only one audio recording and only one transcript of a recorded conversation, both identified as Dr. Shah's. There was no reason for Respondents' counsel to suspect the audio recording they had been given in a zip folder was anything other than the recorded statement of Dr. Shah. Producing an audio recording of Dr. Burk, misidentified as Dr. Shah's, amounted to hiding Dr. Burk's statement "in plain sight."

The trial court's ruling that Respondents discovered the existence of the recording sufficiently in advance of trial to prepare misses the point of Appellant's misconduct entirely. By the time Respondents' counsel realized that a recording of Dr. Burk existed, Dr. Burk had already been questioned about the events of the case under oath in his deposition. He had been "pinned down" by the record, without ever knowing the recording existed or having an opportunity to contextualize his remarks on the recording.

Rule 56.01(b)(3) of the Missouri Rules of Civil Procedure expressly allows parties to discover the existence of statements of that party in the possession of an opponent. The Missouri Rules of Civil Procedure are ultimately promulgated and/or approved by the Missouri Supreme Court. They contain an express obligation for parties to supplement discovery responses which are erroneous. They provide for sanctions when parties break the rules. They do not provide for trial judges to forgive intentional discovery abuses, so

long as opposing counsel discover them in sufficient time to prepare for cross-examination at trial.

In this case, there is one fact that is undeniably true and undisputed by Appellant: Maria Ordinola *knew* she had recorded a statement from Dr. Kent Burk. She knew that because on the very same day she secretly recorded her conversation with Dr. Burk, she also secretly recorded Dr. Shah in a separate meeting. It beggars disbelief that when asked about possessing any statements of defendants, she would acknowledge that she had a statement from Dr. Shah (not a party), but would not acknowledge possession of a statement from Dr. Burk (a party), both procured in the same manner and on the same date.

The clear and unavoidable conclusion is that Ms. Ordinola did not want Dr. Burk to know there was a recording of him reciting the sequence of events of her five-week hospital admission. That intentional and egregious violation of the rules of discovery should not have been countenanced by the trial court by overruling Respondents' objection to the use of the recorded statement.

That decision by the trial court amounted to a waiver of Ms. Ordinola's violation of the rules of discovery. Respondents respectfully suggest that such a decision was an abuse of discretion.

**C. Respondents did not waive their objection to this issue at trial.**

Appellant suggest that Respondents waived their objection to this issue due to Dr. Burk's interjection regarding the existence of the secret recording. (Appellant's Response-Reply Brief, p. 24). This argument ignores the above referenced examination by Appellant's counsel after the trial court overruled Respondents' objection. Appellant's

counsel pursued this line of questioning immediately after the sidebar where the trial court overruled Respondents' objection. (A201). Further, this questioning preceded any reference to the secret recording by undersigned counsel. (A205).

Appellant's counsel's improper questioning was based on a transcript of the secret recording. Respondents initially objected to Appellant's use of anything stemming from this secret recording. (A175). Appellant's counsel was eventually allowed to use this transcript (A195), and this transcript is the source of undue prejudice. Dr. Burk's mentioning of the secret recording is irrelevant since Appellant's counsel previously used a transcript of that recording to impugn his character. (A200-205).

Finally, it is not a waiver of the right to appeal simply because after a party's requested relief is not given, that party does not further move for a mistrial. A motion for mistrial is not a prerequisite to an appeal challenging an erroneous ruling by the Court. *See Wheeler v. Dean*, 482 S.W.3d 877, 879 (Mo.Ct.App. S.D. 2016).

**III. The trial court correctly reduced the total noneconomic damages awarded to the plaintiff under R.S.Mo. 538.210 because that statute does not violate the right to trial by jury guaranteed by the Missouri Constitution.**

At this time, Respondents do not seek leave to file a sur-reply in support of their opposition to Appellant's initial point relied on.

**IV. The trial court erred in denying the Motion for Periodic Payments of Future Non-Economic Damages because the court had a duty to allocate damages properly on a *pro rata* basis, in that the court incorrectly applied all of Ms. Ordinola's Attorneys' Fees to the future damages portion of the judgment, rather than applying the attorneys' fees pro-rata to past and future damages, and that error caused prejudice by artificially reducing the future damages award.**

**A. Respondents preserved this matter for appellate review.**

At the earliest possible juncture, Respondents requested periodic payments of the future damages awarded by the jury to Appellant. (D. 111). Specifically, Respondents requested the trial court to enter a payment schedule pursuant to R.S.Mo. § 538.220, which requires the trial court to order periodic payments in the event future damages exceed \$100,000.00. The applicable portions of the Missouri statute at issue is found below:

“At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars.”

R.S.Mo. § 538.220.2.

The jury initially awarded Appellant \$700,000 in future non-economic damages. (D.139). In its Amended Judgment, the trial court ordered future damages payable in the amount of \$348,828. (D. 139).

**B. Respondents' point is sufficient and the trial court erred in not ordering the future non-economic damages payable in periodic payments pursuant to Missouri statute.**

Respondents timely invoked the Missouri statute on periodic future damage payments. This request was made prior to entry of the trial court's judgment, and it was



appropriately requested as the future damages awarded exceeded the statutory amount of \$100,000.00. (D. 111).

The total award to Appellant was \$1,030,000. Of that award, \$700,000 was for future noneconomic damages. Therefore, the past damages of \$330,000 represented 32% of the total award, and the future damages represented 68% of the total award.

The trial court should have followed the jury's directive by paying Appellant's attorneys' fees and expenses in a lump sum, but pro-rating the fees and expenses so 32% of the attorneys' fees and expenses were charged against past damages, and 68% were charged against the award of future damages. To do the calculation otherwise thwarts the intent of the statute.

The trial court should have performed a calculation of damages pursuant to the above pro rata basis. The total award to Appellant after adjusting for the cap was \$778,828. According to Appellant's fee agreement with counsel, Appellant's counsel was to receive a total of \$435,725.28.

The trial court should have pro-rated this amount according to the jury's percentage of past and future damages award. The trial court should have awarded Appellant's counsel \$139,432.09 in accordance with the 32% of total damages being past damages awarded by the jury. This would have left \$639,396 in future damages to be paid in periodic payments pursuant to R.S.Mo. § 538.220.2.

- V. The trial court erred in denying the motion for remittitur because the judgment applied the “catastrophic injury” cap on non-economic damages rather than the standard cap on non-economic damages in that the evidence did not establish that Ms. Ordinola suffered an irreversible failure of an organ system as defined by Section 538.205.**
- A. The trial court erred in finding the evidence presented established Appellant suffered a “catastrophic” injury to her bladder or urinary organ system.**

Appellant points to various portions of Dr. Burk’s testimony in arguing the trial court was correct in finding the evidence supported a finding that Appellant suffered a “catastrophic” injury in the form of irreversible organ failure. Appellant calls into question Dr. Burk’s testimony regarding his initial fistula repair (A169), his testimony regarding Appellant’s current source of leaking (A170) and his testimony regarding Appellant’s overactive bladder as an alternate cause of Appellant’s alleged leaking (A172).

Missouri law defines a “catastrophic personal injury” in an action based on improper health care as:

an injury resulting in quadriplegia, paraplegia, loss of two or more limbs, an injury to the brain resulting in permanent cognitive impairment, an injury that causes irreversible failure of one or more major organ system or vision loss such that the plaintiff’s central visual acuity is no more than twenty/two hundred with the best correction or whose field of vision is restricted to a degree that its widest diameter subtends an angle no greater than twenty degrees.

R.S.Mo. § 538.205(1)(a-f).

Appellant argues she suffered an irreversible failure of her urinary organ system. However, the evidence presented at trial illustrates that Appellant’s alleged injury had previously been successfully treated with surgical measures.

Contrary to Appellant's assertions, these highlighted portions of Dr. Burk's testimony support the finding that Appellant is not suffering from permanent, irreversible damage to an organ system. Testimony at trial demonstrated that the initial fistula repair worked for "a few months." (A170). Multiple cystograms after the repair procedure illustrated contrast fluid not escaping the bladder. *Id.* Dr. Burk's testimony establishes that, for a time, Appellant's fistula was repaired and did not cause urine leaking through her vagina. As Appellant's leakage was able to be remedied for "a few months" after the repair procedure, it does not logically follow that Appellant's injury is irreversible and permanent.

Appellant also highlights Dr. Burk's testimony regarding alternate causes of Appellant's leaking at issue. Dr. Burk testified regarding recent examinations revealing the possibility this urine leaking was coming from Appellant's urethra. (A170). He also testified about Appellant developing overactive bladder apart from the fistula at issue as an alternate cause for the leaking at issue. (A172).

Appellant's alternate causes of vaginal urine leakage further casts doubt on the irreversibility of her damage. Subsequent providers questioned whether this leakage is coming from Appellant's urethra, which would be an appropriate and normal source of leakage. This finding by subsequent treaters is magnified considering Appellant's own complaints of using the bathroom 20 times per day. (A162). This urinary frequency is a symptom of overactive bladder (A162), and overactive bladder is a reasonable alternate explanation for the cause of Appellant's leakage.

**VI. The trial court erred in denying Respondents’ motion for remittitur because the court applied the incorrect statutory cap, in that the court applied the cap in effect in calendar year 2019 (the year the case was tried), rather than calendar year 2015 (the year the cause of action accrued) and thereby improperly gave retroactive effect to a substantive change in the law, in violation of *Klotz v. St. Anthony Medical Center*.**

**A. The trial court erred in denying Respondents’ request to apply the cap in effect at the time of the care at issue.**

The trial court erred in denying Respondents’ request to apply the cap in effect at the time of the care at issue. Instead, the trial court applied the statutory cap in place four years after the *care* at issue. Appellant correctly points out the statute applied to the verdict was the same statute in effect at the time of the care at issue. (Appellant’s Response-Reply Brief, p. 55). However, that statute expressly provides for a different cap for each succeeding year. R.S.Mo. §538.210.10.

Appellant relies on *Cook v. Newman, M.D., et al.*, to support their premise the cap to be used is the cap in place during the time of trial. Notably, this case was handed down over 11 years before the applicable cap was enacted. Two years later, this Court cautioned that *Cook* “misstated the law as to the constitutional ban (on retrospective laws) and **should not be followed.**” *Hess v. Chase Manhattan Bank USA, N.A.*, 2006 WL 768513, 6 (Mo.Ct.App. W.D. 2006).

What controls here in the Missouri Supreme Court’s holding in *Klotz v. St. Anthony Medical Center*, 311 S.W.3d 752 (Mo. banc. 2010). The Court in *Klotz* was presented with an instance where a plaintiff’s cause of action, which had already accrued before August 28, 2005 (the date the 2005 version of § 538.210 took effect), was being impacted by the

new statutory cap on noneconomic damages because plaintiff's lawsuit went to trial after the new cap was enacted. *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 758 (Mo. 2010). The Court held that the law, which went into effect *after* the plaintiff's cause of action had accrued, could not be given retrospective effect to alter their rights. *Id.* at 760.

Appellant's cause of action accrued in September 2015. When the cause of action accrued, both Appellant's and Respondents' rights in the law were fixed. In other words, the amount of the caps that were in effect for 2015 should be the caps that govern this lawsuit, no matter when it ultimately goes to trial. To permit the amount of the cap to change in any given case, based upon the calendar date of the trial of that case, is giving retroactive effect to a provision of the statute which the legislature clearly did not intend to happen. It also offers parties and their counsel an opportunity to maneuver cases to one side or the other of New Year's Day in order to alter the value of the case. The law that applies to a case should be the version of the law in effect when the cause of action accrues. Defendants in medical negligence cases have just as much right as plaintiffs to rely on the law as it exists when the cause of action accrues.

### **CONCLUSION**

For the reasons stated herein, the Court should vacate the Amended Judgment of the trial court and order a new trial for Respondents-Appellants Jennifer Reeves, M.D., Kristen Fried, M.D., Shilpa Babbar, M.D., Kathryn Goins, M.D., Kent Burk, M.D., and University Physician Associates.

Respectfully submitted,

*/s/ Timothy M. Aylward*

Timothy M. Aylward MO # 30274

Robert J. Givens MO # 67423

Horn Aylward & Bandy, LLC

2600 Grand Boulevard, Suite 1100

Kansas City, MO 64108

(816) 421-0700

[taylward@hab-law.com](mailto:taylward@hab-law.com)

[rgivens@hab-law.com](mailto:rgivens@hab-law.com)

**ATTORNEYS FOR RESPONDENTS-  
APPELLANTS JENNIFER REEVES, M.D.,  
KRISTEN FRIED, M.D., SHILPA BABBAR,  
M.D., KATHRYN GOINS, M.D., KENT  
BURK, M.D., AND UNIVERSITY  
PHYSICIAN ASSOCIATES**

**CERTIFICATE**

I hereby certify that to the best of my knowledge, information and belief and after reasonable inquiry, this brief complies with the limitations of Rule 84.04(i) and 84.06(b). There are 5,013 words in this brief.

*/s/ Robert J. Givens*

Timothy M. Aylward MO # 30274

Robert J. Givens MO # 67423

Horn Aylward & Bandy, LLC

2600 Grand Boulevard, Suite 1100

Kansas City, MO 64108

(816) 421-0700

[taylward@hab-law.com](mailto:taylward@hab-law.com)

[rgivens@hab-law.com](mailto:rgivens@hab-law.com)

**ATTORNEYS FOR RESPONDENTS-  
APPELLANTS JENNIFER REEVES, M.D.,  
KRISTEN FRIED, M.D., SHILPA BABBAR,  
M.D., KATHRYN GOINS, M.D., KENT  
BURK, M.D., AND UNIVERSITY  
PHYSICIAN ASSOCIATES**

**CERTIFICATE OF SERVICE**

This will certify that on the 17<sup>th</sup> day of November, 2020, a copy of the above and foregoing document was served on the following counsel of record via the Missouri court's eFiling system.

Russell S. Dameron  
Kathleen M. Meier  
Watson & Dameron, LLP  
2500 Holmes St.  
Kansas City, MO 64108  
(816) 474-3350  
(816) 474-3351 FAX  
[rdameron@kctrallawyers.com](mailto:rdameron@kctrallawyers.com)  
[kmeier@kctrallawyers.com](mailto:kmeier@kctrallawyers.com)

**ATTORNEYS FOR APPELLANT-RESPONDENT  
MARIA ORDINOLA**

*/s/ Robert J. Givens*  
\_\_\_\_\_  
Timothy M. Aylward                      MO # 30274  
Robert J. Givens                         MO # 67423  
Horn Aylward & Bandy, LLC  
2600 Grand Boulevard, Suite 1100  
Kansas City, MO 64108  
(816) 421-0700  
[taylward@hab-law.com](mailto:taylward@hab-law.com)  
[rgivens@hab-law.com](mailto:rgivens@hab-law.com)

**ATTORNEYS FOR RESPONDENTS-  
APPELLANTS JENNIFER REEVES, M.D.,  
KRISTEN FRIED, M.D., SHILPA BABBAR,  
M.D., KATHRYN GOINS, M.D., KENT  
BURK, M.D., AND UNIVERSITY  
PHYSICIAN ASSOCIATES**