WD83485

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MARIA DEL CARMEN ORDINOLA VELAZQUEZ
Appellant-Respondent,

v.

UNIVERSITY PHYSICIAN ASSOCIATES, *et al.*
Respondents-Appellants.

On Appeal from the Circuit Court of Jackson County
The Honorable John M. Torrence, Circuit Judge
Case No. 1716-CV20186

REPLY BRIEF OF THE APPELLANT-RESPONDENT

Russell S. Dameron, MO #32055
Kathleen M. Meier, MO #43194
Watson & Dameron, LLP
2500 Holmes St.
Kansas City, MO 64108
(816) 474-3350 / (816) 474-3351 (Fax)
rdameron@kctriallawyers.com
kmeier@kctriallawyers.com

ATTORNEYS FOR APPELLANT-RESPONDENT MARIA ORDINOLA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

SUPPLEMENTAL STATEMENT OF FACTS

On September 5, 2015, at 3:25 a.m., Ordinola underwent a C-section and elective tubal ligation at Truman Medical Center. D2 p.5.[1] Then at approximately 7 a.m., she experienced a postpartum hemorrhage causing her to become hypotensive/hypovolemic. A022-24.[2] Respondent Burk, M.D. (hereinafter Dr. Burk) testified that her uterus had stopped clamping down and her abdomen filled with blood the size of her baby. A202-03. About the same time, Respondent Reeves, M.D. performed a bimanual exam (A024) to try to express any blood from her uterus. A029. Dr. Reeves pushed real hard on Ordinola's abdomen to expel the blood. A203. Dr. Burk's best guess was that the tie on her tube became dislodged when Dr. Reeves was pushing. A203-04. A blood transfusion was then ordered. A203.

Before Dr. Burk assumed care at around 8 a.m., blood was ordered and a blood transfusion initiated. A005, A016, A034 and A040. Four hours later "code blue" was called when Ordinola stopped breathing and had no heartbeat. A087. She was resuscitated and transferred to the PACU where she underwent "mass transfusion protocol." A087-88. Ultrasound revealed blood in her abdomen, requiring emergent laparotomy. A093. During surgery, Dr. Burk noted the absence of a suture on her fallopian tube which oozed blood. A097-98. Dr. Burk had no explanation for the intra-abdominal bleeding except the missing

[1] References herein are to Legal File filed by Appellant on June 4, 2020, unless indicated otherwise.

[2] The Transcript is in two volumes: Vol. I numbered A001-A199 and Vol. II A200-A295.

suture. A098. While closing, Ordinola became bradycardic and CPR was again performed. A103. For the next 2½ weeks, Ordinola was on a ventilator in an induced coma in the ICU (A111) and underwent additional surgeries for bleeding, receiving 44 units of blood. A113-14.

Also, a few days after her first surgery, Ordinola became hypertensive, was not responding to the transfusions and was urgently returned to surgery. A115-16. During this 3½-hour surgery, she underwent a hysterectomy. A119. The surgeon lacerated her bladder while trying to remove her cervix. A128. Dr. Burk admitted Ordinola sustained a bladder injury during this surgery. A131.

Before she was discharged from the hospital weeks later, Dr. Burk was concerned that Ordinola had developed a vesicovaginal fistula (A140), *i.e.*, a hole/opening between her bladder and vagina. A143-44. A fistula allows urine to leak into the vagina and puts a patient at higher risk for urinary tract infections. A141. About three weeks after discharge, Dr. Burk confirmed Ordinola had a relatively large vesicovaginal fistula of one centimeter. A152.

On January 18th, 2017, Dr. Burk attempted a surgical repair of Ordinola's fistula under general anesthesia at TMC. A166-67. The repair was unsuccessful. A169-71. Since then, Ordinola has continued to have urine leaking out of her vagina from the fistula. A170 and 172. Dr. Burke agreed if she continued to have leakage that it is due to the fistula. A173-74. He did not dispute that Ordinola continued to have the fistula at trial. A174.

Over the past two years, Ordinola has continued to suffer from UTIs and has been hospitalized for pyelitis, which Dr. Burk agreed are related to the fistula. A148-49 and

A155. He also related her sharp pain/burning sensation while urinating and ongoing urine leakage to the fistula, requiring her to change incontinence pads several times a day. A161-62. Dr. Burk related her not being sexually active to the leakage and pain from the fistula. A163.

At trial, plaintiff's expert Soyini Hawkins, M.D., testified that the injury to Ordinola's bladder/urinary organ system was permanent. D13 p.2. Dr. Hawkins's unrefuted testimony was that Ordinola suffered permanent organ failure to her bladder, which permanently leaks urine into her vagina. *Id*. Respondents failed to include Dr. Hawkins' testimony in their record on appeal (ROA).

Dr. Burk also acknowledged the permanent nature of Ordinola's injury. A161-63 and A173-74. Respondents' retained expert, Scott Bailey, M.D., testified that he did not have an opinion as to the permanency of Ordinola's injuries. Respondents failed to include his testimony in their ROA.

Ordinola testified at length about her ongoing medical condition/symptoms related to her bladder/urinary organ system failure from the fistula. Respondents failed to include her testimony in their ROA. Ordinola described to the jury her daily and nightly uncontrollable leaking of urine from her vagina, her extreme pain/burning while urinating, her recurrent UTIs/kidney infections (requiring hospitalization) and her inability to have sexual relations from pain. *Id*.

On November 3rd, 2015, Ordinola met with Dr. Burk at his clinic and asked what happened during her hospitalization, which she recorded. A200-01. During trial, while Dr. Burk was on the stand and before any mention of the recording was ever made to the jury

by anyone, Respondents objected to the use of the recording. A194. The trial judge did not rule on the admissibility of the recording, stating he would wait and see if Dr. Burk made an inconsistent statement. A195-96. The trial judge said, "I guess we'll cross that bridge when we get to it." A196. Respondent's counsel replied that since it "appears you are going to let her use it, so let me just say this." A197. The judge corrected him stating, "I'm not saying that… Here is what I'm suggesting as a logistical matter as to how to deal with this. You [Ordinola's counsel] ask your question. If you think you have an answer that is inconsistent with something that is in this Exhibit 63 [the recording transcript] come to the bench and we'll talk about it." A197-98. But such a bench conference never happened because Dr. Burk never contradicted anything he had said on the recording. A201-03.

The only time the recording was brought up during Ordinola's counsel's examination was when it was interjected by Dr. Burk. A201. This occurred when Ordinola's counsel asked if he remembered telling Ordinola he was not being "over dramatic" when saying "after her C-section, her uterus would not clamp down and filled with blood?" A201. The following exchange occurred:

A. **Do I independently recall that?**

Q. Yes.

A. **No**.

Q. Okay. Do you remember – do you agree that is true?

A. **Well, you produced an audio recording of me saying that. But I don't have – other than getting the recording, I do not have an independent recollection of what I said.**

A201.

As Ordinola's counsel continued her examination, she did not have to use the recording/transcript to impeach Dr. Burk as he agreed to the following:

> Q. Doctor, did you tell her after the tubes were tied that everything looked good, they were not bleeding, the uterus was clamped down and was not bleeding from the uterus either? Did you tell her that?
>
> A. **That sounds – I think that sounds like what was said, yes.**
>
> Q. And then did you tell her then you went to the recovery area, and in the recovery area your uterus stopped staying clamped down and filled with blood? Did you tell her that?
>
> A. **Yes. That sounds like my conversation.**
>
> Q. And then you said you were not being overly dramatic. It filled up big, because it filled up to the size the baby was. Did you tell her that?
>
> A. **Yes.**
>
> Q. And so the doctor came in and pushed on your tummy real hard and pushed a bunch of blood out. Do you remember that?
>
> A. **Yes.**
>
> Q. And that's when they gave you some blood?
>
> A. **Yes.**

A202-03.

Ordinola's counsel did not have to use the recording to impeach Dr. Burk. A200-04. So, the Court was never asked to rule on the recording's admissibility. *Id.*

Immediately after direct exam, Respondent's counsel began questioning his client about his meeting with Ordinola. A205. Dr. Burk told the jury he had been at Children's Mercy Hospital when he was summoned to TMC to talk to Ordinola in the OB-GYN clinic. A205. He said he did not stop on his way from Children's Mercy to TMC to review Ordinola's chart, which encompassed over 5,000 pages. A206. He recalled they had to call for an interpreter, causing a delay. A206. He explained that during the meeting he summarized a 30-day hospital admission and did not give a blow-by-blow description of what happened. A206-07.

Respondents' counsel then brought up the recording, asking Dr. Burk if he knew he was being recorded, and he said he did not. A207. Respondents' counsel asked:

> Q. But you have now seen the transcript that was made from the recording that was done in secret of you on that day, correct?
>
> **A. Yes.**
>
> Q. All right. And I'm going to read a passage of it and see – and I think it is the same passage that Ms. Hagen just read to you. This is you speaking…

A207.

Respondents' counsel then read statements from the transcript of the recording, including the timing of Ordinola's internal bleeding. A207-08. He asked Dr. Burk, "Now does that sound generally accurate to you as an overview of what happened to her in this hospital admission?" A208. Dr. Burk replied, "Yes." A208. After his counsel reinforced when Ordinola's bleeding began by reading those excerpts, he asked Dr. Burk, "were you intending to pinpoint the exact moment in time the tube came dislodged in your

conversation with Ms. Ordinola?" A208. He stated, "No" although that is exactly what Dr. Burk said during his examination with his attorney. A208. Dr. Burk's counsel ended his questioning about the meeting and recording as follows:

> Q. But back in November of 2015, before there was a lawsuit, before lawyers were involved, before any expert witnesses were involved you told her that you thought the tube, the tie has become dislodged from doctors pushing hard on her tummy?
>
> A. **Yes.**

A209.

Discovery Dispute

Respondents also objected to the recording arguing Ordinola failed to timely disclose it during discovery. A194. The trial court overruled the discovery objection stating:

> I think the record is clear that the 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.

A194-95.

Note: Appellant maintains that since Respondents first told the jury about the existence of the recording, the timing of the disclosure of the recording during discovery is irrelevant to any appellate issue. But since Respondents objected to the manner of

disclosure, Ordinola includes below the circumstances surrounding the disclosure. (Respondents' Brief, p.22.)

During the litigation of this matter through October 9th, 2019, it was Appellant's counsel's mistaken belief that the recording was not of Dr. Burk but between Ordinola and another treating physician, Dr. Shah. D27 p.6-7. It was not until after Dr. Burk's counsel and Dr. Burk listened to the recording that he contacted Ordinola's counsel on October 9th, 2019, informing that the recording was actually of Dr. Burk. D27 p.7. Respondents assert when Ordinola's counsel was approached with this information that Appellant's counsel "confirmed it was Dr. Burk on the recording," implying counsel already knew. (Respondents' Brief, p.11, citing D117 p.5 of their Legal File.) However, Ordinola's counsel did not "confirm" it was Dr. Burk, since until that moment he thought it was Dr. Shah. D27 p.6-7.

The citation relied upon by Respondents (D117 p.5 of their Legal File) as their "factual basis" that Ordinola's counsel "confirmed" comes only from *Respondents'* supporting suggestions for their motion for new trial. D15 p.5. The citation is to Respondents' counsel's statement about what occurred, not Ordinola or her counsel. D16 p.5 and D27 pp.6-8. In fact, Ordinola's counsel was surprised to learn the recording was of Dr. Burk and not Dr. Shah. D27 p.6-8. Had Respondents' counsel not informed Ordinola's counsel that it was actually Dr. Burk, Appellant's counsel would have never known. *Id*.

Respondents agree their counsel possessed the recorded statement along with the mislabeled transcript of Dr. Burk, both provided by Ordinola's counsel, as early as March 22nd, 2018, about 1½ years before trial. (D105 p.10, Respondents' Legal File.) Ordinola's

mistaken belief that the recording was of Dr. Shah and not Dr. Burk is evident in Dr. Shah's deposition on April 30th, 2019, when Ordinola's counsel marked and used the mislabeled transcript during Dr. Shah's deposition. D27 p.6. Dr. Shah even claimed during his deposition that he made several of the statements contained in the transcript, which were later learned to be Dr. Burk's statements. *Id*. Ultimately, both sides learned the recording was actually of Dr. Shah on the same day, October 9th, 2019, about 2 weeks before trial and 3 weeks before Dr. Burk testified at trial. D27 p.7.

Closing

At the beginning of closing rebuttal argument, Ordinola's counsel addressed the theory Respondents had advanced regarding when Ordinola became unstable after her tubal ligation, which countered Ordinola's theory, claiming she was actually stable during those important early morning hours. A282-83. Because she understood Respondents to be asking the jury to believe certain facts were true, Ordinola's counsel said:

> this is something they [Respondents] have to convince you that Maria Ordinola was not stable or that she was stable. They have to convince you of that, that at 9:30 when she had two normal readings –

A283. Before Appellant's counsel could finish her statement and complete her thought, Respondents' counsel interrupted, asking to approach the bench. A283.

At the bench, Respondents' counsel objected that Ordinola was shifting the burden of proof by stating "they have to convince you." (A283) and requested the court to "instruct

the jury they are to follow the instructions on burden of proof and not what [Ordinola's counsel] is suggesting to them." A284.

The trial court sustained the objection finding "they have to convince you of that… crosses the line." A284-85. Respondents' counsel then 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 trial court agreed to counsel's initial request instructing the jury:

> Ladies and gentlemen, the discussion here is regarding burden of proof in the case and who has the burden to prove what. I'll just remind you that Instruction No. 5 in your instruction packet sets forth how that is to be calculated by you and how it should direct you in determining who has to prove what in this case. So you can be guided by Instruction No. 5.

A286.

ARGUMENT

I. The trial court did not err in its ruling on Respondents' objection during closing argument and Respondents are not entitled to a new trial because there is not a complete record for review, it was an isolated statement, and the trial court sustained Respondents' objection and gave an oral curative instruction to the jury, relief Respondents requested, resulting in no confusion or prejudice.

A. Standard of Review

When the trial court sustains an objection during closing argument and grants the relief requested, "there is no adverse ruling for our review." *Gleason v. Bendix Commercial Vehicle Sys., LLC*, 452 S.W.3d 158, 180 (Mo.App. 2015). Because attorneys "are allowed substantial latitude in closing argument; trial courts are given wide discretion in ruling on closing arguments; and we will not reverse the trial court absent abuse of discretion and a showing of prejudice." *Mengwasser v. Anthony Kempker Trucking, Inc.*, 312 S.W.3d 368, 376 (Mo.App. 2010). "In exercising its discretion, the circuit court is in 'the best position to appraise the consequence of argument." *Gleason*, 452 S.W.3d at 179. "[S]uch discretion is not lightly to be disturbed on appeal." *Id.* at 180.

In this case, the trial court ruled in Respondents' favor and granted the relief requested, giving an appropriate oral curative instruction to the jury, leaving no adverse ruling for review.

B. Incomplete record for review

Respondents objected to one isolated statement during a lengthy closing argument

and asked the court only for an oral curative instruction. A283-84. The court sustained the objection and gave the jury an oral curative instruction. A284-86. Respondents did not ask for a mistrial at the time the objection was sustained. They only asked for a new trial after receiving an adverse verdict. D15 p.2.

As the party appealing the issue, Respondents had the duty to provide this Court with a complete ROA. Rule 81.12(a); *Davis v. Davis*, 222 S.W.3d 335, 336 (Mo.App. 2007). When a party desires review of an issue, it is that party's "duty to furnish a transcript containing all the records, proceedings and evidence relating thereto. In the absence of the required record, there is nothing for this court to review." *Powers v. Coffman*, 383 S.W.3d 12, 14 (Mo.App. 2012). The Court must have before it a record which it "can act with some degree of confidence in the reasonableness of its review, without resort to speculation and conjecture as to the controlling facts of the case." *Id*. "Where all or part of the transcript is missing from the record on appeal, such evidentiary omission will be taken as favorable to the trial court's ruling and unfavorable to the appeal." *Finch v. Finch*, 442 S.W.3d 209, 218 (Mo.App. 2014).

Instead of providing the entire record of closing argument, Respondents submitted only Ordinola's rebuttal, 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. Without the full record of the argument, one is left to speculate, and Point I should be denied.

C. <u>Objection sustained and curative instruction given</u>.

From the record provided, there is no basis to conclude that the trial court committed

error in handling Respondents' objection. It was a single, isolated remark. Ordinola's counsel was attempting to respond to defendants' argument about what occurred during Ordinola's hospital care. A282-83. Ordinola's counsel was trying to say that if the defense wanted the jury to believe what they claimed happened then they had "to convince you that Maria Ordinola was not stable or that she was stable." A283. Respondents objected that plaintiff was shifting the burden of proof, and asked for this relief: "I would request that you instruct the jury they are to follow the instructions on the burden of proof and not what Ms. Hagen is suggesting to them." A283.

Ordinola's counsel explained to the trial court the context of her statement and that she did not believe she had told the jury that defendants have the "burden of proof." A284. Her comment was only intended to reply to Respondents' closing argument that the facts supported their theory that Ordinola was stable and then suddenly went into cardiac arrest, contradicting Ordinola's theory that she was unstable for five (5) hours before she coded.

The court sustained the objection. A284-85. Respondents then re-worded their request for relief asking the court to instruct the jury that "the defendants don't have to convince them of anything." A285. The trial court in response informed defense counsel it was not going to do that, but was willing to remind the jury of the burden of proof instruction and that it directs how they determine who has the burden to prove what in this case and they should be guided by the instructions. A285. Defense counsel responded that was "better than nothing." A286. The trial court then gave the following oral curative instruction:

> Ladies and gentlemen, the discussion here is regarding the burden of proof in the case and who has the burden to prove what. I'll just remind you that Instruction No. 5 in your instruction packet sets forth how that it is to be calculated by you and how it should direct you in determining who has to prove what in this case. So you can be guided by Instruction No. 5.

A286-87. Respondents did not request a mistrial.

The trial court's oral curative instruction was exactly the relief initially requested by Respondents. On appeal, a party cannot complain when it receives the relief requested. See *e.g.*, *State v. Vincent*, 785 S.W.2d 805, 809 (Mo.App. 1990). The court directed the jury to the mandatory MAI on burden of proof which accurately states Missouri law. Respondents are not challenging the propriety of the burden of proof instruction in this appeal, and, to the extent they complained about it below, they have waived such objection by failing to properly raise it in their point/brief. Rule 84.04(e).

Respondents could have requested a mistrial but did not. Instead, they decided to take their chances with the jury. The verdict did not favor Respondents and subsequently they asked for a new trial based on this occurrence. D15 p.2. However, "[a] party is not entitled, in such a situation, to gamble on the verdict of the jury, and if he loses then assert in a motion for new trial or on appeal that prejudicial error resulted from the incident." *Gilmore v. Union Constr. Co.*, 439 S.W.2d 763, 766 (Mo. 1969); see also *State v. Courtney*, 589 S.W.3d 49, 57 (Mo.App. 2019) ("a party cannot fail to ask for relief, gamble on the verdict, and then, if adverse, request relief for the first time on appeal").

In *State Farm Mut. Auto. Ins. Co. v. Weber*, 767 S.W.2d 336 (Mo.App. 1989), a similar situation occurred where the plaintiff, in a civil action to recoup money paid on a fraudulent insurance claim, tried to get into evidence that the defendant had taken a polygraph test. *Id.* at 338-39. Defendant objected, asked for a mistrial, then withdrew the request. *Id*. at 339. The court gave an oral curative instruction, admonishing the jurors to ignore State Farm's question about the testing. *Id.* The verdict was for plaintiff and defendant sought a new trial based on State Farm's questioning about the polygraph. *Id.* The appellate court held the defendant was not entitled to any relief on appeal. *Id.* He received the relief he wanted in the form of an oral curative instruction and did not ask for a mistrial when it happened. *Id*. at 339.

Likewise, Respondents here objected and requested relief in the form of an oral curative instruction. The trial court properly instructed the jury to be guided by the burden of proof as contained in the instructions, substantially mirroring the relief Respondents requested. Respondents did not ask for a mistrial, they gambled on the outcome, and may not now complain about the result.

D. <u>An incomplete and unrepeated remark, without prejudice</u>.

The ROA submitted does show Ordinola's counsel's remark was an interrupted incomplete statement. A286. After the trial court sustained the objection and provided a curative instruction, the comment was not repeated. The court of appeals "will not find prejudice and reverse a trial court's ruling on an errant statement in closing argument that is fleeting, unrepeated and part of an otherwise appropriate argument." *State v. Emerson*,

573 S.W.3d 93, 106 (Mo.App. 2019); see also *State v. Storey*, 40 S.W.3d 898, 911 (Mo. banc 2001).

Respondents claim it "was not an isolated statement" and "the conclusion of nearly 10 minutes of counsel pondering whether the defense had convinced the jury about several material facts." (Respondents' Brief, pp.15-16.). This is incorrect, unsupported by the ROA, and Respondents fail to cite to any part of the record to support these errant statements. Respondents thereby failed to preserve such matters for review. Rule 84.04. Since Respondents' counsel did not object at trial to any further statements made regarding the burden of proof, these claims are not preserved for review. "The failure to object when the statement was made during closing argument is fatal to a claim on appeal that the argument was improper." *Rains v. Herrell*, 950 S.W.2d 585, 592 (Mo.App. 1997) (citing *Dalcom Serv., Inc. v. Indep. Freightway, Inc*., 895 S.W.2d 619, 622 (Mo.App. 1995)). It is particularly important during closing that an objection be made so the trial court has the opportunity to correct the error without causing a mistrial. *Tune v. Synergy Gas Corp*., 883 S.W.2d 10, 15 (Mo. banc 1994). This is especially true here where the court sustained the one objection Respondents did make. And it is noteworthy that the trial judge, who heard all of the argument - even that not included in the ROA - believed a curative instruction was sufficient.

Finally, there is no reason to believe the jury was "confused" by counsel's remark or the court's ruling. The judge was in the best position to assess the situation and craft relief. The court, being fully informed, decided the appropriate course was to direct the jurors to be guided by the burden of proof instruction in determining who had to prove

what. A286. The jury is presumed to know and follow the instructions of the court. *Deckard v. Webster Cnty.*, 467 S.W.3d 283, 289 (Mo.App. 2015). A trial court that deviates from the specific approved language of an instruction runs the risk of committing prejudicial error. Indeed, deviation from an approved instruction would have been presumptive prejudicial error. *Syn, Inc., v. Beebe,* 200 S.W.3d 122, 128 (Mo.App. 2006). The prudent curative instruction and correct course of action when a party objects to a misstatement of the law, is to direct the jury to be guided by the controlling law of the case, which is in the MAI instructions given. That is exactly what the trial court did here. Point I should be denied.

II. The trial court did not err in handling Respondents' objection to the use of a recording at trial because Ordinola produced it during discovery, Respondents had ample opportunity to prepare and explain the context of the recording, and did so at trial, and in any event, the trial court never ruled on the objection because Ordinola did not use the recorded statement in evidence; it was Respondents who first mentioned the recording to the jury thereby waiving its objection.

A. Standard of Review

The appeals court reviews the trial court's admission or exclusion of evidence for abuse of discretion. *Ziolkowski v. Heartland Reg'l Med. Ctr.*, 317 S.W.3d 212, 216 (Mo.App. 2019). On appellate review, the issue is not whether the evidence was admissible, it is whether the trial court abused its discretion in excluding or admitting evidence. *Id.*

> When reviewing for an "abuse of discretion" we presume the trial court's finding is correct, and reverse only when the ruling is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Upon finding an abuse of discretion, this court will reverse only if the prejudice resulting from the improper admission of evidence is outcome-determinative.

Id., quoting with approval, *Williams v. Trans States Airlines, Inc.,* 281 S.W.3d 854, 872 (Mo.App. 2009) (citations omitted).

Likewise, review of the denial of a discovery motion is governed by an abuse of discretion standard. *Nigro v. St. Joseph Med. Ctr.,* 371 S.W.3d 808, 814 (Mo.App. 2012). A trial court abuses its discretion when its ruling shocks the sense of justice, shows a lack of consideration, and is obviously against the logic of the circumstances. *Id.* If reasonable persons can differ as to the propriety of the trial court's action, it cannot be said the trial court abused its discretion. *Id.*

The party appealing the issue bears the burden of establishing the trial court abused its discretion. *Id.*

B. Respondents' Failure to Comply with *Rule 84.04*.

Respondents repeatedly violate *Rule 84.04(e)* by not providing specific page references to support facts they claim are in the record. In the first and third paragraphs of

their Point II Argument, Respondents assert seven alleged facts to support their point with no citations to the ROA. (Respondents' Brief, p.17-18.) Respondents paint Dr. Burk as a lifesaving, busy physician so involved in Ordinola's care that he could not possibly be held to his memories of her hospitalization record 30 days later. Yet none of these statements are supported by the ROA and are contrary to Ordinola's position that Dr. Burk nearly killed her due to his lack of involvement in her care. Respondents failure to support its alleged facts with page cites to the record impede appellate review.

Any "fact" stated by Respondents without a supporting citation should be disregarded. These violations alone warrant denial of Respondents' Point II. *See Johnson v. Buffalo Lodging Assoc.*, 300 S.W.3d 580, 581 (Mo.App. 2009).

C. <u>The trial court never ruled on Respondents' objection to the recording, leaving no adverse ruling to appeal</u>.

Respondents complain about a recording of a conversation between Dr. Burk and Ordinola and the "undue prejudice" to Dr. Burk from Ordinola being allowed to use it at trial. (Respondents' Brief, pp.17-21.) But their unsupported factual background and argument of prejudice are baseless, particularly since the trial court never ruled on Respondents' objection because Ordinola's counsel ***never used it in evidence*** during her examination of Dr. Burk until after Dr. Burk mentioned it and Respondents' counsel told the jury about it.

Ordinola produced Dr. Burk's audio recording during discovery, but Respondents moved to exclude the statement claiming it was not properly produced during discovery. After hearing extensive arguments from counsel about how the statement was in fact

produced over a year before trial, but misunderstood to be a different witness's statement, was not used by any party during the witness's deposition, and then discovered a few weeks before trial by defense counsel to be his own client's voice on the tape, the Court took all of those facts, circumstances and arguments of counsel into consideration and overruled Respondents' discovery objection to use of the statement at trial. A174-95. The trial judge said, "the record is clear that 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. There was no abuse of discretion in his ruling. Nothing that shocks the conscious and nothing arbitrary or unreasonable. The judge was fair and deliberate, giving careful consideration to the matter. Even if reasonable persons could differ over the matter, it cannot be objectively said the trial court abused its discretion.

Next, with respect to the court's ruling concerning use of the statement in evidence, Respondents are wrong about what transpired. Respondents' statement that Ordinola's counsel "used the transcript of Dr. Burk's audio recording… to impeach Dr. Burk" is unsupported and incorrect. (Respondents' Brief, p.19.) What actually occurred at trial was that Respondents' counsel made a premature objection to any mention of the recording, followed by a recess with no resulting ruling on the objection. A197-98.

Respondent objected during Ordinola's counsel's examination of Dr. Burke when she asked: "Doctor, do you remember about a month after Maria left the hospital… that she asked to meet with you because she wanted to figure out what happened to her and why she had been in the hospital?" A174-75. Before Dr. Burk could answer, his attorney asked

to approach the bench for an objection. A175. After a lengthy discussion about the history of the recording (A175-94), the trial court overruled Respondents' discovery objection, as discussed above, but reserved its ruling on whether Ordinola's counsel would be allowed to use it in evidence. A195. The trial court stated, "Well, the next threshold question is whether you have an inconsistent statement. I guess we will cross that bridge when we get to it." A196.

Before resuming her questioning of Dr. Burk, Respondents' counsel made the following record:

> MR. AYLWARD: Let me make one suggestion so this doesn't get – appears you are going to let her use it, so let me just say this.
>
> **THE COURT: I'm not saying that.**
>
> MR. AYLWARD: I misunderstood. I thought you were going to go ahead and – I was going to say – well, if you are not saying that.
>
> **THE COURT: Here is what I'm suggesting as a logistical matter as to how to deal with this. You ask your question. If you think you have an answer that is inconsistent with something that is in this Exhibit 63, come to the bench and we'll talk about it.**
>
> MS. HAGEN (Ordinola's counsel): Okay.

A197-98.

When Ordinola's counsel resumed examination of Dr. Burk, she asked if he recalled seeing Ordinola at his clinic on November 3rd, 2015. A200. He said he remembered "being called to the clinic" after receiving a message that Ordinola "wanted to ask what happened

during her hospitalization." *Id*. Dr. Burk clearly testified that he recalled the meeting and purpose of the meeting. Yet, Respondents argue in their brief that because he was unable to refresh his recollection of the timing of the events, the impromptu nature of the visit, the passage of time and complexities of her treatment that he did not "accurately relay all the details in precise order." (Respondents' Brief, p.18.) But at no time during Dr. Burk's testimony did he state or suggest that he was confused during the November 3rd meeting and consequently failed to accurately relay the details in the correct order. In fact, he testified quite to the contrary.

Dr. Burk recalled in vivid detail his meeting with Ordinola, including exactly where he had been when summoned to the clinic, the substance of their conversation, the fact he did not stop on his way from Children's Mercy to his clinic, and that an interpreter had to be called to translate. A205-06.

As a result of his vivid recollection and because he never contradicted any statement made in the recording, Ordinola's counsel never used the recorded statement to impeach him. A201-03. The only time the recording was even mentioned during Ordinola's counsel's initial examination of Dr. Burk was when ***Dr. Burk*** referred to it:

> Q (by Ordinola's counsel): Okay. Do you remember telling her that you were not being overly dramatic but her C-section – but after her C-section, her uterus would not clamp down and filled with blood?
>
> **A (by Dr. Burk): Do I independently recall that?**
>
> Q: Yes.
>
> **A: No.**

Q: You don't remember saying that?

A: Not from memory, no, ma'am.

Q: Okay. Do you remember – do you agree that is true?

A: Well, you produced an audio recording of me saying that. But I don't have – other than getting the recording, I do not have an independent recollection of what I said.

A201. At that moment, it was Dr. Burk himself who was the first to tell the jury about the existence of the recorded statement.

Even after Dr. Burk told the jury about the recording, Ordinola's counsel still did not use the statement for impeachment purposes, because Dr. Burk never contradicted what he said in the recording. Consequently, the trial judge never ruled on whether it could be used in evidence.

Respondents incorrectly assert in their Brief that:

> At trial, Appellant's counsel used the transcript of Dr. Burk's recording, which had not been produced prior to trial, and which was not marked as an exhibit at trial, to impeach Dr. Burk. Appellant's counsel compared the transcript of the secret audio recording to Dr. Burk's responses that he gave at his deposition on May 8, 2019. 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, referencing a bimanual exam, and that she received blood shortly thereafter. (Transcript Vol. II A288-289).

Respondents fail to provide a cite for the first two sentences of the above argument, because it is incorrect and there is no such record to cite. Ordinola's counsel never used the transcript to impeach Dr. Burk and never compared it to his deposition testimony of May 8th, 2019. A201-03. The only citation provided by Respondents in the above argument is to the last sentence (citing to A288-89), which refers to Ordinola's counsel's closing argument. But Ordinola's counsel never argued that Dr. Burk contradicted his prior deposition testimony or recorded statement. A289. Instead, she merely reminded the jury during her argument that Dr. Burk did not contradict his testimony but agreed with Ordinola's retained expert, Dr. Hawkins, that Ordinola's bleeding began in the morning as the doctor was pushing hard on her stomach causing the suture to dislodge. A289. Instead of arguing as suggested by Respondents that Dr. Burk provided contradictory testimony, Ordinola's counsel actually argued that this issue "***was not in dispute***." *Id*.

Had Dr. Burk not interjected the existence of the recording into evidence, and had his counsel not discussed at length the "secret recording" during his examination of Dr. Burk, the jury would never have known of its existence.

D. <u>Respondents waived their objection</u>.

Since it was Respondent Burk who interjected the existence of the recording to the jury, he has waived any objection he may have had. A201. "A party may not complain about matters he brings before the jury." *Bushong v. Marathon Elec. Mfg. Corp.*, 719 S.W.2d 828, 840 (Mo.App. 1986). By Respondents' counsel further eliciting testimony concerning the recording from Dr. Burk, Respondents waived their right to challenge the admissibility of such testimony. "A party cannot take advantage of self-invited error." *Id.*

Not only was it Dr. Burk who chose to interject the existence of the recording and its content while Ordinola's counsel questioned him, but his own counsel chose to begin his examination of Dr. Burk by questioning him about the November 3rd meeting, making specific references to the "secret recording," and reading it to the jury. A205-09. Respondents' counsel asked the following of Dr. Burk:

> Q. Okay. Did you know that you were being recorded?
>
> **A. No.**
>
> Q. Okay. So Ms. Ordinola didn't tell you I'm going to record this conversation?
>
> **A. No, she did not.**
>
> Q. But you have now seen the transcript that was made from the recording that was done in secret of you on that day, correct?
>
> **A. Yes.**
>
> Q. All right. And I'm going to read a passage of it and see – and I think it is the same passage that Ms. Hagen just read to you.

A207. The ROA establishes that Ordinola's counsel never informed the jury of the existence of the recording which was actually introduced first by Dr. Burk. A201-03. She merely asked him questions about the November 3rd meeting and whether he made certain statements during that meeting.

Dr. Burk's counsel then refers further to the recording, even proceeding to read the transcript to Dr. Burk to determine if he agrees with the statements contained:

> This is you speaking. So after the tubes were tied like that everything looked very good. They were not bleeding. The uterus was clamped down and was not bleeding from the uterus either. Then you went to the recovery area and recovery room. And then in the recovery area your uterus stopped staying clamped down and filled up with blood. I'm being not over dramatic. It filled up big because it filled up to the size the baby was. So the doctor came in and they pushed on your tummy real hard and pushed a bunch of blood out. Do you remember that? She says no. And that is okay. I understand. And that is when you they gave you some blood. You had lost enough blood from your uterus that you needed blood. Okay. My best guess is that in the process of them pushing very hard on your tummy and the uterus getting big, somewhere in that process the tie on the tube became dislodged. And so that is just a very small and very slow little bleeding spot.

A207-208. After reading the content of the transcript to Dr. Burk, detailing what he said to Ordinola during the meeting, Dr. Burk's counsel asked him, "Now does that sound generally accurate to you as an overview of what happened to her in this hospital admission?" Dr. Burk replied, "Yes." A208.

Dr. Burk even confirmed through questioning by his own counsel that what he said to Ordinola during the recorded meeting was the truth:

> Q. You were trying to comply with her request for you to kind of tell her what happened?
>
> **A. Yes. I felt like when they called me, I don't know whether a resident or another attending called and asked me -- I can't remember which it was. I felt like I had the best overall knowledge of her entire hospital course.**
>
> Q. But back in November of 2015, before there was a lawsuit, before lawyers were involved, before any expert witnesses were involved you told her that you thought the tube, the tie had become dislodged from doctors pushing hard on her tummy?
>
> **A. Yes.**

A209. At no time during Dr. Burk's direct or cross examination did he ever testify that he "forgot" or "misremembered the exact order of events" or "did not accurately relay all the details in the precise order," instead he consistently testified to the very statements that he made to Ordinola during their meeting. He never had to explain contradictory testimony because there was none. (Respondents' Brief, pp.20-21.)

Throughout their brief, Respondents claim that Dr. Burk was put in a position where he had to explain why he contradicted prior testimony and that Ordinola's counsel impeached him with contradictory statements. *Id*. But this did not happen and is not supported by the record. For example, the following statements are made without any citation to the record:

1) "As a result of the impromptu nature of the visit, the passage of time and the complexities of Ms. Ordinola's treatment, Dr. Burk did not accurately relay all the details in precise order." (Respondents' Brief, p.18)

2) "Given the opportunity, Dr. Burk could have investigated and prepared for these inaccuracies if he had timely received the statement he requested in discovery." (*Id*.)

3) "At trial, Appellant's counsel used the transcript of Dr. Burk's audio recording which had not been produced at trial, and which was not marked as an exhibit at trial, to impeach Dr. Burk." (*Id*. at p.19)

4) "Appellant's counsel compared the transcript of the secret audio recording to Dr. Burk's responses that he gave at his deposition on May 8, 2019." (*Id*.)

5) "Unsurprisingly, Appellant's counsel used the secret recording of Dr. Burk in November 2015, to argue to the jury that Dr. Burk's sworn testimony at trial was false because the sequence of events described in the recording is different from his sworn testimony on the subject of exactly when and why Ms. Ordinola's internal bleeding began." (*Id*. at p.20, citing A288-89, which fails to support this statement. Appellant's counsel never said that Dr. Burk provided false testimony or contradicted himself. A289.)

6) "Appellant used the discrepancy between Dr. Burk's unprepared narrative events in November 2015 and his trial testimony in October 2019 to impeach and impugn his credibility." (*Id*.)

7) "Dr. Burk swore to facts and a narrative in his deposition, and then had to explain on the stand that he had at one time told Appellant something different." (*Id.*)

Respondents failure to provide citations to the record to support these factual assertions violates *Rule 84.04(e).*

Respondents further argued that "the secret recording undermined Dr. Burk's credibility on the stand as he truthfully explained that under oath he said one thing, and in private had told [Ordinola] something different." (Respondents' Brief, p.21.) But in fact Ordinola's counsel never attacked Dr. Burk's credibility on the stand or during closing since he never contradicted himself, and Respondents have not provided any citation to the record to show that ever happened.

Finally, there was no prejudice to Respondents. The trial court was never asked to rule on the evidentiary use of the recording. It was Dr. Burk who first told the jury about the recording and Respondent's counsel that first used it.

Point II should be denied.

III. The trial court erred in reducing pursuant to *§538.210* the total noneconomic damages awarded to Ordinola in her medical negligence claim because *§538.210* violates the right to trial by jury guaranteed by Art. I, Sec. 22(a) of the Missouri Constitution, in that, as understood at common law at the time the Constitution was adopted, that right encompasses the substantive right to have the plaintiff's damages in such a cause of action determined by the jury; the jury here determined that Ordinola's noneconomic injuries merited an award of damages in excess of the statutory limitation; and *§538.210* thereby unconstitutionally prevented the jury's award from having its full intended effect.

A. Transfer to Missouri Supreme Court is Appropriate.

Respondents tacitly agree that transfer is appropriate. Respondents filed no opposition to Appellant's motion to transfer. In their brief, Respondents do not challenge Appellant's assertions that (1) Ordinola's constitutional challenge to the validity of *§538.210* has been properly preserved or (2) the challenge is real and substantial and not merely colorable. This appeal should be transferred to the Missouri Supreme Court for determination of the constitutional challenge to *§538.210* in view of its exclusive jurisdiction over this issue pursuant to Art. V, Sec. 3 of the Missouri State Constitution.

B. *§538.210* Violates the Right to Trial by Jury.

Respondents first argue that the legislature was within its rights to abolish the common law cause of action for medical negligence and replace it with an identical

statutory version but with caps.[3] Respondents baldly assert that "***nothing*** excludes modifying the common law from the powers of the people's representatives." (Respondents' Brief, p.24 (emphasis added). The short answer is that when the Missouri Constitution was adopted the people reserved certain power for ***themselves***.

More pointedly, every act of the legislature is subject to the restrictions and limitations imposed by the Missouri Constitution. And it is axiomatic that laws implemented by the legislature are subject to constitutional scrutiny by the judiciary. While "it may be conceded that every intendment should be made in favor of the propriety of legislative action. Notwithstanding this presumption, however, the courts have, ever since the ruling by the Supreme Court of the United States in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), exercised the right to determine whether legislative enactments are violative of the Constitution." *State v. Becker*, 233 S.W. 641, 650 (Mo. banc 1921). "'It is,' said the learned Chief Justice in that case, 'emphatically the province and duty of the judicial department to say what the law is.'" *Id*.

The Constitution that the people of Missouri adopted in 1820 guaranteed that the right to trial by jury as then known shall remain inviolate. So here we are dealing with a

---

[3] Respondents state the legislature "comprehensively revised the cause of action" and "significant changes were made" (Respondents' Brief, pp.24 and 26), but fail to specify any such revisions or changes. In fact, there was none, except caps on noneconomic damages. The statutory elements are the same as a common law action, and the MAI instruction has not changed.

constitutional provision which has in effect adopted the rules of the common law regarding the right to trial by jury, and so, as the United States Supreme Court reasoned in *Dimick v. Schiedt*, 293 U.S. 474 (1935), "to effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is fundamental…." *Id.* at 487.

In *Watts*, the Missouri Supreme Court struck down statutory caps on noneconomic damages in personal injury medical negligence actions based on this very principle. *Watts v. Lester E. Cox Med. Ctr.*, 376 S.W.3d 633 (Mo. banc 2012). And as explicated in Appellant's Brief, with respect to the constitutional provision regarding the right to trial by jury, our Missouri Supreme Court has held even subsequent to *Watts* that while the legislature may "negate causes of action or their remedies that did not exist prior to 1820," the judiciary has the duty "to protect those rights to jury trial as existed prior to 1820." *Dodson v. Ferrara,* 491 S.W.3d 542, 556 (Mo. banc 2016).

So, while the legislature may choose to meddle in the common law, its acts must pass constitutional muster. And as made explicit in Appellant's Brief, *§538.210* does not. The legislature, in destroying the common law cause of action and statutorily reincarnating it with caps, violated the constitutional guarantee that the right to trial by jury as the people enjoyed in 1820 would remain inviolate.

Respondents' reliance on *Overbey* is misplaced. *Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364 (Mo. banc 2012), concerned the *Missouri Merchandising Practices Act* (MMPA), a cause of action that did not exist at common law. The legislature is free to provide whatever remedies it wants for causes of action it ***creates***.

Id. at 375. And though similar to a common law cause of action for fraud, the MMPA did not abolish common law fraud, and the MMPA does not impose caps on damages in a common law fraud action. *Overbey* did not hold that the legislature could cap damages in a common law cause of action by abolishing the action and recreating it statutorily. *Id*. Indeed, Respondents have provided no case so holding, and Appellant has not discovered any.

Respondents next argues that this legislative maneuver is not a patent attempt to legislate away the right to a jury trial because "the new statute preserves the procedural right to have all claims heard by a jury." (Respondents' Brief, p.26.) But this argument was rejected by the Missouri Supreme Court in *Watts*. The ***scope*** of the right to a jury trial "is defined by Missouri's common law at the time the Missouri Constitution was adopted in 1820." *Watts,* 376 S.W.3d at 638. And while remittitur was practiced, "history demonstrates that statutory caps on damages awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by jury as heretofore enjoyed shall remain inviolate." *Id*. at 639. Therefore, "the right to trial by jury 'heretofore enjoyed' was not subject to legislative limits on damages." *Id*.

Finally, in a patent Hail Mary pass attempt to avoid the holding in *Watts*, Respondents raise for the first time ever the issue of sovereign immunity. (Respondents' Brief, p.27.) Noticeably, Respondents do not claim that the Fund is Appellant's only recourse for collecting on the judgment. No claim is made that the Respondents themselves are not liable for any portion of the judgment unpaid by the Fund, or even the entire amount

of the judgment for which each is liable, should Appellant elect to collect from Respondents directly. Also, Respondents do not claim herein that the sovereign immunity cap would have applied had there been no other statutory caps in place, either under the law or under the facts of this particular case. Again, noticeably, Respondents provide no case law to support its position that a statutory cap on noneconomic damages in medical negligence cases "can be construed as revoking that waiver for judgments that exceed the statutory caps." (Respondent's Brief, p.27). Absent controlling or even supporting authority, this Court should not so hold either.

C. *Watts* should not be overturned.

Implicitly recognizing the controlling and definitive impact of *Watts* on the issue at hand, Respondents in desperation lastly request the Missouri Supreme Court to overrule *Watts*, a case decided just eight (8) years ago and which has been steadfastly followed ever since. But *Watts* is solid precedent, it's implications and ramifications important to the people of Missouri, and it should not be overruled.

Respondents assert the Court made two incorrect assumptions in arriving at its holding in *Watts*. But Respondents' criticisms of the Missouri Supreme Court's well-reasoned opinion is unfounded. Respondents fundamentally misconstrue the Court's opinion, and Respondents' reliance on a U.S. copyright infringement case interpreting the 7th Amendment of the U.S. Constitution and federal common law is misplaced.

Respondents are not entirely clear in what the purported erroneous assumptions were. Respondents suggest that there were in fact caps on damages at common law at the time the Missouri Constitution was adopted, citing copyright infringement damages of one

Penny per sheet. (Respondents' Brief, p.28.) But the Court in *Watts* was concerned with common law caps on damages on noneconomic personal injury damages in medical negligence actions. That was the jury trial right at issue. Not copyrights. *Watts* thoroughly examined this issue and confirmed that, contrary to Respondents' assertion, history demonstrates there were no caps in civil personal injury medical malpractice claims in 1820 when the Missouri Constitution was adopted. *Watts,* 376 S.W.3d at 639. Respondents then simultaneously suggest that, even if there were no caps at common law, it "does not, by itself, mean that "the jury trial right limits the *legislative* rather than the *judicial* prerogative." (Respondents' Brief, p.28.) But Respondents' argument in this respect merely begs the question. Respondents have no support for this conclusory statement. They do not even develop the argument any further. It appears abandoned. In any event, Respondents miss the point of the holding entirely. The Constitution defines the right and the Constitution confines the legislative prerogative. The jury trial right is preserved as it existed at the time the Constitution was adopted. The only way to determine the extent of that right is to examine historically what existed at that time in order to ascertain whether the right is now being infringed upon.

Second, Respondents complain that *Watts* erroneously equated the fact-finding function of the jury with a court's role in applying the law to the fact when entering judgment, relying on the *Adams* case that *Watts* overruled. (Respondents' Brief, p.29.) But this was not an erroneous assumption in *Watts*. This argument was met head on, thoroughly analyzed, and ***rejected*** by the Missouri Supreme Court in *Watts*. There is no need to revisit, and it would border on capriciousness to reverse the Court's holding eight (8) years later.

As the Court rightly held, *Adams* was wrongly decided. *Watts*, 376 S.W.3d at 641-46. *Adams* was overturned not lightly, but because it was "necessary to protect the constitutional rights of Missouri's citizens." *Id.* at 644. *Adams'* rationale was rejected on multiple grounds, but with respect to Respondents' specific point, the Missouri Supreme Court held that *Adams* "misconstrues the right to trial by jury because it specifically permits legislative limitation of an individual constitutional right." *Id.* at 642. The Court reasoned:

> *Adams* justifies the section 539.210 damage cap because the jury nominally is permitted to find the facts while the judge statutorily is required to make a separate legal determination that applies the damages cap. The unavoidable result of this rationale is that right to trial by jury is directly subject to legislative limitation. This holding is untenable for the simple reason that *a statutory limit on the state constitutional right to trial by jury amounts to an impermissible legislative alteration of the Constitution.*

Id. at 642 (emphasis added). Respondents fail to grasp this fundamental and profound insight. Fortunately, the Court in *Watts* gets it. As the Court continued, "Adams did not acknowledge, much less distinguish, the myriad cases recognizing that a statute may not limit constitutional rights, which are beyond the reach of hostile legislation." *Watts*, 376 S.W.3d at 642. As in *Adams*, Respondents merely repeat the mantra that the legislature has the power to create and abolish causes of action, but they repeat this mantra "without any further analysis and without addressing how this reasoning can stand in the face of their continued recognition that statutes cannot limit constitutional rights." *Id.* at 643. The

transparent truth of the matter is that if the legislature may abolish and re-create the cause of action with limits on damages, then the people's constitutional right exists in name only. "If that could be done, it would make constitutional protections of only theoretical value – they would exist only unless and until limited by the legislature. Such rights would not be rights at all but merely privileges that could be withdrawn." *Id*.

Determination of noneconomic damages is now and always has been a fundamental part of a jury trial at common law and should be protected. To allow legislative caps to infringe on that right is to render meaningless a jury's determination and assessment of damages. *Watts* should not be revisited or overturned. *Watts* is exemplary jurisprudence, which passes the analysis and scrutiny of even an originalist/textualist approach. The citizens of Missouri voted on and approved a state Constitution that guaranteed that the right to trial by jury "as heretofore enjoyed" would remain inviolate. The citizens knew then what that right encompassed, and it did not entail legislative caps on people's personal injury damages. While it may have once been a mere common law right, when the people ratified the Missouri Constitution, it was no longer a mere common-law right from that point forward. It became a part of the people's state constitutional rights. The Court in *Watts* correctly analyzed this issue, and its holding should be honored and given *stare decisis* effect.

IV. The trial court did not err in its method of allocating payment of the judgment and assessing attorneys' fees in the manner Respondents complain because (1) Respondents never requested the court to allocate damages on a pro rata basis, (2) *§538.220* does not require the court to allocate attorneys' fees on a pro rata basis, (3) the court acted within its discretion in its assessment of attorneys' fees and allocation of damages, and (4) there was no prejudice to Respondents.

A. Standard of Review

"Entry of, or refusal to enter, a periodic payment schedule is reviewed for abuse of discretion." *Williams v. Mercy Clinic Springfield Cmtys*., 568 S.W.3d 396, 408 (Mo. banc 2019). "A trial court will be found to have abused its discretion when the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id*. When there is no factual dispute and only the interpretation of the Missouri statute is at issue, this Court's review is *de novo*. *Id*.

"In jury tried cases… allegations of error must be included in a motion for a new trial in order to be preserved for appellate review" unless they involved questions of jurisdiction over subject matter, presented in motions for judgment under *Rule 72.01(b)* or related to motions for directed verdict granted at trial. Rule 78.07, M.R.Civ.P. Furthermore, "in all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings**,** must be raised in a motion to amend the judgment in order to be preserved for appellate review." Rule 78.07(c).

Argument outside the point relied on is prohibited and will not be considered by the reviewing court. *Tracfone Wireless, Inc., v. City of Springfield*, 557 S.W.3d 439, 448 (Mo.App. 2018).

B. <u>Failure to preserve the Point for review</u>.

Having failed to raise this issue in their motion for new trial or in a motion to amend the judgment, Respondents have failed to preserve this issue on appeal and the Court should not consider it. Appellant can find no reference in the ROA where Respondents requested the trial court to provide the relief sought in their Point relied on. Respondents did not argue in their post-trial motions or motion for new trial that the trial court allocate damages on a pro rata basis in determining the amount subject to payment of attorneys' fees and arriving at an amount to be apportioned to future non-economic damages. Respondents failed to provide this Court with a citation to the ROA where that argument was made to the trial court. Respondents in their motions for periodic payments only asked that future damages "be paid in periodic or installment payments in such amounts and at such intervals as the Court determines are appropriate after a hearing on the matter." D10 p.1-2. After Respondents' post-trial motions were filed and ruled on, Respondents failed to include in their Motion for New Trial that the trial court erred in calculating periodic payments/installments, although Respondents did challenge the manner in which the court assessed costs. Following the entry of the judgment, Respondents never raised this issue in a motion to amend the judgment.

C. <u>Respondents' Point IV is deficient and should be denied</u>.

Sect. 538.220 grants the trial court broad discretion in determining the amount and

manner of payment of future installments for payment of ***noneconomic*** damages. The balance of the Judgment, in this case involving only future noneconomic damages, then may be payable "in whole or in part" in periodic payments. §538.220.2. In the final analysis, it is up to the trial court to determine the amount to be paid as a lump sum and the amount to be paid in future installments. *Watts*, 376 S.W.3d at 647. Not all future damages must be paid in installments; some may be paid by lump sum, others periodic. *Id*. The statute grants the trial court considerable discretion in this regard. *Id*. The language of *§538.220.2* is a general grant of equity powers to the circuit court, which is thereby entitled to fashion relief in the best interests of the parties, subject to review for arbitrariness. *Long v. Delta Medical Center*, 33 S.W.3d 629, 646 (Mo.App. 2000).

Missouri law does not require the trial court to "pro rate the past and future damages and the attorneys' fees and expenses" as Respondents argue. (Respondents' Brief, p.31.) Respondents provide no authority to support its argument. None is listed under the Point or identified in its argument. Respondents' Brief, pp.31-33. The court was also not required to "pro rate the noneconomic damages award" and did not err by "subtracting the full amount of attorneys' fees and expenses from the total damages amount instead of on a pro-rata basis," as argued by Respondents, again, without legal support. *Id*. at p.32. Missouri law, including the plain language of *§538.220.2,* does not dictate how the court should determine the amount or method of future periodic payments.

The only specific instructions in determining how to calculate and distribute future payments is for "future medical periodic" payments, which expressly requires lifetime amortization. §538.220.2. However, Ordinola did not request and was not awarded future

medical payments. At trial, she did not provide any medical evidence and did not seek an award for future medical expenses because her condition is permanent. As a result, the balance remaining after the court reduced her award by the catastrophic personal injury cap and attorneys' fees/case expenses/past damages, was a mere $13,102.72.

While Respondents may have had an argument that a portion of the $13,102.72 should have been ordered to be paid in installments, Respondents cannot advance that argument because they failed to preserve it in Point IV. Argument outside the Point relied on is prohibited and will not be considered by the reviewing court. *Tracfone Wireless, Inc.*, 557 S.W.3d at 448. Instead Point IV is a convoluted presentation of Respondents' personal desire to have the damages allocated on a pro rata basis, a requirement not articulated by statute or any case law interpreting it.

Finally, as a practical matter, even if the court should have ordered a portion of the $13,102.72 be paid in periodic payments, the court had the discretion to order it paid in one lump sum six months after the verdict. It has now been longer than that since the judgment was entered in this case. It has been a year since the verdict itself, and Ordinola has not seen any of the money awarded by the jury. There is no prejudice to Respondents when the period of time the payment could have been made is less than the amount of time that has transpired since the alleged error. And, if necessary, this Court could even remedy any potential error by ordering an installment payment in the disputed amount payable now.

While it is neither in Point IV or the ensuing argument of Respondents' brief, in the "Conclusion" of their brief Respondents request this Court to order periodic payments be paid over Ordinola's life expectancy. (Respondents' Brief, p.38.) Respondents misread the

statute. Payments over a plaintiff's life expectancy pertain solely to future ***medical*** payments, by the plain language of *§538.220.2*. The trial court has discretion to order future noneconomic damages paid in whatever time frame it chooses, subject to review for arbitrariness. *See Watts*, 376 S.W.3d at 647.

D. <u>The trial court properly reduced the judgment by attorneys' fees and case expenses and past damages</u>.

After reducing the verdict by the statutory cap, the trial court had to first determine what amount of the judgment would be reduced by attorneys' fees and case expenses. The trial court stated in the Amended Judgment "Missouri law is clear that Plaintiff's contingent attorneys' fees and expenses should be paid at the time of the judgment becomes final." D41 p.4. As a result, it determined that Ordinola's award should be reduced by her contracted 50% contingency fee with her counsel of $389,414.00 and by her case expenses in the amount of $46,311.28. D41 p.4-5.

After ruling on applicable caps and attorneys' fees/case expenses, the trial court determined the jury's awarded $30,000.00 toward past economic damages and $300,000.00 for past noneconomic damages. D41 p.4-5. The court held that "past noneconomic damages should not be subject to periodic future payments as the jury awarded these damages for her ***past*** 'pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement and loss of capacity to enjoy life.'" D41 p.4.

After making the above determinations, the trial court correctly calculated the jury's damage award for Ordinola as follows:

Reduced non-economic damage award	$748,828.00

Past economic damage award	$30,000.00
TOTAL AWARD	$778,828.00
50% attorney fee	<$389,414.00>
Case expenses	<$46,311.28>
Net to Plaintiff after fees and expenses	$343,102.72
less past economic damages	<$30,000.00>
less past non-economic damages	<$300,000.00>
available for future payments	$13,102.72

D41 p.4-5. The trial court found there was only $13,102.72 available for potential scheduling of periodic payments. D41, p.5.

Missouri law provides when the plaintiff and her attorneys have entered into a contingency fee contract, as in this case, it is presumed counsel will be paid when the judgment becomes final. §538.220.4. Specifically, the statute states: "If a plaintiff and his attorney have agreed that attorney's fees shall be paid from the award, as part of a contingent fee arrangement**,** it shall be presumed that the fee will be paid at the time the judgment becomes final." *Id*. With Ordinola's opposing suggestions to Respondents' motion for periodic payment of future damages, Ordinola's counsel provided the trial court with their Contract for Legal Services and an Itemization of Case Expenses. D25 and D26.

After determining the amount of attorneys' fees and expenses due to Ordinola's counsel, the court properly reduced the jury's award to $435,725.28, the trial court then, in full accordance with Missouri law, ordered an award for "all past damages" be paid by lump sum to Ordinola in the amount of $330,000.00. *Davolt v. Highland*, 119 S.W.3d 118,

138 (Mo.App. 2003). Payment of past damages and attorneys' fees are the only "two exceptions to the trial court's discretion under *§538.220.4*." *Long*, 33 S.W.3d at 646.

After making the required reductions, there remained a balance of only $13,102.72 for the trial court to consider for purposes of future periodic payments. As discussed *infra,* the Court was within its discretion to apportion payment of this amount in the manner it did in the Amended Judgment. Respondents failed to challenge the trial court's actions at the trial court level and thereby failed to preserve the matter for review. Respondents further failed to preserve any appropriate challenge to the trial court's actions in this regarding their Point relied on. Any arguments outside the Point should be ignored. And finally, Respondents have suffered no real prejudice by the court's actions. The trial court could have apportioned a portion of the $13,102.72 payable within six months of the judgment, and it has already been longer than that since the final judgment. Even this Court may do so, if it deemed necessary to remedy any potential error. See Rule 84.14; *Lewellen v. Franklin*, 441 S.W.3d 136, 139 (Mo. banc 2014).

Respondents' Point IV should be denied.

V. If the statutory caps are constitutional,[4] the trial court did not err in denying Respondents' motion for remittitur because the judgment correctly applied the catastrophic injury cap rather than the non-catastrophic injury cap on noneconomic damages in that there was substantial competent evidence at trial that Appellant suffered a permanent, irreversible injury to her bladder and urinary organ system per *§538.205*.

A. Standard of Review

Appellant finds no case addressing the standard of review specifically with respect to a trial court's determination of the appropriate cap to be applied under *§538.205*. Separate caps for catastrophic and non-catastrophic injuries only came about in August 2015. Respondents suggest that review is strictly a matter of law and therefore simply *de novo*. (Respondents' Brief, p.33.) But Appellant proposes that the issue involves mixed questions of law and fact.

When presented with mixed questions of law and fact, a reviewing court will defer to the fact findings made by the trial court so long as they are supported by competent, substantial evidence, but will review *de novo* the application of the law to those facts. *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012); see also, *Mayes v. UPS, Inc.*, 593 S.W.3d 604, 616 (Mo.App. 2019). The evidence should be viewed in the light most

[4] If Ordinola prevails in her appeal, there would be no reduction of the jury's award as a matter of law.

favorable to the trial court's judgment, disregarding all contrary inferences and evidence. *See e.g.*, *Brown v. Brown*, 530 S.W.3d 35, 40 (Mo.App. 2017); *Diaz v. AutoZoners, LLC*, 484 S.W.3d 64, 87, 89 n.28 (Mo.App. 2015).

Respondents assert in their Point V and ensuing argument that *the evidence* did not establish Ordinola suffered irreversible failure of an organ system. (Respondents' Brief, p.33.) Such is a factual finding this Court is to consider in the light most favorable to the trial court's ruling. *Id.* What legally constitutes "irreversible organ failure" within the meaning of the statute, on the other hand, is an issue of law reviewed *de novo*. However, Respondents are not challenging the trial court's interpretation of the language of the statute requiring *de novo* review. Respondents instead only claim there was no evidence of a catastrophic injury presented at trial, which involves a factual finding by the trial court. On this factual finding, the reviewing court should defer to the trial court's finding, so long as it is supported by substantial and competent evidence, viewing the evidence in the light most favorable to the trial court's ruling, disregarding all contrary evidence and inferences.

B. Respondents' fail to provide a fair, concise statement of facts, citations to the record, and a complete ROA for review.

Respondents' statement of facts does not comply with *Rule 84.04(c)*, which requires "a fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04(c). The statement of facts must "have specific page references to the relevant portion of the" ROA. Rule 84.04(c). An appellant's failure to provide a fair and concise statement of facts is a sufficient basis to dismiss an appeal. *See e.g., Selberg v. Selberg,* 201 S.W.3d 513, 515 (Mo.App. 2006).

In their statement of facts, Respondents fail to provide this Court with ***any*** facts concerning whether Ordinola suffered irreversible organ failure. The only time Respondents even mention "catastrophic" injury in their statement of facts is when they state the trial court found Ordinola's "alleged injury to be 'catastrophic' under applicable Missouri statutes" applying that cap. (Respondents' Brief, pp.7-8.) Respondents' statement of facts is devoid of any other facts supporting or refuting Ordinola's claim of suffering a catastrophic injury.

A fair and concise statement of facts concerning the issue of whether the trial court erred in applying the catastrophic cap instead of the non-catastrophic cap logically entails a review of the evidence/testimony adduced at trial concerning the nature and extent of Ordinola's injury due to Respondents' negligence. Respondents not only fail to provide such facts, but fail to provide a complete record of the testimony and evidence adduced at trial regarding this issue, including the testimony of Ordinola's expert witness, Respondents' expert witness, and Ordinola herself, concerning the nature and extent of her injuries and long-term symptoms she experienced and continues to experience. Respondents' statement of facts completely ignores all such evidence. Respondents' critical failure to include such evidence in the ROA and summarize it in their statement of facts justifies denial of this Point.

Finally, the factual assertions contained within Respondents' argument of their brief completely ignore the substantial, competent evidence which support the trial court's finding that Ordinola suffered a catastrophic injury of irreversible organ failure. That is because Respondents largely omitted it from the ROA. *Rule 81.12* requires the appealing

party to order and pay for the transcript which "shall contain the portions of the proceedings and evidence not previously reduced to written form and necessary to determination of the issues on appeal." Rule 81.12(c)(1)(2). As the appealing party on this issue, the burden was on Respondents to supply the Court with a complete ROA necessary to determine this Point. *Pierson v. Laut*, 113 S.W.3d 298, 299 (Mo.App. 2003). Although *Rule 81.12(c)* allows a dissatisfied respondent to supplement the ROA and *Rule 81.12(e)* permits this Court to order "the record be supplemented, ***it is neither respondent's nor this Court's duty to obtain the materials necessary to determine an appellant's points on appeal***." *Id*. (emphasis added) "Instead, the rule makes clear that ***it is the appellant's duty to compile the record on appeal***." *Id*. (emphasis added) "Absent the required record, this Court has nothing to review." *Id*. at 299-300. With respect to the issue at hand, Respondents are the appealing party charged with these duties concerning all points they have raised on appeal (Points I, II, IV, V and VI).

As in *Pierson*, *supra,* where the appealing party supplied an insufficient ROA, this court "cannot review evidentiary sufficiency claims without knowing the evidence presented" and "cannot determine whether the law was correctly or incorrectly applied without a transcript to show the factual or procedural background for the application of law." *Id* at 300. Since Respondents failed to provide this Court with everything necessary to determine the Point they presented, dismissal of Point V is appropriate. *Id*.

By way of example, Respondents state in their Brief without citation: "The evidence presented at trial did not support a finding of "irreversible failure" of one or more major organ systems. The evidence showed persistent problems with urinary incontinence but no

'irreversible failure' of an 'organ system.'" (Respondents' Brief, p.34.) Because they failed to follow *Rule 84.04(e)* that "all factual assertions in the argument shall have specific page references to the relevant portion of the" ROA, these statements should be disregarded.

Respondents failed to provide this Court with other relevant evidence and trial testimony on this issue, such as testimony of Ordinola's retained expert, Soyini Hawkins, M.D. At trial, Dr. Hawkins unequivocally testified that Ordinola suffered a permanent failure to her bladder and urinary organ system. This testimony was not refuted by Respondents' retained expert, Scott Bailey, M.D. (They also failed to provide this Court with a transcript of his testimony where he conceded he was not providing an opinion as to the permanency of Ordinola's injury.) While this Court does not have the benefit of this evidence, because Respondents excluded it, the legal file does contain Ordinola's Suggestions in Opposition to Respondents' Motion for Remittitur. D13. Ordinola references such favorable testimony adduced from her expert at trial in her suggestions. D13 p.2. Specifically, she stated in her opposing suggestions:

> Dr. Hawkins, plaintiff's expert witness, testified that the harm plaintiff suffered from the malpractice constituted organ failure of her bladder, and the uncontradicted medical evidence in this case was that the damage is permanent and therefore irreversible.

Id.

Respondents also chose not to include in the ROA Ordinola's testimony regarding the nature and extent of her injuries. At trial, Ordinola described in detail the effects of her permanent injury, including constant leakage of urine from her vagina, sharp pain/burning

while urinating, numerous urinary tract and kidney infections (requiring hospitalization) and inability to have sexual relations due to leakage and pain. The ROA is devoid of her testimony.

After the trial court heard the testimony on the issue of Ordinola's irreversible organ failure, none of which was refuted by any of Respondents' witnesses, the court found the evidence established Ordinola suffered a catastrophic injury within the meaning of the statute. A41 p.4. Respondents' inexcusable violations of *Rule 84.04* and *Rule 81.12* results in nothing being preserved on this issue for the Court's review. As a result, the Court should dismiss this Point. See, *Johnson*, 300 S.W.3d at 581.

C. <u>The court did not err in finding the evidence presented established Ordinola suffered a "catastrophic" injury to her bladder/urinary organ system</u>.

If the statutory caps are upheld as constitutional, the trial court correctly applied the cap for catastrophic personal injury in this matter. Under *§538.210.2(2),* the applicable cap on noneconomic damages for such injuries is $700,000.00. However, the legislature also contemplated the effect of inflation on an award for noneconomic damages, resulting in a "catastrophic" cap at the time of verdict of $748,828.00. §538.210.4; *See also, Cook v. Newman,* 142 S.W.3d 880, 894 (Mo.App. 2004). "Catastrophic personal injury" is statutorily defined as "an injury that causes irreversible failure of one or more major organ systems." §538.205(1)(e).

As stated above, in their statement of facts, Respondents failed to provide this Court with even one factual reference to the ROA in support of their claim that Ordinola's injury was not catastrophic (and it was devoid of all of Ordinola's facts at trial of a catastrophic

injury). However, in their argument, they claim that Dr. Burk (who was found to be the most negligent defendant by the jury) is the witness who "proves" their Point that Ordinola's injury was not catastrophic. A close review of the citations provided by Respondents claiming they presented evidence of a non-catastrophic injury shows otherwise. (Respondents' Brief, pp.34-35.)

Respondents do not dispute at trial or in this appeal that Ordinola suffered a vesicovaginal fistula due to the alleged medical negligence. However, they claim that "Dr. Burk stated he created "a watertight repair of the fistula" citing to A169. His actual testimony was that after the initial attempt to repair the fistula "we put water in and didn't see any fluid coming through the repair." A169. He was then asked, "your hope was it would be a successful repair and she would no longer have problems?" He responded, "At this point we were very hopeful that we had made things at least better." *Id*. He was then asked, "You learned a few months later that unfortunately the repair didn't work?" A 170. Dr. Burk answered:

> Yes. She had, I think, two UCG cystograms again that did not show any extravasation, which means contrast leaving the bladder and going anywhere else, whether the vagina or the abdomen. So it was just all contained. So she had two of those tests. I believe both showed no extravasation. And then later she developed leaking again.

Id. When asked could he "confirm to the jury that she does still have a fistula and she is still leaking?" A170. His response was that he was unsure. *Id*. He stated:

> Well, I didn't know for sure. Dr. Sutkin's nurse was equivocal -- his last note in the record that I saw was equivocal whether or not the leakage at that time was coming from the bladder -- or through the urethra or through the vagina. But there was urine in the vagina. So he was suspicious, but no confirming test had been performed at Truman.

Id. He never testified he successfully repaired the fistula or that Ordinola was not leaking from her vagina to this day due to the fistula. Instead, he stated he did not know.

Respondents then argue that the "evidence showed" through Dr. Burk that Ordinola had an "overactive bladder being an alternative explanation for this alleged leakage" (citing to A172). That is not what Dr. Burk stated. In actuality, he was asked the following:

> Q. Do you have a medical explanation why she is having urethra as well, not being able to know when she is going to leak?
>
> **A. Well, it's most likely overactive bladder. Okay? And we have ways to test for that. So there are – and that is not uncommon in people who have extensive gynecologic issues.**
>
> Q. As she has?
>
> **A. Yes. So it is not surprising to me. But it is something that can be treated or managed.**

A172. He is not talking about the vaginal leaking from the fistula but another medical issue plaguing Ordinola daily of leaking from her urethra. Contrary to Respondents'

representation, Dr. Burk never claimed this as an "alternative explanation for this alleged leaking."

Their final argument that Ordinola did not suffer a catastrophic injury is that "evidence was presented that such conditions may take multiple surgical attempts to fix the symptoms" and Ordinola "underwent a single repair procedure, and she has refused subsequent surgical care from any care provider to resolve it" (citing to A255 where Dr. Burk was being questioned by his attorney). The questioning was not specific to Ordinola or in regard to her fistula, they were instead general questions about fistulas:

> Q. Is it known that sometimes fistulas, the repair of the fistula doesn't take on the first try?
>
> **A. Yes.**
>
> Q. Is there any kind of average on how many surgical attempts it takes to actually fix a fistula?
>
> **A. No. It's not uncommon for fistulas to have two or three attempts before they become dry.**

A255. Dr. Burk's attorney then asked him, "And how many attempts has Ms. Ordinola had at this point?" He answered, "One." *Id*. At no time did Dr. Burk state that Ordinola would be cured if she would simply endure multiple surgeries or that Ordinola ever stated she "refused" to undergo treatment that would cure her. That page of the transcript (A255) provides no evidence that her fistula was repairable or that she "refused" or "elected not to undergo reasonable treatment to reverse her condition" as Respondents state. *Id*. Neither statement is true nor supported by the ROA.

Although the ROA is deficient on this issue, Dr. Burk's testimony, which is included in the transcript submitted on appeal, supports the trial court's finding relating to permanency of Ordinola's fistula. Dr. Burk testified that since his attempt to repair her fistula she had a recurrence of the fistula and developed leaking again from her vagina. A170 and 172. He agreed that if she continued to have leaking from her vagina at the time of the trial that he had no doubt this was a result of the fistula. A173-74. He did not dispute that she continued to have a fistula at trial. A174. He agreed her ongoing UTIs and kidney infections, requiring her to be hospitalized, were related to the fistula. A148-49 and A155. He related her sharp pain/burning sensation while urinating and ongoing urine leakage, requiring her to change incontinence pads several times a day, to be due to the fistula. A161-62. He agreed that her not being sexually active due to the leakage and pain was due to the fistula. A163.

Reviewing even the scant ROA presented by Respondents on this issue, there was substantial, competent evidence to support the trial court's finding that Ordinola suffered permanent/irreversible organ failure, satisfying the statutory criteria for "catastrophic" personal injury. Should the Court determine statutory caps are constitutional, the higher cap was appropriately applied by the trial court. This Point should be denied.

VI. The trial court did not err in denying Respondents' motion for remittitur because the applicable cap amount, if constitutional, was the one in effect at the time of trial, not when the cause of action accrued, in that the statute in effect when the cause of action accrued was the same statute applied to the verdict and it expressly provided for annual adjustments for inflation to ensure that compensation for personal injury is not diminished from the time of the act of negligence to the time of trial (often years later), and as such the annual adjustment is procedural, not substantive, it is not a new enactment, and does not impose new legal effects to a defendant's conduct in violation of the constitutional proscription against retrospective laws.

A. Standard of Review

Where no factual dispute and only the interpretation of a Missouri statute is at issue, the standard of review is *de novo. Williams,* 568 S.W.3d at 408.

B. The trial court did not err in denying Respondents' request to apply the cap in effect at trial instead of the amount in effect at the time of occurrence.

If the Court determines caps are constitutional, the trial court did not err in denying Respondents' request to apply the cap in effect at the time of trial instead of the amount in effect four years earlier at the time of occurrence. The statute applied to the verdict was the same statute in effect at the time of the malpractice. The relevant statute expressly provided for annual adjustments to the caps for inflation. Such adjustments are fair and necessary to ensure compensation for personal injury is not diminished from the time the

harm is done until the time justice is done, which is often years later. Such adjustments do not violate the constitutional proscription against retrospective laws. See, *Cook*, 142 S.W.3d at 894.

The malpractice in this case occurred in September 2015. The verdict was not returned until October 30th, 2019. The statute in effect at the time of Respondents' negligent acts was *§538.210 (2015).* Appellant's Appendix, A11-13. The trial court applied this same statute to the jury's verdict when reducing the jury's award. A41 p.3-4.

Sect. 538.210 capped noneconomic damages at $400,000 for non-catastrophic injures and $700,000 for catastrophic injuries. §538.210.2(1)(2). Appellant's Appendix, A12. The statute expressly provided for an annual inflation adjustment to the caps, to wit:

> 8. The limitations on awards for noneconomic damages provided for in this section shall be increased by one and seven-tenths percent on an annual basis effective January first of each year.

§538.210.8. Appellant's Appendix, A12.

Respondents contend, erroneously, there should be no annual adjustments in the caps once a cause of action accrues and while the claim is being litigated, and that increasing the cap in such a manner violates the constitutional proscription against retrospective laws. (Respondents' Argument, pp.36-37.) This argument was squarely rejected by the Missouri Court of Appeals in *Cook,* 142 S.W.3d at 894, when addressing an identical challenge to the previous version of the statutory caps, §538.210 (2000).

Sect. 538.210 (2000) imposed a cap on noneconomic damages of $350,000 and provided the limitation amount was to be increased or decreased every year in accordance

with a specified economic index. *Cook*, 142 S.W.3d at 893. The plaintiff in *Cook* obtained a substantial jury verdict and the trial court reduced the verdict to the cap in effect at the time of trial, rather than the lower cap in effect at the time of the occurrence. *Id.* The defendant cried foul, arguing application of the higher cap was a retrospective application of the law violating the constitutional proscription against ex post facto laws. *Id*. The appellate court summarily rejected defendant's claim on the same grounds. *Id*.

In reaching this conclusion, the Court in *Cook* reasoned that the noneconomic damages cap statute had not been amended between the time of the negligent acts and time of trial. *Id.* at 894. The statute applied was the same statute in effect at trial. The statute provided for a cap with adjustments for inflation with the legislature unambiguously providing that the statute only applied prospectively to causes of action arising after February 3, 1986. *Id*. The action in *Cook* arose in 1998 long after the enactment of the statute. "Thus," the court concluded, "in the sense that the legislature did not *enact* a statute during the life of this cause of action, Article I, Section 13 of the Missouri Constitution is inapplicable in this case."[5] *Id.* at 893 (emphasis in the original).

The appellate court further held that by providing for annual adjustments to the caps, the legislature was "unambiguously express[ing] the legislative intent that a plaintiff's noneconomic damages award be protected from inflation." *Id.* at 894. The court observed

[5] Article I, Section 13 of the Missouri Constitution provides that no ex post facto law, nor law impairing the obligations of contracts nor retrospective in its operation shall be enacted.

"the practical effect of the [adjustments] is that compensation received from injury incurred is not diminished from the time of the act of negligence to the time of trial, which may occur years later, by the impact of inflation." *Id*. "In that regard," the court concluded, "the annual adjustment for inflation merely affects procedure or remedy. *Id*. It neither defines or regulates a plaintiff's right to compensation nor imposes or ascribes new or different legal effects to a defendant's conduct in violation of the constitutional proscription against retrospective laws." *Id*. "Thus, the applicable cap amount in this case is … the cap amount in effect at the time of trial." *Id*.

The same holds true in this case. As in *Cook*, the statute applied to the verdict here was the same statute in effect at the time of the negligent acts.[6] And, the statute expressly allowed for annual adjustments for inflation. Ordinola's cause of action arose after the relevant statute was enacted. Thus, as in *Cook*, since the legislature did not *enact* a statute during the life of Ordinola's cause of action, the constitutional proscription against retrospective laws is not applicable here.

It is noteworthy that *Cook* was decided in 2004. The legislature amended the statute in 2015, incorporating adjustments for inflation *without* providing that the applicable statutory cap is the one in effect at the time of accrual of the cause of action. "The legislature is presumed to be have acted with a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent." *Baptist*

[6] While there was a revision to the statute in 2017, it did not change the cap and it was not applied to the verdict in this case.

Convention v. Baptist Univ., 569 S.W.3d 1, 18 (Mo.App. 2019), quoting with approval, *Kolar v. First Student, Inc.*, 470 S.W.3d 770, 777 (Mo.App. 2015). The legislature could have easily incorporated language contravening the holding in *Cook*, but chose not to.

Lastly, Respondents' reliance on *Klotz v. St. Anthony's Medical Center,* 311 S.W.3d 752 (Mo. banc 2010), is entirely misplaced. In *Klotz,* the statute applied to the verdict did not exist at the time the cause of action accrued. *Id.* at 759. When the malpractice occurred in *Klotz*, the statutory cap on noneconomic damages was $579,000, but in between accrual of the cause of action and trial, the legislature *enacted* a new law reducing the cap to $350,000. *Id.* Further, the legislature provided the new law would apply to all suits filed after a specific date, without regard to causes of action that had already accrued as of that date. *Id*. The Missouri Supreme Court per force held such an *enactment* violated the constitutional prohibition of retrospective laws. *Id.* at 760. As Inspector Kemp insightfully pronounced at the end of *Young Frankenstein*, "this is, of course, an entirely different situation." The case at bar presents no such monstrous issue. There was no new enactment involved in reducing the verdict in this case. The statute applied to reduce the caps was the same one in effect at the time the action accrued. The annual adjustment for increase in the caps was provided for in the same statute and known to all involved at the time of the occurrence that ultimately resulted in Ordinola's verdict several years later. The wheels of justice often turn slowly, and it is only fair if caps are to be imposed that the compensation received from injury incurred not be diminished from the time of the act of negligence to trial, years later, by the impact of inflation. This Point should be denied.

CONCLUSION

Appellant prays this Court affirm the circuit court's judgment, except the portion reducing the noneconomic damages award assessed against Respondents pursuant to *§538.210*, and enter judgment as the circuit court ought to have entered to reflect the full amount of the damages award against Respondents assessed by the jury. See Rule 84.14; *Lewellen v. Franklin*, 441 S.W.3d 136, 139 (Mo. banc 2014).

Respectfully submitted,

/s/ Russell S. Dameron
Russell S. Dameron Mo #32055
Watson & Dameron, LLP
2500 Holmes St.
Kansas City, MO 64108
(816) 474-3350 / Fax (816) 474-3351
rdameron@kctriallawyers.com

/s/ Kathleen M. Meier
Kathleen M. Meier Mo #43194
Watson & Dameron, LLP
2500 Holmes St.
Kansas City, MO 64108
(816) 474-3350 / Fax (816) 474-3351
kmeier@kctriallawyers.com

ATTORNEYS FOR APPELLANT-RESPONDENT MARIA ORDINOLA

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word in Times New Roman font and size 13 point. I further certify that this brief complies with the word limitations of *Supreme Court Rule 84.06(b)* and Western District *Special Rule 41(A)* in that this case involves cross appeals and this brief contains 15,464 words.

/s/ Russell S. Dameron
Attorney for Appellant-Respondent Ordinola

Certificate of Service

The undersigned attorney for appellant certifies that a pdf copy of the foregoing Reply Brief of the Appellant-Respondent were filed pursuant to *Rule 108.08* with the Court's E-filing system causing the same to be served upon all counsel of record this 2nd day of November, 2020.

/s/ Russell S. Dameron
Attorney for Appellant-Respondent Ordinola