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IN THE SUPREME COURT OF MISSOURI

Appeal No. SC98362

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

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

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

SUBSTITUTE REPLY BRIEF AND CROSS-APPEAL RESPONSE BRIEF OF APPELLANT SSM HEALTH CARE ST. LOUIS

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II. The Circuit Court erred in denying Appellant's Motion for JNOV as to the submission of the case to the jury based upon the conduct of Dr. Herrmann, because there was a full release of Appellant from vicarious liability for the conduct of Dr. Herrmann in that Respondents had already settled with Dr. Herrmann and released Appellant from any claim "arising out of the vicarious relationship and conduct of Dr. Herrmann.". 20

III. The Circuit Court erred in excluding evidence of the Release because if the Release was not a legal bar to the vicarious liability claim against Appellant for the conduct of Dr. Herrmann, it became a question of fact in that the Release was pleaded as an affirmative defense and under MAI 32.21 because a submissible issue. 28

IV. The trial court erred when it submitted Instruction No. 7 using MAI 13.06, and used the term "agency" in verdict directing Instruction No. 9 and 16, over defense objection, because it violated the provisions of RSMO §538.210 governing medical negligence claims against health care providers in that it permitted an award based upon an agency relationship when the law requires an employment relationship and currently one based upon direct compensation. 33

V. The submission of Instructions No. 11 and 18 for the conduct of Nurse Farr was erroneous because they were not supported by the evidence and a roving commission in that there was no expert testimony to support the claim that Nurse Farr had a duty to know all the vitals, breached a duty to know the results of the urinalysis, breached a duty to

tell Dr. Herrmann about the vital sign trend, breached a duty to tell Dr. Herrmann of the urinalysis results, breached a duty to obtain a reasonable medical explanation for the discharge from Dr. Herrmann, or breached a duty of protective oversight. 36

VI. The submission of Instructions No. 11 and 18 for the conduct of Nurse Farr was erroneous because there was no "but for" causation for the submission in that a nurse is not obligated to disclose known facts and in that Dr. Herrmann admitted knowing the vital signs, lab results and radiology study results and, thus, his conduct was an intervening act. 41

VII. The trial court erred when it submitted Instruction No. 14 and Verdict Form A to the jury, over defense objection, because (A) Verdict Form A included the damage element for "future economic damages" and as plain error under Rule 84.13(c) in that such element was not defined for the jury in Instruction No. 14 and omitted by respondent's counsel in violation of Rule 70.02, and (b) Instruction 14 included future economic damages and future medical damages in that there was no expert support for such damage elements. 46

VIII. The Circuit Court erred in denying Appellant's motion for JNOV on the verdicts arising from the conduct of Dr. Herrmann because there was no evidence of his employment or control of his conduct by Appellant in that medical staff bylaws do not create control, and Dr. Herrmann testified that he was not employed by Appellant and exercised his own independent medical judgment when treating Respondent Lindsey Setzer. 51

IX. The trial court erred in denying Appellant's post-trial motion to modify the judgment to permit Appellant to pay future damages in periodic payments, without hearing, in that there was a timely request for periodic payments and the future damages exceeded the threshold set out in RSMO §538.220. 54

X. The Circuit Court erred in failing to remove Juror #6 and seat an alternate because Juror #6 submitted a question to the bailiff before the evidence closed in that the question was read to counsel and permitted Respondents' counsel to focus on that issue in closing argument. 55

XI. The Circuit Court erred in permitting Respondents to offer evidence of lost financial support by way of tax returns in an effort to utilize the

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rebuttable presumption found in RSMO §537.090 because Respondents had no economic expert, and any alleged presumption had been rebutted, in that the Appellant's economics expert had opined on the lack of an economic basis to support the claim. 57

XII. The Circuit Court erred in not reducing the judgment by the amount of the settlement between Respondents and Dr. Herrmann because Appellant was entitled to the reduction under RSMO §537.060 in that Respondents had previously settled with joint tortfeasor, Dr. Herrmann, and Respondents' counsel stipulated to the reduction / credit. 58

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I. This Court should deny Cross-Appellants' Cross-Appeal Point I, requesting Additur because (A) additur is not permitted in actions brought under RSMo Chapter 538 against health care providers and (B) the jury made a determination that is not against the weight of the evidence and therefore should not be disturbed on appeal. 60

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ARGUMENT

REPLY IN SUPPORT OF APPELLANT'S POINTS ON APPEAL

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

As an initial matter, Respondents[1] confuse and misconstrue the standard of review for this point. While Respondents initially admit whether the jury was instructed is a question of law reviewed *de novo*, *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. banc 2008), Respondents then assert verdict forms are reviewed for the more deferential abuse of discretion standard. (Respondents' Brief at 21). This is not correct. Like all jury instruction issues, this Court reviews the propriety of a verdict form *de novo*. *Advantage Bldgs. & Exteriors, Inc. v. Mid–Continent Cas. Co.*, 449 S.W.3d 16, 28 (Mo. App. W.D. 2014) (citing *Edgerton v. Morrison*, 280 S.W.3d 62, 65–66 (Mo. banc 2009)).

Next, Respondents' conclusory assertion that Appellant's point is multifarious is not well taken. A point relied on is multifarious *only* when it sets out multiple *unrelated* issues, not when it presents multiple contentions related to a single issue or ruling. *See State v. Batiste*, 264 S.W.3d 648, 650 (Mo. App. W.D. 2008). Consistent with Rule

[1] Appellant uses the term "Respondents" to apply to Respondents/Cross-Appellants Lindsey Setzer and Michael Setzer throughout to comport with the designations in Appellant's opening substitute brief.

84.04, Appellant's points identify the trial court ruling being challenged and then state "wherein and why" the trial court's ruling was erroneous.

Here, Appellants' Point I relates to a single issue, the improper use of MAI 21.05 and inclusion of those damage elements into the Verdict Form, which are integrally related and involve a single legal issue. The erroneous instruction and the erroneous verdict form contain the same error and were submitted by the Circuit Court to the jury at the same time. They are part and parcel of the same asserted error.

Turning to the substance of the point, Respondents fail to acknowledge the interrelationship between the damages categories set forth in RSMO § 538.205 and MAI 21.05. In fact, Respondents fail to address Comment C to MAI 21.05 whatsoever, which clearly illustrates the prejudicial error here. The Comment provides (emphasis added):

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

The jury instructions tendered by Respondents here plainly illustrate this problem and the resulting prejudice to Appellant, as the instruction permitted an award of damages for items not permitted by law. For example, Instruction 21 permitted an award in the wrongful death claim of the fetus for dental care, past lost earnings, past lost earnings capacity, past and future physical impairment, disfigurement, loss of capacity to enjoy life, pain and suffering and mental anguish none of which were proper in this death action.

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Respondents correctly state that RSMO § 538.215 sets forth the five categories of damages recoverable in a personal injury or wrongful death case arising from healthcare services as (1) past economic damages, (2) past noneconomic damages, (3) future medical damages, (4) future economic damages, excluding future medical damages, and (5) future noneconomic damages. (Respondents' Brief at 23-24). But Respondents then incorrectly assert that RSMO § 538.215 mandates the use of all five damage elements in this case and attempt to confuse the issue. (Respondent's Brief at 23). Appellant's argument is not that the RSMO § 538.215 categories should not have been used, but rather that the stock MAI 21.05 should have been modified to submit only those damage elements permitted under RSMO § 537.090. RSMO § 538.215 merely states that the jury is to itemize any award by the categories, but does not say all of those elements are to be submitted in each case. In fact, the elements are only partially addressed in the definitions found in RSMO §538.215 and MAI 21.05 has a much more detailed list of potential damage elements. This Court has held that MAI and its Notes on Use are not binding to the extent they conflict with the substantive law. If an instruction following MAI conflicts with the substantive law, any court should decline to follow MAI or make appropriate modifications. *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997).

Respondents further make the curious argument that RSMO § 537.090 does not apply here because it was superseded by RSMO § 538.215. (Respondents' Brief at 26). No one needs to resort to statutory construction here because both statutes apply. Further if we accepted Respondent's argument, then their tendered Instruction 21 is still wrong because it included damage elements not permitted under the definitions of those five

damage categories set out in RSMO § 538.205. To properly instruct the jury, all instructions offered must comply with the substantive requirements of the law. *Gorman v. Wal-Mart Stores, Inc.*, 19 S.W.3d 725, 731 (Mo. App. W.D. 2000)(Use of the stock MAI is appropriate where the MAI is applicable and "does not violate the substantive law"). Rule 70.02 contemplates that MAI instructions must be freely modified where necessary to conform to the substantive requirements of the cause of action and provides the mechanism for such medication. The Rule states in part: "Where an MAI must be modified to fairly submit the issues in a particular case… then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts."

Under these circumstances, Instruction No. 14 using the stock MAI 21.05, failed to fulfill this requirement. Therefore, in order to comply with the substantive requirements of the laws applicable to Respondents' claim, modifications to the stock MAI were required in order to comply with Comment C and take into account the substantive requirements and restrictions of both statutes.

Respondents also assert that this issue was not preserved due to a general non-specific objection made at trial. (Respondent's Brief at 22). At trial, defense counsel gave a three (3) page objection to Instruction 21 (MAI 21.05) to include that it was improper in a death action, cited to the elements permitted under RSMO § 537.090, objected to the inclusion of an award for past economic damages, the inclusion of references to pain and suffering and mental anguish which are not permitted and in conflict with Jury Instruction 20 (MAI 5.01, D52 p. 24), and an award of future medical

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damages for a decedent when there are none. (TR. 760-763). This issue was also clearly set out in the post-trial motion. (D64, p. 12).

Respondents also claim that defense counsel objected to Verdict From B in that it included damage elements not permitted by law but then added "There is no question that you have to do that." Respondent's Brief at 24. This is less than a half-truth. Defense counsel objected to verdict form B, restated his objections that it included damage elements not permitted by law and in conflict with MAI 5.01. (TR 769-70). Mr. Fenlon then said they were required to do this under RSMo § 538.215. The actual quote from defense counsel is set out below:

> MR. BEAN: There is no question that you have to do that. The issue is what elements you can submit in each of those, and it is clear under the law that you are supposed to delete things that don't apply to the claim. So, mental anguish, for example, is one of those that has to be deleted because they are not allowed to award for that; and you can't ask this jury for future economic damages or future medical damages in a death case because there are none. So, it's the elements, not the categories, that is the problem.

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This is the precise point being presented here: it is the elements not the categories. See Comment C to MAI 21.05. A plaintiff is permitted to submit any or all of the five categories of damage, subject to evidentiary support and the law.

Respondents further assert Appellant either was not prejudiced or failed to identify the prejudice resulting from the erroneous instruction. This too is incorrect. Where an instruction does not instruct the jury about the substantive law of the claim, the instruction is erroneous and per se prejudicial. See, e.g.; *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 468 (Mo. banc 1995) (it is critical to give the jury "appropriate guidance" via instruction for wrongful death claim, and "[t]he failure of the instruction to give necessary guidance to the jury was error"). Furthermore, the erroneous instruction prejudiced Appellant by inviting the jury to consider and award damages for categories not permitted in a wrongful death action, including (A) future non-economic damages, (B) past economic damages, and (C) future medical damages with awards for those categories. It is hard to imagine how submission of improper damage elements is not prejudicial.

A. Future non-economic damages

Missouri's wrongful death statute specifically states that "damages for grief and bereavement by reason of the death shall not be recoverable." RSMO §537.090. Instruction #21 as submitted to the jury defined "future non-economic damages" to mean "those damages arising in the future from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life." MAI 21.05, (D. 100, p. 28). Based on this erroneous instruction, the jury

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awarded $300,000 in Verdict B for this category of damages. (D. 100, p. 31-32). This definition conflicted with MAI 5.01, Instruction No. 13 (D.100, p. 20) and permitted an award of grief and bereavement not permitted under RSMO §537.090. The parents in a death action cannot recover for "physical impairment, disfigurement and loss of capacity to enjoy life." These specific objections were made to the Trial Judge. (TR 760-63). Appellant renewed these specific objections in its post-trial motion. (D64, p. 12).

B. Past Economic Damages

Past economic damages were defined in Instruction No. 21 as "those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services and for past lost earnings and for past lost earning capacity." The jury awarded $28,000 for this category of damages in Verdict B. (D. 100, p. 31-32). The deceased baby Setzer, as an unborn fetus, would not have *past* lost earnings, *past* lost earning capacity, dental expense, custodial care or rehabilitative services so the Instruction was wrong and contained elements not permitted under RSMO §537.090. Appellant also raised this objection in the jury instruction conference and in the post-trial motion. (TR761; D64, p. 12)

Respondents assert the bills incurred by Ms. Setzer at St. Clare Hospital and Mercy Hospital are recoverable in the wrongful death count because the care was related to the care provided to baby Setzer. However, Respondents also submitted in Instruction #14, the exact same definition of "past economic damages" for the medical negligence count. (D11 p. 21) (Plaintiffs' Brief at 47). In Verdict A, the jury awarded $100,000 to

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Respondent Lindsey Setzer for "past economic damages." Because Plaintiffs showed no evidence of separate past medical expenses for baby Setzer, inclusion of this category of damages in both the medical negligence and wrongful death verdict forms constituted double recovery, which is not allowable under *Boley v. Knowles*, 905 S.W.2d 86, 88 (Mo banc. 1995).

C. Future Medical Damages

Instruction # 21 also improperly submitted "future medical damages" in the wrongful death claim. Almost by definition there can be no future medical expenses for the death of a fetus; there was no evidence to support this submission and it was erroneous. Ms. Setzer may try to claim future medical expenses for her personal injury claim, but cannot assert those on the death action. Appellant also objected to this at trial and preserved it in the post-trial motion. (TR 748; D64, p. 9-10).

The erroneous instructions permitted the jury to consider and award impermissible damages categories, demonstrating prejudicial juror confusion. *Eisenmann v. Podhorn*, 528 S.W.3d 22, 38-39 (Mo. App. E.D. 2017)(prejudice resulted from erroneous instruction, because jury confusion led to inconsistent verdicts). "An instruction must be a correct statement of the law." *Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224, 226 (Mo. banc 1994). "It is error to submit a theory that is not proven or supported by substantial evidence." *Buffa v. Hauser*, 781 S.W.2d 172, 173 (Mo. App. E.D. 1989).

Therefore, MAI or not, Instruction 21 and Verdict Form B were erroneous. *Bennett*, 896 S.W.2d at 468. Erroneous instructions require a new trial on all issues. *Cova v. Am. Family Mutual Ins. Co.*, 880 S.W.2d 928, 931 (Mo. App. E.D. 1994)

(reversing trial court's determination that erroneous instruction was not prejudicial because instruction which fails to submit an essential element is "fatally defective").

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

Respondents first assert this Point on Appeal was not preserved. This assertion fails, as Appellant preserved this claim by filing a timely motion for directed verdict and motion for JNOV with the Circuit Court specifically asserting the release as a bar and presenting this argument before the Court of Appeals. (D51 p.4; D69 p.6).[2] In this point, Appellant asserts the Circuit Court erred in denying its motion for JNOV and permitting the submission of the case to the jury on the vicarious liability claim when such claim was barred by Release. Point I of SSM's opening brief before the Court of Appeals asserted, *inter alia*, the Circuit Court erred by failing to grant SSM a directed verdict for the claims arising from Dr. Herrmann's conduct due to the bar found in the Release. Court of Appeals brief, Point I(F). Also, in its claim for relief in the conclusion of its brief, SSM explicitly specified it sought JNOV as to all points on appeal. Court of Appeals brief at 85. Furthermore, a motion for JNOV and directed verdict have the same standard of review. *Bauer v. Bowes*, 350 S.W.3d 478, 481 (Mo. App. W.D. 2011). Here, Appellant simply cited to the last error the Trial Court made as it related to the Release.

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[22] In its Substitute Brief, SSM also pointed out that the bar found in the release was presented by the defendant via a motion for partial summary judgment, a motion in limine, and a trial brief on the subject. Substitute Brief at 14: (D31 p.3-4)(*See* D31 p.1-7 and TR675-676, 684-687 for Full Release).

On this basis, Respondents' reliance on *J.A.R. v. D.G.R.*, 426 S.W.3d 624 (Mo. banc 2014) and *State v. Prince*, 534 S.W.3d 813 (Mo. banc 2017) is misplaced. In each of those cases, the appellant raised entirely new legal arguments in its Supreme Court brief. *See J.A.R.*, 426 S.W.3d at 629 (barring claim on appeal the circuit court's findings were against the manifest weight of the evidence, where arguments before court of appeals related to specific findings of abandonment, neglect, and failure to rectify); *Prince*, 534 S.W.3d at 818, n.2 (barring claim based on RSMO § 211.271 before Supreme Court where the section was raised only once in passing in court of appeals brief and was not a claimed point of error).

To meet the requirements of Rule 83.08(b), an appellant must assert claims on transfer to this Court on "substantially the same basis" as those asserted before the Court of Appeals. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 n. 4 (Mo. banc 2015). As the Court noted in *Cox*, "Rule 83.08(b) does not prohibit a party filing a substitute brief with this Court from improving the brief with more detailed legal analysis than that articulated below." *Id.* Indeed, the very function of a substitute brief before this Court is to facilitate such expanded argument. Otherwise, "there would be no point in encouraging or allowing substitute briefs at all." *Id.* Thus, the Points in the Substitute Brief need not be worded identically to the way they were phrased in the Court of Appeals provided that the basis for the Points was preserved at the trial court and the substance presented to the Court of Appeals. *See id.*

Respondents also assert JNOV is an improper remedy because JNOV only relates to the sufficiency of evidence in support of a submission. (Brief at 31). This argument

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fails. A case may not be submitted unless each and every fact essential to liability is predicated on legal and substantial evidence. *Ford v. Ford Motor Co.*, 585 S.W.3d 317, 331 (Mo. App. W.D. 2019). A motion for JNOV should be granted if the defendant shows that at least one element of the plaintiff's case is not supported by the evidence. *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014); *Holmes v. Kansas City Pub. Sch. Dist.*, 571 S.W.3d 602, 611 (Mo. App. W.D. 2018). Therefore, if a plaintiff cannot state a claim because its claim is legally barred, it cannot make a submissible claim as a matter of law.

Before we respond to the improper arguments made by the Respondents we should look once again at the Release. It is telling that the Respondents quote that section of the Release that says they are not releasing and are preserving all rights against "SSM as provided herein." (Respondent's Brief at 35). The very first paragraph of the Release states they are released Dr. Herrmann and "other entities, whomsoever" from liability for the conduct of Dr. Herrmann all of whom are defied as the Released Parties. (D31, p 3). The next paragraph states:

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

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

(D31, p 3-4) From the very language of the Release, Respondents released Appellant from all claims premised on the vicarious relationship and conduct of Dr. Herrmann.[3] This is clear; Respondents were paid by Dr. Herrmann for the very claim against Appellant asserted in Instructions 9 and 16 and Verdict Forms A and B at this trial. Respondents assert that SSM "gloms onto those provisions of the Release wherein the Setzer promised Dr. Herrmann not to bring a claim against SSM based upon his vicarious

[3] Respondent's also conceded this in their motion to strike the defense motion for partial summary judgment. (D37 p.3).

liability." Respondents' Brief at 35. It is true that Appellants rely on the very terms of the Release to support this Point; our opponents admit that they promised not to bring such claims but that is what they did. Respondents' Brief at 34. Plain and simple: either the Release included Appellant as a released party on these vicarious liability claims or Appellant is to be considered an identified third party beneficiary. Moreover, the Respondents have been paid for these claims.

Respondents admit that the "intent to benefit Dr. Herrmann is clear. The parties sought to exclude Dr. Herrmann's involvement in future and expected litigation with SSM." Respondent's Brief at 35. However, Respondent's counsel violated this clear intent and by their conduct have exposed Dr. Herrmann to a third party action for contribution. RSMO § 537.060; *SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP*, 128 S.W.3d 534, 540-41 (Mo. App. E.D. 2003) (hospital may seek indemnity for vicarious liability damages from non-employee agent physician).

Respondents argue that Appellant is not a party to the Release and not entitled to enforce it, but never once cite a case involving a release that states that. In support they cite several cases which do not support their claim. For example they cite *Verni v. Cleveland Chiropractic Coll.*, 212 S.W.3d 150 (Mo. banc 2007), but that case did not involve a release. Rather, this Court held a student was not a third party beneficiary to an employment contract between a college and instructor, because only parties and third-party beneficiaries have standing to enforce an employment contract. *Id.* at 152-153. Respondents released all claims against Appellant arising out of Dr. Herrmann's released conduct. Respondents have already received satisfaction from Dr. Herrmann for their

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claims against SSM due to the conduct of Dr. Herrmann and their claims are barred by accord and satisfaction. Appellant pleaded accord and satisfaction as an affirmative defense. (D4 p.5). There is no doubt Respondents were parties to the Release and bound by its terms. It should not matter who paid the consideration for the release, only that consideration was paid for the release. Here, Dr. Herrmann elected to settle and paid the Respondents to release him and all parties who may be held responsible for his conduct, including SSM. SSM should be considered a Released Party or an identified third party beneficiary.

Additionally, the employment contract at issue in *Verni* addressed the instructor's employment, salary, and benefits, but made no mention whatsoever of the student seeking to enforce its terms. *Id.* at 153. Any impact on the student was therefore merely "incidental." *Id.* Here, the Release explicitly discusses Appellant and explicitly confers a benefit, in that it expressly releases claims against Appellant arising from Dr. Herrmann's vicarious liability.

The other cases cited by Respondents similarly involved suits to enforce a contract or suits for breach of contract and none involved a release. See, e.g., *Klenc v. John Beal, Inc.*, 484 S.W.3d 351 (Mo. App. E.D. 2015) (condominium association agreement); *Fuller v. Partee*, 540 S.W.3d 864 (Mo. App. W.D. 2018) (legal malpractice and breach of fiduciary duty).

Finally Plaintiffs quote from and cite to *Branick v. Nat'l Site Acquisition, Inc.*, 585 S.W. 2d 305 (Mo. App. W.D. 1979), but their quote omits the last sentence of the quoted paragraph which reads as follows: "This provision in the law allows for contribution

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among wrongdoers. A covenant with an individual wrongdoer, however, amounts to a *release or discharge*." *Id*. (emphasis added, *citing*, *McDonald v. Goddard Grocery Co*., 184 Mo. App. 432, 171 S.W. 650 (Mo. App. Kansas City 1914).

Respondents further assert that the release is irrelevant because the jury found against SMS for the conduct of its nurse. (Respondents' Brief at 37). As an initial matter, this ignores the substantial problems with the Respondents' evidence and submission against Nurse Farr. But, more importantly, the Circuit Court's rulings permitted the Respondents to smear Appellant with the conduct of the very doctor they settled with and this tainted the entire trial including the damage award. This Court can look at the Respondent's Statement of Fact to see all the evidence the plaintiff claim proved Dr. Herrmann was negligent. Respondent's Brief at page 4, 7, and 11-12. Yes there was a jury finding against SSM for the conduct of Nurse Farr, but as submitted by Respondents, the erroneous submission of the claim against Dr. Herrmann taints both verdicts. As drafted and submitted, the verdict forms allowed the jury to hold Appellant liable for either Nurse Farr's conduct, *or* Dr. Herrmann's (released) conduct. Because Respondents elected to submit the Verdict Forms allowing the jury to hold Appellant liable for both individuals, there is no way to ascertain whether the jury would have found Appellant liable for Nurse Farr's conduct alone. Where a submission is disjunctive, "each submission must be supported by substantial evidence." *Lowe v. Mercy Clinic E. Communities*, 592 S.W.3d 10, 21 (Mo. App. E.D. 2019).

The language of the Release is clear. Respondents retained the right to pursue relief against Appellant, *only* so far as "those claims do not premise liability arising out of

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the vicarious relationship and conduct of Dr. Joseph G. Herrmann." (D31, p.4). Nevertheless, Respondents submitted their claims against Appellant on precisely this theory. The Circuit Court should have barred Respondents from offering any evidence regarding the conduct of Dr. Herrmann and failing that should have granted the defense motions for directed verdict on the vicarious liability claims submitted against SSM for the conduct of Dr. Herrmann. (D51, 55). The trial court then submitted the case to the jury using Instructions 9 and 16 on the vicarious liability claim against SSM for the conduct of Dr. Herrmann in violation of the release. The Circuit Court improperly submitted the vicarious liability claim against Appellant, warranting a JNOV and new trial on all issues.

The law encourages settlements. *State ex rel. Sharma v. Meyers*, 803 S.W.2d 65, 67 (Mo. App. W.D. 1990). If this verdict is allowed to stand, then SSM would have a viable claim against Dr. Herrmann for contribution on the judgment amount. RSMO §537.060; *Radiologic Imaging Consultants, LLP*, 128 S.W.3d at 540-41. In their Brief, Respondents' counsel have essentially admitted that they intentionally breached their clear agreement and have subjected their client and themselves to suit by Dr. Herrmann for breach of contract. That is certainly not what SSM seeks; rather SSM seeks to have this Court enforce the clear language of the Release and as it relates to this point, remand this case for retrial only on the claim against SSM for the conduct of Nurse Farr.

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

Again respondents assert this point of error was not preserved. This assertion is plainly incorrect. In this point, Appellant asserts the Circuit Court erred in excluding evidence of the Release at trial, because if the Release was not a legal bar to liability, it became an issue of fact, in that Appellant pleaded the Release as an affirmative defense and it was a submissible issue under MAI 32.21. Part (E) of Point I of SSM's brief before the Court of Appeals asserts the Circuit Court erred in excluding SSM's offer of proof in relation to the Release from being admitted into evidence. Court of Appeals brief at 33. At multiple points prior to trial the defendant asserted that the Release bared Respondents' claims as a matter of law or in the alternative created a submissible issue. *See* Motion of Partial Summary Judgment and Trial Brief. (D33, p.1-3; D47, p.1-6). Appellant argued to the Court of Appeals, that because the Circuit Court denied its prior motion for partial summary judgment, the Release became an issue of fact. Court of Appeals brief at 37-39. Appellant cited the same authorities on which it relies in its substitute brief, specifically *State ex rel. Normandy Orthopedics, Inc. v. Crandall*, 581 S.W.2d 829, 834 (Mo. 1979) and MAI 32.21. Respondents claim that SSM failed to preserve this point is without merit.

In making this assertion, Respondents cite to a portion of the Court of Appeals' per curium memorandum that provides: "Next, SSM alleges the trial court erred in

excluding evidence from SSM's offer of proof. SSM did not indicate which offer of proof." Per curium memorandum at 9. As an initial matter, because this Court accepted transfer, under Rule 83.09 the "opinion of the Court of Appeals is of no precedential effect." *McDowell v. Waldron*, 920 S.W.2d 555, 561 (Mo. App. E.D. 1996)(citing Rule 83.09). Second, the Court of Appeals denied plaintiff's motion to dismiss and ruled on the merits of the appeal. Per curium memorandum at 7. Third, Appellant's briefing plainly set forth the offer of proof and relevant testimony at issue. Court of Appeals Brief at 19; Substitute Brief at 21. Respondent testified regarding the Release in Appellant's offer of proof at TR675, 685-687, and in Defendant's Exhibit L. Defendant offered the Release into evidence and the Trial Court denied that request so there was no way to even present the Release to the jury. (TR685-687).

Substantively, Respondents' arguments are erroneous and again assert Appellant was not a third party beneficiary of the Release, again citing to *Verni* and *Kaiser*. Respondents further misunderstand the significance of *Crandall*. The fundamental rule of this Court's holding in *Crandall* is that the effect of an injured party's general release regarding an original tortfeasor as to the party's action against subsequent tortfeasors for alleged malpractice in the treatment of the original injuries *is an issue of fact*. *Crandall*, 581 S.W.2d at 834. Where a co-tortfeasor "made no payment toward satisfaction" in relation to the prior release (as is the case here), the non-setting tortfeasor "can fairly be called upon to show that either the release which they rely on was intended to discharge them or that the releasor has received full compensation." *Id*. (internal citations and emphasis deleted).

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Therefore, the non-contributing defendant has the burden to show either (1) the release was intended to discharge it, or (2) the plaintiff has been made whole. Respondents assert further Appellants' offer of proof was properly denied because it did not contain any testimony or evidence relevant to the parties' intent in entering the Release. (Brief at 42). Again, Respondents misconstrue the issue. Because the offer of proof was denied, Appellant was prevented from presenting *any* evidence in relation to the Release whatsoever, including the existence and the language of the document itself. The jury was precluded from deciding if the release barred the claim. Respondents' arguments regarding the parties' intent upon execution and the supposed testimony on that issue is disingenuous. In fact, as a written contract, the Release itself is the only admissible evidence of the parties' intent. *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 846 (Mo. banc 2012) ("If a contract is unambiguous, the intent of the parties is to be discerned from the contract alone based on the plain and ordinary meaning of the language used."). Absent ambiguity, no other evidence regarding their intent upon execution would be admissible under the parol evidence rule. *Id.*; *see also, Thiemann v. Columbia Public School Dist.*, 338 S.W.3d 835, 840-41 (Mo. App. W.D. 2011) (court reads a contract as a whole to determine the intent of the parties, and if the language used demonstrates the intent of the parties is clear and unambiguous, the court cannot resort to rules of construction or extrinsic evidence). Therefore, the Release itself is the most relevant piece of evidence, and it was improperly excluded from presentation to the jury.

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As it relates to MAI 32.21, Respondents cite to the Notes on Use that state the instruction is only to be given "where there is a disputed issue as to whether plaintiff gave a release." Respondents" Brief at 43. That certainly fits the issue here. However, without the Release itself in evidence, there was no way to submit the issue to the jury under MAI 32.21.

Respondents cannot have it both ways: the Release is either a bar to Respondents' vicarious liability claims or it is a jury question. Because the Circuit Court determined the Release did not bar the claims, and allowed the submission of verdict directors based on vicarious liability, the Release should have been admissible.

Finally, the exclusion of the Release was prejudicial. The jury entered two erroneous verdicts on the basis of Dr. Herrmann's released conduct. The submission in the disjunctive, where one submission is not supported by substantial evidence, is erroneous and taints the entire verdict. "[T]he erroneous submission [of an unsupported disjunctive instruction] raises a substantial indication of prejudice[.]" *Brown v. Shawneetown Feed & Seed Co.*, 730 S.W.2d 587, 589 (Mo. App. S.D. 1987). Furthermore, as presented by Respondents and as set forth in their instructions and verdict directors, the conduct of Nurse Farr and released conduct of Dr. Herrmann were part and parcel to the same claims. Where the issues and parties to suit are "inextricably intertwined," a new trial must be granted as to all issues and parties. *Oventrup v. Bi-State Development Agency*, 521 S.W.2d 488, 493 (Mo. App. St. Louis 1975) ("Since the verdict as to one defendant was tainted, a new trial as to both defendants must be

granted" because it is" essential to include all parties for the new trial in order to preserve fairness and avoid disadvantage to any of the litigants.").

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

The issue here is quite simple: Can a plaintiff in a medical malpractice action against a health care provider submit a jury instruction based upon "agency" rather than "employment." There are multiple reasons why Instructions 7, 9 and 16 were erroneous to include that they were not in compliance with the 2005 law and not in compliance with the 2017 amendment to RSMO §538.210.

Under the prior version of RSMO §538.210.2(3) (2005), the statute provided: "No individual or entity whose liability is limited by the provisions of this chapter shall be liable to any plaintiff based on the actions or omissions of any other entity or person who is not an employee of such individual or entity whose liability is limited by the provisions of this chapter." At that time Chapter 538 included a definition of "physician employee" but not of an "employee."

Respondents' reliance on *Jefferson ex rel. Jefferson v. Missouri Baptist Medical Center*, 447 S.W.3d 701 (Mo. App. E.D. 2014) to support their use of MAI 13.06 over MAI 13.05 is misplaced. *Jefferson* does not control the result here because it dealt only with what principles should be used to assess "employment" in the context of summary judgment motion. The *Jefferson* court repeatedly stated that the defendant hospital was only responsible for the conduct of employees. The *Jefferson* Court noted, a hospital

defendant can only be liable for the conduct of "employees." *Id*. at 707 ("Here, section 538.210.2(3)'s plain language is clear. It provides that MBMC is not liable to the Jeffersons for the actions of Dr. Mosher if Dr. Mosher is not MBMC's 'employee'"). Accordingly, the Circuit Court erred by using MAI 13.06, as opposed to MAI 13.05, which Appellant tendered at trial. (TR854).

Also as set out in the jury instruction conference, if the trial court was going to use MAI 13.06 using an agency approach, then the Instruction should have been modified to use the term employee not agent. (TR731-37, 750-54). As pointed out in its Substitute Brief, this is what other trial courts have done.

Next, the 2017 amendments to RSMO § 538.210 are applicable to Respondents' claims because they serve to define the remedy for the cause of action and define the proper parties to the suit. Respondents assert the amendments should not apply "retroactively," but this assertion misstates the law. Missouri law prohibits the "retrospective" application of a statute. "A law is 'retroactive' in its operation when it looks or acts backward from its effective date; however, a law is 'retrospective' "if it has the same effect as to *past* transactions or considerations as to future ones...." *Missouri Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010) (quoting *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo. banc 1971)). In other words, "[t]he constitutional inhibition against laws retrospective in operation…does not mean that no statute relating to past transactions can be constitutionally passed, but rather, that none can be allowed to operate retrospectively so as to affect such past transactions to the

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substantial prejudice of parties interested." *Fisher v. Reorganized Sch. Dist. No. R–V of Grundy County*, 567 S.W.2d 647, 649 (Mo. banc 1978).

RSMO § 538.210, the statutory tort for medical malpractice, is a remedial statute. By its terms, the statute eliminates any common law cause of action and replaces it with the statutory scheme. *Id*. Amendments to remedial statutory provisions apply retroactively to pending cases. *Leutzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W.2d 591, 594 (Mo. App. E.D. 1995). This includes application of retroactive amendments to "all pending cases—that is, those cases not yet reduced to a final, unappealable judgment." *State ex rel. Faith Hosp. v. Enright*, 706 S.W.2d 852, 854 (Mo. banc 1986). On this basis alone, because the instructions offered failed to conform to the amended statute, they were erroneous.

The prejudice is clear; the jury was permitted to return a verdict against SSM due to the conduct of an "agent" when that is not permitted by law. RSMO §538.210.

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

As set forth in greater detail in Appellant's opening substitute brief, the instructions presented purported "duties" which were not identified by any expert testimony or otherwise and used vague phrases not defined by any expert, including "trends of … vital signs," "medically reasonable explanation," and "protective oversight."

The use of non-defined medical terms in an instruction is erroneous. Absent appropriate expert testimony, the jury has no way of knowing what would be considered a "medically reasonable explanation." *St. Joseph's Hosp. of Kirkwood v. Schierman*, 829 S.W.2d 4, 6 (Mo. App. E.D. 1991). *Schierman* demonstrates the prejudicial effect of vague phrases such as those used by Respondents' in their submissions. In that case, use of the phrase "failed to adequately communicate" in a jury instruction was erroneous because it created a "generalized theory of negligence." *Id*. In other words, the phrase invited the jury to speculate and determine on its own why and in what manner the defendant "failed to adequately communicate." *Id*.

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Respondents attempt to avoid these rules by a long recitation of their evidence on their claims against Nurse Farr. The problem is that their recitation does not cite to any testimony from their expert or any source that Ms. Farr was negligent in failing to know "each" of the vital signs or the results of the urinalysis. With the benefit of hindsight and years of litigation, Ms. Setzer had a urinary tract infection, but a submission must be supported by substantial evidence, including expert testimony. *McLaughlin v. Griffith*, 220 S.W.3d 319, 320 (Mo. App. S.D. 2007) (standard of care in medical negligence case generally must be established by expert testimony).

Respondents cite to their nurse expert testimony that Nurse Farr needed to know the medical diagnosis and prognosis, but nowhere did their expert say Nurse Farr needed to know each vital or the urinalysis results. Respondents' Brief at 50. Although Respondents' expert claimed Nurse Farr should have acted on the basis of the urinalysis results, nowhere in her testimony did Nurse Beckmann identify that Nurse Farr had any duty to know the urinalysis results in the first place.

Respondents further rely heavily on sections of the trial transcript at page 234 to support their assertion Nurse Farr should have known the urinalysis result, but that is the testimony of Ms. Setzer herself and is related to what she does at Mercy Hospital (now that she is a registered nurse). There never was any testimony that Ms. Farr was negligent for failing to know the urinalysis or all the vitals. Even the quoted testimony by plaintiff expert Beckman referenced in Respondent's brief at 54 does not support the submission.

Next Respondents misquote the deposition of Ms. Farr. In their Brief at page 50 they state that Ms. Farr testified that "she did not review anything in depth" at page 40 of her deposition. The problem is that this is only part of her answer which is set out below:

> Q Well, wouldn't you look at the chart to see whether -- see what the care and treatment had been provided to this patient?
> A Well, that is done at the time when you're speaking to whomever you need to.
> Q Who is that?
> A It would have been the physician.
> Q Well, wouldn't you have made yourself aware of what the patient was in the hospital for, since you were going to assist in the discharge?
> A I have a -- I know her diagnosis, and then I looked at the last set of vital signs. I don't review anything in depth.

Id.

Respondents' brief sets out the evidence that Ms. Farr "failed to advocate to protect the patient from inappropriate medical orders" but those were not part of Instructions 11 and 18. (Respondents' Brief at 48).

Instructions 11 and 18 submitted that Ms. Farr was negligent for failing to obtain a "medically reasonable explanation" from Dr. Herrmann when there is no evidence for that submission. Appellant objected to the use of the term "medically reasonable" because it is outside the scope of a nurse's scope of responsibility at the instruction conference. (TR742). In response, Respondents argue that the jury would know what that meant and they are entitled to reasonable inferences. Certainly when evaluating a motion for directed verdict a plaintiff is entitled to reasonable inferences, but for jury instructions, expert testimony to justify the submission. *McLaughlin*, 220 S.W.3d at 320.

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Nurse Farr testified that if she had any doubt about an order she would question the doctor, but that is why she called Dr. Herrmann here. Respondents assert that this term has a "plain meaning" and "adequately conforms" with the opinions of their experts but they provide no citation for that claim. No expert ever used that term. The entire trial transcript is searchable and the first use of the term "medically reasonable explanation" is in the jury instruction.

Respondents' use of the vague and undefined term "protective oversight" suffers from the same fate. While defense expert Dr. Pearse and the SSM Bylaws use that term, there was no expert who testified that Nurse Farr failed to use protective oversight. The Bylaws do not state who is to provide the protective oversight or what that means. This invitation to speculate creates a roving commission warranting reversal. *Id*.

Respondents next assert the erroneous submissions were not prejudicial. The law is clear that an instruction submitted without evidentiary support is reversible error. *Doe 1631 v. Quest Diagnostics, Inc.*, 395 S.W.3d 8, 11 (Mo. banc 2013). If no evidence supports a submission, the submission is improper, and the burden shifts to the submitting party, here Respondents, to demonstrate that *no* prejudice resulted from their erroneous and unsupported submission. *Id*. For this reason, Respondents' arguments that Appellant had a duty to submit a contrary instruction fail. It was Respondents' duty to support their submission with substantial evidence. Where they failed to meet this burden, the instruction submitted without support was erroneous and prejudicial, absent the Respondents' demonstration of no prejudice. *Id*. If we accepted the Respondents'

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argument then a verdict director could contain ten disjunctive submissions and even if nine of the ten were erroneous, the verdict would stand; that is illogical and not the law.

Respondents fail to distinguish *Quest Diagnostics* or otherwise explain why it is not controlling. Respondents claim only "This citation is in error" and "The citation is dicta," while addressing the other cases cited within *Quest Diagnostics*. (Brief at 60-61). In other words, Respondents assert *Quest Diagnostics* does not mean what it says. This argument fails; the rule set out in *Quest Diagnostics* is plainly stated and in accord with prior and subsequent Missouri appellate rulings: "In the case of a disjunctive instruction, each submission must be supported by substantial evidence." *Lowe*, 592 S.W.3d at 21; *see also*; *Berra v. Union Elec. Co.*, 803 S.W.2d 188 (Mo. App. E.D. 1991). Respondents' attempt to rely on *Lowe*'s holding that there is no requirement each submission be based on independent, or different evidence therefore fails. (Respondents' Brief at 58). While the evidence for each disjunctive submission need not be different or independent, the evidence for each submission must be substantial. *Shawneetown Feed & Seed Co.*, 730 S.W.2d at 589. Respondents failed to meet this burden.

Based on the foregoing, the Circuit Court erred in submitting these instructions and in denying Appellant's post-trial motion for a new trial. Appellant was prejudiced by these submissions.

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

The law is clear, there is no "but for" causation for the claimed error of a nurse to tell a physician what he/she already knows. *Callahan v. Cardinal Glennon Hosp*., 863 S.W.2d 852, 862 (Mo. banc 1993). Further, nurses have no duty to disclose to physicians what they already know. *Harvey v. Washington*, 95 S.W.3d 93, 96 (Mo. banc 2003); *Callahan*, 863 S.W.2d at 862.

There was no causation for submission in Instructions No. 11 and 18 that Ms Farr was negligent in failing tell Dr. Herrmann of the trends in the vital signs and the results of the urinalysis prior to discharge. In light of these rules of law, the submission of Instructions No. 11 and 18 was erroneous, as the *only* evidence adduced at trial demonstrates Dr. Herrmann was aware of Ms. Setzer's vitals and the results of the urinalysis at the time of discharge. (TR506). On this issue, Respondents mischaracterize the issue and the standard of review.

Contrary to Plaintiff's assertions, the evidence adduced at trial clearly shows that Dr. Herrmann had access to and knew all of Lindsey Setzer's vitals at the time of her discharge from SSM. (TR505-506, 509, 535, 538-539). Dr. Herrmann knew of the urinalysis results. (TR133, deposition of Dr. Herrmann p. 62, TR509). Dr. Herrmann testified at trial (TR506):

Q. (By Mr. Bean) At the time you issued the orders to discharge, were you aware of the results of the urinalysis, the CBC, the chem panel, the OB ultrasound, the kidney ultrasound, and the last set of vitals?

A. Yes.

There were multiple exchanges between Mr. Horan, counsel for Respondents and Dr. Herrmann about the vital signs: (TR 535)

Q. (By Mr. Horan): When you were taking care of her on July 31st, 2012, did you know what the other vital signs were?

A. I would have asked, yes.

Q. Well, you've remembered everything else. Can you tell me the other vital signs?

A. Well, I don't think that's entirely true. I said I haven't recalled quite a bit. So I think you are making a misstatement there.

Q. Well, What I'm saying is, you should have known the other vital signs when you sent her home, isn't that correct?

A. Well, I probably did at the time.

Dr. Herrmann repeatedly emphasized he knew all relevant data. He testified further (TR539):

Q. (By Mr. Horan) Let me ask you this. If you did not know them at the time and you did not know the trend at the time on 7/13/12, that would have been a deviation from the standard of medical care on your part; correct?

* * *

A. That is not the case.

Q. (By Mr. Horan) I understand that. I'm asking you, if you did not know that trend, if you did not know those earlier values on 7/31/12, of the pulse and the temperature, that would have been a deviation from the standard of medical care on your part; correct?

A. That is not correct. I know what those values were.

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Respondents assert this evidence (the only evidence offered as to Dr. Herrmann's state of mind at the time of discharge) must be ignored because it is contrary to the verdict and the submission. Brief at 63, citing *Oldaker v. Peters*, 817 S.W.3d 245, 251-52 (Mo. banc 1991). *Oldaker* is not on point. In that case, regarding a traffic accident, substantial evidence was adduced in support of the submission, including the lighting conditions on the highway, the relative locations and viewpoints of the parties, and the decedent's path of travel based on eyewitness testimony. *Id.* at 252. Here, by contrast, the only evidence regarding Dr. Herrmann's knowledge was his own testimony. Respondents adduced no contrary evidence. Respondents' proposed rule of law would lead to absurd results, as indeed it does here. Under Respondents' proposed rule, the submission of an instruction, even one not supported by substantial evidence, could never be subject to appellate review, because all contrary evidence would have to be ignored.

Additionally, Respondents misconstrue the issue. Appellant is not asserting the contrary evidence should be outweighed or disregarded in favor of Dr. Herrmann's testimony. The problem is that Respondents conflate the verdict with the evidence they had a duty to provide to support their instruction. *Ellison*, 437 S.W.3d at 768. Respondents had a duty to provide evidence of a causal link between the alleged failure of the nurse to disclose the vitals sign trend and the urinalysis results to Dr. Herrmann. Even if we accept the premise that Nurse Farr had a duty to disclose those two items, Respondents had a duty to prove that Dr. Herrmann did not know those and if disclosed he would have acted differently. *Callahan*, 863 S.W.2d at 862; *Harvey*, 95 S.W.3d at 96.

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The only evidence on causation was the testimony of Dr. Herrmann who testified he knew of the vital sign trends and the UA results. (TR506). As a consequence there was no but for causation for the submissions in Instructions No. 11 and 18.

Therefore, Respondents derive the wrong holding from *Callahan*. Appellants seek to rely upon one of the hypotheticals posed by the *Callahan* Court where a nurse fails to disclose the patient's condition before discharge "where the physician is not otherwise informed." Brief at 65, citing *Callahan*, 863 S.W.2d at 862. Dr. Herrmann's testimony, which was not contradicted by any contrary evidence, establishes that he was otherwise aware of Ms. Setzer's condition.

Therefore, pursuant to *Callahan*, a nurse cannot be liable where the physician already has knowledge of the underlying facts:

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

Id. at 862.

Contrary to the holding in *Callahan*, jury instructions 11 and 18 required a verdict in favor of Respondents if Nurse Farr either failed to know each of Lindsey Setzer's vital signs or failed to inform Dr. Herrmann of the trends and vitals and of the urinalysis.

Accordingly, Appellant cannot be held liable for Nurse Farr's purported failure to inform him of the vitals, the vital sign trends, and the urinalysis. *Callahan*, 863 S.W.2d at 862. This precise issue was raised in the defense objection to the jury instruction

(TR741-743, 757;) and in the post-trial motion (D69 p.16-17). This court should reverse and remand for a new trial on the nursing conduct. The erroneous submission of an unsupported instruction "raises a substantial indication of prejudice[.]" *Shawneetown Feed & Seed Co.*, 730 S.W.2d at 589. There is presumed prejudice because the jury may very well have found fault with the conduct improperly submitted to them.

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VII. THE TRIAL COURT ERRED WHEN IT SUBMITTED INSTRUCTION NO. 14 AND VERDICT FORM A TO THE JURY, OVER DEFENSE OBJECTION, BECAUSE (A) VERDICT FORM A INCLUDED THE DAMAGE ELEMENT FOR "FUTURE ECONOMIC DAMAGES" AND AS PLAIN ERROR UNDER RULE 84.13(C) [4] IN THAT SUCH ELEMENT WAS NOT DEFINED FOR THE JURY IN INSTRUCTION NO. 14 AND OMITTED BY RESPONDENT'S COUNSEL IN VIOLATION OF RULE 70.02, AND (B) INSTRUCTION 14 INCLUDED FUTURE ECONOMIC DAMAGES AND FUTURE MEDICAL DAMAGES IN THAT THERE WAS NO EXPERT SUPPORT FOR SUCH DAMAGE ELEMENTS.

Respondents first assert, again erroneously, that Point VII is multifarious. As stated, Instruction No. 14 and Verdict Form A contained the same error; they are part and parcel of the same asserted error and claim for relief on appeal. A point relied on is multifarious *only* when it sets out multiple *unrelated* issues, not when it presents multiple contentions related to a single issue or ruling. *Batiste*, 264 S.W.3d at 650.

Respondents next assert the point was not preserved at trial. As explained in greater detail in Appellant's opening substitute brief, part of the basis for the alleged error is that Respondents submitted to the trial court their proposed Instruction No. 14 without noting it was modified from the stock MAI. Rule 70.02 governs the procedure for instructions to juries and states that instructions shall be tendered to the court and each party with notations "MAI No. ___" or "MAI No. ___ modified" or "Not in MAI" as the case may be. Rule 70.02(a). Respondents' counsel violated Rule 70.02 because failed to disclose to the court and counsel that they deleted the definition of "future economic damages excluding medical damage" from Instruction No. 14, while keeping that damage

[4] Appellant concedes it incorrectly referred to plain error review under Rule 30.20 in its substitute brief. Rule 30.20 is applicable to criminal appeals. Rule 84.13(c) is the equivalent rule applicable to civil appeals and is the correct rule applicable to this appeal.

element in Verdict A. (D53 p.17; A23, A31-A32). Based on this omission, Appellant did not have notice of the modification and was therefore unable to object to Verdict Form A at trial. Appellant made clear and detailed objections to Instruction No. 14 and those alone warrant reversal. The issue of Verdict A should be reviewed as plain error.

There is no doubt that Instruction No. 14 did not match Verdict A because it deleted the definition of "future economic damages excluding medical damage" while keeping that damage element in Verdict A. The Jury then awarded $239,712 for this element. Appellant relied upon the representation of opposing counsel that Instruction No. 14 was unmodified and therefore did not object to the modification (omission of a damage element that was then included in the Verdict Form).

At the first opportunity that Appellant noticed the change, Appellant brought it to the Court's attention and made an objection before the jury was released so that the mistake could be corrected. (TR 844-847). Plaintiffs should not be able to benefit from this misrepresentation now.

Substantively, Respondents claim that despite the error, the jury could still understand the instruction and verdict form because they had a definition of "past economic damages" so presumably the jury could understand what "future economic damages" mean. (Respondents' Brief at 68). This might be a reasonable argument if the definitions of "past economic damages" and "future economic damages" were <u>identical</u> aside from the word "past" and "future" in MAI 21.05, but that is not the case. In MAI 21.05, "past economic damages" is defined to mean "those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for

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medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services and for past lost earnings and for past lost earning capacity." However, the phrase "future economic damages" is defined to mean "those damages arising in the future from pecuniary harm such as lost earnings and lost earning capacity." The omission of the medical expenses is deliberate due to the fact that there is a separate category of damages of "future medical damages" but no "past medical damages" separate from "past economic damages" in MAI 21.05.

Despite receiving no definition for the term, the jury awarded $239,712 for "future economic damages excluding future medical damages" in addition to the $175,000 that they awarded for "future medical damages." Without a definition, what is this award of $239,712 meant to represent? It could be duplicative of medical damages and an impermissible double recovery. Or it may represent future lost earnings and future lost earning capacity; however, in the medical negligence count there was no evidence put on that Ms. Setzer was expected to miss any future work or work opportunity so there was no evidence put on at trial to support this category of damages. Respondents' violation of Rule 70.02 prevented Appellant from noticing the change, resulting in substantial prejudice. This error should be reviewed for plain error under Rule 84.13(c).

Instruction No. 14 was also not supported and erroneous, but Respondents' claim Appellant failed to preserve these errors on appeal with its objections at trial. This argument is disingenuous. Appellant made the specific argument in the jury instruction conference that the category of post economic damages was not supported by the evidence. (TR747-748)("I have several objections….I don't think there is any evidence to

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support the past economic damages. And for the past lost earnings, Ms. Setzer herself testified on the witness stand that she was paid for her time that she was off work…There is no past lost earnings, and there is no past lost earning capacity. So, they are submitting damage elements that are not part of the evidence."). Appellant also objected to future medical damages. (TR 748)("I don't think there is any causation for any of these, but specifically, as to future medical damages, there has been no evidence that Ms. Setzer needs future medical damages as a result of any neglect."). Since Respondents' counsel deleted the definition of "future economic damages" without telling the Court or the undersigned, it was impossible for the undersigned to object to something that was missing. Respondents should not be permitted to "profit" from their error and a Verdict Form not supported by the instructions or the evidence. Appellant's arguments were **not** waived and were properly preserved for appeal. It is true that defense counsel did not object to Verdict From A due to the inclusion of a damage element that was not defined for the jury, but that was due to the failure of plaintiffs' counsel to comply with Rule 70.02(a). The objections to Instruction No. 14 were clearly preserved and Appellant does not need to rely upon plain error for this portion of the argument on Point VII.

Substantively, the cases on which Respondents purport to rely are not factually on point. Respondents cite to *Chaussard v. Kansas City S. R. Co.*, 536 S.W.2d 822, 829-830 (Mo. App. W.D. 1976), but that case discusses future pain and suffering, not future medical damages. To recover for future medical expenses, a plaintiff must show either (a) there is an increased risk of suffering possible future consequences, or (b) that a future injury is reasonably certain to occur. *Ball v. Allied Physicians Grp., L.L.C.*, 548 S.W.3d

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373, 382 (Mo. App. E.D. 2018). Similar to *Ball*, in the instant case, Respondents presented no medical expert testimony Ms. Setzer would require future medical care. Ms. Setzer's testimony about her past symptoms is not sufficient to establish an increased risk of future consequences or a reasonably certain future injury. This award of $239,712 is not supported by any evidence, and under *Ball* this portion should be vacated

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

Respondents assert this point was not preserved because it was not addressed by the Court of Appeals. This is incorrect. Appellant presented this argument in Point XII of its brief before the Court of Appeals, which asserted the verdict and judgment were against the manifest weight of the evidence, on the same basis raised in Point VIII here, because Dr. Herrmann "had no contract with SSM, was paid nothing by SSM, had identical call schedules and bylaws at his other hospitals, exercised his own independent medical judgment, and was not controlled by SSM." Court of Appeals Brief at 80-81. *See also* Appellant's Reply Brief, filed August 29, 2019, at pages 61-63 for the briefing below on the issue of whether medical staff bylaws would support a finding of employment or agency, and citing the same authorities on which SSM relies in Point VIII here, specifically *Hefner v. Dausmann*, 996 S.W.2d 660, 667 (Mo. App. S.D. 1999) and *Wilcox v. Lake Regional Health System*, 2016 WL 5939351 at *3, No. 2:16-cv-05058-MDH (W.D. Mo. Oct. 12, 2016). The *Wilcox* court specifically held "staff privileges generally permit a doctor to use hospital facilities to practice his medical profession, but do not constitute employment or a contract for employment." *Id.* (internal quotations omitted). Further, the requirement to "abide by [the hospital's] by-laws and policies" did not "equate[] to an employment or agency relationship with that facility." *Id.*

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To establish Appellant's purported employment with Dr. Herrmann and/or control over his conduct, Respondents cite only to the hospital bylaws and Dr. Herrmann's testimony regarding them. The bylaws alone are insufficient to establish an employment relationship as a matter of law, as the mere affiliation between a hospital and third party physician does not create vicarious liability for the hospital arising from the third party physician's malpractice. *Hefner*, 996 S.W.2d at 667.

Because the bylaws themselves are insufficient to establish an employment relationship, Respondents point to certain interrogatory answers which were read at trial. However, Respondents misrepresent and overstate those interrogatories and answers in their brief. For instance, Respondents claim "Plaintiffs introduced and read to the jury defendant SSM's answer to interrogatory 11 which states Dr. Herrmann was acting as its employee in referring Lindsey to Dr. Super." Brief at 74. The interrogatory and response are set out below:

> Number 11: During the course of this defendant's health care provider relationship with plaintiff, and while acting through the defendant's *agents, servants and/or employees*, state the name and address of any health care providers this defendant's employees referred plaintiff to at any time and the date and purpose of said referral.
>
> ANSWER: Yes. Dr. Herrmann appeared. Ms. Setzer was told to follow up with her private OB, Dr. Super, in one day.

(TR165 emphasis added). This is far short of an admission that Dr. Herrmann was Appellant's employee as Respondents assert in their brief. An SSM employee in the Emergency Department did contact Dr. Herrmann; the response was accurate and does not concede that Dr. Herrmann was an employee or agent. This assertion by Respondents

is also directly contrary to other discovery responses that Dr. Herrmann was not employed by Appellant and the language of the Release, wherein Respondents stated that Appellant represented that Dr. Herrmann was not an employee or agent. (TR494-97; D31, p 3-4).

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

The fact that the jury also entered a verdict for Nurse Farr's conduct does not negate the prejudicial effect of the erroneous submission, because "each submission must be supported by substantial evidence." *Lowe*, 592 S.W.3d at 21; *see also; Berra*, 803 S.W.2d at 190; *Shawneetown Feed & Seed Co.*, 730 S.W.2d at 589. This Court should reverse and remand, granting Appellant a JNOV on the claims arising from the conduct of Dr. Herrmann.

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

The law is clear that the defendant is entitled to periodic payments on future damage awards in excess of $100,000. RSMO § 538.220.2. This request was made in the Answer (D4, p. 4), at trial (TR869-40), and in the post-trial motions. (D54, p.1).

The Circuit Court never ruled on any of the post-trial motions. SSM provided the court with the needed data in the form of the Federal funds rate and the life expectancy chart from Respondents' evidence (TR240, 245, Plaintiff Ex. 14). Respondents assert the Circuit Court did hold an evidentiary hearing and that satisfies the statutory requirements. (Respondent's Brief at 76). There are multiple flaws in that analysis. First, it was an argument on the cross post-trial motions; no evidence was offered. Second, if the argument was an evidentiary hearing, the Circuit Court was required to address the defense request. Certainly the trial court is given wide latitude to evaluate a plaintiff's current medical needs versus those due in the future, but it must rule on those issues and set out a payment schedule. RSMO § 538.220.2. Here the Circuit Court did neither; there was no ruling and that is erroneous under multiple previously cited cases.

Additionally, Respondents and Appellant each submitted competing orders on periodic payments and did not agree on how to apply the statute. (D74, D79). Accordingly, should this Court reject all defense points on appeal, then it should also remand to the Circuit Court for a full hearing on periodic payments.

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

Admittedly, Missouri courts have not issued any rulings directly on point to the circumstances at issue here. However, the law does provide for"[r]eplacement of a juror with an alternate is an appropriate remedy when there is a *possibility* of bias." *Hudson v. Behring*, 261 S.W.3d 621, 624 (Mo. App. E.D. 2008) (emphasis in original). Further, Missouri courts have held that a juror's speculation on the evidence or drawing unwarranted conclusions may suggest juror bias, for which the appropriate remedy is removal of the juror. *Milam v. Vestal*, 671 S.W.2d 448, 453 (Mo. App. S.D. 1984).

Juror #6 submitted a written question to the bailiff during the trial asking about whether the kidney stones were too big to pass naturally. The trial judge brought juror #6 into the courtroom and quizzed him on the topic. Appellant moved for a mistrial and then to disqualify Juror #6. (TR705-06). The size of the kidney stones and whether they could pass naturally was a disputed issue. Appellant's expert Dr. Matlaga testified that the kidney stones would pass naturally on an outpatient basis. (TR586, 600). Respondent expert Dr. Heller testified that the kidney stones were too large to pass naturally. (TR 137-39, Deposition of Ross Heller, TR138, Deposition of Dr. Ross Heller, November 25, 2015, p. 91). After the question posed by Juror #6, Respondents' counsel seized on this issue and argued twice in closing that the kidney stones were too big to pass naturally. (TR824, 831). An alternate juror was available and should have been

seated in place of Juror #6. The failure to remove him and seat the alternate prejudiced SSM and a mistrial was the only appropriate remedy. The defense raised this issue at trial (TR839-40) and in the post-trial motion. (D54 p.1). This Court should grant a new trial on all issues.

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

Respondents assert in relation to this point that Appellant failed to object to the admission of the tax returns. This is not correct. Appellant's objection is plainly noted in the transcript. Upon Respondents' offer of the exhibit into evidence, Appellant's counsel noted "So, we have objected previously on the issue of this rebuttable presumption, and we would incorporate all the prior motions and argument on that." (TR242). This point of error is preserved on appeal and was briefed in the Appellant's Substitute Brief.

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

In the alternative, if the verdicts and judgment are not reversed in their entirety, Appellant is entitled to a reduction in the judgment in the amount of the settlement paid by Dr. Herrmann.[5] RSMO **§** 537.060.

Appellant raised this issue in its Answer and Affirmative Defenses. At trial, the Respondent's counsel *stipulated* that Appellant was entitled to the set off and confirmed this at the argument on the post-trial motions. (D4 p.5; TR6-8, 869). The request was also included in the Appellant's post-trial motion. (D62). The Court of Appeals observed in its per curium memorandum "We note that the Setzers were also less than forthcoming regarding the facts of this case. They did not acknowledge the parties' clear stipulation regarding a reduction in the judgment, and then misconstrued SSM's point on appeal addressing that issue." Memorandum at 3. Respondents have committed the same error here and assert in this Court that they are not bound by these stipulations.

Appellant is entitled to a reduction in the judgment in the amount of the settlement between Respondents and Dr. Herrmann pursuant to the plain terms of RSMO § 537.060 and Respondents' stipulations on the record.

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

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ARGUMENT

RESPONSE TO CROSS-APPELLANTS' CROSS-APPEAL

I. THIS COURT SHOULD DENY PLAINTIFFS' CROSS-APPEAL, POINT ONE, REQUESTING ADDITUR BECAUSE (A) ADDITUR IS NOT PERMITTED IN ACTIONS BROUGHT UNDER RSMO CHAPTER 538 AGAINST HEALTH CARE PROVIDERS AND (B) THE JURY MADE A DETERMINATION THAT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND THEREFORE SHOULD NOT BE DISTURBED ON APPEAL.

Respondents argue in their cross-appeal that the jury's verdict of $0.00 for "future economic damages excluding future medical damages" on Count II (the wrongful death count) should be amended to add the sum of $636,455.26 based upon the rebuttable presumption in RSMO § 537.090. Respondents' argument fails because (a) their evidence of tax returns was improperly admitted, (b) additur is not permitted in actions against a healthcare provider, and (c) as the trier of fact, the jury made a determination on future economic damages in Count No. 2, that is not against the weight of the evidence, and therefore should not be disturbed on appeal.

A. Tax Return Evidence: As asserted in Point XI of Appellant's Substitute Brief, the admission of the plaintiff's tax returns was in error.

B. Additur is not permitted in actions against health care providers: Additur is governed by RSMO § 537.068, which states, in relevant part, that "[a] court may increase the size of a jury's award if the court finds that the jury's verdict is inadequate because the amount of the verdict is less than fair and reasonable compensation for plaintiff's injuries and damages." *Id.* Although RSMO § 537.068 does not expressly use the word "additur," traditional additur was "clearly intended" by the

statute's juxtaposition with remittitur. *Tucci v. Moore*, 875 S.W.2d 115, 116 (Mo. banc 1994). Likewise, Respondents' brief does not expressly use the term "additur," but it is clearly intended in Respondents' request to amend the judgment to add additional compensation for Plaintiff's alleged damages.

Additur has not been permitted in medical malpractice actions since 1987 when RSMO § 538.300 was first adopted. This section provides: "The provisions of section…537.068 [the additur statute]…**shall not apply to actions under sections 538.205 to 538.230**." RSMO § 538.300 (emphasis added). Because common law additur was replaced by statutory additur, a plaintiff may only obtain additur under the provisions of the additur statute. *Stewart v. Partamian*, 465 S.W.3d 51, 59 (Mo. banc 2015)("In 1987, the legislature superseded *Firestone* and enacted section 537.068, which provides for both remittitur and additur.").

Statutory additur is expressly disallowed in actions under RSMO Chapter 538 for professional liability claims against health care providers like Appellant in this case. Therefore, no matter how they style their additur claim, they are not legally entitled to additur. *Id.*

C. The jury made a determination that was not against the weight of the evidence and therefore should not be disturbed on appeal: Assuming *arguendo* that RSMO § 538.300 does not prohibit Respondents' request for additur, Respondents would still have the burden to prove the verdict was "against the weight of the evidence" and that Respondents are "entitled to a new trial" in order to obtain additur. *Stewart*, 465 S.W.3d at 59 ("The circuit court should not sustain a motion for additur or remittitur

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under section 537.068 without having determined that the verdict is against the weight of the evidence and that the party moving for additur or remittitur is entitled to a new trial"). Aside from Respondents' disagreement with the opinions of Appellant's economic expert Prof. Summary, Plaintiffs have made no argument in their brief that the jury's verdict was "against the weight of the evidence" or that they are "entitled to a new trial." *Id.* Instead, Plaintiffs make a nonsensical argument that the language of RSMO § 537.090 entitles them to a presumption of an award of $636,455.26 (an amount apparently calculated by Respondents' counsel, not based upon direct evidence or the testimony of an expert) and that Appellant did not rebut the presumption under the statute. While Respondents may be right that damages are determined under RSMO § 537.090, they completely misinterpret the statute and the rebuttable presumption.

In wrongful death cases, one component of pecuniary loss a jury may consider is the deceased's earning capacity. *Martin v. Sloan*, 377 S.W.2d 252 (Mo. 1964). Wrongful death is a statutory cause of action and Missouri's wrongful death statute specifically provides for consideration of lost financial support and states in pertinent part:

> In every action brought under section 537.080, **the trier of the facts <u>may</u> give** to the party or parties entitled thereto **such damages as the trier of the facts <u>may deem fair and just</u> for the death and loss thus occasioned**, having regard to the **pecuniary losses suffered by reason of the death**, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death…."

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RSMO § 537.090 (emphasis added). This Court has set out how the jury is to evaluate the claim for lost financial support suffered by a parent as a result of the death of a child as follows:

> The measure of damages and the amount of the verdict in an action for wrongful death of a minor inherently involves some element of speculation and intangibles. An award is not based on direct, positive evidence but upon probabilities which the jury must reasonably find. The jury has an extraordinarily wide discretion in determining the amount of recovery in such wrongful death cases. The probabilities depend upon the child's age, condition, health, mentality, personality and the parent's ages and circumstances. In cases of this kind the award of damages can rest only on considerations of the most general character and much must be left to the common sense of the jury.

Cobb v. State Sec. Ins. Co., 576 S.W.2d 726, 738-39 (Mo. banc 1979).

Prior to the 2005 amendment to RSMO § 537.090, in the case of a minor with no earnings history, determination of earnings capacity was left to the "sound judgment, experience, and conscience of the jury." *Newman v. St. Louis-San Francisco Ry. Co.*, 369 S.W.2d 583, 590 (Mo. 1963). However, in 2005, the Legislature amended to RSMO § 537,090 to add the following language:

> If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death **shall be calculated based on** the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

RSMO § 537.090 (emphasis added).

Respondents misinterpret the statute's language and insist that the jury is required to award damages equal to Respondents' counsel's mathematical calculation. However,

that is not what the statute says at all; it says that the pecuniary losses shall be calculated **based on** the annual income. The rebuttable presumption in RSMO § 537.090 merely operates to set a framework for estimating the deceased child's earning potential, but the statute still requires the jury to determine how much of that loss the a plaintiff has "suffered by reason of the death." RSMO § 537.090 ("[T]he **trier of the facts <u>may</u> give** to the party or parties entitled thereto **such damages as the trier of the facts <u>may deem fair and just</u>**.")(emphasis added).

A general rule with respect to statutory interpretation is that the entire statute, not just one sentence or phrase must be considered (*in pari materia*). *See, e.g., Davidson v. Lazcano*, 204 S.W.3d 213, 217 (Mo. App. E.D. 2006); *State ex rel. Audrain Healthcare, Inc. v. Sutherland*, 233 S.W.3d 217, 219 (Mo. banc 2007). Furthermore, statutes should be interpreted in a manner which avoids unjust, absurd, unreasonable, or oppressive results. *Davidson*, 204 S.W.3d at 217. If a statute can be interpreted in more than one way, with one being constitutional and the other one unconstitutional, one being reasonable, the other unreasonable, the reasonable and constitutional interpretation shall be applied. *Id.*

Applying the rules of statutory interpretation, the plain and ordinary language requires that Plaintiffs prove they were deprived of future lost income before the jury can award the same. There is nothing new about this. In the case of parents making a claim for pecuniary loss related to the death of a minor, it has long been and continues to be the law that the parents must demonstrate the extent to which they could have reasonably been expected to benefit from a child's earnings or other measures of pecuniary

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contribution before they can recover pecuniary losses. *See, e.g., Hines v. Sweet*, 567 S.W.2d 435, 439 (Mo. App. S.D. 1978).

Here, Respondents offered no proof of any losses. Respondents' counsel simply stood up and read tax information to the jury and now tries to apply that fuzzy math to this verdict.

While RSMO § 537.090 provides a rebuttable presumption, both parties are free to introduce evidence that would overcome the presumption. *See e.g., United Missouri Bank of Kansas City v. March*, 650 S.W.2d 678, 680-81 (Mo. App. W.D. 1983); *Terminal Warehouses of St. Joseph, Inc. v. Reiners*, 371 S.W.2d 311, 316 (Mo. 1963); *Deck v. Teasley*, 322 S.W.3d 536, 539 (Mo. banc 2010); *Mansil v. Midwest Emergency Med. Servs., P.C.*, 554 S.W.3d 471 (Mo. App. W.D. 2018), reh'g and/or transfer denied (July 3, 2018), transfer denied (Sept. 25, 2018). Instead at trial, Respondents attempted, improperly, to provide information about the statute directly to the jury without laying a proper foundation and without appropriate fact or expert witness testimony. (TR239-246, 271-281, 296-297). At no point did Respondents ask the Circuit Court for a ruling on the rebuttable presumption.

Respondents' purported reliance on *Mansil* is misplaced, as the *Mansil* opinion favors the defense. In *Mansil*, the plaintiff had an economist expert, but the defense did not. *Mansil*, 554 S.W.3d at 477. The defense did cross-examine the plaintiff's expert and the cross centered on the precise issues addressed by defense expert Prof. Summary in this trial. The jury awarded some of the damages plaintiff requested but not the full amount. *Id*. at 474. On appeal, the Court held that both sides had fairly addressed the

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issue at trial and the jury was entitled to reject some or all of the plaintiff's claimed lost pecuniary support. *Id.* at 478. Also, notably, in *Mansil*, the plaintiff's economist made an effort to reduce the claimed pecuniary losses to present value as required by RSMO § 538.215(2). *Id*. Unlike in *Mansil*, in this case, Respondents made no effort to reduce the calculations (made by Respondent's counsel without expert support) to present value.

In contrast, Appellant offered expert testimony from an economist, Prof. Summary, an economics professor at Southeast Missouri State University and the immediate past Chairperson of the Department of Economics and Finance. (TR376-407). Prof. Summary outlined six different reasons why it is improper to calculate lost pecuniary support based upon parental wage earnings and that children do not statistically provide support to parents. (TR376-407).

Respondents assert Dr. Summary's testimony was improper as it was based upon economic theory, but that is precisely the point; an economist can rebut the concept that a child will provide economic support to a parent. A presumption places the burden of producing substantial evidence to rebut the presumed fact on the party against whom the presumption operates. *Deck*, 322 S.W.3d at 539; *Terminal Warehouses of St. Joseph*, , 371 S.W.2d at 316. When a party adduces substantial evidence to rebut the presumed fact, "the case is decided on the basis of the evidence as if no presumption existed." *Deck*, 322 S.W.3d at 539 (citing *Duff v. St. Louis Mining & Milling Corp.*, 363 Mo. 944, 255 S.W.2d 792, 793–94 (Mo. 1953)). Applying those rules of law here, the jury was entitled to consider Dr. Summary's testimony, weigh it against any evidence Respondents

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did or did not adduce to the contrary, and reject Respondents' claim for lost financial support.

Further, Respondents' own testimony served to rebut the presumption. On the stand, Respondent Lindsey Setzer testified that she did not expect her baby to support her. (TR 265). Construing the evidence in favor of the jury's verdict, the jury as trier of fact properly considered this evidence when they made a determination as to the proper amount of future economic damages to be awarded for the wrongful death count.

Finally, even if this Court were to accept the Respondents' logic, they are attempting to mix and match the two verdicts. By statute, the rebuttable presumption only applies to wrongful death actions. Here the jury awarded the Plaintiffs $239,712.00 in future economic damages excluding future medical damages on Count I, the personal injury claim. In their appeal, Respondents essentially argue that mathematically the presumption would result in an award of $1,010,455.26 and because the jury already awarded $239,712 on Count I, the personal injury claim, this Court should give them the remaining $646,455.26 on Count II, the wrongful death claim. Respondents' elementary calculation makes no sense and has no rational legal basis. There was no evidence for the award in Count I and there are different plaintiffs in Count I and Count II, so it would be improper to simply aggregate the two awards.

Plaintiffs' cross-appeal, Point I, should be denied. Further Respondents have not proven any prejudice; they cite no trial court errors on evidence rulings or the jury instructions. Rather they simply argue that they should be entitled to more money because the jury did not award them what they feel was appropriate. In the event this

Court does not order a new trial on the bases set forth in Appellant's points on appeal, the jury verdict awarding $0.00 for "future economic damages excluding future medical damages" on Count II and the judgment entered in accordance with the verdict should be affirmed.

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CONCLUSION

As explained above and in Points I-XII of Appellant's opening substitute brief on appeal, the Circuit Court erred in numerous respects each of which resulted in prejudice to Appellant. The erroneous submission of the claims against SSM for the conduct of Dr. Herrmann tainted the entire trial and permitted our opponent to smear SSM with the claims that Dr. Herrmann never saw the patient and he missed the infection. This was compounded by prejudicial jury instructions on damages and the verdict director on the submission against SSM for the conduct of Nurse Farr.

For these reasons, Appellant seeks a JNOV. Should the Court deny that request, then this Court should reverse and remand for retrial on the nursing issues and preclude vicarious liability claims against Appellant for the conduct of Dr. Herrmann. Should that request be denied, then Appellant seeks a reversal and remand requiring the Circuit Court to afford Appellant a reduction in liability in the amount of the prior settlement and requiring the Circuit Court to hold a hearing regarding the appropriate payment schedule for the periodic payment of future damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify this brief fully complies with the provisions of Rules 55.03 and 84.06(b). This brief contains 16,067 words, excluding the cover, certificate of compliance and service, signature block, and substitute appendix. Counsel has relied upon the word-counting utility of Microsoft Word in making this certification.

I further certify a copy of this brief was filed electronically on July 24, 2020 using the Court's electronic filing system, causing automated delivery to counsel of record in this matter.

/s/Kenneth W. Bean