WD79064

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JANE DOE *by her next friend* JANE DOE GMA,
Respondent,

vs.

PROGRESSIVE COMMUNITY SERVICES, *et alia*,
Defendants,

and

ALBERTA HUGHES,
Appellant.

On Appeal from the Circuit Court of Buchanan County
Honorable Randall R. Jackson, Circuit Judge
Case No. 13BU-CV05586

BRIEF OF THE RESPONDENT

JONATHAN STERNBERG,
Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

ROSE C. BRISCOE, Mo. #61540
Law Office of Rose C. Briscoe, LLC
Post Office Box 243
St. Joseph, Missouri 64502
Phone: (816) 233-2244
Fax: (816) 233-2252
rosebriscoe@ymail.com

COUNSEL FOR RESPONDENT

Table of Contents

Table of Authorities iv

Statement of Facts 1

A. Jane Doe's Background 1

B. Events Leading to the Proceedings Below 2

1. Alberta Hughes's "Caregiving" for Jane 2

2. Alberta's Falsification of Records 5

3. Tony Hughes Rapes Jane Three Times 6

i. Alberta Allows Jane Alone with Tony 6

ii. Jane's Pregnancy 8

iii. Investigation 11

C. Proceedings Below 13

Argument 16

I. Alberta Hughes was not entitled to official immunity for her failure to meet her ministerial, non-discretionary duties to Jane Doe. (*Response to Appellant's Point I*). 16

Standard of Review 16

II. The evidence supported both that Tony raping Jane was foreseeable and that Alberta's allowing him to be with Jane unsupervised was the proximate cause of the three rapes. (*Response to Appellant's Points II and III*). 27

Standard of Review 27

A. Alberta owed Jane a duty to follow the ISP and PCS's rules not to take Jane to her home or allow Jane out of her reach. 28

B. It was foreseeable that Alberta's breach of her duties to Jane by allowing Jane out of her supervision would result in Jane being injured. 29

C. Alberta's breach of her duties to Jane by allowing Jane out of her supervision was the proximate cause Tony raping Jane. 32

III. Punitive damages were submissible and the amount of the punitive damages awarded satisfies Due Process. (*Response to Appellant's Point IV and VIII*). 35

Standard of Review 35

A. Alberta was recklessly indifferent to and consciously disregarded Jane's safety. 36

B. The jury's amount of punitive damages satisfies Due Process. 39

IV. The trial court properly admitted into evidence recordings of Alberta's and Tony's conversations and Dr. Brewer's testimony. (*Response to Appellant's Points V and VI*). 43

Standard of Review 43

A. Alberta's challenge to Exhibit 34 is not preserved. 44

B. The trial court properly admitted Exhibit 34. 45

C. The trial court properly admitted Dr. Brewer's testimony. 47

V. The jury was not biased or prejudiced and the amount of its compensatory damage award was proper. (*Response to Appellant's Point VII*). 51

Standard of Review 51

Conclusion 58

Certificate of Compliance 59

Certificate of Service..... 59

Table of Authorities

Cases

A.R.B. v. Elkin, 98 S.W.3d 99 (Mo. App. 2003) 56

Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226 (Mo. banc 2001) 48, 50

Barker v. Schisler, 329 S.W.3d 726 (Mo. App. 2004) 48

Benedict v. N. Pipeline Constr., 44 S.W.3d 410 (Mo. App. 2001) 54

Blanks v. Fluor Corp., 450 S.W.3d 308 (Mo. App. 2014) 35-37, 50, 54

Bodimer v. Ryan's Family Steakhouses, Inc., 978 S.W.2d 4
(Mo. App. 1998) 55

Brazell v. St. Louis S.W. Ry. Co., 632 S.W.2d 277 (Mo. App. 1982) 55

Brooks v. SSM Health Care, 73 S.W.3d 686 (Mo. App. 2002) 55

Burg v. Dampier, 346 S.W.3d 343 (Mo. App. 2011) 44

Burnett v. Griffith, 769 S.W.2d 780 (Mo. banc 1989) 36

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993) 33

City of Joplin v. Flinn, 914 S.W.2d 398 (Mo. App. 1996) 45

Cooper v. Bowers, 706 S.W.2d 542 (Mo. App. 1986) 20

Diaz v. Autozoners, LLC, 484 S.W.3d 64 (Mo. App. 2015) 42

Echard v. Barnes-Jewish Hosp., 98 S.W.3d 558 (Mo. App. 2002) 45

Evans v. FirstFleet, Inc., 345 S.W.3d 297 (Mo. App. 2011) 54, 56

Fierstein v. DePaul Health Cent., 24 S.W.3d 220 (Mo. App. 2000) 54

First Bank v. Fischer & Frichtel, Inc., 364 S.W.3d 216 (Mo. banc 2012) 55

Fort Zumwalt Sch. Dist. v. Recklein, 708 S.W.2d 754 (Mo App. 1986) 53

Friend v. Holman, 888 S.W.2d 369 (Mo. App. 1994) 16

G.E.T. ex rel. T.T. v. Barron, 4 S.W.3d 622 (Mo. App. 1999) 34

Geiger v. Bowersox, 974 S.W.2d 513 (Mo. App. 1998) 18-20, 23

Giddens v. Kan. City S. Ry. Co., 29 S.W.3d 813 (Mo. banc 2000) 52, 54-55

Graeff v. Baptist Temple of Springfield, 576 S.W.2d 291 (Mo. banc 1978)..... 57

Hancock v. Shook, 100 S.W.3d 786 (Mo. banc 2003)..... 43, 51

Hawley v. Tseona, 453 S.W.3d 837 (Mo. App. 2014) 54

Hogate v. Am. Golf Corp., 97 S.W.3d 44 (Mo. App. 2002)..... 22

Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc., 700 S.W.2d 426
(Mo. banc 1985) 36

Hurst v. Kan. City Sch. Dist., 437 S.W.3d 327 (Mo. App. 2014)..... 53

In re Care & Treatment of Wadleigh v. State, 145 S.W.3d 434
(Mo. App. 2004) 47

In re King's Estate, 572 S.W.2d 200 (Mo. App. 1978) 45

Ince v. Money's Bldg. & Dev., Inc., 135 S.W.3d 475 (Mo. App. 2004)..... 53

Johnson v. Allstate Indem. Co., 278 S.W.3d 228 (Mo. App. 2009) 54

Kell v. Kell, 53 S.W.3d 203 (Mo. App. 2001)..... 48

Kerr v. Vatterott Educ. Cents., Inc., 439 S.W.3d 802 (Mo. App. 2014)..... 16, 27

Krause v. U.S. Truck Co., 787 S.W.2d 708 (Mo. banc 1990)..... 30-32

Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. App. 1997)..... 54

Lewellen v. Franklin, 441 S.W.3d 136 (Mo. banc 2014)..... 40

Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635
(Mo. App. 2005) 55

Mackey v. Smith, 438 S.W.3d 465 (Mo. App. 2014) 53

Mansfield v. Horner, 443 S.W.3d 627 (Mo. App. 2014)..... 53

Marquis Fin. Servs. of Ind. Inc. v. Peet, 365 S.W.3d 256 (Mo. App. 2012) 45

Martin v. Survivair Respirators, Inc., 298 S.W.3d 23 (Mo App. 2009) 54

McCormack v. Capital Elec. Constr. Co., 159 S.W.3d 387
(Mo. App. 2004) 54, 56

McGinnis v. Northland Ready Mix, Inc., 344 S.W.3d 804
(Mo. App. 2011) 16, 40

McPherson v. David, 805 S.W.2d 260 (Mo. App. 1991)..... 56

Merseal v. Farm Bureau Town & Country Ins. Co., 396 S.W.3d 467
(Mo. App. 2013) 54

Mitchem v. Gabbert, 31 S.W.3d 538 (Mo. App. 2000) 45

Nelson v. Waxman, 9 S.W.3d 601 (Mo. banc 2000) 43

Nguyen v. Grain Valley R-5 Sch. Dist., 353 S.W.3d 725 (Mo. App. 2011) 20

O.L. v. R.L., 62 S.W.3d 469 (Mo. App. 2001) 31

Peterson v. Progressive Contractors, Inc., 399 S.W.3d 850
(Mo. App. 2013) 50

Pope v. Pope, 179 S.W.3d 442 (Mo. App. 2005) 54

Rhea v. Sapp, 463 S.W.3d 370 (Mo. App. 2015) 24-25

Richardson v. Burrow, 366 S.W.3d 552 (Mo. App. 2012) 20

Richardson v. Sherwood, 337 S.W.3d 58 (Mo. App. 2011)..... 17

Root v. Manley, 91 S.W.3d 144 (Mo. App. 2002) 56-57

Rush v. Senior Citizens Nursing Home Dist. of Ray Cnty.,
212 S.W.3d 155 (Mo. App. 2006) 17-19, 23

Simonian v. Gevers Heating & Air Conditioning, Inc., 957 S.W.2d 472
(Mo. App. 1997) 29-32

Southers v. City of Farmington, 263 S.W.3d 603 (Mo. banc 2008) 17-18, 23-24, 26

St. John Bank & Trust Co. v. City of St. John, 679 S.W.2d 399 (Mo. App. 1984) 34

State ex rel. Eli Lilly & Co. v. Gaertner, 619 S.W.2d 761 (Mo. App. 1981)..... 20

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003)..... 40-41

State v. Brink, 218 S.W.3d 440 (Mo. App. 2006) 44

State v. Hawkins, 58 S.W.3d 12 (Mo. App. 2001)..... 47

State v. Hineman, 14 S.W.3d 924 (Mo. banc 1999) 22

State v. Hutchison, 957 S.W.2d 757 (Mo. banc 1997) 47

Stegan v. H. W. Freeman Constr. Co., 637 S.W.2d 794 (Mo. App. 1982) 54

Stewart v. Partamian, 465 S.W.3d 51 (Mo. banc 2015) 51-53, 55

Teets v. Am. Family Mut. Ins. Co., 272 S.W.3d 455 (Mo. App. 2008) 54

Thomas v. Brandt, 325 S.W.3d 481 (Mo. App. 2010)..... 20

Toppins v. Schuermann, 983 S.W.2d 582 (Mo. App. 1998) 55

Tune v. Synergy Gas Corp., 883 S.W.2d 10 (Mo. banc 1994)..... 53

Turrell v. Mo. Dept. of Revenue, 32 S.W.3d 655 (Mo. App. 2000)..... 22

Tuterri's, Inc. v. Hartford Steam Boiler Inspection & Ins. Co., 894 S.W.2d 266 (Mo. App. 1995) 54

Weaver v. African Methodist Episcopal Church, 54 S.W.3d 575 (Mo. App. 2001) 42

Wilkes v. State, 82 S.W.3d 925 (Mo. banc 2002)..... 46

Willman v. Wall, 13 S.W.3d 694 (Mo. App. 2000) 54

Constitution of the United States

Fourteenth Amendment 35, 39

Revised Statutes of Missouri

§ 490.065 47-48

Missouri Supreme Court Rules

Rule 84.06 59

Rules of the Missouri Court of Appeals, Western District

Rule XLI 59

Statement of Facts

A. Jane Doe's Background

Respondent Jane Doe ("Jane") is the maternal granddaughter of Jane Doe GMA ("Grandmother"), who raised Jane and is her guardian (Tr.288-89). They live in St. Joseph, Missouri (Tr.293-94). Jane is the niece of Tony Hughes, her father's brother (Plt.Ex.53 at 1). Tony[1] was married to Appellant Alberta Hughes (Tr.507). Alberta also separately is related to Jane: her father's brother's grandson is Jane's half-brother (Tr.183). Grandmother never considered Alberta or Tony to be family (Tr.302,325).

Jane was 35 years old at trial (Plt.Ex.4 at 1). At age four, she was diagnosed with "mental retardation" (Plt.Ex.9 at 8). At age six or seven, she suffered a head injury and began to experience symptoms of Rett's syndrome ("Rett's"), a genetic progressive neurologic disease (Plt.Ex.9 at 8;Tr.192,291). At age eight, she formally was diagnosed with Rett's (Tr.192).

Rett's afflicts Jane with seizures, "loss of speech to just a few words," severe motor dis-coordination, and autism profoundly hampering social interactions, resulting in paranoia, not wanting to be touched, and not wanting to be around others (Tr.192-95,366). Grandmother has to help Jane in the bathroom, including wiping and bathing Jane (Tr.307,365).

Jane functions at a level similar to a two-year-old, though she cannot function socially or be trained as easily as one (Tr.193,197). She has a happy

---

[1] This brief refers to individuals by their first names only for ease of reference. No disrespect is intended.

face, a sad face, and a pain face, but otherwise is unable to verbalize emotions (Tr.365). She can show displeasure, compassion, and affection (Tr.222).

Around age 20, Jane's personal physician became Dr. Alan Brewer, remaining so through trial (Tr.190,195). The only two words he ever heard her speak were "Barney" and "no" (Tr.196). "Barney" referred to a stuffed animal he gave her to calm her down so he could take readings (Tr.196-97). On most visits, however, she prevented him from taking readings, sometimes saying "no," and he complied (Tr.196-97). When necessary, he prescribed sedatives prior to visits so it "wouldn't traumatize her" (Tr.206).

B. Events Leading to the Proceedings Below

1. Alberta Hughes's "Caregiving" for Jane

At age 21 or 22, Jane began having daily caregiving supplied by Progressive Community Services ("PCS") (Tr.295). Alberta began working for PCS in December 2009, upon which she became Jane's PCS caregiver, though she did not tell PCS she was related to Jane (Tr.504-07,534;L.F.979).

PCS is a county-funded organization providing services for Buchanan County residents with developmental disabilities (L.F.202-93,366,961). It provides both "residential services" and "service coordination" for clients (L.F.963-64). "Residential services" are habilitative services designed to help an individual keep, learn, or improve skills and functioning for daily living according to the individual's needs and capabilities, as outlined in an Individual Support Plan ("ISP") (L.F.965). "Service coordination" is the process of meeting with the individual receiving support or the person's

guardian and assisting them in gaining access to various services, whether through PCS or another entity (L.F.967).

Beginning in October 2008, Jane received both residential services and service coordination from PCS (L.F.972). When Alberta became Jane's caregiver, she was to provide Jane services on two days each week for seven hours each day (L.F.979;Tr.518-19;Plt.Ex.53 at 1).

Alberta's position was as a "community networker," meaning she was to be Jane's companion (Tr.466,512-13). Jane's ISPs were individualized, with input from Grandmother and taking into account Jane's individual needs and characteristics (Tr.446-49,461-62,548). They had three main goals: (1) community; (2) life skills; and (3) healthy lifestyle (Tr.465,545).

Grandmother signed ISPs for Jane each year after a "plan meeting" with Alberta, Alberta's supervisor, and another PCS supervisor, including in January 2011 and again in January 2012 (Tr.304-05;Plt.Ex.9). In January 2012, this group included Defendant Terri Zeamer, Jane's "service coordinator" who supervised Alberta (Tr.419).

Both the 2011 and 2012 ISPs had the same safety rules (Tr.405-06;Plt.Ex.9). They required that, when Jane was out in the community, Alberta had to be within arm's reach of her at all times and be able to reach her within ten seconds (Tr.403-04,419,424,553;Plt.Ex.44 at 14). This was "a common standard level of supervision" for people like Jane and left no room for interpretation (Tr.449-51). The ISP also required Alberta to keep Grandmother informed as to Jane, let Grandmother make all major decisions

as to Jane, and inform Grandmother immediately if Jane's health or safety were at risk (Tr.554;Plt.Ex.9).

Alberta was aware of these safety rules, participated in creating the ISPs, signed off on them, and was required and expected to follow these rules (Tr.406). If Alberta wanted to vary from anything the ISP said, she had to get permission from her direct supervisor or have the plan formally amended at a regular meeting including Grandmother (Tr.449-51,470-73,551).

Under Jane's plan, Alberta was to take Jane swimming, shopping, to the park to feed ducks or walk around, to a lake, and to fun restaurants (Tr.466,512-13,561). Tony worked at one of the restaurants (Tr.528).

Alberta would pick Jane up from Grandmother's house with Grandmother there, and most of the time Alberta would not tell Grandmother what they would be doing, nor did Grandmother generally ask (Tr.347-49,352,628). Alberta's home did not count as "the community" into which she was allowed to take Jane (Tr.455).

Alberta was required to keep records, called observation notes, of her activities with Jane for PCS and deposit them in a locked black box kept at Grandmother's home, though Grandmother did not have access to them (L.F.987;Tr.525;Plt.Ex.56). At the end of each month, Alberta was to turn them over to PCS for review, with a deadline of the fifth of the following month (Tr.525-26). PCS then was to place the records in Alberta's work mailbox so Alberta then could place them in Jane's file (Tr.525-26).

Allison Lippard, Alberta's supervisor at PCS for a period, explained it was important to keep accurate observation notes because they were the

"receipt of services to the state" and were to ensure "the client is actually getting what they're supposed to get … and being treated the way they're supposed to be treated" (Tr.401-02). They also were designed to verify the PCS employee was following the client's ISP (Tr.390-91).

2. Alberta's Falsification of Records

Alberta admitted that, sometime in 2011, she began falsifying her observation notes for Jane, including lying about both being out in the community with Jane per the ISP when she actually was not and providing services for Jane when she actually was not (Tr.494-96,501-02,527-28). She falsified the records for more than one year (Tr.494-96,501-02). Ms. Lippard confirmed PCS prohibited its employees from falsifying observation notes (Tr.402). No one from PCS ever read Alberta's observation notes to Grandmother or described activities to Grandmother in a way that made her aware Alberta was not following the ISP (L.F.987).

Alberta admitted that, beginning in 2012, she began taking Jane to her own home (Tr.413,514). Alberta's brief states she "suggested that she would teach [Jane] life skills at Alberta's house, and [Grandmother] agreed" (Brief of the Appellant ("Aplt.Br.") 3). While this is what Alberta claimed at trial, Grandmother testified this was not true, and she did not actually authorize this (Tr.308-09,350-51,517,520).

Alberta said she falsified the notes to hide this activity from PCS because she figured it was wrong, she did not get permission from PCS to take Jane to her home, and she assumed she could get fired for it (Plt.Ex.34). Her brief says hiding this was the sole reason for her conduct (Aplt.Br.4) but

does not address her also making up instances when she claimed was providing care for Jane but was not actually doing so at all (Tr.617-18).

PCS coordination manager Bette Szafranski and PCS operations director Amy Cohorst both confirmed that, while there was no *written* policy in 2012 prohibiting an employee from take a client to the employee's home, it nonetheless was a well-known PCS rule that this was prohibited and PCS employees, including Alberta, "were told" so (Tr.386-89,549,552-53). Other PCS employees had been fired for this same conduct (Tr.393).

3. Tony Hughes Rapes Jane Three Times

i. Alberta Allows Jane Alone with Tony

The ISP required Alberta to provide Jane "door-to-door" services: from the time she picked Jane up from Grandmother's home to when Jane got back home, Jane was to be under only Alberta's care (Tr.456-57). In fall 2012, however, Alberta allowed her husband, Tony, to drive Jane home to Grandmother's house from her house unsupervised (Tr.314-15,319,352-53,522-23;Plt.Ex.53 at 1-2). Alberta claimed both that this was because her van broke down and she always would call Grandmother to get approval beforehand (Tr.522-23). She repeats this claim in her brief (Aplt.Br.4-5).

Grandmother, however, said she knew this had happened four times, but Alberta never cleared it with her (Tr.314-15,318-20). Instead, Alberta merely called Grandmother and said, "He's on his way with" Jane, hanging up just as Tony arrived (Tr.318-20). Grandmother said she did say this was okay the first time, but never again consented to it (Tr.318-20,353).

Grandmother said Alberta only even asked permission that one time (Tr.353). She also never gave permission for Tony to be alone with Jane (Tr.361-62).

At trial, an expert explained Grandmother was not in a position to allow Alberta to let a third party to transport Jane (Tr.457,472). If Grandmother somehow were to be allowed "to give consent to waive [Alberta's] responsibility," she "would need to be given all the information, including the attendant risks with that decision before [she gave] any consent, or it would not be considered informed" (Tr.457,472).

Alberta admitted she "knew of [Jane]'s particular vulnerability to sexual abuse and rape when she chose" to allow Tony to drive Jane alone, and this was ignoring the safety rules in Jane's ISP (Tr.496-97,518). Ms. Cohorst confirmed PCS has a rule that "the direct care employees like [Alberta], are to not allow third parties to transport clients," which all employees, including Alberta, were trained to know (Tr.385-88,394-95). The rule was in place for the clients' safety, because PCS would not have screened or trained the third party (Tr.385-88,394-95).

Alberta knew Tony had three prior felony convictions: (1) stealing in 1988, serving four months in jail; (2) tampering with a motor vehicle in 1990, serving one year in prison; and (3) armed robbery of a gas station using a knife in 1994, for which he was sentenced to 20 years in prison but served 13 before being paroled (Plt.Ex.42). Alberta also knew Tony had a propensity for drug use, including fearing he would get high and drive home, and she did not know what he did when he was out (Tr.529;Plt.Ex.34).

In her brief, Alberta states, "After he was released from prison …, Tony … would visit [G]randmother's house … because she was like an aunt to him" and "[h]e met Doe for the first time at [G]randmother's house in 2006 or 2007" (Aplt.Br.5). Tony stated this in his deposition, but Grandmother testified it was untrue: she never considered Tony to be part of her family or her friend (Tr.302). While Grandmother had known Tony when he was younger, he never "came over to [her] house on a regular basis at any time" and she never socialized with him (Tr.302).

Alberta also knew Tony had a sex addiction (Tr.529;Plt.Ex.34). She had heard rumors Tony was unfaithful to her, and though Tony denied this, she accused him of it and did not trust him (Tr.508-09;Plt.Ex.34). She described it as "fucking all along in their marriage" (Plt.Ex.34). She knew he "loved pussy and that's just the way it was" and he would "go out and get it anywhere he wanted" or could (Tr.529-30;Plt.Ex.34).

Alberta never told any of this to Grandmother (Tr.321-23). Alberta's own expert agreed that, in order "to give the informed consent to actually give permission" to allow Tony to drive Jane unsupervised, Grandmother would have needed to know Tony's sex addiction, drug use, infidelity, and criminal history (Tr.581,620).

ii. Jane's Pregnancy

In fall 2012, Grandmother noticed Jane had missed her menses over several months (Tr.310). By January or February 2013, Jane continued to miss her menses, and her stomach began to swell (Tr.311). Grandmother

took her to a hospital and tests were performed, but the lab work came back stating Jane was fine; she was not tested for pregnancy (Tr.311).

In late April 2013, Jane went to Dr. Brewer for her yearly physical and Grandmother told him Jane had "not had a period for 5 months" (Tr.311-12;Plt.Ex.3). Dr. Brewer asked whether Jane could be pregnant, but Grandmother said no, because she "was still a virgin," "but it sure looks like it" (Tr.311-12;Plt.Ex.3). Dr. Brewer explained that, if Jane were not pregnant, the swelling would be a result of "an ovarian tumor or a uterine tumor or something is growing in her abdomen" (Tr.200). He immediately arranged for an ultrasound and a gynecological consult (Tr.200,311-12).

Because of Jane's Rett's, the ultrasound had to be conducted while she was in an operating room under sedation (Tr.255-56). The gynecologist, Dr. Maureen Boyle, said that, pending the procedure, she observed Jane being paranoid, confused, with her arms up, eyes big, and looking terrified (Tr.255-56). She was given a shot of ketamine, after which she still was combative and resistant, but which settled her down just enough to perform the procedure (Tr.256-57). Dr. Boyle also performed a pelvic exam, to which Jane also was resistant (Tr.259-60).

Dr. Boyle said it immediately "was extremely obvious … that it was a fetus" (Tr.257). Having performed "tens of thousands of exams on pregnant people," based on her experience she was able to estimate Jane had been pregnant for "about 26 weeks" (Tr.258). After the procedure, based on Jane's last period, the physical exam, and measurements from the ultrasound, Dr.

Boyle was able scientifically to estimate a conception date of November 16, 2012, plus-or-minus two weeks (Tr.261-62,264-67).

Dr. Boyle said that, "to a reasonable degree of medical certainty," this was a high-risk pregnancy because of the uncertain nature of Jane, who could injure the baby while in a combative state, and because she was unsure how Jane would have the baby (Tr.268-70). She referred Jane to physicians at St. Luke's Hospital in Kansas City specializing in high-risk pregnancies, who took over her care during the pregnancy (Tr.268-70).

St. Luke's provided Jane with "a full-time social worker," set it so she did not have to spend time in a waiting room upon arriving at the hospital, assigned personnel such that she "would see the same person all the time," and assigned "a midwife to do the actual prenatal care" (Tr.476-81). The ultimate delivery took careful planning (Tr.476-77).

Whenever Jane came to St. Luke's for an appointment, she was fearful, including being "very reluctant to get on the scale" and refusing to get on the exam table, and would push back against physical exams (Tr.477-81). She would scream "no, no, no" while coming in the door and when workers would try to weigh her or read her blood pressure, and would resist having her blood pressure read (Tr.483-85). The screaming particularly was directed at men, including one time yelling, "He hit me, he hit me" (Tr.485-86).

On July 15, 2013, Jane gave birth to a baby girl via caesarean section (Tr.327-30,364). When Jane awoke from sedation, Grandmother could tell she "was in pain but she didn't really acknowledge it" (Tr.333). The nurses tried to make her comfortable by decorating her hospital room and playing

children's videos (Tr.335-36;Plt.Ex.38). Grandmother said Jane did not understand she was pregnant and did not remember what happened (Tr.360).

After the birth, Jane saw Dr. Brewer for follow-up appointments (Tr.206). He noted she was "more aggressive" than before, "acting out a great deal more," and "had to be more sedated there for a period of time after the baby was delivered" (Tr.206;Plt.Ex.4). He told Grandmother Jane may have been traumatized by the rape, but there was no way of telling whether she was in pain (Tr.360-61).

iii. Investigation

The same day as the ultrasound, the Department of Health and Senior Services ("DSS") received a hotline alleging Jane was sexually abused, and authorities arrived at Grandmother's home 20 minutes after they returned from the ultrasound (Tr.234-37,313). The pregnancy had to be the result of rape, "given [Jane's] inability to offer informed consent" (Plt.Ex.3).

Grandmother told the police about Tony taking Jane home unsupervised (Tr.354). A DSS worker investigated "what males were around or had access to [Jane] during the time in question," which amounted to five including Tony (Tr.240-42,244,359). DNA samples were taken from all five to determine if any was the father (Tr.244).

The same day as the ultrasound, a DSS investigator called Ms. Lippard and asked about PCS's policies and Alberta (Tr.500). Still that same day, Alberta drove by Grandmother's house and saw police outside, leading her to call Ms. Lippard and say she feared "there was a pregnancy because she

knew [Jane] had gone to the doctor" and "I think she's been raped and she's pregnant and they found out" (Tr.410;Plt.Ex.43).

Ms. Lippard called Alberta into a meeting around 5:00 p.m. and told Alberta about the pregnancy and DSS's allegations (Tr.411;Plt.Ex.43). Alberta admitted taking Jane to her house and being related to Jane, but lied that there never were any other adults around Jane at her home, she only took Jane home when she could not get a babysitter, she always supervised Jane, she never left Jane alone with anyone else, and she never allowed any third party to transport Jane (Tr.411-14,416-17,426-27,499-500;Plt.Ex.43).

Still, Alberta told Ms. Lippard, "I know I'm done here," and immediately was placed on suspension (Tr.414;Plt.Ex.43). Ms. Lippard then wrote all of this up in an incident report (Tr.410-11;Plt.Ex.43). Two days later, PCS terminated Alberta for violating policy, including taking Jane to her home and not disclosing she was Jane's relative (Tr.417-18;Plt.Ex.43).

Tony and Alberta gave statements to police (Tr.488-89;Plt.Ex.46;Plt.Ex.53). Tony claimed he knew Jane was his niece but said he only saw her in passing, never helped her in the bathroom, and never was alone with her in his house, but admitted driving her home "a few times" (Tr.488-89;Plt.Ex.46). He denied touching Jane sexually or having sex with her (Tr.488-89,Plt.Ex.46).

In August 2013, DNA testing revealed Tony was Jane's baby's father, and he was arrested (Tr.238-39;Plt.Ex.40). He then admitted having sex with Jane but claimed it was only once on one day between October 1 and 31, 2012, while driving her (Tr.490;Plt.Ex.47). He said he had become stuck in

snow and ice at an intersection and then proceeded to have sex with her (Plt.Ex.42;Plt.Ex.47).

In 2012, however, the first snow in St. Joseph was in December (Plt.Ex.39). Scientifically, the first day intercourse could have occurred was October 31, 2012 (Tr.272-73). And to a reasonable degree of medical certainty, November 16, 2012, was the date of conception (Tr.262). From these facts and Tony's admission, the plaintiff inferred Tony had raped Jane three times, and the defense did not object (Tr.611-12).

In January 2014, Tony pleaded guilty to the Class C felony of sexual assaulting Jane (Plt.Ex.48 at 1,14). He was sentenced to seven years in prison, in addition to the remaining time on his previous sentence, for which his parole was revoked (Plt.Ex.48 at 7-8,27).

Based on her "knowledge, education, training and experience … to a reasonable degree of certainty," the plaintiff's expert concluded that, because Alberta "had not followed the care plan as it was developed," "that deviation created the circumstances in which" Jane was raped (Tr.453-54). Alberta taking Jane to her and Tony's home, and Alberta allowing Tony to drive Jane unsupervised, caused Jane's rapes (Tr.454-55).

C. Proceedings Below

In November 2013, Jane and her baby, through Grandmother as next friend, as well as Grandmother individually, filed a petition for damages against PCS, PCS's executive director Lynn Wells, Ms. Zeamer, PCS nurse Karla Halter, Alberta, and Tony (L.F.35,120). Alberta answered the suit separately from the remaining defendants (L.F.121,148). PCS, Ms. Wells,

Ms. Zeamer, and Nurse Halter counterclaimed for indemnity against Grandmother (L.F.5,274-92). The plaintiffs dismissed their claims against Tony shortly after his sentencing (L.F.238,456). Grandmother and Jane's baby then dismissed all their claims (L.F.326-29).

Ultimately, in her first amended petition against all previously-named defendants except Tony, Jane stated four claims: (1) negligence against PCS; (2) negligence *per se* against PCS; (3) negligence against the remaining defendants; and (4) negligence *per se* against the remaining defendants (L.F.330-64). She sought actual and punitive damages against all defendants (L.F.348,353,358,363). All defendants answered, and only Alberta brought a cross-claim for indemnity against Grandmother (L.F.378-97,403-24).

The trial court dismissed Jane's claims against Nurse Halter for failure to file an affidavit of merit (L.F.10,398-402). It then granted PCS, Ms. Wells, and Ms. Zeamer summary judgment (L.F.447-55,1980-91).

The case was tried to a jury over four days in June 2015, bifurcated into a liability and actual damages phase followed by a punitive damages phase (Tr.3-8). The plaintiff's witnesses included Dr. Brewer, the DSS investigator, Dr. Boyle, Grandmother, Jane's uncle, Ms. Cohorst, Ms. Lippard, an expert, two St. Luke's workers, and Alberta (Tr.3-6). Portions of Alberta's video deposition, portions of recorded conversations Alberta had with Tony while Tony was in prison, portions of Tony's video deposition, and a video of Jane taken at St. Luke's all were played for the jury (Tr.3-5). The defense's witnesses were Ms. Szafranski, Ms. Zeamer, and an expert (Tr.7).

The defense moved for a directed verdict at the close of the plaintiff's evidence and all evidence, which the court overruled (Tr.537-40;L.F.2288-96).

The jury was instructed on only one claim by Jane, along with Alberta's comparative fault counterclaim against Grandmother (L.F.2309-23). Without objection from the defendant except "on submissibility grounds" (Tr.592), the jury was instructed to find for Jane and against Alberta if it believed: "First, while acting as an employee for Progressive Community Services Alberta Hughes failed to adequately supervise" Jane, "Second, defendant Alberta Hughes was thereby negligent, and Third, such negligence directly caused or contributed to cause damages to" Jane (L.F.2309).

The jury found for Jane against Alberta, awarded Jane $3 million in compensatory damages, and found Alberta liable for punitive damages (L.F.2314). It then found for Alberta against Grandmother and apportioned Grandmother 30% of the fault (L.F.2317,2320). After the punitive damages phase, the jury awarded Jane $6 million in punitive damages against Alberta (L.F.2323). Jane sought prejudgment interest under § 408.040, R.S.Mo., at 3% per year from September 29, 2014, through judgment (L.F.2370-72).

The trial court entered a judgment accepting the verdicts and awarding Jane $2,100,000 in compensatory damages and $6 million in punitive damages, plus $135,616.44 in prejudgment interest, for a total of $8,235,616.44, plus 5% per year in post-judgment interest (L.F.2424-29).

Alberta timely moved the court for JNOV, a new trial, or remittitur (L.F.2430-69). When the court denied her motion, she timely appealed to this Court (L.F.2781-82).

Argument

I. Alberta Hughes was not entitled to official immunity for her failure to meet her ministerial, non-discretionary duties to Jane Doe.

(*Response to Appellant's Point I*)

Standard of Review

Alberta merely states that denials of motions for directed verdict and JNOV are reviewed *de novo* (Aplt.Br.15). But the *de novo* review is made using the same standard the trial court had to use.

Just as the trial court, "[i]n reviewing the denial of a directed verdict motion, [this Court is] limited to determine whether a submissible case was made," "view[ing] the evidence and all reasonable inferences from it in the light most favorable to the plaintiff and disregard[ing] all contrary evidence." *Kerr v. Vatterott Educ. Cents., Inc.*, 439 S.W.3d 802, 809 (Mo. App. 2014).

"A directed verdict is inappropriate unless reasonable minds could *only* find in favor of the defendant." *McGinnis v. Northland Ready Mix, Inc.*, 344 S.W.3d 804, 809 (Mo. App. 2011) (emphasis in the original). "[D]irecting a verdict is a drastic measure" and is presumed reversible error. *Friend v. Holman*, 888 S.W.2d 369, 371 (Mo. App. 1994).

That Alberta's argument concerns her affirmative defense of official immunity, a legal doctrine, does not change this. "Whether immunity applies is an issue of law to the extent that there is no essential dispute as to the operative facts. To the extent that the operative facts are disputed, however, the dispute may be resolved by the factfinder," and the ordinary directed

verdict and JNOV standards apply. *Richardson v. Sherwood*, 337 S.W.3d 58, 63 (Mo. App. 2011); *see also Rush v. Senior Citizens Nursing Home Dist. of Ray Cnty.*, 212 S.W.3d 155, 157-58, 160 (Mo. App. 2006) (viewing evidence in light most favorable to plaintiff in reviewing denial of motions for directed verdict and JNOV based on claim of official immunity).

* * *

In her first point, never citing the record, Alberta argues she was entitled to official immunity for her negligence in consciously, willfully countermanding the express requirements of both Jane's ISP and PCS's rules governing her. Her argument misstates the law and fails to view the facts in the light most favorable to the plaintiff. The Court should affirm.

Official immunity is a "judicially-created doctrine" that "protects public employees from liability for alleged acts of negligence committed during the course of their official duties **for the performance of *discretionary* acts**." *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008) (emphasis added). But it does not "provide public employees immunity for torts committed **when acting in a *ministerial* capacity**." *Id.* (emphasis added).

"Whether an act can be characterized as discretionary depends on the degree of reason and judgment required." *Southers*, 263 S.W.3d at 610. "A discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued." *Id.* "A ministerial function, in contrast, is one 'of a clerical nature which a public officer is required to perform upon a given state

of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.'" *Id.* (citation omitted).

"**[W]hether an act is discretionary or ministerial *is made on a case-by-case basis***, considering: (1) the nature of the public employee's duties; (2) the extent to which the act involves policymaking or exercise of professional judgment; and (3) the consequences of not applying official immunity." *Id.* (emphasis added). So, when this Court reviews a claim of official immunity on appeal from the denial of motions for directed verdict and JNOV, "[u]nder the applicable standard of review, all evidence is viewed in a light most favorable to the jury's verdict." *Rush*, 212 S.W.3d at 160.

It is well-established that public-employee caregivers for the elderly, infirm, incapacitated, or disabled who are accused of negligence in providing that care for violation of a mandatory rule ***always*** are held to be performing a ministerial function, rather than a discretionary act, and official immunity does not apply. *See, e.g.*, *Rush*, 212 S.W.3d at 160-61; *Geiger v. Bowersox*, 974 S.W.2d 513, 517 (Mo. App. 1998). This makes sense. These employees have a duty to obey set rules in providing that care regardless of their opinion, without exercising judgment or reason. If they fail to do so, injuring their clients, official immunity provides no shield.

In *Rush*, for example, an elderly man suffered from Alzheimer's disease and diabetes. 212 S.W.3d at 158. A doctor at his county-operated nursing home ordered his blood sugar level tested four times per day and insulin administered if the level was over 200. *Id.* Despite this, there were seven

days in which the man's levels were above 200 and his nurses did not administer insulin. *Id.* As a result, he died. *Id.*

This Court rejected the nurses' claim that they should have been granted a directed verdict or JNOV for official immunity. *Id.* at 160-61. They were "only to follow a set policy," were "not required to exercise any professional expertise or judgment," and had no "latitude with respect to" this. *Id.* at 161. "Therefore, the acts that [we]re alleged to be negligent [we]re ministerial in nature and [the nurses were] not protected by official immunity." *Id.*

Similarly, in *Geiger*, a prison nurse's duties were ministerial because they only entailed following the required prison policy. 974 S.W.2d at 517. An inmate was prescribed medication. *Id.* at 515. Prison policy mandated "inmates' prescriptions are to be maintained and administered only by prison medical staff." *Id.* The nurse, however, placed the inmate's "prescription into the control of the housing unit guards." *Id.* Upon taking some of the medication, the inmate ingested liquid floor wax, which only was accessible by prison employees and had been placed into the prescription bottle, injuring him. *Id.* He sued the nurse. *Id.*

This Court rejected the nurse's argument that she had official immunity. *Id.* at 517. Her "duties included the maintenance and administration of inmates' prescriptions as directed by prison policy" and "her actions did not involve policy making or the exercise of professional

expertise or judgment." *Id.* Thus, her "duties were ministerial and, therefore, she is not shielded from liability by official immunity." *Id.*[2]

The same is true here. Alberta has no official immunity from Jane's claim of negligence.

---

[2] For additional decisions rejecting claims of official immunity relating to the care or treatment of an infirm, incapacitated, elderly, or disabled person, *see*:

- *Richardson v. Burrow*, 366 S.W.3d 552, 554-56 (Mo. App. 2012) (reversing summary judgment: intubation was set policy and thus ministerial duty; city paramedic's failure to intubate was not subject to official immunity);
- *Nguyen v. Grain Valley R-5 Sch. Dist.*, 353 S.W.3d 725, 730-32 (Mo. App. 2011) (reversing summary judgment: following set school district head-injury treatment rules was ministerial duty; nurses' failure to follow them, causing student's death, was not subject to official immunity);
- *Thomas v. Brandt*, 325 S.W.3d 481, 483-85 (Mo. App. 2010) (reversing summary judgment: following set rules for ambulance personnel responding to non-emergencies was ministerial duty; failure to follow them and take patient to hospital, causing death, was not subject to official immunity);
- *Cooper v. Bowers*, 706 S.W.2d 542, 542-43 (Mo. App. 1986) (reversing dismissal: prison physician's duty to obey standard of care was ministerial; physician's malpractice was not subject to official immunity); and
- *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761, 765 (Mo. App. 1981) (same re: physician at state mental hospital).

Alberta bases her argument on the notion she "violat[ed] two of PCS's rules: she should not have delivered services to Doe in Hughes' home, and she should not have permitted Tony Hughes to drive Doe home," which she says were discretionary (Aplt.Br.18). She argues there "was no written evidence of these rules" (Aplt.Br.18-19).

Alberta's argument fails to view the facts in the light most favorable to the plaintiff. This Court presumes the "plaintiff's evidence is true and disregard[s] any of defendant's evidence which does not support the verdict." *Hogate v. Am. Golf Corp.*, 97 S.W.3d 44, 46 (Mo. App. 2002). This is true even if testimony could be viewed as internally inconsistent: the Court accepts as true the part supporting the judgment and disregards the remainder. *Turrell v. Mo. Dept. of Revenue*, 32 S.W.3d 655, 657 (Mo. App. 2000). This is because "[t]he jury … may believe or disbelieve all, part, or none of the testimony of any witness." *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999).

Correctly viewing the evidence, Alberta's duties to provide services to Jane according to Jane's ISP and PCS's rules plainly was ministerial, not discretionary. Official immunity does not shield her admittedly conscious, willful failure to meet those ministerial duties.

Jane's ISP consisted of specific instructions to Alberta that, when Jane was with her, Alberta ***had to*** be within arm's reach of her at all times and able to reach her within ten seconds (Tr.403-04,419,424,553;Plt.Ex.9 at 18;Plt.Ex.44 at 14). It also instructed Alberta to keep Grandmother informed as to Jane, let Grandmother make all major decisions as to Jane, and inform Grandmother immediately if Jane's health or safety were at risk

(Tr.554;Plt.Ex.9). Alberta was ***required*** to follow these specific instructions to ensure Jane's safety without regard to her own judgment or opinion (Tr.398,406,449-51,470-73,551).

Nor were Alberta's decisions to "delive[r] services to Doe in Hughes' home" and "permi[t] Tony Hughes to drive" Jane (Aplt.Br.18) up to her discretion. Ms. Cohorst, Ms. Lippard, and Ms. Szafranski all testified that, during the entire period of Alberta's employment at PCS, there was a set rule in place ***prohibiting*** PCS employees from taking clients to their homes, which Alberta was instructed upon employment, and for violation of which other employees had been fired (Tr.386-89,400-01,549,552-53). Ms. Cohorst confirmed that, during the same period, there also was a set rule in place that ***prohibited*** PCS employees from "allow[ing] third parties to transport clients," which all PCS employees, including Alberta, were trained to know (Tr.385-88,394-95).

Nothing in Jane's ISP gave Alberta ***any*** ability to do anything other than obey these set rules. Indeed, under the plan, Alberta's choices of places to take Jane in "the community" did not include her home, but instead specific other places agreed upon at the monthly planning meetings with Grandmother (Tr.455,466,512-13,561;Plt.Ex.9 at 21;Plt.Ex.44 at 17;Plt.Ex.49 at 3;Plt.Ex.50 at 3;Plt.Ex.51 at 3;Plt.Ex.52 at 1-2).

Alberta's admitted falsification of her observation notes weighs strongly against any notion her duties not to take Jane home or allow Tony to drive Jane were anything but ministerial. Keeping true, accurate, and detailed observation notes of her activities with Jane was another ***mandatory***

requirement (Tr.525-26;Plt.Ex.56). It "ensured" Jane was "actually getting what [she was] supposed to get," was "treated the way [she was] supposed to be treated," and Alberta was following the ISP (Tr.390-91,401-02). Alberta was ***prohibited*** from falsifying the notes (Tr.402).

Alberta, however, ***admitted*** she continually countermanded these requirements and falsified her notes about Jane, including lying about being out in the community with Jane (which was required) when, in fact, she had taken Jane to her home (which was prohibited) (Tr.494-96,501-02,527-28;Plt.Ex.34). She ***knew*** this was prohibited and ***knew*** she would be "fired" if PCS employees "caught" her with Jane at her home (Plt.Ex.34). The falsified notes also included failing to report she had allowed Tony to transport Jane alone, which also was prohibited (Tr.495-96).

So, if Alberta had discretion to take Jane to her home and allow Tony to drive her, why lie? She would have had no reason to fear being "caught." Plainly, as Alberta both expressly and tacitly admitted, she had ***no*** discretion to take either action. Just like the nurses in *Rush* and *Geiger*, she was not a decision-maker, but simply was to perform according to Jane's ISP and PCS's set rules.

Alberta's suggestion that her duties to follow the ISP and PCS's rules, which she breached, were anything but ministerial, is untenable. Her duties to be with Jane at all times, not take Jane home, not allow any third party (let alone Tony) to transport Jane, and not falsify her observation notes, were "of a clerical nature which [she was] required to perform … in a prescribed manner, in obedience to the mandate of legal authority, without regard to

[her] own judgment or opinion concerning the propriety of the act to be performed." *Southers*, 263 S.W.3d at 610. The law of Missouri is these duties were ministerial.

Not citing the record, Alberta briefly argues "these rules could be waived with the permission of a guardian – and they were in this case" (Aplt.Br.19). This fails to view the evidence in the light most favorable to the plaintiff. First, while Alberta claimed she could countermand the ISP with Grandmother's mere consent, such a decision actually would have required either permission from Alberta's direct supervisor or a formal amendment of the plan at a regular review meeting including Grandmother (Tr.449-51,470-73,551).

Second, while Alberta testified Grandmother agreed she could take Jane to her home, Grandmother explained this was ***untrue*** and she ***did not*** actually authorize this (Tr.308-09,350-51,517,520). Similarly, while Alberta testified she always would call Grandmother to get approval before allowing Tony to drive Jane, Grandmother explained that this, too, was ***untrue*** (Tr.314-15,318-20,353,361-62,522-23).

So, viewing the evidence in the light most favorable to the plaintiff: (1) Alberta could not simply "ask" Grandmother for permission to countermand her set ministerial duties; (2) Grandmother could not have given informed consent in the first place; and (3) Grandmother did not consent in any case. Alberta's argument otherwise is without merit.

Alberta briefly invokes *Rhea v. Sapp*, 463 S.W.3d 370, 379 (Mo. App. 2015), for the proposition that, today, "Missouri law requires more than just a

statute or internal policy to render an otherwise discretionary decision ministerial" "where the provisions at issue indicate no intent to modify or supersede these common law immunity protections." She argues there was "no evidence [PCS's] rules were meant to supplant common law immunities" (Aplt.Br.18).

But Alberta does not explain what "***these***" common law immunities in her quote from *Rhea* are. The reason is they have nothing to do with this case. *Rhea* concerned the common-law "emergency aid" exception to the lack of official immunity from failing a ministerial duty, which is not at issue.

In *Rhea*, a woman was killed when a firetruck speeding to a fire struck her car, and her estate sued the fireman driving for wrongful death. 463 S.W.3d at 373-75. The estate argued the fire department's policy of obeying the speed limit was ministerial, and so official immunity did not apply, as the fireman's speeding was the cause of the woman's death. *Id.* at 379.

Invoking the common law "general rule as to police officers and other emergency responders … that when they are … responding to an emergency, … the officer exercises judgment and discretion and is entitled to official immunity," this Court disagreed. *Id.* at 376-79 (quotation marks and citations omitted). Consequently, ***due solely to this exception***, the fireman "exercised his discretion when he elected to speed while traveling to the fire." *Id.* at 378.

This case has nothing to do with an officer "responding to an emergency." *Id.* at 380. *Rhea* does not make Alberta's conscious, willful violations of her set, mandatory, non-emergency duties to Jane discretionary.

Finally, even if Alberta's negligence somehow was while performing a discretionary act, viewing the facts in the light most favorable to the plaintiff her conduct was consciously, willfully wrong, and official immunity still would not apply. "Even a discretionary act … will not be protected by official immunity if the conduct is willfully wrong." *Southers*, 263 S.W.3d at 610.

From her own admissions, Alberta plainly knew she was not to take Jane to her house, allow Jane out of her sight, allow Tony to be alone with Jane, or falsify her records. She consciously, willfully did so anyway and then lied about it to avoid losing her job. She has no official immunity from these willful wrongs in any case.

II. The evidence supported both that Tony raping Jane was foreseeable and that Alberta's allowing him to be with Jane unsupervised was the proximate cause of the three rapes.

(*Response to Appellant's Points II and III*)

Standard of Review

Alberta again merely states that review of the denial of a motion for JNOV or directed verdict is *de novo* (Aplt.Br.20,25-26). The actual standard, which requires the Court to "view the evidence and all reasonable inferences from it in the light most favorable to the plaintiff and disregard all contrary evidence," *Kerr*, 439 S.W.3d at 809, is discussed *supra* at 16.

* * *

Alberta's second point argues Jane did not make a submissible case of negligence because "it was not foreseeable that her husband would sexually assault" Jane (Aplt.Br.20). Her third point argues this also was because there was no evidence "that permitting her husband to drive Jane Doe home was the proximate cause" of Jane's injuries (Aplt.Br.25).

Both points are without merit. Alberta's arguments for both never cite the record. Unsurprisingly, then, both are riddled with statements contrary to the evidence viewed in the light most favorable to the plaintiff. There was ample evidence both that a reasonable person would foresee Jane being injured and that Alberta's allowing Jane out of her supervision, let alone to be alone with *Tony* unsupervised, was the proximate cause of her injuries.

This Court should affirm the judgment below.

A. Alberta owed Jane a duty to follow the ISP and PCS's rules not to take Jane to her home or allow Jane out of her reach.

Alberta argues there was no evidence "that permitting her husband to drive Jane Doe home breached a duty to Jane Doe" (Aplt.Br.20). She says this is because "PCS has some rules that restricted [Alberta's] activities, and Doe's care plan established certain requirements," but "these rules and requirements were not iron-clad" and she "was permitted to deviate from" them with Grandmother's permission (Aplt.Br.24). She says Grandmother "gave [her] permission to deviate from some rules and requirements," including "for Doe to be driven by Tony" (Aplt.Br.24).

Jane already refuted Alberta's improper claims that the ISP and PCS's rules were discretionary and not mandatory, and that Grandmother gave permission for Tony to drive Jane. *Supra* at 21-24. Viewed in the light most favorable to the plaintiff, the evidence is directly to the contrary: (1) the ISP and PCS's rules ***absolutely prohibited*** Alberta from deviating from them and following them was a ***mandatory*** duty; and (2) Grandmother ***did not*** give permission for Tony to drive Jane. *Supra* at 21-24.

At all times when Jane was with Alberta, she was under Alberta's care as an employee of PCS, and Alberta owed her duties of care to Jane "door-to-door" per the ISP and PCS's rules governing that care (Tr.456-57). Alberta's arguments otherwise are unsupported by the evidence viewed in the light in which this Court must view it.

B. It was foreseeable that Alberta's breach of her duties to Jane by allowing Jane out of her supervision would result in Jane being injured.

Alberta argues there was no evidence she could have foreseen that allowing Tony to drive Jane unsupervised would result in Tony raping Jane because, "[w]hile there is no question" Jane "is a vulnerable person, there was no reason to suspect that she was in danger of being sexually assaulted by Tony" (Aplt.Br.23-24). She says this is because, while Tony "had a felony record" for "robbery, burglary and stealing," "he had no prior history of any sex crimes, much less molesting disabled adults," he "was related to Doe, and he was known to" Grandmother (Aplt.Br.24).

Once again, this fails to view the evidence in the light most favorable to the plaintiff. Grandmother and Tony had no relationship or interaction. Grandmother never considered Tony to be part of her family or her friend (Tr.302). While Grandmother knew Tony when he was younger, he never "came over to [her] house on a regular basis at any time," and she never socialized with Tony (Tr.302).

Alberta's argument also misstates the law. The law of Missouri does not support her tacit notion that, for it to be reasonably foreseeable that a disabled woman will be raped when out of supervision of her authorized caregiver, the caregiver must have knowledge who the specific potential rapist is and that the rapist has a prior record of raping disabled women.

To the contrary, "A duty exists when a ***general type of event or harm*** is foreseeable." *Simonian v. Gevers Heating & Air Conditioning, Inc.*, 957

S.W.2d 472, 476 (Mo. App. 1997) (emphasis added). "The duty owed is generally measured by whether or not a reasonably prudent person would have anticipated danger and provided against it." *Krause v. U.S. Truck Co.*, 787 S.W.2d 708, 710 (Mo. banc 1990).

Here, Alberta's own admissions showed she knew Jane was particularly vulnerable to assault, which she had a duty to guard against by being with Jane at all times. She knew she was prohibited from letting Jane out of her sight because of Jane's inability to communicate and her extreme mental disability (Plt.Ex.14). Both when she decided to take Jane to her home instead of out in the community and when she allowed Tony to drive Jane unsupervised, she was aware of Jane's particularly vulnerability to being sexually assaulted (Plt.Ex.14). She knew allowing Tony to transport Jane alone was violating a safety rule because, contrary to Jane's ISP and PCS's mandatory rules, Jane was not within her reach (Plt.Ex.14).

Additionally, Tony testified that, when Jane was in Alberta's care, on one instance Jane grabbed at Tony's penis (Plt.Ex.42). But Alberta failed to take any precautionary steps to protect Jane (Plt.Ex.42). Instead, she simply said, "Hey, that's my husband" (Plt.Ex.42). The incident was not reported to anyone, including PCS or Grandmother (Plt.Ex.42).

Alberta also specifically did not trust Tony and was fearful of Tony's drug use, his infidelity, and his sex addiction (Plt.Ex.34). And, of course, she knew Tony was a convicted violent felon, having previously robbed a gas station at knifepoint (Plt.Ex.42). It was not just some simple "robbery" (Aplt.Br.24). It was a ***violent*** felony using a ***deadly weapon***.

As a result, Jane met her burden to show sufficient facts from which a reasonably juror could conclude Alberta could have foreseen the risk of ***injury*** to Jane by allowing Jane out of her supervision, let alone allowing Tony to transport Jane Alone. It did not have to be specific sexual injury – or even specifically by Tony. *Simonian*, 957 S.W.2d at 475; *Krause*, 787 S.W.2d at 710. The reasonable foreseeability of any injury is enough for duty-foreseeability.

The sole authority Alberta cites in arguing otherwise is *O.L. v. R.L.*, 62 S.W.3d 469 (Mo. App. 2001), where a child sued her grandmother for negligent supervision by her grandfather, who had sexually molested her.

O.L. is inapposite. There, both grandparents were entrusted with the child's care at their home. *Id.* at 472. Here, Tony never was Jane's authorized caregiver. And the grandparents in *O.L.* were not under anything like the specific ISP or PCS's rules Alberta was duty-bound to follow, requiring her to be within a ten-second reach of Jane at all times. As well, the grandmother in *O.L.* never testified she knew the child was particularly vulnerable to being harmed when left alone with her husband, which Alberta testified here.

Plainly, viewing the evidence in the light most favorable to the plaintiff, Alberta owed a duty to prevent that injury by keeping Jane in her sight and under her supervision at all times, and she breached that duty. It was reasonably foreseeable that Alberta's allowing the vulnerable Jane out of her sight entirely, let alone with an untrustworthy, drug-using, sex-addicted, violent felon, would result in Jane's injury.

C. Alberta's breach of her duties to Jane by allowing Jane out of her supervision was the proximate cause Tony raping Jane.

Alberta conclusorily argues "an injury to Jane Doe was not the natural and probable consequence of her husband driving Jane Doe home" because, while Alberta "may have known about her husband's criminal record, or even may have believed that he had cheated on her, these proclivities were not consistent with Tony Hughes committing a criminal sexual assault on" Jane (Aplt.Br.25,28). She attempts to analogize this to a case of negligent supervision (Aplt.Br.27), and tacitly argues Tony's rapes were a superseding cause of Jane's injuries, absolving her of liability.

Contrary to Alberta's assertions, "the test of proximate cause is not whether a reasonably prudent person would have foreseen the precise hazard or the exact consequences that were encountered" and "is not whether defendant could have foreseen plaintiff's particular injury." *Simonian*, 957 S.W.2d at 476. Rather, it is "whether after the conclusion of all occurrences, plaintiff's injury appears to be the reasonable and probable consequence of defendant's actions." *Id.*

"[F]rom the essential meaning of proximate cause arises the principle that in order for an act to constitute the proximate cause of an injury, *some* injury, if not the precise one in question, must have been reasonably foreseeable." *Krause*, 787 S.W.2d at 710 (citation omitted) (emphasis in the original). "[I]n deciding questions of proximate cause and efficient, intervening cause, each case must be decided on its own facts …." *Id.*

So, "[i]t is sufficient for liability if a reasonable defendant could foresee the person who would be injured as opposed to the nature of the injury." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 865 (Mo. banc 1993).

> It is of course unnecessary that the party charged should have anticipated the very injury complained of or anticipated that it would have happened in the exact manner that it did. All that is necessary is that he knew or ought to have known **that there was an appreciable chance *some* injury would result.**

Id. (citation omitted) (emphasis added).

Jane's injuries were the natural and probable consequences of Alberta's conscious, willful disobedience of her duties to Jane. Alberta testified she knew Jane was particularly vulnerable to being sexually assaulted or raped when she allowed Jane to be alone with Tony (Plt.Ex.14). So, though Jane was not even required to prove Alberta should have anticipated the very injury resulting in this case, Alberta acknowledged she did.

Regardless, Jane *did not* have to prove Alberta would have anticipated the injury would have happened in the exact manner that it did – i.e., *Tony* would *rape* Jane. All she had to prove was Alberta *reasonably could have foreseen* that, if she let Jane out of her mandatory sight and ten-second reach – let alone allowing an untrustworthy, sex-addicted, drug-using, violent felon to transport Jane unlicensed, un-cleared, and unsupervised – Jane might wind up injured. Plainly, the evidence satisfied this burden in spades. *Supra* at 29-31.

Even failure-to-supervise cases do not hold otherwise. *See, e.g.*, *St. John Bank & Trust Co. v. City of St. John*, 679 S.W.2d 399, 403 (Mo. App. 1984) (affirming judgment against police force for failure to supervise after officer committed arson, damaging building; arson itself did not have to be foreseeable, merely property damage); *G.E.T. ex rel. T.T. v. Barron*, 4 S.W.3d 622, 625 (Mo. App. 1999) (A "jury could reasonably find that the abuse of young children who are not properly supervised is foreseeable and is one of the dangers parents and other care givers expressly protect children from by providing them proper supervision and care").

Viewing the evidence in the light most favorable to the plaintiff, Jane's injury was the natural and probable result of Alberta's negligence.

III. Punitive damages were submissible and the amount of the punitive damages awarded satisfies Due Process.

(*Response to Appellant's Points IV and VIII*)

Standard of Review

Alberta again merely states that review of the submissibility of punitive damages on denial of a motion for JNOV or directed verdict is *de novo* (Aplt.Br.28). But this Court still must "view the evidence and all reasonable inferences drawn therefrom in the light most favorable to submissibility," "disregard[ing] all evidence and inferences that are adverse thereto. Only evidence that tends to support the submission should be considered." *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 401 (Mo. App. 2014).

* * *

In her fourth point, Alberta argues punitive damages were not submissible because there was no evidence she "showed complete indifference to or conscious disregard for" Jane's safety (Aplt.Br.28). In her eighth point, she argues the amount of punitive damages – $6 million – violated her Fourteenth Amendment right to Due Process (Aplt.Br.42-43).

Both arguments are without merit. Alberta again never cites the record, littering both arguments with statements unsupported by the evidence viewed in the light most favorable to submissibility. There was ample evidence for the jury to conclude she was completely indifferent to and consciously disregarded Jane's safety. And the amount of punitive damages – twice the compensatories – certainly was constitutional, especially given the extreme torture Jane suffered as a result of Alberta's conscious misconduct.

A. Alberta was recklessly indifferent to and consciously disregarded Jane's safety.

"There must be some element of outrage to justify punitive damages." *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. banc 1989) (citation omitted). They "require a willful, wanton or malicious culpable mental state on the part of the defendant," which the "plaintiff can establish … by showing … that the defendant acted with reckless disregard for the plaintiff's rights and interests." *Blanks*, 450 S.W.3d at 400.

"Thus, to make a submissible case for punitive damages, a reasonable juror must be able to conclude, from the evidence and the inferences drawn therefrom, that the plaintiff established with sufficient clarity that the defendant's conduct was outrageous because of … reckless indifference." *Id.* The evidence is sufficient when it shows "the person doing the act or failing to act [was] conscious of his conduct, and, though having no specific intent to injure, [was] conscious, from [her] knowledge of surrounding circumstances and existing conditions, that [her] conduct will naturally or probably result in injury." *Id.* at 401 (quoting *Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc.*, 700 S.W.2d 426, 435 (Mo. banc 1985)). If "the defendant knew or had reason to know that a high degree of probability existed that the action would result in injury," *id.*, punitive damages are submissible.

In one single paragraph not citing the record, Alberta conclusorily argues the evidence below did not meet these standards because "[t]here is no evidence that [she] intended for Doe to be injured," "had an evil motive," "acted with reckless indifference to the rights of others," or "knew or had

reason to know that there was a high degree of probability that allowing" Tony "to drive Doe with [Grandmother]'s consent would result in injury" (Aplt.Br.31).

As before, *supra* at 21-24, 28, these statements rest on Alberta's invalid notion that her "deviation from PCS's rules occurred with [Grandmother's] consent" and she "had no reason to believe that deviating from the rules under the circumstances … would naturally or probably result in her husband sexually assaulting Doe" (Aplt.Br.31). Viewing the evidence in the light most favorable to submissibility of punitive damages, Grandmother ***did not*** "consent" to Tony driving Jane alone. *Supra* at 21-24. And Alberta ***admitted*** she ***knew*** Jane was particularly vulnerable to being raped when she allowed Jane to be alone with Tony. *Supra* at 29-31. She ***did*** know her conduct probably would result in injury to Jane. *Supra* at 29-34.

Plainly, viewing the evidence in the light most favorable to submissibility, Alberta "acted with reckless disregard for [Jane]'s rights and interests," her "conduct was outrageous because of reckless indifference," she was "conscious of [her] conduct" and "from [her] knowledge of [Jane's] surrounding circumstances and existing conditions, that [her] conduct [would] naturally or probably result in injury" to Jane. *Blanks*, 450 S.W.3d at 400-01 (citation omitted). She "had reason to know that a high degree of probability existed that the action would result in [Jane's] injury." *Id.* at 401.

Alberta ***admitted*** she ***consciously*** "knew of [Jane]'s particular vulnerability to sexual abuse and rape when she chose" to allow Jane out of her supervision, much less to be alone with Tony (Tr.496-97,518). She ***knew***

this was ignoring the safety rules in Jane's ISP – which she, herself, helped create – that Jane never be out of her reach (Tr.304-05,403-04,419,424,496-97,518,553;Plt.Ex.9;Plt.Ex.44). She ***knew*** she was ***prohibited*** from allowing any third-party to transport Jane for Jane's own safety (Tr.385-88,394-95). She ***knew*** Tony had a violent felony conviction, a propensity for drug use, was untrustworthy, and was a sex addict (Tr.509-09,529-30;Plt.Ex.34;Plt.Ex.42).

Despite all of this, Alberta ***consciously, recklessly*** disregarded and countermanded Jane's ISP and PCS's mandatory rules, let admittedly-vulnerable Jane out of her reach, sight, and supervision, and ***willfully*** allowed an untrustworthy, drug-using, sex-addicted, violent felon to be alone with Jane. Then, to add insult to injury, she covered all of this up by ***consciously, willfully*** falsifying her observation notes. *Supra* at 5-6, 22-23. She ***knew*** this would prevent PCS or Grandmother from knowing Jane was not "actually getting what [she was] supposed to get … and being treated the way [she was] supposed to be treated" (Tr.401-02).

Viewing the evidence in the light most favorable to the submissibility of punitive damages, according it the benefit of all reasonable inferences and disregarding all contrary evidence and inferences, Alberta's conduct in ignoring all of the ISP's and PCS's safety rules and allowing dangerous, untrustworthy Tony to drive Ms. Hughes alone plainly was with reckless, conscious disregard for Jane's rights and interests.

Jane effectively was a helpless child, unable to communicate. Alberta admittedly knew that, when she chose to let Jane out of her sight and leave

Jane alone with Tony, Jane was particularly vulnerable to being sexually assaulted or raped, ***but she did so anyway***.

Had Alberta not shown this admittedly complete, reckless indifference to and conscious disregard for Jane's safety and instead cared for Jane as the ISP and PCS's rules required, Tony never would have had the opportunity to rape Jane and impregnate her. Jane never would have been made to suffer immense fear and distress through multiple sedations, a grueling caesarean section delivery, hospitalization in an unfamiliar setting with people she did not know, and being taken out of her normal daily routine.

Ample evidence supports the jury's verdict finding that Alberta was liable for punitive damages. Alberta's arguments otherwise are unsupported by the law or the record.

B. The jury's amount of punitive damages satisfies Due Process.

Alberta also argues the amount of the punitive damages award – $6 million, twice the $3 million award of compensatory damages – violated her Fourteenth Amendment right to Due Process (Aplt.Br.41-44).

Alberta says this is because her "tortious conduct was" merely having Tony "drive [Jane] to her house with [G]randmother's permission," with "no notice that Tony Hughes would have sex with" her, the "sexual encounter was an isolated incident," and "the harm … was a mere accident" (Aplt.Br.44). She glowers, "[O]n the reprehensibility scale, [her] conduct ***registers virtually nothing***" (Aplt.Br.44) (emphasis added).

Alberta's argument is contrary to both the law and the evidence viewed in the light most favorable to the verdict.

"[T]hree guideposts" govern whether "a punitive damages award comports with due process": "(1) the reprehensibility of the defendant's misconduct; (2) the disparity between the harm and the punitive damages award; and (3) the difference between the punitive damages award and penalties authorized or imposed in comparable cases." *Lewellen v. Franklin*, 441 S.W.3d 136, 146 (Mo. banc 2014) (citation omitted).

> The first factor, "[t]he reprehensibility of the conduct," is the most important factor and includes consideration of whether: "[a] the harm caused was physical …; [b] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [c] the target of the conduct had financial vulnerability; [d] the conduct involved repeated actions or was an isolated incident; [e] and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

Id. (quoting *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

As to the second factor, "disparity between the harm and the punitive damages award," single-digit ratios between punitive and compensatory damages, especially less than four-to-one, are presumed constitutional. *State Farm*, 538 U.S. at 424. And "[t]his [C]ourt gives great deference to a jury's decision regarding the appropriate amount of damages, as they are in the best position to make such a determination." *McGinnis*, 344 S.W.3d at 841.

The amount of punitive damages the jury awarded Jane readily satisfied Due Process. Viewing the evidence in the light most favorable to the

verdict, Alberta's "tortious conduct was" not simply "having Tony Hughes drive Doe to her house with her grandmother's permission" (Aplt.Br.44). It was, ***knowing*** of Jane's particular vulnerability to sexual assault, allowing someone she ***knew*** to be an untrustworthy, drug-using, sex-addicted, violent felon to be alone with Jane, in ***conscious*** violation of the ISP's and PCS's mandatory safety rules designed to prevent just such a harm, and then falsifying records to cover it up. That is a far cry from merely "having Tony drive Jane home." *Supra* at 21-24, 29-31. And to top it all off, Grandmother ***did not*** give permission. *Supra* at 21-24.

As well, Alberta allowed Tony to drive Jane alone *at least four times* (Tr.314-15,318-20,522-23;Plt.Ex.53 at 1-2). ***Three of those times***, he raped her (Tr.611-12). This was no "mere accident" or "isolated incident" (Aplt.Br.44). Jane's rape was a result of Alberta's repeated, conscious, reckless indifference and disregard for Jane's health and safety.

The jury's punitive damage award fits all the factors for satisfying Due Process. First, Alberta's conduct plainly was reprehensible: the rape of Jane was physical, Alberta's conduct was indifferent and reckless to Jane's health and safety, Jane was vulnerable, the conduct involved repeated actions, and Alberta engaged in intentional deceit in falsifying observation notes. *State Farm*, 538 U.S. at 419. Second, the punitive damages award was merely twice the jury's compensatory damage award. *Id.* at 424.

Finally, while (thankfully) no prior Missouri decision has concerned facts identical to those here, Missouri courts have upheld punitive damage awards of far larger ratios against defendants whose negligence caused

another person to sexually assault or abuse a plaintiff. *See, e.g.*, *Diaz v. Autozoners, LLC*, 484 S.W.3d 64 (Mo. App. 2015) (employee sexually assaulted at work, $1 million in punitive damages against employer, $75,000 in compensatory damages); *Weaver v. African Methodist Episcopal Church*, 54 S.W.3d 575, 580 (Mo. App. 2001) (clergywoman sexually assaulted by clergyman, $1 million in punitive damages against supervising clergyman, $15,000 in compensatory damages).

That, here, the victim-plaintiff was a particularly vulnerable mentally disabled child, and not a fully competent adult, makes the smaller-ratio punitive damages here especially appropriate.

IV. The trial court properly admitted into evidence recordings of Alberta's and Tony's conversations and Dr. Brewer's testimony.

(*Response to Appellant's Point V and VI*)

Standard of Review

"The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. banc 2000). An abuse of discretion only occurs when the trial court's "ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.*

* * *

In her fifth and sixth points, again never citing the record, Alberta respectively attacks the admission into evidence of: (1) recordings of conversations between herself and Tony while Tony was in prison; and (2) all of Dr. Brewer's testimony (Aplt.Br.32-38).

Neither point is preserved. Alberta did not timely or properly object to any of this evidence below.

Even if either is preserved, the trial court properly admitted both the relevant, probative prison conversations and Dr. Brewer's expert testimony. Moreover, as both pieces of evidence were cumulative to other evidence at trial, Alberta was not prejudiced by their admission.

A. Alberta's challenge to Exhibit 34 is not preserved.

Alberta's argues below her fifth point that "[t]he trial court erred when it admitted recordings of [her] and Tony['s] conversations" (Aplt.Br.33), apparently referring to Plaintiff's Exhibit 34. Her actual fifth point, however, merely alleges error "in admitting [her] statements that she was concerned her husband was unfaithful to her," with no challenge to any recordings, let alone any specific evidence, let alone all of Exhibit 34 (Aplt.Br.12,32).

By failing to identify Exhibit 34 in her point, Alberta's challenge to its admission is not preserved. Rule 84.04(d)(1)(A) requires a point "identify the trial court ruling or action that the appellant challenges." Rule 84.04(e) requires the argument over any point "be limited to those errors included in the 'Points Relied On.'"

So, "[a]rguments advanced in the brief but not raised in the point relied on are not preserved …." *Burg v. Dampier*, 346 S.W.3d 343, 354 (Mo. App. 2011); *see also State v. Brink*, 218 S.W.3d 440, 448 (Mo. App. 2006) (argument challenging admission of piece of evidence not identified in point not preserved). Alberta's fifth point fails for this reason alone.

Moreover, while Alberta now challenges the admission of Exhibit 34 for both relevance and prejudice (Aplt.Br.33-35), she ***did not*** object to its admission below. As she recounts, the trial court initially issued an order in limine excluding Exhibit 34, but then decided otherwise (Aplt.Br.34).

When, at trial, Jane sought to admit Exhibit 34 and play it for the jury, the court asked, "Any objection on behalf of the defendant?" defense counsel responded, "None other than what we already have discussed with the

Court," and the court replied, "All right. You may proceed, then, based on the Court's earlier ruling" (Tr.229-30).

This was insufficient. "To preserve an evidentiary issue for appeal after the denial of [her] motion in limine," Alberta had to "object at trial to the introduction of the evidence …." *Marquis Fin. Servs. of Ind. Inc. v. Peet*, 365 S.W.3d 256, 260 (Mo. App. 2012). Alberta's objections had to "be specific so that the trial court can realize what rule of evidence is being invoked and why the rule of evidence would exclude the evidence." *In re King's Estate*, 572 S.W.2d 200, 204 (Mo. App. 1978).

Simply "renewing" the motion in limine by reference, without specifying the exact ground of the objection, did not suffice. *City of Joplin v. Flinn*, 914 S.W.2d 398, 401 (Mo. App. 1996); *see also Echard v. Barnes-Jewish Hosp.*, 98 S.W.3d 558, 566 (Mo. App. 2002) ("I want to renew my objection earlier about this issue" was insufficient); *Mitchem v. Gabbert*, 31 S.W.3d 538, 543 (Mo. App. 2000) ("Same objection as previously noted with the Court" and "I'll object for the previous reasons noted with the Court" were insufficient).

Alberta's vague statement of no objection to Exhibit 34 "other than what we already have discussed" preserved nothing for appeal.

B. The trial court properly admitted Exhibit 34.

Alberta argues the recordings of her and Tony's conversations when Tony was in prison were not "relevant" because she made her observations in them after Tony had admitted to raping Alberta, "the prejudice was

abundant" because she used profanity and discussed sex in them, and "all of this was deeply unfair" to her (Aplt.Br.34-35).

Alberta's argument does not include the text of the recordings or, as before, any citation to the record. A partial transcript of the recordings is in the record (L.F.2542), and the parties are depositing Exhibit 34 with the Court. Jane encourages the Court to listen to the recordings.

Key portions include not just that Alberta suspected Tony of infidelity, the sole thing mentioned in her fifth point (Aplt.Br.12,32), but also: (1) she knew Tony was a drug user; (2) she knew Tony had "to have [his] woman whenever [he] get through first and foremost off the top because that's how" he was and "just love[d] pussy, and that's just how it" was; (3) Tony had a "sex problem;" (4) Alberta falsified her observation notes; and (5) Alberta knew taking Jane to her house would get her "fired" (Plt.Ex.34).

Plainly, the recordings were relevant. "Evidence is relevant and admissible if it tends to prove or disprove a fact in issue." *Wilkes v. State*, 82 S.W.3d 925, 930 (Mo. banc 2002). The recordings here were relevant not only to show Alberta breached her duty to keep Jane safe by leaving her alone with someone she knew posed a danger to Jane, but they underscored Alberta's reckless indifference to Jane's rights and safety for Jane's punitive damages claim. *Supra* at 36-39.

The recordings also shed significant light on the basis for Alberta's independent admissions at trial that she knew Jane was "particularly vulnerable to sexual abuse and rape" when she chose to violate the ISP and PCS's mandatory safety rules by leaving Jane alone with Tony. *Supra* at 29-

34. Additionally, the tone and language she used were relevant to show her reckless and callous attitude for the purposes of Jane's punitive damages claim. Plainly, the trial court did not abuse its discretion in determining Exhibit 34 was relevant.

Citing no authority, Alberta also argues the recordings were prejudicial because she used profanity and discussed sex in them, which she argues was "unfair" (Aplt.Br.34-35). Missouri courts consistently hold mere profane or sexual content in relevant, admissible evidence does not make for an abuse of discretion due to prejudice. *See, e.g.*, *In re Care & Treatment of Wadleigh v. State*, 145 S.W.3d 434, 437-38 (Mo. App. 2004); *State v. Hawkins*, 58 S.W.3d 12, 25-26 (Mo. App. 2001); *State v. Hutchison*, 957 S.W.2d 757, 762-63 (Mo. banc 1997). As in all those cases, Exhibit 34 was relevant and probative, and the trial court did not abuse its discretion in determining its probative value outweighed any potential prejudice.

C. The trial court properly admitted Dr. Brewer's testimony.

Not citing the record, Alberta argues admitting ***all*** of Dr. Brewer's testimony was error because he was called "as an expert witness to provide evidence of [Jane's] emotional distress" but conceded "it would be speculation to attribute [Jane's] reported behavioral changes" to her rape by Tony (Aplt.Br.36-38). She argues that, as a result, he was unqualified to be an expert under § 490.065, R.S.Mo. (Aplt.Br.36-38).

This argument is not preserved. At trial, Alberta never objected to "all" of Dr. Brewer's testimony. And her only occasional objections during his

testimony were "to the form of the question, calls for speculation, conjecture, no foundation" (Tr.204,209).

At no time during Dr. Brewer's testimony did she ever object on the basis that it was not qualified expert testimony under § 490.065 (Tr.189-223). As this is her only ground in her sixth point relied on, the point is not preserved. *Supra* at 44; *see Barker v. Schisler*, 329 S.W.3d 726, 732-35 (Mo. App. 2004) (general "foundation" objections did not preserve specific argument that expert's opinions were unqualified under § 490.065, especially where party "did not specifically rely on § 490.065" in objecting).

Regardless, Alberta's argument is without merit. Whether a witness sufficiently has established his qualifications to state an opinion is within the trial court's discretion. *Kell v. Kell*, 53 S.W.3d 203, 209 (Mo. App. 2001). "[I]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by skill, knowledge, experience, training, or education may testify thereto in the form of an opinion or otherwise." *Id.*

Conversely, "any weakness in the factual underpinnings of the expert's opinion or in the expert's knowledge goes to the weight that testimony should be given and not its admissibility." *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 246 (Mo. banc 2001) (overruled on other grounds). "In general, the expert's opinion will be admissible, unless the expert's information is so slight as to render the opinion fundamentally unsupported." *Id.*

Dr. Brewer was a board-certified family physician practicing for 28 years and had been Jane's treating physician for the previous 15; he

"certainly" was familiar with her conditions (Tr.190-92). He regularly diagnosed and treated emotional distress in patients, including through medication (Tr.191). He observed and was told about Jane's behaviors before and after the rapes, before and after she gave birth, and before and after her baby was brought home (Tr.195-212). He also relied on information Grandmother provided him, explaining physicians typically rely on information from guardians when treating young children who cannot articulate their medical issues (Tr.208).

Though Alberta never cites the record, she mentions a "concession" by Dr. Brewer "that it would be speculation to attribute [Jane's] reported behavioral changes" to Tony's rapes "or her pregnancy" (Aplt.Br.37). This seems to refer to his use of the word "speculation" when answering a single question: "Do you hold an opinion to a reasonable degree of medical certainty regarding how [Jane], given her conditions and your observation of those conditions over the last 18 years, how she reacts to having her environment changed?" (Tr.205-06). He responded that, after the birth, Jane was "acting out a great deal more" and added, "was that a result of what she had been through and having had a baby and everything, the rape before? That's speculation" (Tr.206). The defense did not object (Tr.206).

Dr. Brewer's later testimony, however, cleared this up, explaining unequivocally that Jane suffered medically-diagnosable and medically-significant emotional distress as a result of the rapes and their consequences of taking her out of her home and into the hospital for the birth, as well as the need for medication to address that trauma (Tr.209-10). Again, the

defense did not object (Tr.209-10). Indeed, during cross-examination, the defense had Dr. Brewer *reiterate* all of this (Tr.214).

If Dr. Brewer contradicted himself by using the word "speculation" and later correcting it with clear statements that Jane suffered emotional injuries due to the rapes and their consequences, at most that would go to the weight of his testimony and ***not*** its admissibility. *Alcorn*, 50 S.W.3d at 246. Alberta's argument otherwise is without merit.

Moreover, Alberta cannot show that Dr. Brewer's testimony as to Jane's emotional distress was prejudicial. Error in admitting evidence "requires reversal only if the trial court's ruling results in prejudice" – if "there is a reasonable probability that the … error affected the outcome of the trial." *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 860 (Mo. App. 2013). This is impossible where the purportedly inadmissible evidence was cumulative to other evidence. *Blanks*, 450 S.W.3d at 390-91.

Dr. Brewer's testimony was not "the only evidence of [Jane's] emotional distress" (Aplt.Br.37). Videos and photographs of Jane at St. Luke's before and after she traveled there to give birth were played for and given to the jury, showing the jury firsthand Jane's pain, suffering, and emotional distress from the strange surroundings and intensive surgery Alberta's negligence caused (Tr.336;Plt.Ex.16-30;Plt.Ex.38). Dr. Boyle testified to the fear and pain Jane exhibited during her vaginal examination when the pregnancy was discovered, and the nurses present at St. Luke's before and after the birth gave similar testimony (Tr.255-60,474-91).

Dr. Brewer's testimony was cumulative and not possibly prejudicial.

V. The jury was not biased or prejudiced and the amount of its compensatory damage award was proper.

(*Response to Appellant's Point VII*)

Standard of Review

The denial of motions for new trial or remittitur is reviewed for abuse of discretion. *Stewart v. Partamian*, 465 S.W.3d 51, 56 (Mo. banc 2015). An abuse of discretion only occurs when the trial court's "ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock*, 100 S.W.3d at 795. "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.*

"In considering whether the trial court abused its discretion, appellate courts view the facts in the light most favorable to the trial court's order." *Stewart*, 465 S.W.3d at 56.

* * *

In her seventh point, Alberta argues the trial court had to grant her a new trial or remittitur of the jury's $3 million compensatory damage award because it was "so excessive as to demonstrate juror bias" (Aplt.Br.38). She argues "the jury considered matters outside the scope of the evidence and jury instructions" (Aplt.Br.39).

Alberta's argument is without merit. There was ample evidence from which the jury could find substantial compensatory damages. Its award of $3 million – $1 million for each of the three rapes (lowered to $2.1 million after

application of comparative fault) – reached after nearly three hours of deliberation (Tr.647,652) was fair and reasonable and was not the result of bias or prejudice.

"There are two general types of excessive verdicts:" either "a verdict that is disproportionate to the evidence of injury and results from an 'honest mistake' by the jury in assessing damages" or "a verdict that is excessive due to trial error that causes bias and prejudice by the jury." *Stewart*, 465 S.W.3d at 56. ***Alberta argues only the second type*** (Aplt.Br.38-39).

But the "standard of review of a claim that the trial court erred in failing to find the verdict excessive is a narrow one: an appellant must show both that the verdict is excessive and that some event occurred at trial that incited the bias and prejudice of the jury." *Giddens v. Kan. City S. Ry. Co.*, 29 S.W.3d 813, 821-22 (Mo. banc 2000). "Appellate review of a jury's verdict begins with the recognition that the jury retains 'virtually unfettered' discretion in reaching its decision" as to the amount of noneconomic damages. *Stewart*, 465 S.W.3d at 57.

The "amount of the verdict does not by itself establish bias or passion and prejudice without showing some other error was committed during the trial." *Stewart*, 465 S.W.3d at 56. Instead, the appellant must show *both* "that the size of the verdict is so grossly excessive as to shock the conscience because it is glaringly unwarranted" *and* some erroneous "trial event … caused the bias and prejudice it claims occurred." *Giddens*, 29 S.W.3d at 822. The appellant's other unmeritorious points are insufficient to meet this. *Id.*

Given this extremely narrow, heightened standard, unsurprisingly, in the past 35 years, Missouri appellate courts have reversed ***only two*** verdicts under it. *See Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 20-22 (Mo. banc 1994); *Fort Zumwalt Sch. Dist. v. Recklein*, 708 S.W.2d 754, 756 (Mo App. 1986). In *Tune*, a personal injury plaintiff violated the rule against surprising the jury with a proposed amount of damages in the final portion of its closing argument, giving the defense no opportunity to respond, which the Supreme Court held biased and prejudiced the jury into entering exactly the $2.8 million award the plaintiff requested. 882 S.W.2d at 20-22. In *Fort Zumwalt*, a contract case, the jury's award was not supported by sufficient evidence of the amount of economic damages. 708 S.W.2d at 756.

As well, ***only once*** in the past 35 years did a Missouri appellate court affirm a trial court's order granting a new trial for excessive compensatory damages. *See Ince v. Money's Bldg. & Dev., Inc.*, 135 S.W.3d 475, 480 (Mo. App. 2004). In *Ince*, also a contract case, the jury awarded $420,000, but "the maximum amount of damages supported by the evidence was $183,380.07," making the verdict excessive. *Id.*

Conversely, ***every other* time** since 1980 when an appellant alleged an excessive verdict, the appellate court rejected the argument and affirmed. *See*:

- *Stewart*, 465 S.W.3d at 56-58;
- *Mackey v. Smith*, 438 S.W.3d 465, 480 (Mo. App. 2014);
- *Hurst v. Kan. City Sch. Dist.*, 437 S.W.3d 327, 331-33 (Mo. App. 2014);
- *Mansfield v. Horner*, 443 S.W.3d 627, 641-42 (Mo. App. 2014);

- *Hawley v. Tseona*, 453 S.W.3d 837, 839-40 (Mo. App. 2014);
- *Blanks*, 450 S.W.3d at 363, 408;
- *Merseal v. Farm Bureau Town & Country Ins. Co.*, 396 S.W.3d 467, 469 (Mo. App. 2013);
- *Evans v. FirstFleet, Inc.*, 345 S.W.3d 297, 309-10 (Mo. App. 2011);
- *Martin v. Survivair Respirators, Inc.*, 298 S.W.3d 23, 35-36 (Mo App. 2009);
- *Johnson v. Allstate Indem. Co.*, 278 S.W.3d 228, 237 (Mo. App. 2009);
- *Teets v. Am. Family Mut. Ins. Co.*, 272 S.W.3d 455, 459-60 (Mo. App. 2008);
- *Pope v. Pope*, 179 S.W.3d 442, 466 (Mo. App. 2005);
- *McCormack v. Capital Elec. Constr. Co.*, 159 S.W.3d 387, 393-97 (Mo. App. 2004);
- *Benedict v. N. Pipeline Constr.*, 44 S.W.3d 410, 429 (Mo. App. 2001);
- *Giddens*, 29 S.W.3d at 821-22;
- *Fierstein v. DePaul Health Cent.*, 24 S.W.3d 220, 223-27 (Mo. App. 2000);
- *Willman v. Wall*, 13 S.W.3d 694, 699 (Mo. App. 2000);
- *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 175-77 (Mo. App. 1997);
- *Tuterri's, Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*, 894 S.W.2d 266, 268 (Mo. App. 1995);
- *Stegan v. H. W. Freeman Constr. Co.*, 637 S.W.2d 794, 796-99 (Mo. App. 1982);

- *Brazell v. St. Louis S.W. Ry. Co.*, 632 S.W.2d 277, 279-80 (Mo. App. 1982).

Even more tellingly, ***every other* time** an appellant appealed an order granting a new trial due to allegedly excessive damages, the appellate court ***reversed*** it. *See*:

- *Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635, 641-42 (Mo. App. 2005);
- *Brooks v. SSM Health Care*, 73 S.W.3d 686, 690-93 (Mo. App. 2002);
- *Toppins v. Schuermann*, 983 S.W.2d 582, 585 (Mo. App. 1998);
- *Bodimer v. Ryan's Family Steakhouses, Inc.*, 978 S.W.2d 4, 8-9 (Mo. App. 1998).

And those were under ***heightened* abuse of discretion review**, Missouri's ***highest*** standard in favor of ***affirmance***. *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 219 (Mo. banc 2012).

Just as in all these other cases, Alberta's claim that the jury's $3 million noneconomic damages award was reversibly excessive fails. The only error she alleges is her fifth point concerning the admission of Exhibit 34 (Aplt.Br.40). As that fails, *supra* at 44-47, so must her argument about excessive damages. *Stewart*, 465 S.W.3d at 57; *Giddens*, 29 S.W.3d at 822.

While Alberta complains the plaintiff's counsel asked for $1 million for each of the three rapes in the opening portion of his closing argument, arguing this "was speculative as to the emotional damage suffered by the plaintiff, as well as the number of sexual encounters between the plaintiff and Tony" (Aplt.Br.40), she did not object to that argument (Tr.611-13). This,

alone, also defeats her claim of jury prejudice. *McCormack*, 159 S.W.3d at 397. Moreover, Jane's counsel requested ***$4 million*** (Tr.615-16), and the jury awarded $1 million ***less***. This shows an independent mind, regardless of what counsel argued.

Alberta also complains about a question the jury sent the trial court midway through their deliberations, which she claims showed "their willingness to consider matters outside the evidence" (Aplt.Br.40-41) (citing L.F.2497).[3] Her counsel agreed on the court's response, which merely told the jury the instructions were the law, to review them, and to continue deliberating (Tr.651;L.F.2497). It is well-established that a question from the jury, even one far afield, does not "reflect abdication of its role as trier of fact," especially where the court gave an appropriate response and deliberations continued. *McPherson v. David*, 805 S.W.2d 260, 263-64 (Mo. App. 1991); *Evans*, 345 S.W.3d at 309-10.

Alberta also argues the amount of the jury's verdict was speculative (Aplt.Br.40-42). This is without merit. "An injured party may also recover compensatory damages for bodily pain, humiliation, mental anguish and other injuries that occur as a necessary and natural consequence of the tortious conduct." *A.R.B. v. Elkin*, 98 S.W.3d 99, 104 (Mo. App. 2003).

"There is no fixed measure or standard available to the trier of fact in determining the measure of damages for pain and suffering. ***The measure of damages is simply that which is fair and reasonable.***" *Id.* (citation omitted) (emphasis added). "[T]he jury is charged with the task of weighing

---

[3] This is Alberta's only citation to the record in her entire argument section.

witness credibility and testimony, and the amount of damages awarded falls primarily within their discretion." *Root v. Manley*, 91 S.W.3d 144, 146 (Mo. App. 2002). While counsel may "suggest a 'lump sum,'" "no witness may express his subjective opinion concerning" the amount. *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291, 302 (Mo. banc 1978).

The jury's award of $3 million plainly was fair and reasonable. There was voluminous evidence of Jane's extreme pain and suffering as a result of Alberta's negligence resulting in Tony raping Jane three times, including: the video of Jane at St. Luke's; Dr. Brewer's testimony as to Jane's emotional trauma and pain and suffering from being touched, let alone raped, as well as his in-depth description of a caesarean section; Dr. Boyle's testimony as to the fear and pain Jane exhibited during her vaginal examination when the pregnancy was diagnosed; and the testimony of the nurses present at St. Luke's before and after the birth (Tr.189-228,255-60,474-91;Plt.Ex.38).

The jury's compensatory damage award was proper.

Conclusion

The Court should affirm the trial court's judgment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg
Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (Ext. 7020)
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

By: */s/ Rose C. Briscoe*
Rose C. Briscoe Mo. Bar No. 61540
LAW OFFICE OF
ROSE C. BRISCOE, LLC
P.O. Box 243
St. Joseph, Missouri 64502
Phone: (816) 233-2244
Fax: (816) 233-2252
rosebriscoe@ymail.com

COUNSEL FOR RESPONDENT
JANE DOE b/n/f JANE DOE GMA

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in Century Schoolbook size 13 font, which is not smaller than Times New Roman, 13-point font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule XLI, as this brief contains 13,936 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that, on August 19, 2016, I filed a true and accurate Adobe PDF copy of this brief of the respondent via the Court's electronic filing system, which notified the following of that filing:

Mr. Steven F. Coronado Coronado Katz LLC 14 West Third Street, Suite 200 Kansas City, Missouri 64105 Telephone: (816) 410-6600 Facsimile: (816) 337-3892 steve@coronadokatz.com	Counsel for Appellant
Mr. Matthew J. Gist Ensz & Jester, P.C. 1100 Main Street, Suite 2121 Kansas City, Missouri 64105 Telephone: (816) 474-8010 Facsimile: (816) 471-7910 mgist@enszjester.com	Counsel for Defendants Progressive Community Services Lynn Wells Terri Zeamer

/s/Jonathan Sternberg
Attorney