

MISSOURI CIRCUIT COURT
 TWENTY-FIRST JUDICIAL CIRCUIT
 ST. LOUIS COUNTY

R.A., a minor, by and through His Next Friends
 and Natural Parents, SARAH ANYAN and
 BLAKE ANYAN,

Plaintiffs,

v.

Cause No. 21SL-CC03944

Div. 18

MERCY HOSPITALS EAST COMMUNITIES
 d/b/a MERCY HOSPITAL ST. LOUIS,
 MERCY CLINIC EAST COMMUNITIES d/b/a
 MERCY CLINIC MERCY OB/GYN, and
 DR. DANIEL McNEIVE,

Defendants.

**MEMORANDUM IN SUPPORT OF
 PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT**

COMES NOW Plaintiff, by and through undersigned counsel, and for his
 memorandum in support of his motion to enforce settlement, states as follows:

I. INTRODUCTION

The facts and the law favor Plaintiff in the Court's determination of whether an
 enforceable settlement was reached. The settlement agreement was reached at 4:47 p.m.
 The unambiguous terms were reduced to writing. They are:

8 and 18

All the way to verdict

Confidentiality to high/low

No non disparagement

Despite the facts and the law, Mercy Hospital's counsel, on behalf of all Defendants,
 backed out of the settlement an hour and a half after it was reached by attempting to add

material terms that counsel admitted were never discussed. Mercy's counsel claimed the trigger for the high/low was based only on the compensatory damages *after* application of the statutory medical malpractice caps, not the verdict; yet, counsel admitted, "There was no discussion of caps, Your Honor."

Then, without evidence, Mercy's counsel alleged that Plaintiff inexplicably abandoned his claim for punitive damages after the jury asked a promising question about the punitive damages amount—an action against the weight of the evidence and Plaintiff's interests.

In contrast, Plaintiff's counsel and defense counsel jointly developed the unambiguous, written material terms of the high/low agreement. Plaintiff's counsel immediately transferred the written agreement to defense counsel by text message so there would be no misinterpretation. When Defendants constructively breached those terms post-verdict, Plaintiff immediately sought to preserve all parties' recollections of the negotiations on record. Meanwhile, Mercy's counsel declined to make a record at all and only did so in response to the Court's direct questions.

An hour after leaving court that evening, counsel for Mercy Clinic and Dr. McNeive, Mr. Willman, called Plaintiff's counsel and asked her to refrain from filing anything because he needed one day to confirm that the agreement above resulted in a settlement of \$18 million. This is a curious action if Defendants really believed the settlement agreement meant anything other than what Plaintiff set forth in the post-verdict record.

The law states that counsel's actions, not their subjective assumptions or their

client's secret intent, give context to the terms of a written settlement. As a result, counsels' actions prove only one result: The parties agreed to a pre-verdict high/low settlement. The jury's verdict triggered the "high" resulting in an \$18 million settlement.

II. FACTS

A. Settlement Reached

Plaintiff and Defendants entered into a high/low agreement of \$8 million and \$18 million on the verdict just prior to the jury announcing its verdict of \$48.1 million. **Ex. 3**, *Post-Verdict Record (Unsealed by Court Order April 9, 2025)*, 7:7-15.^{1, 2}

B. At Sidebar, Defendants Backed Out of Settlement Claiming a Material Term Applied that They Admit Parties Did Not Discuss

After the jury was dismissed, Plaintiff's counsel approached the Court at sidebar to announce that the parties were settled at \$18 million. **Ex. 3**, 7:7-15. For the first time, Ms. Kamykowski, on behalf of all Defendants, stated additional terms that were not part of the settlement agreement. **Ex. 3**, 7:16-22. Ms. Kamykowski admitted that the words "judgement" or "net verdict" were never used in the negotiations. **Ex. 3**, 7:23-8:4. In fact, there was never any suggestion by defense counsel that the trigger to the high/low was anything other than the words and phrases used in the written agreement: "all the way to

¹ Plaintiff's counsel, Ms. Slater, adopted her statements reflected on the record in **Ex. 3** in an affidavit attached hereto as **Ex. 5**. All references to Ms. Slater's statements on the record in **Ex. 3** should be taken as sworn testimony under oath by Ms. Slater and offered as evidence herein.

² The settlement agreement included a material term of limited confidentiality as to the high/low agreement. Plaintiff took steps to preserve this confidentiality in its filings before this Court, including initially sealing the post-verdict record that included the amounts and maintaining confidentiality of the high/low agreement in their filing of this motion on March 28, 2025. Defendants did not object to unsealing the post-verdict record and filed the complete details of the amounts at issue and fact of the high/low settlement in their filing dated April 18, 2025. Thus, Plaintiff discusses the facts of the high/low agreement, the negotiations, and the amounts involved herein based on Defendants' waiver of limited confidentiality.

verdict.” **Ex. 3**, 8:5-11.

Importantly, when asked to respond to Plaintiff’s recitation of the negotiations and high/low agreement resulting in a settlement of \$18 million, Ms. Kamykowski initially declined to make a record. **Ex. 3**, 9:1-11.

After Ms. Kamykowski stated to the Court that she believed the medical malpractice statutory caps on non-economic damages applied to trigger the high/low, the Court asked Ms. Kamykowski, “And were discussions with regards to the caps involved in this settlement agreement at all?” **Ex. 3**, 11:7-22. “There was no discussion of caps, Your Honor.” **Ex. 3**, 11:23-24.

C. After Sidebar, Plaintiff’s Counsel Made the Post-Verdict Record Detailing the Settlement and Negotiations

Plaintiff’s counsel detailed the course of the negotiations on the record. Trial of this matter began on March 11, 2025. On day one of trial, Mercy offered \$10 million and an apology to the Anyan Family, which Plaintiff rejected. **Ex. 5**, *Affidavit of Erica B. Slater*, ¶ 4. The jury began deliberating on March 25, 2025 at 12:42 p.m. **Ex. 6**, *Trial Proceedings March 25, 2025*, 2:3-4. After nearly two and a half hours of deliberation, the Jury asked for the life care plans and expenses calculated by the experts and then asked for a calculator. **Ex. 6**, 2:7-5:20. Shortly thereafter and while the jury continued to deliberate, Defendants collectively offered a lump sum of \$12 million which Plaintiff rejected. **Ex. 3**, 3:8-11.

i. High/low negotiations ensue; Defendants make a final offer of \$8 million and \$18 million.

Plaintiff then offered Defendants a high/low settlement agreement of \$10 million and \$20 million. **Ex. 3**, 3:11-14. Defendants rejected the amount and countered with a

high/low amount of \$8 million and \$15 million. **Ex. 3**, 3:13-22. Plaintiff rejected that amount and re-offered \$10 million and \$20 million as the high/low amount. **Ex. 3**, 4:2-6. Defendants then offered several other high/low amounts which Plaintiff rejected and instead, repeatedly renewed the \$10 million and \$20 million high/low offer. **Ex. 3**, 4:7-17. The jury then asked questions about suggested percentages of fault and whether the definition of punitive damages included or equaled all the monies awarded. **Ex. 6**, 5:22-7:19; **Ex. 3**, 4:18-20. Defendants offered a high/low of \$8 million and \$18 million. **Ex. 3**, 4:24-5:3. Then the Court informed counsel there was a verdict. **Ex. 3**, 4:20-5:3. Plaintiff re-offered Defendants the high/low of \$10 million and \$20 million to which Ms. Kamykowski stated that a high/low of \$8 million and \$18 million was their top offer. **Ex. 3**, 5:4-18.

ii. Plaintiff accepts amount of high/low and material terms are drafted jointly and accepted at 4:47 p.m.

After Plaintiff's counsel and Mr. Anyan discussed the offer in the hallway, Ms. Slater informed Ms. Kamykowski that Plaintiff accepted the high/low amount of \$8 million and \$18 million. **Ex. 3**, 5:10-12. At that point, the only details of the communication were characterizing the settlement as a "high/low" on the "verdict" and negotiating the amount to \$8 million and \$18 million. **Ex. 3**, 5:19-22. Then, Ms. Slater and Ms. Kamykowski stepped out of the courtroom and jointly drafted the unambiguous, material terms of the settlement agreement on a Note in Ms. Slater's iPhone Notes app. **Ex. 3**, 5:22-6:1. The complete terms read:

8 and 18

All the way to verdict

Confidentiality to high/low

No non disparagement

Ex. 1, Agreement.

Immediately after drafting the settlement agreement, Ms. Slater texted the settlement agreement from the Notes app to Ms. Kamykowski's cell phone at 4:47 p.m.

Ex. 3, 6:2-5; Ex. 5, Affidavit of Erica B. Slater, ¶¶ 10, 10.a., and 10.b. Parties never changed or altered the four-line settlement agreement.

iii. Mr. Willman confirms details of settlement. Parties do not change any material terms.

Mr. Willman, on behalf of Mercy Clinic and Dr. McNeive, confirmed that the settlement resolved all claims as his clients were subject to punitive damages. **Ex. 3, 6:10-17.** Ms. Slater agreed but reiterated that the settlement was still on the full verdict. **Ex. 3, 6:10-17.** Defendants never used the words "judgment," or "net verdict," nor communicated in any way that they disagreed that the high/low was based on the jury's full verdict. **Ex. 3, 6:19-25.** To the contrary, the jointly drafted provision for the trigger for the \$8 million and \$18 million was "all the way to verdict," which objectively includes both phases of trial should the second phase come to pass, otherwise the modification would be unnecessary. **Ex. 1, Agreement.**

Mr. Willman communicated the way in which Defendants preferred to pay the amount, which was not to construe the payment as paying for punitive damages because the insurance policies between \$8 million and \$18 million could not technically pay for punitive damages although they sought to buy all claims in the settlement. Plaintiff agreed.

Ex. 3, 7:1-6. It is typical and customary when punitive damages are alleged in a case that the settlement agreement releases all claims, including punitive damages, and that no payments are being made on behalf of the punitive damages claims. This alone was the impetus behind the clarification made after the material terms of the settlement agreement were reduced to writing. The parties' exchange as to punitives was a narrow, explicit conversation, not counsel's subjective understanding of the discussion. **Ex. 3**, 7:1-6.

iv. Verdict is read at 4:56 p.m. Punitive damage amount is read at 5:56 p.m. Defense counsel makes no record regarding settlement during stage two deliberations.

The jury then returned their verdict in open court at 4:56 p.m., nine minutes after parties reached the 4-line settlement agreement. **Ex. 6**, 8:2-9. The verdict totaled \$28.1 million in compensatory damages and found Mercy Clinic and Dr. McNeive liable for punitive damages, signed by all twelve jurors. **Ex. 6**, 8:14-9:4. After hearing counsel's arguments, the jury deliberated as to the award for punitive damages. **Ex. 6**, 10:7-14:23. During this time, Defendants never approached the Court to announce the settlement or state that the second stage of trial was inconsequential to the settlement. *See Ex. 6*, 14:23-16:1. At 5:59 p.m., the Court read the jury's verdict as to the amount of punitive damages which totaled \$20 million and was signed by all twelve jurors. **Ex. 6**, 15:24-16:11.

v. Parties approach the Court to announce settlement. On behalf of all Defendants, Ms. Kamykowski attempts to add material terms and backs out of settlement.

At Ms. Slater's request, she and Ms. Kamykowski approached sidebar to announce the settlement. **Ex. 3**, 7:7-15. Ms. Kamykowski backed out of the settlement that was reached one and a half hours earlier. **Ex. 3**, 7:16-22. Plaintiff requested to make a record

immediately to preserve the facts and counsels' contemporaneous recollections of the negotiations.

vi. *Plaintiff makes post-verdict record, moves to enforce settlement, and for sanctions.*

At 6:15 p.m., Plaintiff made the post-verdict record providing context to the clear and unambiguous settlement agreement reached between all parties. **Ex. 3.** Ms. Kamykowski stated that one of her negotiation points was that by settling, Plaintiff avoided the defendant-favored periodic payment statute that applies in medical malpractice cases. **Ex. 3**, 12:5-14. Yet, inconsistently, she claimed that another defendant-favored medical malpractice statute, caps on non-economic damages, did apply. **Ex. 3**, 12:5-14.

Although his clients, Mercy Clinic and Dr. McNeive, had just incurred a punitive damage verdict of \$20 million that presumably had been settled until counsel for Mercy Hospital backed out of the settlement on their behalf, Mr. Willman surprisingly did not make any record in defense of his clients. **Ex. 3.**

As a result of Ms. Kamykowski and Mercy's conduct and based on Ms. Kamykowski's repeated behavior known to Plaintiff's counsel of attempting to change settlement terms after the fact to the disadvantage of the plaintiff, Plaintiff moved for sanctions against Ms. Kamykowski and Mercy. **Ex. 3**, 15:16:19; *see* Docket, *J.I. v. SSM Cardinal Glennon Children's Hospital*, 22nd Circuit Case No. 1722-CC11203, Plaintiff's Motion to Enforce Settlement Reached Prior to Minor Decedent's Death dated June 27, 2024, Defendants' Joint Memorandum in Opposition filed July 19, 2024 signed by

Attorney Kamykowski, and Court's Order Enforcing Settlement dated December 2, 2024.³

D. Mr. Willman Calls Plaintiff's Counsel One Hour After Leaving the Courthouse and States He Anticipates Confirming \$18 Million Settlement Tomorrow

The record concluded at 6:38 p.m. and the parties and their representatives exited the courtroom. **Ex. 3**, 17:24-25. One hour later, at 7:39 p.m., Mr. Willman called Ms. Slater. **Ex. 4**, 7:39 p.m. call from Phil Willman; **Ex. 5**, Affidavit of Erica B. Slater, ¶¶ 10.c. and 11. Mr. Willman stated that he was designated as the messenger for all Defendants. **Ex. 5**, ¶ 12. He asked Plaintiff to "hold on everything," i.e. refrain from filing a judgment, motion to enforce settlement, or motions for sanctions, and stated that Defendants "need[ed] to talk to one more person tomorrow and then we can confirm the settlement at \$18." **Ex. 5**, ¶ 13.

Upon the Court's suggestion, to support his oral motions made during the post-verdict record on March 25, 2025, Plaintiff filed the instant motion and written motions for sanctions against Mr. Kamykowski and her firm and Mercy Hospital on March 28, 2025, after waiting three days to hear back from Mr. Willman to no avail.

III. LAW AND ANALYSIS

"Settlements are favored in the law." *State Farm Mut. Auto. Ins. Co. v. MFA Mut. Ins. Co.*, 671 S.W.2d 276, 279 (Mo. banc 1984).

³ In *J.I.*, Ms. Kamykowski and her firm took a similar position as they do in this matter: that material terms can be added post-settlement to change the terms of the settlement and lower the amount her client owed to plaintiff. Despite Ms. Kamykowski's argument in *J.I.* that past negotiations added additional terms to the settlement agreement, the Court's order in *J.I.* finds that a clear settlement was reached at mediation, without consideration of past negotiations or intent. There was an offer that was accepted and supported by consideration which was the dismissal of all claims in exchange for payment of a confidential sum. Any other terms were not material to the purpose of the agreement and could not be changed after the fact by counsel's subjective intent. Ms. Kamykowski's arguments did not prevail in *J.I.* and they should not here.

As an initial matter, it is important to understand how the Court determines a settlement is reached, the legal mechanism for enforcing a settlement, and how reviewing courts scrutinize the trial court's judgment.

This Court should find that Plaintiff and Defendants entered a clear, written, enforceable high/low settlement agreement triggered by the Jury's full verdict.

A. Framework of the Trial Court's Enforcement of a Settlement

i. Trial Courts May Determine a Settlement Was Reached on a Motion to Enforce Settlement Proven by the Evidence

Missouri lacks a specific process for enforcing settlement in a pending case. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 598 (Mo. 2007); *citing Barton v. Snellson*, 735 S.W.2d 160, 161 (Mo. App. 1987). Settlement may be raised by a motion to enforce the settlement agreement. *Id.* A motion to enforce a settlement adds a collateral action to the case seeking specific performance of the agreement. *Id.* The moving party must prove the fact of the agreement by clear, convincing, and satisfactory evidence. *Id.* Express authority to settle is presumed where the attorney of record asserts such authority. *Id.*; *citing Leffler v. Bi-State Dev. Agency*, 612 S.W.2d 835, 837 (Mo. App. 1981).

ii. The Preferred Approach to a Motion to Enforce Settlement is an Evidentiary Hearing

A trial court may take one of three possible approaches to decide a motion to enforce settlement. *Eaton*, 224 S.W.3d at 598. "By far the most desirable approach would be to hold an evidentiary hearing where the moving party proves the agreement and the non-moving party can then present evidence as to any defenses." *Id.* The other two less desirable approaches are disposing of the motion on the pleadings pursuant to Rule 55.27 or treating

the motion like one for summary judgment under Rule 74.04. *Id.*

iii. To Determine if a Settlement Exists, the Court Applies Contract Law

The settlement of a lawsuit is a contract that is complete when the proposition of one party is accepted in the form tendered by the other party. *Randall v. Harmon*, 761 S.W.2d 278 (Mo.App. S.D. 1998). Thus, to determine whether parties entered an enforceable settlement agreement, contract law governs. *St. Louis Union Station Holdings, Inc. v. Discovery Channel Store, Inc.*, 301 S.W.3d 549, 551 (Mo.App. E.D. 2009); citing *Emerick v. Mutual Benefit Life Insurance Co.*, 756 S.W.2d 513, 518 (Mo. banc 1988).

To establish a legal, valid settlement agreement, a party must prove the essential elements of a contract: offer, acceptance, and consideration. *Id.* (internal citations omitted).

To create a valid settlement agreement, the parties must have a meeting of the minds and mutual assent to the essential terms of the agreement. *Id.*; citing *Emerick*, 756 S.W.2d at 518. To determine whether there was a “meeting of the minds,” Missouri courts look to the parties’ “objective manifestations of intent...[a] person’s subjective intent is irrelevant.” *Fiegener v. Freeman-Oak Hill Health System*, 996 S.W.2d 767, 771 (Mo.App. S.D. 1999) (emphasis in original).

Where a settlement agreement is unambiguous and complete, it must be enforced as written. *Fiegener*, 996 S.W.2d at 771. Even if a term, phrase, or entire contract is unambiguous, some extrinsic evidence may be used to interpret, rather than construe, the contract or its terms. *Id.* at 772. The *Fiegener* court quoted the Missouri Supreme Court in dicta that “collateral facts and circumstances may be introduced to ascertain the subject

matter of the [unambiguous] contract and to aid in interpreting it, [but] such facts cannot cause the court to read into the contract something which it does not say.” *Id.*; citing *Craig v. Jo B. Hardner, Inc.*, 586 S.W.2d 316, 324[6] (Mo. banc 1979).

iv. The Standard of Review on a Court’s Judgment to Enforce Settlement is Clearly Erroneous/Against the Weight of the Evidence.

Once a trial court enforces a settlement and enters judgment upon that ruling, appellate courts apply a clearly erroneous standard on review. As early as *Murphy v. Carron* in 1976, the Missouri Supreme Court clarified this standard:

“Appellate review as in suits of an equitably nature as found in Rule 73.01, is construed to mean that the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is ‘against the weight of the evidence’ with caution and with a firm belief that the decree or judgment is wrong.”

536 S.W.2d 30, 32 (Mo. banc 1976).

The Supreme Court and Missouri Courts of Appeal have continued to adopt this standard for the past 50 years. The *Hunter* Court, sitting *en banc*, stated: “This Court will affirm a trial court’s judgment in a court-tried case unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *Hunter v. Moore*, 486 S.W.3d 919, 925 (Mo. banc 2016); *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 598 (Mo. 2007) (“The standard of review here is under *Murphy v.*

Carron, 536 S.W.2d 30, 32 (Mo. banc 1976.); *Puga v. Nephrite Fund I, LLC*, 697 S.W.3d 783, 790–91 (Mo.App. W.D. 2024).

“We view the evidence in the light most favorable to the trial court’s judgment, disregarding all contrary inferences and evidence.” *Ste. Genevieve Cnty. Levee Dist. #2 v. Luhr Bros., Inc.*, 288 S.W.3d 779, 782 (Mo. App. E.D. 2009) (internal citation omitted). “We defer to the trial court’s findings of fact, recognizing the superior ability of the trial court to judge the credibility of the witnesses.” *Id.* (internal quotation marks omitted). A reviewing court will only set aside a judgment as against the weight of the evidence only upon “a firm belief the trial court was wrong.” *Id.* “We view the evidence in the light most favorable to the trial court’s judgment, disregarding all contrary inferences and evidence.” *St. Louis Union Station Holdings, Inc.* 301 S.W.3d at 551. Since a motion to enforce settlement seeks specific performance, an equitable remedy, appellate courts “will afford the trial court great deference in granting a motion to enforce settlement.” *Id.*

B. Parties Entered an Unambiguous, Enforceable High/Low Agreement Triggered by the Jury’s Full Verdict

On March 25, 2025, after the evidence in this matter concluded and the jury deliberated, the parties entered an unambiguous, enforceable, written high/low settlement agreement with the following terms:

8 and 18

All the way to verdict

Confidentiality to high/low

No non disparagement

Ex. 1, Agreement, Ex. 2, 4:47 p.m. Text to Defense Attorney Kamykowski.

The parties made a record after the \$48.1 million verdict was announced and Mercy

Hospital's counsel back out of the settlement agreement. That record gave context to the settlement agreement terms above. **Ex. 3**, *Post-Verdict Record (Unsealed by Court Order April 9, 2025)*.

i. Offer

For the first time, Plaintiff offered a high/low settlement of \$10 million and \$20 million during deliberations after rejecting Defendants' offer of a lump sum payment. **Ex. 3**, 3:8-13. The parties negotiated only the amount of the high/low as the jury continued to deliberate. **Ex. 3**, 3:8-5:9. Once the high of \$18 million and the low of \$8 million was agreed to, the material settlement terms were memorialized in the four-line written agreement above and transferred to Defendants at 4:47 p.m. **Ex. 1**, *Agreement*, **Ex. 2**, 4:47 p.m. *Text to Defense Attorney Kamykowski*; **Ex. 3**, 5:19-6:5.

ii. Acceptance, Mutual Assent, and Meeting of the Minds

The written agreement was composed jointly by Ms. Slater and Ms. Kamykowski, counsel for Mercy Hospital and negotiator on behalf of all Defendants. Ms. Slater typed the agreement on her iPhone "Notes" app while standing with Ms. Kamykowski. **Ex. 3**, 5:19-6:5. Each counsel was looking at the screen as Ms. Slater typed, heads together. The drafting process continued until each counsel confirmed it was their agreement. Once the four lines above were written and agreed to, Ms. Slater texted the complete and final agreement to Ms. Kamykowski at 4:47 p.m. **Ex. 2**, 4:47 p.m. *Text to Defense Attorney Kamykowski*. Ms. Kamykowski immediately looked at her phone and opened the text message and acknowledged, received, and read the text (as confirmed by iPhone's "read receipts" feature). *Id.*

No changes were ever suggested or made to the written agreement. By 4:47 p.m., the agreement was complete and enforceable and was a high/low settlement agreement with the trigger being the full verdict as expressed by the phrase “All the way to verdict” immediately following the monetary bounds of the amount of the high/low.

iii. **Consideration**

The high/low settlement agreement consisted of Defendants paying an amount of money between \$8 million and \$18 million to be determined by the amount of the Jury’s verdict in exchange for a release of all claims and dismissal with prejudice of the lawsuit.

Based on normal and customary contract law, the agreement is valid, enforceable, unambiguous, and includes an offer, acceptance of that offer, and consideration.

C. Missouri Case Law Supports that All Parties Agreed to the Four Material Terms of the Settlement at 4:47 p.m. on March 25, 2025

The Missouri case of *Fiegener v. Freeman-Oak Health System*, which involved a pre-verdict high/low settlement agreement in a birth injury case, is most analogous.

i. ***Fiegener v. Freeman-Oak Health System***

Fiegener v. Freeman-Oak Hill Health System consisted of a similar set of circumstances which are instructive. In *Fiegener*, parties tried a medical malpractice birth injury case to verdict. Plaintiff sued a doctor, several nurses, and the hospital that delivered the minor. The parties tried the case to a jury for nine days. While the jury deliberated late into the night, they asked for plaintiff’s life care plan and economist report. At 11:30 p.m. while the jury continued to deliberate, the parties made a record detailing their high/low settlement agreement. *Fiegener*, 996 S.W.2d at 769-770. Counsel for the hospital

defendants represented that “on behalf of all defendants” they had reached a settlement with the plaintiffs. *Id.* at 770. The high/low agreement was detailed as follows:

[DEFENSE COUNSEL FOR HOSPITAL]: If the plaintiffs recover a net judgment of one million dollars or less defendants will pay one million dollars. If plaintiffs receive a jury verdict between—plaintiffs' judgment against the defendants between one million and four million dollars then plaintiffs will recover the actual net judgment. If plaintiffs recover a net judgment against defendants of over four million dollars then the net amount of the judgment to be enforced against defendants will be four million dollars.

Id. (emphasis added to distinguish from the facts here). Plaintiffs’ counsel then clarified the parties’ material terms on the record: a) the statute calling for periodic payments would not apply, b) there would be no structured settlement annuity involved, and c) the medical malpractice caps did apply to trigger the amount to be paid. *Id.*

Plaintiffs’ counsel also stated that there were different amounts of coverage between the defendants (the doctor had \$1 million in insurance coverage and the hospital had \$8 million) but it was his understanding they had worked out who would pay what between the \$1 million and \$4 million. Defense counsel confirmed the same. Then, parties went off the record. *Id.*

Eighteen minutes later at 11:48 p.m., hospital defense counsel made an additional record:

[DEFENSE COUNSEL FOR HOSPITAL]: It was the intent of the nurse defendants and Freeman Hospital to only accept their percentage of the net fault assessed to them. Apparently that was not well understood, and we wanted to now express after talking about that, that that was what was intended in the settlement.

Id. At 11:50 p.m. the jury announced its verdicts which assessed 100% fault to the doctor and awarded \$1,346,894.85 to the child. *Id.*

After the verdict, the hospital and nurses refused to pay into the settlement at all and the doctor only had \$1 million in coverage when over \$1.3 million was owed under the settlement agreement. *Id.* at 771. The trial court overruled plaintiffs' and the defendant doctor's motions to enforce settlement citing the late hour at which the settlement was reached, the weary attorneys, the large amount, and the haste to reach the high/low before the jury reached their verdict, among other reasons why the attorneys did not come to a meeting of the minds. *Id.*

Plaintiffs and the defendant doctor appealed the trial court's denial of their motions to enforce settlement. The Missouri Court of Appeals reversed the trial court finding an enforceable settlement agreement was reached on behalf of all defendants at 11:30 p.m. as evidenced by the record. *Id.* at 773. In analyzing the facts, the Court of Appeals pointed out various facts that are akin to the facts here.

First, when defense counsel for the doctor announced on the record "on behalf of all defendants" that they had entered a high/low settlement with plaintiff, it was in the context of all the insurance representatives for the doctor and hospital having been present during the trial and everyone's understanding the coverage limits of all defendants. *Id.*

Second, reading the language used by the attorneys on the record at 11:30 p.m. in context, "and giving such language its natural, ordinary, and commonsense meaning, we find that the agreement announced was not ambiguous and did not lack any essential

contractual elements as between Plaintiffs on one side and Dr. Dunlap and Hospital Defendants, collectively, on the other.” *Id.* at 772.

The Court noted that the words that defense counsel for the hospital defendants used were on behalf of “all defendants” and plainly communicated an intent to act collectively and jointly with the doctor to settle the case. *Id.* The Court found that the objective words used showed that all defendants agreed to contribute to the amounts plaintiffs would recover without qualification. *Id.* “Attorney Hyde’s actions and words would lead any reasonably prudent person to this conclusion as his 11:30 p.m. remarks offered no indication that his clients intended to limit the scope of the settlement as he contended at 11:48 p.m. ‘Any reservation or limitation as to the scope of a settlement agreement must be clearly expressed.’” *Id.*; citing *Angoff v. Mersman*, 917 S.W.2d 207, 211[8] (Mo.App. W.D. 1996). The Court confirmed that the court’s “job is to decide what the parties intended by what they said, and we cannot be concerned with what they may have subjectively intended to say.” *Id.*

In reaching the conclusion that the hospital defendants intended to pay collectively with the doctor under the high/low agreement, the Court explicitly stated that they did not disregard hospital defense counsel’s unilateral act of supplementing the record at 11:48 p.m. To the contrary, the Court stated, “[h]owever, his unilateral act of supplementing the record cannot alter the terms of the contract entered into earlier. At best, [hospital counsel]’s actions belatedly revealed the subjective intent of his client. We must consider what the parties contract actually said and not what the Hospital Defendants secretly intended or what they might have said if they had decided to further explain their

intentions.” *Id.*

Here, the Court’s final quote above decides this matter. This court must look at the words and objective intent of the parties to resolve the case and not the subjective intent of Defendants and their insurer. Post-verdict, defense counsel denied that a verdict of \$48.1 million triggered the \$18 million “high.” Counsel belatedly stated her client’s subjective and non-negotiated intent that the medical malpractice caps reduced the compensatory amount to trigger the settlement and that punitive damages were excluded for purposes of determining the trigger amount for the high/low. **Ex. 3.** Counsel’s contention may have been the subjective intent of counsel’s client or insurer, but it was withheld from Plaintiff. The only words used were the four phrases in the written settlement agreement. The only word that appears therein is “verdict.” No assertion of caps, or net judgment, or compensatory only, or no punitive damages—only verdict.

It is clear these terms were not negotiated since, to the contrary, there *is* evidence that the parties got into the weeds on other terms. The parties went as far as to limit explicitly the scope of any proposed confidentiality provision in line three and completely exclude non disparagement in line four. **Ex. 1, Agreement.**

Also like the *Fiegener* case, where the Court found that there was no indication that the clients intended to limit the scope of the settlement as the hospital’s attorney did later at 11:48 p.m., here, there is no indication that the parties limited the trigger in the high/low to anything other than the full verdict. **Ex. 1, Agreement, Ex. 2, 4:47 p.m. Text to Defense Attorney Kamykowski; see Fiegener, 996 S.W.2d at 773.**

Nothing about the conversation subsequent to the 4:47 p.m. settlement agreement

changed the material terms or provided additional material terms.⁴ Just like *Fiegener*, defense counsel's clarifications only had to do with how the Defendants and their insurers planned to split and designate the payment regardless of the result of the verdict.⁵ Ms. Kamykowski's statements to the contrary in the post-verdict record show a subjective intent. Defense counsel either concealed her intent or failed to express it to Plaintiff during negotiations and acceptance of the settlement agreement. As in *Fiegener*, the unilateral act of supplementing the record cannot alter the terms of the contract entered into earlier. See *Fiegener*, 996 S.W.2d at 773.

Defendants also argue that they would not contract to pay an amount that they would otherwise not owe under the application of the non-economic damages cap. Hospital counsel's same argument failed in *Fiegener*. Hospital counsel argued that his clients would not contract to contribute to a settlement that they would otherwise not owe under the verdict if fault was not apportioned to them. Here, that is the nature of a high/low settlement. There is always a risk a party pays what they otherwise would not have (when the verdict is below the "low") or a party fails to collect what they otherwise would have (when the verdict is above the "high").

⁴ The only exchange after the 4-line Agreement at 4:47 p.m. was counsel for Mercy Clinic and Dr. McNeive clarifying that the agreement settled all claims which was the objective intent of the agreement—any argument by Plaintiff otherwise would be void, and to clarify that the payment was to be construed as not paying for punitives. This is customary in settlements involving punitive damages, especially here where Defendants represented that Med Pro's insurance did not cover punitive damages.

In further support that even in the face of a punitive damage judgment being entered against a party it can be settled and not construed as a "payment" for punitive damages, R.S.Mo. § 537.675.3 which governs punitive damages in certain tort cases states, "Nothing in this section shall hinder or in any way affect the right or ability of the parties to any claim or lawsuit to compromise or settle such claim or litigation on any terms and at any time the parties desire."

⁵ Indeed, defense attorneys (Mandy Kamykowski and Phil Willman) and Med Pro (Joe Crawford) knew that [REDACTED] but Plaintiff did not know this until the Court ordered they produce all insurance policies post-verdict.

A distinguishing factor compared to the *Fiegener* case is that when communicating the agreement to the court, counsel made a point to always say “net judgment” and the parties communicated that the caps applied in their trigger. This was an explicit carve-out that was negotiated between the parties and objectively communicated to the court. Here, the argument that the caps applied and that punitives were somehow extinguished was at best a subjective intent, or rather what Mercy secretly intended or developed as a new argument after the verdict.

Further, according to *Fiegener*, the timing of communication is important. Here, the high/low agreement was proposed after the jury asked for the life care plans and a calculator. It was finalized and accepted at 4:47 p.m. The jury verdict was read at 4:56 p.m. in open court. **Ex. 6**, 8:2-9. That verdict included a finding that Mercy Clinic and Dr. McNeive were liable for punitive damages. Thereafter, Ms. Gunn and Mr. Willman offered short arguments regarding the amount of punitive damages and the jury went back to deliberate on that amount. Verdict B, which included the punitive damages amount, was not read until 5:59 p.m. in open court. **Ex. 6**, 8:14-9:4.

If the Court is to believe Defendants that Plaintiff agreed to exclude punitive damages from the trigger, their actions, or lack thereof, do not support that belief. At no time did Defendants approach the Court during the jury’s second deliberations to announce that parties had settled and agreed punitive damages were excluded or irrelevant. This did not happen because that was not the agreement. “It is the actions, and not the intentions or suppositions of the parties, that determine whether or not there is a contract and the terms of the contract.” *B-Mall v. Williamson*, 977 S.W.2d 74, 77 (Mo.App. W.D. 1998).

The settlement agreement was “All the way to verdict.” Plaintiff would not act against his own interest and extinguish punitive damages from the high/low agreement when the jury had already asked a question about the amount of punitive damages during the first stage of deliberations. **Ex. 3**, 4:18-20; **Ex. 6**, 5:22-7:19. The fact that Defendants failed to make any sort of record at any point and initially declined to make a record after the verdict shows that the four-phrase settlement agreement is what it is—an unambiguous contract to settle the case.

Lastly, Mr. Willman, counsel for Mercy Clinic and Dr. McNeive, placed a call to Ms. Slater at 7:39 p.m. after all parties had left the courthouse on March 25, 2025. He asked Plaintiff’s counsel to “hold” on filing anything, that he needed to talk to one more person the next day and then he believed they would have the \$18 million. This objective action on Defendants’ behalf gives complete context to the situation that happened in the courtroom post-verdict. **Ex. 3**. Ms. Kamykowski backed out of the settlement agreement based on an undisclosed and subjective intent to trigger the settlement in one way, and upon second thought, Defendants immediately wanted an opportunity to honor the deal that they originally made and that Plaintiff reported to the Court. **Ex. 4**, **Ex. 5**, ¶ 10.c., 11-13.

Applying contract law and the guidance in *Fiegener*, this Court should find that a valid enforceable contract existed at 4:47 p.m. and no uncommunicated or subjective intent of Defendants or their insurers changed the material terms of the agreement as written.

D. Parties' Actions Prove the Settlement at \$18 Million, as Trigger by the Jury's Verdict

The parties' written settlement agreement reached at 4:47 p.m. is the complete, enforceable agreement. All counsels' actions and objective intent confirm this result. First, Plaintiff and Defendants memorialized the material terms of the settlement in the four-line text. The terms were specific, unambiguous, detailed, and in order of importance:

Amount in exchange for dismissal of all claims: 8 and 18

Trigger: All the way to verdict

Limited confidentiality: Confidentiality as to high/low

Excludes non disparagement: No non disparagement

After the terms were agreed to by counsel and exchanged, Ms. Kamykowski even called her client's insurer, Joe Crawford. **Ex. 3**, 6:2-9. At no point thereafter did defense counsel seek to change or rewrite any of the material terms in the text message. If the trigger was to be only on the capped compensatory damages and exclude punitive damages, those are very simple and important terms to communicate.

Further, defense counsel never alerted the Court after the compensatory damages and punitive liability were announced that the second phase of trial was irrelevant and had no consequence on the settlement agreement. In contrast, right after the full verdict was read, Plaintiff's counsel approached the Court to announce the settlement. Plaintiff's counsel sought to make a record the moment the terms of the agreement were breached, while defense counsel tried to decline to make any record. Mr. Willman did not make a record.

Defense counsel attempted to state that the settlement offer avoided periodic payments, an undesirable statutory result for plaintiff, yet somehow non-economic damage

caps applied at the same time. A settlement prior to the verdict means that parties do not intend the Court to enter judgment on the verdict. Had Defendants honored the settlement, the Court would never have entered a judgment because parties would have requested the Court approve the settlement and enter judgment on the settlement. If the Court were to enter a judgment on the verdict, it is illogical to believe the Court would apply one defendant-favored statute (non-economic damages cap) but not apply periodic payments, another defendant-favored statute.

Finally, by Mr. Willman calling Plaintiff's counsel an hour after leaving the courthouse and asking for a day to confirm the settlement at \$18 million, Defendants ratified the settlement exactly as it was originally agreed to by all. This action confirms that Defendants acknowledged they agreed to the settlement as reported by Plaintiff's counsel despite Ms. Kamykowski's *post hoc* interpretation.

As a result, the Court should enforce the settlement agreement contract of \$18 million because all counsels' actions confirm the settlement.

IV. CONCLUSION

The law favors settlement. When parties settle a case, the settlement should be upheld and honored. That is the rule of law. Defendants backed out of a settlement after hearing the result of the jury verdict and revising the terms of the agreement to save themselves money. This result cannot stand under the rule of law.

The terms of the agreement are unambiguous. The parties jointly drafted the terms and accepted them all. A settlement was reached at 4:47 p.m. on March 25, 2025. The settlement was a high/low agreement of \$8 million and \$18 million based on the jury's full

verdict that included limited confidentiality and excluded non disparagement provisions. All evidence supports this conclusion. This Court should enforce the settlement of \$18 million and enter judgment approving the settlement on behalf of minor, R.A. Plaintiff requests specific performance of the \$18 million settlement that was so hard fought.

WHEREFORE, Plaintiff respectfully requests that this Court GRANT its motion to enforce the settlement, enter judgment ordering specific performance of the \$18 million, approve the settlement on behalf of minor, R.A., and for any other relief this Court finds just and necessary under the circumstances.

Respectfully submitted,

GUNN | SLATER

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of May 2025, the foregoing document was filed electronically with the St. Louis County Clerk of the Court using the Missouri Electronic Document Management System, which will send notice of electronic filing to the attorneys of record.

/s/ Erica B. Slater