ATTORNEYS FOR APPELLANT

Kathleen A. DeLaney
Christopher S. Stake
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Bryan H. Babb
Andrew M. McNeil
Bradley M. Dick
Indianapolis, Indiana

ATTORNEYS FOR AMICUS CURIAE
INDIANA HOSPITAL ASSOCIATION

Angela M. Smith
Andrew B. Howk
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Rebecca J. Denman, M.D.,
Appellant/Cross-Appellee-Plaintiff,

v.

St. Vincent Medical Group, Inc., St. Vincent Carmel Hospital, Inc.,
Appellees/Cross-Appellants-Defendants

August 18, 2021

Court of Appeals Case No. 20A-PL-1236

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause No. 49D01-1807-PL-26160

Altice, Judge.

Case Summary

[1] In December 2019, a nurse employed by St. Vincent Carmel Hospital (the Hospital) reported that, the prior evening, she had smelled alcohol on the breath of Rebecca J. Denman, M.D. (Dr. Denman) while Dr. Denman was on call and had stopped at the Hospital to check on a patient. About ten days later, Dr. Denman's employer, St. Vincent Medical Group (SVMG), placed Dr. Denman on leave and required her to submit to an alcohol assessment, which ultimately led to an evaluation and six weeks of treatment.

[2] Dr. Denman sued the Hospital, the nurse, and SVMG (collectively Defendants), for, among other things, defamation, fraud, constructive fraud, negligent misrepresentation, tortious interference with an employment relationship, and civil conspiracy. Following the trial court's denial of Defendants' motions for summary judgment and directed verdict, the jury found in Dr. Denman's favor on all her claims except civil conspiracy, awarding her $4.75 million. The trial court granted Dr. Denman's motion for an award of prejudgment interest, but tolled accrual of post-judgment interest for several months pursuant to a COVID-related Indiana Supreme Court emergency order. Defendants then filed a motion to correct error or for remittitur which the trial court granted in part, finding that the fraud/constructive fraud and negligent misrepresentation damages were duplicative.

[3] In this consolidated appeal, Defendants raise three issues that we combine and restate as:

I. Should the trial court have granted a directed verdict on (1) Dr. Denman's defamation claim, (2) her three reliance-based claims of fraud, constructive fraud, and negligent misrepresentation, and (3) her claim of tortious interference with employment relationship?

Dr. Denman raises the following restated issues:

II. Did the trial court err when it reduced the verdict and judgment against SVMG for fraud, constructive fraud, and negligent misrepresentation from $2.25 million to $1 million?

III. Was Dr. Denman entitled to post-judgment interest on the trial court's award of prejudgment interest, and, if so, was the trial court required to amend the original judgment to add the award of prejudgment interest to it?

IV. Did the trial court err when it temporarily suspended the accrual of post-judgment interest pursuant to the emergency order?

[4] We affirm in part, reverse in part, and remand.

Facts & Procedural History[1]

[5] Dr. Denman began her medical career as an OB/GYN with Women's Health Alliance (WHA) in 1996 and has remained with that practice since. In 2015, SVMG purchased WHA from the Hospital, such that SVMG became, and

[1] We held oral argument on June 2, 2021, in the Indiana Court of Appeals Courtroom. We commend counsel on their excellent oral and written advocacy.

continues to be, Dr. Denman's employer. She holds medical staff privileges at the Hospital.

[6] In December 2017, Dr. Denman was on call at the Hospital from 7:00 a.m. on December 11 to 7:00 a.m. on December 12. Around 6:00 p.m. on December 11, before heading to dinner with her significant other, George McKown, Dr. Denman called the Hospital to check on a patient who was in labor (the patient) and spoke to a new nurse named Andrea. Dr. Denman inquired how the patient was progressing, and Andrea advised Dr. Denman that she had time to go to dinner. While at dinner, Dr. Denman received what she considered a "snarky" text from one of her partners, Dr. Rasbach, about having to evaluate the patient for Dr. Denman. *Transcript Vol. III* at 35. Dr. Denman immediately called Dr. Rasbach, who said that Andrea had asked her to evaluate the patient per Dr. Denman's request. Dr. Denman advised Dr. Rasbach that she had made no such request, and Dr. Denman was angry at Andrea about the situation.

[7] Dr. Denman left dinner, dropped off McKown at home, and went to the Hospital. Upon arrival, she went directly to the labor and delivery nurses' station, where there were several nurses present, including Hannah Thornton, who had worked for the Hospital for about ten years and was the charge nurse for that night, and Barb Meyerrose, who had more years of experience than Thornton. It is undisputed that Dr. Denman vented for a couple of minutes about being "pissed" at Andrea. *Id.* at 184. Dr. Denman recalled that those present at the nurses' station were seated, including Thornton and Meyerrose,

and that the closest she got to any of them was "four to six" feet away. *Id*. at 62. Dr. Denman "could see anger in [Thornton's] face" as Dr. Denman was venting about the situation with Andrea. *Id*. at 39, *see also id*. at 64 (testifying that Thornton "was obviously angry" and "I could tell it in her face").

[8] After venting, Dr. Denman calmed down, apologized, and went into the patient's room to assess her cervical dilation. Although another nurse was assisting with the procedure, Thornton followed Dr. Denman into the room and observed. Dr. Denman determined that the patient could continue to labor and then left the Hospital. Thornton saw nothing unusual or concerning during the time that Dr. Denman was working with the patient.

[9] After Dr. Denman exited the labor and delivery unit, Thornton told Meyerrose that she had smelled "an overwhelming smell of alcohol" on Dr. Denman's breath during the encounter at the nurses' station, and Thornton asked Meyerrose whether she had smelled it too; Meyerrose stated that she had not. *Id*. at 175. According to Thornton, Meyerrose told her that since Dr. Denman was gone "there's not much that we can do." *Id.* at 176. Meyerrose, however, stated that she told Thornton to report it as soon as possible to the Hospital's Director of Nursing, Michelle Slayman.

[10] The next morning, at the end of her shift, Thornton told the incoming charge nurse, Michelle Gerke, about the events of the night and status of patients, as is normal procedure, and she also told Gerke what had occurred at the nurses'

station including having smelled alcohol on Dr. Denman's breath. Gerke agreed with Thornton's plan to email Slayman.

[11] At 7:56 a.m. on December 12, at the end of her shift, Thornton emailed Slayman as follows:

> Michelle,
>
> I just wanted to make you aware of some unprofessional behavior displayed by Dr. Denman last night. Feel free to call me today if you want to know more details. 317-xxx-xxxx
>
> Several nurses witnessed Dr. Denman asking Andrea (New hire) to have dr. [sic] Rasbach go assess her pt.
>
> Dr. Rasbach was not on call, and called Dr. Denman to say that she was not able to see her pt.
>
> At this point Denman insisted that she never asked Andrea to talk to Rasbach and became upset.
>
> When she arrival [sic] at the hospital she threw her purse down and loudly yelled in the nurses station about how "pissed" she was at Andrea and she wished that Andrea was still here so that she could let her know how angry she was. At this point she was in my face and I could smell alcohol on her breath.
>
> She quickly apologized, calmed down, and went home for the night.
>
> Barb was present with me; but did not smell the alcohol; so I did not feel like I could approach Denman about it without a witness

> -- plus she went home and was not conducting any procedures at this time.
>
> This has been bothering me all night; I'm not sure what I should do or say about this behavior.
>
> We had a float from Fishers last night; Amanda- who was upset but [sic] Denman's behavior as well.
>
> Thanks
>
> Hannah

Defendants' Appendix Vol. V at 15-16; *Plaintiff's Exhibit* 2.

[12] Meanwhile, Dr. Denman fielded phone calls throughout the night of December 11 and into the morning of December 12, including at least one from Thornton. Dr. Denman returned briefly to the hospital at 5:00 a.m. on December 12, but, after her shift ended at 7:00 a.m., Dr. Denman was off until December 13.

[13] Upon receiving Thornton's email on December 12, Slayman promptly called Thornton and, later that morning, met with Steven Priddy, M.D., the Hospital's Chief Medical Officer, to discuss Thornton's email. On December 13, Dr. Priddy contacted Amy Moon-Holland, M.D., who at the time was managing partner at WHA. Dr. Moon-Holland met with Dr. Priddy on December 13, and, in response to his questions, she shared with him that she and another WHA doctor, Julie Hirsch, M.D., had approached Dr. Denman in 2015 with concerns that she was drinking too much in her personal life, such that her

work performance was suffering by such things as arriving late and failing to show up for WHA meetings. At the time, they suggested to Dr. Denman that she seek an evaluation through ISMA's physician assistance program, but Dr. Denman declined to get an evaluation but modified her drinking habits and resumed seeing a therapist.

[14] Dr. Priddy asked Dr. Moon-Holland to document her concerns, and in response, Dr. Moon-Holland reviewed her emails and records and compiled a file that outlined about ten instances in 2015-2017 involving Dr. Denman that either Dr. Moon-Holland observed or were reported to her by staff. These included Dr. Denman speaking to staff in an inappropriate manner and tone in front of patients, forgetting a scheduled surgery, and providing incomplete or inaccurate dictation notes to staff.

[15] At Dr. Priddy's request, Dr. Denman met with Dr. Priddy at his office at the end of her workday on December 13; also present was Dr. Brenda Cacucci, president of the medical staff. Dr. Priddy advised Dr. Denman that a nurse had reported smelling alcohol on her breath on December 11, which was the first time Dr. Denman learned of the allegation. Dr. Denman denied having had anything to drink and also asked him if Hospital policies had been followed, and he told her they had not. Dr. Denman left the ten-minute meeting with the expectation that nothing more would happen.

[16] On December 13, Dr. Priddy contacted Dr. Aaron Shoemaker, SVMG Chief Medical Officer, and relayed that the Hospital had received an email from

Thornton reporting that she smelled alcohol on Dr. Denman's breath on December 11. Dr. Shoemaker was one of four doctors on SVMG's Peer Review Executive Committee (PREC), which conducts peer reviews on behalf of SVMG. SVMG's Peer Review Policy provides in part: "Alleged Peer Review issues arising at any SVMG Practice Site shall be directed in writing to the PREC for review"; "The PREC shall be initially responsible to screen and determine, in their discretion, whether the alleged Peer Review Issues should be addressed as peer review or employment/contractual matters"; "Any PREC decision which limits the Physician's ability to work at SVMG Practice Site for more than fourteen (14) days shall entitle the Physician to fair hearing rights under the SVMG fair hearing plan[.]" *Defendants' Appendix Vol. V* at 17.

[17] Between December 13-20, Dr. Shoemaker conducted what he characterized as a peer review screening process, which included (1) Thornton's email to Slayman and (2) a meeting with Dr. Moon-Holland and the file she had compiled. Dr. Shoemaker did not consult the PREC, did not contact or meet with Dr. Denman, and did not meet with or speak to Thornton or anyone else who was present at the Hospital during the time of the encounter at the nurses' station on December 11. Dr. Shoemaker reached the conclusion that SVMG had received a credible, reasonable complaint of a possible impaired physician and that SVMG either had to report the complaint to Indiana's Medical Licensing Board or have the physician assessed by ISMA. He viewed the matter as a human resources issue rather than one requiring peer review.

[18] On December 20, Debbie Alley, WHA Manager of Practice Operations, approached Dr. Denman at work and asked her to attend a meeting the following morning with Tricia Holda, SVMG Director of Regional Operations. On December 21, 2017, Dr. Denman attended the meeting and, in addition to Holda, also present were Shoemaker and Kellie Harris (SVMG Human Resources). Dr. Shoemaker informed Dr. Denman that she needed to take a voluntary leave of absence, that he was putting her on paid administrative leave, and that she could not return to work until she went to ISMA's Physician Assistance Program for assessment. Dr. Denman was presented with, but did not sign at that time, a Physician Assessment Agreement. Dr. Denman left the meeting with the understanding that there would be consequences, such as suspension or termination, if she did not comply.

[19] On December 22, Dr. Shoemaker initiated a conference call with the PREC, which included Dr. Edward Fry. During the call, the other PREC members learned that Dr. Denman had been placed on administrative leave the prior day. The call lasted about fifteen minutes, and it was the only time the PREC discussed the matter involving Dr. Denman.

[20] Meanwhile, on December 21, Dr. Denman called ISMA to schedule an assessment. On December 22, Dr. Denman met with ISMA representative, Anne Kelley, for an assessment interview, after which Kelley informed Dr. Denman she needed to undergo a third-party evaluation for alcohol use disorder at one of four independent diagnostic facilities. On December 23, 2017, Dr. Denman selected Positive Sobriety Institute (PSI) in Chicago for the

evaluation. The PSI evaluation occurred on January 2, 3, and 17, 2018. About a week later, PSI called Dr. Denman and told her of its diagnosis of alcohol use disorder-severe and that it was recommending treatment. The recommendation was sent to ISMA, who told Denman that if she did not complete the treatment, then it would notify the state licensing board. Dr. Denman participated in six weeks of inpatient treatment with PSI, beginning on February 1, 2018. Dr. Denman disagreed with PSI's evaluation and diagnosis in many ways. She was placed on paid leave until a treatment recommendation was made and then was on short-term disability.

[21] Dr. Denman returned to work at WHA on or around March 23, 2018, to the same position[2] and same compensation plan, but as a condition of her return, SVMG required her to agree to ISMA's five-year alcohol monitoring agreement, which required breathalyzer tests several times a day, random urine screens, group and individual therapy, and AA meetings. In addition, Dr. Denman cannot drink any alcohol during the term of the monitoring agreement.

[22] On July 5, 2018, Dr. Denman filed a complaint asserting the following: defamation against Thornton and the Hospital; tortious interference with contract against the Hospital; tortious interference with employment relationship against the Hospital; fraud, constructive fraud, and negligent

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[2] Dr. Denman stopped doing OB work – continuing only with GYN work – in January 2018, which was already planned before the December 11, 2017 occurrence.

misrepresentation against SVMG; and civil conspiracy against Defendants. Dr. Denman alleged that she was entitled to damages for harm to her professional reputation, as well as emotional distress, mental anguish, and financial harm. On August 24, 2018, Defendants filed a motion to dismiss all claims. On October 22, 2018, the court issued an order granting the motion in part, by dismissing Dr. Denman's tortious interference with contract claim, and denying it in all other respects.

[23] On June 10, 2019, Defendants filed a motion for summary judgment on all pending claims. Both sides submitted briefs and considerable designated evidence, such as deposition testimony, affidavits, declarations, policies, correspondence, and other documentation, including the Physician's Assessment Agreement and ISMA's Monitoring Agreement. On August 23, 2019, the court held a hearing on the motion for summary judgment, and, on October 24, 2019, the court denied Defendants' motion by a twenty-four-page order. The case proceeded to jury trial on January 13-16, 2020.

[24] At trial, Thornton testified that she was standing at the nurses' station when Dr. Denman walked up and threw down her purse and that Dr. Denman stood less than two feet from Thornton's face while "yelling" about Andrea. *Transcript Vol. III* at 215. When Thornton was asked why she waited until the morning of December 12 to send the email to Slayman, Thornton testified that she "didn't know what to do[,]" especially given that Meyerrose had not smelled anything, but she continued to think about it during her shift, and after discussing with Gerke, she emailed Slayman. *Id.* at 224. She stated that it was not her intent to

wait twelve hours so that Dr. Denman could not have her blood tested and that she had no malicious feelings toward Dr. Denman on December 11 or 12.

[25] Thornton acknowledged that Hospital policies were available on the Hospital's intranet on December 11, but that she did not consult the policies before sending the email to Slayman. She admitted that she was not aware at the time of the specific policies concerning reporting of a suspected impaired physician, which required that, whenever there is a reasonable suspicion that a physician is under the influence of alcohol or drugs at work, the employer must immediately perform an assessment of the physician with the assistance of Human Resources, relieve the physician of duty, and request that the physician submit to immediate testing of urine or blood screening at an external facility. Thornton testified that she did not believe Denman was drunk that night and that she observed no signs of impairment.

[26] Dr. Denman testified that Dr. Shoemaker gave her the impression at the December 21 meeting that the matter had been evaluated by the PREC. Dr. Denman explained that she could not recall a specific statement in that regard because she was "very much taken aback by the whole situation" and "in shock" when he told her she could not return to work until she submitted to an ISMA assessment. *Id.* at 70. She stated that the representation about peer review having been done impacted her decision to agree to an ISMA assessment. When Dr. Shoemaker was asked whether he had told Dr. Denman at the meeting that a peer review had already been done, he said that he could not recall.

[27] Evidence was presented that Dr. Denman had at no time in her career been subject to disciplinary actions of any sort. Several partners from WHA testified that they had worked with Dr. Denman for many years and had never observed her consume alcohol while at work or on call, never observed her to be under the influence while at work or on call, and never observed her to endanger the care or safety of her patients. McKown testified that on December 11, he and Dr. Denman ate at restaurants that do not serve alcohol, that he did not observe Dr. Denman drink that day or any time while on call, and he did not smell alcohol on her breath. There was no evidence that Dr. Denman consumed alcohol on either December 11 or 12 and no indication that her work during that time was affected by consumption of alcohol.

[28] At the conclusion of Dr. Denman's evidence, Defendants orally moved for a directed verdict or judgment on the evidence pursuant to Ind. Trial Rule 50. The trial court denied the motion, and Defendants presented their evidence, after which the jury returned a verdict in favor of Dr. Denman on all counts except civil conspiracy and awarded damages of $4.75 million. In accord with the verdict, the court entered a judgment as follows: defamation against the Hospital in the amount of $1,000,000 for presumed damages and $1,000,000 for compensatory damages; tortious interference with employment relationship against the Hospital in the amount of $500,000; fraud against SVMG in the amount of $1,000,000; constructive fraud against SVMG in the amount of $1,000,000; and negligent misrepresentation against SVMG in the amount of $250,000.

[29] On January 28, 2020, Dr. Denman filed a Motion to Assess Prejudgment Interest and a Motion for Entry of Amended Judgment in which she asked the court to amend the judgment to include in it any award of prejudgment interest that the court might make.

[30] On February 18, 2020, SVMG and the Hospital filed a Motion to Correct Error, for New Trial, or for Remittitur. They argued, among other things, that the jury awarded "multiple recoveries for the same harm," that the damage awards were "excessive," and that the evidence was "legally insufficient" to support a jury finding of liability on any of the claims. *Denman's Appendix Vol. II* at 147. In opposition, Dr. Denman argued that SVMG and the Hospital waived most of their arguments by raising them for the first time after the verdict and entry of judgment and/or failing to adequately preserve them. The trial court initially scheduled a hearing on the pending motion for March 18, 2020, but continued it due to the coronavirus pandemic.

[31] Beginning on March 13, 2020, and pursuant to Administrative Rule 17, the Indiana Supreme Court entered a series of orders related to the COVID-19 public health emergency that granted emergency relief to courts throughout the state. The relevant Marion County Emergency Order stated, in part, that "no interest shall be due or charged during this tolled period." The Emergency Order took effect on March 16, 2020. On March 30, 2020, the trial court issued an order which: (1) tolled post-judgment interest accruing on the final judgment "during the pendency of the judicial emergency as declared by the Indiana

Supreme Court" and (2) set a hearing for May 11, 2020, on the pending motions. *Id.* at 30.

[32] Following the hearing, which was held via videoconference, the trial court issued on June 29, 2020, a detailed, forty-four-page Consolidated Order Granting in Part and Denying in Part Plaintiff's Motion to Assess Prejudgment Interest and Order Granting in Part and Denying in Part Defendants' Motion to Correct Error, for a New Trial, or For Remittitur. The trial court denied SVMG and the Hospital's renewed request for a directed verdict on all claims but found that the jury's awards for constructive fraud and negligent misrepresentation (totaling $1.25 million) were duplicative of the $1 million fraud award and reduced the awards on these two claims to zero dollars. The court entered judgment on the modified amounts. The trial court also granted Dr. Denman's request for prejudgment interest at 8%.[3] However, the trial court denied Dr. Denman's request to add the prejudgment interest award to the overall verdict amounts, which would have allowed for accrual of post-judgment interest on the prejudgment interest award. Finally, the trial court ended the tolling period for accrual of post-judgment interest on June 19, 2020.

[3] The court awarded Dr. Denman: (1) $135,890.40 in prejudgment interest on her defamation claim against the Hospital; (2) $33,863.00 in prejudgment interest on her tortious interference claim against the Hospital; and (3) $65,972.64 in prejudgment interest on her fraud claim against SVMG.

[33] The parties separately appealed.[4] This court consolidated the two appeals, designating Dr. Denman as Appellant/Cross-Appellee. Additional facts will be provided as necessary.

Discussion and Decision

I. Directed Verdict

[34] Because they are potentially dispositive of this consolidated appeal, we first address Defendants' claims that the trial court should have granted a directed verdict on Dr. Denman's claims of (1) defamation, (2) fraud, constructive fraud, and negligent misrepresentation, and (3) tortious interference with employment relationship.[5]

[35] The standard of review on a challenge to a directed verdict, also known as judgment on the evidence, is the same as the standard governing the trial court

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[4] Indiana Hospital Association (the Association) filed an amicus curiae brief asserting that Thornton's statement was not defamatory and was protected by a qualified privilege. The Association also urges that this case threatens to chill necessary reporting of suspected misconduct by hospital employees, which would ultimately threaten public safety.

[5] Defendants alternatively argue that the trial court should have granted summary judgment on the defamation claim and the fraud/constructive fraud/negligent misrepresentation claims. As we have recognized, "the procedural standards for summary judgment and judgment on the evidence are fundamentally different." *Think Tank Software Dev. Corp. v. Chester, Inc.*, 30 N.E.3d 738, 745 (Ind. Ct. App. 2015), *trans. denied*. Our Supreme Court in *Purcell v. Old Nat. Bank*, 972 N.E.2d 835, 841 (Ind. 2012), distinguished summary judgment from directed verdict: "Unlike a motion for summary judgment under Rule 56, the sufficiency test of Rule 50(A) is not merely whether a conflict of evidence may exist, but rather whether there exists probative evidence, substantial enough to create a reasonable inference that the non-movant has met his burden." *Id.* Accordingly, "the same evidence that allowed [a plaintiff] to defeat a summary judgment motion could be insufficient to overcome a motion for a directed verdict." *Think Tank*, 30 N.E.3d at 746. In this appeal, we elect to address only the appropriateness of the trial court's decision to deny a directed verdict, which placed a higher burden on Dr. Denman to defeat than at the summary judgment stage. That is, because we ultimately determine that denial of directed verdict was proper, we find it unnecessary to separately address whether Defendants were entitled to summary judgment.

in making its decision. *Think Tank Software Dev. Corp. v. Chester, Inc.*, 30 N.E.3d 738, 744 (Ind. Ct. App. 2015), *trans. denied*. Judgment on the evidence is proper where all or some of the issues are not supported by sufficient evidence. *Id*. We will examine only the evidence and the reasonable inferences that may be drawn therefrom that are most favorable to the non-movant, and the motion should be granted only where there is no substantial evidence to support an essential issue in the case. *Id*. If there is evidence that would allow reasonable people to differ as to the result, judgment on the evidence is improper. *Id.*; *see also* Ind. Trial Rule 50(A).

[36] Determining whether a motion for judgment on the evidence is proper "requires both a quantitative and a qualitative analysis[.]" *Purcell v. Old Nat. Bank*, 972 N.E.2d 835, 841 (Ind. 2012).

> Evidence fails quantitatively only if it is wholly absent; that is, only if there is no evidence to support the conclusion. If some evidence exists, a court must then proceed to the qualitative analysis to determine whether the evidence is substantial enough to support a reasonable inference in favor of the non-moving party.
>
> Qualitatively, [evidence] fails when it cannot be said, with reason, that the intended inference may logically be drawn therefrom; and this may occur either because of an absence of credibility of a witness or because the intended inference may not be drawn therefrom without undue speculation. The use of such words as "substantial" and "probative" are useful in determining whether evidence is sufficient under the qualitative analysis. Ultimately, the sufficiency analysis comes down to one word: "reasonable."

Id. (citations and some quotation marks omitted). The *Purcell* Court explained, "The crux of the qualitative failure analysis under Rule 50(A) is whether the inference the burdened party's allegations are true may be drawn without undue speculation." *Id*. at 841-42 (internal quotations and citations removed).

Defamation

[37] Dr. Denman argues that Thornton's email report was both false and belated – made the next day when it was too late for Dr. Denman to be tested – and caused a chain of events that resulted in a dramatic and detrimental effect on her life: To continue working for SVMG, she had to agree to ISMA's 5-year alcohol monitoring contract that requires her to, among other things, carry and use a breathalyzer several times a day and be randomly summoned for urine screens; her reputation was damaged; and she cannot transition to work and eventual retirement[6] in South Carolina as she had planned to do because she does not want to report as an impaired physician on the license application.

[38] A defamatory communication is one that tends to harm the reputation of another as to lower her in estimation of the community or to deter a third person from associating or dealing with her. *Meyer v. Beta Tau House Corp.*, 31 N.E.3d 501, 514 (Ind. Ct. App. 2015). To prevail on a claim of defamation, a plaintiff must prove four elements: (1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages. *Id*. For a statement to

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[6] Dr. Denman was sixty-three years old at the time of trial in January 2018.

be actionable, it must be clear that it contains objectively verifiable fact regarding the plaintiff. *Id.* at 515. If the speaker is merely expressing her subjective view, interpretation, or theory, then the statement is not actionable. *Id*. If a statement is susceptible to both defamatory and non-defamatory meanings, the matter of interpretation should be left to the trier of fact. *Id*.

[39] In Indiana, a qualified privilege is a defense to defamation. The privilege applies to "communications made in good faith on any subject matter in which the party making the communication has an interest in or reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty." *Kelley v. Tanoos*, 865 N.E.2d 593, 597 (Ind. 2007) (citations omitted). The privilege implicated in this case relates to the "common interest" privilege that is "intended to facilitate 'full and unrestricted communication on matters in which the parties have a common interest or duty."' *Ali v. All. Home Health Care, LLC*, 53 N.E.3d 420, 430 (Ind. Ct. App. 2016). The common interest privilege includes "intracompany communications regarding the fitness of an employee." *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 262 (Ind. 1994).

[40] The burden is on the defendant first to establish the existence of a privileged occasion for the publication, by proof of a recognized public or private interest which would justify the utterance of the words. *State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121, 138-39 (Ind. Ct. App. 2013), *trans. denied*. Then, the plaintiff has the burden of overcoming that privilege by showing that it has been abused. *Id*. at 139. A statement may lose its privileged character upon a

showing of abuse wherein (1) the communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the defamatory statements; or (3) the statement was made without belief or grounds for belief in its truth. *Id.* Unless only one conclusion can be drawn from the evidence, the question of whether the privilege has been abused is for the jury. *Id*.

[41] At trial, Defendants sought a directed verdict arguing that Thornton's statement that she smelled alcohol on Dr. Denman's breath fell within the qualified privilege because there was no evidence that Thornton knew that her report was false or did not believe the statement was true, and she had a duty to report it to her manager. The trial court found, as it did when denying summary judgment, that Thornton's statement was subject to the qualified privilege but that whether the privilege was abused was a question of fact. More specifically, the court denied the motion for directed verdict as follows:

> [O]n the defamation, whether or not Nurse [Thornton] knew the statement was true or false is definitely a question of fact. They're going to have to judge her credibility. Some of those important factors are: she didn't report it in a timely manner, she was unaware of the policies, other nurses did not smell it and no one else there reported it. [Dr. Denman] did medical procedures on pregnant women and so, all of those things the jury has to weigh when they are trying to determine the issue. . . . So, I think when you look at . . . excessive publication or the statement made without belief or grounds for its truthfulness, it goes back to . . . what does the jury believe, right? These are facts that each of you are going to argue in a different way and . . . whether or not

> the qualified privilege exists . . . [i]n this particular situation, it's a question of fact.

Transcript Vol. V at 73-74.

[42] Again, a motion for directed verdict should be granted only where there is no substantial evidence to support an essential issue in the case, and on review we examine only the evidence and the reasonable inferences that are most favorable to the non-movant, here Dr. Denman. Under that lens, we find that Dr. Denman presented enough evidence to withstand a directed verdict as to whether the qualified privilege was abused. Regarding whether Thornton was primarily motivated by ill will, Dr. Denman observed that, as she was venting at the nurses' station, Thornton had "anger in her face." *Transcript Vol. III* at 37, 39, 171-72. As to excessive publication, there was evidence presented that the matter was "all over" labor and delivery by the next day, and although Thornton testified that she only told Meyerrose, Gerke, and Slayman, the jury was free to assess her credibility. *Id*. at 63. With regard to whether the statement was made without belief in its truth, the jury was free to weigh Thornton's stated reasons for waiting to make her report until morning, when it was too late for Dr. Denman to be tested. According to Meyerrose, she told Thornton to report it as soon as possible, although Thornton did not recall Meyerrose making that statement. Slayman testified that "if Nurse Thornton actually smelled alcohol on Dr. Denman's breath, Nurse Thornton should not have allowed Dr. Denman to perform a procedure on a pregnant patient[,]"

referring to when Thornton observed as Dr. Denman performed a cervical check on the patient. *Transcript Vol. IV* at 76.

[43] Considering only the facts and inferences that are most favorable to Dr. Denman, we find that there was evidence that would allow reasonable people to differ on whether the privilege had been abused. Therefore, we find no error with the trial court's denial of a directed verdict on the defamation claim.

Fraud, Constructive Fraud, Negligent Misrepresentation

[44] Although the elements of Dr. Denman's three reliance-based allegations – fraud, constructive fraud, and negligent misrepresentation – are different, each one required her to show that her damages arise from reliance on a misrepresentation of fact. *See Westfield Ins. Co. v. Yaste, Zent & Rye Agency*, 806 N.E.2d 25, 30-31 (Ind. Ct. App. 2004), *trans. denied* (fraud and constructive fraud); *Passmore v. Multi-Management Servs., Inc.*, 810 N.E.2d 1022, 1026 n.2 (Ind. 2004) (negligent misrepresentation). The basis of Dr. Denman's claims is that, at her meeting with Dr. Shoemaker and Harris on December 21, 2017, Dr. Shoemaker misrepresented to her that a peer review had been performed, when in fact, there had been no review by the PREC and that, if she had known that the PREC had not reviewed the matter, she never would have agreed to go to the ISMA for assessment.

[45] SVMG argues that they were entitled to a directed verdict on the three claims, arguing that (1) Dr. Denman's evidence did not identify a specific false statement made by Dr. Shoemaker about peer review and (2) Dr. Denman did

not prove reliance on any "impression" or statement because she did not have any choice about whether to go for assessment. That is, SVMG required it for her to keep her job, and, thus, whether SVMG conducted a peer review did not have any impact on whether she went to ISMA for assessment.

[46] Under our standard of review for denial of directed verdict, we find that Dr. Denman presented sufficient evidence to withstand the motion. Dr. Denman was consistent and firm in her testimony that she was given the impression at the December 21 meeting that a peer review had been conducted and that she relied on Dr. Shoemaker's misrepresentation when she agreed to go to ISMA for assessment, which led to the PSI evaluation (with which she disagrees) and treatment. Although she could not remember "the exact words" used, she explained that contributing to her lack of memory was the fact that she "was in shock" and "very, very much taken aback by the whole situation." *Transcript Vol. III*. at 70. She presented evidence of notes taken by Harris (the HR person) during the meeting that mentioned peer review,[7] thus suggesting peer review had been discussed at the meeting, and the Physician Assessment Agreement, which was handed to her at the meeting and that she was asked but refused to sign, which refers to a peer review process.

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[7] Harris's notes from the meeting stated, in part: Dr. Shoemaker told Dr. Denman that SVMG "wanted this to be a voluntary and collaborative effort" and "reiterated that once the ISMA evaluation is complete and the evaluation results are submitted to the peer review committee, that [Dr. Denman] would have a chance to provide rebuttal to areas of concern[,]" and that Dr. Denman "appreciated the confidentiality of the peer review process." *Defendants' Appendix Vol. V* at 26.

[47] When Dr. Shoemaker was asked whether he recalled telling Dr. Denman that peer review had already been done, he did not directly deny it, stating "I don't recall that." *Transcript Vol. IV* at 112. Dr. Fry, a member of the PREC, testified that at the time of the PREC phone call on December 22, he did not know that Dr. Denman had not been tested on the date of the encounter at the nurses' station, did not know that Dr. Denman had been presented on December 21 with the Physician Assessment Agreement, and had not been consulted about placing Dr. Denman on administrative leave. Considering only the facts and inferences that are most favorable to Dr. Denman, we find that there was evidence presented from which reasonable people could differ about whether it had been represented to Dr. Denman that a peer review had been done.

[48] We are not persuaded by SVMG's argument that, because Dr. Denman knew that her employment was contingent on her completion of an ISMA assessment, she could not have relied on any alleged misrepresentation about peer review. Even though Dr. Denman testified that she understood her job was in jeopardy, she also testified that she agreed to the assessment because Dr. Shoemaker gave her the impression that a peer review had been done. It was for the jury to hear and decide the issue.

[49] We also do not find merit in SVMG's argument that any reasonable doctor in her position would not "sit idly by on December 21st (and months afterwards)" and never ask Dr. Shoemaker or HR about whether peer review had been done. *Defendants' Brief* at 24. The question is not whether she asked about it; the

question is whether SVMG misrepresented to her that a peer review had been done.

[50] We find no error with the trial court's denial of a directed verdict on the fraud/constructive fraud/negligent misrepresentation claims.

Tortious Interference with Employment Relationship

[51] Dr. Denman's claim of tortious interference with employment relationship was against the Hospital only and was based on Dr. Priddy (the Hospital's Chief Medical Officer) telling Dr. Denman's employer, Dr. Shoemaker (SVMG's Chief Medical Officer), about nurse Thornton's report. A claim of tortious interference with employment relationship requires the plaintiff to show: (1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful interference with that relationship." *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235-36 (Ind. 1994).

[52] The Hospital primarily challenges the "absence of justification" element. In part, the Hospital relies on this court's decision in *Winkler v. V.G. Reed & Sons, Inc.*, 619 N.E.2d 597, 598 (Ind. Ct. App. 1993), *aff'd by* 638 N.E.2d 1228 (Ind. 1994), where, citing to federal cases, we stated, "To satisfy this element . . . the breach must be malicious and exclusively directed to the injury and damage of another." On transfer, the *Winkler* Court elaborated on our analysis and relied on seven factors from the Restatement (Second) of Torts: "(a) the nature of the

defendant's conduct; (b) the defendant's motive; (c) the interests of the plaintiff with which the defendant's conduct interferes; (d) the interests sought to be advanced by the defendant; (e) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff; (f) the proximity or remoteness of the defendant's conduct to the interference; and (g) the relations between the parties." *Winkler*, 638 N.E.2d at 1235-36. The Court stated that the "weight to be given to each consideration may differ from case to case depending on the factual circumstances, but the overriding question is whether the defendants' conduct has been fair and reasonable under the circumstances." *Id*.

[53] The Hospital highlights that Dr. Priddy shared Thornton's report only with Dr. Shoemaker and argues that the Hospital and SVMG were interrelated entities and both had responsibility for Dr. Denman, such that SVMG needed to be told about the reported situation. These circumstances, the Hospital argues, do not show malicious conduct that is exclusively directed to the injury and damage of Dr. Denman's relationship with SVMG. Rather, the Hospital argues, its actions were justified and motivated by legitimate concerns as a matter of law, and, therefore, the trial court should have granted its request for a directed verdict.

[54] As Dr. Denman observes, not all Indiana courts have found that proof of malicious conduct is required to show an absence of justification. *Compare Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000) (relying on *Winkler* court of appeals decision and finding that

defendant must act intentionally and the breach must be malicious and exclusively directed to injury and damage of another) *with Coca-Cola Co. v. Babyback's Int'l, Inc.*, 806 N.E.2d 37, 49-52 (Ind. Ct. App. 2004) (stating that our Supreme Court's analysis in *Winkler* did not even discuss a malicious standard and, rather, "clearly dictates" that "the overriding question in determining whether there is an absence of justification is whether the defendant's conduct was fair and reasonable under the circumstances") *vacated on other grounds*, 841 N.E.2d 557, 560 (Ind. 2006). Our Supreme Court in *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*, 136 N.E.3d 208, 215 (Ind. 2019), which concerned a claim of tortious interference with a contractual relationship, acknowledged the split in authority without directly resolving it, concluding that "no matter which of the two standards for what constitutes the absence of justification element for tortious interference with a contractual relationship is applied to the facts of this case, there remains an issue of material fact so as to preclude summary judgment." *Id*.

[55] We similarly conclude that, whether or not a malicious component is required, Dr. Denman presented sufficient evidence to survive Defendants' motion for directed verdict. When considering whether a party's actions are justified, the jury is invited to weigh the evidence against multiple factors, including the nature of the party's conduct, the relationship of the parties, and the party's motive. *Winkler*, 638 N.E.2d at 1235. We find, as did the trial court, that the jury was presented with evidence from which it could have found that Dr. Priddy provided Thornton's report to SVMG with a lack of justification. More

specifically, Dr. Denman presented evidence that, at the time he told Dr. Shoemaker about Thornton's report, Dr. Priddy knew that her report was not timely made, that Dr. Denman had not been tested per Hospital protocols, and that, consequently, Dr. Denman was not offered an opportunity to clear her name. From that evidence, the jury was free to determine whether the Hospital acted without justification. We conclude it was not error for the trial court to deny the Hospital's motion for a directed verdict on the tortious interference with employment claim.

[56] Having found that the trial court did not err by allowing Dr. Denman's claims to proceed at trial, we now turn to her appellate claims, which raise post-trial issues.

II. Remittitur

[57] The jury awarded Dr. Denman $1 million for fraud, $1 million for constructive fraud, and $250,000 for negligent misrepresentation.[8] Dr. Denman asserts that

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[8] As mentioned previously, each of those claims has separate elements. The elements of a fraud claim are: "(1) a material misrepresentation (2) of past or existing facts, (3) the falsity of the representation, (4) the representation was made with knowledge or reckless disregard of its falsity, and (5) detrimental reliance on the representations." *AutoXchange.com, Inc. v. Dreyer & Reinhold, Inc.*, 816 N.E.2d 40, 51 (Ind. Ct. App. 2004). The elements of a constructive fraud claim are: "(1) a duty owing by the party to be charged to the complaining party due to their relationship, (2) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists, (3) reliance thereon by the complaining party, (4) injury to the complaining party as a proximate result thereof, and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party." *Westfield Ins. Co.*, 806 N.E.2d at 30-31. The elements of negligent misrepresentation are: "(1) one who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, (2) supplies false information for the guidance of others in their business transactions, (3) is subject to liability for pecuniary loss caused to them (4) by their justifiable reliance upon the information, (5) if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Thomas v. Lewis Eng'g, Inc.,* 848 N.E.2d 758, 760 (Ind. Ct. App. 2006) (quoting Restatement (Second) of Torts § 552).

the trial court erred when it granted in part Defendants' Motion to Correct Error, for a New Trial, or for Remittitur (Motion to Correct Error) and reduced the jury's damages award against SVMG on the fraud/constructive fraud/negligent misrepresentation claims from a collective $2.25 million to $1 million. Generally, rulings on motions to correct error are reviewed for an abuse of discretion, but when the error depends on a question of law, as is the case here, we review that question de novo. *Becker v. State*, 992 N.E.2d 697, 700 (Ind. 2013).

[58] The Motion to Correct Error sought relief under Ind. Trial Rule 59(J), which provides in pertinent part that if the trial court "determines that prejudicial or harmful error has been committed, [it] shall take such action as will cure the error, including…[i]n the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages[.]" T.R. 59(J)(5). "This remedy is only available when the evidence is insufficient to support the verdict as a matter of law." *Carbone v. Schwarte*, 629 N.E.2d 1259, 1261 (Ind. Ct. App. 1994) (citation omitted); *see also Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 560 (Ind. Ct. App. 1999) (same), *trans. denied*, *cert. denied*. The Motion to Correct Error asserted, as is relevant here, that the three fraud-type awards were for the same injury and thus should be reduced.

[59] The trial court agreed and ordered that the verdict for fraud would remain at $1 million but reduced the verdicts for constructive fraud and negligent misrepresentation to zero. Specifically, the court found that the awards were duplicative because they were based on the same fraudulent conduct, namely,

Dr. Shoemaker indicating to Dr. Denman at the December 21 meeting that a peer review had been done.

[60] Dr. Denman does not challenge the premise that a double recovery occurs when a party recovers twice for the same wrong. *See INS Investigations Bureau v. Lee*, 784 N.E.2d 566, 577 (Ind. Ct. App. 2003), *trans. denied*. Rather, she maintains that, in this case, the award of $2.25 million against SVMG did not constitute double recovery.[9] On the facts of this case, we agree.

[61] In reaching our decision, we find it appropriate to discuss *INS Investigations*, where this court determined that jury awards on both a breach of contract claim and a negligence claim constituted double recovery and vacated one of the awards. Defendants urge that, similar to *INS Investigations*, the trial court here properly reduced two of the three fraud-based awards to zero. We, however, find that *INS Investigations* is distinguishable and, while it informs our decision, it does not control it.

[62] In that case, the plaintiffs sued a fire investigator for negligence and breach of contract stemming from a faulty investigation. At trial, the plaintiffs presented

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[9] As a threshold argument, Dr. Denman asserts, as she did below, that Defendants waived any double recovery argument by failing to challenge at trial the three jury instructions or otherwise assert that the claims were alternate theories of recovery under which Dr. Denman could only recover, at most, on one. Defendants urge in response that an error for double recovery "constitutes fundamental error, which cannot be waived." *Kellogg v. City of Gary*, 562 N.E.2d 685, 708 (Ind. 1990). Dr. Denman argues that cases subsequent to *Kellogg* have indicated that the *Kellogg* Court's statement – that double recovery is fundamental error and cannot be waived – is dicta, and, therefore, the trial court should have found Defendants' post-trial argument concerning double recovery was waived. Assuming without deciding that *Kellogg*'s statement was not dicta, and is binding precedent for the proposition that double recovery is fundamental error, it has no bearing on our decision today as we conclude that the jury's three awards were not double recovery.

expert testimony concerning the calculation and specific amount of the plaintiffs' economic losses. The jury rendered three verdicts in favor of the plaintiffs, including (1) an award of $2,203,601 in compensatory damages on the breach of contract claim and (2) an award of $2,546,404 (comprised of $2,203,601 plus prejudgment interest) on the negligence tort claim. The defendant filed a motion to correct error asserting, among other things, that the judgment constituted a double recovery, which motion the trial court denied.

[63] On appeal, this court reversed in part, affirming the jury's award on the negligence claim but vacating the award on the contract claim. The court found that the breach of contract claim, which was a claim that the investigators breached a duty to investigate in a skillful workmanlike manner, resembled a claim for negligence and that awarding compensatory damages for claims of both negligence and breach of contract on the same facts and the same damages constituted an improper double recovery. The court also observed that the jury's decision on damages directly reflected the expert's calculation of damages presented at trial, as the only difference between the negligence and contract awards "was the omission of the prejudgment interest on the contract claim." *Id*. at 578. Accordingly, to avoid double recovery, we vacated one of the two damage awards.

[64] Unlike in *INS Investigations*, the jury in the present case was not presented with evidence of precise, calculated amounts that Dr. Denman suffered in damages. And we find that, as a result, it is much less clear than it was in *INS Investigations* that the awards in question represented duplicate awards. An

examination of other parts of the record lends further support to our decision that these did not represent double recovery.

[65] For instance, during closing argument, Dr. Denman's counsel asked the jury to render the following in damages:

> We are going to ask you, ladies and gentlemen, when you complete your verdict forms to . . . *find in Dr. Denman's favor on each of the forms*. . . . [O]n the defamation claim, we're asking for a million dollars in presumed damages. And a million dollars in compensatory damages. And we are asking for compensatory damages on the tortious interference claim of five hundred thousand dollars ($500,000*). And then on the fraud, constructive fraud and negligent misrepresentation claim we're asking that you award her a total of two million dollars ($2,000,000)* ***across those claims****.* And then on the conspiracy claims we're seeking two hundred and fifty thousand dollars ($250,000) against each of the Defendants. So that – we're asking you to consider awarding Dr. Denman a total of five million dollars ($5,000,000) to right the wrong and to vindicate her reputation and help her get her life back.

Transcript Vol. VI at 92-93 (emphases added). Thereafter, separate verdict forms for fraud, constructive fraud, and negligent misrepresentation were presented to the jury, and at no point was the jury told or instructed that these were alternate theories of recovery. To the contrary, they were invited to award $2 million "across those claims." *Id*. at 93.

[66] On this record, it is reasonable to read the jury's three awards as a reflection of its desire to award Dr. Denman $2.25 million, which it then divided among the three claims. *See e.g.*, *Auto Liquidation Ctr., Inc. v. Chaca*, 47 N.E.3d 650, 656

(Ind. Ct. App. 2015) ("[T]he jury's damage award will not be deemed the result of improper considerations if the size of the award can be explained on any reasonable ground."). Stated differently, the record does not reflect that the jury intended for Dr. Denman to receive only $1 million, the amount it awarded to Dr. Denman on one of the three claims. We conclude that the jury clearly intended to award a total amount of $2.25 million on the three fraud-based claims and to reduce it would be contrary to jury intent.

III. Interest on Award of Prejudgment Interest

[67] On January 16, 2020, the trial court entered judgment in favor of Dr. Denman on the jury's $4.75 million verdict. By statute, post-judgment interest began to accrue on that money judgment on that date. Specifically, Ind. Code § 24-4.6-1-101 (Section 101) provides:

> Except as otherwise provided by statute, interest on judgments for money whenever rendered shall be from the date of the return of the verdict or finding of the court until satisfaction at: . . . (2) an annual rate of eight percent (8%) if there was no contract by the parties.

[68] On January 28, 2020, Dr. Denman filed a Motion to Assess Prejudgment Interest, asking for the court to enter an award of prejudgment interest at a rate of 10% for a total of $404,726.10. That same day, Dr. Denman also filed a Motion for Entry of Amended Judgment, asking the trial court to add the prejudgment interest award to the $4.75 million judgment, so that interest

would accrue from January 16, 2020, on a cumulative amount of $5,154,726.07 ($4,750,000 + $404,726.10).

[69] Indiana's Tort Prejudgment Interest Statute (the Statute), Ind. Code Chap. § 34-51-4, permits a trial court to award prejudgment interest to the party that prevails at trial, so long as that party has made a timely offer of settlement according to terms specified in the Statute. *See* I.C. §§ 34-51-4-5 and -6. The purpose of the Statute is to encourage settlement and to compensate the plaintiff for the lost time value of money. *Inman v. State Farm Mut. Auto. Ins. Co.*, 981 N.E.2d 1202, 1206 (Ind. 2012); *Johnson v. Eldridge*, 799 N.E.2d 29, 33 (Ind. Ct. App. 2003), *trans. denied*.

[70] An award of prejudgment interest is discretionary. *Inman*, 981 N.E.2d at 1204. Accordingly, we review a trial court's ruling on a motion for prejudgment interest for abuse of discretion. *Id*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Id*.

[71] Following a hearing in May 2020, the trial court, on June 19, 2020, issued a Consolidated Order addressing various pending post-trial motions. As is relevant here, the court (1) granted Dr. Denman's request for an award of prejudgment interest, but at a rate of 8% rather than her requested 10%, and awarded her $235,726.04 (8% on the reduced award of $3.5 million accruing through date of judgment), and (2) denied Dr. Denman's request to add that award to the original money judgment, finding that a trial court "can award

prejudgment interest as part of overall judgment" but was not required to do so. *Denman's Appendix Vol. II* at 72.

[72] At issue in this appeal is Subsection 7 of the Statute, which states: "The court may award prejudgment interest as part of a judgment." I.C. § 34-51-4-7. Dr. Denman contends that the trial court, in refusing to amend the judgment as requested, misinterpreted Subsection 7. She argues that the word "may" in Subsection 7 is intended to attach only to the clause "award prejudgment interest" and not to the latter phrase "as part of a judgment" such that, while a trial court has discretion as to whether to award prejudgment interest, once it does so, it must add the prejudgment interest award to the judgment, upon which post-judgment interest then accrues. We agree with Dr. Denman to the extent that she is entitled to accrue post-judgment interest on her award of prejudgment interest but disagree that the trial court was required to amend the judgment in the manner she suggests.

[73] Section 101 provides in relevant part that interest "on judgments for money" shall accrue from the date of "the . . . finding of the court[.]" Here, on June 18, 2020, the court granted an award for prejudgment interest and entered final judgment, in pertinent part, as follows:

> - Defamation against Defendant, [the Hospital], in the amount of $1,000,000 for presumed damages and $1,000,0000 for compensatory damages, *with an additional award of $135,890.40 of prejudgment interest*;

> - Tortious Interference with Employment Relationship against [the Hospital] in the amount of $500,000, *with an additional award of $33,863.00 of prejudgment interest*;
>
> - Fraud against [SVMG] in the amount of $1,000,000, *with an additional award of $65,972.64 of prejudgment interest*[.]

Denman's Appendix Vol. II at 73. We find that the June 18, 2020 award of prejudgment interest, upon which the trial court expressly entered judgment, constituted a "judgment for money" within the meaning of Section 101, such that post-judgment interest automatically began to accrue on that date.[10]

[74] While Dr. Denman urges that the trial court was required to amend the original January 16, 2020 judgment, such that interest on the prejudgment award would begin to accrue that date, we disagree. As an initial matter, Dr. Denman cites to no caselaw or authority requiring that an award of prejudgment interest must be included in the original money judgment on a jury's verdict. Furthermore, this court has recognized a prejudgment interest award is – or can be – "a separate and distinct order." *See Johnson*, 799 N.E.2d at 33 (noting, in context of a partial satisfaction issue, that "the prejudgment interest award was not included as part of the $750,000 judgment against [the defendant]" and "was contained in a separate and distinct order"). With these considerations in mind, we reject the invitation to engraft a requirement that, when a trial court

[10] Because in our decision today we are reinstating the full $4.75 million that the jury awarded to Dr. Denman, we instruct that, on remand, the trial court recalculate the prejudgment interest award on that amount.

grants an award of prejudgment interest, it must retroactively include that award in any previously-issued judgment in the case.

[75] We also are not persuaded by Defendants' argument that accrual of post-judgment interest on an award of prejudgment interest "is undeniably 'compounding' interest[,]" that is, interest on interest. *Defendants' Brief* at 80. Our courts have recognized that "prejudgment interest represents an element of complete compensation" and, as such, "is not simply an award of interest on a judgment, but rather is recoverable as 'additional damages to accomplish full compensation.'" *Johnson*, 799 N.E.2d at 32 (quoting *Harlan Sprague Dawley v. S.E. Lab Group*, 644 N.E.2d 615, 619 (Ind. Ct. App. 1994), *trans. denied*). Thus, in our view, interest that accrues on an award of a specific, fixed dollar amount is not interest on interest; it is interest on an award. Indeed, post-judgment interest incentivizes payment of a judgment, and that principle should apply equally to both money owed on a jury's verdict as well as money owed on a court-ordered award of prejudgment interest.

[76] We thus affirm the trial court's denial of Dr. Denman's request to amend the judgment, but we direct the court on remand to recalculate the prejudgment interest award based on the $4.75 million verdict, which award shall accrue post-judgment interest beginning June 19, 2020.

IV. Suspension of Post-Judgment Interest

[77] Dr. Denman also challenges the trial court's decision to temporarily toll the accrual of post-judgment interest. The trial court entered judgment in favor of

Dr. Denman on January 16, 2020. According to Indiana Code § 24-4.6-1-101, "interest on judgments for money whenever rendered shall be from the date of the return of the verdict or finding of the court until satisfaction at . . . an annual rate of eight percent (8%) if there was no contract by the parties."

[78] Shortly after judgment was entered, the unprecedented and developing nature of the COVID-19 pandemic prompted our Supreme Court to enter a series of emergency orders (collectively, Emergency Orders) pursuant to Indiana Administrative Rule 17. *See, e.g.*, *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, 20S-CB-123 (Mar. 16, 2020).[11] On March 13, 2020, the Supreme Court issued an order granting Marion County's petition for emergency relief. *In the Matter of the Petition of the Courts of Marion County for Administrative Rule 17 Emergency Relief*, 20S-CB-00113 (Mar. 13, 2020). Among other things, the March 13 order stated that "no interest shall be due or charged during the tolled period[,]" beginning on March 16, 2020. *Id.* The Supreme Court reiterated this same provision ten days later in a generally applicable order. *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123 (Mar. 23, 2020).

[11] This was the first general order. It urged trial courts to create emergency local plans in response to the pandemic. Our Supreme Court had already granted Marion County's petition for emergency relief by the time this order was filed.

[79] On March 30, 2020, the trial court applied the Emergency Orders to Dr. Denman's case, stating "any post-judgment interest accruing on the final judgment is tolled during the pendency of the judicial emergency as declared by the Indiana Supreme Court, which shall last at least through May 1, 2020." *Denman's Appendix Vol. II* p. 30. The trial court later extended its order on post-judgment interest through June 19, 2020, at which time the tolling period ended. *Id.* at 74.

[80] Dr. Denman contests as unconstitutional the trial court's order tolling the accrual of post-judgment interest. Her argument, as well as the trial court's ruling, assumes the Emergency Orders mandated that post-judgment interest be tolled.[12] But the Emergency Orders cannot reasonably be construed in such a manner.

[81] Article 3, Section 1 of the Indiana Constitution divides governmental powers into three departments: legislative, executive, and judicial. Ind. Const. Art. 3 § 1. Enacting laws is legislative power vested in the General Assembly. Ind. Const. Art. 4 § 1; *Ind. Wholesale Wine & Liquor Co. v. State ex rel. Ind. Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 107 (Ind. 1998). Deciding cases is judicial power vested in the courts. Ind. Const. Art. 7 § 1; *Ind. Wholesale Wine & Liquor*

[12] In response to an unrelated petition filed by various financial institutions seeking clarification of the Emergency Orders, our Supreme Court recognized that the emergency nature of the Orders could leave them vulnerable to misinterpretation, and therefore, specifically invited appellate review on such issues. *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123 (Mar. 19, 2021).

Co., 695 N.E.2d at 107. "[N]o person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." Ind. Const. Art. 3 § 1.

[82] Post-judgment interest is a creature of statute, borne of legislative authority. *Int'l Bus. Machs. Corp. v. State*, 124 N.E.3d 1187, 1190 (Ind. 2019); I.C. § 24-4.6-1-101. The statutory language is mandatory: interest "shall be" rendered from the date of judgment. *See Daugherty v. Robinson Farms, Inc.*, 858 N.E.2d 192, 197 (Ind. Ct. App. 2006) (construing "shall"). Unlike prejudgment interest, trial courts have no discretion over whether post-judgment interest will be awarded; prevailing plaintiffs are automatically entitled to it. *See Gurbnich v. Renner*, 746 N.E.2d 111, 114-15 (Ind. Ct. App. 2001) (finding a right to post-judgment interest even where the trial court did not specifically award it).

[83] The post-judgment interest statute is substantive rather than procedural, meaning it "creates, defines, and regulates rights" rather than "prescrib[ing] the method of enforcing a right or obtaining redress" for its invasion. *See Johnson v. Johnson*, 849 N.E.2d 1176, 1179 (Ind. Ct. App. 2006) (finding that post-judgment interest is "substantive part of the money judgment, not merely a mechanism to enforce the judgment"); *Morrison v. Vasquez*, 124 N.E.3d 1217, 1222 (Ind. 2019) (quoting *Hayden v. State*, 771 N.E.2d 100, 102 (Ind. Ct. App. 2002)). An appellate court cannot change a rule of substantive law without a case before it. *Square D. Co. v. O'Neal*, 225 Ind. 49, 72 N.E.2d 654, 655 (Ind. 1947) ("No rule which we could adopt would repeal [substantive law]. This court cannot change a rule of substantive law nor could the General Assembly

vest us with such legislative power."); *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019) ("Unlike its federal counterpart, the Indiana Constitution imposes no case or controversy restriction on the judicial power of the State. But the express distribution-of-powers clause in our fundamental law performs a similar function, serving as a principal justification for judicial restraint." (cleaned up)).

[84] Despite the potential breadth of the term "interest" in the Emergency Orders, we do not interpret that language to include post-judgment interest. The words "tolled period" are instructive, because post-judgment interest – being automatic and continuous – cannot be tolled. Our conclusion is in keeping with our practice of presuming that each branch of our government acts within their constitutionally prescribed boundaries. *Cf. Ind. Newspapers, Inc. v. Miller*, 980 N.E.2d 852, 860 (Ind. Ct. App. 2012) (interpreting a Supreme Court rule under the rules of statutory construction and presuming its rules are constitutional); [13] *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 396 (Ind. 2018) (interpreting a statute's terms broadly to avoid constitutional issues). In this case, the trial court erred in interpreting the Emergency Orders to apply to post-judgment interest because so doing would give the Emergency Orders effect beyond the power constitutionally and statutorily allocated to the courts.

[85] Interpreting "no interest shall be due or charged" to exclude post-judgment interest is also consistent with the restraint our Supreme Court has

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[13] The Supreme Court granted transfer in this opinion, but later vacated that order, denied transfer, and reinstated this decision, ending the appeal. *Ind. Newspapers, Inc. v. Miller*, 994 N.E.2d 731 (Ind. 2013).

demonstrated when invoking its emergency powers in other ways during the pandemic. *See, e.g.*, *In re Petition to the Indiana Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments From Attachment or Garnishment from Creditors*, No. 20S-MS-258, 20S-CB-123 (April 20, 2020) (acknowledging the Court's authority "to suspend issuance of *all* hold, attachment, or garnishment orders" during the emergency but, instead, choosing "a much narrower and more carefully tailored subset of that relief . . . ."). *Id.* Given the Court's reticence to exercise the full width of the expansive powers it possesses, we cannot find that our Supreme Court intended to exercise powers it undoubtedly lacked. We would be foolish to infer such intent simply because the Court did not designate every type of "interest" it was tolling. Reason dictates that the Court did not intend its order to apply to post-judgment interest which is mandated by the legislature. This seems particularly likely in light of other, less invasive measures available to the Court if it intended to grant temporary post-judgment interest relief, i.e., requiring the deposit of post-judgment interest into clerks' office or escrow accounts.

[86] Moreover, excluding post-judgment interest from the Orders satisfies the Supreme Court's emergency purpose. In an emergency, the Supreme Court's inherent authority to supervise all courts of the state allows it to suspend trial courts' discretionary decision-making, like the grant of prejudgment interest. Ind. Admin. R. 17; *Wisner*, 984 N.E.2d at 1209. As the March 23 Order observed, the COVID-19 emergency "impede[d] litigants' and courts' ability to comply with statutory deadlines and rules of procedure." *See In the Matter of*

Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Mar. 23, 2020). Permitting grants of prejudgment interest would have cost litigants for a delay they did not cause. As we explained above, Indiana's Tort Prejudgment Interest Statute is meant to influence litigants' behavior. *Supra* Part III. To award prejudgment interest for delays not attributable to any party would not advance that goal. Post-judgment interest, on the other hand, arises just as automatically during a pandemic as it does any other time—and it will continue to do so until the legislature decides otherwise. For all these reasons, we find that the trial court erred in tolling the accrual of Dr. Denman's post-judgment interest.

[87] To summarize, we affirm both the trial court's denial of a directed verdict to Defendants and its denial of Dr. Denman's request to amend the judgment, but we direct the court on remand to recalculate the prejudgment interest award based on the $4.75 million verdict, which award shall accrue post-judgment interest beginning June 19, 2020. We reverse the trial court's remitter of damages, and because we find that our Supreme Court's Emergency Orders did not toll the accrual of post-judgment interest, we reverse and remand to the trial court to recalculate post-judgment interest pursuant to statute.

[88] Judgment affirmed in part, reversed in part, and remanded.

Robb, J. and Weissmann, J., concur.