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MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED100952

JASON D. DODSON, and JASON D. DODSON, JR., a Minor,
EVA RAINE DODSON-LOHSE, a Minor
and AUGUST WILLIAM DAVIS DODSON, a Minor, said Minors appearing by their duly appointed Next Friend, JASON D. DODSON,

***Plaintiffs/ Respondents/ Cross-Appellants*,**

v.

ROBERT P. FERRARA, M.D.
and MERCY CLINIC HEART AND VASCULAR, L.L.C.,

Defendants/ Appellants/ Cross-Respondents

Appeal from the Circuit Court of St. Louis County, Missouri
Case No. 11SL-CC03684
The Honorable Thea A. Sherry

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JURISDICTIONAL STATEMENT

This action involves the question of whether the § 538.210(1), RSMo. cap on noneconomic damages still applies in wrongful death cases in light of the Missouri Supreme Court's holding in *Watts v. Lester E. Cox Medical Center*, 376 S.W.3d 633 (Mo. banc 2012), and whether imposing the cap only on wrongful death plaintiffs violates the equal protection, right to trial by jury or separation of powers provisions of the Missouri and United States Constitutions. Accordingly, because the action involves the validity of a Missouri statute, Plaintiffs/Respondents/Cross-Appellants ("Plaintiffs") aver that the Missouri Supreme Court has exclusive jurisdiction and said jurisdiction extends to the other issues in this case.

As a result, Plaintiffs filed their Notice of Appeal in the Missouri Supreme Court, while Defendants/Appellants/Cross-Respondents ("Defendants") took the position that jurisdiction is proper in the Court of Appeals and filed their Notice of Appeal therein. The Missouri Supreme Court issued an Order on February 25, 2014, transferring Plaintiffs' Appeal to the Missouri Court of Appeals, Eastern District, "where jurisdiction is vested." (SC93917, Order of February 25, 2014). Although Plaintiffs believe that under the law jurisdiction is in the Missouri Supreme Court, jurisdiction in this Court is proper pursuant to the Order transferring the appeal to this Court. Nevertheless, this Court may, under Rule 83.02, transfer this case to the Missouri Supreme Court.

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STATEMENT OF FACTS

This case arises out of the death of Shannon Dodson, a 34 year old woman, at Mercy Hospital in St. Louis County on February 10, 2011. After experiencing shortness of breath, Shannon went to the hospital on February 8, 2011, where she was diagnosed with bronchitis. (Transcript ("Tr.") 643:23-645:14). After an EKG revealed some abnormalities, the emergency room physician consulted with interventional cardiologist Dr. George Kichura, who decided that Shannon should be admitted to the hospital for a few days to monitor her bronchitis and heart. (Tr. 646:11-647:21; 806:24-808:25). On February 9, 2011, Shannon had a stress echocardiogram, though she would not consent to the use of contrast, due to a prior bad experience with contrast. (Tr. 649:3-650:12; 809:10-21). The stress echo was not diagnostic of any heart disease. (Tr. 829:23-830:1). However, because good images did not result from the stress echo, Dr. Kichura recommended a heart catheterization. Although hesitant, Shannon ultimately agreed to the procedure. (Tr. 650:13-21; 656:15-21; 831:6-21).

On February 10, 2011, Dr. Kichura's partner, Defendant Dr. Robert Ferrara, performed the heart catheterization. (Tr. 818:20-819:8). At 3:53:04 p.m., Dr. Ferrara caused a dissection of Shannon's left main artery. (Tr. 720:14-721:3; 993:20-994:13). According to multiple experts (for both Plaintiffs and Defendants), such a dissection is an emergent condition and the physician must act quickly to either stent the patient[1] or get the patient to

[1] As explained by Dr. Ferrara, stenting "involves placing a very thin flexible wire down the coronary artery. . . . Over that wire, a catheter is advanced. The catheter has a

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surgery for coronary artery bypass. (Tr. 494:13-25; 584:3-586:3; 802:7-20; 1084:9-20; 1097:25-1098:24; 1101:2-22; 1102:23-1105:2). However, Dr. Ferrara did neither of these things. Instead, he called Dr. Kichura, who did not arrive until 22 minutes after the dissection occurred. During those 22 minutes, Dr. Ferrara did nothing to try to restore blood flow to the left main coronary artery. (Tr. 994:14-995:5). He did not attempt a stent and did not attempt to use a guidewire to open the obstruction to Shannon's left main artery. (Tr. 995:6-996:7; 1011:4-11). It was not until almost ten minutes after Dr. Kichura arrived, and more than thirty minutes after the dissection, that any effort was made to open Shannon's vessel. This was done by Dr. Kichura. (Tr. 1001:16-23; 1014:5-18). Finally, at 4:41:46 p.m., Shannon was transferred to the operating room for emergency surgery - 48 minutes and 46 seconds after the dissection. (Tr. 721:8-10).

During the 48 minutes and 46 seconds before she was sent to surgery, Shannon's

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balloon that's wrapped up on it. . . . Once that's positioned in the artery where the blockage is, we inflate the balloon with a certain amount of what's called atmospheres of pressure, it's a fluid medium, and that pressure is exerted on a blockage and that softens the blockage up, if you will. And then the wire stays down in the artery, the catheter is withdrawn that has the balloon on it, and the catheter that has the stent on it is advanced to the same location where the balloon was. The balloon is inflated, the stent is depressed against the arterial -- the wall of the artery, and that's permanently embedded in the artery. And it pushes the plaque to the sides of the artery and re-establishes an open channel." (Tr. 917:24-918:22).

condition was critical. She needed CPR and chest compressions multiple times. (Tr. 999:9-15; 1012:20-25; 1013:24-1014:2; 1015:23-1016:15). She was given emergency medications. (Tr. 1013:1-8). By the time Shannon was taken to surgery, her condition was dire. The surgeons and anesthesiologist all testified that Shannon was basically dead by the time she reached them. (LF837-LF838; LF882; Tr. 1140:8-14). The surgeons were unsuccessful in reviving Shannon, and she died as the result of the dissection in her left main artery. (LF842).

The death of Shannon was a tremendous loss for her husband Jason Dodson and the couple's three young children, Jason Jr., Eva and Gus. Shannon was a remarkable young woman, who after quitting high school due to family circumstances, got her GED, put herself through college and became a successful and valued employee in the real estate management business, with a bright future. (Tr. 534:5-535:12; 409:4-410:18). Shannon was also a devoted mother, whose life revolved around her three children. (Tr. 420:1-17). She was enthusiastic and supportive of all of the children's activities. (Tr. 427:9-15). The entire family enjoyed being together and they did activities and socialized as a family unit. (Tr. 426:8-21). Jason described the family as a "team" that depended on one another and said that they did everything together. (Tr. 641:10-18; 667:17-668:13). After Shannon's death, Jason and the children faced numerous struggles while learning to adapt to life without her. (Tr. 536:5-539:13). At the time of the trial, Jason, Jr. was eleven, Eva was nine, and Gus was five. (Tr. 637:8-22).

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Jason, Jason Jr., Eva and Gus Dodson (collectively, "Plaintiffs") filed suit against Dr. Ferrara and Mercy Clinic Heart and Vascular, L.L.C. (collectively, "Defendants") for medical negligence. Plaintiffs alleged that Dr. Ferrara's performance of, and handling complications arising out of, the catheterization procedure caused or contributed to cause the death of Shannon Dodson. Plaintiffs also claimed aggravating circumstances damages. (LF149-LF164).

The case proceeded to trial on August 19, 2013, concluding on August 29, 2013. (Tr. 1; 6:8-25; 84:1; 1407:3). At the close of all evidence, Judge Thea Sherry directed a verdict for Defendants on the issue of aggravating circumstances damages. (Tr. 1266:23-1267:7). On the claim for wrongful death, the jury returned a verdict in favor of Plaintiffs, and assessed damages in the amount of $305,737 for past economic injuries including past medical damages, $1,000,000 for past noneconomic damages, $1,525,418 for future economic damages, and $8,000,000 for future noneconomic damages. (LF386-LF389). On August 29, 2013, Judge Sherry entered judgment in favor of Plaintiffs and against Defendants in the amount of $10,831,155. (LF390-LF391; A13-A14).

After judgment was entered, Defendants requested that the trial court apply the damage cap and other damage provisions under Chapter 538, RSMo, including the cap on noneconomic damages in § 538.210(1) (LF393-LF396; LF625-LF659). Plaintiffs opposed this request. (LF417-LF442). On December 16, 2013, Judge Sherry issued an Amended Judgment and Order, granting Defendants' request to apply the damage cap. (LF773-LF776;

A15-A18). She then issued the final judgment appealed from here, the Second Amended Judgment and Order, on December 23, 2013. Therein, the trial court applied the § 538.210(1) cap on noneconomic damages, reducing the amount awarded for past and future noneconomic damages to $350,000. Thus, the amended judgment was in the total amount of $2,181,155, fully $8,650,000 less than the jury awarded. (LF789-LF796).

The Second Amended Judgment and Order also ruled on all remaining motions before the trial court: denying Defendants' motions for JNOV or for a new trial; denying Defendants' motion to investigate alleged juror misconduct; granting in part Defendants' motion for periodic payments under § 538.220 RSMo.; and denying Plaintiffs' motion for new trial on aggravating circumstances damages. Finally, the court allocated the judgment among the wrongful death beneficiaries and approved payment of the attorneys' fees and expenses. (LF789-LF796).

Plaintiffs timely filed a Notice of Appeal in the Missouri Supreme Court on December 27, 2013, asserting that jurisdiction in the Supreme Court was appropriate under article V, section 3 of the Missouri Constitution because the appeal involved the validity of a state statute (specifically, § 538.210(1)). (LF797-LF808). Defendants filed a separate Notice of Appeal in the Court of Appeals for the Eastern District of Missouri. (LF814-LF825). The Missouri Supreme Court ultimately issued an Order on February 25, 2014, transferring Plaintiffs' Appeal to the Missouri Court of Appeals, Eastern District, "where jurisdiction is vested." (SC93917, Order of February 25, 2014). Plaintiffs' Appeal was

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consolidated with Defendants' Appeal by Order of this Court on March 6, 2014. (ED100952, Order of March 6, 2014).

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ARGUMENT OF RESPONDENTS

I. THE TRIAL COURT DID NOT ERR IN ADMITTING DR. GELTMAN'S TESTIMONY REGARDING ST. LOUIS DOCTORS (RESPONSE TO APPELLANTS' POINT RELIED ON I)

A. Standard of Review

Defendants' Point I challenges the trial court's decision to permit questioning by Plaintiffs' counsel and admit testimony from Dr. Geltman regarding the willingness of St. Louis doctors to testify against other St. Louis doctors. The standard of review for issues involving the admissibility of evidence is abuse of discretion. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 367 (Mo. banc 1993). "Substantial deference is given a decision of the trial court as to the admissibility of evidence, which will not be disturbed absent an abuse of discretion." *Id.*

B. Dr. Geltman raised the topic of St. Louis doctors and Defendants failed to timely object.

Defendants take issue with an exchange between Plaintiffs' counsel and Edward M. Geltman, M.D., Defendant's expert witness, regarding the willingness (or lack thereof) of Dr. Geltman and other St. Louis doctors to testify against other St. Louis doctors in medical negligence cases. What Defendants do not acknowledge is that it was Dr. Geltman himself who first raised the issue, completely unprompted by Plaintiffs. During cross-examination, Dr. Geltman testified as follows:

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Q You've indicated in your earlier testimony that you review cases, medical negligence cases periodically?

A That's correct.

Q It's my understanding you review about 10 or 12 a year?

A That's correct.

Q And for the last several years you only review cases for physicians who have been sued?

A I don't think I've been requested to answer -- to review any for plaintiffs, at least that I recall recently. I've done it in the past, and I do -- and have been consulted by attorneys about some that I've said that I think they do or do not have a case and referred them to -- if they're in the St. Louis area, <u>it would be bad for my referral practice to be testifying against local physicians. If I think they have a case, I refer those attorneys to out-of-state physicians who could provide them the guidance they need</u>.

(Tr. 786:20-787:14) (emphasis added). Defendants did not object or request any other relief regarding this now complained of error. As such, it is not preserved for appellate review.

A short time later, Plaintiffs followed up with Dr. Geltman regarding his previous comments that testifying against local doctors would be "bad for [his] referral practice." The following line of questions were asked without objection:

Q You've indicated that it would not be good for your referral business if you testified for plaintiffs against health care providers in St. Louis; is that right?

A That's correct.

Q So if a -- if a lawyer, any lawyer came to you with a medical chart and said, "I want you to look at this and give me your honest opinion whether this injury or death occurred because of medical negligence or something the doctor did very, very wrong," but it was a St. Louis case, you wouldn't look at that?

A No, I would look at it. I would look at them; I would give them my opinion as to whether or not I thought there was a cause to pursue it. And if there was, I would then give them the name of a reputable physician who would not have a conflict of interest who could then review it for them.

Q But you wouldn't --

A I would have a conflict of interest. I don't want to have a conflict of interest. That's inappropriate.

(Tr. 790:17-791:12). It was not until Plaintiffs began the question, "If people in the St. Louis community can't get --" (Tr. 791:13), that Defendants actually objected, before it was even

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clear what the question from Plaintiffs would be.[2] The trial court appropriately overruled the objection. Up until this point, the issue of willingness to testify against local doctors had been discussed at length by Dr. Geltman. Then, when Plaintiffs asked their full question, Defendants did not object:

> Q Dr. Geltman, if folks in St. Louis can't get St. Louis doctors to come in and testify to the truth, what they felt in their heart, feel was handled wrong by a physician in St. Louis, how can we - - how can anybody in St. Louis get the care that we are entitled to?
>
> A Oh, it's - - you would certainly get the care you're entitled to, because what happens is there are many physicians of high quality from other - - from other cities where they don't have a conflict of interest who are more than happy to come in from out of town to provide the expertise and the testimony that's needed to provide a fair trial.
>
> And when I'm - - I've come across those kinds of cases, I provide the names of qualified people from other cities or states who won't have a

[2] In fact, during the sidebar, counsel for Defendants anticipated that the question would be regarding how Plaintiffs can prosecute medical malpractice cases if local doctors will not testify on their behalf. This is the question that Defendants objected to. (Tr. 791:18-792:4). However, the question ultimately asked by counsel for Plaintiffs was different - it dealt with how people in St. Louis can get the care that they are entitled to. (Tr. 792:14-19).

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conflict of interest that can provide them the expert advice that they need to pursue those matters.

So those matters do get pursued and the people in St. Louis do get excellent medicolegal expertise, and sometimes I'll help them get that, I just can't do it personally.

Q So we have to go out of town?

A I think that happens in every city. It happens in New York and Boston, St. Louis, Chicago, every city. That's the way the system works.

(Tr. 792:14-793:14).

"A party seeking the correction of error must stand or fall on the case which was made in the trial court, and thus it follows that only those objections or grounds of objection which were urged in the trial court, without change and without addition, will be considered on appeal." *Hill v. City of St. Louis*, 371 S.W.3d 66, 72 (Mo. App. E.D. 2012). Defendants did not properly object to the testimony they now allege was error for the trial court to permit. Their Point I fails for this reason alone.

C. Dr. Geltman's testimony is relevant and not prejudicial.

Even if Defendants' objections were sufficient (they were not), their argument fails because Dr. Geltman's testimony was relevant and not prejudicial. Defendants' argument regarding Dr. Geltman's testimony focuses largely on the questioning by Plaintiffs' counsel. In particular, Defendants claim that Plaintiffs' counsel made an "unprovoked statement

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during cross-examination of Dr. Edward Geltman that St. Louis physicians will not 'testify to the truth,'" which "impugned the credibility" of both Dr. Geltman and Defendants' other witnesses. (Brief of Defendants/Appellants/Cross-Respondents (hereinafter "Brief") at 24). This is a mischaracterization of Plaintiffs' counsel's question. To be sure, Plaintiffs' counsel did not state or even imply that St. Louis doctors do not testify truthfully; rather, Plaintiffs' counsel, in the context of a hypothetical question about the ability of a patient to obtain proper care, postulated about the unwillingness of St. Louis doctors to testify against other St. Louis doctors. This point was initially raised by Dr. Geltman himself, and was certainly not some "unprovoked" statement or allegation by Plaintiffs' counsel.

Defendants clearly engage in hyperbole in their brief by focusing extensively on Plaintiffs' counsel's question, and then ascribing myriad bad motives to counsel. But looking at the question and the ensuing dialogue (that took place without objection), the entire exchange can only be described as benign. It could not have influenced the jury to disregard the testimony of "all St. Louis doctors." Dr. Geltman was allowed to express his strong disagreement with Plaintiffs' counsel's question. His self-serving answers about his helpfulness providing out of town experts for local cases and the alleged uniformity of the practice across the country ("New York and Boston, St. Louis, Chicago, every city") (Tr. 793:12-14) comes far closer to a dramatic speech than any hidden implication in Plaintiffs' counsel's question. Any assertion by Defendants that they were prejudiced by Plaintiffs' counsel's purported question about St. Louis doctors' unwillingness to testify for

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patients or that the exchange included improper commentary about other witnesses has no merit.

Defendants' argument is thus reduced to an objection to the line of questioning regarding Dr. Geltman's own unwillingness to testify in a malpractice case against a St. Louis doctor. This evidence is clearly relevant to show the bias of Dr. Geltman. Under Missouri law, evidence of bias is relevant and admissible. *See Newell Rubbermaid, Inc. v. Efficient Solutions, Inc.*, 252 S.W.3d 164, 171 (Mo. App. E.D. 2007) "Parties are given wide latitude in their cross-examinations of expert witnesses 'to test qualifications, credibility, skill or knowledge, and value and accuracy of opinion.'" *Moon v. Hy Vee Inc.*, 351 S.W.3d 279, 284 (Mo. App. W.D. 2011) (quoting *Montgomery v. Wilson*, 331 S.W.3d 332, 341 (Mo. App. W.D. 2011)). The Missouri Supreme Court has noted:

> A good deal of latitude is permitted in cross-examining witnesses. It has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity or credibility or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge.

Sandy Ford Ranch, Inc. v. Dill, 449 S.W.2d 1, 6 (Mo. 1970); *see also Miller v. SSM Health Care Corp.*, 193 S.W.3d 416, 421 (Mo. App. E.D. 2006). Because a jury is tasked with

determining the credibility of witnesses and the weight to give a witness's testimony, "it is entitled to know information that would affect this determination." *Moon*, 351 S.W.3d at 284. "Consequently, the witness's bias or prejudice may *always* be shown, subject to the trial court's discretion." *Id.* (emphasis added).

This case is similar to *Weatherly v. Miskle*, in which this Court considered whether the trial court erred in admitting a solicitation letter sent by the plaintiff's expert to law firms. 655 S.W.2d 842, 843 (Mo. App. E.D. 1983). The plaintiff argued that the letter "was irrelevant and served no other purpose than to prejudice the jury." *Id.* at 844. The Court disagreed, noting that "[p]ecuniary interest of a witness, or his bias or prejudice, can always be shown," and that "[t]he jury is entitled to know everything that might affect a witness's credibility and the weight to be given his testimony." *Id.* The Court recognized that it is permissible to make general inquiries of an expert regarding the frequency with which he appears as a witness for a particular party. *Id.* The Court reasoned, "[w]e find it equally permissible to make inquiries of [an expert]'s willingness to testify for any client. The fact is relevant to show possible bias on his part and is not a collateral matter." *Id.* Likewise, in this case, the line of questioning regarding Dr. Geltman's practice of reviewing cases for defendant doctors is clearly relevant and proper.

While not binding authority, a Maryland case with similar facts demonstrates the propriety of the trial court's decision in this case. In *Keyes v. Lerman*, 992 A.2d 519 (Md. Ct. Spec. App. 2010), the plaintiffs sought to question the defendant's expert (a Baltimore

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County doctor) about a statement he made in his deposition that he would not testify against other Baltimore County doctors insured by the insurance company with which both the expert and the treating doctor had malpractice insurance. *Id.* at 546. The trial court permitted questions about the expert's unwillingness to testify against the treating doctor, but did not permit the plaintiffs to elicit information about the expert's or the treating doctor's medical malpractice insurance. *Id.* at 546-47. The appellate court, noting that "the scope of cross-examination of witnesses is largely within the control and discretion of the trial judge," concluded that the trial court properly balanced the plaintiffs' desire to show the expert's bias against the prejudice to the treating doctor from revealing he had malpractice insurance. *Id.* at 547.

Like in *Weatherly* and *Keyes*, Dr. Geltman's testimony about his unwillingness to testify against other St. Louis doctors was properly permitted by the trial court. Defendants' cases do not establish otherwise. Both *Yingling v. Hartwig*, 925 S.W.2d 952 (Mo. App. W.D. 1996) and *Allen v. Andrews*, 599 S.W.2d 262 (Mo. App. S.D. 1980) involved testimony from doctors about the tendency of patients involved in litigation to exaggerate their injuries. Such testimony, which the *Yingling* court said amounted to irrelevant "[s]tatements about unidentified people with unidentified injuries and complaints," is very different than the line of questioning about Dr. Geltman's specific bias at issue in this case. *Yingling*, 925 S.W.2d at 956. *Wiedower v. ACF Industries, Inc.*, 763 S.W.2d 333 (Mo. App. E.D. 1988), is also inapposite. That case examined the prejudice and confusion that resulted from detailed

testimony about the workers' compensation process and delays that had occurred. It did not involve evidence regarding witness bias *Id.* at 335-36. *Warnke v. A. Leschen & Sons Rope Co.*, 178 S.W. 76 (Mo. 1915), also relied on by Defendants, did not involve admissibility of evidence of bias, rather that case dealt with improper counsel commentary.

Dr. Geltman's unsolicited testimony revealed his bias, and Plaintiffs were properly "afforded an opportunity to display before an uninformed jury the bias, hostility, or prejudices held by the witness." *Newell Rubbermaid*, 252 S.W.3d at 172. The testimony was admissible and, even if it were deemed prejudicial, Defendants did not properly object to the line of questioning that they now allege is improper.

Defendants' Point I was correctly ruled by the trial court, and provides no basis for a new trial.

II. THE TRIAL COURT DID NOT ERR IN PERMITTING QUESTIONING ABOUT WHETHER DEFENDANT DR. FERRARA SPOKE WITH DR. CLEVELAND AFTER SHANNON DODSON'S DEATH (RESPONSE TO APPELLANTS' POINT RELIED ON II)

A. Standard of Review

Defendants' Point II challenges the trial court's decision to admit deposition testimony of Defendant Dr. Ferrara regarding whether he spoke with Dr. Jeanne Cleveland after Shannon died. The standard of review for issues involving the admissibility of evidence is abuse of discretion. *Keene Corp.*, 855 S.W.2d at 367. "Substantial deference is given a

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decision of the trial court as to the admissibility of evidence, which will not be disturbed absent an abuse of discretion." *Id.*

B. Defendant Dr. Ferrara's deposition testimony is relevant and admissible.

As with Point I, Defendants, in Point II, take a snippet of testimony and then ascribe all manner of bad intentions to the Plaintiffs' questions despite the fact that the overall testimony would likely have no effect on the jury's decision. Plaintiffs' theory at trial, amply supported by expert testimony, was that Dr. Ferrara needlessly delayed sending Shannon to the operating room after a dissection of her left main artery had occurred. Dr. Cleveland was one of the cardiothoracic surgeons who tried to save Shannon's life when she was finally taken to the operating room.

Under Plaintiffs' evidence, Dr. Ferrara's delay in taking any action to restore blood flow caused Shannon to die. At trial, Dr. Ferrara denied negligence, and denied that he unduly delayed sending her to surgery. What Dr. Cleveland observed in surgery was directly relevant to the nature of the damage that resulted from the dissection, the condition of Shannon when she finally got to the emergency room, and the cause of her death.

That Dr. Ferrara never consulted with Dr. Cleveland goes directly to the credibility of Dr. Ferrara's assertion that his conduct did not cause Shannon's death. Defendants argue that the deposition testimony at issue should not have been admitted because the line of questioning about whether Dr. Ferrara spoke with Dr. Cleveland after Shannon's death was "argumentative, irrelevant, and implied there was something improper and uncaring about

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Dr. Ferrara not consulting with Dr. Cleveland or that this fell below the standard of care in some way." (Brief at 38). These arguments fail as the evidence is relevant and was properly admitted by the trial court. They are also different from the arguments Defendants made at trial.

Defendants assert that anything that happened after Dr. Ferrara's care of Shannon is irrelevant to whether he breached the standard of care. Defendants do not cite any legal authority for this proposition. Missouri courts have held on a number of occasions that evidence of events that occurred after the incident at issue in the lawsuit are properly admitted. *See, e.g.*, *Scarlett v. School of the Ozarks, Inc.*, 2011 WL 529797, at *2 (W.D. Mo. Feb. 7, 2011) ("Of course, evidence about what happened after the wreck, namely that when [the plaintiff] told his father about it, he was very upset with him, is relevant and admissible."); *Taylor v. Associated Elec. Coop., Inc.*, 818 S.W.2d 669, 672 (Mo. App. W.D. 1991) (evidence of the removal and replacement of pipe crossings after accident was relevant to show condition of accident site at the time of the fall and was thus admissible); *State ex rel. Div. of Family Servs. v. Duncan*, 782 S.W.2d 457, 459-60 (Mo. App. S.D. 1990) (affirming trial court's overruling of objection to argument about the defendant's life after conception of child whose paternity was at issue). The evidence was clearly relevant.

The mere fact that the question posed to Dr. Ferrara referred to a time after Dr. Ferrara's care of Shannon had concluded does not make the subject irrelevant. If it did, how could a negligent surgeon ever be questioned about autopsy results? Here, information

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about whether Dr. Ferrara discussed the case with Dr. Cleveland was relevant because Dr. Ferrara was a defendant and endorsed as a non-retained expert who offered opinions regarding timing, appropriateness of his response to the dissection, and the cause of death. The fact that Dr. Ferrara did not talk to the cardiothoracic surgeon goes to show the basis (or lack thereof) of his opinions. Further, the information is relevant to demonstrate the sources from which he gathered information to form his conclusions about what happened to Shannon.

Defendants' argument that the line of questioning was argumentative or implied that Dr. Ferrara was uncaring similarly fails. In contrast to Defendants' portrayal of the testimony as prejudicial, when considered in context with Dr. Ferrara's response that he was curious about Dr. Cleveland's findings but was able to read them in her operative report (LF860), the testimony is somewhere between neutral and favorable to Dr. Ferrara. Further, while Plaintiffs never suggested or implied that Dr. Ferrara did not care what happened to Shannon, Defendants consistently presented Dr. Ferrara as caring. Counsel for Defendants, in opening statement, called Dr. Ferrara "an experienced and caring and exceptional interventional cardiologist." (Tr. 354:22-25). Later in opening counsel called him "a careful interventional cardiologist." (Tr. 377:9-10). Counsel then repeated this theme in closing argument, stating that the evidence had shown Dr. Ferrara "to be a very conscientious and an excellent, experienced interventional cardiologist, and I think the evidence clearly shows that well beyond what it may need to show." (Tr. 1350:14-16). He called Dr. Ferrara "very astute"

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(Tr. 1369:19), and said that he did not panic after the dissection and did not let "egos get in the way" of proper treatment of Shannon. (Tr. 1378:1-3). In light of this theme, it is difficult to see how Defendants were prejudiced by the testimony about whether Dr. Ferrara followed up with Dr. Cleveland.

Defendants' argument that this line of questioning was irrelevant and offered only to prejudice Defendant Dr. Ferrara has no support in fact or law. The trial court properly admitted the evidence and denied Defendants' motion for new trial on this point.

III. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 4 (MAI 2.07 - EXPLANATORY-INSURANCE, BENEFITS) (RESPONSE TO APPELLANTS' POINT RELIED ON III)

A. Standard of Review

Defendants' Point III challenges the trial court's decision to include MAI 2.07 in the jury instructions. The standard of review for issues involving whether the jury was properly instructed is *de novo*. *Fleshner v. Pepose Vision Inst.*, 304 S.W.3d 81, 90 (Mo. banc 2010). An instruction is proper if it "follows the substantive law and can be readily understood by the jury." *Twin Chimneys Homeowners Ass'n v. J.E. Jones Constr. Co.*, 168 S.W.3d 488, 498 (Mo. App. E.D. 2005). When reviewing a claim of instructional error, the evidence is viewed in the light most favorable to the instruction and all contrary evidence is disregarded. *Id.* An appellate court will reverse a jury verdict on the ground of instructional error only where the appellant demonstrates: (1) the instruction "misled, misdirected, or confused the

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jury"; and (2) prejudice resulted from the submission of the instruction. *Fleshner*, 304 S.W.3d at 90-91.

Notwithstanding the established standard of review for jury instruction questions, the proper standard of review to apply may be abuse of discretion. According to the Committee Comment to MAI 2.07 (2014 Revision, effective August 16, 2013), the instruction is not mandatory and the decision of whether to include the instruction is "in the discretion of the trial judge." MAI 2.07 cmt.A. Where a ruling is discretionary, "it is presumed correct and appellant bears the burden of showing an abuse of discretion." *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 804 (Mo. banc 1988); *see also Williams v. Daus*, 114 S.W.3d 351, 370 (Mo. App. S.D. 2003) (en banc) ("A trial court has the best opportunity to determine whether a jury instruction is confusing or misleading, and we shall not disturb that ruling absent an abuse of discretion.").

Defendants' argument fails under either standard of review.

B. The trial court's inclusion of MAI 2.07 was proper.

At the time of trial, MAI 2.07 was approved for use by the Missouri Supreme Court. The Committee Comments, dated August 16, 2013, suggest that the trial court and counsel discuss any issue pertaining to insurance and/or benefits. The parties did so, and based on this discussion, the trial court gave MAI 2.07 as part of the general instruction packet. Defendants' argument regarding MAI 2.07 is essentially that there was no need to give the instruction because the existence or non-existence of insurance was not an issue (outside of

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economic damages) and the inclusion of the instruction amounted to an improper injection of insurance. This argument mischaracterizes both the evidence and the purpose of the instruction.

First, Defendants claim that the "only" reference to insurance was in the context of loss of insurance benefits, through the testimony of Plaintiff Jason Dodson and Robert E. ("Jay") Marsh, Plaintiffs' economic expert. (Brief at 42). However, this is a misstatement of the record. In fact, the jury was exposed to the topic of insurance at least four separate times and in contexts outside of loss of benefits. The first was in *voir dire*, when Venireman Henzler made an unsolicited comment about insurance companies paying for medical malpractice claims. (Tr. 160:16-19). Venireman Henzler later commented that when it comes to medical malpractice, "people tend to think, Oh, it's insurance, just go ahead and give them the world." (Tr. 183:14-19). The second was in the testimony of Plaintiff Jason Dodson, when he testified that prior to Shannon's death, the children were insured under her insurance policy and that after her death, they were insured under his policy. (Tr. 681:7-17). The third was in the testimony of Jay Marsh, who noted multiple times the change in insurance policies that Jason Dodson had discussed while explaining his economic analysis. (Tr. 693:21-24; 696:2-7; 697:17-25; 701:11-15; 714:12-718:14). The fourth was in Exhibit 11, the un-objected to and admitted hospital bill, which showed both the original bill number and the amount actually paid with insurance. (Tr. 670:1-9; 1269:13-1270:10).

The topic of insurance came up multiple times during the trial proceedings. It was

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entirely possible that the jurors would be confused as to whether they were to include the amount of medical bills in their damage award because they knew that the Plaintiffs and decedent had health insurance. It was also important to remind jurors that any assumptions they had about the existence or non-existence of medical malpractice insurance should not come into play in their verdict. Because insurance was injected into the case, the trial court properly exercised its discretion to give the instruction. The instruction, approved for use by the Missouri Supreme Court and clearly a correct statement of the law, did not mislead, misdirect or confuse the jury.

Defendants devote a significant portion of their argument on this point to discussing the impropriety of injecting insurance issues into an action for damages. Plaintiffs agree with Defendants that "under Missouri law, the mention of insurance and other benefits is to be handled in a careful and reasoned way, even where relevant to the issues presented." (Brief at 44). This is precisely why it was important for the trial court to include MAI 2.07. Issues of insurance and benefits were unavoidably before the jury through the above cited testimony and evidence. By including MAI 2.07, the trial court dealt with the complex topic of insurance in a careful and reasoned way - by giving the jurors an instruction that properly summarized Missouri law on the issue.

MAI 2.07 is a correct statement of the law and was properly submitted to the jury. The trial court properly exercised its discretion in including it. Under the *de novo* standard of review, Defendants are required to prove that the alleged instructional error resulted in

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prejudice that materially affected the merits. Defendants have failed to meet this standard. They allege without explanation that there was "potential for jury confusion and misleading of the jury." (Brief at 45). However, the instruction was included in order to - and did - clarify the issue of insurance for jurors so that there would not be any confusion. Certainly Defendants could not credibly suggest that the jury should have considered the existence of insurance as part of its deliberations. To the extent that Defendants' real issue is the discussion or admission of evidence of insurance during the trial, their failure to timely object prohibits further argument here.

Whether the appropriate standard of review is abuse of discretion or *de novo*, Defendants' argument fails.

IV. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF LOSS OF ECONOMIC SUPPORT (RESPONSE TO APPELLANTS' POINT RELIED ON IV)

A. Standard of Review

Defendants' Point IV challenges the trial court's denial of Defendants' motion for directed verdict, motion for judgment notwithstanding the verdict, and motion for new trial based on Plaintiffs' alleged failure to make a submissible case for loss of economic support. The standard of review for the denial of a motion for directed verdict or judgment notwithstanding the verdict is *de novo*, "to determine whether the plaintiff has made a submissible case." *McGinnis v. Northland Ready Mix, Inc.*, 344 S.W.3d 804, 809 (Mo. App.

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W.D. 2011). The standard of review for the denial of a motion for new trial is abuse of discretion, and the court of appeals "will not reverse unless there is a substantial or glaring injustice." *Carter v. White*, 241 S.W.3d 357, 362 (Mo. App. S.D. 2007).

The basis for Defendants' allegation of trial court error is the admission of two pieces of evidence - Maria Kossmeyer's testimony regarding Shannon Dodson's future career path and earnings and evidence of Shannon Dodson's health insurance benefit. The standard of review for issues involving the admissibility of evidence is abuse of discretion. *Kansas City v. Keene Corp.*, 855 S.W.2d 360 at 367. "Substantial deference is given a decision of the trial court as to the admissibility of evidence, which will not be disturbed absent an abuse of discretion." *Id.*

B. The trial court properly permitted Maria Kossmeyer to testify regarding Shannon Dodson's future career path and earnings.

Defendants allege that the testimony of Maria Kossmeyer should not have been permitted because it "was based *entirely* upon Ms. Kossmeyer's personal opinions regarding decedent's long-term income potential." (Brief at 50 (emphasis added)). This argument fails because Ms. Kossmeyer clearly based her testimony on personal knowledge, experience and reasonable professional certainty.

Prior to Ms. Kossmeyer's testimony, the trial court clearly established boundaries to avoid any speculation on the part of Ms. Kossmeyer. (Tr. 388:10-394:21). The trial court then carefully circumscribed the testimony, and the transcript makes plain that most of

Defendants' objections during Ms. Kossmeyer's testimony were sustained. What Ms. Kossmeyer did say, as part of the foundation, was:

1. She has been a professional property manager for thirty-three (33) years (Tr. 401:2-5);
2. All of her work has been in commercial real estate (Tr. 401:12-17);
3. As of 1998, she began working for Trammell Crow Company, which was later purchased by CBRE, which was where she was working when she met Shannon (Tr. 401:19-25);
4. Shannon and Ms. Kossmeyer left the employment of CBRE to join McShane Health Properties (Tr. 402:1-9), and after Shannon's death McShane sold its portfolio to Lillibridge (Tr. 405:25-406:7);
5. As a property manager at Lillibridge, Ms. Kossmeyer earned in excess of $77,000 (Tr. 406:25-407:6);
6. At the time Shannon died she was working as Ms. Kossmeyer's assistant, earning approximately $42,000 (Tr. 403:20-404:2);
7. Even though denominated an assistant, Shannon carried out essentially the same duties as Ms. Kossmeyer; Shannon's financial reporting duties increased, she was well-liked, well-respected, talented, very consistent, faithful in her attendance. In Ms. Kossmeyer's words, she was an "excellent employee." (Tr. 408:6-410:6).

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Up to this point there can be no dispute that each and every item listed above was within the personal knowledge of the witness, and was factual. The only testimony that touches on opinions held by Ms. Kossmeyer consists of her reasonable estimates of the type of pay someone such as Shannon would earn in the near future, in particular five years on. First, Ms. Kossmeyer testified that with a reasonably anticipated promotion, Shannon's salary would have gone to $45,000 - a mere $3,000 more than she was already earning at the time of her death. (Tr. 417:9-18). Then, Ms. Kossmeyer testified based on her experience in the field, her knowledge of levels of pay in the industry, her knowledge of Shannon's experience and work ethic, and upon a reasonable degree of professional certainty, that five years out, $55,000 was realistic for Shannon Dodson. (Tr. 417:20-418:6).

Defendants claim that this testimony from Ms. Kossmeyer is based on speculation and not reasonable certainty, as required by Missouri law. (Brief at 51-53). However, this assertion ignores the above cited testimony. Ms. Kossmeyer clearly explained the bases for her conclusions and emphasized that all of her conclusions were based on her own personal knowledge, experience and reasonable professional certainty. Additionally, the trial court carefully excluded testimony that it found to be based on hearsay or lacking foundation. (Tr. 403:3-406:23). Furthermore, the fact that the company Shannon worked for at the time of her death is no longer in business does not prohibit Plaintiffs from seeking lost wages. *See Fairbanks v. Weitzman*, 13 S.W.3d 313, 319-20 (Mo. App. E.D. 2000) (concluding that "an injured plaintiff, who is unable to return to work due to the employer's non-existence, is not

prohibited from seeking an award of lost wages"). This testimony from Ms. Kossmeyer was sufficient to support Plaintiffs' claim for lost future earnings. "Missouri courts do not require as strict a level of proof of future lost wages as they do of lost profits." *Brenneke v. Dep't of Mo., Veterans of Foreign Wars of U.S. of Am.*, 984 S.W.2d 134, 142 (Mo. App. W.D. 1998). Expert testimony and proof of the exact amount of future losses are not required. *Id.* Missouri courts have consistently held that absolute certainty in predicting future economic damages is not required. *See Anderson v. Burlington N. R.R. Co.*, 700 S.W.2d 469, 477 (Mo. App. E.D. 1985); *Sampson v. Mo. Pac. R.R. Co.*, 560 S.W.2d 573, 588 (Mo. banc 1978).

Defendants compare the future wage loss award in this case to that of *Thienes v. Harlin Fruit Co.*, 499 S.W.2d 223 (Mo. App. 1973). *Thienes* involved a wage differential award based on contingencies, steps out of the plaintiff's control, and rank speculation. The plaintiff in *Thienes* was a U.S. Army soldier who was involved in an automobile collision while he was on the way to begin Officer Candidate School. *Id.* at 224. The *Thienes* court noted that the plaintiff's argument that he would have made more money in the Army if he had not been injured required three significant assumptions: 1) that the plaintiff would complete Officer Candidate School and be commissioned as a Second Lieutenant; 2) that the plaintiff would apply for and be accepted into flight school; and 3) that the plaintiff would win his wings and earn promotions "strictly in accordance with his hypothesized schedule." *Id.* at 229. The *Thienes* court ultimately reversed the trial court, finding that "the evidence adduced upon trial, much of which was highly speculative and should have been excluded

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upon defendant's objections thereto, was insufficient to have permitted and supported a finding that plaintiff's escalator chain of hypothesization had been established to a reasonable certainty." *Id.* at 230-31. Unlike in *Thienes*, the evidence of future wages set forth by Ms. Kossmeyer did not involve contingencies or speculation. The wage increases that Ms. Kossmeyer discussed were based on her own professional knowledge and were not due to Shannon's successful completion of any training program or placement into a specialized program. The evidentiary vacuum in *Thienes* is not present here.

Missouri courts have upheld awards for lost wages on evidence that was significantly less certain than Ms. Kossmeyer's testimony. In *Fairbanks v. Weitzman*, a case cited by Defendants, this Court affirmed the plaintiff's wage loss award, which was supported only by the plaintiff's own estimates regarding the amount of commissions she would receive and her own testimony without documentation regarding pay. 13 S.W.3d 313 at 320. In *Messina v. Prather*, the Western District found no error in the trial court's admission of testimony regarding the decedent's lost wages by the decedent's niece, who "did not financially support" the decedent but who took care of the decedent's finances by maintaining her checkbook and paying bills. 42 S.W.3d 753, 765 (Mo. App. W.D. 2001). The *Messina* court described the testimony as "not based on speculation and conjecture" and stated that it "afforded the jury a basis for a reasonable estimate of the amount of [the decedent]'s lost wages." *Id.*

The trial court did not err in permitting Ms. Kossmeyer to testify regarding Shannon

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Dodson's future earnings or in denying Defendants' various motions on this point. The testimony was relied on by Plaintiffs' economic expert Jay Marsh, who testified that Ms. Kossmeyer's testimony is the type of information that economists in his field typically use in performing evaluations like that performed by Mr. Marsh in this case. (Tr. 691:18-692:14). Under the Missouri statute on expert witnesses, § 490.065, RSMo., this is the standard used to determine if an expert properly relied on a particular fact or data. Moreover, it was not unreasonable for the jury to conclude that a highly respected, highly qualified worker like Shannon could gradually earn slightly more money than she was earning at the time of her death. Jurors are allowed to use common sense, and ordinary life experiences suggest that people stay at jobs in which their pay gradually increases. This is sufficient to support the jury's award of lost future wages. *See Robinson v. Empiregas Inc. of Hartville*, 906 S.W.2d 829, 842 (Mo. App. S.D. 1995) (en banc) (recognizing that "the law requires only that the evidence, with such certainty as it permits, lay a foundation to enable the jury to make a fair and reasonable estimate").

C. The trial court properly admitted evidence of the value of Shannon Dodson's future health insurance benefit.

Defendants also challenge the submissibility of Plaintiffs' claim for loss of future health insurance benefits. However, with the exception of a motion *in limine* (LF316), which only addressed part of Defendants' argument on appeal, Defendants failed to object to any

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of the testimony that they now claim is speculative, unsupported and not credible.[3] Moreover, the claim for future health insurance benefits, which was included in the calculations of economic loss by Plaintiffs' expert Jay Marsh, was based on reasonable certainty.

The topic of Shannon Dodson's health insurance benefit and the increased cost to the Dodson family as the result of Shannon's death came up in both the trial testimony of Plaintiff Jason Dodson and Plaintiffs' expert Jay Marsh. Defendants did not object when Plaintiff Jason Dodson testified about Shannon's health insurance benefit:

> Q And, also, when she was working, she had the children insured under her insurance policy; is that right?
>
> A Through work, yes.
>
> Q And you've given those figures to Mr. Marsh as to what the cost she was paying for her insurance and then -- well, the insurance for the children?
>
> A Right.

---

[3] Because they failed to object, Defendants cannot argue that the Court erred in admitting evidence of Plaintiffs' loss of future health benefits. Instead, Defendants attempt to challenge the trial court's denial of both the motion for judgment nothwithstanding the verdict and the motion for directed verdict. This attempt to focus on post-trial motions to distract from their own failure to object must fail.

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Q And now, you're insuring the children under your employer; is that correct?

A That's correct.

Q And that has raised the cost considerably?

A Yeah. It's a lot more, and it always was. That's why we went through her insurance.

Q Your insurance on you, personally, is covered by your employer. You have to pay for the children's insurance, both dental and medical?

A Yes. Mine is --

Q That runs approximately $500?

A A little bit over 500 for health and dental.

(Tr. 681:7-682:1). Defendants did not object when Mr. Marsh testified that "Mr. Dodson provided me some information which was subsequently verified with regard to his expenditure for insurance, health insurance for the children." (Tr. 693:21-24). Defendants did not object when Mr. Marsh testified:

> Then I assumed that the medical insurance for Ms. Dodson's children would be some $500 a month. I think it actually ended up being an incremental cost to Mr. Dodson of 480 for health and another 50-some-odd for dental insurance, but I assumed that would have continued.
>
> I assumed that she would have continued to receive these benefits beyond the

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present time.

(Tr. 696:2-9). Defendants also did not raise an objection regarding the health insurance benefit when Plaintiffs moved to admit Mr. Marsh's expert reports. (Tr. 724:20-725:19).

Due to Defendants' failure to raise an objection to any of the testimony regarding Shannon Dodson's health insurance benefit, the issue has not been preserved for appeal. *Payton v. Union Pac. R.R. Co.*, 405 S.W.3d 1, 7 (Mo. App. E.D. 2013) ("If a party fails to raise an objection concerning an issue at trial, that issue is not preserved for appeal. An objection to evidence must be made at trial, and on appeal the party must base its claim of error on the same grounds raised in its trial objection." (internal quotations and citations omitted)). While Defendants did file a motion *in limine* on this topic, the motion only addressed a part of the argument Defendants make on appeal - it did not address Defendants' current argument regarding the period of time through which Mr. Marsh carried the anticipated loss of benefit. Further, a motion *in limine* is not alone sufficient to preserve an issue for trial. *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 353 n.4 (Mo. App. W.D. 2012) ("A ruling on a motion *in limine* is interlocutory and, without more, preserves nothing for appellate review. . . . A party must object at the time of the alleged error to preserve the issue for appellate review."). "It is well recognized that a party should not be entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court the opportunity to rule on the question." *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 267 (Mo. banc 2014). Defendants' failure

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to call attention to this alleged error regarding the future economic benefit of Shannon Dodson's health insurance waives the argument on appeal.

Even if Defendants had properly objected, the trial court properly admitted evidence of the $500 per month health insurance benefit. In order to value the loss of future benefits to Plaintiffs as the result of Shannon Dodson's death, Mr. Marsh made certain assumptions, which Defendants now mistake for speculation. Missouri courts recognize that calculating lost future earnings "[i]nevitably" involves " a degree of speculative nature," however, such speculation is not improper "when based upon the use of facts in reasonable calculations" and amounts to "a prediction based upon reasonable certainty." *Sampson v. Mo. Pac. R.R. Co.*, 560 S.W.2d 573, 589 (Mo. banc 1978). Mr. Marsh gave a thorough and detailed explanation of his method, compared it to the typical economic analysis, and testified that all of his opinions and calculations were based upon a reasonable degree of economic certainty. (Tr. 706:16-19). In fact, Mr. Marsh explained that using the "case-specific information" provided by Jason Dodson is "more accurate" than using available statistical data. (Tr. 694:7-19). "Admission or exclusion of the testimony of an economic expert regarding the value of an injured party's lost future earnings is a matter within the discretion of the trial court, and exercise of that discretion will not be interfered with unless it plainly appears that such has been abused." *Robinson*, 906 S.W.2d at 842. There was no such abuse of discretion here.

Moreover, Defendants' criticisms of the evidence of the economic value of Shannon

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Dodson's health insurance benefits go to the weight and not the admissibility of the evidence. Defendants had the opportunity to cross-examine Mr. Marsh on his assumptions and his valuation of Plaintiffs' economic loss. Defendants questioned Mr. Marsh on the source of his information about insurance, pointed out that he did not have records of the children's health benefits prior to Shannon's death, and inquired as to why Mr. Marsh carried the health benefits out beyond the time when the children would reach adulthood. (Tr. 714:12-718:14). The jury heard the Defendants' criticisms of Mr. Marsh's economic calculations and were able to take those criticisms into account in their deliberations.

Both of Defendants' arguments regarding loss of economic support fail. The trial court did not abuse its discretion in permitting Ms. Kossmeyer's testimony regarding Shannon's future career path and earnings or in admitting evidence of the value of Shannon's future health insurance benefit. Plaintiffs made a submissible case for loss of economic support.

V. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ON PLAINTIFFS' CLAIM FOR AGGRAVATING CIRCUMSTANCES DAMAGES AT THE CLOSE OF PLAINTIFFS' CASE (RESPONSE TO APPELLANTS' POINT RELIED ON V)

A. Standard of Review

Defendants' Point V challenges the trial court's denial of Defendants' motion for directed verdict at the close of Plaintiffs' case, specifically on Plaintiffs' claim for

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aggravating circumstances damages. The standard of review for the denial of a motion for directed verdict is *de novo*, "to determine whether the plaintiff has made a submissible case." *McGinnis*, 344 S.W.3d at 809. In examining whether the plaintiff made a submissible case, the appellate court is to "view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the prevailing party, and we disregard all evidence and inferences to the contrary." *Berra v. Danter*, 299 S.W.3d 690, 698 (Mo. App. E.D. 2009). While *Berra* states the standard of review for denial of a motion for directed verdict, Plaintiffs will now explain how, in fact, there is nothing for this Court to review.

B. By presenting the evidence at issue, Defendants waived their argument that the trial court should have granted their motion for directed verdict on Plaintiffs' claim for aggravating circumstances damages at the close of Plaintiffs' case.

Defendants waived any argument regarding the motion for directed verdict raised at the close of Plaintiffs' case. Missouri law is clear that "a motion for directed verdict made at the close of the plaintiff's evidence is waived when the defendant thereafter puts on evidence." *Carson Mitchell, Inc. v. Macon Beef Packers, Inc.*, 544 S.W.2d 275, 276 (Mo. App. W.D. 1976). The Missouri Supreme Court explained this legal principle as follows:

> At the close of plaintiff's evidence, Rule 72.01(a) provides defendant with the opportunity to challenge whether plaintiff has made a submissible case. If no further evidence is introduced, the case–both at trial and on appeal–is

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> determined by the evidence on the record at that point. Should the trial court overrule the motion, defendant then has the choice of putting on evidence of his or her own. If defendant introduces evidence, the state of the record at the close of plaintiff's case is waived and the case–both at trial and on appeal–is determined in accordance with all evidence admitted: plaintiff's *and* defendant's. Rule 72.01(b) allows defendant the opportunity to move for a directed verdict at the close of all evidence.

Sanders v. Ahmed, 364 S.W.3d 195, 207 (Mo. banc 2012).

Based on the foregoing, Defendants' decision to put on the very evidence that they now claim is prejudicial and irrelevant waived their ability to challenge the trial court's decision not to grant the motion for directed verdict as to Plaintiffs' claim for aggravating circumstances damages at the close of Plaintiffs' evidence.

C. The trial court properly delayed ruling on the motion for directed verdict as to Plaintiffs' claim for aggravating circumstances damages.

Defendants complain that the trial court should have granted their motion for directed verdict as to Plaintiffs' aggravating circumstances damages claim at the close of Plaintiffs' evidence. Of course, the trial court did ultimately grant Defendants' motion as to aggravating circumstances damages - after the close of all evidence. Thus, Defendants' complaint appears to be that the trial court *waited too long* to direct a verdict in favor of Defendants on Plaintiffs' claim for aggravating circumstances damages. Plaintiffs are

unaware of any similar argument succeeding on appeal in this state.

"A directed verdict is a drastic action and should be granted only where no reasonable and honest men could differ on a correct disposition of the case." *Jarrell v. Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828, 833 (Mo. App. E.D. 1984); *see also McGinnis*, 344 S.W.3d at 809 ("a directed verdict is inappropriate unless reasonable minds could *only* find in favor of the defendants"). At the time the issue was presented to the trial court, at the close of Plaintiffs' evidence, the trial court clearly expressed uncertainty as to whether Plaintiffs had made a submissible case for aggravating circumstances damages. Despite Plaintiffs' clear argument that the evidence of delay by Dr. Ferrara supported a finding of conscious disregard (Tr. 738:3-17), the trial court noted its uncertainty several times:

- "Well, I've been thinking about this, and I'm not sure that we're there. And the question for me has been am I going to submit it anyhow. I'm not sure." (Tr. 728:18-21).
- "I'm not sure that that is enough to go to the jury at this point." (Tr. 729:2-3).
- "Well, that's where I'm -- I am not convinced that it's there, and I am -- I decided that where I was going to be left was letting in your case as well and then making the final decision at that point." (Tr. 729:7-11).
- "I'm going to withhold my decision on punitives, but frankly, Mr. Graham, I'm not sure that there's enough for me." (Tr. 730:7-9).

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It is clear that the trial court (certainly a reasonable mind) was uncertain if it was appropriate to direct a verdict on aggravating circumstances damages at the close of Plaintiffs' evidence, thus, the court could not conclude that reasonable minds could not differ on the matter.

The trial court's hesitation in dismissing the aggravating circumstances damages claim was understandable, considering the evidence that Plaintiffs presented which supported the claim. As addressed *infra* at Section III of Plaintiffs' Cross-Appeal, Plaintiffs provided ample evidence of the recklessness of Defendant Dr. Ferrara, which rises to the level of intent. *See Schroeder v. Lester E. Cox Med. Ctr. Inc.*, 833 S.W.2d 411, 421 (Mo. App. S.D. 1992) ("The phraseology differs in different kinds of cases, but all depend on willful wrongdoing, *or recklessness which is the legal equivalent of willfulness*."). Plaintiffs also unquestionably demonstrated that Defendants displayed a "conscious disregard for the safety of others." *Id.* Moreover, Missouri courts have recognized that a defendant's defense at trial may be relevant to the jury in determining if punitive damages are appropriate. *See Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 73 (Mo. App. E.D. 2003) ("[A] defendant's aggressive defense at trial on either the issue of breach of duty or causation may supply, in the jurors' minds, the 'complete indifference' or 'conscious disregard' element." (quoting *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 248 (Mo. banc 2001))). Thus, the trial court properly withheld ruling Defendants' motion for directed verdict at the close of Plaintiffs' evidence. Viewing the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to Plaintiffs - as this Court must - it is clear that the trial court properly

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withheld its ruling on the claim for aggravating circumstances damages until after the close of all of the evidence. Of course, Plaintiffs disagree with the ultimate conclusion of the trial court to grant the directed verdict at the close of all of the evidence, *see* Argument of Cross-Appellants Section III, but the trial court's decision to deny Defendants' Motion for Directed Verdict at the close of Plaintiffs' case on the issue of aggravating circumstances damages was proper.

D. Defendants were not prejudiced by the delayed ruling.

The impetus for Defendants' challenge to the trial court's delayed ruling is the supposed prejudice they suffered as a result. Defendants claim that if the trial court had granted their motion for directed verdict on the aggravating circumstances damages claim at the close of Plaintiffs' evidence, they would not have introduced evidence of other arterial dissections that Defendant Dr. Ferrara was aware of or involved in. Defendants claim that this evidence was "irrelevant and prejudicial," "had no relevance to a negligence claim" and "was relevant only to show a basis for Dr. Ferrara's allegedly improper delay in sending Shannon Dodson to surgery and rebut the claim of willful, wanton or malicious misconduct." (Brief at 59-60). Dr. Ferrara's testimony can hardly be called prejudicial. He testified that as of February 2011, he had performed approximately 8000-8500 diagnostic cardiac catheterizations and only had one other dissection. (Tr. 919:11-21; 921:4-922:20). He testified at length about that dissection and about how the patient, who survived, went to surgery approximately one hour and fifteen minutes after the dissection occurred. (Tr. 921:4-

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922:20).

Furthermore the allegation of improper delay in sending Shannon to surgery was also a part of Plaintiffs' medical negligence claim, as clearly shown by Jury Instruction No. 8. One of the four elements of this verdict director instruction was:

> Second, defendants Robert P. Ferrara, M.D. and Mercy Clinic Heart and Vascular, LLC either:
>
> > proceeded with a cardiac catheterization on Shannon Dodson, or failed to stent in a timely manner the dissected left main coronary artery of Shannon Dodson, or
> >
> > failed to place a wire in a timely manner to maintain flow in the dissected left main coronary artery of Shannon Dodson, or
> >
> > *failed to call for a surgeon in a timely manner to assess Shannon Dodson for coronary artery bypass surgery . . . .*

(LF382) (emphasis added). Clearly, any evidence offered by Defendants to rebut allegations that Dr. Ferrara improperly delayed sending Shannon to surgery was, in fact, relevant to the defense of Plaintiffs' medical negligence claim. Defendants' argument that they were prejudiced by the trial court's decision, by being forced to introduce evidence that was irrelevant to the negligence-only claim, fails. Defendants have not alleged any other prejudice.

Defendants' Point Relied On V fails.

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ARGUMENT OF CROSS-APPELLANTS

I. THE TRIAL COURT ERRED IN APPLYING THE § 538.210(1) RSMo. CAP ON NONECONOMIC DAMAGES BECAUSE THE CAP HAS BEEN DECLARED UNCONSTITUTIONAL, IN THAT IT VIOLATES THE RIGHT TO TRIAL BY JURY, WHICH ATTACHES TO WRONGFUL DEATH CLAIMS.

Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633 (Mo. banc 2012)

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

James v. Christy, 18 Mo. 162 (Mo. 1853)

Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752, 771 (Mo. banc 2010)

(Wolff, J., concurring)

II. THE TRIAL COURT ERRED IN APPLYING THE § 538.210(1) RSMo. CAP ON NONECONOMIC DAMAGES BECAUSE THE STATUTE IS UNCONSTITUTIONAL AS APPLIED, IN THAT CAPPING DAMAGES FOR WRONGFUL DEATH MEDICAL MALPRACTICE CASES BUT NOT PERSONAL INJURY MEDICAL MALPRACTICE CASES VIOLATES THE EQUAL PROTECTION CLAUSE.

U.S. Const. amend. XIV

Mo. Const. art. I, § 2

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006)

Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752, 781 (Mo. banc 2010) (Teitelman, J., concurring)

III. THE TRIAL COURT ERRED IN APPLYING THE § 538.210(1) RSMo. CAP ON NONECONOMIC DAMAGES BECAUSE THE STATUTE IS UNCONSTITUTIONAL IN THAT THE CAP VIOLATES THE SEPARATION OF POWERS.

Mo. Const. art. II, § 1

Sanders v. Ahmed, 364 S.W.3d 195, 214 (Mo. banc 2012) (Draper, J., dissenting)

Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997)

Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989)

IV. THE TRIAL COURT ERRED IN DIRECTING A VERDICT ON PLAINTIFFS' AGGRAVATING CIRCUMSTANCES DAMAGES CLAIM BECAUSE PLAINTIFFS MADE A SUBMISSIBLE CASE FOR AGGRAVATING CIRCUMSTANCES DAMAGES, IN THAT THE EVIDENCE ESTABLISHED THAT DEFENDANT DR. FERRARA CONSCIOUSLY DISREGARDED THE SAFETY OF SHANNON DODSON AND KNEW OR SHOULD HAVE KNOWN THAT THERE WAS A HIGH DEGREE OF PROBABILITY THAT HIS ACTIONS WOULD RESULT IN INJURY.

Schroeder v. Lester E. Cox Med. Ctr., Inc., 833 S.W.2d 411 (Mo. App. S.D. 1992).

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Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Prods., Inc., 700 S.W.2d 426 (Mo. banc 1985)

Coon v. Am. Compressed Steel, Inc., 207 S.W.3d 629 (Mo. App. W.D. 2006)

Kaplan v. U.S. Bank, N.A., 166 S.W.3d 60 (Mo. App. E.D. 2003)

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I. THE TRIAL COURT ERRED IN APPLYING THE § 538.210(1) RSMo. CAP ON NONECONOMIC DAMAGES BECAUSE THE CAP HAS BEEN DECLARED UNCONSTITUTIONAL, IN THAT IT VIOLATES THE RIGHT TO TRIAL BY JURY, WHICH ATTACHES TO WRONGFUL DEATH CLAIMS.

A. Standard of Review

Plaintiffs' first point on cross-appeal involves the trial court's application of § 538.210(1) RSMo., the statutory cap on noneconomic damages. "The interpretation and application of a statute to a given set of facts is a question of law." *Comens v. SSM St. Charles Clinic Medical Group, Inc.*, 335 S.W.3d 76, 80 (Mo. App. E.D. 2011). Thus, the appropriate standard of review "is *de novo*, giving no deference to the trial court's judgment." *Id.*

B. Post-trial Proceedings.

At the conclusion of an eight day jury trial, on August 29, 2013, the jury entered a verdict for Plaintiffs for the total sum of $10,831,155.00, which was allocated $1,831,155.00 in past and future economic damages, and $9,000,000.00 in past and future noneconomic damages. After the trial court entered judgment on the jury verdict, Defendants filed a Motion to Apply Damage Caps Under Chapter 538 of the Missouri Revised Statutes (LF393-LF396) and a Motion to Amend Judgment (LF413-LF416). Plaintiffs filed a Post-Trial Motion Requesting Court Not to Reduce, Pursuant to § 538.210 RSMo., the Noneconomic

Damages Awarded by the Jury as § 538.210 Has Been Held Unconstitutional (LF417-LF421) and supporting Memorandum (LF422-LF442). The trial court held three separate hearings on post-trial motions. (LF11-LF12). The court issued an amended judgment on December 16, 2013 (LF773-LF776; A15-A18), and a Second Amended Judgment and Order (LF789-LF796) on December 23, 2013. In the Second Amended Judgment and Order, the Court explained:

> The Court acknowledges that the appearance of inherent unfairness in the disparity between the analysis of medical negligence that results in injury and medical negligence that results in death. The Court notes with approval Judge Michael Wolff's concurring opinion in *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 779-780 (Mo. banc 2010) that damage caps "arbitrarily reduce the amount of a jury's award . . . without a reference to the evidence in the particular case . . ." However, the Court, under the *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012) ruling, is constrained to conclude that wrongful death actions did not exist at common law and therefore did not exist at the time of [sic] the first Missouri Constitution was adopted in 1820. Accordingly, the caps on non-economic damages must still apply to wrongful death actions, despite *Watts* holding that Section 538.210 R.S.Mo. is unconstitutional as applied to medical negligence cases. Although *Watts* clearly overruled *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907

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(Mo. banc 1992), the Court was conspicuously silent on the effect of its decision on *Sanders*.

It will be up to the highest Court in this State to reconcile its holdings in *Watts* and *Sanders* regarding statutory caps in Section 538.210 RSMo. Trial courts of this state are obligated to follow existing precedent from Missouri's appellate courts. But for *Sanders*, the Court would uphold the wisdom of the jury in its assessment of damages. However, in light of *Sanders*, the Jury verdict rendered in this cause must be reduced and remitted as follows:

For past economic damages including		
past medical damages	$	305,737.00
For past and future noneconomic damages	$	350,000.00
For future economic damages	$	1,525,418.00
TOTAL DAMAGES	$	2,181,155.00

(LF791-LF792).

This decision by the trial court is erroneous because it was based on a flawed interpretation of *Watts* and *Sanders*.

C. The trial court erred in applying the noneconomic cap in § 538.210(1) RSMo., as the cap is invalid after *Watts v. Lester E. Cox Medical Centers*.

The statute the trial court cited in reducing the jury's award for past and future noneconomic damages, § 538.210(1), was held unconstitutional in *Watts v. Lester E. Cox*

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Medical Centers, 376 S.W.3d 633 (Mo. banc 2012). Thus, the trial court lacked the authority to impose the damage cap. Further, as Plaintiffs will explain, *Sanders* does not decide the issue before this Court for several reasons.

In *Watts*, the mother of a child born with disabling brain injuries sued the child's healthcare providers for medical malpractice, and the jury awarded $1.45 million in noneconomic damages. *Id.* at 635. The trial court entered a judgment reducing the noneconomic damages award from $1.45 million to $350,000.00, pursuant to the cap found at § 538.210(1) RSMo. 2005. *Id.* The plaintiff appealed, alleging the substantial reduction in noneconomic damages violated her constitutionally protected right to trial by jury. *Id.*

The Missouri Supreme Court's analysis of the constitutionality of § 538.210(1) in *Watts* depended on article I, section 22(a) of the Missouri Constitution, which provides: "the right of trial by jury as heretofore enjoyed shall remain inviolate." *Id.* at 637. The court's inquiry was two-fold. First, the court reasoned that "heretofore enjoyed means that citizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted in 1820." *Id.* at 638. Thus, "if Missouri common law entitled a plaintiff to a jury trial on the issue of non-economic damages in a medical negligence action in 1820, Watts has a state constitutional right to a jury trial on her claim for damages for medical malpractice." *Id.* Second, the Court had to determine if the cap abridges the common law right to a jury determination of damages, such that the right to trial by jury does not remain inviolate. *Id.* at 638.

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With respect to the first inquiry, the Missouri Supreme Court reasoned that "civil actions for damages resulting from personal wrongs have been tried by juries since 1820," thus, Watts' action for medical negligence was the same type of case that was recognized at common law when the constitution was adopted in 1820. *Id.* at 638. Regarding the scope of Watts' right to a jury trial, the Court concluded:

> [H]istory demonstrates that statutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by jury as heretofore enjoyed shall remain inviolate. The right to trial by jury "heretofore enjoyed" was not subject to legislative limits on damages.

Id. at 639 (citing *Klotz*, 311 S.W.3d at 774 (Wolff, J., concurring)).

The Court then considered whether the right to trial by jury "remain[ed] inviolate" after application of the statutory cap on economic damages. Because the amount of noneconomic damages is a fact that must be determined by the jury, and is subject to the protections of the article I, section 22(a) right to trial by jury, the Court ultimately concluded:

> Once the right to a trial by jury attaches, as it does in this case, the plaintiff has the full benefit of that right <u>free from the reach of hostile legislation</u>. Section 538.210 imposes a cap on the jury's award of non-economic damages that operates wholly independent of the facts of the case. As such, <u>Section 538.210 directly curtails the jury's determination of damages and, as a result,</u>

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> <u>necessarily infringes on the right to trial by jury</u> when applied to a cause of action to which the right to jury trial attaches at common law. Because the common law did not provide for legislative limits on the jury's assessment of civil damages, Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case. Statutory damage caps were not permissible in 1820 and, pursuant to the plain language of article I, section 22(a), remain impermissible today.

Id. at 640 (emphasis added).

Thus, the Missouri Supreme Court has declared that § 538.210(1) violates the right to trial by jury and, as such, is unconstitutional and invalid. As a result, there was no cap for the trial court to apply.[4] The trial court erred in applying an invalid statute to reduce the

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[4] By imposing the statute in the context of the Dodsons' wrongful death claim, the trial court effectively severed the invalid application of the statute - for personal injury cases - from actions for "death." However, "[l]egislative intent governs whether a statute is severable." *Hodges v. Southeast Mo. Hosp. Ass'n*, 963 S.W.2d 354, 358 (Mo. App. W.D. 1998). It is unlikely that the legislature would have intended for noneconomic damages to be capped only in wrongful death medical negligence cases, particularly in light of the impact of doing so, discussed *infra*, and the fact that amendments to the wrongful death statute over the years have expanded recovery. *See, e.g.*, *O'Grady v. Brown*, 654 S.W.2d 904, 907 (Mo. banc 1983) (discussing the amended wrongful death statute). Moreover, if the legislature

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noneconomic damages awarded by the jury.

D. Application of *Watts* is appropriate in this case.

The court below determined that wrongful death claims, like the claim at issue in this case, are not provided the protection of *Watts* because such claims did not exist at common law. This finding is in error because it is contrary to Missouri case law establishing that statutory actions not in existence prior to 1820 are still entitled to the protections of article I, section 22(a)'s right to trial by jury. Further, despite several pronouncements to the contrary, there is compelling evidence that a wrongful death claim did, in fact, exist at common law.

1. *Diehl* establishes the test for determining when the right to trial by jury attaches.

In 2003, the Missouri Supreme Court decided *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003). While *Diehl* does not involve negligence by a health care provider or wrongful death, its application of article I, section 22(a) provides a simple and straightforward test for determining whether the right to trial by jury attaches.

Diehl involved a suit against an employer under the Missouri Human Rights Act, § 213.055 RSMo., which prohibits certain discrimination and retaliatory actions for filing a discrimination complaint with the Missouri Commission on Human Rights. 95 S.W.3d at 84.

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wanted caps on noneconomic damages only in wrongful death cases, it would have attempted to do so as part of the wrongful death statute instead of the medical malpractice statute.

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After receiving her right to sue letter, the plaintiff moved for a jury trial, which the trial court denied. *Id.* On appeal, the Missouri Supreme Court unanimously determined that a cause of action that was not in existence prior to 1820 was still entitled to the protections of article I, section 22(a).

The *Diehl* court examined the historical test Missouri courts use in determining the reach of article I, section 22(a)'s right to trial by jury, explaining that the provision is "intended to guarantee a right, not to restrict a right." *Id.* at 84-87. After examining the jury trial provisions contained within the territorial laws of the Louisiana Territory and Missouri, which allowed litigants to agree to jury trials in "all civil cases of the value of one hundred dollars," the Court stated: "The simple analysis is whether the action is a 'civil action' for damages. If so, the jury trial is to 'remain inviolate.'" *Id.* at 85. The Court then went on to examine two cases that ultimately guided the *Diehl* court's conclusion: *Briggs v. St. Louis & S.F. Ry. Co.*, 20 S.W. 32 (Mo. 1892), and *Bates v. Comstock Realty Co.*, 267 S.W. 641 (Mo. banc 1924).

The *Diehl* court noted that in *Briggs*, the Court held that the right to a jury attaches "'in all cases in which an issue of fact, in an action for the recovery of money only, is involved, whether the right or liability is one at common law or is one created by statute.'" *Diehl*, 95 S.W.3d at 86 (quoting *Briggs*, 20 S.W. at 33). The Court then noted that *Bates* held that proceedings involving a special tax bill unknown to common law courts were allowed jury trials because they were analogous to actions tried by juries at common law. *Id.* at 86

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(citing *Bates*, 267 S.W. at 644). Based on this precedent, the *Diehl* court concluded that the right to a jury trial attached to the plaintiff's Missouri Human Rights Act claim because it was a "civil action for damages for a personal wrong" and, because of its similarities to a common law action for trespass, "is the kind of case triable by juries from the inception of the state's original constitution." *Id.* at 92.

Applying the precedent established by the Supreme Court in *Diehl*, it is clear that this wrongful death suit is deserving of the full protection of the constitutional right to a trial by jury. First, an action for wrongful death seeking money damages is a civil action for damages. Second, both fatal and non-fatal medical malpractice claims are based on a healthcare provider's negligence and plaintiffs in both types of malpractice suits must show the same elements in order to hold a healthcare provider liable. *See Super v. White*, 18 S.W.3d 511, 515 (Mo. App. W.D. 2000) ("Hence, for the appellants to succeed on their wrongful death actions against the respondents, based on their claims of medical malpractice, they were required to show the requisite elements of a medical malpractice claim."). Since *Diehl* found that a statutorily-created cause of action authorizing a remedy for discrimination was analogous to Missouri forms of action from the 1800s, medical malpractice wrongful death claims are sufficiently analogous to a common law action for physician negligence.

Under *Diehl*, the right to trial by jury clearly attaches to wrongful death medical malpractice claims and the reasoning of *Watts* applies.

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E. *Sanders v. Ahmed* does not control.

In applying the noneconomic damages cap in § 538.210(1), the trial court noted that it was bound by the Supreme Court opinion in *Sanders*, 364 S.W.3d 195. However, *Sanders* does not control for at least four (4) reasons. First, that case involved a different, prior version of § 538.210(1). Second, *Sanders* was decided prior to *Watts*, which declared the present § 538.210(1) cap unconstitutional. Third, *Sanders* relied on the now-discarded assertion from *Adams* that as long as a jury issues a verdict on paper for noneconomic damages - even if the court immediately overrules it - the constitutional right to jury trial is not offended. And, fourth, any analytical value of *Sanders* is undercut because wrongful death cases were tried at common law.

1. Different versions of the statute.

The Dodson family's cause of action arose after August 28, 2005, the effective date of HB 393, which included § 538.210(1). *See Klotz*, 311 S.W.3d at 760. In comparison, the wrongful death plaintiffs' cause of action in *Sanders* accrued in 2003, and the *Sanders* court noted specifically: "Section 538.210 was amended in 2005, after the time in which the purported negligence occurred. Section 538.210, RSMo 2000, the statute then in effect, governs unless otherwise noted." 364 S.W.3d at 200 n.1.

The differing statutory enactments is not an insignificant fact, as the two statutes are fundamentally different. As of August 28, 2005, only one "hard" cap of $350,000.00 applies; prior to this time, a cap was applied "per occurrence" and "from any one defendant."

§ 538.210, RSMo. 2000, *repealed by* HB 393. In other words, depending on the facts of the case, multiple caps could apply. Additionally, the prior version of the statute allowed the cap to rise with the Consumer Price Index; this adjustment was eliminated in 2005. An example of the significance of this change is a comparison between the stipulated cap in *Sanders*, $632,603.82 in September 2010, and the $350,000.00 cap imposed by the trial court in this case. *Sanders*, 364 S.W.3d at 201 n.3; LF792. It would be remarkable to expect the same court that found § 538.210(1) to be unconstitutional in 2012 (in *Watts*) would find it acceptable that a plaintiff in September 2013 would receive a minimum of $275,000.00 less than the same plaintiff in 2010. The elimination of multiple caps makes the application of the 2005 cap even more egregious here.

In short, any speculation on how the Supreme Court would rule on a statute that wasn't before it in *Sanders* is insufficient to support application of the cap in this case.

2. *Watts* is more recent than *Sanders* and discarded principles relied on by the *Sanders* court.

Sanders v. Ahmed was handed down on April 3, 2012. *Watts* was issued July 31, 2012. Although separated by less than four months, the opinions could hardly be more different. While *Sanders* relied on *Adams v. Childrens Mercy Hosp.* to support its decision, *Watts* specifically jettisoned *Adams*. 376 S.W.3d at 645-646. *Sanders* relied on the *Adams* language that "[i]f the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery in those causes of action."

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Sanders, 364 S.W.3d at 203 (quoting *Adams*, 832 S.W.2d at 907). By contrast, *Watts* disavowed this language. 376 S.W.3d at 643.

Finally, *Watts'* formulation of the right to trial by jury was considered under the test of the unanimous Supreme Court decision in *Diehl*, i.e., if the lawsuit is a "civil action for damages, then the right to a jury trial attaches and must 'remain inviolate.'" *Watts*, 376 S.W.3d at 642 (quoting *Diehl*, 95 S.W.3d at 84); *see also Sanders*, 364 S.W.3d at 214 (Draper, J., dissenting) ("Because the constitutional right to a civil jury trial attaches in this case, statutory limits imposed on the jury's determination of damages directly curtails one of the most significant constitutional roles performed by the jury.") By contrast, *Sanders* did not even discuss the *Diehl* formulation, and instead followed *Adams*. 364 S.W.3d at 203.

3. Wrongful death cases *were* tried at common law.

Finally, although *Sanders* repeated that wrongful death cases have no common law antecedent, appellate courts of Missouri have failed to recognize that wrongful death actions, in some form, were tried at common law.

The claim that wrongful death was not a common law action descends from Lord Ellenborough's 1808 pronouncement in the English case of *Baker v. Bolton*, (1808) 1 Camp. 493, 170 Eng. Rep. 1033: "In a Civil court, the death of a human being could not be complained of as an injury." *Baker* was widely accepted in American courts; however, Missouri went the other way in *James v. Christy*, 18 Mo. 162 (Mo. 1853), decided two years before the enactment of Missouri's wrongful death statute. In *James*, a father recovered

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damages for the loss of services of his deceased fifteen-year-old son. *Id.* at 164.[5]

The dissenting opinion of Judge John Bardgett in *State ex rel. Kansas City Stock Yards Co. of Maine v. Clark*, 536 S.W.2d 142 (Mo. 1976) provides a useful description of the law at the time *James* was decided:

> Now I cite the *James v. Christy* case in order to show that the supreme court of this state was cognizant of the loss to a parent occasioned by the death of his minor son and . . . the father was in 1853 allowed to recover for at least the same items of loss that the subsequently enacted wrongful death statute allowed. And so, *James v. Christy*, although not called a wrongful death action, was an action by which the father could recover what is now compensatory wrongful death damages. Additionally, it might be noted that the damages to the father in *James v. Christy* included loss of society and comfort and there was no limitation on the amount. Although courts of this

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[5] Importantly the first medical malpractice case tried in this country actually arose out the the death of a patient. In *Cross v. Guthery*, 2 Root 90, 1794 WL 198 (Conn. Super. 1794), a husband recovered for the death of his wife during a mastectomy. *Cross* has been described as the "first reported American medical-malpractice case." *McCullum v. Tepe*, 693 F.3d 696, 702 (6th Cir. 2012). It is inexplicable that courts widely conclude that wrongful death did not exist at common law when the earliest medical malpractice case was, in fact, for death.

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> and other states have repetitively said there was no action for wrongful death prior to the enactment of death damage statutes, the fact is that in Missouri there was a cause of action available, at least to the parent when the minor child was negligently killed, for loss of services during minority and the other damages spoken of in *James v. Christy*.

Id. at 151. Finally, in words that make as much sense today as they did in 1976 and in 1853, the judge stated:

> What is also rather striking about the opinion in *James v. Christy*, . . . is that it simply states the situation as it existed in and prior to 1853. In other words, here were judges of this court who had practiced law in Missouri and by their experience knew what was going on at that time simply reciting that this type of suit was then being entertained in courts of this state. I can hardly believe that the judges of this court would have acknowledged the existence of such a cause of action unless it did actually exist.

Id.

Plaintiffs readily acknowledge that the weight of authority is against them on this one sub-point. *Sanders*, 364 S.W.3d at 203, is but one of numerous cases to declare that wrongful death actions did not exist at common law. Still, merely repeating the same mantra while overlooking *James v. Christy* does not make the mantra true. As the Supreme Court said in *Watts*, "'the adherence to precedent is not absolute, and the passage of time and the

experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.'" 376 S.W.3d at 644 (*quoting Med. Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 335 (Mo. banc 2005)). Since Judge Bardgett's thorough discussion of the matter in his dissent, Missouri courts have not considered the impact of *James v. Christy* on the *Baker v. Bolton* position.[6] Based on *James*, and Judge Bardgett's analysis thereof, this Court should conclude that wrongful death is not merely a statutory cause of action. To the contrary, the cause of action existed at common law and, thus, the reasoning of *Watts* applies to preclude constitutional application of § 538.210(1)'s cap on noneconomic damages.

In sum, the trial court erroneously applied an invalid damage cap, and in so doing deprived Plaintiffs of their constitutional right to trial by jury.

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[6] For an insightful discussion of the interplay of *Baker v. Bolton* and *James v. Christy* in Missouri and the need to reevaluate the view that wrongful death did not exist at common law, see Daniel J. Sheffner, *Wrongful Death's Common Law Antecedents in Missouri*, 70 J. Mo. Bar 194 (2014).

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II. THE TRIAL COURT ERRED IN APPLYING THE § 538.210(1) RSMo. CAP ON NONECONOMIC DAMAGES BECAUSE THE STATUTE IS UNCONSTITUTIONAL AS APPLIED, IN THAT CAPPING DAMAGES FOR WRONGFUL DEATH MEDICAL MALPRACTICE CASES BUT NOT PERSONAL INJURY MEDICAL MALPRACTICE CASES VIOLATES THE EQUAL PROTECTION CLAUSE.

A. Standard of Review

In addition to § 538.210(1) violating Plaintiffs' right to trial by jury, application of the statute in this case is unconstitutional as violative of the equal protection clause. Plaintiffs' "constitutional challenge to the validity of section 538.210 is subject to *de novo* review." *Watts*, 376 S.W.3d at 637 (citing *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010)).

B. The trial court's application of the § 538.210(1) cap on noneconomic damages violates the equal protection clauses of the Missouri and United States Constitutions.

Under the trial court's interpretation of Missouri law, the Missouri Supreme Court has rewritten § 538.210(1) by implication such that it only applies to causes of action that did not exist when the Missouri Constitution was created in 1820. If that is now the law in Missouri, then the law violates the equal protection clauses of the Missouri and United States Constitutions. Simply put, there is no acceptable basis for limiting a plaintiff's recovery

when a patient dies, while at the same time allowing for unlimited recovery when the patient survives.

The Fourteenth Amendment to the U.S. Constitution mandates that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article I, section 2 of the Missouri Constitution similarly guarantees equal protection of the law: "that all persons are created equal and are entitled to equal rights and opportunity under the law." This equal protection guarantee ensures that the State cannot treat similarly situated persons differently without adequate justification. *Klotz*, 311 S.W.3d at 782 (Teitelman, J., concurring).

Missouri's equal protection guarantee may be interpreted even more expansively in this case than the comparable federal clause. *See Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006) ("[P]rovisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions."). The Missouri Supreme Court has consistently construed Missouri provisions more broadly than their federal counterparts, particularly where federal precedents inappropriately "dilute" equal protection and substantive due process rights. *See State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978); *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. banc 2006).

Equal protection analysis focuses on classifications of persons or groups. *Doe*, 194 S.W.3d at 845. Not all classifications of individuals or groups are invalid. A law may

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properly treat different groups differently, but it may not treat similarly situated persons differently without adequate justification. *Id.* Thus, the two required inquiries are: 1) whether there is a class of people who are "similarly situated" to a class of people who are treated differently, and 2) whether that differentiation is adequately justified.

The similarly situated inquiry focuses on whether the plaintiffs are similarly situated to another group for purposes of the challenged government action. *Klinger v. Dep't of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994). "To be 'similarly situated,' groups need not be identical in makeup, they need only share commonalities that merit similar treatment." *Betts v. McCaughtry*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993); *Klinger*, 31 F.3d at 736-37 (McMillian, J., dissenting) (*quoting Betts*). In the scenario created by the trial court's application of *Watts*, whereby § 538.210(1) is still valid in wrongful death medical malpractice cases but not in medical malpractice injury cases, wrongful death plaintiffs are similarly situated to, but treated differently from, other medical malpractice plaintiffs. Members of both classes are persons who have been harmed by the negligence of a health care provider in Missouri, and have prevailed in a malpractice action. There is a small distinction in the nature of the injury, but a wrongful death case in Missouri includes damages suffered by the decedent while alive, so even that distinction is minimal. The *Klinger* test asks whether the two classes are similarly situated for the purpose of the government action, and in this case they clearly are. Section 538.210(1), RSMo. 2005 was intended by the legislature to apply to both classes equally - and in fact it did for many years.

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From the standpoint of the courts, both classes involve prevailing plaintiffs, based on similar wrongs. Prevailing wrongful death plaintiffs whose cases are based on the negligence of health care providers are similarly situated to prevailing personal injury plaintiffs whose lawsuits were based on the negligence of health care providers.

Regarding the second inquiry, whether adequate justification exists for treating groups differently depends on the nature of the distinction made. *Doe*, 194 S.W.3d at 845. "If the law disadvantages a suspect class or affects a fundamental right, a court must apply strict scrutiny to determine whether the statute is necessary to accomplish a compelling state interest and whether the chosen method is narrowly tailored to accomplish that purpose." *Id.* (internal quotations and citations omitted). If, however, no fundamental right is infringed, equal protection claims are analyzed under a rational basis test. To satisfy rational-basis review, legislation must be "rationally related to a legitimate governmental purpose." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Rational-basis review "does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws, but it does guarantee that those classifications will not be based on impermissible criteria or arbitrarily used to burden a group of individuals." *Tyler v. Mitchell*, 853 S.W.2d 338, 341 (Mo. App. W.D. 1993).

Thus, even under rational-basis review, the classification must be based upon some real difference, bearing a reasonable and just relation to the act with respect to which the classification is proposed. *State v. Ewing*, 518 S.W.2d 643, 646 (Mo. banc 1975). Arbitrary

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and irrational discrimination violates equal protection under even rational basis review. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S.71, 83 (1988).

In his concurring opinion in *Klotz*, Judge Teitelman applied the strict scrutiny standard to review § 538.210(1) under the equal protection clause, because "the right to a trial by jury is a fundamental constitutional guarantee in the Missouri Constitution's bill of rights." *Klotz*, 311 S.W.3d at 782 (Teitelman, J., concurring). As established by *Watts*, application of a cap on noneconomic damages infringes on the right to trial by jury, a fundamental right. Heightened scrutiny review should apply here.

The Missouri Supreme Court in *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. banc 1992), also faced with an equal protection challenge to the damage cap, did not find that the statute infringed on a fundamental right, and therefore heightened scrutiny review was not required. The reason, however, was that *Adams* concluded that § 538.210 did not violate the plaintiffs' constitutional right to trial by jury or right to open courts under Mo. Const. art. I, § 14. *Adams*, 832 S.W.2d at 903. Plaintiffs submit that in light of *Watts*' holding that § 538.210 *does* violate the right to trial by jury, Judge Teitelman's opinion was correct in *Klotz* that strict scrutiny review is mandated.

Under strict scrutiny, "a governmental intrusion must be justified by a compelling state interest and must be narrowly drawn to express the compelling state interest at stake." *In re Care & Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. banc 2003). There is no compelling state interest in capping noneconomic damages for patients killed by medical

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negligence but not those who are injured by medical negligence. Moreover, the same reasons discussed below as to why there is no rational basis for the law apply more substantially under strict scrutiny.

Here, even if this Court applies the deferential rational basis review, § 538.210(1) cannot stand. The relevant question is not whether there was a legitimate government purpose for the cap on noneconomic damages in the first place.[7] Instead, the relevant inquiry is whether there is a legitimate government purpose for applying a cap on noneconomic damages in wrongful death medical negligence cases, but not in personal injury medical negligence cases. When examined in this light, there can be no legitimate government purpose for the distinction between classes because the distinction did not exist when the statute was enacted. *See* § 538.210(1), RSMo. 2005 ("In any action against a health care provider for damages for *personal injury or death* . . . ." (emphasis added)). The legislature

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[7] Historically, defenders of medical negligence damage caps have argued that they are a necessary response to a "crisis" in the tort and insurance liability system. Although the Missouri Supreme Court has not directly addressed whether this is a legitimate government crisis, Judge Wolff seemed to call the legitimacy into question in his concurring opinion in *Klotz* when he noted that the number of malpractice claims had reduced since 2005. 311 S.W.3d at 773 ("I take the defendant doctors' point . . . that the legislature considered malpractice litigation to be a crisis, but it seems a rather slow-moving crisis, more a trickle than a flood.").

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never demonstrated an intent to adopt the dichotomy now at issue.

There is no rational basis for applying a damage cap to medical malpractice cases that result in death, while applying no cap to medical malpractice cases in which the plaintiff survives. To the contrary, it is wholly irrational. If the trial court's ruling here were upheld, negligent health care providers would benefit economically from the deaths of their patients. There is absolutely no logic to "rewarding" health care providers whose patients do not survive by protecting them with a damage cap, while providers who are initially negligent but then save their patients face unlimited liability. If there could be a rational basis for any distinction, it would be in the other direction. The legislature would not have knowingly passed a law under which wrongful death claims are capped but medical malpractice claims are not. To the extent that *Sanders* and *Watts* created this scenario, the scenario created is arbitrary and irrational and, thus, violative of the equal protection clause.

If § 538.210(1) still exists to cap damages in wrongful death cases based on medical negligence only, then it creates an impermissible distinction between classes. The trial court's application of the damage cap in this case was in contravention of the equal protection clause of the U.S. Constitution, as well as the expanded equal protection guarantee of the Missouri Constitution.

Courts in other states have found equal protection violations when assessing malpractice damage caps. The Florida Supreme Court recently struck down that state's statutory cap on noneconomic damages in wrongful death cases based on medical

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malpractice, finding that the cap "has the effect of saving a modest amount for many by imposing devastating costs on a few," namely "those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction simply based on the existence of the cap." *Estate of McCall v. United States*, 134 So.3d 894, 903 (Fla. 2014). The court concluded: "to reduce damages in this fashion is not only arbitrary, but irrational, and we conclude that it offends the fundamental notion of equal justice under the law." *Id.* The court also went on to discuss the purpose of the legislation - a supposed medical malpractice crisis in the state - and concluded:

> At the present time, the cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members. Moreover, it has never been demonstrated that there was a proper predicate for imposing the burden of supporting the Florida legislative scheme upon the shoulders of the persons and families who have been the most severely injured and died as a result of medical negligence. Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications. Accordingly, and for each of these reasons, the cap on wrongful death noneconomic damages in medical malpractice actions does not pass constitutional muster.

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Id. at 914-15. Likewise here, the Dodsons are effectively punished in the distribution of damages by having a larger family. Had there been only one survivor of Shannon Dodson, he or she would have received the full amount of the cap without division. Since Shannon left a husband and three children, an unconscionably low cap is divided four ways, guaranteeing that none of her survivors will be fully compensated for their losses.

One of the cases cited in *Estate of McCall* is also relevant here. In *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997), the Illinois Supreme Court determined that a cap on noneconomic damages in negligence and product liability actions violated the special legislation clause of the Illinois Constitution, which "is judged under the same standards applicable to an equal protection challenge." *Id.* at 1070. The plaintiffs in *Best* argued that the $500,000 cap on noneconomic damages impermissibly "penalizes the most severely injured individuals" because "for individuals whose injuries are minor or moderate, the limit will rarely, if ever, be implicated," while plaintiffs with severe injuries are more likely to receive an award in excess of $500,000 for pain and suffering, disfigurement and other noneconomic damages. *Id.* at 1069. Applying the rational basis standard of review, the *Best* court held that for a plaintiff who will suffer permanent pain and disability, the statute "arbitrarily and automatically reduces the jury's award for a lifetime of pain and disability, without regard to whether or not the verdict, before reduction, was reasonable and fair." *Id.* at 1075. Further, the statute confers a benefit on a tortfeasor who causes significant injuries because he pays only a portion of the assessed compensatory damages under the statutory

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cap. *Id.* Therefore, the *Best* court determined that "the statute discriminates between slightly and severely injured plaintiffs, and also between tortfeasors who cause severe and moderate or minor injuries." *Id.*

As in *Estate of McCall* and *Best*, the practice of applying the § 538.210(1) cap on noneconomic damages only to wrongful death medical malpractice cases has the effect of imposing devastating costs on families who suffer the unimaginable - loss of a loved one due to the negligence of a health care worker. Had the family member survived, the plaintiffs' noneconomic damages would not be subject to a cap. This distinction is arbitrary and irrational and does not pass constitutional muster.

Plaintiffs are not aware of any cases addressing the constitutionality of a cap on medical malpractice damages that applies only to wrongful death cases and not personal injury cases. However, in *McGuire v. C & L Restaurant Inc.*, 346 N.W.2d 605 (Minn. 1984), the Supreme Court of Minnesota addressed a comparable "anomalous situation" whereby a statutory damages cap applied to recoveries against vendors of intoxicating liquor but not against vendors of 3.2 beer. *Id.* at 611. Plaintiff, who was severely injured by a motorist who was over-served intoxicating liquor, obtained a large damage award from the jury but afterward the trial court imposed the damage cap. Plaintiff challenged the cap on equal protection grounds. The Minnesota Supreme Court, after pointing out that abusers of 3.2 beer could cause devastating injuries just as much as those abusing intoxicating liquor, found that the legislature's classification was "neither genuine nor relevant to the purpose of the

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law." 346 N.W.2d at 612. The court also stated:

> Moreover, as the present case graphically illustrates, severely injured victims receive only limited compensation for their injuries, while those less severely injured may gain full recovery in damages. This incongruous result conflicts with the legislature's policy determination that the liquor industry should bear the cost of injuries caused by the consumption of intoxicating liquor when there have been illegal sales.

Id. at 613.

Like in *McGuire*, a court-created scheme whereby a cap on medical malpractice noneconomic damages applies when a patient dies as a result of physician's malpractice but does not apply when the patient lives, is not genuine or relevant to the purpose of the law. The application of the cap in this case unconstitutionally deprived Plaintiffs of equal protection of the laws.

C. Plaintiffs timely raised their Constitutional objections.

In the court below, Defendants argued that Plaintiffs had failed to raise the constitutionality of the damage cap at the earliest opportunity, citing *Willits v. Peabody Coal Co., LLC*, 400 S.W.3d 442, 452 (Mo. App. E.D. 2013). As the trial court docket reflects, just two weeks after the jury returned its verdict, Plaintiffs filed an in-depth post-trial motion specifically opposing imposition of the noneconomic damage cap and arguing that any such imposition would be unconstitutional. (LF417-LF442).

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Importantly, by that time the trial court had entered judgment in the full amount of the jury verdict. (LF390-391; A13-A14). This was on August 29, 2013. The trial court first held a hearing on post-trial motions on November 17, 2013. (LF11). The court held a second hearing on November 22, 2013, and a third hearing on December 19, 2013. (LF11-LF12). It was not until December 23, 2013, that the trial court issued its Second Amended Judgment and Order. (LF789-796).

In its final judgment, the court carefully considered the respective positions of the parties as to whether § 538.210(1) is constitutional. The court considered the confusion created by the Supreme Court's decisions - four months apart - in *Sanders* and *Watts*. Echoing Judge Wolff in *Klotz*, 311 S.W.3d at 779-80 (Wolff, J., concurring), the court noted the inherent arbitrariness in damage caps that do not consider the facts and circumstances of each case. (LF803).

Ultimately, the trial court felt constrained by *Sanders* to impose a damage cap, while leaving no doubt that the evidence in <u>this</u> case amply supported the jury's full award. While Plaintiffs assert that the trial court imposed the cap erroneously, there is no question that the court <u>considered</u> the constitutional issue. The "earliest possible time" rule exists in order to make sure that trial courts have an opportunity to consider the constitutional issue. It is not a mere function of time, as Defendants suggested below. This question is made clear by several Missouri Supreme Court cases.

In *Call v. Heard*, 925 S.W.2d 840 (Mo. banc 1996), the defendant raised a

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constitutional challenge to an award of punitive damages. He had not raised the challenge until his motion for new trial was filed; however, the issue of punitive damages had not entered the case until plaintiffs requested them on the first day of trial. *Id*. at 847. The Supreme Court pointed out that the purpose of the "earliest opportunity" rule is "to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue." *Id*. The Court then decided:

> Plaintiffs had the opportunity to respond and the trial court had the opportunity to address the issue, thus, the purposes of the rule were met. The due process issue was adequately raised before the trial court; it is therefore proper for this Court to address it.

Id. (emphasis added).

In *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008), the plaintiffs alleged that the defendant mortgage lender, in charging a fee for "document preparation," was practicing law without a license in violation of § 484.010, RSMo. 2000. At the time, a violation of the statute authorized treble damages. In their original petition plaintiffs cited the statute and asked for treble damages. *Carpenter,* 250 S.W.3d at 701. It was not until four years after the suit was filed that defendant amended its answer and asserted the statute was unconstitutional. *Id*. Despite this delay, the Supreme Court held that consideration of the constitutional issue was proper:

> [T]he issue was raised prior to trial; plaintiff had a full opportunity to respond;

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> and the trial court had the opportunity to address the issue. There was no showing of prejudice. Although this defense should have been raised at an earlier date, the purposes of the rule were met, and the trial court did not abuse its discretion in considering this issue.

Id. (emphasis added).

Finally, the Supreme Court's most recent discussion of preservation of constitutional issues confirms Plaintiffs' argument that the challenge to the damage cap is properly before this Court. In *Mayes v. St. Luke's Hospital of Kansas City*, 430 S.W.3d 260 (Mo. banc 2014), the Court held that the plaintiffs' constitutional challenge was not preserved for review, but made clear that this was simply because - unlike here - the trial court never was squarely presented with the constitutional issue.

The facts and procedural history of *Mayes* are important for a full understanding of the Court's decision. When plaintiffs first filed their lawsuit for medical malpractice, they asserted that the medical malpractice statute, including the requirement of an affidavit of merit under § 538.225, denied plaintiffs their constitutional right to open courts and trial by jury. 430 S.W.3d at 263-264.[8] Defendants moved to dismiss plaintiffs' petition when no affidavit of merit was filed. Plaintiffs made a number of arguments against defendants'

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[8] Plaintiffs will leave out some of the procedural history of *Mayes* as it is not pertinent. There were actually three lawsuits over the same incident. Plaintiffs include here only those facts that are pertinent to the issue of preservation of the constitutional challenge.

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motion, but none related to a constitutional challenge. The trial court granted the motion to dismiss based on § 538.225. *Id*. at 264.

After this, the *Mayes* plaintiffs filed a motion to vacate under Rule 75.01. Again, no constitutional arguments were presented in their motion. However, plaintiffs did argue for the first time that they had, in fact, "substantially complied" with the affidavit of merit statute. *Id*. Finally, at the end of his oral argument, plaintiffs' counsel stated that strict application of the affidavit statute violated the right to open courts, Art. I, sec. 14, and trial by jury, Art. I, sec. 22(a). The trial court overruled plaintiffs' motion to vacate. 430 S.W.3d at 265.

The Supreme Court in *Mayes* held that the constitutional challenge was not preserved because the plaintiffs only orally raised it during the hearing on the motion to vacate - a motion that was devoted to the issue of substantial compliance with the affidavit statute. The Supreme Court went on to identify <u>when</u> the occasion to seek a trial court ruling on the constitutional challenge first appeared:

> Here, the occasion for the plaintiffs' desired ruling regarding the constitutional viability of section 538.225 first appeared when the trial court was ruling on defendants' motion to dismiss pursuant to section 538.225. When the trial court was considering the motion, it did not have an opportunity to fairly identify and rule on the claims that section 538.225 is unconstitutional because the plaintiffs failed to present these claims to the court . . . . By not asserting

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> the claims in their response to the defendants' motion to dismiss the plaintiffs failed to preserve for appeal the issues of whether section 538.225 violates their constitutional rights to access to open courts and to a trial by jury.

430 S.W.3d at 267-268.

Although making clear that the appropriate time for the *Mayes* plaintiffs to seek a ruling was when defendants moved to dismiss for lack of an affidavit, the Supreme Court pointed out in a footnote that "[i]f the plaintiffs had even raised the constitutional claims in their motion to vacate, the trial court might have exercised its discretion to consider the constitutional claims like it did the untimely claim of substantial compliance." *Id*. at 268 n.13. This statement makes it plain that once a trial court exercises its discretion to consider the constitutional claims, "the purposes of the rule" are satisfied,[9] and the issue is preserved for this Court's review.

Defendants did not ask the Court to impose the damage cap until after the jury issued its decision and after the trial court entered judgment in the full amount. Immediately upon Defendants' moving to impose the cap, Plaintiffs objected on constitutional grounds, extensive memoranda were filed (LF413-416; 417-421; 422-443; 625-634; 635-659), and oral argument on constitutionality took up fully 20 pages of transcript. (Tr. 1410:6-1430:14).

In short, Defendants have no credible claim that Plaintiffs failed to raise these issues at the earliest possible time, nor that Defendants and the trial court didn't have a full and fair

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[9] *Carpenter*, 250 S.W.3d at 701.

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opportunity to address the issue. In fact, the trial court clearly considered and addressed the issue at oral argument on the post trial motions and in its amended final judgment. (Tr. 1410:6-1430:14; LF801-LF808).

III. THE TRIAL COURT ERRED IN APPLYING THE § 538.210(1) RSMo. CAP ON NONECONOMIC DAMAGES BECAUSE THE STATUTE IS UNCONSTITUTIONAL IN THAT THE CAP VIOLATES THE SEPARATION OF POWERS.

A. Standard of Review

In addition to § 538.210(1) violating Plaintiffs' right to trial by jury and equal protection, application of the statute in this case is unconstitutional as violative of the separation of powers. Plaintiffs' "constitutional challenge to the validity of section 538.210 is subject to *de novo* review." *Watts*, 376 S.W.3d at 637 (citing *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010)).

B. The trial court's application of the § 538.210(1) cap on noneconomic damages violates the separation of powers.

In addition to violating the equal protection clause, as pointed out by Judge Draper in his dissent in *Sanders*, a cap on noneconomic damages such as that contained in § 538.210(1) violates the separation of powers required by Article II, section 1 of the Missouri Constitution:

The statutory cap on non-economic damages encroaches on the judicial

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> prerogative of remittitur in determining whether the jury's assessment of damages is appropriate on a case-by-case basis. As an institutional body, the legislature is not in a position of being able to make this particularized determination, and this violates the separation of powers.

Sanders, 364 S.W.3d at 215 (Draper, J., dissenting) (internal citations omitted). Courts in other states have reached similar conclusions. *See Best*, 689 N.E.2d at 1081 ("The courts are constitutionally empowered, and indeed obligated, to reduce excessive verdicts where appropriate in light of the evidence adduced in a particular case. Section 2-1115.1, however, reduces damages by operation of law, without regard to the specific circumstances of individual jury awards."); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989) ("The judge's use of remittitur is, in effect, the result of a legal conclusion that the jury's finding of damages is unsupported by the evidence. The Legislature cannot make such case-by-case determinations.").

What the legislature has done in § 538.210(1) is to enforce a "one size fits all" damage cap, which takes no account of particular case facts. So in this case, the family of a young mother with small children is faced with the same cap as the family of an elderly parent who dies perhaps a few months or years earlier than would be normal. Such inequity is what remittitur and additur are designed to address, and § 538.210(1) clearly interferes with this process. As such, it violates the separation of powers and is unconstitutional.

Section 538.210(1) violates the separation of powers by interfering with the process

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of remittitur. This Court should find § 538.210(1) unconstitutional and reverse the trial court's application of the statute in this case.

IV. THE TRIAL COURT ERRED IN DIRECTING A VERDICT ON PLAINTIFFS' AGGRAVATING CIRCUMSTANCES DAMAGES CLAIM BECAUSE PLAINTIFFS MADE A SUBMISSIBLE CASE FOR AGGRAVATING CIRCUMSTANCES DAMAGES, IN THAT THE EVIDENCE ESTABLISHED THAT DEFENDANT DR. FERRARA CONSCIOUSLY DISREGARDED THE SAFETY OF SHANNON DODSON AND KNEW OR SHOULD HAVE KNOWN THAT THERE WAS A HIGH DEGREE OF PROBABILITY THAT HIS ACTIONS WOULD RESULT IN INJURY.

A. Standard of Review

The trial court erred in directing a verdict on Plaintiffs' aggravating circumstances damages claim. When the grant of a directed verdict is "based upon a matter of law," the standard of review is *de novo*. *Bailey v. Hawthorn Bank*, 382 S.W.3d 84, 92 (Mo. App. W.D. 2012) (*quoting Trinity Lutheran Church v. Lipps*, 68 S.W.3d 552, 557 (Mo. App. E.D. 2001)). "Whether there is sufficient evidence for an award of punitive damages is a question of law." *Hoyt v. GE Capital Mortgage Servs., Inc.*, 193 S.W.3d 315, 322 (Mo. App. E.D. 2006). The relevant inquiry is whether, as a matter of law, the evidence was sufficient to submit the claim for aggravating circumstances damages. *Id.* The evidence and all

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reasonable inferences are viewed in the light most favorable to submissibility. *Id.*

B. The trial court erred in granting Defendants' motion for directed verdict as to Plaintiffs' aggravating circumstances damages claim.

The trial court erred in finding that Plaintiffs failed to present sufficient evidence to submit their claim for aggravating circumstances damages and erred in refusing to submit instructions to the jury. *See* Aggravating Circumstances Instructions - Refused (LF361-LF373; A1-A12). Missouri permits an award of punitive damages against a health care provider "only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct with respect to his actions which are found to have injured or caused or contributed to cause the damages claimed in the petition." RSMo. § 538.210(5). Punitive damages are submissible in a negligence claim where the evidence shows the defendant knew or had reason to know that there was a high degree of probability that his actions would result in injury. *Jone v. Coleman Corp.*, 183 S.W.3d 600, 610 (Mo. App. E.D. 2005). A plaintiff seeking punitive damages in a negligence case "must demonstrate that the defendant showed a complete indifference to or conscious disregard for the safety of others." *Id.* Intent is not a necessary finding, because the defendant's conduct is tantamount to intentional wrongdoing where the natural and probable consequence of the conduct is injury to another. *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 160 (Mo. banc 2000). Further, a plaintiff seeking punitive damages need not always prove conduct that is different from and in addition to the conduct that proves the underlying action

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- such as the medical malpractice established in this case - in order to make a submissible case for punitive damages. *Haynam v. Laclede Elec. Coop., Inc.*, 889 S.W.2d 148, 151 (Mo. App. S.D. 1994). Rather, "a plaintiff may meet the burden of showing the defendant's conduct is 'more egregious than that on which the claim of negligence is based' by presenting evidence of the defendant's culpable mental state." *Id.* (*quoting Litchfield v. May Dep't Stores Co.*, 845 S.W.2d 596, 599 (Mo. App. E.D. 1992)).

In oral argument on their motion for directed verdict, Defendants took the position that submission of aggravating circumstances damages is only appropriate in cases involving willful, wanton or malicious misconduct and is not appropriate where there is evidence of a conscious disregard for the safety of others. (Tr. 1264:20-1265:7). This argument fails to acknowledge that under Missouri law, recklessness and willfulness are equivalents. This principle is demonstrated most aptly by the Southern District Court of Appeals' decision in *Schroeder v. Lester E. Cox Med. Ctr., Inc.*, 833 S.W.2d 411, 421 (Mo. App. S.D. 1992). In that case, similar to this case, a hospital patient died while undergoing surgery and the patient's surviving family brought a medical malpractice action against the hospital. *Id.* at 412. The court concluded that plaintiff's evidence that the death was caused by an improperly mixed cardiologic solution, prepared in the hospital pharmacy and administered during the operation, was sufficient to support an award of aggravating circumstances damages. In support of this ruling, the court explained, "'while [acts] need not always include an intent to do harm, they must show such a conscious disregard for another's rights

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as to amount to willful and intentional wrongdoing.'" *Id.* at 420 (*quoting Warner v. Sw. Bell Tel. Co.*, 428 S.W.2d 596, 603 (Mo. 1968)); *see also id.* at 420 ("Damages for aggravating circumstances in death cases depend on proof of willful misconduct, wantonness, recklessness, or want of care indicative of indifference to consequences." (internal quotations omitted)). The Court stated plainly that recklessness "*is the legal equivalent of willfulness*." *Id.* at 421 (*quoting Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. banc 1990)) (emphasis added by *Schroeder* court). In further support of finding conscious disregard to justify punitive damages, the *Schroeder* court cited the following passage from *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Prods., Inc.*, 700 S.W. 2d 426, 435 (Mo. banc 1985):

> Ordinarily [punitive] damages are not recoverable in actions for negligence, because negligence, a mere omission of the duty to exercise care, is the antithesis of willful or intentional conduct. . . . But an act or omission, though properly characterized as negligent, may manifest such reckless indifference to the rights of others that the law will imply that an injury resulting from it was intentionally inflicted. . . . *Or there may be conscious negligence tantamount to intentional wrongdoing, as where the person doing the act or failing to act must be conscious of his conduct, and, though having no specific intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or*

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probably result in injury. . . .

Schroeder, 833 S.W.2d at 421-22 (alterations and emphasis in original).

Schroeder is consistent with *Burnett v. Griffith*, in which the Missouri Supreme Court clarified its views on punitive damages and adopted the standard for punitive damages found in the Restatement (Second) of Torts. 769 S.W.2d 780, 789 (Mo. banc 1989) (adopting the Restatement view that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive *or reckless indifference to the rights of others*" (emphasis added)). After *Burnett*, Missouri courts, including the *Schroeder* court, have continued to hold that a finding of conscious disregard for the rights of others is sufficient to support punitive damages. *See Coon v. Am. Compressed Steel, Inc.*, 207 S.W.3d 629, 637 (Mo. App. W.D. 2006) ("Under a negligence theory, punitive damages are properly submitted upon evidence that the defendant knew or had information from which he, in the exercise of ordinary care, should have known that the alleged negligent conduct created a high degree of probability of injury, and thereby showed complete indifference or conscious disregard for the safety of others."); *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 73 (Mo. App. E.D. 2003) ("In a negligence case, the defendant can be assessed punitive damages if he knew or should have known that his conduct created a high degree of probability of injury and thereby showed complete indifference to or conscious disregard for the rights of others."). Although these cases are not medical malpractice cases governed by § 538.210(5) like *Schroeder*, they support the proposition that in Missouri, courts routinely interpret

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willful, wanton or malicious misconduct to include a finding of conscious disregard.

In this case, Plaintiffs provided evidence of the recklessness of Defendant Dr. Ferrara which rises to the level of intent. Further, conscious disregard for the life of Shannon Dodson was more than sufficiently established by Plaintiffs. The evidence supporting Plaintiffs' aggravating circumstances damages claim includes, but is not limited to:

1. Dr. Ferrara recognized and knew (state of mind) that he had a left main coronary artery dissection at 3:53:04 p.m. (Tr. 720:14-721:3).
2. Dr. Ferrara testified under oath that at 3:53:04 p.m., he knew (state of mind) that there was a possibility that Shannon may need a surgeon to save her life. (LF856).
3. Dr. Ferrara knew that it was an emergent, life threatening condition and that time was of the essence. (LF846).
4. Dr. Ferrara further testified that he felt (state of mind) that he could attempt stenting to save her from going to surgery. (LF856-LF857).
5. With the knowledge of (1) - (4) above, Dr. Ferrara knowingly did not place a stent or send Shannon to surgery, and instead called Dr. Kichura, who arrived 22 minutes after the dissection occurred. (Tr. 994:14-23).
6. During the 22 minutes that Dr. Ferrara was waiting for Dr. Kichura to arrive, Dr. Ferrara did nothing to try to restore blood flow to the left main coronary artery. (Tr. 994:24-995:5).

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7. Dr. Ferrara knowingly never attempted to use a guidewire to open the obstruction to Shannon's left main artery prior to her being taken for surgery. (LF845).

8. It was not until almost 10 minutes after Dr. Kichura arrived, and more than 30 minutes after Dr. Ferrara recognized the dissection, that any effort was made to open the vessel (by Dr. Kichura, and not Dr. Ferrara). (Tr. 1014:14-23; 1016:16-22).

9. Even though Dr. Ferrara recognized that he had a left main coronary artery dissection at 3:53:04 p.m., Dr. Ferrara knowingly did not transfer Shannon Dodson to the operating room for emergency surgery until 4:41:46 p.m., 48 minutes and 46 seconds after he recognized the dissection. (Tr. 721:8-10).

10. Plaintiffs' expert Dr. Bruce Charash testified that if a dissection of the left main coronary artery occurs, it is an emergent condition, and you must immediately intervene to prevent cardiogenic shock and death. (Tr. 494:13-25).

11. Defendants' expert Dr. Edward Geltman acknowledged under oath that dissection of the left main artery is an emergency condition, that if the left main artery is completely occluded it is a "disaster," and that you must restore blood supply "as rapidly as feasible." (Tr. 802:7-20).

12. Dr. Michael Lim, an interventional cardiologist who testified on behalf of

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Defendants, acknowledged that dissection of the left main artery during a heart catheterization is an emergent condition, and that the physician must either attempt to stent the patient or get the patient to surgery for coronary artery bypass; and further that he, Dr. Lim, would not have handled the dissection that Shannon suffered in the manner that Dr. Ferrara handled it. (Tr. 1084:9-20; 1097:25-1098:24; 1101:2-22; 1102:23-1105:2).

13. Plaintiffs' expert Dr. John Setaro testified that dissection of the left main artery during a catheterization is an emergent condition, and that the interventional cardiologist must immediately or promptly find a way to reopen the artery, either by use of a stent or, if that is unsuccessful, by sending the patient to surgery for coronary artery bypass. (Tr. 584:3-586:3).

14. Defendant Dr. Ferrara was asked specifically whether he panicked at the time of the dissection, and he denied this. (LF847).

15. Dr. Jeanne Cleveland and Dr. John Marbarger, two of the surgeons who were involved in the attempt to save the life of Shannon Dodson, testified that if they had an opportunity to do coronary artery bypass surgery on Shannon earlier, that her chances of survival would have been greater. (LF840; LF885-LF886).

Without a doubt, the above evidence was sufficient to submit aggravating circumstances damage instructions to the jury. Plaintiffs did not simply rely on the

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negligence of Defendants, rather, they provided ample evidence of Defendant Dr. Ferrara's reckless actions when treating Shannon Dodson. The above cited evidence demonstrates that Dr. Ferrara knew or should have known that there was a high degree of probability that his actions (or inaction) would result in injury. Further, Dr. Ferrara's decisions in the 45 minutes after he discovered the dissection demonstrate a conscious disregard for the safety of Shannon Dodson, and are tantamount to intentional wrongdoing. The trial court erred in concluding that Plaintiffs had not made a submissible case for aggravating circumstances damages and in granting Defendants' motion for directed verdict.

CONCLUSION

For all the reasons stated herein, Plaintiffs/Respondents/Cross-Appellants respectfully request that this Court reverse the trial court's application of the § 538.210(1) cap on noneconomic damages and the trial court's directed verdict on Plaintiffs' aggravating circumstances damages claim. Plaintiffs further request that this Court otherwise affirm the judgment of the court below.

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Date: March 10, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned certifies that this brief: (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) pursuant thereto, contains 20,816 words as calculated by the WordPerfect software used to prepare it, exclusive of the matters identified in Mo. R. Civ. P. 84.06 and Local Rule 360.

/s/ Maurice B. Graham

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2015, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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