

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED100952

JASON D. DODSON, and JASON D. DODSON, JR., a Minor, and 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,

vs.

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

Defendants/Appellants/Cross-Respondents.

**SECOND BRIEF OF DEFENDANTS/APPELLANTS/CROSS-RESPONDENTS
ROBERT P. FERRARA, M.D. and
MERCY CLINIC HEART AND VASCULAR, LLC**

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TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES	3
STATEMENT OF FACTS FOR ARGUMENTS IN RESPONSE TO PLAINTIFFS’ POINTS RELIED ON.....	9
REPLY ARGUMENT IN SUPPORT OF DEFENDANTS’ POINTS RELIED ON.....	13
I. Trial Court Error in Allowing Plaintiffs’ Counsel to Pose Argumentative and Prejudicial Questions to Dr. Edward Geltman.....	13
II. Trial Court Error in Permitting Questioning of Dr. Ferrara About His Not Speaking With Dr. Cleveland Post-Health Care.....	17
III. Trial Court Error in Giving Instruction No. 4 Based Upon Non-Mandatory MAI 2.07	19
IV. Plaintiffs’ Failure to Make a Submissible Case for Loss of Economic Support	22
V. Trial Court Error in Deferring Ruling on Defendants’ Motion for Directed Verdict Until the Close of Plaintiffs’ Evidence	26
ARGUMENT IN RESPONSE TO PLAINTIFFS’ POINTS RELIED ON.....	29
I. The Trial Court Did Not Err in Applying the Non-Economic Damage Cap of Section 538.210(1) Because the Missouri Supreme Court has Held the	

Cap Is Constitutional and Does Not Violate the Right to Trial by Jury in
Wrongful Death Actions 29

II. The Wrongful Death Non-Economic Damage Cap of Section 538.210(1)
Does Not Deny Equal Protection 49

III. The Application of Section 538.210 to Limit Non-Economic Damages in
Wrongful Death Cases Does Not Violate Separation of Powers 62

IV. The Trial Court Did Not Err in Granting Defendants a Directed Verdict on
Plaintiffs’ Punitive Damages Claim Because Plaintiffs’ Evidence was
Insufficient to Create a Jury Question on the Issue of Punitive Damages or
Aggravating Circumstances Damages 64

CONCLUSION 82

RULE 84.06(c) CERTIFICATE OF COMPLIANCE 84

PROOF OF SERVICE 85

TABLE OF AUTHORITIES

Cases:	Pages:
<i>Adams by and through Adams v. Children’s Mercy Hospital</i> , 832 S.W.2d 898 (Mo. banc 1992)	32, 33, 34, 35, 40, 42, 49, 50, 51, 52, 56, 63
<i>Akin v. Director of Revenue</i> , 934 S.W.2d 295 (Mo. banc 1996)	36
<i>Alcorn v. Union Pacific R.R. Co.</i> , 50 S.W.3d 226 (Mo. banc 2001)	68
<i>Allen v. Dunham</i> , 175 S.W. 135 (Mo.App. 1915).....	46
<i>Amador v. Lea’s Auto Sales & Leasing, Inc.</i> , 916 S.W.2d 845 (Mo.App. S.D. 1996)	19
<i>Anheuser-Busch Employees’ Credit Union v. Davis</i> , 899 S.W.2d 868 (Mo. banc 1995)	60
<i>Arnold v. City of Maryville</i> , 85 S.W. 107 (Mo.App. 1905)	28
<i>Badahman v. Catering St. Louis</i> , 395 S.W.3d 29 (Mo. banc 2013).....	68
<i>Ballinger v. Gascosage Elec. Coop.</i> , 788 S.W.2d 506 (Mo. banc 1990).....	19
<i>Barker v. Hannibal & St. J.R. Co.</i> , 14 S.W. 280 (Mo. 1886)	44, 46
<i>Bauldin v. Barton County Mutual Ins. Co.</i> , 666 S.W.2d 948 (Mo. App. S.D. 1984)	56, 57
<i>Baysinger v. Hanser</i> , 199 S.W.2d 644 (Mo. 1947).....	46
<i>Bennett v. Owens-Corning Fiberglass Corp.</i> , 896 S.W.2d 464 (Mo. banc 1995). 45	45
<i>Boggs ex rel. Boggs v. Lay</i> , 164 S.W.3d 4 (Mo.App. E.D. 2005)	30
<i>Brug v. Manufacturers Bank & Trust Company</i> , 461 S.W.2d 269 (Mo. banc 1970).....	13

Burnett v. Griffith, 769 S.W.2d 780 (Mo. banc 1989) 80

Call v. Heard, 925 S.W.2d 840 (Mo. banc 1996) 58

Carpenter v. Countrywide Home Loans, Inc., 250 S.W.3d 697 (Mo. banc 2008). 60

Carson-Mitchell, Inc. v. Macon Beef Packers, Inc., 544 S.W.2d 275
(Mo.App. 1976)..... 27

City of St. Louis v. Butler Co., 219 S.W.2d 372 (Mo. banc 1949)..... 55

Clark v. Kansas City, St. L. & C. R. Co., 118 S.W. 40 (Mo. 1909) 44, 46, 48

Critcher v. Rudy Fick, Inc., 315 S.W.2d 421 (Mo. 1958)..... 14

Cummins v. Kansas City Public Service Co., 66 S.W.2d 920 (Mo. banc
1933)..... 45, 46

Demattei v. Missouri-Kansas-Texas R. Co., 139 S.W.2d 504 (Mo. 1940)..... 46

Dibrill v. Normandy Associates, Inc., 383 S.W.3d 77 (Mo.App. E.D. 2012)..... 66

Doe 1631 v. Quest Diagnostics, Inc., 395 S.W.3d 8 (Mo. banc 2013)..... 65

Drummond Co. v. St. Louis Coke & Foundry Supply Co., 181 S.W.3d 99
(Mo.App. E.D. 2005) 65

Englezos v. Newspress and Gazette Co., 980 S.W.2d 25 (Mo.App. W.D. 1998).. 65

Frazee v. Partney, 314 S.W.2d 915 (Mo. 1958)..... 47

Glaize Creek Sewer Dist. of Jefferson County v. Gorham, 335 S.W.3d 590
(Mo.App. E.D. 2011) 25

Glick v. Ballentine Produce, Inc. 396 S.W.2d 609 (Mo. 1965)..... 45, 46

*Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co.,
Inc.*, 358 S.W.3d 528 (Mo.App. E.D. 2012) 30

Guy v. City of St. Louis, 829 S.W.2d 66 (Mo.App. E.D. 1992) 66

Hagen v. Celotex Corp., 816 S.W.2d 667 (Mo. banc 1991) 45

Hammons v. Ehney, 924 S.W.2d 843 (Mo. banc 2006) 48

Hecht v. Hecht, 289 S.W.3d 647 (Mo.App. E.D. 2009) 30

Hollis v. Blevins, 926 S.W.2d 683 (Mo. banc 1996)..... 55, 56, 57

Hoover’s Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc.,
700 S.W.2d 426 (Mo. banc 1985) 67, 79, 80

James v. Christy, 18 Mo. 162 (Mo. 1853) 45, 46, 47

Jefferson ex rel. Jefferson v. Missouri Baptist Medical Center, 447 S.W.3d 701
(Mo.App. E.D. 2014) 35

John Doe B.P. v. Catholic Diocese of Kansas City-St. Joseph, 432 S.W.3d 213
(Mo.App. W.D. 2014) 52

Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205 (Mo. 1934) . 46

Klotz v. St. Anthony’s Medical Center, 311 S.W.3d 752 (Mo. banc 2010) 43

Knorp v. Thompson, 175 S.W.2d 889 (Mo. 1943) 46

Labrayere v. Bohr Farms, LLC, --- S.W.3d ---, 2015 WL 1735494,
(Mo. banc 2015) 49

*Land Clearance for Redevelopment Authority of Kansas City, Missouri v.
Kansas University Endowment Ass’n*, 805 S.W.2d 173 (Mo. banc
1991) 53, 54, 56

Lewis v. FAG Bearings Corp., 5 S.W.3d 579 (Mo.App. S.D. 1999) 65

Litchfield v. May Dept. Stores Co., 845 S.W.2d 596 (Mo.App. E.D. 1992) 66

Lopez-Vizcaino v. Action Bail Bonds, Inc., 3 S.W.3d 891 (Mo.App. W.D. 1999)..... 68, 69

Lopez v. Three Rivers Electric Cooperative, Inc., 26 S.W.3d at 160 (Mo. banc 2000) 73, 79

Luechtefeld v. Marglous, 151 S.W.2d 710 (Mo.App.E.D. 1941) 15

Mayes v. St. Luke’s Hospital of Kansas City, 430 S.W.3d 260, (Mo. banc 2014) 54, 59, 60

McCormack v. Capital Elec. Const. Co., Inc., 159 S.W.3d 387 (Mo.App. W.D. 2005) 62

McGrath v. Meyers, 107 S.W.2d 792 (Mo. 1937) 53, 61

Menaugh v. Resler Optometry, Inc., 799 S.W.2d 71 (Mo. banc 1990)..... 78

Missouri Association of Club Executives, Inc., v. State, 208 S.W.3d 885 (Mo. banc 2006) 37

Nelms v. Bright, 299 S.W.2d 483 (Mo. banc 1957) 47

Olian v. Olian, 59 S.W.2d 673 (Mo. 1933)..... 22

Peters v. General Motors Corp., 200 S.W.3d 1 (Mo.App. W.D. 2006)..... 65, 67, 68, 69

Plaza Express Co., Inc. v. Galloway, 280 S.W.2d 17 (Mo. banc 1955)..... 46

Rentschler v. Nixon, 311 S.W.3d 783 (Mo. banc 2010)..... 49

Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. banc 1996) 68

Sanders v. Ahmed, 364 S.W.3d 195 (Mo. banc 2012) 27, 29, 30, 31, 32, 33, 34
..... 35, 38, 39, 40, 41, 42, 43, 47, 48, 52, 53, 63, 64

Schnatzmeyer v. Nat'l Life Ins. Co., 791 S.W.2d 815 (Mo.App. E.D. 1990) 27

Schroeder v. Lester E. Cox Medical Center, Inc., 833 S.W.2d 411 (Mo.App. S.D. 1992) 74, 75, 76, 77, 78

Sharp v. Robberson, 495 S.W.2d 394 (Mo. banc 1973) 80

Simpson v. Kilcher, 749 S.W.2d 386 (Mo. banc 1988)..... 37

State v. Taylor, 663 S.W.2d 235 (Mo. banc 1984)..... 14

State v. Self, 155 S.W.3d 756 (Mo. banc 2005) 62

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)..... 29, 38, 39, 40, 43, 45, 47, 48

State ex rel. Kansas City Stock Yards Co. of Maine v. Clark, 536 S.W.2d 142 (Mo. banc 1976) 45

State ex rel. State Highway Comm. v Offutt, 488 S.W.2d 656 (Mo. 1972) 13

State ex re. Thomas v. Daves, 283 S.W.51 (Mo. banc 1926) 45

Sullivan v. Carlisle, 851 S.W.2d 510 (Mo. banc 1993) 45

Thienes v. Harlin Fruit Co., 499 S.W.2d 223 (Mo.App. 1973)..... 23, 24

Twin Chimneys Homeowners Ass'n v. J.E. Jones Constr. Co., 168 S.W.3d 488 (Mo.App. E.D. 2005) 19

Villinger v. Nighthawk Freight Service, Inc., 104 S.W.2d 740 (Mo.App. 1937) ... 14

Warner v. Southwestern Bell Telephone Company, 428 S.W.2d 596 (Mo. 1968.. 78

Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633 (Mo. banc 2012)..... 29, 33, 34, 35, 36, 38, 40, 41, 42, 43, 48, 49, 52

Wehrkamp v. Watkins Motor Lines, Inc., 436 S.W.2d 698 (Mo. 1969)..... 65

Wilson v. Kaufmann, 847 S.W.2d 840 (Mo.App. E.D. 1992)..... 22

Ziervogel v. Royal Packing Co., 225 S.W.2d 798 (Mo.App. 1949) 28

Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W.2d 384 (Mo. banc 1991)..... 19

Statutes: Pages:

Missouri Constitution Article I, Section 22(a)..... 32, 35, 40, 43, 62

Section 1.140 RSMo (1986)..... 36

Section 523.045 RSMo (1986)..... 54

Section 538.210 RSMo (2000)..... 31, 41

Section 538.210 RSMo (2005)..... 30, 41

Section 538.215 RSMo (2005)..... 30

Other Authorities: Pages:

Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary
..... 67

Missouri Approved Instruction 2.07 [2012 New] Explanatory – Insurance Benefits..... 19, 20, 21, 22, 82

Restatement (Second) of Torts § 500 80

Restatement (Second) of Torts § 908..... 66

STATEMENT OF FACTS FOR ARGUMENTS
IN RESPONSE TO PLAINTIFFS' POINTS RELIED ON

At 3:59 pm on February 10, 2011, during the course of Shannon Dodson's cardiac catheterization, Dr. Robert Ferrara recognized an abnormality in terms of a "hang-up" of dye not moving through at normal flow but did not yet know what had caused it. (Tr. 948:8-949:12). Within one minute, he gave Ms. Dodson an injection of a blood vessel dilator to determine if the "hang-up" was due to a vascular spasm rather than a dissection. (Tr. 950:3-24). He testified he "needed to confirm what was happening, but [he] wanted to do so in a very careful manner." (Tr. 952:7-8).

At 4:00 pm, after the "hang-up" remained despite two injections of the blood vessel dilator, Dr. Ferrara diagnosed a dissection, as opposed to a spasm of the vessel. (Tr. 952:19-954:3). At that point, he had a call put out to Dr. George Kichura, the cardiologist who had ordered Ms. Dodson's cardiac catheterization, for him to come to the cath lab right away. (Tr. 954:11-955:19). Dr. Kichura testified he responded as quickly as he could and arrived at the cath lab around 4:15 pm. (Tr. 820:6-821:5). Within a few minutes of having the call placed to Dr. Kichura, Dr. Ferrara also had a call put out to a cardiothoracic surgeon. (Tr. 958:20-959:5).

Between 4:00 and 4:06 pm, Dr. Ferrara took steps to obtain images of the right coronary artery. Because the original issue for which Ms. Dodson was having the catheterization done involved a potential blockage to the right coronary artery, Dr. Ferrara felt he needed to obtain images of the right coronary artery to assess its status before he went any further. (Tr. 956:3-23). He did this because, irrespective of whether

they would proceed with stenting or bypass surgery (the two treatment options available to address the dissection), the physicians (Dr. Kichura and the surgeons) would need full information about all arteries so that they would know exactly how to handle the situation. (Tr. 956:3-958:19; 959:12-19). At 4:06 p.m., Dr. Ferrara confirmed the right coronary artery was clear. (Tr. 958:10-19).

Also around 4:06 p.m., Ms. Dodson developed some shortness of breath and chest discomfort, and Dr. Ferrara decided to insert an intra-aortic balloon pump (also "IABP") to try to stabilize her for the potential of either a stenting procedure or surgery. (Tr. 960:8-961:14; 965:11-20; 966:2-967:22). The set-up for the IABP takes approximately five to ten minutes. (Tr. 962:5-8).

At 4:10 pm, Ms. Dodson went into cardiac arrest and CPR was given for a short time. (Tr. 971:22-972:13). At approximately 4:12 pm, Ms. Dodson was again awake and talking (Tr. 972:23-973:6). Dr. Ferrara proceeded with insertion of the IABP, with Dr. Kichura arriving at approximately 4:15 pm as Dr. Ferrara was placing the balloon pump. (Tr. 968:18-22; 1001:16-23; 820:6-821:5). Dr. Kichura then attempted to place a stent, which is to open the blood vessel with a guide wire; also referred to as angioplasty. (Tr. 975:14-977:4; 1016:18-22).

At about 4:16 pm, Ms. Dodson again went into cardiac arrest, CPR was again started, within one minute she returned to normal rhythm, and CPR was stopped. (Tr. 973:16-974:6). At about 4:20 pm, she again went into cardiac arrest, CPR was started, and by 4:21 pm she was again awake and responding to questions. (Tr. 973:11-975:1).

Because of the repeated episodes of cardiac arrest and the need for CPR, the decision was made to have Ms. Dodson intubated to take stress off her heart. (Tr. 975:2-13). Dr. Kichura and Dr. Ferrara then decided that Dr. Ferrara would monitor vitals, blood pressure, heart rhythm, etc., while Dr. Kichura proceeded with attempting the stenting procedure. (Tr. 970:25-971:21; 1001:16-23). One of the cardiothoracic surgeons arrived in the cath lab while Dr. Kichura was performing the stenting procedure. The surgeon and Dr. Ferrara discussed the situation and the possible need for surgery if Dr. Kichura's stenting attempts were not successful. (Tr. 1023:17-1024:14).

Images of the left main coronary artery taken at 4:28 and 4:29 pm showed there was blood flow. (Tr. 970:16-17; 977:17-978:18). Sometime shortly before 4:39 pm, the anesthesiologist arrived at the bedside in the cath lab. (Tr. 980:21-24). At approximately 4:39 or 4:40, Ms. Dodson was taken from the catheterization lab for surgery. (Tr. 978:19-25).

Dr. Ferrara testified that one of the things he could have done in an attempt to restore blood flow would have been to try to insert a wire to open up the left main artery, but he was concerned about the possible further worsening of the situation by taking that step. (Tr. 995:6-10). He believed there was a reasonable chance of making things worse by inserting such a wire in the first 10 to 20 minutes after the dissection occurred. (Tr. 998:3-10; 1011:21-1012:2). There was also a risk of death in proceeding with the stenting procedure because a stenting procedure that goes badly can kill the patient. (Tr. 967:16-25).

Dr. Ferrara had one previous experience with a left main artery dissection, and in that instance the patient was taken to surgery about an hour and 15 minutes after the dissection. (Tr. 921:4-922:20). A few years prior, he also observed another dissection (not his own patient) in the left main artery where the patient was taken to surgery after about 45 minutes. (Tr. 922:21-923:9). Both of those patients survived. (Tr. 923:4-12).

REPLY ARGUMENTS TO DEFENDANTS' POINTS RELIED ON

I. Trial Court Error in Allowing Plaintiffs' Counsel to Pose Argumentative and Prejudicial Questions to Dr. Edward Geltman

A. Defendants timely objected to Plaintiffs' counsel's voluntary statement/argument postulating that St. Louis physicians will not testify to the truth.

Plaintiffs' attempt to re-characterize defendants' argument as being about Dr. Geltman's unwillingness to testify against St. Louis physicians is significant. (*See* Plaintiffs' Brief, p. 8). This deflection shows Plaintiffs understand the danger of counsel's irrelevant and prejudicial accusation of St. Louis physicians as being unwilling "...to testify to the truth, what they felt in their heart, feel what was handled wrong by a physician in St. Louis...." It is also significant that Plaintiffs have not provided a rational explanation as to how this far-reaching, rhetorical question about the welfare of the St. Louis community is relevant or probative on any issue in this case.

Defendants' objection to the line of inquiry was made at precisely the correct time and was sufficient to preserve the error. It is well-established that when a party has duly objected to a certain type of evidence and it has been overruled, the objection need not be repeated to further evidence of the same type. *State ex rel. State Highway Comm. v Offutt*, 488 S.W.2d 656, 661 (Mo. 1972); *Brug v. Manufacturers Bank & Trust Company*, 461 S.W.2d 269, 275 (Mo. banc 1970)(noting it would be futile for a party to have to object to an argument based upon evidence the trial court, over objection, already deemed

admissible); *Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421 (Mo. 1958)(noting it futile, and therefore unnecessary, to request trial court to reprimand counsel for an argument which the trial court had already expressly sanctioned); *Villinger v. Nighthawk Freight Service, Inc.*, 104 S.W.2d 740, 743 (Mo.App. 1937)(“Plaintiff’s suggestion that defendant has no just ground to complain, since defendant did not request the court to rebuke counsel, is without substantial merit. Obviously, it would have been futile to request the court to rebuke counsel for making a statement which the court by its ruling had already sanctioned.”).

Here, when Plaintiffs’ counsel continued to question Dr. Geltman about St. Louis physicians impeding quality health care by not being willing to “testify to the truth, what they felt in their heart,” it was merely continuing the same irrelevant and character-impugning theme. One could wonder how close this question is to the classic, “when did you stop beating your children?” The fact that Dr. Geltman managed to maintain his composure and to try to answer this unanswerable question does not somehow neutralize the exchange or make it relevant.

This is really no more than what cases have observed and ruled upon for decades: commenting on the credibility of witnesses and bolstering one’s own witnesses at the same time. *See State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984).

Plaintiffs being in real denial about this point is perhaps best illustrated by their assertion that: “To be sure, Plaintiffs’ counsel did not state or even imply that St. Louis doctors do not testify truthfully...” (Plaintiffs’ Brief, p. 13). This, despite the actual words of the question, as set out above and in the trial transcript, include – “...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...". (Tr. 792:14-19)(emphasis added).

Plaintiffs' efforts to convert this objectionable event to one of mere cross-examination on Dr. Geltman's bias as a medical witness falls short. First, Plaintiffs' counsel explored the potential bias of Dr. Geltman without objection because it was a legitimate line of inquiry. (*See* Appellants' Brief, pp. 9-10, for lengthy quotes). Second, the only cases Plaintiffs offer are on the topic of the potential bias of the expert witness in court and undergoing cross-examination. Noticeably absent from Plaintiffs' response – and with good reason - is any case which permitted a party to cross-examine on what *other* witnesses, let alone an entire professional community, would or would not do. Nor do Plaintiffs provide any case approving a witness being asked to defend the truthfulness of other witnesses in general and to more than imply that those doctors are unwilling to testify to "the truth" about some unknown health care situation.

If the court has doubts about whether defendants' counsel objected enough, then defendants request the Court review the issue under the plain error doctrine. Cases have held that even a general objection of "irrelevance" can be sufficient for appellate review and remedy. *Luechtefeld v. Marglous*, 151 S.W.2d 710, 713 (Mo.App. E.D. 1941)(" . . . a party objecting to a general assignment of relevance may on appeal show its prejudicial, though not specifically pointed out to the trial court but such prejudice must be of the character actually to be expected from the admission of such evidence.").

That being said, defendants still fervently believe this line of questioning was unsupported, controversial, inflammatory, prejudicial, and irrelevant to this case. The trial court erred in overruling Defendants' objection to this questioning and denying Defendants' Motion for New Trial.

II. Trial Court Error in Permitting Questioning of Dr. Ferrara About His Not Speaking With Dr. Cleveland Post-Health Care

A. Questioning of Dr. Ferrara regarding the absence of post-care discussions with Ms. Dodson’s surgeon was accusatory, argumentative, irrelevant and prejudicial.

Plaintiffs’ basic argument in response to Defendants’ second Point Relied On is (almost flippantly) “no harm, no foul.” Plaintiffs contend Dr. Ferrara’s “overall testimony... likely [had] no effect on the jury’s decision.” (Plaintiffs’ Brief, p. 18). Further, according to Plaintiffs, “[t]hat Dr. Ferrara never consulted with Dr. Cleveland goes directly to the credibility of Dr. Ferrara’s assertions that his conduct did not cause Shannon’s death.” *Id.* This might have been true if the evidence of Dr. Ferrara’s consultation with Dr. Cleveland (or lack thereof) concerned a time *before* Dr. Ferrara’s care and treatment of Ms. Dodson ended. But this is not the issue here. The issue is the questioning and testimony Plaintiffs presented, over Defendants’ objections (Tr. 302-305, A18-A19; Tr. 319-320, A22), from Dr. Ferrara regarding his not having interacted with Dr. Cleveland (the surgeon who performed Ms. Dodson’s by-pass surgery and whose treatment was not at issue) *after* Dr. Ferrara’s care of Ms. Dodson:

Q. Have you talked to Dr. Cleveland at all since this night about what her observations or conclusions were?

A. No, I have not.

Q. Even after Shannon died, you never consulted her to talk about her surgery and what she thought?

THE WITNESS: I don't recall having a – you know, I might have had a brief conversation. I, I don't recall what was said at the conversation.

Q. (BY MR. GRAHAM) Were you, were you curious at all about what Dr. Cleveland found and did?

A. Yes, absolutely. But I mean I did read the operative report too, and that pretty much laid everything out.

(L.F. 860, Transcript of Dr. Ferrara, p. 116:9-117:4, A78)(emphasis added).

As is obvious from the cases Plaintiffs cite in support of their argument, Plaintiffs misunderstand the nature of Defendants' argument as to this testimony. Defendants do not and have not argued that the subject questioning and testimony is irrelevant simply by nature of the timing of the interaction with Dr. Cleveland. Rather, the point is that here, under these factual circumstances, there is no relevant issue to which this particular post-occurrence evidence could be said to relate.

It is not plausible to say the questioning and testimony was "somewhere between neutral and favorable to Dr. Ferrara," and therefore did not imply Dr. Ferrara was uncaring. (Plaintiffs' Brief, p. 20). Plaintiffs' vain attempt to judge the facts in this regard is based on Defendants' counsel, at other points in the trial, calling Dr. Ferrara "caring," "careful," "conscientious," etc. (*Id.*) Plaintiffs cite no cases supporting the notion that Defendants meeting the improperly admitted post-care testimony with other testimony changes the prejudicial nature of the improperly admitted testimony. The purpose and effect of this post-care conduct "evidence" could only be to prejudice Dr. Ferrara in the minds of the jury and portray him as uncaring and callous. This prejudice

clearly outweighed whatever usefulness Plaintiffs claim it had, even if Defendants' evidence painted a different picture.

The questioning and testimony at issue was inadmissible as both logically and legally irrelevant. The combined error of Points Relied On I and II, clearly demonstrate that this case was tried on bias and not the relevant facts. The trial court erred in denying Defendants a new trial.

III. Trial Court Error in Giving Instruction No. 4 Based Upon Non-Mandatory MAI 2.07

A. Non-mandatory MAI 2.07 was without foundation, misled and confused the jury, and needlessly injected "insurance" into this case.

The test for whether or not a jury was properly instructed is whether the instruction 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, 497-98 (Mo.App. E.D. 2005). Neither is true here.

The fundamental flaw in Plaintiffs' argument as to Instruction No. 4 is that the request to instruct the jury not to consider insurance, should have come, if at all, from Defendants. A trial free from improper references to the existence of insurance is a closely guarded right belonging, rather uniquely, to the defense. *See Ballinger v. Gascosage Elec. Coop.*, 788 S.W.2d 506, 513 (Mo. banc 1990), overruled on other grounds by *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. banc 1991)("[T]he presence of insurance was no secret. This does not give the plaintiff license to flaunt insurance coverage in the jury's face."); *Amador v. Lea's Auto Sales & Leasing*,

916 S.W.2d 845, 851 (Mo. App. S.D. 1996)(“The plaintiff does not have the right to flaunt insurance coverage in the jury's face.”) Yet, here, it was the Plaintiffs who requested the instruction, despite it being the Plaintiffs’ witnesses who themselves mentioned the existence of insurance benefits (Mr. Dodson and Plaintiffs’ economist) and the Plaintiffs who included the loss of an insurance benefit as an element of their own damages.

Plaintiffs incorrectly assert Instruction No. 4 was necessary due to comments made during *voir dire*. (Plaintiffs’ Brief, p. 23). Venireman Henzler volunteered, “Well, I work in insurance, so in a medical malpractice, it’s the insurance company that’s going to be paying the claim.” (Tr. 160:16-19). Later, she commented, “people tend to think, Oh, it’s insurance, just go ahead and give them the world.” (Tr. 183:18-19). At the request of Defendants’ counsel, all further questioning of Venireman Henzler regarding her job or insurance was done at sidebar. (Tr. 183:21-186:2). As is clear from the nature of the questioning of and comments from Venireman Henzler, to the extent an instruction based upon MAI 2.07 was necessary, it should have been Defendants requesting it. Defendants did not so request.

Next, Plaintiffs point to the testimony of Plaintiff Jason Dodson and Jay Marsh. (Plaintiffs’ Brief, p. 23). Asserting this testimony as a basis for instructing the jury pursuant to MAI 2.07 is nonsensical. Plaintiffs presented the evidence as to the loss of the health insurance benefit so that the jury would, in fact, consider it in awarding damages. Yet, Instruction No. 4, as requested by Plaintiffs, informed the jury that the existence or non-existence of any type of insurance or benefit must not be considered in

arriving at the verdict. (L.F. 378). The potential for and likelihood of jury confusion is clear.

Finally, Plaintiffs erroneously assert Exhibit 11, which consisted of hospital and clinic bills that included both the original bill amounts and the amounts as adjusted or paid by insurance, necessitated Instruction No. 4. (Plaintiffs' Brief, p. 23). There is no indication in the record, however, that the jury was ever presented with or saw the pages from Exhibit 11 which included the insurance payments or adjustments. During the direct examination of Jason Dodson, Plaintiffs' counsel asked that Exhibit 11 be "pull[ed] up" and shown to the jury, but stated that he would "not... run through all the pages on this..." (Tr. 670:1-6). It is unclear which page or pages of trial Exhibit 11 were actually shown the jury at that time, and this is the transcript's only mention of trial Exhibit 11 in front of the jury.

Because non-mandatory instruction MAI 2.07 is so new (2012), no appellate decisions have interpreted the proper use of the instruction. The Committee Comments state, however, that there may be situations in which the instruction would *not* be appropriate, such as bad faith insurance cases, vexatious refusal to pay cases, and insurance coverage cases. MAI 2.07, Committee Comment B (2014 Revision). Here, insurance was at issue at least to the extent of Plaintiffs' request for damages resulting from the loss of a health insurance benefit. Despite the lack of Notes on Use and appellate court opinions interpreting the instruction, it appears certain that the instruction was not intended to address a situation where a plaintiff introduces the loss of insurance benefits as an element of their damages.

The potential for jury confusion and for misleading of the jury is great. Plaintiffs injected “insurance” in terms of an element of their damages and then asked the trial court to tell the jury not to consider it. The effect of the trial court’s instruction – which the jurors also took back to the jury room for deliberations – was to remind juror of the possibility of the existence of insurance but, due to the vague nature of the wording of MAI 2.07, with no rationale in the context of the case as to why they were being so instructed. Thus, under these circumstances, the MAI 2.07 instruction itself needlessly mentioned and injected insurance into the case. Mentioning or reminding the jury of the existence of insurance – a highly prejudicial matter – is to be avoided if at all possible. *Olian v. Olian*, 59 S.W.2d 673, 677 (Mo. 1933). It is axiomatic that improper injection of insurance is reversible error. *Wilson v. Kaufmann*, 847 S.W.2d 840, 851 (Mo.App. E.D. 1992). The trial court, therefore, erred in not granting a new trial.

IV. Plaintiffs’ Failure to Make a Submissible Case For Loss of Economic Support

A. The testimony of decedent’s friend and co-worker, Maria Kossmeyer, as to Shannon Dodson’s future income and career path lacked foundation and reasonable certainty.

As was discussed in Defendants’ initial Brief, the Kossmeyer testimony was based entirely upon her own personal opinions regarding decedent’s long-term income potential without any particular effort to tie the opinion to any actual facts regarding Ms. Dodson or her work performance. Thus, it was speculative, lacked foundation, and could not properly support Plaintiffs’ claim for loss of economic support.

Plaintiff's argument in opposition misses the point. (Plaintiffs' Brief, p. 25-29). The point is that, as Ms. Kossmeyer admitted, her projections as to what Ms. Dodson might have earned in the future were merely her personal opinions based upon personal experience and what she has seen with other, *unidentified* assistant property managers who have advanced into *unknown* property management positions. (Tr. 414:24-415:8, A30). She "felt" Ms. Dodson's salary would have increased to \$45,000.00, and then to \$55,000.00. (Tr. 416:16-418:6, A30-A31).

Plaintiffs vainly attempt to distinguish the *Thienes* case as one that "involved a wage differential award based on contingencies, steps out of the plaintiff's control, and rank speculation." (Plaintiffs' Brief, p. 29). That, however, is the very situation here, where the evidence of loss of future earnings should have been found too speculative in nature and not reasonably certain.

In *Thienes*, the plaintiff, who dropped out of Officer Candidate School as a result of an accident, presented the salary he thought he would have earned if he had completed OCS and received certain promotions thereafter. *Thienes v Harlin Fruit Company*, 499 S.W.2d 223, 227 (Mo.App. 1973). This "evidence" came from Army documents identifying – *in general and not with any specific tie to this plaintiff or his abilities* – rates of promotion or advancement, rates of pay for various ranks, and costs of living increases among officers in general. *Id.*

Similarly here, the raises and promotions to which Ms. Kossmeyer testified were general in nature with no specific tie to decedent. They had not yet occurred, were not actually planned to occur, and there was no indication Ms. Kossmeyer even had the

authority to determine Ms. Dodson's compensation or that she ever became aware that Ms. Dodson was to receive a promotion or raise at any time. Because the company Ms. Dodson worked for at the time of her death went out of business in 2011, Ms. Kossmeyer's testimony as to future earnings was not tied to any particular company. Thus, as in *Thienes*, there are multiple levels of speculation and hypothesis present: that decedent would have found another job in the field; what her salary might have been at this unknown company; what promotions, if any, might have been available; what promotions decedent (who had expressed a desire to work a part-time schedule, Tr. 539:21-544:12) would accept.

Accordingly, any claim for loss of future earnings in this case, based on the personal opinions of Ms. Kossmeyer, falls squarely within the realm of "contingent or speculative occurrences, possible...developments," or "conjecture" as rejected in *Thienes*. The trial court erred in submitting to the jury the claim for loss of economic support.

B. Plaintiffs' speculative and unsupported evidence that the loss of Shannon Dodson's health insurance benefit of \$500.00 per month for family coverage would extend into the future 30+ years could not support Plaintiffs' claim for loss of economic support.

This point on appeal does not concern, as Plaintiffs seem to argue, the admissibility of Jason Dodson's testimony regarding the loss of his wife's health insurance benefit or economist Jay Marsh's testimony regarding that loss. (Plaintiffs' Brief, p. 31-35). The trial court error is in allowing the claim for economic damages to go to the jury based on nothing more than this testimony. The issue is one of submissibility of the claim, not admissibility of evidence.

Plaintiffs also argue Defendants mistake Mr. Marsh's assumptions for speculation. (Plaintiffs' Brief, p. 35). To have probative value, an expert's opinion must be founded on substantial data, not mere conjecture, speculation or unwarranted assumptions. *Glaize Creek Sewer Dist. of Jefferson County v. Gorham*, 335 S.W.3d 590, 594 (Mo.App. E.D. 2011). Mr. Marsh's testimony candidly admits the speculative nature of his loss of fringe benefit testimony. The only evidence of the cost of health insurance through Mr. Dodson's employer was a copy of an e-mail indicating insurance through his employer would cost \$482.51 per month for medical coverage and \$56.21 for dental coverage. (Tr. 714:12-715:8, A44). Mr. Marsh then used this email to support his assumption that the loss of decedent's insurance benefits amounts to \$500 per month/\$6,000.00 per year, despite the fact that this would mean the costs of health insurance through decedent's employer would have to be zero. (Tr. 714:12-715:8, A44). There was no such testimony, and Mr. Marsh acknowledged decedent contributed *some unquantified* dollar amount for her family coverage. (Tr. 715:9-715:21, A44).

Further, Mr. Marsh's reason for carrying this loss of fringe benefit well beyond the age of majority of the Dodson children was purely speculative. Mr. Marsh testified he carried out the loss of fringe benefits 10 to 19 years beyond the age of majority of the children because "there is *some prospect* that 23 years in the future that Mr. Dodson could have benefited from group insurance through his wife." (Tr. 718:10-14, A45)(emphasis added). This was a wholly unsupported assumption. There was no evidence of Mr. Dodson's intention to leave his current employment and go into the private practice of law. (Tr. 716:18-23, A45). According to Mr. Marsh, "there's *some*

likelihood that Mr. Dodson at *some* point could have benefitted from his wife having insurance through her employer.” (Tr. 716:23-25, A44)(emphasis added). This testimony, far from a supported assumption, was rank speculation, and could not properly support the alleged fringe benefit loss of \$6,000.00 yearly until at least age 67.

The trial court, therefore, erred in not directing a verdict or entering judgment notwithstanding the verdict in favor of Defendants and, subsequently, in not granting a new trial on Plaintiffs’ claim for economic damages.

V. Trial Court Error in Deferring Ruling on Defendants’ Motion for Directed Verdict Until the Close of Plaintiffs’ Evidence

A. The trial court erred in not sooner directing a verdict in favor of Defendants on Plaintiffs’ claim for aggravating circumstances damages.

Due to the trial court’s failure to direct a verdict on Plaintiffs’ claim for aggravating circumstances damages at the close of Plaintiffs’ case, Defendants were forced to present evidence of Dr. Ferrara’s knowledge of and involvement in other arterial dissections in their own case-in-chief. This was not evidence which Defendants would have chosen to present. In other words, Defendants were forced to present evidence which, though relevant to punitive/aggravating circumstances damages, was clearly irrelevant and prejudicial in the setting of a negligence-only claim. Plaintiffs’ argument that the evidence of other arterial dissections “can hardly be called prejudicial” misses this point. (Plaintiffs’ Brief, p. 41-42). This powerful evidence of negligence is not evidence which Defendants’ counsel would have voluntarily chosen to present but

were forced to do so in direct response to the allegations of conscious disregard attendant to Plaintiffs' then still-pending claim for aggravating circumstances damages.

B. Defendants have not waived any argument as to the trial court's ruling on the Motion for Directed Verdict at the close of Plaintiffs' evidence.

Plaintiffs incorrectly assert Defendants have waived their argument that the trial court should have entered the directed verdict in their favor at the close of Plaintiffs' evidence. (Plaintiffs' Brief, p. 37-38). The cases Plaintiffs cite, however, show this to be the case only where a trial court *overruled* a motion for directed at the close of the plaintiff's evidence and not, as here, where the trial court *deferred* ruling. *See Carson-Mitchell, Inc. v. Macon Beef Packers, Inc.*, 544 S.W.2d 275, 276 (Mo.App. 1976)(trial court overruled defendant's motion for directed verdict at the close of plaintiff's evidence and defendant failed to file a motion for directed verdict at the close of all the evidence; held trial court properly denied defendant's post-trial motion "to have judgment in accordance with the motion for directed verdict" because the defendant filed no motion for directed verdict at the close of *all* the evidence); *Sanders v. Ahmed*, 364 S.W.3d 195, 207 (Mo. banc 2012)(noting it is only when a trial *overrules* a motion for directed verdict at the close of plaintiff's evidence *and* the defendant then chooses to put on evidence that any error in overruling the motion for directed verdict is waived; "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..."); *see also Schnatzmeyer v. Nat'l Life Ins. Co.*, 791 S.W.2d 815, 819 (Mo.App. E.D. 1990)("If... the moving party presents evidence, the moving party waives

any trial court error in *denying* the motion filed at the close of plaintiff's case.")(emphasis added).

Here, rather than denying Defendants' Motion for Directed Verdict at the close of Plaintiffs' evidence on the claim for aggravating circumstances damages, the trial court deferred ruling until after the close of all the evidence. (Tr. 728:18-730:13, A46-A47). With no ruling from the trial court, Defendants were not presented with a choice as to whether to put on further evidence or not. Defendants had a right to continue to defend themselves, and Plaintiffs' waiver argument is unavailing. See *Arnold v. City of Maryville*, 85 S.W. 107, 108 (Mo.App. 1905)(holding a party has a right to try the issues which have been forced upon him); *Ziervogel v. Royal Packing Co.*, 225 S.W.2d 798, 803 (Mo.App. 1949).

ARGUMENTS IN RESPONSE TO PLAINTIFFS' FOUR POINTS RELIED ON

I. The Trial Court Did Not Err in Applying the Non-Economic Damage Cap of Section 538.210(1) Because the Missouri Supreme Court has Held the Cap is Constitutional and Does Not Violate the Right to Trial by Jury in Wrongful Death Actions

A. Summary of Argument

Plaintiffs' arguments that the damage cap in section 538.210(1) unconstitutionally infringes upon Plaintiffs' right to a jury trial in this wrongful death action fail because:

a) Sanders v. Ahmed controls here because it correctly decided the General Assembly has full authority to legislate what remedies are available in a statutory cause of action, such as wrongful death, which was not an action at common law; b) Watts v. Lester Cox does not control here because it reached only the issue of statutory damage caps and the right to a jury trial in a non-wrongful death action; c) Diehl is not applicable here because it dealt only with the basic right for a trial by jury in a statutorily created action which was sufficiently analogous to some common law actions, but it did not deal with statutory damage caps; and, d) there was no common law action for wrongful death in Missouri at or before 1820 and therefore, this is a statutorily-created cause of action for which the legislature properly can set or limit remedies.

Although this Summary of Argument sets out its main points above for Point Relied On I, for convenience of the court, we will attempt to deal with Plaintiffs' arguments (as is possible) in the order they have raised them over pages 46 through 60 of their brief.

B. Standard of Review

Interpretation of a statute and its application to a given set facts are questions of law which this Court will review *de novo*. *Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co., Inc.*, 358 S.W.3d 528, 534 (Mo.App. E.D. 2012). *Boggs ex rel. Boggs v. Lay*, 164 S.W.3d 4, 23 (Mo.App. E.D. 2005). In interpreting statutes, this Court is to ascertain the intent of the legislature and give effect to that intent, if possible. *Hecht v. Hecht*, 289 S.W.3d 647, 649 (Mo.App. E.D. 2009). In ascertaining legislative intent, the language used is to be given its plain and ordinary meaning. *Id.*

C. The trial court correctly followed *Sanders v. Ahmed* and applied the non-economic damage cap of Section 538.210(1) to reduce the non-economic damages portion of the jury’s verdict.

The trial court correctly applied the statutory non-economic damage cap of §538.210(1) RSMo to the judgment in this case. Section 538.210(1) mandates, “In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars for non-economic damages irrespective of the number of defendants.” Section 538.210(1) RSMo. (2005). Section 538.210(1) directs that, “[a]ny award of non-economic damages in excess of the limit provided herein shall be reduced by the court to the maximum amount.” Section 538.215(3) RSMo. (2005). Here, following the presentation of evidence in this matter against a health care provider, the jury returned a \$9,000,000.00 verdict for non-economic

damages. (L.F. 386-389). Accordingly, as the facts of this case are clearly of the kind to which the legislature intended the statutory cap to apply, the trial court correctly reduced the non-economic damage award to \$350,000. (L.F. 789-796).

1. In *Sanders*, the Missouri Supreme Court expressly held the non-economic damage cap is constitutional as to wrongful death actions.

In *Sanders v. Ahmed*, the husband of a deceased patient filed a wrongful death medical malpractice action against a neurologist and his professional corporation. The jury returned a verdict for \$9.2 million in non-economic damages, which the trial court reduced to \$1,265,207.64, pursuant to the non-economic damage cap contained in Section 538.210, RSMo. (2000). 364 S.W.3d 195, 200 (Mo. banc 2012). The plaintiff filed a Motion to Amend the Judgment, alleging, among other things, that the statutory non-economic damage cap of Section 538.210 violated their constitutional right to a jury trial. A major part of Sanders's argument was that a wrongful death action actually did exist at common law and, therefore, the Missouri Constitution protected plaintiff's right to a trial by a jury whose monetary awards could not be limited by statutory damage caps. *Id.* at 202.

The Supreme Court undertook a lengthy constitutional analysis of the right to trial by jury and separation of powers, holding the legislature in a statutorily created cause of action, has the authority to choose what remedies will be permitted under that cause of action, stating in part:

Sanders attempts to avoid this result through three arguments that wrongful death is a common law cause of action rather than statutory:

first, that the original proscription of the cause of action at common law was dicta; second, that Missouri did not adopt the common law baron wrongful death recovery; and third, that wrongful death should be considered a continuation of the predicate tort causing death.

This Court has already rejected the dictum argument related to Lord Ellenborough's pronouncement in *Baker v. Bolton*, (1808) 1 Camp. 493; 170 Eng. Rep. 1033, which stated that one could not recover in court for the death of another. (citations omitted). This Court has also rejected Sanders's second argument. (citations omitted).

Sanders [also] asserts . . . that his claim arises out of the underlying tort of medical negligence and, therefore, existed at common law. (citations omitted).

Here, the General Assembly merely placed limits on the amount of non-economic damages recoverable under a statutorily created cause of action. The provisions within section 538.210 limiting non-economic damages in wrongful death suits do not violate article I, section 22(a) of the Missouri Constitution.

Id. at 204.

The *Sanders* Court specifically noted it was not addressing whether the Court's previous decision in *Adams by and through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), had been correctly decided. In *Adams*, the Court had held the legislature could, if it so chose, limit recoveries in common law personal injury cases.

Id. at 907. “We need not decide whether [plaintiff] is correct that *Adams* incorrectly stated the law **as to common law causes of action.**” *Sanders*, 364 S.W.3d at 203 (emphasis added).

2. Plaintiffs incorrectly argue that *Watts* declared Section 538.210 unconstitutional for all claims, because it explicitly reached only non-wrongful death claims.

a. By its very language, *Watts* reaches only personal injury, non-wrongful death claims.

Plaintiffs assert the *Watts v. Lester E. Cox Medical Centers* case struck down the non-economic damage caps of Section 538.210(1) in their entirety. (Plaintiffs’ Brief, heading C.I. pp. 48-52). This is simply incorrect. As will be discussed later, *Watts* clearly holds the non-economic damage cap is unconstitutional only *as applied to personal injury claims which existed at common law*. 376 S.W.3d 633, 636 (Mo. banc 2012). Wrongful death claims, however, did not exist at common law and are entirely a creature of statute. *Sanders*, 364 S.W.3d at 204.

Watts involved a child born with catastrophic brain injuries who filed a personal injury medical malpractice suit against a hospital and its associated physicians. 376 S.W.3d at 635. The jury returned a verdict in favor of plaintiff for \$1.45 million in non-economic damages, which the trial court reduced to \$350,000 pursuant to Section 538.210 RSMo. *Id.* Like the plaintiff in *Sanders*, the plaintiff in *Watts* asserted that the Section 538.210 non-economic damage cap violated the right to trial by jury and several

other provisions of the Missouri Constitution, including equal protection and separation of powers. *Id.*

As it did in *Sanders*, the Supreme Court undertook a lengthy analysis of the constitutionality of the non-economic damage cap in light of the nature of the cause of action alleged. *Id.* at 637-646. Based upon the fact that the right to a trial by jury in a personal injury cause of action – unlike a statutorily-created wrongful death cause of action – existed at common law, the Court held the legislature’s attempt to limit damages for such a cause of action infringed upon the Missouri Constitution’s right to trial by jury, overruling *Adams* on this point. *Id.*

Significantly, the *Sanders* opinion, issued less than three months prior to *Watts*, is not even mentioned by the majority opinion. Clearly, this is because the *Watts* decision did not overrule in any way the *Sanders* decision, but was, rather, merely the next click on the analytical dial. *Sanders* decided the constitutionality of the non-economic damage cap with regard to statutorily created causes of action (wrongful death), while *Watts* decided the constitutionality of the non-economic damage cap with regard to common law causes of action (personal injury).

That the *Watts* opinion is limited to personal injury cases – i.e., those which existed under the common law – is expressly stated in the opinion.

This Court holds that Section 538.210 is unconstitutional to the extent that it infringes on the jury’s constitutionally protected purpose of determining the amount of damages sustained by an injured party. *Such a limitation was not permitted at common law when Missouri’s constitution first was*

adopted in 1820 and, therefore, violated the right to trial by jury guaranteed by Article I, Section 22(a) of the Missouri Constitution. Accordingly, the judgment is reversed to the extent that it caps non-economic damages pursuant to *Section 538.210*. To the extent that the decision in *Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. banc 1992), is inconsistent with this decision, it is overruled.

376 S.W.3d at 636 (emphasis added). Further, Justice Russell's dissenting opinion in *Watts* cites *Sanders* as an example of "settled Missouri constitutional law." 376 S.W.3d at 649, fn1. "Just this year, this Court upheld *Section 538.210* with regard to *statutorily* created causes of action. *Sanders v. Ahmed*, 364 S.W.3d 195, 204 (Mo. banc 2012)." (Emphasis in original). Since *Watts*, this Court has also recognized that opinion as being limited to personal injury cases. *See Jefferson ex rel. Jefferson v. Missouri Baptist Medical Center*, 447 S.W.3d 701, fn 5 (Mo.App. E.D. 2014)(recognizing that under Missouri law unconstitutional portion of statute may be severed to leave constitutional portion in effect and that in *Watts*, "the Missouri Supreme Court held that section 538.210(1)'s cap on non-economic damages was unconstitutional as applied to personal-injury claims...[and] only four months before *Watts* was decided, the Missouri Supreme Court in *Sanders*... specifically upheld the constitutionality of section 538.210(1)'s cap on non-economic damages in regard to wrongful-death claims.").

- b. Watts implemented the doctrine of severability in holding only a portion of Section 538.210(1) to be invalid.

Further, *Watts*'s declaration of being only for partial invalidity of Section 538.210(1) on constitutional grounds did not totally invalidate the statute. Rather, it presumptively would have been regarded as following the statutory construction doctrine of severability, which is codified in Missouri. Section 1.140 RSMo. (entitled "Severability of Statute Provisions") provides in pertinent part:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Thus, the statutory doctrine of severability permits one provision of law found to be offending to be stricken and the remainder of a statute to survive. *Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996). Upon a finding of invalidity as to one provision of a statute, courts are to presume the legislature intended to give effect to the other parts of the statute which are not invalidated. *Id.* at 300-301. This makes logical sense because courts are required to construe a statute in a manner that renders it

constitutionally valid if reasonably possible to do so. *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988)(overruled on other grounds by *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000).

The test of whether the other portions of a statute, which has been found to contain invalid portions, may be upheld is: (1) whether, after separating invalid portions, the remaining portions are in all respects complete and susceptible of constitutional enforcement; and, (2) whether what remains is a statute which the legislature would have enacted if it had known that the rescinded portion was invalid. *Id.* at 393. The Supreme Court has emphasized that an act of the General Assembly carries a strong presumption of constitutionality, with all doubts to be resolved in favor of the procedural and substantive validity of legislative acts. *Missouri Association of Club Executives, Inc., v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006). “This Court has an obligation to sever unconstitutional provisions of a statute unless the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” *Id.* at 889.

Section 538.210 contains a disjunctive reference to “personal injury” claims and to claims for “death” as follows: “In any action against a health care provider for damages for personal injury or death arising out of the rendering or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars for

non-economic damages....” (emphasis added). The *Watts* court clearly held that the non-economic damage cap as applied to personal injury/non-wrongful death actions is unconstitutional. 376 S.W.3d at 636. The Court did not, however, declare the entire statute unconstitutional, nor did it strike the statute down. Clearly, this is because the Court was cognizant of both the disjunctive language in the statute and the statutory severability concept in Missouri law, as expressed in statutes and in its own decisions as set forth above.

D. Plaintiffs’ efforts to use *Diehl*’s “analogous to common law actions” analysis to expand *Watts*’s reach to wrongful death actions fails.

Plaintiffs also incorrectly rely upon the Supreme Court’s opinion in *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82 (Mo. banc 2003), asserting the opinion “provides a simple and straightforward test for determining whether the right to trial by jury attaches.” (Plaintiffs’ Brief, p. 52). *Diehl*, however, is not applicable to the facts of this case for a variety of reasons. First, the Plaintiffs here, unlike the plaintiff in *Diehl*, were not denied a trial by jury. Secondly, although the Supreme Court reasoned that *Diehl*’s claim was analogous to trespass at common law – therefore providing for the right to trial by jury – there is no action at common law analogous to wrongful death. Not to mention, courts have expressly stated the cause of action did not exist at common law. *See* Subsection E.3, *Infra*. Third, *Diehl* did not involve statutorily imposed damage caps or their constitutionality. Finally, as explained earlier herein, the Supreme Court in *Sanders* has already specifically upheld the statutory non-economic damage cap as it relates to wrongful death actions.

To put it bluntly, Plaintiffs' analysis of *Diehl* is not on point. The case involved the complete denial of a trial by jury in a discrimination action brought under the Missouri Human Rights Act for damages based on age discrimination, sex discrimination and retaliation for filing a discrimination complaint. *Id.* The Supreme Court, issuing a preliminary writ of prohibition, ruled that an "employee had state constitutional right to have her action tried by a jury." *Id.* at 92. The Supreme Court reasoned that the matter was "analogous to those kinds of actions triable by juries at the time of the Constitution of 1820," and relied on the analysis of the *Briggs* court, which held that the right to a jury trial is implied in all cases whether the right or liability is one at common law or is one created at statute. *Id.*

Here, however, the right to a jury trial itself is not at issue. Plaintiffs had a right to jury trial and received a jury trial in the present action. The issue, rather, is one of a statutory cap on non-economic damages. That issue was not addressed by the *Diehl* court.

It must be noted that *Sanders* in no way involved the issue of whether plaintiffs are entitled to the basic right of a jury trial (on a wrongful death claim or otherwise). Rather, the issue was whether a cap on certain monetary damages in a wrongful death claim infringes upon the right to trial by jury as it existed when the Missouri Constitution was adopted. The *Sanders* Court clearly held it is not an infringement of the right to jury trial for the General Assembly to have placed a limit on the amount of non-economic damages recoverable under a statutorily-created cause of action. 364 S.W.3d, at 204. This holding presupposes that a right to jury trial does exist for wrongful death claims,

otherwise there would be no right upon which a damage cap could potentially infringe. And in this way, *Sanders* is in no way inconsistent with *Diehl*.

Despite Plaintiffs' argument to the contrary, *Sanders* did not hold that wrongful death actions are not afforded to a jury trial under Article I, Section 22(a). Rather, *Sanders* held that because a wrongful death claim is statutory and has no common law antecedent, a damage cap does not run afoul of that Article I, Section 22(a) right to jury trial. As a matter of fact, *Diehl* embraced this same rule of law as later expressed in *Sanders* with its statement: "For instance, a claim for damages for wrongful death is statutory; it has no common law antecedent. Missouri's first wrongful death statute was enacted in 1855." *Diehl*, 95 SW3d at 88.

E. Plaintiffs incorrectly assert *Sanders v. Ahmed* does not control the outcome of this case.

Plaintiffs state they have mustered four reasons showing why the *Sanders's* decision does not control here, but they have merged them into three points: 1) that *Sanders* involved the pre-2005 version of Section 538.210(1); 2) that *Sanders* preceded *Watts*, which Plaintiffs claim declared the entire damages cap in the current version of Section 538.210(1) unconstitutional; 3) that *Sanders* relied on the now discarded assertion from *Adams by and through Adams v. Children's*, that a jury's function is served if it determines damages, even if overridden by statutory damage caps; and, 4) "any analytical value of *Sanders* is undercut because wrongful death cases were tried at common law."

1. The fact that *Sanders* dealt with the pre-2005 version of Section 538.210(1) is of no consequence because *Sanders*'s ultimate holding rests on the fact that no wrongful death action existed at common law.

Plaintiffs also incorrectly argue that *Sanders* does not apply because it was decided based on Section 538.210 as it existed before the 2005 changes to the statute. (Plaintiffs' Brief, p. 55-56). This is a distinction without a difference. As acknowledged by Plaintiffs, both the pre-2005 statute and the current version placed a cap on non-economic damages. The only difference is as to amount, number of caps, and means of adjustment. *See* Section 538.210 RSMo (2000) as compared to Section 538.210 RSMo (2005). Neither the *Sanders* nor *Watts* opinions turned, in any way, upon any of these factors.

Rather, both cases turned on whether the citizens of the State of Missouri had the right to trial by jury in each cause of action as of the time of enactment of the state's Constitution. In the case of a cause of action for personal injury, the Court found such a right to trial by jury existed as of that time, hence legislative attempts to limit the jury's determination of damages are deemed unconstitutional. On the other hand, in the case of a cause of action for wrongful death, the Court found such a right to trial by jury did not exist as of that time, leaving the legislature free to limit the jury's determination of damages in any way it sees fit (up to and including eliminating the cause of action entirely, if it so chooses). This has nothing to do with amount or number of damage caps, but rather with the fundamental authority to impose damage caps – in any amount or in any number – in the first instance. It does not, as Plaintiffs contend, require speculation

to determine how the Supreme Court would rule on a post-2005 application of the Section 538.210 damage cap in a wrongful death case because the nature of the cause of action and the substance of the cap to be applied are the same.

2. Neither *Sanders* being decided three months before *Watts*, nor its discussion of *Adams* prevents it from controlling the right to jury trial issue here.

Plaintiffs' reliance on *Watts* being "more recent" than *Sanders* is also without merit. The timing of the *Sanders* and *Watts* decisions is inconsequential, as the cases themselves address different causes of action. One, *Watts*, stems from a personal injury matter recognized at common law and the other, *Sanders*, stems from a wrongful death action not recognized at common law.

Additionally, Plaintiffs misstate the significance of *Adams* as it relates to the court's underlying analysis in *Sanders*. (Plaintiffs' Brief, p. 56-57). The *Sanders* court specifically stated that it did not need to decide whether *Adams* incorrectly stated the law as to common law causes of action because Missouri did not recognize a common law claim for wrongful death. *Sanders*, at 203. The same observation holds true here.

3. Plaintiffs' attempt to prove that pre-1820 common law as adopted by the Missouri Constitution recognized a wrongful death action falls well short, both in their own argument, as well as in the long history of Missouri cases on the subject.

a. Missouri law has consistently treated wrongful death claims as arising only by operation of statute and not arising from common law.

Article I, Section 22(a) of the Missouri Constitution provides, “[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate.” The words “as heretofore enjoyed” have been understood to refer to the right to a jury trial at common law when the state constitution was adopted in 1820. *Watts*, 376 S.W.3d at 638; *Diehl*, 95 S.W.3d at 85. The scope of that right is also defined by the common law limitations on the amount of a jury’s damage award. *Watts* at 638; *Klotz v. St. Anthony’s Medical Center*, 311 S.W.3d 752, 775 (Mo. banc 2010)(Wolff, J., concurring).

As recently as 2012, the Missouri Supreme Court expressly held that “[t]he provisions within Section 538.210 limiting non-economic damages in wrongful death suits do not violate article I section 22(a) of the Missouri Constitution.” *Sanders*, 364 S.W.3d at 204. The rationale for this holding was that “...the General Assembly merely placed limits upon the amount of non-economic damages recoverable under a statutorily-created cause of action.” *Id.* at 204. This rationale was acknowledged previously by Judge Wolf in his concurring opinion in *Klotz*, 311 S.W.3d at 779, where he stated: “[t]here have been instances in which limits on damages validly have been imposed on jury-tried cases when the cause of action was unknown at common law, such as wrongful death actions.” (emphasis added). This further shows the distinction between the application of statutorily-created damage caps in statutorily-created causes of actions from those actions recognized at common law prior to 1820, as held in *Watts*.

The fact that a wrongful death action was created by statute and unknown at common law has been steadfastly recognized by Courts as a part of Missouri’s legal

heritage since, at least, 1886. In *Barker v. Hannibal & St. J.R. Co.*, 14 S.W. 280, 281 (Mo. 1886), it was clearly stated,

It may be observed that damages for a tort to the person, resulting in death, were not recoverable at common law, nor could husband or wife, parent or child, recover any pecuniary compensation therefor against the wrong-doer. Our statute on this subject both gives the right of action, and provides the remedy for the death, where none existed at common law, and where an action is brought, under the statute, it can only be maintained subject to the limitation and conditions imposed thereby. In conferring the right of action, and in providing such remedy, in designating when and by whom suits may be brought, it was, as a matter of course, competent for the legislature to provide and impose such conditions as it might deem proper, and the conditions thus imposed modify and qualify the right of recovery, or form rather, we think, a part of the right itself, and upon which its exercise depends.

In *Clark v. Kansas City, St. L. & C. R. Co.*, 118 S.W. 40, 45 (Mo. 1909), it was stated,

In our exposition of the statute it has been steadily held that as there was no right of action for a wrongful death at common law at all, and as the statute transmitting such right of action is in derogation of the common law, it must be construed with reasonable strictness. Furthermore, as the right of action is only of statutory origin, the Legislature had the right in creating it to prescribe a preclusive remedy, and nominate those entitled to sue and the terms on which they could sue, and has done so.

And, again, in *State ex rel. Thomas v. Daves*, 283 S.W. 51, 56 (Mo. 1926), it was stated,

The very purpose of the Damage Act of 1855 was to give a cause of action where none existed at common law. It did not revive a cause of action theretofore belonging to the deceased, but it gave a new cause of action to named parties bearing some relationship to the deceased.

Consistent decisions have followed to this day. See *Cummins v. Kansas City Public Service Co.*, 66 S.W.2d 920, 922 (Mo. banc 1933); *Glick v. Ballentine Produce, Inc.* 396 S.W.2d 609, 614 (Mo. 1965)(overruled on other grounds by *Bennett v. Owens-Corning Fiberglass Corp.*, 896 S.W.2d 464 (Mo. banc 1995); *State ex rel. Kansas City Stock Yards Co. of Maine v. Clark*, 536 S.W.2d 142, 144 (Mo. banc 1976)(“There was no right of action for wrongful death at common law. It is only by virtue of statutory enactments that a recovery may be had upon such a claim.”); *Hagen v. Celotex Corp.*, 816 S.W.2d 667, 674 (Mo. banc 1991)(“Actions for wrongful death are purely statutory.”); *Sullivan v. Carlisle*, 851 S.W.2d 510, 513 (Mo. banc 1993) (“Wrongful death is a statutory cause of action.”); *Diehl*, 95 S.W.3d at 88 (“For instance, a claim for damages for wrongful death is statutory; it has no common-law antecedent. Missouri’s first wrongful death statute was enacted in 1855.”)

Plaintiffs, somewhat incredibly, suggest that for more than 100 years, Missouri judges and lawyers alike have overlooked the case of *James v. Christy*, 18 Mo. 162 (1853), as holding there was a wrongful death claim at common law. This suggestion, however, is incorrect and has been declined in every case in which it has been raised. See e.g., *Clark*, 536 S.W.2d at 144; *Glick*, 396 S.W.2d at 614; *Cummins*, 66 S.W.2d at 922.

In *Cummins* it was stated:

Some American Courts even thereafter, before the passage of the wrongful death acts, allowed recovery by a father for loss of services for the death of a minor son. *See James v. Christy* 18 Mo. 162....The first real right to recover for the wrongful death of a person (not on a theory of loss of services) was created by Lord Campbell's Act, St. 9 to 10 Vict., enacted by the English Parliament in 1848.... It was therefore intended to be much broader in scope than either the old (rejected) theory of right to recover for loss of services only or the mere survival of the deceased's cause of action for his injuries.

66 S.W.2d at 677-79.

Later, in *Glick*, it was stated:

The only Missouri case cited, *James v. Christy* (1853), 18 Mo. 162, has been discussed and distinguished in *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W.2d 920, loc. Cit. 922. To the effect that there is no common law right of action in Missouri for wrongful death see the following: *Barker v. Hannibal & St. Joseph R. Co.*, 91 Mo. 86, 14 S.W. 280; *Allen v. Dunham*, 188 Mo.App. 193, 175 S.W. 135; *Clark v. Kansas City, St. Louis & C. R. Co.*, 219 Mo. 524, 118 S.W. 40; *Jordan v. St. Joseph Ry., Light, Heat & Power Co.*, 335 Mo. 319, 73 S.W.2d 205; *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W.2d 920; *Demattei v. Missouri-Kansas-Texas R. Co.*, 345 Mo. 1136, 139 S.W.2d 504; *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W.2d 644; *Knorp v. Thompson*, 352 Mo. 44, 175 S.W.2d 889; *Plaza Express Co. v. Galloway*, 365 Mo.

166, 280 S.W.2d 17; *Nelms v. Bright, Mo.*, 299 S.W.2d 483; *Frazee v. Partney, Mo.*, 314 S.W.2d 915. Other cases might also be cited. We decline to overturn this Missouri law of well over a century's duration on the strength of scattered voices of protest and criticism.

396 S.W.2d at 614.

There are a number of other reasons why *James v. Christy* does not provide a valid rationale for overturning Section 538.210 as to wrongful death actions. First, *James v. Christy* was a property rights case. It based its reasoning on the then well-recognized theory that "the father has a property right in the services of his son." *Id.* at 164. Certainly the notion that a husband would have a "property right" in his wife or that children would have a "property right" in their mother cannot be embraced in 21st century jurisprudence. Second, in *James v. Christy*, the court clearly stated the recovery allowed was limited to the actual value of the services. Section 538.210 does not limit the recovery of *economic* damages. Finally, and perhaps most importantly, *James v. Christy* was decided in 1853. It neither purports to, nor does it provide any authority for what was recognized at common law in 1820, the key date for Art. I, Sec.22(a), which was more than a quarter of a century earlier.

Defendants do not ask the court to blindly repeat a mantra, but rather to apply the well-supported law of Missouri. "Missouri does not recognize a common-law claim for wrongful death. The Supreme Court has reaffirmed time and time again that 'a claim for damages for wrongful death is statutory; it has no common-law antecedent.'" *Sanders*, at 203. (citing *Diehl*, at 88). The Court has further proclaimed, "In our exposition of the

statute it has been steadily held that as there was no right of action for a wrongful death at common law at all, and as the statute transmitting such right of action is in derogation of the common law, it must be construed with reasonable strictness.” *Clark v. Kansas City, St. L. & C.R. Co.*, 118 S.W. 40, 45 (Mo. 1909).

The current action is clearly distinguishable from the ruling in *Watts*, as this is a wrongful death action; an action that was not recognized at common law, or prior to the adoption of the Missouri Constitution in 1820. *Diehl*, at 88. The *Sanders* court acknowledged that the Missouri Constitution itself provides the timeframe for which the right to jury trial should be evaluated. *Sanders* at 203. “Particularly, the phrase ‘as heretofore enjoyed’ has been interpreted to mean that the constitution protects the right as it existed when the constitution was adopted and does not provide a jury trial for proceedings subsequently created.” *Sanders* at 203. (citing *Hammons v. Ehney*, 924 S.W.2d 843, 848 (Mo. banc 2006). Furthermore, courts have held that “as the right is only of statutory origin, the Legislature had the right in creating it to prescribe a preclusive remedy, and nominate those entitled to sue and the terms on which they could sue, and has done so.” *Clark*, 118 S.W. at 45.

II. The Wrongful Death Non-Economic Damage Cap of Section 538.210(1) Does Not Deny Equal Protection

A. Summary of Argument

Plaintiffs have failed to demonstrate the remaining damage cap in Section 538.210 is irrational or arbitrary. *Adams by and through Adams v. Mercy Children's* still provides valid assessment that 538.210 damage caps pass equal protection scrutiny.

B. Standard of Review

Plaintiffs' constitutional challenge to the validity of section 538.210(1) is subject to *de novo* review. *Watts*, 736 S.W.3d at 637. A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). Plaintiffs have the burden of proving that the statute "clearly and undoubtedly" violates the constitution. *Id.* When applying rational-basis review, a court presumes that a statute has a rational basis, and the party challenging the statute must overcome this presumption by a "clear showing of arbitrariness and irrationality." *Labrayere v. Bohr Farms, LLC*, --- S.W.3d ---, 2015 WL 1735494, *6 (Mo. banc 2015).

C. The application of Section 538.210 to limit non-economic damages in wrongful death cases does not violate the equal protection clause of either the Missouri or United States Constitutions.

Plaintiffs argue that an interpretation of Section 538.210 holding the non-economic damage cap applies only to causes of action that did not exist at common law violates the Equal Protection Clause of both the Missouri and U.S. Constitutions.

Plaintiffs' entire argument in this regard is based upon the contention that the legislature had "no acceptable basis for limiting a plaintiff's recovery when a patient dies, while at the same time allowing for unlimited recovery when that patient survives." (Plaintiffs' Brief, p. 61-62).

First, the cause of action in a wrongful death case is not that of the patient who died, but that of his survivors. It is entirely rational that when the legislature wrote Section 538.210 in the disjunctive ("personal injury or death") that it recognized that a different level of protection and recovery would be appropriate for a victim of malpractice who must live with his or her injuries, as opposed to the survivors of such a victim whose recovery is specifically recognized and limited only in accordance with Sections 537.080 and 537.090.

Second, to the extent there is a different application of damage caps between personal injury plaintiffs and wrongful death plaintiffs, it is not the result of a legislative decision, but rather of Art. I, Section 22(1) of the Missouri Constitution that protects "the right of trial by jury" only "as heretofore enjoyed"; that is, as recognized by common law prior to 1820. Quite simply, the different treatment of these two classes of plaintiffs is driven by the Constitution itself.

Further, the non-economic damage cap for medical negligence cases has already been held to not violate equal protection. In *Adams*, the plaintiffs argued, among other things, that the damages cap violated the equal protection clause because the victims of medical malpractice are a suspect class. 832 S.W.2d at 903. The Missouri Supreme Court, however, ruled that neither a denial of a fundamental right nor a suspect class was

involved. *Id.* The Court specifically rejected the notion that victims of medical malpractice are a suspect class as a claim “without support in either law or reason.” *Id.* Because the statute did not infringe upon a fundamental right or a suspect class, the Court ruled that Section 538.210 is subject to rational basis review only. *Id.*

A rational basis review, the Court explained, is “minimal in nature.” *Id.* A statutory classification will be upheld if “any state of facts reasonably may be conceived to justify it,” and a court will strike down the challenged legislation “only if the classification rests on grounds wholly irrelevant to the achievement of the state’s objective.” *Id.*, at 903. It is up to the legislature’s determination to question the wisdom, social desirability or economic policy underlying a statute, not the courts. *Id.*

With the information from interested parties as to the purpose and effectiveness, or lack thereof, for the various sections of the medical malpractice statutes, the Adams court found that one could entertain doubts about the efficacy of the General Assembly’s efforts. *Adams*, 832 S.W.2d at 904. That being said, the Court honored its role and that of the legislature: “Under equal protection rational review, this doubt must be resolved in favor of the General Assembly. While some disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists. Here, the preservation of public health and the maintenance of generally affordable health care costs are reasonably conceived legislative objectives that can be achieved, if only inefficiently, by the statutory provision under attack.” *Id.*

Based on these principles, the *Adams* Court found imposition of a non-economic damages cap is rationally related to the goals of reducing medical malpractice premiums, preventing physicians and other from discontinuing high risk practices and procedures, and preserving the public health, and therefore does not violate equal protection. *Id.* at 903-05. Therefore, the statutory limitation on non-economic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians. *Id.* at 904.

Watts overruled only one aspect of *Adams*. It did so only “to the extent that [*Adams*] holds that the *Section 538.210* caps on non-economic damages do not violate the right to trial by jury” in a medical malpractice personal injury case. *Watts*, 376 S.W.3d at 646 (emphasis added). So, because *Adams* has been overruled only to that extent, its pronouncement that *Section 538.210* passes equal protection muster still stands.

D. Plaintiffs’ constitutional challenges were untimely because they first attempted to raise them in a post-trial Motion.

Out the outset on this issue, Defendants want to make clear Plaintiffs’ timeliness argument is moot because *Sanders v. Ahmed* controls this case on the statutory damages cap issue. *John Doe B.P. v. Catholic Diocese of Kansas City-St. Joseph*, 432 S.W.3d 213, 219 (Mo.App. W.D. 2014)(Court of Appeals is constitutionally bound to follow the most recent controlling decision of the Missouri Supreme Court and inquiries questioning the correctness of such a decision are improper.). Therefore, the preservation or waiver of the constitutional challenges are of no consequence and this Court need not reach them. Indeed, the procedural history of this case contains the Order of the Missouri

Supreme Court stating that “jurisdiction is vested” with this Court. (SC93917, Order of February 25, 2014). Clearly, that Court was informing this Court and the parties that *Sanders v. Ahmed* controlled, thus rendering the constitutional claims to be at most “merely colorable” and thereby, properly within the jurisdiction of this Court. That being said, Defendants have no choice at this point and must brief Plaintiffs’ claims of constitutional invalidity of Section 538.210(1).

Plaintiffs have failed to show they properly raised and preserved their constitutional challenges to section 538.210(1). (Plaintiffs’ Brief, pp. 71-77). It is uncontroverted that Defendants pled the statutory section at issue in their Answers to the Petition in 2011. It is also uncontroverted that the first time Plaintiffs asserted the unconstitutionality of the statute was in a post-trial Motion in 2013. The maxims on this issue of raising and preserving constitutional challenges to statutes are clear and rigid.

A constitutional challenge to statute is considered to be of such dignity and importance that it must be raised at the earliest opportunity and not as an afterthought in a post-trial motion or on appeal. *Land Clearance for Redevelopment Authority of Kansas City, Missouri v. Kansas University Endowment Ass’n*, 805 S.W.2d 173, 176 (Mo. banc 1991). Time and time again the courts have stated that constitutional challenges must be asserted at the pleading stage, if that is the first opportunity to do so. “If the cause of action be founded upon a pleaded ordinance, then the answer would be the first open door. If the defense in its answer relies upon a pleaded ordinance, then the reply would be the first open door.” *McGrath v. Meyers*, 107 S.W.2d 792, 794 (Mo. 1937). “The rule which the cases have established is that if a defense is based on a statute or an ordinance,

the plaintiff must determine whether there is any ground for challenging its validity and if he desires to make such a challenge, assert it in his reply...or it is waived.” *Id.* Even if the challenger has raised a challenge early enough, the challenge must be of the requisite specificity and must be kept alive throughout the proceeding. *Mayes v. St. Luke’s Hospital of Kansas City*, 430 S.W.3d 260 (Mo. banc 2014).

The key to this issue is that one must focus on when the first opportunity presented itself for the challenger to raise their constitutional attack. This first opportunity may present itself with the opening pleadings, or at later times. That timing may seem confusing as to how “late” a challenge can be raised. However, the courts have shown time and time again the challenger’s failure to properly challenge at the first opportunity ends the issue with a holding of waiver.

Plaintiffs herein attempt to escape the effect of this general rule by arguing that their first opportunity to object to the application of Section 538.210 (1) came when Defendants filed their Motion to Amend Judgment. However, this is an argument which has been already rejected multiple times by the Missouri Supreme Court over many years.

For example, in *Land Clearance for Redevelopment Authority of Kansas City, Missouri v. Kansas University Endowment Association*, 805 S.W.2d 173 (Mo. banc 1991), the defendant property owner was awarded judgment pursuant to a jury verdict in a condemnation proceeding. The judgment added interest at the rate of 6% per annum pursuant to Section 523.045 RSMo (1986). *Id.* at 174. The property owner filed a post-trial motion to amend the judgment, arguing Section 523.045 violated the Missouri and

United States Constitutions and that the higher interest rate of Section 408.040 (9% per annum) should apply. *Id.* The trial court denied the motion to amend the judgment and the property owner appealed. *Id.*

On appeal, the property owner argued, as Plaintiffs do here, that the constitutional questions presented themselves only after trial and when judgment was to be entered on the verdict and that a constitutional challenge may be raised for the first time in a post-trial motion. *Id.* at 175. The Court disagreed, holding that the property owner had waived the right to raise the constitutional issues by failing to give timely notice of its intent to assert those issues. *Id.* at 176. “An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal.” *Id.* (citing *City of St. Louis v. Butler Co.*, 219 S.W.2d 372, 376 (Mo. banc 1949).

Similarly, in *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. banc 1996), the Missouri Supreme Court held constitutional challenges to the joint and several liability statute were waived because they were not raised until after verdict and judgment. In that case, the plaintiff brought a personal injury claim against defendants VanPool and Brewer. In a verdict for plaintiff, the jury apportioned liability between VanPool and Brewer. *Id.* at 683. VanPool first raised constitutional challenges to the joint and several liability statute in his Motion for New Trial. *Id.* He argued that the constitutional issues or questions arose only after the verdict and judgment were rendered. *Id.* at 684. The Court disagreed, noting that when more than one defendant is named in a tort action for damages, the joint and several liability statute applies, so VanPool could hardly argue

post-verdict that its application was a surprise. *Id.* (citing *Adams*, 832 S.W.2d at 908 and *Land Clearance*, 805 S.W.2d at 175). Thus, “[t]he appropriate time to raise the constitutional issue would have been in answer to the tort Petition, which named more than one defendant.” *Id.*

Here, Plaintiffs erroneously argue that their post-trial Motion was the first possible opportunity to assert a constitutional challenge to Section 538.210. As with the application of the statutory interest rate in *Land Clearance. supra*, and the joint and several liability statute in *Hollis, supra*, the application of Section 538.210 to the jury verdict in this case can hardly be said to have been a surprise to Plaintiffs.

The Southern District was faced with a similar argument of “ripeness” in *Bauldin v. Barton County Mutual Ins. Co.*, 666 S.W.2d 948 (Mo. App. S.D. 1984). In that case, plaintiff sued defendant insurer, alleging a failure by the insurer to pay her damages she suffered as a result of a fire loss. By Amended Answer filed with leave of court, the insurer raised the issue that the plaintiff’s claim was barred by the statute of limitations contained in Section 380.840 RSMo (1978). *Id.* at 949. The insurer also filed a Motion to Dismiss on the basis that the claim was barred by the applicable statute of limitations, which was sustained. *Id.* Plaintiff appealed and the appellate court reversed and remanded, holding the Motion to Dismiss should have been treated as a Motion for Summary Judgment. *Id.* at 949-50. It was not until plaintiff filed Suggestions in Opposition to the Motion for Summary Judgment on remand that the plaintiff asserted a constitutional challenge to the statute of limitations. *Id.* at 950. The trial court granted summary judgment, and plaintiff appealed. *Id.*

On appeal, the plaintiff again contended that *Section* 380.840 was unconstitutional, although she did not state why. *Id.* In assessing whether it had jurisdiction over the constitutional question, the Southern District held the issue had not been raised at the earliest opportunity, and had not, therefore, been preserved for appeal. *Id.* at 951. “Here, plaintiff did not raise the constitutional issue by reply to the amended answer, which, though not required by Rule 55.01, would have been a legitimate way to challenge the constitutionality of the statute, or by a motion to strike the statute of limitations defense from defendant’s amended answer. By such inaction, she waived her right to challenge the validity of the statute.” *Id.*

Here, as in *Hollis* and *Bauldin*, Plaintiffs’ earliest opportunity to challenge Section 538.210 came after Defendants’ Answers to the original Petition (filed in 2011) cited to and with their mention and assertion of the application of that section. Under Section 538.210, “[i]n any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff *shall* recover more than three hundred fifty thousand dollars for noneconomic damages...” and any noneconomic damages award in excess of this limit “*shall be reduced by the court* to the maximum amount.” (emphasis added). From the inception of this case, Plaintiffs knew: (1) that they were asserting an “action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services;” (2) that Defendants were asserting Section 538.210 in fact applied to this case and would be asserting all the rights afforded them thereunder; and, (3) that the statute required the Court, upon a jury award for non-economic damage

in excess of \$350,000, to reduce that award to \$350,000. Thus, the earliest opportunity to raise a constitutional challenge to this statute, which was clearly implicated from the beginning of this litigation, came long before the post-trial motion stage. Consequently, this Court must hold that Plaintiffs' post-trial constitutional challenges are waived and cannot be pursued.

Plaintiffs herein erroneously argue they have met the substance of the "earliest possible time" rule because they believe the trial court had an opportunity to consider the constitutional issues in post-trial Motions. (Plaintiffs' Brief, p. 72). However, close review of the cases upon which Plaintiffs rely shows they are not supportive because in those cases the first opportunity to assert the constitutional challenge occurred post-trial. Such are not the facts here.

For example, Plaintiffs cite *Call v. Heard*, 925 S.W.2d 840 (Mo. banc 1996), for the proposition that raising a constitutional challenge in a post-trial motion is sufficient so long as the trial court had the opportunity to hear arguments and rule on the constitutional challenge. (Plaintiffs' Brief, p. 72-73). That case, however, did not turn on whether the trial court had the opportunity post-trial to rule upon the constitutional challenge. Rather, the court noted that a punitive damages claim had not entered the case at all "until the day of trial, at which time plaintiffs made their initial request for the award of punitive damages." *Id.* at 847 (emphasis added). Immediately in response thereto, defendant Heard raised his constitutional due process challenge in a post-trial motion. *Id.* Thus, it was the combination of when the request for punitive damages was made **and** the opportunity of the court to consider the constitutional challenges post-verdict that led the

court to hold the challenges had been raised at the “earliest possible time.” One could argue that plaintiff Call’s request for punitive damages was too late and should have been denied. However, given that the court allowed it to be first asserted on the day of trial, then under those circumstances the constitutional challenge to the punitive damages award was considered timely.

Similarly unhelpful to Plaintiffs’ preservation argument is *Mayes v. St. Luke’s Hospital of Kansas City*. The factual and procedural history of the case was quite complicated and very different from the current case. Plaintiffs there filed wrongful death and lost chance of recovery claims in 2010 (case #1), which they voluntarily dismissed. 430 S.W.3d 260, 263 (Mo. banc 2014). They re-filed the same claims within days of the original dismissal (case #2), but the trial court dismissed the re-filed claims for failure to file section 538.225 health care affidavits. *Id.* Plaintiffs then again re-filed, this time with section 538.225 affidavits (case #3), but the trial court dismissed those claims as time-barred. *Id.* On appeal of the dismissal of case #2, plaintiffs raised, among other arguments, constitutional challenges to section 538.225, but the Supreme Court held them waived. *Id.*

Unlike the Plaintiffs herein, the *Mayes* plaintiffs first raised their constitutional challenges to several Chapter 538 provisions, including Section 538.225, in their original Petitions. *Id.* at 263-64. The Supreme Court, however, held this was not enough to preserve those constitutional challenges. *Id.* at 266-269. Although the Court found plaintiffs had complied with the requirement that constitutional questions be raised at the first opportunity by alleging those challenges in their various petitions, it nevertheless

held a waiver had occurred because plaintiffs failed to plead facts showing the constitutional violation and failed to re-allege and preserve the challenges throughout the litigation. *Id.* The Court specifically faulted the plaintiffs for not re-asserting the challenges in opposition to the defendants' Motion to Dismiss case #2 for failure to file the reviewers' affidavits. *Id.* at 267-68. According to the Court, the plaintiffs should have, at a minimum, re-raised the constitutional challenges in opposition to the Motion to Dismiss, because this was the first occasion for the trial court to rule on the challenges originally raised in the petition. *Id.* at 268. The *Mayes*' opinion emphasizes the importance of raising constitutional challenges "early and often," not – as Plaintiffs have done here – hold any constitutional challenges until the post-trial proceedings.

There are cases supporting the argument that constitutional challenges do not necessarily need to be raised in a party's initial pleading to be preserved. However, those cases involve amendments made to pleadings before trial or other case disposition. For example, in *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008), cited by Plaintiffs herein, the court held properly raised and preserved a constitutional challenge first made in an amendment to an answer, *prior to trial*.

Similarly, in *Anheuser-Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868, 869 (Mo. banc 1995), the plaintiff first raised a constitutional challenge in an amendment to the petition. The court found the constitutional challenge properly raised and preserved because the trial court had allowed the amendment before summary judgment. *Id.*

In conclusion, it can be seen that the general rule that raising a constitutional challenge for the first time in post trial motions does not preserve the issue. Here, Defendants pled section 538.210(1) in their answers to the petition in 2011. As we have seen, this was Plaintiffs' first opportunity to challenge the constitutionality of that statute. *McGrath v. Meyers*, 107 S.W.2d 792, 794 (Mo. 1937). No such challenge was made then. Nor was there ever a request to somehow amend the petition to add a reply containing the challenge or to file a separate reply, pursuant to court rule. Finally, there is no case which holds that a constitutional challenge first raised in a post-trial motion is valid when the first opportunity to raise it was in the earlier pleading stage, before trial.

In conclusion, this Court must hold that Plaintiff's post-trial constitutional challenges are waived and cannot be pursued.

III. The Application of Section 538.210 to Limit Non-Economic Damages in Wrongful Death Cases Does Not Violate Separation of Powers

A. Summary of Argument

Plaintiffs have failed to adequately articulate how the statutory damage cap at issue unconstitutionally infringes on remittitur, especially here, where Plaintiffs did not request remittitur. This point appears to be clearly an insubstantial assertion of a constitutional right, which is not ripe for adjudication.

B. Standard of Review

In reviewing legislation which is attacked for improperly allowing a delegation of judicial powers, the legislature is given large discretion. *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640, 650 (Mo. 1931).

Plaintiffs argue that a non-economic damage cap violates the separation of powers required by *Article II, Section 1* of the Missouri Constitution by encroaching on the judicial prerogative of remittitur. (Plaintiffs' Brief, p. 77-78). Quite frankly, Defendants are puzzled as to whether this issue is actually in this case. Plaintiffs did not request remittitur, nor did the Court refuse it to them. Yet, Plaintiffs argue that the statutory damage caps somehow infringe on the Court's ability or discretion in exercising remittitur. This does not present a real or substantial constitutional issue and, therefore, should be ignored as not being ripe for determination. *McCormack v. Capital Elec. Const. Co., Inc.*, 159 S.W.3d 387, 404 (Mo.App. W.D. 2005); *see also State v. Self*, 155 S.W.3d 756, 761 (Mo. banc 2005)(noting it is not an appellate court's prerogative to offer advisory opinions on hypothetical issues).

C. Plaintiffs' argument that the statutory damage cap of Section 538.210 impairs the judicial function of Remittitur is inapposite in this case.

The only authority which Plaintiffs muster on this argument is Judge Draper's dissent in *Sanders*. 364 S.W.3d at 215. There, Judge Draper cites to cases from other jurisdictions, which have apparently commented or issued opinions on this issue. However, Judge Draper's comments on this topic were not adopted by the Supreme Court or any other Missouri court. Further, his comments in *Sanders* were part of an overall missive aimed at section 538.210, with the first comments being about the damage caps improperly impacting a litigant's Constitutional right to a jury trial.

None of this changes the operative fact that there is no issue in this case about remittitur being denied as the result of the statutory damage cap under examination. Therefore, this is a moot point.

Perhaps it is worth pointing out that a separation of powers challenge dealing with the right to jury trials in wrongful death cases was already rejected by the majority opinion in *Sanders*:

The limit on damages within *Section 538.210* interferes neither with the jury's ability to render a verdict nor with the judge's task of entering judgment; rather, it informs those duties... The remedy available in a statutorily created cause of action is "a matter of law, not fact, and not within the purview of the jury." *Adams*, 832 S.W.2d at 907. . . . To hold otherwise would be to tell the legislature it could not legislate; it could neither create nor negate causes of action, and in doing so could not

prescribe the measure of damages for the same. This Court never has so held and declines to do so now. The General Assembly has the right to create causes of action and to prescribe their remedies. The General Assembly may negate causes of action or their remedies that did not exist prior to 1820.

364 S.W.3d at 205.

Missouri's legislature has the right to create, eliminate, or restrict causes of action, such as it has done with a wrongful death cause of action. *Sanders*, 364 S.W.3d at 205. The application of the non-economic damage cap to this wrongful death action does not, therefore, constitute a violation of the separation of powers between the legislative and judicial branches of government.

IV. The Trial Court Did Not Err in Granting Defendants a Directed Verdict on Plaintiffs' Punitive Damages Claim Because Plaintiffs' Evidence was Insufficient to Create a Jury Question on the Issue of Punitive Damages or Aggravating Circumstances Damages

A. Summary of Argument

The evidence does not come close to demonstrating defendants acted with any degree of intention to harm or any recklessness at all. Dr. Ferrara was faced with a difficult situation after the arterial dissection and he acted with appropriate care.

B. Standard of Review

In passing on the propriety of the trial court's action in sustaining a Motion for Directed Verdict, the court of appeals will determine whether the plaintiff has introduced

substantial evidence that tends to prove the facts essential to plaintiff's recovery, or in other words, whether the plaintiff has made a submissible case. *Englezos v. Newspress and Gazette Co.*, 980 S.W.2d 25, 30 (Mo.App. W.D. 1998). The evidence must be considered in the light most favorable to the plaintiff, and the defendant's evidence must be disregarded except so far as it may tend to aid plaintiff's case. *Wehrkamp v. Watkins Motor Lines, Inc.*, 436 S.W.2d 698, 700 (Mo. 1969); *see also Drummond Co. v. St. Louis Coke & Foundry Supply Co.*, 181 S.W.3d 99, 100 (Mo.App. E.D. 2005). Direction of a verdict will be affirmed if any one of the elements of the plaintiff's case is not supported by substantial evidence. *Doe 1631 v. Quest Diagnostics, Inc.*, 395 S.W.3d 8, 17 (Mo. banc 2013).

C. The trial court correctly determined the evidence at trial did not warrant submitting Plaintiffs' punitive/aggravating circumstances damages claim to the jury.

The liability evidence at trial (as will be recounted below) clearly showed Defendants tried to do their best in providing care to Ms. Dodson. The evidentiary standard for punitive damages demands the conduct involved be of a striking character such that a defendant would deserve to be punished for what is tantamount to intentional misconduct. A plaintiff's burden of proof on a claim for punitive damages is high: he must present evidence "which instantly tilts the scales in the affirmative when weighed against evidence in opposition; evidence which clearly convinces the fact finder of the truth of the proposition to be proved." *Peters v. General Motors Corp.*, 200 S.W.3d 1, 25 (Mo.App. W.D. 2006)(quoting *Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579, 582-83

(Mo. App. S.D. 1999)(emphasis added). Here, Plaintiffs presented insufficient evidence to support this very high evidentiary standard.

1. Willful, wanton or malicious misconduct is required to support an award of punitive damages.

Section 538.210(5), RSMo., provides, “[A]n award of punitive damages against a health care provider... shall be made **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.” (Emphasis Added). In other words, “to state a claim for punitive damages against a health care provider, a plaintiff’s petition must allege facts indicating the defendant willfully, wantonly, or maliciously injured the plaintiff by its tortious act.” *Dibrill v. Normandy Associates, Inc.*, 383 S.W.3d 77, 91 (Mo.App. E.D. 2012). Section 538.205(10), RSMo., similarly defines “punitive damages” as “damages intended to punish or deter willful, wanton or malicious misconduct, including exemplary damages and damages for aggravating circumstances.” By contrast, “[p]unitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence.” *Litchfield By and Through Litchfield v. May Dept. Stores Co.*, 845 S.W.2d 596, 600 (Mo.App. E.D. 1992)(quoting Restatement (Second) of Torts §908 (1979)).

Chapter 538 does not contain its own definition of “willful, wanton or malicious misconduct.” Absent a statutory definition, words in a statute are to be given their usual, plain and ordinary meaning, for which the court can turn to a dictionary definition. *Guy*

v. City of St. Louis, 829 S.W.2d 66, 68 (Mo.App. E.D. 1992). The Merriam-Webster Online Dictionary defines the operative words as follows: a) willful: “done deliberately; intentional”; b) wanton: “merciless, inhumane”; c) malicious: “having or showing a desire to cause harm to another person”. MERRIAM-WEBSTER ONLINE DICTIONARY, at: www.merriam-webster.com/dictionary. Thus, the plain and ordinary meaning of the terms “willful, wanton or malicious misconduct” means conduct done intentionally, mercilessly or inhumanely, or with a desire to cause harm to another person. By contrast, “reckless” means “marked by lack of proper caution: careless of consequences” or “irresponsible,” and “outrageous” means “very bad or wrong in a way that causes anger; too bad to be accepted or allowed” or “going beyond all standards of what is right or decent.” *Id.*

Missouri cases defining the punitive damages standard echo the harsh nature of the conduct required to support an exemplary damages award. *See Peters*, 200 S.W.3d at 25 (the defendant’s conduct “must be tantamount to intentional wrongdoing where the natural and probable consequence of the conduct is injury.”). “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.” *Id.* at 24 (quoting *Hoover’s Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426, 435 (Mo. banc 1985)).

2. The right to punitive damages must be shown by “clear and convincing” evidence, not a mere preponderance of the evidence.

Punitive damages are regarded as “so extraordinary or harsh that [they] should be applied only sparingly,” and their submission warrants special and careful judicial scrutiny. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996); *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 247-48 (Mo. banc 2001)(overruled on other grounds by *Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013). In fact, punitive damages are so extraordinary and harsh that a plaintiff must prove such damages by the higher standard of *clear and convincing evidence*, rather than by a mere preponderance of the evidence. *Rodriguez*, 936 S.W.2d at 111. To meet the “clear and convincing” burden of proof, the plaintiff must show the defendant’s conduct was “tantamount to intentional wrongdoing where the natural and probable consequence of the conduct is injury.” *Peters*, 200 S.W.3d at 25.

In a search for clear and convincing evidence, “the circuit court must scrutinize the evidence in much closer detail than it does in cases in which the standard of proof is a mere preponderance.” *Id.* (quoting *Lopez-Vizcaino v. Action Bail Bonds, Inc.*, 3 S.W.3d 891, 893 (Mo.App. W.D. 1999)). The circuit court does not engage in a simple, comparative weighing of the evidence in deciding whether a plaintiff has made a submissible case. Rather,

The circuit court must determine whether the evidence – giving full play to the jury’s right to determine credibility, weigh the evidence and draw justifiable inferences of fact – is sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity – that is, that

it was **highly probable** – that the defendant’s conduct was outrageous because of evil motive or reckless indifference.

Peters, 200 S.W.3d at 25 (emphasis added)(quoting *Lopez-Vizcaino*, 3 S.W.3d at 893.

3. There was no evidence to support a “clear and convincing” case for punitive damages based on willful, wanton or malicious misconduct.

The trial record in this case clearly shows the evidence came nowhere near the burden of proof sufficient to support a punitive or aggravating circumstances damages award. The focal point of the conduct in this case is the health care providers’ reaction to and handling of the arterial dissection – which is a known but, rare complication – once it occurred. That is, this case does not involve the relatively simple situation of, for example, there being no potential harm to someone if a certain product is not placed into the stream of commerce, but there is a high probability of harm if the product is sold. Here, all agree that once the dissection occurred, it was an emergent situation. Dr. Ferrara had to decide the best course for Ms. Dodson under the circumstances, knowing that all possible courses of action – whether stenting the artery, trying to get Ms. Dodson to surgery, or doing nothing – carried their own potential for harm. The evidence does not support Plaintiffs’ argument that Dr. Ferrara failed to react at all after the dissection was discovered. Rather, as can be seen below, he was faced with multiple options on ways he could react, none of which was without its own risks, and he made careful and deliberate professional judgments and decisions:

- At 3:59 pm, during the course of Ms. Dodson’s cardiac catheterization, Dr. Ferrara recognized an abnormality in terms of a “hang-up” of the catheterization dye not moving through at normal flow but did not yet know what had caused it. (Tr. 948:8-949:12). Within one minute, he gave Ms. Dodson an injection of a blood vessel dilator to determine if the “hang-up” was due to a vascular spasm, rather than a dissection. (Tr. 950:3-24). He testified he “needed to confirm what was happening, *but [he] wanted to do so in a very careful manner.*” (Tr. 952:7-8)(emphasis added).
- At 4:00 pm, after the “hang-up” remained despite two injections of the blood vessel dilator, Dr. Ferrara diagnosed a dissection, as opposed to a spasm of the vessel. (Tr. 952:19-954:3). At that point, he had a call put out by the staff to Dr. Kichura, the cardiologist who had ordered Ms. Dodson’s cardiac catheterization, for him to come to the cath lab right away. (Tr. 954:11-955:19). Dr. Kichura testified he responded as quickly as he could (and arrived at the cath lab around 4:15 pm). (Tr. 820:6-821:5).
- Within a few minutes of having the call placed to Dr. Kichura, Dr. Ferrara also had a call put out to the cardiothoracic surgeon. (Tr. 958:20-959:5).
- Between 4:00 and 4:06 pm, Dr. Ferrara took steps to obtain images of the right coronary artery. Because the original issue for which Ms. Dodson was having the catheterization done involved a potential blockage to the right coronary artery, Dr. Ferrara felt he needed to obtain images of the right coronary artery to assess its status before he went any further. (Tr. 956:3-23). He did this because,

irrespective of whether they would proceed with stenting or bypass surgery (the two treatment options available to address the dissection), the physicians (Dr. Kichura and the surgeons) would need full information about all arteries so that they would know exactly how to handle the situation. (Tr. 956:3-958:19; 959:12-19). At 4:06 p.m., Dr. Ferrara confirmed the right coronary artery was clear. (Tr. 958:10-19).

- Also around 4:06 p.m., Ms. Dodson developed some shortness of breath and chest discomfort, and Dr. Ferrara decided to insert an intra-aortic balloon pump (also “IABP”) to try to stabilize her for the potential of either a stenting procedure or surgery. (Tr. 960:8-961:14; 965:11-20; 966:2-967:22). The set-up for the IABP takes approximately five to ten minutes. (Tr. 962:5-8).
- At 4:10 pm, Ms. Dodson went into cardiac arrest and CPR was given for a short time. (Tr. 971:22-972:13).
- At approximately 4:12 pm, Ms. Dodson was again awake and talking (Tr. 972:23-973:6), and Dr. Ferrara proceeded with insertion of the IABP, with Dr. Kichura arriving at approximately 4:15 pm as Dr. Ferrara was placing the balloon pump. (Tr. 968:18-22; 1001:16-23; 820:6-821:5). Dr. Kichura then attempted to place a stent, which is to open the blood vessel with a guide wire; also referred to as angioplasty. (Tr. 975:14-977:4; 1016:18-22).
- Also at about 4:16 pm, Ms. Dodson again went into cardiac arrest, CPR was again started, within one minute she returned to normal rhythm, and CPR was stopped. (Tr. 973:16-974:6).

- At about 4:20 pm, she again went into cardiac arrest, CPR was started, and by 4:21 pm she was again awake and responding to questions. (Tr. 973:11-975:1).
- Because of the repeated episodes of cardiac arrest and the need for CPR, the decision was made to have Ms. Dodson intubated to take stress off her heart. (Tr. 975:2-13). Dr. Kichura and Dr. Ferrara then decided that Dr. Ferrara would monitor vitals, blood pressure, heart rhythm, etc., while Dr. Kichura proceeded with attempting the stenting procedure. (Tr. 970:25-971:21; 1001:16-23).
- One of the cardiothoracic surgeons arrived in the cath lab while Dr. Kichura was performing the angioplasty. The surgeon and Dr. Ferrara discussed the situation and the possible need for surgery if Dr. Kichura's stenting attempts were not successful. (Tr. 1023:17-1024:14).
- Images of the left main coronary artery taken at 4:28 and 4:29 showed there was blood flow. (Tr. 970:16-17; 977:17-978:18).
- Sometime shortly before 4:39 pm, the anesthesiologist arrived at the bedside in the cath lab. (Tr. 980:21-24).
- At approximately 4:39 or 4:40, Ms. Dodson was taken from the catheterization lab for surgery. (Tr. 978:19-25).

Although Dr. Ferrara testified that one of the things he could have done in an attempt to restore blood flow would have been to try to insert a wire to open up the left main artery, he was concerned about the possible further worsening of the situation by taking that step. (Tr. 995:6-10). He believed there was a reasonable chance of making things worse by inserting such a wire in the first 10 to 20 minutes after the dissection

occurred. (Tr. 998:3-10; 1011:21-1012:2). There was also a risk of death in proceeding with the stenting procedure because a stenting procedure that goes badly can kill the patient. (Tr. 967:16-25).

Further, Dr. Ferrara's previous experiences with dissections had been such that it was reasonable for him to conclude he had sufficient time to make a well-thought out and reasoned choice among risky treatment options. Dr. Ferrara had one previous experience with a left main artery dissection, and in that instance the patient was taken to surgery about an hour and 15 minutes after the dissection. (Tr. 921:4-922:20). A few years prior, he also observed another dissection (not his own patient) in the left main artery where the patient was taken to surgery after about 45 minutes. (Tr. 922:21-923:9). Both of those patients survived. (Tr. 923:4-12). The infrequency of prior similar occurrences known to the defendant is a factor recognized by the Missouri Supreme Court as mitigating against the submission of punitive damages or aggravating circumstances damages in the context of a negligence case. *Lopez v. Three Rivers Electric Cooperative, Inc.*, 26 S.W.3d 151, 160 (Mo. banc 2000).

Taken as a whole, the evidence of all the health care providers, including the testimony from Dr. Ferrara, paints a picture far from one of a physician willfully, wantonly, or maliciously failing to care for his patient knowing that there is a high probability of death. From the moment he realized something was abnormal, Dr. Ferrara took steps to determine what the issue was. When he determined an arterial dissection had occurred, he took steps to further determine what therapeutic actions should be taken, weighing the risks of each possibility, all while continuing to monitor and treat Ms.

Dodson, including during her episodes of cardiac arrest. If anything, this evidence clearly and convincingly shows a physician (Dr. Ferrara) and health care team so aware of the potential consequences of their actions that they were very thorough in assessing and reacting to the situation presented.

Clearly, the trial court correctly assessed there was insufficient evidence to support Plaintiffs' claim that Defendants engaged in willful, wanton or malicious misconduct.

4. Plaintiffs' reliance on *Schroeder v. Lester Cox* is misplaced because its facts are starkly different than those here and because *Schroeder* does not contain the "recklessness" holding plaintiffs claim it does.

a. *Schroeder* provides an example of conduct which can support punitive damages.

For a number of reasons, Plaintiffs' reliance on the *Schroeder v. Lester E. Cox Medical Center, Inc.* case is misplaced; including differences in the facts of the healthcare, the law on punitive damages at the time, and how the defendants conducted their defense of the case. (Plaintiffs' Brief, p. 81-83).

The facts at issue in *Schroeder* are starkly different from those in the case at bar. In *Schroeder*, the conduct at issue for the punitive damages jury instruction was that defendant Cox Medical Center failed to require its pharmacy employees to observe the compounding of the cardioplegic solution to be used during heart surgery. 833 S.W.2d 411, 417-18 (Mo.App. S.D. 1992). Dextrose was one of the components of the cardioplegic solution, which was used to keep a cardiac surgery patient's heart alive during the time it was stopped during surgery. *Id.*, at 412. It was determined that the

cardioplegic solution used for Mr. Schroeder's heart surgery contained only a tiny fraction of the necessary dextrose. *Id.* As such, it was a fatally deficient solution. There was no dispute this caused Mr. Schroeder's death. *Id.* at 416.

The evidence in support of the defendant's failures in causing the death seems essentially overwhelming. There were no less than eight defense witnesses - either employees or former employees of Cox - who testified, among other things: **1)** that Cox failed to follow "good practice" by requiring its pharmacists to periodically observe the compounding while it is ongoing; **2)** the manufacturer's manual for the compounder directed that the compounding be monitored throughout its cycle to make sure it operated properly; **3)** the operator on the day in question had never read the manufacturer's manual to know of its directions; **4)** if the solution at issue were "end tested" after it was compounded, it would have been found to be incorrect and would have not been used for the patient; **5)** more than one Cox employee testified that Mr. Schroeder would probably not have died if the solution had been "end tested"; and, **6)** after this incident, Cox always conducted "end testing" of all cardioplegic compounded solutions before using them. *Id.* at 417-18. The *Schroeder* court also provided an overview of the evidence (listing approximately 14 segments or topics) which it found supported the punitive damages award. *Id.* at 422. Apparently, the only defense Cox offered was that the computer in the compounder malfunctioned, such that no person was at fault. *Id.* at 419.

It seems that among the most telling of the evidence on the issue of how the tragedy occurred was the testimony of former Cox employee Richard Hodges, who in part said: **"All the operator [of the compounder] has got to do is to see if the dextrose**

is going in there is to stand there for 20 seconds and watch it.” *Id.* at 419. (emphasis added). Pharmacist operator Glenda Adams testified she turned away from the compounder to do other work and did not actually observe the dextrose wheel turning, which would have told her whether it was being added to the cardioplegic solution. Therefore, the jury would have been well-supported by the evidence if it found: **a)** if pharmacist-operator Glenda Adams had observed the compounder for just 20 seconds at the start of the process, she would have seen that the dextrose solution was not properly added to the overall solution; and/or, **b)** if Cox had instructed its pharmacist-operators of the compounder to make sure they observed the compounding in progress to make sure no problems occurred, the lack of dextrose being added would have been detected. The uncontroverted evidence, therefore, was that it would have taken only approximately 20 seconds of observation to have prevented Mr. Schroeder’s death.

Before moving on, a few observations about *Schroeder* seem worthwhile. First, *Schroeder* was decided in 1992, before the Missouri Supreme Court established in *Rodriguez v. Suzuki, supra*, the “clear and convincing” standard as the burden of proof for punitive damage claims. Consequently, the *Schroeder* court did not apply that higher standard to the evidence presented there.

Second, although the jury instructions in *Schroeder* did not include the “willful, wanton or malicious misconduct” language of Section 538.210. Instead, they used the words “reckless indifference” and “outrageous,” but provided no definitions. The court held that defendant Cox invited any error in this regard by inducing the trial court to use a

bifurcated trial procedure. *Id.* at 424-425. The court, therefore, did not substantively review the issue. *Id.*

Finally, in *Schroeder*, the plaintiff presented quite a bit of post-occurrence evidence, to which the defendant apparently did not object, as to the hospital's later practice of testing and verifying the proper content of the cardioplegic solution and how it implemented these steps after and because of the event at issue in the case. *Id.* at 414, 418. Thus, the clear import of the evidence was that the hospital had its employee in charge of a procedure and a mixing machine, but provided no real training or guidance about what she should do, and she, in fact, did not do the most basic of checks on the cardioplegic solution. *Id.* at 417-18.

- b. Plaintiffs incorrectly argue that Schroeder holds that “recklessness” to the degree less than the equivalent of willfulness is sufficient to support punitive damages.

In their Brief, Plaintiffs vainly attempt to distort *Schroeder*, to diminish their burden of proof on aggravating circumstances to recklessness that does not equate with willfulness. They argue that “recklessness” is inherently the legal equivalent of “willfulness.” (Plaintiffs’ Brief, p. 81). The *Schroeder* court, however, did not so hold. The court stated:

The phraseology differs in different kinds of cases, but all [cases in which the evidence would support a punitive damages award] depend on **willful wrongdoing, or recklessness which is the legal equivalent of willfulness...**

Schroeder, 833 S.W.2d at 421 (quoting *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. banc 1990), which was overruled by *Rodriguez* to the extent *Menaugh* did not apply the clear and convincing standard of proof)(bold and underlined emphasis in original; italics added). With no comma after the word “recklessness,” the Supreme Court in *Menaugh* was clearly saying that in all cases in which the evidence supports the punitive damage award, there must be evidence of: (1) “willful wrongdoing,” *i.e.* intentional conduct; **or**, (2) recklessness of such a degree that it amounts to the legal equivalent of willfulness.

Another case cited in the *Schroeder* opinion further supports Defendants’ position that “willfulness” is not the equivalent of mere “recklessness.” In *Warner v.*

Southwestern Bell Telephone Company, 428 S.W.2d 596, 603 (Mo. 1968), the Supreme Court said:

The acts of a defendant which justify the imposition of punitive damages are those which are willful, wanton, malicious or **so reckless as to be in utter disregard of the consequences**. Such acts are clearly distinguished from negligence. While they need not always include an intent to do harm, **they must show such a conscious disregard for another’s rights ‘as to amount to willful and intentional wrongdoing.’**

428 S.W.2d at 603 (quoted by *Schroeder*, 833 S.W.2d at 420)(emphasis added). Thus, as the Supreme Court makes clear in this quote, the evidence as to recklessness sufficient to support punitive damages is not recklessness of some indefinite quality. Rather it must

be recklessness to such a degree as to be in utter and conscious disregard of the consequences as to amount to willful and intentional wrongdoing.

In *Lopez v. Three Rivers Electric Cooperative, Inc.*, the Supreme Court again addressed what the evidence must clearly and convincingly show in order to support the submission of punitive damages to the jury in a negligence case:

Specifically, evidence must show that the defendant either knew or had reason to know that there was a high degree of probability that the defendant's conduct would result in injury. *Hoover's Dairy*, 700 S.W.2d at 436. **The defendant's conduct must be tantamount to intentional wrongdoing where the natural and probable consequence of the conduct is injury.** *Id.* at 435. **With such a showing**, a plaintiff can recover for aggravating circumstances based upon the defendant's **complete indifference to or conscious disregard for the safety of others.**

26 S.W.3d at 160 (emphasis added).

Thus, Plaintiffs are incorrect that to support their punitive damages submission, they were required merely to produce sufficient evidence of "conscious disregard for the safety of others." (Plaintiffs' Brief, p. 83-84). The standard is that to recover punitive damages or aggravating circumstances damages based upon Defendants' alleged complete indifference to or conscious disregard for the safety and life of Ms. Dodson, Plaintiffs were required to show, with clear and convincing evidence, that Defendants' conduct was tantamount to intentional wrongdoing where the natural and probable consequence of the conduct was injury. *See Lopez*, 26 S.W.3d at 160.

This is consistent with other cases where the phrase “complete indifference to or conscious disregard for the safety of others” has been interpreted to mean situations where the defendant knew or had reason to know that there was a high degree of probability that the action would result in injury. *Hoover’s Dairy*, 700 S.W.2d at 436; *Sharp v. Robberson*, 495 S.W.2d 394, 398 (Mo. banc 1973). This principle is also paralleled in the Restatement (Second) of Torts, § 500, which defines “reckless disregard of safety.” The Comments make clear that the actor must either know or have reason to know that his or her act is substantially likely to cause physical harm. *Hoover’s Dairy*, 700 S.W.2d at 435. The classic example of an individual knowing or having reason to know that his or her act is substantially likely to cause physical harm is that of an individual firing a rifle into a moving passenger train. *Id.* at 435-36. Clearly, the facts of this case are quite different.

Plaintiffs also misuse *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. banc 1989). (Plaintiffs’ Brief, p. 81, 83). *Burnett* involved punitive damages in the context of intentional torts (assault & battery, false imprisonment, and malicious prosecution), for which submission of punitive damages involves an element of “outrageousness” due to defendant’s evil motive or reckless indifference to the rights of others. *Burnett*, 769 S.W.2d at 789 (determining that MAI 10.01 should instruct the jury to award punitive damages in an intentional tort case where the jury finds the conduct of the defendant “was outrageous because of the defendant’s evil motive or reckless indifference to the rights of others.”). The case at bar does not involve an intentional tort.

For the foregoing reasons, the trial court correctly held Plaintiffs presented insufficient evidence as a matter of law to make a submissible case for punitive damages/aggravating circumstances. The directed verdict in Defendants' favor on this issue should be affirmed.

CONCLUSION

For the reasons fully discussed above and in Defendants' initial Brief, the trial court erred in: (1) permitting Plaintiffs' counsel to pose an argumentative and accusatory question to Defendants' expert cardiologist; (2) permitting Plaintiffs' counsel to question Dr. Ferrara regarding irrelevant post-care conduct; (3) giving Instruction No. 4 (MAI 2.07); (4) failing to grant a directed verdict or new trial as to Plaintiffs' claim for economic damages; and (5) failing to grant Defendants' Motion for Directed Verdict at the close of Plaintiffs' case as to the claim for aggravating circumstances damages. Any single one of these errors, standing along, constitutes reversible error, as does the cumulative weight of these errors. Defendants, therefore, ask that the Judgment in this case be reversed and the case remanded for a new trial on all issues.

For the reasons fully discussed above, the trial court did not err in applying the non-economic damage cap of Section 538.210(1) in this matter and in granting Defendants' Motion for Directed Verdict at the close of all the evidence on Plaintiffs' claim for punitive/aggravating circumstances damages. Defendants, therefore, ask that, to the extent the Court does not reverse and remand the judgment as requested in Defendants' appeal, this Court affirm the application of the non-economic damage cap and the directed verdict in Defendants' favor on the punitive/aggravating circumstances damages claim.

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing Second Brief of Defendant/Appellants/Cross-Respondents Robert P. Ferrara, M.D. and Mercy Clinic Heart and Vascular, LLC contains 19,029 words (exclusive of the cover, the table of contents, the table of authorities, the proof of service, this Rule 84.06(c) certificate of compliance, and the signature block), and that counsel relied on the word count of Microsoft Word for Windows, which was used to prepare the brief. Further, counsel certifies that the electronic copies of the foregoing brief have been scanned for viruses and are virus free.



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Heart and Vascular, LLC

PROOF OF SERVICE

The undersigned hereby certifies that he signed the original of the foregoing document and that the foregoing was filed and served electronically through the Missouri Courts eFiling System this 7th day of May 2015, which sent notification to all parties of interest herein. A copy of the foregoing was also served via U.S. mail and email to the following:

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