Case No. SC91867

IN THE SUPREME COURT OF MISSOURI

DEBORAH WATTS as Next Friend for
NAYTHON KAYNE WATTS,

Appellant/Cross-Respondent,

v.

LESTER E. COX MEDICAL CENTERS, d/b/a FAMILY MEDICAL CARE CENTER, LESTER E. COX MEDICAL CENTERS,

Respondent,

MELISSA R. HERRMAN, M.D., MATTHEW P. GREEN, D.O., WILLIAM S. KELLY, M.D.,

Respondents/Cross-Appellants.

Appeal from the Circuit Court of Greene County, Missouri
At Springfield
Case No. 0931-CV01172

PLAINTIFF-APPELLANT'S INITIAL BRIEF

Roger Johnson
MO Bar # 48480
Johnson, Vorhees & Martucci
510 W. 6th Street
Joplin, MO 64801
Telephone: (417) 206-0100
Fax: (417) 206-0110
rjohnson@rj-laws.com

Andre M. Mura
Admitted Pro Hac Vice
Center for Constitutional Litigation, P.C.
777 6th Street, N.W., Suite 520
Washington, DC 20001
Telephone: (202) 944-2860
Fax: (202) 965-0920
andre.mura@cclfirm.com

Attorneys for Appellant/Cross-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Rules

INTRODUCTION

This is an appeal from a medical malpractice case. The jury returned verdicts in favor of Appellant/Cross-Respondent Deborah Watts, as Next Friend for Naython Kayne Watts, (hereinafter "Watts") and against Respondent Lester E. Cox Medical Centers, d/b/a Family Medical Care Center, and Respondents/Cross-Appellants Melissa R. Herrman, M.D., Matthew P. Green, M.D., and William S. Kelly, M.D. (hereinafter, collectively, "Cox Medical Centers"). After the verdict, the circuit court reduced, pursuant to Mo. Rev. Stat. § 538.210 (2009) (App. 6), the non-economic damages awarded to Watts and established a future periodic payment schedule pursuant to Mo. Rev. Stat. § 538.220 (2009) (App. 8).

At issue on appeal is whether § 538.210, which was applied here to eliminate $1,110,000 in non-economic damages duly awarded to Watts by a jury after a full and fair trial on the merits, violates the right of trial by jury, article I, section 22(a) of the Missouri Constitution; separation of powers, article II, section 1 of the Missouri Constitution; the right to equal protection, article I, section 2 of the Missouri Constitution; and the prohibition on special legislation, article III, section 40 of the Missouri Constitution. Also at issue is whether §§ 538.210 and 538.220, which were amended by 2005 Mo. Legis. Serv. H.B. 393 (Vernon's) ("H.B. 393"), are unconstitutional because H.B. 393 violates the clear title and single subject mandate, article III, section 23 of the Missouri Constitution. In addition, at issue is whether the circuit court abused its discretion when it ordered, pursuant to § 538.220, that half of all net future medical damages be paid immediately, and half in equal annual installments

over the next 50 years together with interest at the rate of .26 percent. Lastly, at issue is whether § 538.220 violates due process, article I, section 10 of the Missouri Constitution, and equal protection, article I, section 2 of the Missouri Constitution.

JURISDICTIONAL STATEMENT

Article V, section 3 of the Missouri Constitution provides the Missouri Supreme Court with exclusive appellate jurisdiction in all cases involving the validity of a state statute. Mo. Const. art. V, § 3. This Court, accordingly, has exclusive jurisdiction over this appeal, which concerns the validity of Missouri Statutes §§ 538.210 and 538.220. It also has jurisdiction over any other issue that may be presented, even if these issues, standing alone, would not otherwise be directly appealable to this Court. *See State ex rel. Union Elec. Co. v. Public Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985).

The constitutional questions sought to be presented in this case are real and substantial. Also, these questions were properly preserved for appellate review. Before the circuit court, Watts presented her constitutional objections to these Missouri Statutes in a timely fashion and with the requisite specificity. *See Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989). In this case, after the jury returned its verdicts, Cox Medical Centers, in a proposed judgment, requested that the circuit court reduce the jury's award of non-economic damages pursuant to § 538.210. Legal File 134. Cox Medical Centers also requested in its proposed judgment that the court establish a periodic payment schedule for future medical damages, pursuant to § 538.220. Legal File 134. Watts objected on the grounds that §§ 538.210 and 538.220 violated multiple provisions of the Missouri Constitution, and thus could not be applied to limit the jury's

verdict or require periodic payment. Legal File 61-62, 72-96. Watts further objected to the request for periodic payment of future medical damages, arguing that the request was unreasonable and unwarranted. Legal File 57-61, 108-114.

The circuit court rejected these objections (Legal File 126-127) and entered Judgment. Legal File 136-39. The Judgment is a "judgment" within the meaning of Missouri Supreme Court Rule 74.01, and Watts is a "party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited," Mo. Rev. Stat. § 512.020 (2009). Watts then timely filed a notice of appeal (Legal File 140) and a jurisdictional statement. For the reasons discussed, jurisdiction properly lies in this Court.

STATEMENT OF THE FACTS

Appellant Deborah Watts, as Next Friend for Naython Kayne Watts, filed this civil suit for damages on January 22, 2009, in the circuit court of Greene County. Legal File 13-23. In her Complaint, Watts alleged that her son Naython was born with catastrophic and disabling brain injuries arising out of Cox Medical Centers' rendering of or the failure to render health care services. Legal File 18-22. Watts had been receiving care at Cox Medical Centers. Legal File 16. She visited for prenatal care at an associated clinic on October 30, 2006, complaining of cramping and decreased fetal movement. Legal File 16. At that time Watts had been pregnant with Naython for about thirty-nine weeks. Legal File 16. She was examined by Respondent Dr. Herrman, who was then a third-year medical resident. Trial Tr. 58:21-22 (trial testimony of Dr. William E. Roberts). The jury heard testimony from Watts' medical expert, Dr. Roberts, that Dr. Herrman had

failed to perform a non-stress test, had failed to notify Watts of the significance of decreased fetal movement, and had failed to perform any further diagnostic monitoring. Trial Tr. 26-28, 46-47, 56-62. Dr. Herrman's supervisor, Respondent Dr. Kelly, signed off on Dr. Herrman's findings. Trial Tr. 54, 57-62.

On November 1, 2006, Watts was admitted at Cox Medical Centers, complaining that there was no fetal movement. Trial Tr. 62:16-20. Watts was placed on a fetal monitor at 9:10 a.m. Trial Tr. 63:20. Dr. Roberts testified that this diagnostic monitoring indicated fetal hypoxia and acidosis, and that the standard of care required immediate C-section delivery. Trial Tr. 61, 64-71. But a second-year medical resident, Respondent Dr. Green, who was examining Watts, did not begin the C-section until 10:45 a.m. Trial Tr. 68:18-22. As a result of these acts of malpractice, Naython Watts suffered catastrophic brain injuries.

The jury returned a verdict in favor of Watts and against Cox Medical Centers, and Drs. Herrman, Kelly, and Green in the total amount of $4,821,000.00. Legal File 53-54. In the verdict, the jury itemized damages. Legal File 54. As is relevant here, the jury awarded $1,450,000 in total non-economic damages, and $3,371,000 in future medical damages. Legal File 54.

Cox Medical Centers requested, in a proposed judgment, that the circuit court reduce the total non-economic damages award to $350,000 pursuant to Mo. Rev. Stat. § 538.210. Legal File 133-35. They also requested there, and in a motion, that the circuit court establish a future periodic payment schedule pursuant to Mo. Rev. Stat. § 538.220.

Legal File 55-56, 129; *see also* Legal File 98-104 (Defs.' Suggestions in Supp. of Request for Periodic Payments).

In response, Watts filed memoranda opposing both the reduction of total non-economic damages and the request for periodic payment of future damages, on the grounds that § 538.210 and § 538.220 violated the Missouri Constitution. Legal File 57-97. Specifically, Watts argued that § 538.210 and § 538.220 violated the right of trial by jury, separation of powers, the right to equal protection, the prohibition on special legislation, and due process. Legal File 61-62, 72-96. She also argued that § 538.210 and § 538.220, which were amended by H.B. 393, are unconstitutional because H.B. 393 violates the clear title and single subject mandate. Legal File 61-62, 72-96. Apart from these constitutional issues, she argued that Cox Medical Centers' request that the circuit court order payment of all future damages over a period of fifty years at a punishingly low interest rate of .26% was unreasonable and unwarranted, particularly given that all testimony regarding future damages had already been discounted to present-day value. Legal File 57-61, 108-114.

On May 4, 2011, the circuit court issued an Order on the constitutionality of § 538.210. The Order stated, in part: "[A]fter duly considering the arguments of counsel, the Court is compelled by controlling precedent to conclude that § 538.210 is constitutional and will be applied in this case. *See Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992). Judgment will be entered accordingly." Legal File 126.

On May 6, 2011, the circuit court entered Judgment. Legal File 136-39. In accordance with its Order on constitutionality, the court reduced total non-economic damages to $350,000 pursuant to § 538.210. Legal File 137. The court also established a periodic payment schedule pursuant to § 538.220. Legal File 137. Under the court-established schedule, half of all net future medical damages are to be paid immediately, and half in equal annual installments over the next 50 years together with interest at a rate of .26%. Legal File 137-39. The court's Judgment was accompanied by a "docket entry" noting that the court had "refused" various judgments proposed by Watts and Cox Medical Centers. Legal File 127.

Watts filed a notice of appeal in the circuit court on May 11, 2011, seeking appellate review in this Court. Legal File 140. A jurisdictional statement was then timely filed within 10 days of the filing of the notice of appeal. *See* Mo. Sup. Ct. R. 81.08(b).

POINTS RELIED ON

Point relied on 1. The circuit court erred in granting Cox Medical Centers' request, pursuant to § 538.210, to reduce the total non-economic damages awarded to Watts because § 538.210 violates the right to trial by jury guaranteed by article I, section 22(a) of the Missouri Constitution, in that, as understood at common law, that right encompasses the substantive right to have the plaintiff's damages determined by the jury; the jury here determined that Watts's non-economic injuries merited an award of damages in excess of the statutory limitation; and

§ 538.210 thereby unconstitutionally prevented the jury's award from having its full and intended effect.

Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752 (Mo. banc 2010)

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

Lee v. Conran, 111 S.W. 1151 (1908)

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998)

Mo. Const. art. I, § 22(a)

Point relied on 2. The circuit court erred in granting Cox Medical Centers' request, pursuant to § 538.210, to reduce the total non-economic damages awarded to Watts because § 538.210 violates the constitutional separation of powers prescribed by article II, section 1 of the Missouri Constitution, in that the statutory cap on non-economic damages invades the traditional judicial function of assessing, on a case-by-case basis, whether a jury's damages award is excessive or inadequate and against the weight of the evidence and supersedes that judicial power, which is conditioned on a new jury trial, with a fixed "legislative remittitur" which takes no account of the facts in a particular case and is not so conditioned.

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)

Chastain v. Chastain, 932 S.W.2d 396 (Mo. banc 1996)

Kyger v. Koerper, 207 S.W.2d 46 (Mo. banc 1946)

Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895 (Ill. 2010)

Mo. Const. art. II, § 1

Point relied on 3. The circuit court erred in granting Cox Medical Centers' request, pursuant to § 538.210, to reduce the total non-economic damages awarded to Watts because § 538.210 violates the equal protection clause, article I, section 2 of the Missouri Constitution in that § 538.210, as amended in 2005, arbitrarily and irrationally discriminates against, inter alia, all victims of medical malpractice, severely injured victims of medical malpractice, victims of medical malpractice who have been injured by multiple health care providers or multiple acts of malpractice, and women, racial and ethnic minorities, children, the elderly, and the poor—all of whom receive a higher proportion of tort damages in the form of non-economic damages, even though the General Assembly knew that the 2005 cap was not even rationally related to a legitimate state interest—let alone meeting the legal standards for intermediate or strict scrutiny—because there was no malpractice liability crisis in Missouri, malpractice liability insurance premiums were neither high by historic standards nor increasing due to increased tort liability, and the number of health care providers in Missouri had been steadily increasing.

Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752 (Mo. banc 2010)

Mahoney v. Doerhoff Surgical Servs., 807 S.W.2d 503 (Mo. 1991)

Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005)

Mo. Const. art. I, § 2

Point relied on 4. The circuit court erred in granting Cox Medical Centers' request to reduce, pursuant to § 538.210, the total non-economic damages awarded to Watts because § 538.210 violates the prohibition against special legislation in

article III, section 40 of the Missouri Constitution, in that the cap on non-economic damages in malpractice actions arbitrarily and irrationally grants special legislative protection to health care providers, including those who, inter alia, severely injure their patients, commit multiple acts of malpractice against their patients, severely injure married patients, or commit malpractice against women racial and ethnic minorities, children, the elderly and the poor, even though the General Assembly knew that the revised cap is not rationally related to a legitimate state interest because there was no malpractice liability crisis in Missouri, malpractice liability insurance premiums were neither high by historic standards nor increasing due to increased tort liability, and the number of health care providers in Missouri had been steadily increasing.

Fust v. Attorney Gen., 947 S.W.2d 424 (Mo. banc 1997)

Mo. Const. art. III, § 40

Point relied on 5. The circuit court erred in granting Cox Medical Centers' request to reduce, pursuant to § 538.210, the total non-economic damages awarded to Watts because H.B. 393, the legislation that amended § 538.210, unconstitutionally violates the clear title and single subject requirements of article III, section 23 of the Missouri Constitution, in that the title of H.B. 393, "An Act . . . relating to claims for damages and the payment thereof," is so general and amorphous that it could describe much of the legislation enacted by the General Assembly and obscures rather than clarifies the contents of the act; and also in that

certain statutory sections referenced in the title to H.B. 393 apply to civil actions beyond claims for damages.

Jackson Cnty. Sports Complex Auth. v. State, 226 S.W.3d 156 (Mo. banc 2007)

Home Builders Ass'n v. State, 75 S.W.3d 267 (Mo. banc 2002)

St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. banc. 1998)

Mo. Const. art III, § 23

Point relied on 6. The circuit court erred in granting in part Cox Medical Centers' request, pursuant to § 538.220.2, that the circuit court include in the judgment a requirement that future medical damages be paid in periodic or installment payments, insofar as the periodic payment schedule established by the court, which requires half of all future medical damages to be paid in equal annual installments over the next 50 years together with interest at the rate of .26 percent, is unreasonable, arbitrary, and an abuse of discretion, given that all testimony regarding future medical damages had already been discounted to present-day value, the jury had already expressed future medical damages in present-day value, the annual interest rate approaches zero, and any further discounting through a periodic payment schedule would undermine rather than advance the aims of § 538.220.

Vincent by Vincent v. Johnson, 833 S.W.2d 859 (Mo. banc 1992)

Mo. Rev. Stat. § 538.220

Point relied on 7. The circuit court erred in granting in part Cox Medical Centers' request, pursuant to § 538.220.2, that the circuit court include in the

judgment a requirement that future damages be paid in periodic or installment payments, because § 538.220.2 violates due process, in that it is fundamentally irrational and illogical to permit Cox Medical Centers to pay future medical damages periodically and, at the same time, require the jury to reduce all future medical damages awarded to present-day value, which it did in this case.

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

Vincent by Vincent v. Johnson, 833 S.W.2d 859 (Mo. banc 1992)

Mo. Const. art. I, § 10

Point relied on 8. The circuit court erred in granting in part Cox Medical Centers' request, pursuant to § 538.220.2, that the circuit court include in the judgment a requirement that future damages be paid in periodic or installment payments, because § 538.220.2 violates equal protection, in that it sets one method for calculating interest on periodic payments of future medical damages, which takes no account of medical inflation and thus does not provide security for such future payments, and another method applicable to all other future damages, pursuant to which the court must set a rate of interest that provides security for such future payments, and this legislative classification is a wholly irrational and arbitrary means of achieving the end of assuring full payment of future medical damages.

Vincent by Vincent v. Johnson, 833 S.W.2d 859 (Mo. banc 1992)

Mo. Rev. Stat. § 538.220

Mo. Const. art. I, § 2

STATUTORY BACKGROUND

The statutes at issue in this case are §§ 538.210 and 538.220, which were amended by 2005 Mo. Legis. Serv. H.B. 393 (Vernon's). Section 538.210.1 provides:

> 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 noneconomic damages irrespective of the number of defendants.

Id. Non-economic damages are defined in § 538.205(7) as "damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages." "Economic damages" are defined therein as "damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages and lost earning capacity." § 538.205(1).

In addition, § 538.220 concerns the payment of damages. Subsection 2 provides:

> At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars.

Any judgment ordering such periodic or installment payments shall specify a future medical periodic payment schedule, which shall include the recipient, the amount of each payment, the interval between payments, and the number of payments. The duration of the future medical payment schedule shall be for a period of time equal to the life expectancy of the person to whom such services were rendered, as determined by the court, based solely on the evidence of such life expectancy presented by the plaintiff at trial. The amount of each of the future medical periodic payments shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments. The court shall apply interest on such future periodic payments at a per annum interest rate no greater than the coupon issue yield equivalent, as determined by the Federal Reserve Board, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills settled immediately prior to the date of the judgment. The judgment shall state the applicable interest rate. The parties shall be afforded the opportunity to agree on the manner of payment of future damages, including the rate of interest, if any, to be applied, subject to court approval.

> However, in the event the parties cannot agree, the unresolved issues shall be submitted to the court for resolution, either with or without a post-trial evidentiary hearing which may be called at the request of any party or the court. If a defendant makes the request for payment pursuant to this section, such request shall be binding only as to such defendant and shall not apply to or bind any other defendant.

§ 538.220.2.

ARGUMENT

I. REVERSAL IS WARRANTED BECAUSE § 538.210 VIOLATES MULTIPLE CONSTITUTIONAL PROVISIONS.

"Constitutional challenges to a statute are reviewed *de novo*." *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). "An act of the legislature carries a strong presumption of constitutionality." *Missouri Ass'n of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006). But a person challenging the constitutionality of a Missouri law may overcome the presumption of constitutionality by demonstrating that "it clearly contravenes a constitutional provision." *Rentschler*, 311 S.W.3d at 786. For reasons to be discussed, this Court is well within its authority to invalidate the Missouri statutes challenged in this case, on any of the constitutional grounds raised here, because these statutes plainly and palpably affront fundamental law embodied in the Missouri Constitution. *See Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991).

Point relied on 1. The circuit court erred in granting Cox Medical Centers' request, pursuant to § 538.210, to reduce the total non-economic damages awarded to Watts because § 538.210 violates the right to trial by jury guaranteed by article I, section 22(a) of the Missouri Constitution, in that, as understood at common law, that right encompasses the substantive right to have the plaintiff's damages determined by the jury; the jury here determined that Appellant's non-economic injuries merited an award of damages in excess of the statutory limitation; and § 538.210 thereby unconstitutionally prevented the jury's award from having its full and intended effect.

The circuit court rejected Watts' argument that § 538.210 violates the right of trial by jury guaranteed in article I, section 22(a) of the Missouri Constitution, which "as heretofore enjoyed shall remain inviolate; . . . ." Citing this Court's decision in *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), the circuit court ruled that it was "compelled by controlling precedent to conclude that § 538.210 is constitutional." Legal File 126. That ruling should be reversed.

Adams held that the 1986 version of § 538.210, which also capped a medical malpractice plaintiff's non-economic damages, albeit less strictly than the 2005 version at issue here, did not violate the right to trial by jury. 832 S.W.2d at 907. The Court reasoned, because the 1986 cap statute "establishes the substantive, legal limits of the [medical malpractice] plaintiffs' damage remedy," "the permissible remedy is a matter of law, not fact, and not within the purview of the jury." *Id*. But "[t]he best that can be said for *Adams*," Judge Wolff has explained, "is that it arose from the flawed view, then

prevalent, that the right to trial by jury could be modified or abolished legislatively in particular cases." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 773 (Mo. banc 2010) (Wolff, J., concurring).

Notably, this Court rejected that flawed understanding of the constitutional right in *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003). There, the Court unanimously held, as it had almost a century prior in *Lee v. Conran*, 111 S.W. 1151, 1153 (Mo. 1908), "The right to trial by jury is a constitutional right, applies 'regardless of any statutory provision,' and is 'beyond the reach of hostile legislation.'" *Id.* at 92 (quoting *Lee*, 111 S.W. at 1153).

Diehl did much to restore the right of trial by jury to its traditional and vital place in our constitutional system. That unanimous decision reaffirmed that "there is a right to a jury trial in court actions for damages that cannot be legislated away," *see Klotz*, 311 S.W.3d at 774 (Wolff, J., concurring) (describing *Diehl*); and it overruled decisions that erroneously barred, for eleven years, jury trials in employment discrimination suits for damages. *Diehl*, 95 S.W.3d at 92 (overruling *State ex rel. v. Tolbert v. Sweeney*, 828 S.W.2d 929 (Mo. Ct. App. 1992); *Pickett v. Emerson Elec. Co.*, 830 S.W.2d 459 (Mo. Ct. App. 1992); and *Wentz v. Indus. Automation*, 847 S.W.2d 877 (Mo. Ct. App. 1992)).

The restoration, however, is not complete. Section 538.210, which "overrules the jury's determination of a factual issue in a way that was unrecognized at common law when the constitutional right was adopted by the people in 1820," *Klotz*, 311 S.W.3d at 774 (Wolff, J., concurring), remains in force, as does the flawed decision in *Adams*,

which blessed the prior iteration of this "hostile" legislation.[1] As set forth in Judge Wolff's concurrence in *Klotz*, § 538.210 violates article I, section 22(a)'s clear command that "the right of trial by jury as heretofore enjoyed shall remain inviolate." *Id*. at 780. The Court should declare it unconstitutional, reverse the judgment of the circuit court, and remand this case with instructions to enter judgment for Watts for the total amount of non-economic damages awarded by the jury.

In so holding, the Court should reaffirm *Diehl* and overrule *Adams*, which committed a "fundamental error [] in concluding that statutory law can trump the constitutional right to jury trial." *Klotz*, 311 S.W.3d at 774 (Wolff, J., concurring). Article I, section 22(a)'s plain terms establish the constitutional status of the right to trial by jury as "inviolate" in actions at common law in 1820. At common law, the scope of the jury trial right included the right to have a jury determine the amount of damages (if any) due in a personal injury action such as medical negligence. *Id*. at 774-78. That constitutional status "can be changed only by the people voting affirmatively for such change in their constitution. Mo. Const. art. XII." *Klotz*, 311 S.W.3d at 744 (Wolff, J., concurring). *Adams's* diminution of the constitutional right is thus not entitled to stare decisis effect. *See Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137 (Mo. banc 2007) (overruling *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947), and concluding that *Clouse* was not entitled to stare decisis effect

[1] *Vincent by Vincent v. Johnson*, 833 S.W.2d 859, 862 (Mo. banc 1992), adhered to *Adams* and is erroneous for the same reasons.

because it contradicted the plain meaning of article I, section 29, and only Missouri citizens can alter the Constitution's plain meaning). By contrast, *Diehl's* conclusion that the Legislature cannot modify or abolish the right of trial by jury in particular cases *is* entitled to stare decisis effect because that understanding faithfully tracks the Constitution's clear command that the incidents of jury trial at common law in 1820 "shall remain inviolate." Mo. Const. art. I, § 22(a).

A. Section 538.210 Violates the Right to Trial by Jury, Article I, Section 22(a).

The Missouri Constitution states plainly: "That the right of trial by jury as heretofore enjoyed shall remain inviolate; . . . ." Mo. Const. art. I, § 22(a). To decide whether § 538.210 violates Watts' right of trial by jury, this Court first must consider whether a jury's determination of damages in an action at law for medical negligence is among the substantial incidents and consequences that pertained to the right as it existed at common law in 1820. *See Lee*, 111 S.W. at 1153; *see also Diehl*, 95 S.W.3d at 85. If the jury trial right "as heretofore enjoyed" includes the right to have a jury be the judge of damages in such actions, then the jury's role as the arbiter of damages is preserved as "inviolate" and is beyond the reach of hostile legislation. *See Diehl*, 95 S.W.3d at 85; *see also Klotz*, 311 S.W.3d at 774-75 (Wolff, J., concurring). Second, the Court must decide whether § 538.210, which retains the common law action but displaces a jury's findings with a legislated limitation on damages, unconstitutionally impairs that right. *See Klotz*, 311 S.W.3d at 779 (Wolff, J., concurring). Watts answers each question in turn.

1. The right of trial by jury "as heretofore enjoyed" includes the right to have a jury determine the amount of damages in a medical malpractice action.

Article I, section 22(a)'s phrase "as heretofore enjoyed" was first added in the Constitution of 1875, *see* Mo. Const. art. II, § 28 (1875), and means that "[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was [originally] adopted" in 1820.[2] *Hammons v. Ehney*, 924 S.W.2d 843, 848 (Mo. banc 1996). A review of common law history is therefore necessary to determine the causes of action to which the right applies as well as the scope of the right.

(i) Watts' suit for damages arising from medical negligence is among the category of cases tried to juries since 1820, and thus the jury trial right attaches.

Missouri's common law is based on the common law of England as of 1607. Mo. Stat. § 1.010 (2000); *see* Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 Mo. Law. Rev. 595 (2002). English common law recognized medical negligence as one of five classes of "private wrongs." 3 W. Blackstone, *Commentaries on the Laws of England* 122 (1765; 1992 reprint) (hereinafter "Blackstone, *Commentaries*"). Unsurprisingly,

[2] The original Constitution of Missouri in 1820 provided: "That the right of trial by jury shall remain inviolate." Mo. Const. art. XIII, § 8 (1820).

then, this Court in 1844 described "the civil law, *imperitia medici culpu annumeratur*," as "well settled." *Rice v. State*, 8 Mo. 561, 1844 WL 4018, at *3 (Mo. 1844) (italics in original). The civil rule restated in English is: A physician's "ignorance, or want of skill, is considered negligence, for which one who professes skill is responsible." *See* John Bouvier, *Bouvier's Maxims of Law* (1865), *available at* http://www.docstoc.com/docs/51679973/Bouviers-Maxims-of-Law.[3]

Under both English and American common law, suits for damages for medical negligence were tried to juries, as were civil actions for damages generally. *E.g.*, *Townsend v. Hughes*, 86 Eng. Rep. 994, 994-95 (C.P. 1677); *Cross v. Guthery*, 2 Root 90, 1794 WL 198, at *1 (Conn. Super. Ct. 1794); *Grannis v. Branden*, 5 Day 260, 1812 WL 125 (Conn. 1812); *see also Feltner*, 523 U.S. at 353 ("there is historical evidence that cases involving discretionary monetary relief were tried before juries").

Missouri has long followed that practice. Prior to statehood, Missouri's territorial laws provided for jury trials in "all civil cases of value of one hundred dollars . . . if either of the parties require it." Mo. Terr. Laws 58, § 13. "Civil actions for damages resulting from personal wrongs have been tried by juries since 1820." *Klotz*, 311 S.W.3d at 755

[3] Early American common law embraced this legal concept. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010). That the first reported case of medical negligence dates back to 1794 makes this clear. *Cross v. Guthery*, 2 Root 90, 1794 WL 198 (Conn. Super. Ct. 1794) (affirming a jury's award of loss-of-consortium damages against a surgeon for unskillfully performing an operation).

(Wolff, J., concurring) (citing *Diehl*, 95 S.W.3d at 92). Watts' suit for damages resulting from medical negligence "falls into that category." *See id*; *see, e.g.*, *Tiffin v. Forrester*, 8 Mo. 642, 1844 WL 3948, at *1 (Mo. 1844) (affirming a jury award against a physician found liable for "negligence and unskillfulness [sic] in his practice as a physician and surgeon"). It is thus entitled to constitutional protection under article I, section 22a.

(ii) The scope of the right to trial by jury includes, at its core, the right to have a jury determine the amount of non-economic damages.

As discussed, article I, section 22(a) constitutionalized the common-law incidents of trial by jury in existence in 1820. Judge Wolff's exhaustive review of the common-law history of trial by jury demonstrates that the core function of the jury is fact-finding, which includes a determination of the amount of plaintiff's damages.[4] *Klotz*, 311 S.W.3d at 775-778 (Wolff, J., concurring). And it demonstrates that at common law the only recognized power to rein in an excessive verdict was the granting of a new trial or the granting of a remittitur that is premised on the court's power to grant a new trial. *Id*. at 777-779. These core incidents of the right are entitled to constitutional protection.

[4] "Non-economic damages have long been recognized as an element of total damages in tort cases, including those involving medical negligence." *Atlanta Oculoplasty Surgery*, 691 S.E.2d at 222. The purpose of awarding money for non-economic harm caused by another person is to give "the sufferer a pecuniary satisfaction." 3 W. Blackstone, *Commentaries* 1112.

"This concept of the jury as the fact finder is rooted in Missouri's history as is the idea that its verdict should not be disturbed." *Id.* at 777 (Wolff, J., concurring). Thus, for instance, in *Tiffin v. Forrester*, 8 Mo. 642, 1844 WL 3948 (Mo. 1844), a medical malpractice action, the Supreme Court refused to set aside the jury's award of damages as excessive, concluding that it was the "right and duty" of the jury to weigh the evidence at trial, and "to give such credit to it as they thought proper." *Id*. at *1. In *Woodson v. Scott*, 20 Mo. 272 (1855), the Court refused to remit damages in a slander case, which it did not believe to be excessive. It stated: "[T]he juries of the country are the most appropriate judges of the amount of injury sustained; and to them is properly assigned the authority, and right to assess the consequent amount of damages therefore." *Id*. at 273. And in *Steinberg v. Gebhardt*, 41 Mo. 519 (1867), which involved a contract dispute, the Court stated: "It is not the province of this court to weigh the testimony for the purpose of ascertaining whether the jury found too much or too little." *Id*. at 519.

Throughout the 19th century, however, the Court was of two minds regarding the judicial power to grant remittitur. As Judge Wolff has documented, "Missouri cases in the early 1800s seemed to allow remittitur when the jury awarded damages that were greater than the amount requested." *Klotz*, 311 S.W.3d at 777. For example, when a circuit court rendered judgment in an amount greater than asked, this Court reversed without reference to remittitur. *Carr & Co. v. Edwards*, 1 Mo. 137, 137 (1821). Another example: this Court in *Hoyt v. Reed*, 16 Mo. 294 (1852), affirmed a trial court order remitting damages in a case where the trial court found that the jury had awarded damages for an item for which it was understood the defendant was not liable. *Id*. at 294.

Yet, "in the early decisions around 1900, the court was very much in doubt as to the validity of such power in unliquidated damage actions."[5] Samuel R. Gardner, *Comment: Power of the Appellate Court of Missouri to Order Remittiturs in Unliquidated Damage Cases*, 17 Mo. L. Rev 340, 341 (1952). In *Gurley v. Missouri Pac. Ry.*, 16 S.W. 11 (Mo. 1891), for example, the Court refused to remit damages in a personal injury case, stating that the use of remittitur would infringe on the right to trial by jury. *Id*. at 17. "When we set aside any part of the verdict," the Court explained, "we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and different verdict." *Id*.; *see also Rodney v. St. Louis S.W. Ry.*, 30 S.W. 150, 150 (Mo. 1895) (holding that "this court has no power to require a remittitur as a condition of affirmance in [personal injury cases]").

The Court's conflicting views about the power to order remittitur continued for decades. *Klotz*, 311 S.W.3d at 778 (Wolff, J., concurring). The Court temporarily halted the practice of remittitur in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99 (Mo. banc 1985), which held that the use of remittitur "constitutes an invasion of the jury's function by the trial judge." *Id*. at 110. "[T]he power to weigh the evidence," the

[5] Expressing a similar view, the U.S. Supreme Court in *Dimick v. Schiedt* indicated that the assessment of damages, such as for non-economic loss, "was a matter so peculiarly within the province of the jury that the Court should not alter it" *because* such damages were "uncertain." 293 U.S. 536, 480 (1934) (internal quotation marks and citation omitted).

Court said, was "a function reserved to the trier(s) of fact." *Id*. The following year, the Missouri Legislature enacted a law providing that a court "may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." Mo. Rev. Stat. § 537.068 (1986). Legislation restoring the practice, however, expressly excluded medical malpractice actions from its reach. *See* H.B. 700, § 44 (1986). This Court subsequently reinstated the remittitur procedure by rule. *See* Mo. Sup. Ct. Rule 78.10. As Judge Wolff has explained, it is a "procedure, modeled on common law practice, that premises remittitur on the court's authority to grant a new trial, a practice consistent with the understanding at common law of the judge's power to control verdicts at the time of the Missouri Constitution was adopted." *Klotz*, 311 S.W.3d at 778. Critically, this procedure preserves a party's right to have a jury assess damages in any subsequent trial. Mo. Sup. Ct. Rule 78.10(b).

To summarize, Missouri's common law history demonstrates that the core, common-law function of the jury is "fact-finding, which includes a determination of the amount of plaintiff's damages." *Klotz*, 311 S.W.3d at 777 (Wolff, J., concurring). Moreover, it shows that there existed at common law in 1820 "only one power to rein in an excessive verdict—the granting of a new trial or the granting of a remittitur that is premised on the court's power to grant a new trial." *Id*. at 779.

(iii) Federal constitutional precedent and precedent from other states with comparable constitutional provisions support this reading of Missouri's right of trial by jury.

Although the Missouri Constitution's words "shall remain inviolate" (Article I, section 22(a)) are "a more emphatic statement of the right" than the "simply stated guarantee written some 30 years earlier as the 7th Amendment to the United States Constitution that ' . . . the right of trial by jury shall be preserved,'" *Diehl*, 95 S.W.3d at 84, federal jurisprudence concerning the scope of the jury trial right is nonetheless instructive. That is because the U.S. Supreme Court also uses a historical analysis in ascertaining the scope of the right, and its reference point, 1791, is close in time to the Missouri Constitution's reference point of 1820.

Notably, the U.S. Supreme Court has also concluded that at common law juries were the judge of damages; that the common law recognized only one power to rein in an excessive verdict, the power to order a new trial or remittitur; and that in the event a jury's verdict was found to be excessive, both parties remained entitled to a jury's assessment of damages.

For example, in *Dimick v. Schiedt*, 293 U.S. 474 (1935), which found that remittitur does not contravene the Seventh Amendment,[6] but that additur does, *id*. at 486-

[6] *Dimick* did not understand the judicial authority to order remittitur to be deeply rooted in the common law, and further stated that "if the question of remittitur were now before us for the first time, it would be decided otherwise." 293 U.S. at 484. The Court

87, the Court stated: "[T]he common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it."[7] *Id*. at 480 (internal quotation marks and citations omitted). The *Dimick* Court, in addition, found that the trial judge's discretion included "overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (discussing *Dimick*, 293 U.S. at 486-87). But even as *Dimick* "reaffirm[ed] the practice of conditionally remitting damages," it "not[ed] that where a verdict is set aside as grossly inadequate or excessive, both parties remain entitled to have a jury determine the issues of liability and the extent of injury." *See Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998) (per curiam) (discussing

---

nonetheless reaffirmed the judicial practice of conditionally remitting damages, because it had been accepted by federal courts as the law since it was first announced by Justice Story, sitting as a circuit judge, in *Blunt v. Little*, 3 F. Cas. 760, 761-762 (C.C. Mass. 1822) (Story, J.)). *See* 293 U.S. at 484-85.

[7] *See also* Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935) ("The amount of damages . . . from the beginning of trial by jury, was a 'fact' to be found by the jurors."); 3 W. Blackstone, *Commentaries* 1339 (stating that if a civil verdict were for the plaintiff, the jurors "assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought.").

Dimick, 293 U.S. at 486). Thus, some fifty years after *Dimick*, when the U.S. Court of Appeals for the Fourth Circuit ordered a remittitur without offering the plaintiff the option of a new jury trial, the Supreme Court in *Hetzel* reversed on the ground that the court of appeals had violated the plaintiff's federal right to trial by jury. 523 U.S. at 211.

In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), the Court again recognized that the scope of the jury trial right "includes the right to have a jury determine the *amount* of [] damages, if any, awarded to [a plaintiff]."[8] *Id*. at 353 (emphasis in original). The Court, moreover, rejected the argument that a jury determination of the amount of damages is not necessary to preserve the substance of the right. "[I]f a party so demands, a jury *must* determine the actual amount of damages . . . in order to preserve the substance of the common-law right of trial by jury." *Id*. (internal quotation marks and citation omitted; emphasis added).

---

[8] *Feltner* concerned scope of the jury trial right as applied to an action brought to enforce statutory rights under the Copyright Act of 1976, 17 U.S.C. § 504(c). 523 U.S. at 342. The Court reiterated that the constitutional guarantee extends to statutory causes of action that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century. *Id*. at 348 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)). Because the action for statutory damages under the Copyright Act had an analog in the common law, *id*. at 351-52, the constitutional guarantee applied with full force to the assessment of statutory damages under the Copyright Act. *Id*. at 353-55.

State Supreme Courts have similarly read their common law. The Supreme Court of Georgia, for example, has "conclude[d] that at the time of the adoption of our Constitution of 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including non-economic damages, as determined by the jury." *Atlanta Oculoplastic Surgery*, 691 S.E.2d at 223. The Supreme Court of Oregon, using 1857 as its reference point, has concluded that "the assessment of damages was a function of a common-law jury . . . ." *Lakin v. Senco Products, Inc.*, 987 P.2d 463, 470 (Or. 1999). The Supreme Court of Washington, using 1889 as its reference point, has repeatedly reaffirmed: "To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact." *Sofie v. Fireboard Corp*, 771 P.2d 711, 716-17 (Wash. 1989) (citation omitted).

2. The jury's assessment of damages does not "remain inviolate" when § 538.210's legislative limit is applied. Section 538.210 is therefore unconstitutional.

Section 538.210 imposes a legislative remittitur "on a wholesale basis without regard to the evidence and without the option of a new jury trial." *Klotz*, 311 S.W.3d at 780 (Wolff, J., concurring); *see* Mo. Rev. Stat. § 538.210. The common law in 1820 may have recognized the *judicial* authority to order a remittitur on an individual basis and conditioned on a new jury trial, but it *never* recognized the raw assertion of *legislative* authority over juries embodied by § 538.210. *Klotz*, 311 S.W.3d at 780 (Wolff, J.,

concurring); *see also Atlanta Oculoplastic Surgery*, 691 S.E.2d at 224 ("[T]he contention that the damages caps are analogous to the courts' remittitur power is unfounded."); *Sofie*, 771 P.2d at 721 ("the legislative damages limit is fundamentally different from the doctrine of remittitur"); *Lakin*, 987 P.2d at 472-473 (distinguishing judicial remittitur from statutory damages caps, and holding that the latter violates Oregon's constitutional right of trial by jury); *cf. Lebron*, 930 N.E.2d at 908-09 (distinguishing judicial remittitur from statutory damages caps, and holding that the latter violates separation of powers under the Illinois Constitution); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997) (same).

This Court concluded in *Lee* at the turn of the 20th century, and again in *Diehl* at the turn of the 21st, that the constitutional right of trial by jury "means that all the substantial incidents and consequences which pertained to the right of trial by jury, are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existed at common law." *Lee*, 111 S.W. at 1153; *Diehl*, 95 S.W.3d at 85 (citing *Lee*). As demonstrated, the substantial incidents of a jury trial "as heretofore enjoyed" include the right to have a jury determine the amount of damages awarded to a plaintiff in a civil action for damages resulting from medical negligence. The Constitution, moreover, preserves these incidents as "inviolate." Mo. Const. art. I, § 22(a). When the original Missouri Constitution was enacted, "inviolate" meant "unhurt; uninjured;

unprofaned, unpolluted; unbroken." Noah Webster, *American Dictionary of the English Language* 113 (1828).[9]

Certainly if "in order to preserve the substance of the common-law right of trial by jury," "a jury must determine the actual amount of damages . . . ." *Feltner*, 523 U.S. at 353, then a fortiorari, in order to preserve the substance of the right as "inviolate," *a jury must determine the actual amount of damages.* In this case, however, Watts was deprived of the benefit of a jury trial when § 538.210 was applied to nullify the jury's determination of the amount of non-economic damages. Her "inviolate" right to trial by jury was thereby violated.

Courts agree: to date, six state supreme courts, using the same historical analysis as is appropriate under the Missouri Constitution, have concluded that caps on damages violate this fundamental right. *Atlanta Oculoplastic Surgery*, 691 S.E.2d at 224; *Lakin*, 987 P.2d 463; *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Sofie*, 771 P.2d 711; *Kan. Malpractice Victims Coal. v. Bell*, 757 P.2d 251 (Kan. 1988); *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987).[10] Note, too, that the language of the right to

[9] Its meaning has not changed over time. *See Webster's Third New International Dictionary* 1190 (1976) (defining "inviolate" as "free from change or blemish: pure, unbroken ... free from assault or trespass: untouched, intact").

[10] Decisions to the contrary include: *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000);

trial by jury provisions in these states is nearly identical to Missouri's. Ala. Const. art. I, § 11 ("That the right of trial by jury shall remain inviolate."); Fla. Const. art. I, § 22 ("The right of trial by jury shall be secure to all and remain inviolate"); Ga. Const. of 1983, art. I, § I, ¶ XI(a) ("The right to trial by jury shall remain inviolate."); Kan. Const. Bill of Rights, § 5 ("The right of trial by jury shall be inviolate"); Or. Const. art. I, § 17 ("In all civil cases the right of Trial by Jury shall remain inviolate."); Wash. Const. art. I, § 21 ("The right of trial by jury shall remain inviolate, ...").

Adams's conclusion that the 1986 version of § 538.210 does not violate Missouri's right of trial by jury is wrong for two reasons. First, *Adams* committed a "fundamental error [] in concluding that statutory law can trump the constitutional right to jury trial." *Klotz*, 311 S.W.3d at 774 (Wolff, J., concurring). The plain meaning of article I, section 22(a) establishes the constitutional status of the right: it is beyond the reach of hostile legislation. *Diehl*, 95 S.W.3d at 92. Because *Adams's* understanding of the right is contrary to the Constitution's plain meaning, it is not entitled to stare decisis effect. *See Independence-Nat'l Educ. Ass'n*, 223 S.W.3d at 137. The Court should expressly overrule *Adams* and reaffirm *Diehl*, which is entitled to stare decisis effect, because it faithfully tracks the Constitution's clear command that the incidents of jury trial at common law in 1820 "shall remain inviolate."

Murphy v. Edmonds, 601 A.2d 102 (Md. 1992). These decisions are unpersuasive for the reasons described here.

Adams committed a second error: it failed to appreciate that historically juries set the amount of damages awarded to plaintiffs in civil actions for damages. This is clear from *Adams*' citation to *Tull v. United States*, 481 U.S. 412 (1987), which *Adams* described as holding: "There is no substantive right *under the common law* to a jury determination of damages under the Seventh Amendment." *Adams*, 832 S.W.2d at 907 (citing *Tull*) (emphasis added). Based on *Tull*, the Court in *Adams* concluded that the substantive, legal limits of a plaintiff's damage remedy is a matter of law, not fact, and not within the jury' purview. *Id*. But *Tull* does not support *Adams*' understanding of the common-law role of juries.

The U.S. Supreme Court in *Tull* held that Seventh Amendment does not guarantee a right to have a jury assess civil penalties that are owed to the government. 481 U.S. at 428. It reached that conclusion because it found no evidence that juries historically had determined the amount of such civil penalties. *See Feltner*, 523 U.S. at 355 (discussing *Tull*). But "there *is* clear and direct historical evidence that juries, . . . as a general matter . . ., set the amount of damages awarded to a successful plaintiff" in cases involving discretionary monetary relief. *Id*. (emphasis added). *Tull*, the U.S. Supreme Court made clear in *Feltner*, "is thus inapposite" to civil actions for damages recognized at common

law.[11] *Id.* Because *Adams* concerned a medical negligence suit, its reliance on *Tull* was misplaced.[12]

* * *

"The true function of the jury," Judge Wolff has written, "is to determine the facts in a given case and reach a fair and just verdict including damages. It is a function that the people of this state in their constitution have retained for 12 of their number to

---

[11] Courts have read *Tull* and *Feltner* in precisely this way. *See Atlanta Oculoplastic Surgery*, 691 S.E.2d at 222 & n.5 (discussing *Tull* and *Feltner*); *Lakin*, 987 P.2d at 470 n.8 (discussing *Feltner*); *Sofie*, 771 P.2d at 717-718 (discussing *Tull*).

[12] *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 528-29 (Va. 1989), which held that caps on damages do not violate Virginia's constitutional right of trial by jury, and which *Adams* cited approvingly, *see* 832 S.W.2d at 907, is also innapposite. That decision is governed by a less comprehensive constitutional jury trial provision, *Etheridge*, 376 S.E.2d at 528 (constitution provides that "trial by jury is preferable ... and ought to be held sacred"), as are the decisions in *MacDonald v. City Hospital, Inc.*, 715 S.E.2d 405, 414 n.10, 415 (W. Va. 2011) (concluding that "[o]ur state constitutional provision regarding the right to trial by jury differs substantially" from Georgia's, which preserves jury trial as "inviolate"); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (constitution provides that right to jury trial "inviolate" only in capital cases); and *Phillips v. Mirac, Inc.*, 651 N.W.2d 437 (Mich. Ct. App. 2002) (constitution provides that "right of trial by jury shall remain").

perform without interference." *Klotz*, 311 S.W.3d at 780 (Wolff, J., concurring). In this case, the jurors ably performed their function. There was no assertion by Cox Medical Centers, and no finding by the circuit court, that the jury's findings did not conform to the evidence, that the verdict was excessive, or that the jury was misinstructed. The Missouri Constitution demands that the jury's verdict in this case be respected.

Because § 538.210 is legislative interference that impairs the "inviolate" right of trial by jury as heretofore enjoyed, the Court should declare it unconstitutional, reverse the judgment of the circuit court, and remand this case with instructions to enter judgment for Watts for the total amount of non-economic damages awarded by the jury.

B. Section 538.210 Violates Separation of Powers, Article II, Section 1.

Point relied on 2. The circuit court erred in granting Cox Medical Centers' request, pursuant to § 538.210, to reduce the total non-economic damages awarded to Watts because § 538.210 violates the constitutional separation of powers prescribed by article II, section 1 of the Missouri Constitution, in that the statutory cap on non-economic damages invades the traditional judicial function of assessing, on a case-by-case basis, whether a jury's damages award is excessive or inadequate and against the weight of the evidence and supersedes that judicial power, which is conditioned on a new jury trial, with a fixed "legislative remittitur" which takes no account of the facts in a particular case and is not so conditioned.

Section 538.210 also violates the constitutional separation of powers required by article II, section 1 of the Missouri Constitution.[13] While this constitutional provision "does not erect an impenetrable wall of separation between the departments of government," it does "proscribe the exercise of powers or duties constitutionally assigned to one department by either of the other two." *Chastain v. Chastain*, 932 S.W.2d 396, 398 (Mo. banc 1996). Two powers constitutionally assigned to the judiciary include "judicial review and the power of courts to decide issues and pronounce and enforce judgments." *Id*. at 399. These are "exclusive" powers of the judiciary. *Id*. Section 538.210 arrogates both these powers to the Legislature, in violation of the constitutional separation of powers. Put simply, it is a legislative attempt to mandate a legal conclusion, which the constitutional separation of powers does not permit.

Section 538.210 violates the separation of powers in two related ways. First, it has traditionally been the function of the courts, to assess, on a case-by-case basis, whether a jury's damages award is excessive or inadequate and against the weight of the evidence. *See supra* pp. 28-29. The cap on non-economic damages invades the province of the

[13] Article II, section 1 provides: "The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

judiciary by superseding the judicial power of review and the power to pronounce judgments with a fixed legislative remittitur. Second, § 538.210 forces a judge to enter judgment for non-economic damages in an amount that is contrary to what the evidence and factual findings of the jury establish. In Missouri, the "general" rule is that "the judgment is based upon what the jury *actually* found." *Morse v. Johnson*, 594 S.W.2d 610, 616 (Mo. banc 1980) (emphasis added). But by operation of § 538.210, the judgment is based on the Legislature's belief that no medical malpractice plaintiff is entitled to compensation for non-economic harm in excess of $350,000. A judge is thus forced to enter judgment at variance with what the jury actually found, and he or she must do so without regard to the particular evidence or circumstances of the case. The inherent powers of the judiciary are thus unduly infringed by the Legislature, through § 538.210.

This Court has not previously considered whether a cap on non-economic damages violates the separation of powers.[14] But courts in other states have considered the question and have found such legislative remittiturs to be inconsistent with the constitutional separation of powers. *E.g.*, *Lebron*, 930 N.E.2d at 908-09; *Best*, 689 N.E.2d 1057; *Sofie*, 771 P.2d at 720-21.

In *Best*, for example, the Illinois Supreme Court observed that "the inherent power of the court to order a remittitur or, if the plaintiff does not consent, a new trial, is

[14] The Supreme Court declined to address the issue in *Adams* on the ground that the issue had not been preserved at trial. 832 S.W.2d at 908 n.6.

essential to the judicial management of trials." 689 N.E.2d at 1080 (citation omitted). The Illinois cap on non-economic damages, the court concluded, "functions as a legislative remittitur" and "undercuts the power, and obligation, of the judiciary to reduce excessive verdicts." *Id.* It further stated:

> [u]nlike the traditional remittitur power of the judiciary, the legislative remittitur . . . disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action. The cap on damages is mandatory and operates wholly apart from the specific circumstances of a particular plaintiff's noneconomic injuries. Therefore, [the Illinois cap] unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.

Id.

Years after the *Best* Court issued its constitutional ruling, the Illinois Legislature again enacted a cap on non-economic damages.[15] And again, the Illinois Supreme Court

[15] Whereas the cap on damages at issue in *Best* applied to all actions, whether based on the common law or statute, that sought damages on account of death, bodily injury, or physical damage to property based on negligence or other theories of liability, the cap at issue in *Lebron* applied to any medical malpractice action or wrongful death

found the law unconstitutional. In *Lebron*, the Court reaffirmed that a law capping non-economic damages in medical negligence cases requires a court "to override the jury's deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances, and without the plaintiff's consent." 930 N.E.2d at 908. This "legislative override" impermissibly infringed upon the "fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law," in violation of the separation of powers. *Id*. (citation omitted). The Washington Supreme Court has endorsed this reasoning. *See Sofie*, 771 P.2d at 720-21 (reasoning that only trial judge is empowered to make the legal conclusion, on a case-by-case basis, that the jury's damage award is excessive in light of the evidence; because the "[l]egislature cannot make such case-by-case determinations," separation of powers concerns would be violated by the "legislative attempt to mandate legal conclusions.").[16]

---

action based on medical malpractice. *See Lebron*, 30 N.E.2d at 907. Notwithstanding these differences, the Court in *Lebron* reached the same conclusion as in *Best*. *See id.*

[16] A fortiori, the cap on non-economic damages in § 538.210 also "encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is" inadequate. *Best*, 689 N.E.2d at 1080. If the court determines that a verdict in excess of the cap is nevertheless inadequate in light of the evidence to compensate a plaintiff for his injuries, the cap prevents the court from ordering additur or a new trial at which the plaintiff could obtain an appropriate recovery.

Precisely the same analysis—and conclusion—are appropriate under article II, section 1. *See Kyger v. Koerper*, 207 S.W.2d 46, 49 (Mo. banc 1946) (Hyde, J., concurring) ("[T]he Legislature cannot entirely exclude the exercise of the discretion of the Court. To do so is an encroachment of one department of Government upon the functions of another . . . .") (citation omitted).

Fust v. Attorney General, 947 S.W.2d 424 (Mo. banc 1997), is to the contrary. There, this Court said, "Placing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function." *Id*. at 430-31. But *Fust* should no longer be considered good law on this point. In support of this proposition, *Fust* cited only a single case, *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988). *Id.* at 431. Three years after *Fust* was decided, however, *Simpson* was overruled in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000). In *Kilmer*, this Court expressly rejected *Simpson's* analysis of the separation of powers, dismissing the earlier decision's discussion as "circular reasoning," and held that the dram shop liability statute at issue in that case "violates separation of powers." *Id.* at 552-53.

In light of *Chastain*, *Kilmer*, and *Kyger*, Watts urges this Court to adopt the reasoning of the Supreme Courts of Illinois and Washington and hold that the cap on non-economic damages in § 538.210 violates the separation of powers.

C. Section 538.210 Violates Equal Protection, Article I, Section 2.

Point relied on 3. The circuit court erred in granting Cox Medical Centers' request, pursuant to § 538.210, to reduce the total non-economic damages awarded to Watts because § 538.210 violates the equal protection clause of the Missouri

Constitution, article I, section 2, in that § 538.210, as amended in 2005, arbitrarily and irrationally discriminates against, inter alia, all victims of medical malpractice, severely injured victims of medical malpractice, victims of medical malpractice who have been injured by multiple health care providers or multiple acts of malpractice, and women, racial and ethnic minorities, children, the elderly, and the poor—all of whom receive a higher proportion of tort damages in the form of non-economic damages, even though the General Assembly knew that the 2005 cap was not even rationally related to a legitimate state interest—let alone meeting the legal standards for intermediate or strict scrutiny—because there was no malpractice liability crisis in Missouri, malpractice liability insurance premiums were neither high by historic standards nor increasing due to increased tort liability, and the number of health care providers in Missouri had been steadily increasing.

Article I, section 2 of the Missouri Constitution guarantees the right to equal protection of the law. Under the equal protection clause, legislative classifications that burden a suspect class or impinge upon a fundamental right must pass "strict scrutiny" to be upheld; that is, they must be justified by a compelling state interest and must be narrowly drawn to further that interest. *Bernat v. State*, 194 S.W.3d 863, 864 (Mo. banc 2006). Legislative classifications that discriminate on the basis of gender must survive "intermediate scrutiny," they must serve "'important governmental objectives and must be substantially related to achievement of those objectives.'" *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Finally, statutes that are not subject to heightened scrutiny will only be upheld if they are

rationally related to a legitimate state interest. *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 512 (Mo. 1991).

As then-Judge Teitelman (now Chief Justice) explained in his opinion concurring in the result in *Klotz v. St. Anthony's Medical Center*, 311 S.W.2d 752, 781-83 (Mo. banc 2010), the legislative classifications created by § 538.210 must survive strict scrutiny, because they impinge upon the fundamental constitutional right of trial by jury.[17] Section 538.210 cannot meet this test. *Id*. "The arbitrary caps imposed by § 538.210 will permit some measure of full compensation to those whose injuries are primarily economic," he noted. *Id*. at 872. "However, . . . for those whose injuries are predominantly non-economic, the caps arbitrarily will cut off most of their proven, demonstrated damages." *Id*. Also, "those with relatively minor injuries are permitted full recovery, while the most

[17] In *Adams*, this Court left open the question whether such constitutional rights constitute fundamental rights for purposes of equal protection analysis. 832 S.W.2d at 903. The U.S. Supreme Court has repeatedly stated that the right to trial by jury is fundamental. *See, e.g., Hodges v. Easton*, 106 U.S. 408, 412 (1882) ("the trial by jury is a fundamental guaranty of the rights and liberties of the people"); *Jacob v. New York City*, 315 U.S. 752, 752-53 (1942) ("right of jury trial in civil cases" is a "right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts"); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) ("The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence.").

severely injured among us are denied." *Id.* A health care policy that "expressly relies on discrimination against the small number of unfortunate individuals who suffer the most debilitating, painful, lifelong disabilities as a result of medical negligence" is not necessary to accomplish any compelling state interest. *Id.*

Judge Teitelman identified two more "subtle but no less pernicious side effects" to the cap on non-economic damages: the impacts of the cap will fall disproportionately on the young and economically disadvantaged, such as Naython, whose mother was a Medicaid recipient. Trial Tr. 30:8-12. (April 21, 2011). "Young people, because they will have to live with their injuries and disabilities the longest, bear the brunt of section 538.210. Similarly, those with generally more limited economic prospects—the poverty-stricken, the physically and mentally disabled, single mothers, wounded veterans, the elderly, and others—are impacted disproportionately by the arbitrary limits on non-economic damages." *Id.*

Alternatively, § 538.210 should be subject to heightened scrutiny because it disproportionately and adversely affects women, racial minorities, children and the elderly, as discussed below.[18] In *Carson v. Mauer*, 424 A.2d 825 (N.H. 1980), the New

[18] This disproportionate impact occurs because members of these traditionally disadvantaged groups rely more heavily on non-economic damages for their tort recoveries. Members of these groups generally have lower wages than working, white men and, as a result, juries award such victims a grater proportion of their overall compensatory damages in the form of noneconomic damages. *See* Lucinda M. Finley,

Hampshire court applied intermediate scrutiny in invalidating a medical malpractice reform statute because of the importance of the rights involved, *id.* at 830-31; that court later strengthened its test for such intermediate scrutiny review by adopting the federal standard. *Cmty. Res. for Justice v. City of Manchester*, 917 A.2d 707 (N.H. 2007). That reasoning is persuasive and should be adopted here.

Even so, it should not be necessary for this Court to evaluate § 538.210 under either form of heightened scrutiny, because that provision cannot withstand rational relation review; it is arbitrary and irrational legislation that is not rationally related to any legitimate state purpose. Section 538.210 thus cannot survive intermediate or strict scrutiny, either.

Section 538.210 creates a number of arbitrary and irrational classifications that implicate equal protection. In particular, the cap:

a) discriminates between slightly and severely injured victims of medical malpractice, by limiting the ability of severely injured victims to recover their full non-economic damages;

b) discriminates between severely injured malpractice victims who suffer large amounts of non-economic damages and severely injured malpractice victims who suffer injuries of equivalent value that are economic in nature;

The Hidden Victims of Tort Reform: Women, Children, and the Elderly, 53 Emory L.J. 1263, 1280-81 (2004). For the same reason, caps on non-economic damages also disproportionately impact—and discriminate against—women. *Id.*

c) discriminates between malpractice victims and other tort victims who suffer comparable injuries;

d) discriminates between malpractice victims who have been injured by the malpractice of one health care provider and those who have been injured by multiple health care providers, by arbitrarily and irrationally reducing the amount of non-economic damages that the latter may recover from each defendant;

e) discriminates between present victims of medical malpractice and future malpractice victims, by reducing the real value of recoverable non-economic damages for future victims;

f) discriminates against traditionally disadvantaged groups, including women, racial and ethnic minorities, children, the elderly and the poor, because such groups disproportionately receive a higher percentage of tort damages in the form of non-economic damages subject to the cap.

The cap quite clearly discriminates between slightly and severely injured malpractice victims. Malpractice victims with modest injuries will be compensated fully under the law. But those who are severely injured, those who suffer more than $350,000 in non-economic damages that decrease their quality of life—chronic pain, disfigurement, emotional distress, physical difficulties and/or reliance on daily custodial care, inability

to have children, or damage to their marital relationship[19]—will not be fully compensated. Even if they are successful at trial, they will recover only a fraction of what they have lost. It is wholly arbitrary and irrational to ask those most severely injured to bear the entire burden of medical liability reform. *Ferdon*, 701 N.W.2d at 465.

The cap also discriminates between plaintiffs with comparable injuries, where one plaintiff's injuries are primarily economic in nature and the other's are predominantly non-economic; the former can be compensated in full for his injuries, while the latter's recovery will be capped if the non-economic damages exceed $350,000. The same result will occur between two sets of plaintiffs with identical injuries, one injured through medical malpractice and the other through some other tort; only the former's injuries will be subject to the cap. Courts in other states have found these classifications arbitrary and irrational as well. *See id.*

In addition, the cap on non-economic damages necessarily discriminates against women, as well as against children, such as Naython, the elderly and the poor. A non-economic damage cap disproportionately affects these traditionally disadvantaged groups, because they rely more heavily on non-economic damages for their tort recoveries. Members of these groups generally have lower wages than working, white

[19] This list is taken from MDI, *Medical Malpractice Insurance in Missouri: the Current Difficulties in Perspective*, at 33 (Feb. 2003) (hereinafter "Current Difficulties Report"), *available at* http://www.citizen.org/documents/Missouri%20Report%20from%20D.%20of%20Insurance%202-7-03.pdf.

men and, as a result, juries award such victims a greater proportion of their overall compensatory damages in the form of noneconomic damages. *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 Emory L.J. 1263, 1281 (2004).

The 2005 version of § 538.210 differs substantially from the 1986 version, which this Court held was rationally related to a legitimate purpose.[20] *See Adams*, 832 S.W.2d at 905. It creates additional arbitrary and irrational classifications that implicate equal protection. First, under the prior law, each "occurrence" of malpractice was subject to a separate cap. *See Scott v. SSM Healthcare*, 70 S.W.3d 560, 570 (Mo. Ct. App. 2002). But in the 2005 version at issue here provision, the "per occurrence" language has been deleted, limiting Watts here to a single cap regardless of how many acts of malpractice may have been committed against him. In addition, under the prior law, a separate cap applied to each defendant. *See* Mo. Rev. Stat. § 538.210.1 (2000) ("no plaintiff shall recover more than three hundred fifty thousand dollars . . . for noneconomic damages from any one defendant"). Under the amended provision, however, a single cap applies "irrespective of the number of defendants." Mo. Rev. Stat. § 538.210.1.

[20] Prior to H.B. 393, § 538.210 provided that "no *plaintiff* shall recover more than three hundred fifty thousand dollars *per occurrence* for noneconomic damages *from any one defendant*." (emphasis added). The prior statute also provided that the amount of the cap would be adjusted annually for inflation. Mo. Rev. Stat. § 538.210.4.

Consequently, an individual who is injured by a single health care provider in a single occurrence may recover the full measure of the non-economic damages cap from that defendant. But another individual who is injured by multiple health care providers in separate acts of malpractice will be able to recover only a fraction of the capped amount from each. Indeed, this is precisely the result defendants sought and obtained against Watts. The jury found that Drs. Herrman, Kelly, and Green and Cox Medical Centers had breached the standard of care. Legal File 53. Thus, the cap as amended in 2005 works to deprive Naython Watts of non-economic damages from each Respondent for each occurrence in this case—damages that would have been recoverable had each Respondent acted alone in committing malpractice against him. It is wholly arbitrary and irrational to deny a plaintiff such as Watts the right to collect at least the full amount of the cap from any health care provider who has injured her child, for no other reason than that multiple health care providers injured him multiple times. [21]

---

[21] *Cf. St. Mary's Hosp. v. Phillipe*, 769 So. 2d 961, 971-72 (Fla. 2000) (interpreting a "per incident" cap on non-economic damages to be applicable per claimant so as to avoid a serious constitutional question):

> "[W]ere we to interpret the noneconomic damages cap to apply to all claimants in the aggregate, we conclude that such an interpretation would create equal protection concerns. . . . If we were to accept St. Mary's contention that the Legislature intended to limit noneconomic damages to

In addition, unlike the 1986 version of § 538.210 considered in *Adams*, which would adjust for inflation, the 2005 version does not. It thus discriminates between present and future victims of malpractice. Malpractice victims who are awarded non-economic damages in 2005 may recover $350,000 in real 2005 dollars under the cap; but because the cap does not adjust for inflation, future victims such as Naython will effectively be capped at much lower amounts. The Missouri Department of Insurance recognized this phenomenon in its discussion of the fixed non-economic damage cap in California, which was enacted in 1975. As the MDI noted, "[t]he failure to index [the California cap] has created a loss of almost $300,000 in purchasing power for the most seriously injured patients and families." MDI, *Medical Malpractice Insurance in*

> $250,000 per incident in the aggregate, then the death of a wife who leaves only a surviving spouse to claim the $250,000 is not equal to the death of a wife who leaves a surviving spouse and four minor children, resulting in five claimants to divide $250,000. We fail to see how this classification bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability industry. Such a categorization offends the fundamental notion of equal justice under the law and can only be described as purely arbitrary and unrelated to any state interest."

Missouri: the Current Difficulties in Perspective, at 33 (Feb. 2003); *see* also Frank A. Sloan & Lindsey M. Chempke, *Medical Malpractice* 117 (MIT Press 2008) ("Imposition of a cap not indexed to the rate of inflation for the economy overall or for medical inflation in the limit is both arbitrary and unfair. Considering inflation that has occurred since 1975, California's cap was effectively $70,000 around 2005, and with inflation, its value was falling fast.") (footnote omitted) (hereinafter "Sloan, *Medical Malpractice*"). Even if it somehow were rational to cap non-economic damages at $350,000, it is arbitrary and irrational to subject future victims to a much lower effective cap, by denying them an adjustment for inflation.

The application of the cap in this case makes that clear. Applying the 2005 version of § 538.210, the trial court in this case reduced Watts' recovery by $1,110,000. Today, the flat cap of $350,000 represents $168,986 in 1986 dollars.[22]

Under the rational basis test, Missouri courts will start from the presumption that an act of the Legislature has a rational basis; indeed it was on this basis that this Court upheld the prior cap in *Adams*, even though the Court had doubts about whether a "crisis" in medical malpractice premiums even existed. 832 S.W.2d at 904.

But this presumption can be overcome by a clear showing of arbitrariness and irrationality. *Foster v. St. Louis County*, 239 S.W.3d 599, 602 (Mo. banc 2007). The party who challenges legislation under the equal protection clause may present facts or

[22] This calculation is based on U.S. government CPI data released on October 19, 2011.

arguments to show that the classifications effected by the act are not rational. *Mahoney*, 807 S.W.2d at 513. That is exactly what Watts has done. Not only are the classifications created by amended § 538.210 arbitrary and irrational, the Legislature had no rational basis at all for enacting the cap. At the time § 538.210 was enacted, the number of malpractice claims and payments was falling, claims payments were declining in real terms, malpractice premium increases were not tied to tort liability and were not high by historic stands, and the number of physicians in the state was steadily rising. *See infra* pp. 51-58. And there was no rational justification for many of the new, arbitrary classifications created by the revised cap. Evidence in support of the act's irrationality can be found in the pages below, in the reports of the Missouri Department of Insurance, and in a "friend-of-the-Court" brief filed by a group of professors of law and social science who have rigorously studied and tested the factual predicates underlying such legislation. Br. for Professors of Law as Amici Curiae Supporting Appellant/Cross-Respondent (filed Oct. 20, 2011) (hereinafter "Amici Curiae Br. for Law Professors").

Also persuasive are the decisions of numerous courts in other states which have invalidated damage caps on equal protection—or, closely related, special legislation—grounds. *See, e.g., Ferdon*, 701 N.W.2d at 465; *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1095 (Ohio 1999); *Trujillo v. City of Albuquerque*, 965 P.2d 305, 317 (N.M. 1998); *Best*, 689 N.E.2d at 1077; *Hanvey v. Oconee Mem'l Hosp.*, 416 S.E.2d 623, 625-26 (S.C. 1992); *Morris v. Savoy*, 576 N.E.2d 765, 769 (Ohio 1991); *Brannigan v. Usitalo*, 587 A.2d 1232, 1236-37 (N.H. 1991); *Moore*, 592 So. 2d at 169; *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 353 (Utah 1989);

Sofie, 771 P.2d at 715-23; *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988); *Sibley v. Bd. of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1108-09 (La. 1985); *Arneson v. Olson*, 270 N.W.2d 125, 133, 135-36 (N.D. 1978). This Court should likewise hold that § 538.210 violates equal protection.

1. The Legislature Lacked a Rational Basis for Enacting the Revised Cap.

During the legislative debate over H.B. 393, a number of arguments were advanced in support of the version of § 538.210 at issue here. Many were similar to the same arguments that had been made in support of the 1986 "tort reform" legislation. Supporters of H.B. 393 contended that there was a malpractice liability crisis in the state, which was causing malpractice insurance rates to increase dramatically, and was driving doctors to leave the state. Each of these propositions, however, was demonstrably false, as demonstrated by objective, empirical information from both government sources and the advocates for the legislation themselves. Thus, this is the rare case in which "'those challenging the legislative judgment [can] convince the court the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Mahoney*, 807 S.W.2d at 512-13 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

2. There was no malpractice liability crisis in Missouri.

In the years preceding the enactment of H.B. 393, the number of medical malpractice claims filed had decreased substantially. In 1999, according to data collected by the Missouri Department of Insurance (MDI) from malpractice liability insurers, there

had been 1,625 claims filed against medical care providers. MDI, *2000 Missouri Medical Malpractice Insurance Report* (2000) (hereinafter "2000 MMMI Report"). That number dropped steadily in the following years: to 1,599 claims in 2000, and to 1,288 claims in 2001. New malpractice claims against medical providers fell more than 14 percent in 2003, reaching a record low, then fell another 20 percent in 2004. MDI, *2003 Missouri Medical Malpractice Insurance Report*, Executive Summary (2003) (hereinafter "2003 MMMI Report"), *available at* http://insurance.mo.gov/Contribute%20Documents/2003_Medical_Malpractice_Report.pdf; MDI, *Missouri Medical_Malpractice Insurance Report*, Executive Summary (Oct. 2005) (hereinafter "2004 MMMI Report"), *available at* http://insurance.mo.gov/Contribute%20Documents/2004_Med_Mal_Rpt.pdf.

Claims against physicians and surgeons followed a similar pattern, declining from 903 new claims in 2002 to 836 new claims in 2003 and only 630 new claims in 2004. 2004 MMMI Report 18. Equally important, the number of malpractice claims on which a payment was made also declined, from 575 paid claims in 2002 to 535 paid claims in 2003 to only 505 in 2004. *Id.* at 20. These decreases, in both claims filed and claims closed with payment, continued a fifteen year trend. *See* Current Difficulties Report, at 6.

There was an increase in the average claims payment in the years leading up to the act, but this increase was entirely explained by inflation in the cost of medical care and lost wages, as well as by an increase in the severity of injuries suffered by the claimants. Current Difficulties Report, at 17. ("All of the increases in average medical malpractice payouts since 1990 are accounted for by increases in the medical cost of treating injury, the earnings lost by the victim and the severity of the injury suffered."); 2003 MMMI

Report, at 39-62. Indeed, as the MDI acknowledged: "Without increases in health care costs and average wages, and if injury severities remained constant, average payments would have decreased fairly significantly during the 1990s." Current Difficulties Report, at 18.

Moreover, total payouts to malpractice victims (total claims paid x average claims payment) were increasing at less than the general rate of inflation, *i.e.*, declining in real terms. Current Difficulties Report, at 16. In 2003, insurers' overall benefits paid to malpractice victims actually dropped, by 21 percent, from $118.7 million to $93.5 million. Payouts to victims of physician malpractice dropped even more dramatically, by 33 percent, from $79.4 million to $52.9 million. 2003 MMMI Report, Executive Summary, at 1.[23]

[23] While actual payments to victims of malpractice were declining, insurers sharply increased their estimates of future losses for newly filed claims, from $65.1 million in 2001 to $167.9 million in 2002 and $164.3 million in 2003, even though there was no reason to expect such a sharp increase in future payouts. 2003 MMMI Report, Executive Summary, at 2. By "cooking the books" in this way, medical liability insurers were able to claim that they were not making a profit, even though their malpractice premium income in 2003 was more than double the amount that they paid on claims. *Id.*

Thus, any claim that there was a malpractice litigation explosion or crisis in Missouri was belied by the facts; it simply was not true.[24]

---

[24] More generally, there is good reason to believe that—both at other times and across the country—claims by tort reform advocates of a medical malpractice liability crisis have been greatly exaggerated or are false. *See, e.g.*, Stephen Daniels & Joanne Martin, *Texas Plaintifs' Practice in the Age of Tort Reform: Survival of the Fittest-It's Even More True Now*, 51 N.Y.L. Sch. L.Rev. 285, 290 (2007) ("the connection between damage caps and insurance rates, on the one hand, and between insurance rates and medical services, on the other hand, remains empirically murky"); *id*. at 290 n.13 ("There is substantial empirical literature dealing with medical malpractice that would suggest medical malpractice reform is unlikely to remedy the problems used to justify reform."); Finley, 53 Emory L.J. at 1268 ("There is little empirical evidence to support the claims of the critics of the tort system. Indeed, most of the available empirical research refutes the criticisms.").

Several medical malpractice studies have found that despite the high rate of injury caused by medical negligence, relatively few victims file malpractice claims. Paul C. Weiler, *et al.*, *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* 69-76 (Harvard Univ. Press 1993); Lori Andrews, *Studying Medical Error in Situ: Implications for Malpractice Law and Policy*, 54 DePaul L. Rev. 357, 370 (2005) (study reporting that 13 patients of 1047 (1.2 percent) injured by medical negligence filed a claim); Frank A. Sloan & Chee Ruey Hsieh, *Injury, Liability, and the*

3. Increases in malpractice liability insurance premiums were not caused by increases in tort liability; moreover, malpractice premiums were not high by historic standards and constituted a small percentage of the costs of operating a medical practice.

Malpractice premiums for health care professionals had risen in the years immediately preceding the enactment of H.B. 393. As just explained, however, these premium increases could not have been caused by increases in malpractice liability in Missouri, because such liability was decreasing in real terms.

Decision to File a Medical Malpractice Claim, 29 Law & Soc'y Rev. 413 (1995). Moreover, empirical research demonstrates that juries, rather than favoring those few plaintiffs who in fact file suit, view plaintiffs' claims with skepticism, Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 252-54 (1993); that jury verdicts tend to be consistent with judgments of neutral medical experts, Mark I. Taragin, *et al.*, *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 Annals Internal Med. 780 (1992); and that damage awards tend to correlate with the severity of injury, Neil Vidmar, *et al.*, *Jury Awards For Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 Depaul L. Rev. 265, 287 (1998). *See generally* Neil Vidmar, *Medical Malpractice and the American Jury: Confronting The Myths About Jury Incompetence, Deep Pockets, And Outrageous Damage Awards* (Northwestern Univ. Press 1995).

There is a well-established body of evidence, in both Missouri and elsewhere, that changes in malpractice liability premiums are primarily the result of the insurance business cycle. As Professor Tom Baker has explained: "[T]he medical malpractice insurance crises of the mid-1980s and the early 2000s did not reflect a sudden or dramatic change in either litigation behavior or malpractice payments. What changed, instead, were insurance market conditions and the investment and loss predictions built into medical malpractice insurance premiums." Tom Baker, *The Medical Malpractice Myth* 51 (Univ. Chicago Press 2005). The Missouri Department of Insurance had itself advised legislators that it was the insurance business cycle, not a liability crisis, that accounted for premium increases in the state. In the Executive Summary to its 2003 Current Difficulties Report, MDI's Director wrote:

> Missouri is enduring its third underwriting cycle in medical malpractice insurance in the past three decades.
>
> After a decade of declining premiums and aggressive competition for market share, several large carriers—which underpriced their products, but accustomed providers to less expensive coverage—have withdrawn from the market nationally or become insolvent. Medical providers, particularly physicians, have experienced severe "rate shock" as they seek coverage from the remaining higher-cost insurers, which in turn are raising rates further. The withdrawal of carriers also has produced a serious capacity

> problem in which remaining malpractice insurers sometimes lack both the capital and underwriting staff to handle the demand for new business.
>
> Just as in the previous two underwriting cycles, medical groups joined by many insurers and members of the business community have called for limits on malpractice liability awards to patients who have suffered major injury from medical negligence. . . .These difficulties, however, find their roots in the insurance underwriting cycle, not at the hands of victims.

Current Difficulties Report, at 2.

The Missouri Hospital Association ("MHA"), an advocate for medical liability reform, agreed. In a report issued in the fall of 2002, the MHA acknowledged that malpractice premium increases were being driven by the insurers' declining investment income: "Most medical malpractice specialty writers are invested heavily in the bond market. Therefore, insurers' losses currently are driven by a decline in interest rates. . . . Falling interest rates are forcing insurers to raise premiums to cover the declining investment income." MHA, *An Overview of the Medical Malpractice Insurance Market for Physicians* at III (Oct. 2002). The MHA was quite clear that the rise in malpractice premiums was not caused by increases in medical malpractice liability: "the number of claims and the cost of claims have not contributed in a significant way to the sudden increase in medical professional liability coverage." *Id.* at IV.

Indeed, throughout the years preceding the enactment of H.B. 393, malpractice liability insurers in Missouri were consistently profitable; rate increases were not justified to protect the carriers against losses. 2004 MMMI Report, Executive Summary, at 1.

In any event, malpractice premiums in Missouri during this period were not high by historic standards. According to data published by MDI, in inflation adjusted dollars, gross—that is, total—malpractice insurance premiums for physicians in 2003 were equal to the level seen in 1990, even though the number of practicing doctors had increased by nearly 40 percent. Total malpractice premiums paid in 2003 totaled $121.3 million, as compared with an inflation-adjusted total of $120.8 million for 1990. 2003 MMMI Report, Executive Summary, at 3. Indeed, the total premiums paid in 2003 were almost ten percent less than the figure for 1989—fourteen years earlier—when physicians paid an inflation-adjusted total of $134.4 million for malpractice insurance. *Id.* In real terms, malpractice premiums per physician had fallen by more than one third.

Thus, there was no evidence whatsoever to support the proposition that increases in medical malpractice tort liability were somehow responsible for the rising cost of malpractice liability coverage. And, therefore, there was no basis for the Legislature to believe that imposing tighter limits on such tort liability would lead to a reduction in insurance premiums.

4. There was no evidence that doctors were fleeing Missouri, whether due to liability concerns or for any other reason.

Finally, there was no evidence whatsoever to support the proposition that the risk of high malpractice liability was causing doctors to leave Missouri to set up practices

elsewhere. To the contrary, in the years leading up to 2005, and for many years before that, the number of doctors in Missouri had been rising, both in absolute terms and in relation to the state's population. Even in ostensibly high malpractice risk specialties such as orthopedics, neurosurgery, and obstetrics-gynecology, the number of specialists practicing in Missouri was on the rise.

(i) The supply of licensed physicians throughout Missouri has increased steadily over the last 45 years, both in net numbers and in relation to the Missouri population.

Allegations of doctor flight are completely contradicted by research published in the most widely used and respected source of such data, the AMA's own authoritative annual compendium, Physician Characteristics and Distribution in the U.S.[25] *See also*

[25] PC&Ds are routinely relied upon by courts and scholars, because they are among the most accurate and complete source for statistical data about the supply of doctors in the United States. *See, e.g.*, *FormyDuval v. Bunn*, 530 S.E.2d 96, 101 (N.C. Ct. App. 2000); *Vargas v. Cummings*, 149 F.3d 29, 35 (1st Cir. 1998); Nathan Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 Ind. L.J. 71, 83 n.89 (2008); Lawrence P. Casolino, *Physicians and Corporations: a Corporate Transformation of American Medicine*, 29 J. Health Pol. Pol'y & L. 869, 881 (2004). PC&D data was introduced in the court below. Legal File 97. Even so, the Court may take judicial notice of this publicly available data, which is also summarized here and is reproduced in the Appendix 11-13, in rendering its

Amici Curiae Br. for Law Professors 16-20 & App. B (reviewing AMA data and similarly concluding that in the decade preceding H.B. 393's passage, the number of doctors in Missouri "were holding steady or increasing"). AMA data make several things abundantly clear:

First, focusing only on those physicians engaged in patient care, the number of licensed physicians in Missouri consistently has increased over the last four and half decades.[26] The net number of physicians engaged in patient care in Missouri steadily increased from 9,109 in 1990 to 12,486 in 2005. *See* App. 13. Notably, the numbers increased every year; there was no decline in the number of physicians treating patients in the years leading up to the tort reform act.

Second, more important than raw numbers, the relative number of licensed physicians in Missouri, as compared with the state's population, also has grown steadily

---

constitutional decision. *See Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 483 n.3 (Mo.1973). This public data was also presented in *Klotz v. St. Anthony's Medical Center*, SC90107 (Legal File 936, 965), and accordingly the Court also "may take judicial notice of [its] own records." *Lazare v. Hoffman*, 444 S.W.2d 446, 449 (Mo. 1969).

[26] The AMA data distinguishes "patient care" physicians (including both "office based" and "hospital based" practitioners) from other licensed physicians engaged in non-patient care professional activities, such as medical research, teaching, or administration, or who self-report themselves as being retired.

over the last forty-five years. That is, the critical "physician/population ratio"—the rate of licensed physicians per capita—has increased in Missouri, year after year, for more than forty years. During that period, the number of physicians per 100,000 people had more than doubled, rising from 121 physicians per 100,000 persons in 1963 to 264 physicians per 100,000 persons in 2005. *See* App. 11-12; Legal File 97.

Thus, the number of licensed physicians in Missouri has grown more than twice as fast as the State's population over the past forty-five years. Moreover, this increase has occurred steadily—before, during, and after at least two of Missouri's purported malpractice insurance crises. App. 11-12; Legal File 97. Most importantly for present purposes, this physician/population ratio grew steadily during the years preceding the 2005 reform law, from 250 physicians per 100,000 people in 2001 to 264 in the year that the law was passed. *Id*. Thus, there is no credible evidence to support the claim that rising malpractice premiums caused Missouri to suffer from an exodus of doctors in the years leading up to the act. Indeed, the AMA's own statistics show just the opposite.

(ii) The number of high-risk medical specialists was rising—not falling—in Missouri in 2005.

Some proponents of medical liability reform argue that it is not the total number of physicians that matter, but the number of physicians in "high risk", and high premium cost, medical specialties—such as orthopedics, neurosurgery, and obstetrics-gynecology. They contend that these "high risk" specialties were particularly hard hit by spikes in the cost of liability coverage, leading to staffing shortages in these specialties. These claims are also refuted by the data.

Although AMA data regarding physician specialization in Missouri is available only for certain years, that data reveals that the net number of licensed Missouri physicians who specialized in orthopedics, neurosurgery, and obstetrics-gynecology consistently increased from 1990 to 2005. App. 13. The number of neurosurgeons increased by 33 percent, from 88 to 117; the number of orthopedic surgeons grew by 32.5 percent, from 329 to 436; and the number of OB/GYNS climbed from 644 to 722, an increase of 12 percent. And these numbers held steady or grew slightly in the years leading up to 2005.

Thus, the fear of doctor's fleeing the state did not provide a rational justification for enacting the revised § 538.210.

5. The Legislature knew—or at least had been told—that lowering the cap on non-economic damages would not be an effective response to the perceived "crisis" and that such a cap would be quite harmful to malpractice victims.

Finally, the Legislature had no rational basis to believe that the particular changes to amended § 538.210 made by H.B. 393 would be effective in addressing the alleged "medical liability crisis." Indeed, they had been specifically told by the MDI that lowering the cap on non-economic damages would not be effective, but would be extremely harmful to the most severely injured victims of medical malpractice.

In both its Current Difficulties Report and the 2003 MMMI Report, the MDI advised the Legislature that non-economic damages, especially non-economic damages in excess of the prior cap, were not a significant factor in medical malpractice liability in the

state. To begin with, MDI reported, "Missouri has few of the multimillion-dollar awards cited in the media and, when they do occur, most damages represent the medical costs to treat the injury and the income the victim cannot earn." Current Difficulties Report, at 2, 7. "[O]nly a handful of cases each year" reached the old damage cap, and most of those claims involved extremely severe, permanent injuries "like quadriplegia, blindness, severe brain damage requiring lifetime care or a terminal diagnosis." *Id.* at 20. Moreover, only 2-3 percent of closed claims involved payouts in excess of $250,000 for non-economic damages, claims that might possibly be reduced by a reduction in the cap. *Id.*[27]

Similarly, MDI informed the Legislature that the "per occurrence" language in the prior cap—which allowed an injured plaintiff to collect multiple caps if he or she were injured by multiple acts of negligence—had only "a minimal impact on payouts." 2003 MMMI Report, Executive Summary, at 2. Only nine cases were affected by the "per occurrence" language in 2003, and 12 cases in 2002, and those cases only involved 2.2-3.3 percent of total malpractice losses. *Id.* Again, the typical case implicating the

[27] MDI reported the number of cases closed above $250,000 because that was the statutory figure enacted by the state of California and the number that was being advocated by supporters of malpractice reform in Missouri. The MDI did not report the number of cases closed in excess of $350,000, but it was necessarily no more than the number above $250,000.

statutory language involved "death, quadriplegia or severe brain damage with the need for lifetime care and/or a terminal diagnosis." *Id.*

In addition, MDI advised the Legislature that any changes to the cap would have no effect on the immediate "crisis": "based on recent experience of other states—and previously in Missouri—*further 'tort reforms' will not provide relief to financially distressed physicians for several years, if at all.*" Current Difficulties Report, at 2. (emphasis in original).[28] Moreover, any savings realized by a cap reduction would be "much smaller . . . than physicians are demanding." *Id.* at 35.

The MDI also advised the Legislature of some of the negative consequences of lowering the cap on non-economic damages: "Such caps have been criticized because they reduce compensation disproportionately for the young, seniors, and women who do not work outside the home," because such victims have little or no lost earnings to

[28] The reference to previous experience in Missouri was to the 1986 tort reform act and its aftermath. As MDI explained: "The passage of the 1986 law coincided with the almost immediate brightening of the Missouri medical malpractice market. . . .In retrospect, however, loss ratios had peaked and headed downward before the General Assembly acted. This phenomenon was noted in states across the country, whether or not they limited damage awards, and has sparked debate on whether market improvements stemmed from the dynamics of the insurance cycle or tort changes." Current Difficulties Report, at 13. In particular, the 1986 changes "did not have an effect on premium costs for Missouri physicians for several years." *Id.*

recover as economic losses. *Id.* Moreover, a lowered cap would disproportionately affect those most seriously injured by medical malpractice: "[L]owering the caps still further in Missouri would come at considerable cost for the small number of cases in which patients suffered the greatest damage. *MDI prefers to look elsewhere for solutions first, rather than reducing the compensation of victims." Id.* (emphasis in original).

* * *

Naython Kayne Watts was born severely disabled on account of medical malpractice; as a consequence, he has suffered and will suffer great physical and emotional pain. His will be a life of seizures, emotional distress, and little else.

The State demands that he—and a few Missourians who have also been severely injured by medical negligence—surrender compensation for non-economic harm "in a speculative experiment to determine whether liability insurance rates will decrease." *Lucas*, 757 S.W.2d at 691. This legislative bar to the recovery of full non-economic compensation as determined by the jury, if not lifted, will severely impede Naython's ability to maintain any sense of dignity in the future.

Naython's case is "one of a relatively small portion of all civil cases." *Klotz*, 311 S.W.3d at 772 n.3. His case is rarer still because he is one of the few to be awarded non-economic damages in an amount that exceeds the arbitrary limit set by § 538.210. "Victims of medical malpractice with valid and substantial claims do not seem to be the source of increased premiums for medical malpractice insurance, yet the $350,000 cap on noneconomic damages requires that they bear the burden by being deprived of full tort compensation." *Ferdon*, 711 N.W.2d at 632-36. What is more, research shows that the

supposed savings in health care costs that the law imagines would flow to the State by means of a forced wealth transfer from Naython, who has received an award of damages to restore his bodily integrity, to Respondents, who caused him grievous harm, *see* Sloan, *Medical Malpractice*, *supra*, at 21 ("Some tort reforms transfer money from injury victims and their attorneys to health care providers. Flat caps on damages . . . fall in that category."), are essentially illusory, *see* Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice* (2004) ("[E]ven large savings in premiums can have only a small direct impact on health care spending—private or governmental—because malpractice costs account for less than 2 percent of that spending."); *see also Moore*, 592 So. 2d at 168 ("We conclude that the correlation between the damages cap imposed by § 6-5-544(b) and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote."); *Carson*, 424 A.2d at 836 ("We find that the necessary relationship between the legislative goal of rate reduction and the means chosen to attain that goal is weak . . . .").

It is intolerable for any democratic government "to force some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United, States*, 364 U.S. 40, 49 (1960). "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.). The Missouri Constitution's guarantee of equal protection bars the Legislature from unreasonably treating the most disadvantaged

victims of medical malpractice worse than others who are similarly situated. Because § 538.210 does precisely that, the Court should declare it unconstitutional.

D. Section 538.210 Violates the Prohibition Against Special Legislation, Article III, Section 40.

Point relied on 4. The circuit court erred in granting Cox Medical Centers' request to reduce, pursuant to § 538.210, the total non-economic damages awarded to Watts because § 538.210 violates the prohibition against special legislation in article III, section 40 of the Missouri Constitution, in that the cap on non-economic damages in malpractice actions arbitrarily and irrationally grants special legislative protection to health care providers, including those who, inter alia, severely injure their patients, commit multiple acts of malpractice against their patients, severely injure married patients, or commit malpractice against women racial and ethnic minorities, children, the elderly and the poor, even though the General Assembly knew that the revised cap is not rationally related to a legitimate state interest because there was no malpractice liability crisis in Missouri, malpractice liability insurance premiums were neither high by historic standards nor increasing due to increased tort liability, and the number of health care providers in Missouri had been steadily increasing.

Article III, section 40 of the Missouri Constitution prohibits the General Assembly from enacting "special law[s]" "for limitation of civil actions" or "where a general law can be made applicable." Art. III, § 40 (6) & (30). The prohibition against special legislation is essentially the flip-side of the guarantee of equal protection. Whereas the

equal protection clause prohibits the state from unreasonably treating some people worse than others who are similarly situated, the proscription against special legislation bars the legislature from arbitrarily treating some classes better than similarly situated classes. Missouri courts analyze special law violations under a rational-basis test. *Fust*, 947 S.W.2d at 432.[29]

For each of the arbitrary discriminations discussed in the equal protection section, there is a correspondingly arbitrary special treatment for a particular class of defendants. The cap on non-economic damages arbitrarily treats health care providers who seriously injure their malpractice victims more favorably than those who only moderately injure their victims. It arbitrarily treats health care providers who treat the young (such as Naython Watts) more favorably than other health care providers, because their patients are more likely to incur substantial non-economic damages as a result of malpractice that will be restricted by the cap. And, it arbitrarily treats health care providers who provide health care services to women, the elderly, and the economically disadvantaged more favorably than health-care providers who treat working-age men, by shielding them from a higher percentage of tort judgments against them. *See supra* pp. 43-49.

[29] The Missouri Supreme Court has not considered whether the prohibition on special legislation invalidates caps on non-economic damages in malpractice actions, *Adams*, 832 S.W.2d at 907-08, so the question is one of first impression in this state. But, as noted, numerous courts in Missouri's sister states have invalidated damage caps on special legislation grounds. *See supra* pp. 50-51.

Section 538.210 is a law "for limitation of civil actions," Mo. Const. art. III, § 40(6), that singles out one class of tortfeasors—health care providers who commit malpractice—for special treatment. Watts has already explained that none of these arbitrary distinctions is justified by a legitimate state interest. *See supra* pp. 51-64. For these same reasons, § 538.210 also violates the constitutional prohibition against special laws.

II. REVERSAL IS WARRANTED BECAUSE H.B. 393 VIOLATES THE CLEAR TITLE AND SINGLE SUBJECT MANDATE OF ARTICLE III, SECTION 23.

Point relied on 5. The circuit court erred in granting Cox Medical Centers' request to reduce, pursuant to § 538.210, the total non-economic damages awarded to Watts because H.B. 393, the legislation that amended § 538.210, unconstitutionally violates the clear title and single subject requirements of article III, section 23 of the Missouri Constitution, in that the title of H.B. 393, "An Act . . . relating to claims for damages and the payment thereof," is so general and amorphous that it could describe much of the legislation enacted by the General Assembly and obscures rather than clarifies the contents of the act; and also in that certain statutory sections referenced in the title to H.B. 393 apply to civil actions beyond claims for damages.

Article III, section 23 of the Missouri Constitution provides, "No bill shall contain more than one subject which shall be clearly expressed in its title." As interpreted by the Missouri Supreme Court, "This provision contains two distinct but related procedural

limitations—a single subject rule and a clear title requirement." *Jackson Cnty.*, 226 S.W.3d at 161.

The purpose of the clear title requirement is to keep "individual members of the legislature and the public fairly apprised of the subject matter of pending laws." *Home Builders Ass'n*, 75 S.W.3d at 269. A title is clear where it "indicate[s] in a general way the kind of legislation that was being enacted." *Fust*, 947 S.W.2d at 429. Generally, bills that have "'multiple and diverse topics' within a single, overarching subject, . . . may be 'clearly expressed by . . . stating some broad umbrella category that includes all the topics within its cover.'" *Jackson Cnty.*, 226 S.W.3d at 161 (quoting *Mo. State Med. Ass'n v. Mo. Dep't of Health*, 39 S.W.3d 837, 841 (Mo. banc 2001)).

A title is unclear, however, where it is "so general that it tends to obscure the contents of the act . . . [or] so broad as to render the single subject mandate meaningless." *St. Louis Health Care Network*, 968 S.W.2d at 147. Bills that "describe most, if not all, legislation enacted or include nearly every activity the state undertakes," are so broad and amorphous as to constitute a clear title violation. *Jackson Cnty.*, 226 S.W.3d at 161 (citations and quotation marks omitted).

H.B. 393's title provides: "An Act to repeal sections 355.176, 408.040, 490.715, 508.010, 508.040, 508.070, 508.120, 510.263, 510.340, 516.105, 537.035, 537.067, 537.090, 538.205, 538.210, 538.220, 538.225, 538.230, and 538.300, Mo. Rev. Stat., and to enact in lieu thereof twenty three new sections relating to claims for damages and the payment thereof." 2005 Mo. Legis. Serv. H.B. 393. The catchall phrase "relating to claims for damages and the payment thereof" is so broad and amorphous as to constitute

a clear title violation. "[C]laims for damages and the payment thereof" could reasonably be interpreted to describe any legislation that affects any conduct of individuals or businesses or government employees or agencies in Missouri. Indeed, the title is broad enough to encompass any conduct that may be shaped by tort, contract, property, family, corporate, or administrative law—all of which fit comfortably within the phrase "claims for damages and the payment thereof." It could reasonably be understood to describe legislation affecting "claims for damages and the payment thereof" in the distinct contexts of copyright infringement, or regulatory taking, or breach of warranty, or trespass, or defamation, or the failure to pay child support, or the improper distribution of shares of a corporation. Nothing in the generalized and abstract phrasing of H.B. 393's title suggests that the Act itself concerns a single subject within the meaning of article III, section 23.

The title of H.B. 393 is similar to other bill titles that the Missouri Supreme Court has determined violate the clear subject requirement, in that it "could describe the better part of all the legislation passed by the General Assembly." *Jackson Cnty.*, 226 S.W.3d at 161. For example, in *St. Louis Health Care Network*, the Supreme Court concluded that a bill entitled "relating to certain incorporated and non-incorporated entities" violated the clear title mandate because the title "could describe any legislation that affects, in any way, business, charities, civic organizations, governments, and government agencies." 968 S.W.2d at 147-48. Similarly, in *Home Builders Association*, the Supreme Court determined that a bill entitled "relating to property ownership" violated the clear title mandate on overbreadth grounds. 75 S.W.3d at 272. The Court reasoned that "it is hard

to imagine any statute which would not have some . . . arguable relation to ownership of either tangible or intangible property." *Id.* H.B. 393's title is constitutionally defective for these same reasons: it could describe any legislation that affects, in innumerable ways, the conduct of individuals or business (including incorporated or non-incorporated entities) or government agencies, and their respective relationships to personal or intangible property. Notably, the search engine Westlaw—when prompted to search the terms "claims" "for" "damages" "and" "the" "payment" "thereof" in the database Missouri Statutes Annotated—fails to return *any* results because these terms, taken together, are "too common" to identify any discernible set of state laws. Surely the public cannot be expected to discern the subject of an act based on such a broad and amorphous title when Westlaw itself concludes that the title does not delimit a finite set of subjects.

It is of no moment that H.B. 393's title lists statutory sections to be repealed or amended. Even considering the sections listed in H.B. 393, its title fails to express a single subject within the meaning of article III, section 23. *See St. Louis Health Care Network*, 968 S.W.2d at 148-49 (holding that the listing of sections in H.S.S.B. 768 did not operate to produce a clear title). If anything, the listing of sections in H.B. 393 further obscures its contents because the sections listed, while primarily concerning claims for damages against health care providers, also appear to concern claims for declaratory or injunctive relief. *See, e.g.*, Mo. Rev. Stat. § 355.176 (2009) (governing service of process on a corporation in civil actions generally); Mo. Rev. Stat. § 508.010 (2009) (governing venue in civil actions generally). Thus, to paraphrase *St. Louis Health*

Care Network, "[e]ven if a legislator or the public could be required to read, or could be assumed to know, the contents of the sections listed in the title of [H.B. 393] in order to discern the bill's single subject, no single subject could be discerned from the sections" listed in its title. 968 S.W.2d at 149.

H.B. 393's title, therefore, provides no guidance as to the act's contents. It does not put the public on notice that H.B 393's purpose is to amend Missouri law governing *health care liability* "claims for damages and the payment thereof." *See* 2005 Mo. Legis. Serv. H.B. 393 (amending, inter alia, sections 408.040, 490.715, 508.010, 508.040, 510.263, 537.067, 538.205, 538.210, 538.225). And because H.B. 393 amends sections relating to claims for declaratory or injunctive relief, *see, e.g.*, Mo. Rev. Stat § 355.176; Mo. Rev. Stat. § 508.010, its title does not even include all topics within its cover. *See Jackson Cnty.*, 226 S.W.3d at 161 (recognizing that a title "stating some broad umbrella category that includes all the topics within its cover" may be constitutional) (citation omitted).

The Missouri Legislature is plainly capable of more clearly identifying the core subject of an act such as H.B. 393 in its title. For example, 1986 Mo. Laws 879, the act which first limited non-economic damages recoverable in medical malpractice suits, stated in its title that it was "[a]n Act to repeal sections 383.105 and 383.110, Mo. Rev. Stat. (1978), relating to health care providers, and to enact in lieu thereof fourteen new sections relating to the same subject, with an emergency clause for certain sections and penalty provisions." 1986 Mo. Laws 879 (emphasis added). Thus, despite the fact that the 1986 Act and H.B. 393 both concern limitations on damages in medical malpractice

actions, the 1986 Act's title, unlike H.B. 393's title, at least provided some guidance that its purpose was to amend Missouri law relating to health care providers.

Similarly, in 2003, the Legislature passed Senate Bill 280 ("S.B. 280"), a bill substantially similar to H.B. 393; indeed, S.B. 280 sought to amend many of the same sections of the Missouri General Statutes that H.B. 393 amends. *Compare* S.B. 280, 92nd Gen. Assem., Reg. Sess. (Mo. 2003) (seeking to amend sections 408.040, 508.010, 508.040, 510.263, 537.067, 538.205, 538.210, and 538.225), *with* 2005 Mo. Legis. Serv. H.B. 393 (same). Unlike H.B. 393, however, the title to S.B. 280 stated plainly that it sought to repeal or amend sections of the Missouri General Statues "relating to tort reform." S.B. 280, 92nd Gen. Assem., Reg. Sess. (Mo. 2003) (emphasis added). H.B. 393, on the other hand, never mentions tort reform, or health care, in its title; instead it contains such a broad and amorphous title that the actual subject of the legislation is obscured and the single subject requirement is rendered meaningless. *See Home Builders Ass'n*, 75 S.W.3d at 270.

Cox Medical Centers may argue that, because H.B. 393 and S.B. 280 are not identical, the Missouri Legislature may have thought that S.B. 280's title "relating to tort reform" was not descriptive of H.B. 393's contents. But there is evidence that the Missouri Legislature in fact did view H.B. 393 as legislation relating to tort reform, but sought to obscure that fact by entitling H.B. 393 with the abstract phrase "relating to claims for damages and the payment thereof." It is telling, for example, that the official summary of the truly agreed version of H.B. 393 (but not the bill itself) has the following heading: "CCS SS SCS HCS HB 393—TORT REFORM," Mo. H.R., *Summary of the*

Truly Agreed Version of H.B. 393, *available at* http://www.house.mo.gov/print.aspx ?info=/bills051/bilsum/truly/sHB393T.htm (last visited October 27, 2011). Yet the Legislature chose not to use that in H.B. 393's official title. By contrast, two years earlier, the phrase "tort reform" appeared in both S.B. 280's title and its summary heading. *See* S.B. 280, 92nd Gen. Assem., Reg. Sess. (Mo. 2003); Mo. Sen., *Summary of Truly Agreed to and Finally Passed*, *available at* http://www.senate.mo.gov/ 03info/summs/tat/SB280.htm (last visited October 27, 2011) ("SS/SS/SCS/SB 280—This act enacts several tort reform measures."). Given that the Missouri Legislature's publications evince its own view that H.B. 393 and S.B. 280 both concern, at their core, the subject of "tort reform," this Court should view the Legislature's decision to give H.B. 393 an excessively broad and amorphous title, instead of entitling it an act "relating to tort reform," as "designed to mislead as to the subject dealt with." *State ex rel. Dickason v. Marion Cnty. Court*, 30 S.W. 103, 105 (Mo. 1895).

For these reasons, the phrase "relating to claims for damages and the payment thereof" is not a clear title for H.B. 393. The Court, therefore, should hold the act unconstitutional in its entirety, pursuant to article III, section 23 of the Missouri Constitution. *See Home Builders Ass'n*, 75 S.W.3d at 272 ("[I]n a case of an overinclusive title . . . the entire bill will normally be found invalid because the title's lack of notice as to the subject matter included in the bill applies to the bill as a whole.").

III. REVERSAL IS WARRANTED BECAUSE THE CIRCUIT COURT ABUSED ITS DISCRETION IN ORDERING A FUTURE PAYMENT SCHEDULE THAT IS UNREASONABLE AND ARBITRARY, AND BECAUSE § 538.220 VIOLATES DUE PROCESS AND EQUAL PROTECTION.

Cox Medical Centers requested, in a proposed judgment, that the circuit court establish a periodic payment schedule for future medical damages pursuant to Mo. Rev. Stat. § 538.220.2. Section 538.220.2 specifies: "At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars." Courts have interpreted that language to mean what it says: circuit courts have the "discretion to make 'whole *or part*' of the future damages award subject to future periodic payments." *Davolt v. Highland*, 119 S.W.3d 118, 139 (Mo. Ct. App. 2003) (emphasis in original); *see also Vincent by Vincent v. Johnson*, 833 S.W.2d 859, 866 (Mo. banc 1992) ("The language of § 538.220.2 is a general grant of equity powers to the circuit court. The circuit court is, thus, entitled to fashion relief in the best interests of the parties, subject to review only on the basis of its arbitrariness.").

This Court in *Vincent by Vincent* announced several factors that circuit courts should consider when fashioning a periodic payment schedule. *Id*. at 867. The Court supplied these factors because the version of § 538.220 at issue in that case "did not give any guidance on how such future payments are to be structured." *Id*. at 866. It crafted

them in view of the statute's purposes, which included "spread[ing] that cost over time and [] guard[ing] against squandering of the judgment while reducing future burdens on government social services." *Id*. at 867. One factor the Court announced: "[I]n determining the appropriate rate of interest, the court should consider what would constitute prudent investment, beginning with the rate of return on equivalent long-term investments, in light of the security provided for future payments." *Id*.

In 2005, the Missouri Legislature amended § 538.220; as amended, it provides special guidance for future medical periodic payments. In its present form, and as applicable in this case, it provides:

> The duration of the future medical payment schedule shall be for a period of time equal to the life expectancy of the person to whom such services were rendered, as determined by the court, based solely on the evidence of such life expectancy presented by the plaintiff at trial. The amount of each of the future medical periodic payments shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments. The court shall apply interest on such future periodic payments at a per annum interest rate no greater than the coupon issue yield equivalent, as determined by the Federal Reserve Board, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills settled immediately

> prior to the date of the judgment. The judgment shall state the applicable interest rate.

§ 538.220.2.

In this case, Cox Medical Centers requested that the "whole" future medical damages award be paid periodically for fifty years, Naython's estimated life expectancy, at an annual interest rate of .26 percent. Watts filed a memorandum in response objecting to this request, on the grounds that it was unreasonable and arbitrary, and arguing that the statute itself was unconstitutional. Watts also submitted a proposed judgment suggesting that the circuit court order Cox Medical Centers to pay all future medical damages in a lump sum.

The circuit court split the difference, ordering that only half of all future medical damages be paid over a period of fifty years at an annual interest rate of .26 percent. That interest rate was based on the "coupon issue yield equivalent, as determined by the Federal Reserve Board, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills settled immediately prior to the date of the judgment."[30] § 538.220.2.

[30] In 2005, the Missouri Legislature selected the fifty-two-week United States Treasury bills as the metric by which to measure per annum interest for periodic payment of future medical damages. At that time, Treasury was not auctioning 52-week Treasury bills. Legal File 122. It had discontinued auctions on February 27, 2001. *Id*. The interest rate at the time of H.B. 3939's passage was fixed at 4.442 percent, the percentage set on

A circuit court's decision to enter in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments "is subject to review only on the basis of its arbitrariness." *Vincent by Vincent*, 833 S.W.2d at 866. Thus, appellate courts ask whether a circuit court abused its discretion in crafting a periodic payment schedule for future damages. *Davolt*, 119 S.W.3d at 139. "A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *McGuire v. Seltsam*, 138 S.W.3d 718, 720 (Mo. banc 2004). For reasons that follow, the circuit court abused its discretion in ordering that half of all net future medical damages be paid in equal annual installments over the next 50 years together with interest at the rate of .26 percent.

---

the date of the last auction in 2001. *Id*. Historically, between March 12, 1959, and February 27, 2001, these auctions produced an average interest rate of 6.4 percent. *Id*. at 7. On June 3, 2008, Treasury re-instated the 52-week U.S. Treasury bill. *Id*. To date, auctions have occurred regularly at 52-week intervals. *Id*. at 8. Due to the recent collapse of world finanical markets, there has been an "extraordinary" demand for short-term U.S. Treasury Securities. *Id*. Consequently, interests rates have plummeted to all-time lows. Their value now approaches 0 percent. In April 2011, "U.S. Treasury Bills with maturity through May 31, 2011 [were] trading at negative interest rates." *Id*.

A. The Court's Periodic Payment Plan is Arbitrary and Unreasonable and Represents an Abuse of Discretion.

Point relied on 6. The circuit court erred in granting in part Respondents' request, pursuant to § 538.220.2, that the circuit court include in the judgment a requirement that future medical damages be paid in periodic or installment payments, insofar as the periodic payment schedule established by the court, which requires half of all future medical damages to be paid in equal annual installments over the next 50 years together with interest at the rate of .26 percent, is unreasonable, arbitrary, and an abuse of discretion, given that all testimony regarding future medical damages had already been discounted to present-day value, the jury had already expressed future medical damages in present-day value, the annual interest rate approaches zero, and any further discounting through a periodic payment schedule would undermine rather than advance the aims of § 538.220.

Section 538.220's dual aims are to spread the cost of payment for future medical costs over time and to guard against the squandering of the judgment while reducing future burdens on government social services. *Vincent by Vincent*, 833 S.W.2d at 867. Any periodic payment schedule must "assure full payment of such damages awarded by the judgment." *See* Mo. Rev. Stat. § 538.220.3 (permitting a court to require that a judgment debtor not adequately insured "post security or purchase an annuity" as a condition of receiving periodic payments). The periodic payment schedule established by the circuit court, however, does not assure full payment over time. Instead, it assures that

Naython's future medical needs will not be met. The court's periodic payment plan is thus clearly against the logic of the circumstances before the circuit court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration of § 538.220's aims.

Critically, ordering half of all future medical damages—$873,800—to be paid over fifty years at a per annum interest rate of .26 percent impedes one of the key aims of the statute: to ensure that the judgment is preserved over time so that medical malpractice victims such as Naython have access to funds to pay for future medical needs. In this case, an economist, John Ward, testified regarding Naython's future medical costs. In his testimony, and in a written report admitted into evidence, plaintiff's expert presented his findings regarding these life care costs in present-day value. Supp. Legal File 3; e.g., Trial Tr. 33, 35, 43-44 (testimony of John W. Ward, PhD). The jury, moreover, expressed future medical damages at present-day value. *See* Mo. Rev. Stat. § 538.215 (2009); Legal File 53-54. These costs therefore were discounted to present-day value. Given that health care costs are rising at two-to-three times the rate of inflation, *see* U.S. Dep't of Health and Human Services, *The Effect of Health Care Cost Growth on the U.S. Economy* (Sept. 2007), *available at* http://aspe.hhs.gov/health/reports/08/healthcarecost/report.html, the circuit court's periodic payment schedule affords Naython *none* of the financial security intended by the statute. Instead, the plan established by the circuit court causes an absurd result which is contrary to § 538.220's aims: specifically, half of Naython's future medical damages will deliquesce in advance of fifty years. In the words of economist Kurt Krueger, an affiant in this case familiar with the present value

calculations of Naython's future medical costs, as well as the life care plan prepared by Dr. Shane L. Bennoch: "Since principal and accrued interest are needed to pay for future medical damages as they arise, the plaintiff in this case will never have enough money to pay for his future medical costs if the periodic payment calculation method under Missouri Statute § 538.220 is followed."[31] Legal File 117.

The circuit court, of course, did not have discretion in setting the per annum interest rate; the method of calculation for future medical damages is set by statute. § 538.220.2. But the court retains the discretion to determine the "part" of future medical damages subject to future periodic payments. *See id*. It is against the logic of these circumstances, and arbitrary and unreasonable, to order that fifty percent of all future medical damages be paid at such a punishingly low interest rate. With a per annum interest rate approaching zero, the circuit court should have ordered far less than fifty percent of the total award of future medical damages be paid over time.

Reversal is warranted even though the circuit court's Judgment spread the cost of payment for future medical costs over time—an aim of § 538.220.2.[32] Periodic payments

[31] Here, Dr. Krueger was discussing the effect of requiring periodic payment of all of Naython's future medical damages. But it is clear from his analysis that the periodic payment of even would mean that Naython would not have enough money to pay for future medical costs.

[32] Under this payment schedule, however, even this aim was distorted, because Cox Medical Centers will receive a windfall benefit on account of the interest rate, as

serve two masters: they must spread the cost *and* they must ensure that funds are available over time so that victims of malpractice do not rely on government services. *See Vincent by Vincent*, 833 S.W.2d at 867; *see also* § 538.220.3 (indicating that any periodic payment schedule must assure full payment of such damages awarded by the judgment). A periodic payment schedule is only reasonable if it accounts for *both* these aims. By contrast, a periodic payment plan, such as the plan established in this case, that fails to account for both these aims is by definition arbitrary and unreasonable and indicates a lack of careful consideration of § 538.220.2's purposes.

For these reasons, the circuit court abused its discretion in establishing this periodic payment schedule. The Court should reverse the judgment insofar as it orders periodic payment of half of all net future medical damages, and it should remand for reconsideration of Cox Medical Centers' request for periodic payments, this time taking due account of the statute's twin aims.

B. Section 538.220 Violates Due Process, Article I, Section 10.

Point relied on 7. The circuit court erred in granting in part Respondents' request, pursuant to § 538.220.2, that the circuit court include in the judgment a requirement that future damages be paid in periodic or installment payments, because § 538.220.2 violates due process, in that it is fundamentally irrational and

---

described by Dr. Kruger. *See* Legal File 124. It was not the aim of § 538.220 to provide a windfall benefit to negligent health care providers. *See Vincent by Vincent*, 833 S.W.2d at 867.

illogical to permit Respondents to pay future medical damages periodically and, at the same time, require the jury to reduce all future medical damages awarded to present-day value, which it did in this case.

Article I, section 10 of the Missouri Constitution provides that no person shall be deprived of life, liberty or property without due process of law. Due process requires that a legitimate legislative purpose be furthered by rational means. *See generally Doe v. Phillips*, 194 S.W.3d 833, 844-45 (Mo. banc 2006). Section 538.220.2 violates that constitutional guarantee.

As discussed, § 538.220.2, by spreading the cost of payment for future medical costs over time, in part assures that the plaintiff will not "squander" the judgment. *Vincent by Vincent*, 833 S.W.2d at 867. "[A]ssur[ing] full payment of such damages awarded by the judgment," the statue itself makes clear, is among its central aims. *See* § 538.2220.3. But § 538.220.2, as applied here, is a wholly irrational means of achieving that end.

In this case, the jury expressed future medical damages at present-day value, as required by § 538.215.2. *See* Legal File 54. Also, consistent with § 538.215.2, the only testimony presented at trial regarding future medical costs expressed these costs at present-day value. Supp. Legal File 3; *e.g.*, Trial Tr. 33, 35, 43-44 (testimony of John W. Ward, PhD). Given § 538.220's stautory aims, it is wholly irrational to require any future medical damages to be paid periodically when the jury has already discounted such damages to present-day value. Applying § 538.220 to this case in effect doubly discounts the value of future medical damages, thereby ensuring that victims of medical negligence

will *never* receive the full value of their award. The method for assessing per annum interest on the judgment, moveover, does not account for this double discounting. Because twice discounting the value of future medical damages—first at the time of judgment and then again over fifty years—is a wholly irrational means of furthering § 538.220's aim of assuring full payment of the judgment over time, § 538.220 violates due process.

C. Section 538.220 Violates Equal Protection, Article I, Section 2.

Point relied on 8. The circuit court erred in granting in part Respondents' request, pursuant to § 538.220.2, that the circuit court include in the judgment a requirement that future damages be paid in periodic or installment payments, because § 538.220.2 violates equal protection, in that it sets one method for calculating interest on periodic payments of future medical damages, which takes no account of medical inflation and thus does not provide security for such future payments, and another method applicable to all other future damages, pursuant to which the court must set a rate of interest that provides security for such future payments, and this legislative classification is a wholly irrational and arbitrary means of achieving the end of assuring full payment of future medical damages.

Lastly, § 538.220.2 violates equal protection of the laws guaranteed by article I, section 2 of the Missouri Constitution. Equal protection requires that a legislative classification bear a reasonable relationship to the object sought to be accomplished. *Maran-Cooke, Inc. v. Purler Excavating, Inc.*, 585 S.W.2d 38, 41 (Mo. banc 1979). Section 538.220.2 draws an arbitrary and irrational distinction between the rate of interest

on future medical and other future damages that is not reasonably related to its object of assuring full payment of future damages.

Specifically, the statute mandates that interest for future *medical* damages be calculated based upon the 52-week United States Treasury bill, which takes no account of medical inflation. § 538.220.2.[33] It does not, however, require that interest for any other category of future damages be calculated based upon Treasury bills. *See* § 538.220.2. As to all other future damages, the statute requires that the parties be given an opportunity to "agree on the manner of payment of future damages, including the rate of interest, ..." § 538.220.2. If the parties fail to agree, any unresolved issue, including the rate of interest, "shall be submitted to the court for resolution, ..." *Id.* The court then must determine the appropriate rate of interest in view of "what would constitute prudent investment, beginning with the rate of return on equivalent long-term investments, in

[33] The statute's use of the word "such" is a clear reference to future medical periodic payments. *See* § 538.210.2 ("The amount of each of the *future medical periodic payments* shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments. The court shall apply interest *on such future periodic payments* at a per annum interest rate no greater than the coupon issue yield equivalent, as determined by the Federal Reserve Board, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills settled immediately prior to the date of the judgment.") (emphasis added).

light of the security provided for future payments." *Vincent by Vincent*, 833 S.W.2d at 867.

It is wholly arbitrary and irrational for a statute with the stated aim of assuring full payment of the judgment over time to require, on the one hand, that interest for future medical damages be based on a metric that which takes no account of medical inflation and thus does not provide security for such future payments; and, on the other hand, that the rate for all other future damages be determined by a judge in percentage terms that provide security for future payments. This irrationality is evident given that historically, and in 2005, when the Legislature amended § 538.220.2 to require a separate method of calculating interest only for future medicals, medical inflation was far outstripping inflation in other areas. *See* U.S. Dep't of Health and Human Services, *The Effect of Health Care Cost Growth on the U.S. Economy* (Sept. 2007). Because § 538.220.2 draws a distinction between the rate of interest on future medical and other future damages that lacks any rational basis, it violates equal protection.

CONCLUSION

For the reasons discussed here, the Court should reverse the judgment of the circuit court.

Date: October 31, 2011

Respectfully submitted,

/s/Roger Johnson
Roger Johnson
MO Bar # 48480
Johnson, Vorhees & Martucci
510 W. 6th Street
Joplin, MO 64801

Telephone: (417) 206-0100
Fax: (417) 206-0110
rjohnson@rj-laws.com

Andre M. Mura
Admitted Pro Hac Vice
Center for Constitutional
Litigation, P.C.
777 6th Street, N.W., Suite 520
Washington, DC 20001
Telephone: (202) 944-2860
Fax: (202) 965-0920
andre.mura@cclfirm.com

Attorneys for Appellant/Cross-Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Appellant/Cross-Respondent's Initial Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, and the signature block contains 22,752 words (as determined by Microsoft Word 2003 software).

Date: October 31, 2011

/s/Roger Johnson
Roger Johnson

Attorney for Appellant/Cross-Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was filed with the Missouri Supreme Court via electronic filing and that a true and correct copy was served via the electronic filing service, this 31st day of October, 2011, to the following counsel:

Jeremiah Morgan
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102

Kent O. Hyde
Hyde, Love & Overby, LLP
1121 S. Glenstone
Springfield, MO 65804

Tim Eugene Dollar
1100 Main, Suite 2600
Kansas City, MO 64105

David M. Zevan
1 N. Taylor Avenue
St. Louis, MO 63108

John B. Boyd
1150 Grand Avenue
Suite 700
Kansas City, MO 64106

Kevin J. Davidson
1 N. Taylor Avenue
St. Louis, MO 63108

/s/Roger Johnson
Roger Johnson

Attorney for Appellant/Cross-Respondent

APPENDIX

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
AT SPRINGFIELD

DEBORAH WATTS and LESTER WATTS as Next Friends for NAYTHON KAYNE WATTS	)	
Plaintiffs,	)	
vs.	)	**Case No. 06AO-CC00344**
LESTER E. COX MEDICAL CENTERS d/b/a FAMILY MEDICAL CARE CENTER, LESTER E. COX MEDICAL CENTERS, MELISSA R. HERRMAN, M.D., MATTHEW P. GREEN, D.O., WILLIAM S. KELLY, M.D., and LAIRD ARTHUR BELL, M.D.	)	
Defendants.	)	

Filed
5/4/11

FILED
MAY 4 2011
IN OPEN COURT

ORDER

Before this Court is Defendants' Proposed Judgment, which requests in relevant part that the total non-economic damages awarded to the Plaintiff in this case be reduced to $350,000 pursuant to § 538.210, RSMo Supp. 2009. Plaintiffs have filed a Memorandum in Opposition in which they argue that this statutory "cap" on non-economic damages is unconstitutional.

After providing Defendants with an opportunity to respond, and after duly considering the arguments of counsel, the Court is compelled by controlling precedent to conclude that § 538.210 is constitutional and will be applied in this case. *See Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992). Judgment will be entered accordingly.

It is so ORDERED this 4 day of May, 2011.

Judge J. Dan Conklin
Circuit Court, Greene County, Missouri

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
AT SPRINGFIELD

DEBORAH WATTS as Next Friend for NAYTHON KAYNE WATTS,	)	
Plaintiffs,	)	
vs.	)	Case No. 0931-CV01172
LESTER E. COX MEDICAL CENTERS d/b/a FAMILY MEDICAL CARE CENTER, LESTER E. COX MEDICAL CENTERS, MELISSA R. HERRMAN, M.D., MATTHEW P. GREEN, D.O. and WILLIAM S. KELLY, M.D.,	)	

JUDGMENT

This matter came on for jury trial on March 21, 2011 and the jury returned a verdict on March 31, 2011, in favor of Plaintiff Deborah Watts as Next Friend for Naython Watts, a minor child, and against Defendants Lester E. Cox Medical Centers d/b/a Family Medical Care Center, Melissa R. Herrman, M.D., Matthew P. Green, D.O., and William S. Kelly, M.D. in the amount of four million eight hundred twenty one thousand dollars ($4,821,000.00).

The jury itemized the damages of Naython Watts as follows:

1. For past economic damages including past medical damages: $ 0
2. For past non-economic damages: $250,000.00
3. For future medical damages: $3,371,000.00
4. For future economic damages, excluding future medical damages: $ 0
5. For future non-economic damages: $1,200,000.00

Court costs have accrued for Plaintiff on this matter in the amount of twelve thousand seven hundred forty-nine dollars and eighty nine cents ($12,749.89).

The jury awarded a total of one million four hundred fifty dollars ($1,450,000.00) for non-economic damages and the Court notes the limitation on same as set forth in Section 538.210 RSMo. Therefore, the Court does hereby reduce the non-economic damages to a total of three hundred fifty thousand dollars ($350,000.00).

Further, the Court notes defendants have requested future periodic payments pursuant to the provisions of Section 538.220 RSMo. The award for future medical damages is three million three hundred seventy-one thousand dollars ($3,371,000.00). The Court applies a forty percent (40%) attorney's fee to same and expenses of litigation for total attorney's fees and expenses of one million six hundred twenty-three thousand four hundred dollars ($1,623,400.00), for net future medical damages of one million seven hundred forty-seven thousand six hundred dollars ($1,747,600.00).

The Court is ordering that Eight hundred seventy-three thousand eight hundred dollars ($873,800.00) of the future medical damages be paid immediately to the Trustee of the Special Needs Trust being established on behalf of Naython Watts. The remaining amount of future medical damages in the amount of eight hundred seventy-three thousand eight hundred dollars ($873,800.00) shall be paid in equal annual installments over the next fifty (50) years, that being the life expectancy evidence presented by plaintiff at trial, each payment being in the amount of seventeen thousand four hundred seventy-six dollars ($17,476.00) together with interest at the rate of .26% per annum, the coupon issue yield equivalent of a 52 week US Treasury Bill settled as of the date of the verdict, March 31, 2011, with the first annual installment being due on

March 31, 2012. The Court orders that said annual payment and interest at said rate on the unpaid balance be paid to the Trustee of the Special Needs Trust being established on behalf of Naython Watts on the anniversary date referenced above unless Naython Watts shall sooner expire. Upon the death of Naython Watts, said payments shall cease, pursuant to Section 538.220.5 RSMo., except and only to the extent necessary to enable the estate of Naython Watts to satisfy medical expenses that were due and owing at the time of death, and which resulted directly from the injury for which damages were awarded, and do not exceed the dollar amount of the total payments for such future medical damages outstanding at the time of death.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of Plaintiff Deborah Watts as Next Friend for Naython Watts and against Defendants Lester E. Cox Medical Centers d/b/a Family Medical Care Center, Melissa R. Herrman, M.D., Matthew P. Green, D.O., and William S. Kelly, M.D. in the total sum of three million seven hundred thirty three thousand seven hundred forty-nine dollars and 89/100 ($3,733,749.89) paid as follows:

1. Three hundred fifty thousand dollars ($350,000.00) to the Trustee of the Special Needs Trust being established for Naython Watts (for non-economic damages);

2. One million six hundred twenty-three thousand four hundred dollars ($1,623,400.00) to Johnson, Vorhees & Martucci for their attorney's fees and expenses;

3. Twelve thousand seven hundred forty-nine dollars and 89/100 ($12,749.89) to Johnson, Vorhees & Martucci for reimbursement of Court costs advanced;

4. Eight hundred seventy-three thousand eight hundred dollars ($873,800.00) to be paid immediately to the Trustee of the Special Needs Trust being established for Naython Watts; and

5. Future periodic payments in the amount of seventeen thousand four hundred seventy-six dollars ($17,476.00), plus interest at the rate of .26% per annum, paid annually to the Trustee of the Naython Watts Special Needs Trust (or any subsequently named trustee), on the anniversary date of the verdict, unless Naython Watts shall sooner expire, and upon the death of Naython Watts, said payments shall cease, pursuant to Section 538.220.5 RSMo., except and only to the extent necessary to enable the estate of Naython Watts to satisfy medical expenses that were due and owing at the time of death, and which resulted directly from the injury for which damages were awarded, and do not exceed the dollar amount of the total payments for such future medical damages outstanding at the time of death.

SO ORDERED this 6th day of May, 2011.

5/6/11
Date

Honorable Dan Conklin
Circuit Court, Greene County, Missouri

Mo. Rev. Stat. § 538.210 (2009)

Title XXXVI. Statutory Action and Torts

Chapter 538. Tort Actions Based on Improper Health Care

538.210. Limitation on non-economic damages—jury not to be informed of limit—limit—punitive damages, requirements

1. 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 noneconomic damages irrespective of the number of defendants.

2. (1) Such limitation shall also apply to any individual or entity, or their employees or agents that provide, refer, coordinate, consult upon, or arrange for the delivery of health care services to the plaintiff; and

(2) Who is a defendant in a lawsuit brought against a health care provider under this chapter, or who is a defendant in any lawsuit that arises out of the rendering of or the failure to render health care services.

(3) No individual or entity whose liability is limited by the provisions of this chapter shall be liable to any plaintiff based on the actions or omissions of any other entity or person who is not an employee of such individual or entity whose liability is limited by the provisions of this chapter.

Such limitation shall apply to all claims for contribution.

3. 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, where the trier

of fact is a jury, such jury shall not be instructed by the court with respect to the limitation on an award of noneconomic damages, nor shall counsel for any party or any person providing testimony during such proceeding in any way inform the jury or potential jurors of such limitation.

4. For purposes of sections 538.205 to 538.230, any spouse claiming damages for loss of consortium of their spouse shall be considered to be the same plaintiff as their spouse.

5. Any provision of law or court rule to the contrary notwithstanding, an award of punitive damages against a health care provider governed by the provisions of sections 538.205 to 538.230 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.

6. For purposes of sections 538.205 to 538.230, all individuals and entities asserting a claim for a wrongful death under section 537.080, RSMo, shall be considered to be one plaintiff.

Mo. Rev. Stat. § 538.220 (2009)

Title XXXVI. Statutory Actions and Torts

Chapter 538. Tort Actions Based on Improper Health Care

538.220. Damages, how paid—security required for future damage payments, when, duration—attorney's fees—death of judgment creditor, effect

1. 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, past damages shall be payable in a lump sum.

2. At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars. Any judgment ordering such periodic or installment payments shall specify a future medical periodic payment schedule, which shall include the recipient, the amount of each payment, the interval between payments, and the number of payments. The duration of the future medical payment schedule shall be for a period of time equal to the life expectancy of the person to whom such services were rendered, as determined by the court, based solely on the evidence of such life expectancy presented by the plaintiff at trial. The amount of each of the future medical periodic payments shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments. The court shall apply interest on such future periodic payments at a per annum interest rate no greater than the coupon issue yield equivalent, as determined by the Federal Reserve Board, of the

average accepted auction price for the last auction of fifty-two-week United States Treasury bills settled immediately prior to the date of the judgment. The judgment shall state the applicable interest rate. The parties shall be afforded the opportunity to agree on the manner of payment of future damages, including the rate of interest, if any, to be applied, subject to court approval. However, in the event the parties cannot agree, the unresolved issues shall be submitted to the court for resolution, either with or without a post-trial evidentiary hearing which may be called at the request of any party or the court. If a defendant makes the request for payment pursuant to this section, such request shall be binding only as to such defendant and shall not apply to or bind any other defendant.

3. As a condition to authorizing periodic payments of future damages, the court may require a judgment debtor who is not adequately insured to post security or purchase an annuity adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security or so much as remains to the judgment debtor.

4. If a plaintiff and his attorney have agreed that attorney's fees shall be paid from the award, as part of a contingent fee arrangement, it shall be presumed that the fee will be paid at the time the judgment becomes final. If the attorney elects to receive part or all of such fees in periodic or installment payments from future damages, the method of payment and all incidents thereto shall be a matter between such attorney and the plaintiff and not subject to the terms of the payment of future damages, whether agreed to by the parties or determined by the court.

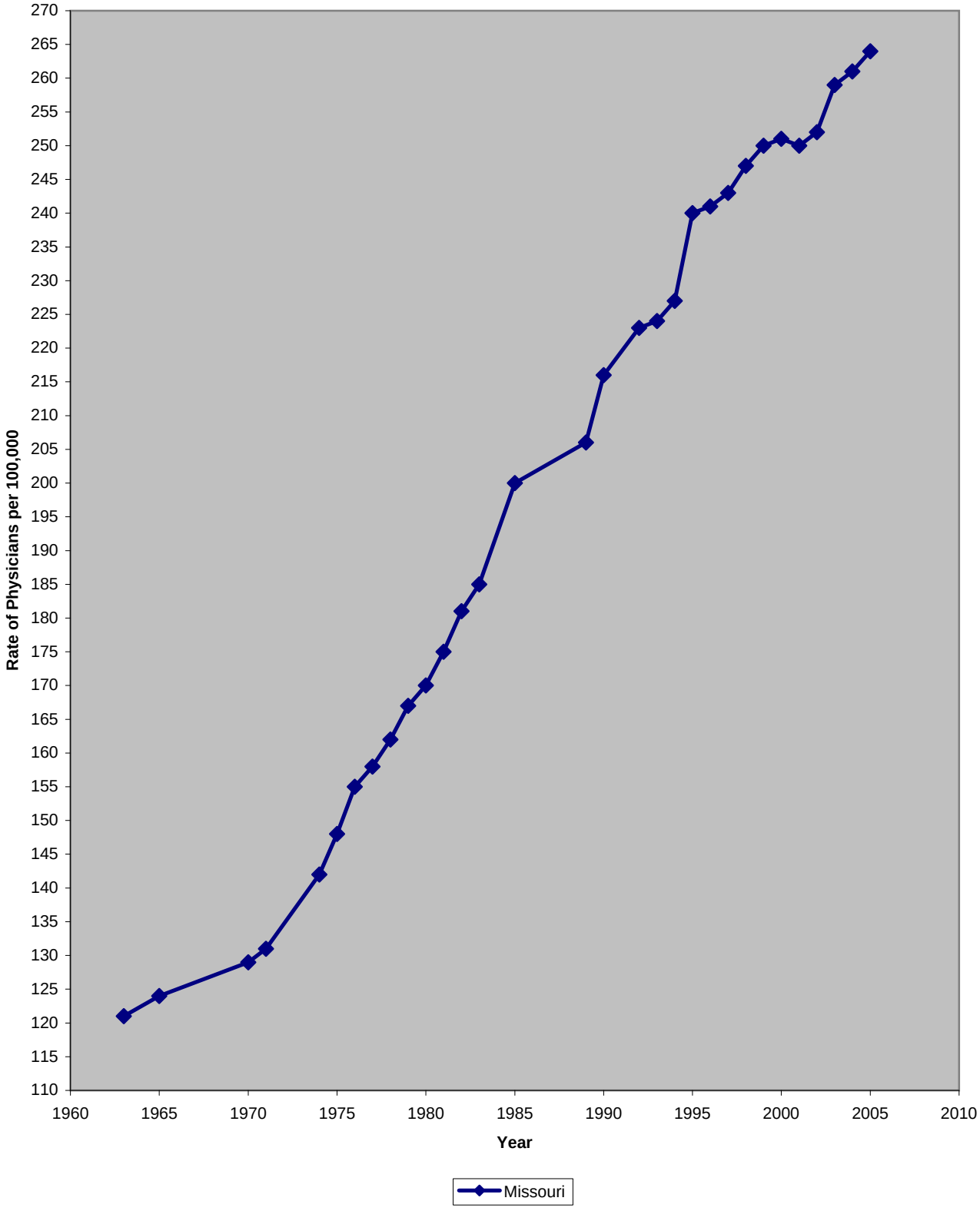
5. Upon the death of a judgment creditor, the right to receive payments of future damages, other than future medical damages, being paid by installments or periodic payments will pass in accordance with the Missouri probate code unless otherwise transferred or alienated prior to death. Payment of future medical damages will continue to the estate of the judgment creditor only for as long as necessary to enable the estate to satisfy medical expenses of the judgment creditor that were due and owing at the time of death, which resulted directly from the injury for which damages were awarded, and do not exceed the dollar amount of the total payments for such future medical damages outstanding at the time of death.

6. Nothing in this section shall prevent the parties from contracting and agreeing to settle and resolve the claim for future damages. If such an agreement is reached by the parties, the future periodic payment schedule shall not apply.

Rate of All Licensed Physicians Per 100,000 People in Missouri

PHYSICIANS PER 100,000 (AMA, Physician Characteristics & Distribution in the US ("PC&D")	Year	MO
1963-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs only; civ. pop. only)	**1963**	121
1965-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1965**	124
1970-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1970**	129
1971-AMA, PC&D 1971 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1971**	131
1974-AMA, PC&D 1974 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1974**	142
1975-AMA, PC&D 2007 ed., Tbl. 5.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1975**	148
1976-AMA, PC&D 1976 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1976**	155
1977-AMA, PC&D 1977 ed., Tbl. I (non-fed. MDs; civ. pop.)	**1977**	158
1978-AMA, PC&D 1978 ed., Tbl. G (non-fed. MDs; civ. pop.)	**1978**	162
1979-AMA, PC&D 1979 ed., Tbl. G (non-fed. MDs; civ. pop.)	**1979**	167
1980-AMA, PC&D 2008 ed., Tbl. 6.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1980**	170
1981-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1981**	175
1982-AMA, PC&D 1983 ed., Fig. 5 (non-fed. MDs; civ. pop.)	**1982**	181
1983-AMA, PC&D 1986 ed., Tbl. A-9 (non-fed. MDs; civ. pop.)	**1983**	185
1985-AMA, PC&D 2008 ed., Tbl. 6.17 (non-fed. MDs; civ. pop. + mil. pers. in US)	**1985**	200
1989-AMA, PC&D 1992 ed., Tbl. A-11 (non-fed. MDs; civ. pop.)	**1989**	206
1990-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**1990**	216
1992-AMA, PC&D 1994 ed., Tbl.A-18 (non-fed. MDs; civ. pop.)	**1992**	223
1993-AMA, PC&D 1995-96 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1993**	224
1994-AMA, PC&D 1996-97 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1994**	227
1995-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**1995**	240
1996-AMA, PC&D 1997-98 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1996**	241
1997-AMA, PC&D 1999 ed., Tbl. A-18 (non-fed. MDs; civ. pop.)	**1997**	243
1998-AMA, PC&D 2000-01 ed., Tbl. 5-18 (non-fed. MDs; civ. pop.)	**1998**	247
1999-AMA, PC&D 2001-02 ed., Tbl. 5.18 (non-fed. MDs; civ. pop.)	**1999**	250
2000-AMA, PC&D 2008 ed., Tbl. 6.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2000**	251
2001-AMA, PC&D 2003 ed., Tbl. 5.17 (non-fed. MDs; civ. pop.)	**2001**	250
2002-AMA, PC&D 2004 ed., Tbl. 5.17 (non-fed. MDs; civ. pop.)	**2002**	252
2003-AMA, PC&D 2005 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2003**	259
2004-AMA, PC&D 2006 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2004**	261
2005-AMA, PC&D 2007 ed., Tbl. 5.17 (fed. + non-fed. MDs; civ. pop. + mil. pers. in US)	**2005**	264

Rate of All Licensed Physicians Per 100,000 People in Missouri



Missouri Specialists and "Patient Care" Specialists

		All Licensed Physicians	All Licensed "Patient Care" Physicians	All Licensed Neurosurgeons	All Licensed "Patient Care" Neurosurgeons	All Licensed Orthopedic Surgeons	All Licensed "Patient Care" Orthopedic Surgeons	All Licensed Ob/Gyns	All Licensed "Patient Care" Ob/Gyns
1990 -- AMA, PC&D 1992 ed., Tbl. 9	**1990**	10759	9109	88	86	329	324	644	624
1992 -- AMA, PC&D 1993 ed., Tbl. 9	**1992**	11460	9685	90	88	361	357	673	651
1993 -- AMA, PC&D 1994 ed., Tbl. 9	**1993**	11609	9887	89	88	381	377	665	644
1994 -- AMA, PC&D 1995-96 ed., Tbl. 9	**1994**	11928	10111	98	91	369	363	680	655
1995 -- AMA, PC&D 1996-97 ed., Tbl. 9	**1995**	12525	10448	106	103	394	387	697	673
1996 -- AMA, PC&D 1997-98 ed., Tbl. D9	**1996**	12907	10808	105	102	422	412	717	688
1997 -- AMA, PC&D 1999 ed., Tbl. D9	**1997**	13104	11031	109	106	430	420	719	691
1999 -- AMA, PC&D 2001-02 ed., Tbl. 3.9	**1999**	13674	11055	110	106	403	392	724	692
2001 -- AMA, PC&D 2003-04 ed., Tbl. 3.9	**2001**	14052	11698	108	106	409	400	730	705
2002 -- AMA, PC&D 2004 ed., Tbl. 3.9	**2002**	14277	11692	103	101	408	398	724	696
2003 -- AMA, PC&D 2005 ed., Tbl. 3.7	**2003**	14779	12151	109	107	430	419	730	704
2004 -- AMA, PC&D 2006 ed., Tbl. 3.7	**2004**	15026	12317	122	119	433	421	725	700
2005 -- AMA, PC&D 2007 ed., Tbl. 3.7	**2005**	15322	12486	117	115	436	425	722	696
2006 -- AMA, PC&D 2008 ed., Tbl. 3.7	**2006**	15586	12590	121	117	444	435	729	702

** AMA data regarding physicians distribution taken from the relevent editions of the AMA's PC&Ds*