

MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

---

ED100952

---

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

*Plaintiffs/ Respondents/ Cross-Appellants,*

v.

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

*Defendants/ Appellants/ Cross-Respondents*

---

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

---

**REPLY BRIEF OF PLAINTIFFS/ RESPONDENTS/ CROSS-APPELLANTS**

---

**Maurice B. Graham #18029  
*mgraham@grgpc.com*  
Patrick J. Hagerty #32991  
*phagerty@grgpc.com*  
Joan M. Lockwood #42883  
*jlockwood@grgpc.com*  
Kaitlin A. Bridges #60861  
*kbridges@grgpc.com*  
GRAY, RITTER & GRAHAM, P.C.  
701 Market Street, Suite 800  
St. Louis, MO 63101  
314 241-5620**

**John G. Simon #35231  
*jsimon@simonlawpc.com*  
THE SIMON LAW FIRM, P.C.  
800 Market Street, Suite 1700  
St. Louis, MO 63101  
314 241-2929**

*Plaintiffs/ Respondents/ Cross-Appellants*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

    I.    THE § 538.210.1 CAP ON NONECONOMIC DAMAGES  
          VIOLATES THE RIGHT TO TRIAL BY JURY, WHICH  
          ATTACHES TO WRONGFUL DEATH MEDICAL NEGLIGENCE  
          CLAIMS ..... 1

    II.   AS APPLIED, THE § 538.210.1 CAP ON NONECONOMIC  
          DAMAGES VIOLATES THE EQUAL PROTECTION CLAUSE ..... 5

    III.  THE § 538.210.1 CAP ON NONECONOMIC DAMAGES  
          VIOLATES SEPARATION OF POWERS, ARTICLE II, § 1 ..... 12

    IV.  PLAINTIFFS MADE A SUBMISSIBLE CASE FOR  
          AGGRAVATING CIRCUMSTANCES DAMAGES ..... 12

CONCLUSION ..... 15

CERTIFICATE OF COMPLIANCE ..... 17

CERTIFICATE OF SERVICE ..... 18

## TABLE OF AUTHORITIES

### Cases

*Adams v. Children’s Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992) . . . . . 7, 8

*Associated Industries of Mo. v. Dir. of Revenue*, 918 S.W.2d 780 (Mo. banc 1996) . . . . 3

*Batek v. Curators of University of Missouri*, 920 S.W.2d 895 (Mo. banc 1996) . . . . . 7

*Call v. Heard*, 925 S.W.2d 840 (Mo. banc 1996) . . . . . 9

*Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008) . . . . . 9

*Drummond Co. v. St. Louis Coke & Foundry Supply Co.*, 181 S.W.3d 99  
(Mo. App. E.D. 2005) . . . . . 13

*Jefferson v. Missouri Baptist Medical Center*, 447 S.W.3d 701 (Mo. App. E.D. 2014) . . 5

*Klotz v. St. Anthony’s Med. Ctr.*, 311 S.W.3d 752 (Mo. banc 2010) . . . . . 7

*Land Clearance for Redev. Auth. v. Kan. Univ. Endowment Ass’n*, 805 S.W.2d 173  
(Mo. banc 1991) . . . . . 8, 10, 11

*Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 353 (Mo. banc 2013) . . . . . 3

*O’Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. banc 1983) . . . . . 3

*Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012) . . . . . 4, 5, 8, 11

*Schroeder v. Lester E. Cox Med. Ctr., Inc.*, 833 S.W.2d 411  
(Mo. App. S.D. 1992) . . . . . 13, 14

*State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82 (Mo. banc 2003) . . . . . 1, 2

*State v. Hadley*, 815 S.W.2d 422, 425 (Mo. 1991) . . . . . 2

*Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633

(Mo. banc 2012) ..... 1, 2, 4, 5, 7, 8

*Wehrkamp v. Watkins Motor Lines, Inc.*, 436 S.W.2d 698 (Mo. 1969) ..... 13

*Weinschenck v. State*, 203 S.W.3d 201, 219 (Mo. banc 2006) ..... 3

*Wiley v. Homfield*, 307 S.W.3d 145 (Mo. App. W.D. 2009) ..... 12

**Missouri Constitution**

Mo. Const. art. I, § 22 ..... 2

Mo. Const. art. II, § 1 ..... 12

**State Statutes**

§ 1.140, RSMo. Supp. 2011 ..... 3

§ 537.068 RSMo ..... 12

§ 537.090, RSMo. 1967 ..... 4

§ 537.090, RSMo. 1979 ..... 4

§ 538.210 RSMo. 1986 ..... 4

§ 538.210 RSMo. 2005 ..... 1-8, 10-12, 15

**Other Authorities**

Prosser, *Law of Torts* § 127 (4th ed. 1971) ..... 3

S. 239, 98th Gen. Assem., 1st Reg. Sess. (Mo. 2015) ..... 8

## ARGUMENT

In response to Plaintiffs' Cross Appeal, Defendants raise various arguments regarding the constitutionality of the § 538.210.1, RSMo. 2005, cap on noneconomic damages and the trial court's directed verdict as to Plaintiffs' aggravating circumstances damages claim. For the reasons set forth below, Defendants' arguments fail.

### **I. THE § 538.210.1 CAP ON NONECONOMIC DAMAGES VIOLATES THE RIGHT TO TRIAL BY JURY, WHICH ATTACHES TO WRONGFUL DEATH MEDICAL NEGLIGENCE CLAIMS**

#### **A. Application of *Watts* is appropriate in this case.**

Defendants claim that *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012), "clearly" held that the Section 538.210.1 cap on noneconomic damages was unconstitutional only as to personal injury claims. Second Brief of Defendants/Appellants/Cross-Respondents Robert P. Ferrara, M.D. and Mercy Clinic Heart and Vascular, LLC ("Defs.' 2d Brief") at 33. However, the language of *Watts* should not be read as narrowly as Defendants suggest. The *Watts* court determined that "section 538.210 is unconstitutional to the extent it infringes on the jury's constitutionally protected purpose of determining the amount of damages sustained by an injured party." 376 S.W.3d at 636. There was no express limitation of its holding to non-death cases. The only limitation imposed was that the cause of action must be one for which the right to jury trial attaches. *Id.* at 640.

Under *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the right to trial by jury attaches where the claim is a civil action for damages for a personal wrong and is

analogous to an action tried by a jury at common law. *Id.* at 86, 92. Defendants claim that *Diehl* is inapplicable because Plaintiffs “were not denied a trial by jury.” Defs.’ 2d Brief at 38. However, the constitutional right to trial by jury is about more than just having a jury trial; rather, it “includes all the substantial incidents and consequences that pertain to the right to jury trial at common law.” *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. 1991). “It is beyond dispute that Missouri law always has recognized that the jury’s role in a civil case is to determine the facts relating to both liability and damages and to enter a verdict accordingly.” *Watts*, 376 S.W.3d at 640. “[T]he amount of noneconomic damages is a fact that must be determined by the jury and is subject to the protections of the article I, section 22(a) right to trial by jury.” *Id.* Thus, the fact that Plaintiffs had a jury trial does not mean that there was no violation of their constitutional right to trial by jury.

Defendants also argue that *Diehl* is inapplicable because it did not involve the constitutionality of statutory damage caps. Defs.’ 2d Brief at 38. However, the existence of damage caps is not pertinent to the issue for which Plaintiffs cited *Diehl* - determining whether the right to trial by jury attaches.

**B. Section 538.210.1 is not severable.**

Even if *Watts* does not explicitly apply to all medical negligence cases, the case effectively struck down Section 538.210.1 in its entirety because the statute is not severable. An unconstitutional statutory provision should not be severed where “the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid

provisions without the void one.’” *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 353 (Mo. banc 2013) (quoting Section 1.140, RSMo. Supp. 2011). In other words, the test of severability is whether “after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted if it had known that the excinded portions were invalid.” *Weinschenck v. State*, 203 S.W.3d 201, 219 (Mo. banc 2006) (internal quotations, alterations and emphasis omitted).

Defendants argue that simply because of § 538.210.1’s disjunctive - “personal injury or death” - the unconstitutional portion is severable. Defs.’ 2d Brief at 37-38. Defendants provide little support for inferring such an intent from a simple disjunctive. Can it truly be said that the Missouri legislature would have enacted a statute that places a \$350,000 cap on noneconomic damages in malpractice death cases and no cap whatsoever on noneconomic damages in malpractice injury cases? It is unlikely that the legislature would intentionally create such a statutory scheme. *See O’Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. banc 1983) (“This would simply perpetuate the much-criticized rule of the common law which made it ‘more profitable for the defendant to kill the plaintiff than to scratch him.’”) (quoting Prosser, *Law of Torts* § 127 (4th ed. 1971)). There is no rational reason for capping noneconomic damages only in death cases.

In determining whether severability is appropriate, it is also helpful to examine legislative history. *See Associated Industries of Mo. v. Dir. of Revenue*, 918 S.W.2d 780, 785 (Mo. banc 1996) (finding severability inappropriate because doing so resulted in a

“patchwork tax scheme” which legislative history suggested would not have been approved by the legislature). The statutory history of damage caps on medical negligence claims indicates that a patchwork scheme in which caps apply to death cases but not personal injury cases would not be supported by the legislature. Both the original version of the medical negligence noneconomic damages cap and the 2005 statute specifically applied to both personal injury and death cases. *See* § 538.210, RSMo. 1986; § 538.210, RSMo. 2005.

Considering the legislature’s gradual raising of the cap on wrongful death damages, the eventual elimination of such a cap no later than 1979,<sup>1</sup> and the holding in *Watts*, there is no basis on which to conclude that § 538.210.1 still applies in a death case.

**C. *Sanders* does not control.**

Under Defendants’ analysis, *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012), alone controls and remains unchanged after *Watts*. Defendants claim that *Watts* does not mention *Sanders* because “clearly” the *Watts* decision did not overrule *Sanders* in any way, rather *Watts* was “merely the next click on the analytical dial.” Defs.’ 2d Brief at 34. The *Watts* court’s failure to mention *Sanders* could just as easily mean that the Supreme Court felt it was clear that *Watts* invalidated § 538.210.1 in its entirety. It could also mean that the Supreme Court felt no need to analyze how a claim for wrongful death would have been

---

<sup>1</sup> Compare § 537.090, RSMo. 1967 (\$50,000 limitation) with § 537.090, RSMo. 1979 (no dollar limit).

decided under a prior version of § 538.210.<sup>2</sup> Speculation on the unwritten rationale of the Supreme Court should not outweigh the clear scope of *Watts* as applicable to all cases to which the right to trial by jury attaches.

Defendants claim that this Court recognized in *Jefferson v. Missouri Baptist Medical Center*, 447 S.W.3d 701 (Mo. App. E.D. 2014), that *Watts* is limited to personal injury cases. However, the constitutionality of § 538.210.1 was not at issue in *Jefferson*; rather the Court was examining § 538.210.2(3). Thus, the Court's statement regarding *Watts* applying only to personal injury cases was mere dicta.

## **II. AS APPLIED, THE § 538.210.1 CAP ON NONECONOMIC DAMAGES VIOLATES THE EQUAL PROTECTION CLAUSE**

### **A. Applying the cap only to wrongful death medical negligence claims violates the Equal Protection Clause.**

Defendants argue that because the cause of action in a wrongful death case is not that of the patient who died, but that of the decedent's survivors, there is no equal protection violation. Defs.' 2d Brief at 50. This difference does not change the fact that wrongful death medical malpractice plaintiffs are similarly situated to other medical malpractice plaintiffs. Both groups comprise people who have been harmed by the negligence of health care

---

<sup>2</sup> Counsel for Defendants admitted in oral argument on post-trial motions that *Sanders* involved a different statute. Tr.1430:11-13 ("I'm not suggesting that the *Sanders* case dealt with a tort reform wrongful death cap. I know that it was a prior statute.").

providers. Liability is similar and damages overlap in both claims, particularly since wrongful death plaintiffs can recover for damages suffered by the decedent. Furthermore, Defendants' assertion that the legislature may have recognized that a victim of malpractice who must live with his injuries should receive a higher level of recovery is nonsensical.<sup>3</sup> It can hardly be argued that the noneconomic damages of a person who lives his or her life with medically induced injuries will always be greater than the noneconomic damages of one who loses a close family member through malpractice.

Defendants next claim that the classification of tort plaintiffs, between living injured persons and survivors who have lost loved ones through negligence, is somehow "driven by the Constitution itself," because wrongful death actions purportedly did not exist in 1820 when the Missouri Constitution was adopted. Defs.' 2d Brief at 50. To the extent Defendants mean to suggest that legislatures creating "statutory" causes of action have free reign to draw arbitrary lines between Missouri citizens, they are clearly wrong.

The issue of whether wrongful death existed at common law is relevant to, if anything, the level of scrutiny this Court should apply to its review of § 538.210.1. If the Court believes the cap denies Plaintiffs their fundamental right to jury trial, strict scrutiny applies.

---

<sup>3</sup> It also flies in the face of Defendants' argument (2d Brief at 52) that capping only death damages is an effective means of maintaining the "integrity" of the health care system. That is, why would the legislature go after the "low hanging fruit" of death cases, but leave in place the much larger economic liability of living plaintiff cases?

*Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 782 (Mo. banc 2010) (Teitelman, J., concurring). If not, the Court still would have to evaluate the damage cap under the deferential rational basis standard. *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 898 (Mo. banc 1996).

As previously explained, if § 538.210.1 draws a line between those who live after medical malpractice and those who die from it, it cannot survive even rational basis review. Defendants do not even address the many arbitrary, unreasonable classifications raised in Plaintiffs' brief.

Instead, Defendants rely entirely on *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992) as "settling" the question of whether § 538.210.1 violates equal protection. The problems with this argument are myriad. First, the *Adams* court analyzed a prior version of the statute dramatically different from the one enacted in 2005. Second, the only classification at issue in *Adams* was between tort victims of medical malpractice and tort victims of other negligent conduct. *Id.* at 903-05. This is not the distinction here, where it is undisputed that the cap is invalid as to plaintiffs who survive. The only question is whether the legislature could have lawfully declared that as long as a malpractice victim dies, recovery by his or her survivors is sharply limited.

Moreover, it is the height of speculation to assume, as Defendants do, that the *Adams* Court would have decided the equal protection challenge similarly under strict scrutiny. After *Watts*, courts are required to employ strict scrutiny review - at least in living plaintiff cases like *Adams* - because a fundamental right is abridged. *Watts*, 376 S.W.3d at 635.

(§ 538.210.1 violates art. 1, § 22(a) right to trial by jury). Simply put, Defendants’ circular argument appears to be: this Court should apply deferential review because no fundamental right is at stake, and no fundamental right is at stake because no wrongful death cause of action was available at common law. And, because no wrongful death cause of action existed at common law, the legislature is free to draw whatever distinctions it chooses in the name of “maintaining the integrity of health care for all Missourians.” Defs.’ 2d Brief at 52.

Finally, neither in *Sanders* nor in *Watts* did the Supreme Court address an equal protection challenge to § 538.210.1. The version of § 538.210.1 addressed in *Sanders* was repealed in 2005. Shannon Dodson died in 2011. The *Watts* decision was handed down in 2012. Just this year, the legislature passed and Governor Nixon signed a new noneconomic damage cap, within a medical malpractice bill that radically changes the law. S. 239, 98th Gen. Assem., 1st Reg. Sess. (Mo. 2015).

If this Court declines to address the equal protection challenge and declines to transfer the issue to the Missouri Supreme Court, survivors of malpractice victims will be left in the lurch, if such malpractice and death occurred between August 28, 2005 and the effective date of the new law, August 28, 2015. This ten years of legal limbo is untenable, and is in no way justified by either *Adams* or *Sanders*.

**B. Plaintiffs timely raised their Constitutional objections.**

Plaintiffs certainly agree with Defendants that constitutional issues should be raised at the earliest possible time, “consistent with good pleading and orderly procedure.” *Land Clearance for Redev. Auth. v. Kan. Univ. Endowment Ass’n*, 805 S.W.2d 173, 175 (Mo. banc

1991). What Defendants give scant attention to is the purpose of this rule, namely, to provide the trial court an opportunity to fully consider the constitutional issues. In their initial brief, Plaintiffs cited several cases recognizing that as long as the purpose of the rule has been met, it is proper for the court to consider the constitutional issues, even if not raised at the earliest possible time. *See Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008); *Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996).

Research by Plaintiffs has not uncovered a Missouri case wherein the trial court carefully considered the constitutional issues that were raised, after extensive briefing by the parties and substantial oral argument, and in which, thereafter, an appellate court held that the challenge was waived. Apparently, Defendants have not found such a case either.

Further, it is hard to imagine another case having procedural facts quite like these, where the Defendants raise a statute in their Answer<sup>4</sup>; during the course of the case that statute is held unconstitutional; after a verdict above the cap that was held unconstitutional, those Defendants seek to invoke the same statute; and the trial court itself expresses

---

<sup>4</sup> Counsel for Defendants stated in argument on post-trial motions that the statute was included in their Answer “out of an abundance of caution,” and was not included as an affirmative defense. Tr.1413:24-1414:10. Furthermore, the reference to the statute in Defendants’ Answer was in purely prospective terms, i.e., “in the event of an adjudication of the issues in this case whereby this defendant is held liable to respond in damages to any plaintiff . . . .” LF29, LF63, LF401.

frustration that the state supreme court has left a confusing state of affairs from two opinions issued mere months apart. And, just to add one more unique feature of the case, two separate statutes or even two separate paragraphs in the same statute are not being compared; the court below and this Court are asked to analyze words in the same sentence of a statute that was held unconstitutional.

The case cited by Defendants does not resolve the quandary. In *Land Clearance*, the court held that plaintiffs were required to raise their constitutional claims before trial. 805 S.W.2d at 176. However, the facts of *Land Clearance* are dissimilar to ours. The appellant there obtained a judgment in condemnation and, after the trial court applied the six percent statutory interest rate, appellant asserted for the first time in a motion to amend judgment that the statutory interest rate did not constitute “just compensation,” and was therefore unconstitutional. *Id.* at 174.

The critical distinction between *Land Clearance* and the case before this Court is that, in a condemnation case, “[t]he issue of just compensation is a fact question” and “there are certain factual elements to be considered in determining if the statute amounts to a denial of equal protection of the law.” *Id.* at 175-76. The *Land Clearance* court also noted that appellant’s failure to raise the challenge earlier denied the condemnor a chance to put on evidence to refute the challenge, and denied the trial court “a full opportunity to identify and rule on the issues.” *Id.* at 176.

Here, by statute, the noneconomic cap is not a fact question. The parties are forbidden from mentioning the cap in front of the jury. § 538.210.3, RSMo. The trial court only

reduces excess noneconomic damages to \$350,000 after verdict. § 538.210.3. Further, none of the prejudice to the adversary present in *Land Clearance* from the late challenge is present here. The trial court in this case initially entered judgment in the full amount of the jury's verdict. LF390-LF391. Defendants' Motion to Impose the Cap, LF393-LF396, and Plaintiffs' Motion not to Impose the Cap, LF417-LF442, were filed within days of this initial judgment. Just short of four (4) months passed between the day of the verdict, LF390, and the final judgment of the trial court. LF789-LF796. Three separate court hearings took place. Defendants were free to put in whatever evidence they desired to oppose Plaintiffs' constitutional challenge, and they successfully convinced the trial court to apply § 538.210.1. Defendants cannot show prejudice.

Nor can they show that the trial court was denied "a full opportunity to identify and rule on the issues." *Land Clearance*, 805 S.W.2d at 176. Not only did the court below identify all the constitutional claims, review extensive briefing, and hear argument on them, but also stated that the evidence in this case fully justified the jury's verdict. LF790 ("The Court finds ample evidence to support the jury's verdict in favor of Plaintiffs and its award of damages of \$10,831,155.00."). If not for *Sanders*, the trial court would not have amended its initial Judgment. LF792 ("But for *Sanders*, the Court would uphold the wisdom of the jury in its assessment of damages.").

Plaintiffs timely raised the constitutional issues, and the purpose of the timeliness rule has been met since the trial court had the opportunity to fully examine the constitutional issues and Defendants had a fair opportunity to respond to Plaintiffs' arguments.

### **III. THE § 538.210.1 CAP ON NONECONOMIC DAMAGES VIOLATES SEPARATION OF POWERS, ARTICLE II, § 1**

Defendants take issue with Plaintiffs' argument regarding separation of powers, alleging that because Plaintiffs did not seek remittitur in this case, there is no real or substantial constitutional issue. Defs.' 2d Brief at 62. Defendants' argument misses the point. Plaintiffs argued in their opening brief that § 538.210.1 interferes with the judicial prerogative of remittitur - in other words, the statutory cap removes the court's discretion to reduce a verdict when the evidence does not support the amount awarded by the jury. *See Wiley v. Homfield*, 307 S.W.3d 145, 148 (Mo. App. W.D. 2009) (discussing a trial court's authority to grant remittitur under § 537.068 RSMo.). Instead, the legislature has effectively imposed nondiscretionary, mandatory remittitur on noneconomic damages over \$350,000, thereby violating the separation of powers between the legislature and judiciary. Furthermore, Defendants' argument that Plaintiffs should have requested remittitur and had it refused by the trial court in order to make this argument defies logic, as Plaintiffs would certainly not seek to have a jury verdict in their favor reduced.

### **IV. PLAINTIFFS MADE A SUBMISSIBLE CASE FOR AGGRAVATING CIRCUMSTANCES DAMAGES**

Defendants' argument for upholding the directed verdict on aggravating circumstance damages is essentially that their evidence showed that "Defendants tried to do their best in providing care to Ms. Dodson." Defs.' 2d Brief at 65. However, even Defendants recognize that when a court of appeals reviews the propriety of a trial court's decision to sustain a

motion for directed verdict, “[t]he evidence must be considered in the light most favorable to the plaintiff, and the defendant’s evidence must be disregarded except so far as it may tend to aid plaintiff’s case.” *Id.* (citing *Wehrkamp v. Watkins Motor Lines, Inc.*, 436 S.W.2d 698, 700 (Mo. 1969) and *Drummond Co. v. St. Louis Coke & Foundry Supply Co.*, 181 S.W.3d 99, 100 (Mo. App. E.D. 2005)). Nevertheless, Defendants go on to cite their own evidence and construe contested facts in their favor.

For example, in contrast to Plaintiffs’ evidence that the left main coronary artery dissection occurred at 3:53 pm, Defendants set forth evidence that the dissection occurred at 3:59 pm. Defs.’ 2d Brief at 70. The precise timing of the events that led to Shannon Dodson’s death is a critical issue and inconsistencies between time records presented an evidentiary problem that the trial court recognized. (Tr. 1251:21-24). This is precisely the type of evidentiary conflict that must be resolved in Plaintiffs’ favor when considering the propriety of the trial court’s decision to grant Defendants’ motion for directed verdict. In a case that is all about timing, a difference of six minutes is critical.

The majority of Defendants’ remaining argument is dedicated to attacking Plaintiffs’ reliance on *Schroeder v. Lester E. Cox Med. Ctr.*, 833 S.W.2d 411 (Mo. App. S.D. 1992), one of *several* cases Plaintiffs cited in support of their argument that their evidence of conscious disregard was sufficient for aggravating circumstances damages. Defendants present *Schroeder* as a “starkly different” case than the present matter. Defs.’ 2d Brief at 74. For example, Defendants point to the “overwhelming” evidence of the *Schroeder* defendants’ failures in causing the death and the various witnesses who testified that the outcome would

have been different if proper procedures were required and followed. Compare this evidence to the evidence here where multiple witnesses (both Plaintiffs' and Defendants') testified that a dissection of the left main artery is an emergency situation requiring immediate intervention, and yet it took more than 45 minutes for Dr. Ferrara to transfer Shannon to surgery. During that time, very little was done to try to open the vessel. *See* Pls.' Brief at 84-85. Evidence of Defendants' willfulness in causing Shannon's death easily surpasses the clear and convincing threshold.

Defendants also seem to read in Plaintiffs' Point IV(B) an argument that there are two kinds of recklessness, that which equates to willfulness and that which equates to . . . something less. No such suggestion appears in Plaintiffs' brief. To the contrary, Plaintiffs' brief readily acknowledged that the party intending to submit aggravating circumstances to the jury must have shown recklessness indicative of intentional conduct. This is completely consistent with *Schoeder*. This is exactly what Plaintiffs showed at trial - the evidence demonstrated that Dr. Ferrara knew or should have known that there was a high degree of probability that his actions (or inaction) would result in injury.

## CONCLUSION

For the reasons stated herein, and in their initial brief, Plaintiffs respectfully request that this Court reverse the trial court's application of the § 538.210.1 cap on noneconomic damages and the trial court's directed verdict on Plaintiffs' aggravating circumstances damages claim. Alternatively, this Court may transfer the constitutional issues to the Supreme Court. Plaintiffs further request that this Court otherwise affirm the judgment of the court below.

Date: May 27, 2015

Respectfully submitted,

GRAY, RITTER & GRAHAM, P.C.

By: /s/ Maurice B. Graham

Maurice B. Graham #18029

*Mgraham@grgpc.com*

Patrick J. Hagerty #32991

*phagerty@grgpc.com*

Joan M. Lockwood #42883

*jlockwood@grgpc.com*

Kaitlin A. Bridges #60861

*kbridges@grgpc.com*

701 Market Street, Suite 800

St. Louis, MO 63101

314 241-5620 Office

and

THE SIMON LAW FIRM, PC

John G. Simon #35231

*jsimon@simonlawpc.com*

800 Market Street, Suite 1700

St. Louis, MO 63101

314 241-2929 Office

*ATTORNEYS FOR PLAINTIFFS/  
RESPONDENTS/ CROSS-APPELLANTS*

## CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned certifies that this brief: (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) pursuant thereto, contains 3793 words as calculated by the WordPerfect software used to prepare it, exclusive of the matters identified in Mo. R. Civ. P. 84.06 and Local Rule 360.

/s/ Maurice B. Graham

## CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2015, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

Paul N. Venker #28768

*pvenker@wvslaw.com*

Lisa A. Larkin #46796

*llarkin@wvslaw.com*

WILLIAMS VENKER & SANDERS LLC

100 N. Broadway, 21st Floor

St. Louis, MO 63102

314 345-5000 Office

*ATTORNEYS FOR DEFENDANTS/*

*APPELLANTS/ CROSS-RESPONDENTS*

/s/ Maurice B. Graham