

IN THE MISSOURI SUPREME COURT

CAUSE NO. SC87513

KIMBERLY HODGES,

Plaintiff-Respondent/Cross-Appellant,

v.

CITY OF ST. LOUIS,

Defendant-Appellant/Cross-Respondent

**Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit
Division No. 21
The Honorable Evelyn M. Baker**

**REPLY BRIEF OF PLAINTIFF-RESPONDENT/CROSS APPELLANT
KIMBERLY HODGES**

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TABLE OF CONTENTS

	Page
Table of Authorities	2
Respondent's Reply Brief	3
Points Relied On	3
Argument	4
Point I	4
Point II	18
Conclusion	21
Certificate of Compliance	23
Certificate of Service	24

TABLE OF AUTHORITIES

Error! No table of authorities entries found.State Statutes

Section 537.610, RSMo.....
.....
.....

passim Other Authorities

Adams By and Through Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992)	20
Fisher v. State Highway Commission, 948 S.W.2d 607 (Mo. banc 1997)	20
Richardson v. State Highway and Transportation Commission, 863 S.W.876 (Mo. banc 1993).....	19

REPLY BRIEF OF PLAINTIFF-RESPONDENT/CROSS APPELLANT
KIMBERLY HODGES

POINTS RELIED ON

I. A review of the record in the trial court shows that Plaintiff's constitutional claims were properly asserted in the trial court at the earliest possible time and that her claims were properly preserved throughout the proceedings in the trial court for review by this Court. The City's argument to the contrary is without merit.

Mahurin v. St. Luke's Hospital, 809 S.W.2d 418, 421 (Mo.App.W.D. 1991)

Kroh Brothers Development Company v. State Line Eighty-Nine, Inc., 506 S.W.2d 4 (Mo.App.1974)

Trotter v. Carter, 353 Mo. 708, 183 S.W.2d 898, 901 (1944)

Village of Beverly Hills v. Schluter, 344 Mo. 1098, 130 S.W.2d 532 (1939)

II. Section 537.610's cap on recovery violates equal protection under Article I, Section 2, of the Missouri constitution because it denies Plaintiff recovery of the full amount of her economic damages, unlike medical negligence claims in which full economic damages plus a capped amount of non-economic damages may be recovered, and unlike any other claims under Missouri law, which have no caps on recovery at all.

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Section 538.210, RSMo

Other Authorities

Adams By and Through Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992) 20
Fisher v. State Highway Commission, 948 S.W.2d 607 (Mo. banc 1997) 20
Richardson v. State Highway and Transportation Commission, 863 S.W.876 (Mo. banc 1993)..... 19

ARGUMENT

I. A review of the record in the trial court shows that Plaintiff's constitutional claims were properly asserted in the trial court at the earliest possible time and that her claims were properly preserved throughout the proceedings in the trial court for review by this Court. The City's argument to the contrary is without merit.

The City of St. Louis ("City") argues that Plaintiff has not preserved for review in this Court her claim that the trial court erred in reducing the judgment against the City in accordance with the cap on damages set forth in Section 537.610, R.S.Mo., because that cap on damages is invalid on constitutional grounds. The City argues that the constitutional claim was waived because Plaintiff did not file a reply to the Separate Answer of Defendant City of St. Louis to Plaintiff's Third Amended Petition. The City also claims that Plaintiff did not adequately state facts in the trial court showing the asserted constitutional violation.

A review of the record in the trial court is necessary to properly respond to the City's waiver arguments, and such a review demonstrates that Plaintiff raised her constitutional claim at the earliest possible time after the City first indicated its intention to rely on the cap. Plaintiff renewed her assertion of her claim repeatedly in the trial court. The trial court ruled on her claim. At no time during

the proceedings in the trial court did the City ever suggest that Plaintiff had waived her claim, or that it was not properly before the trial court.

A review of the proceedings in the trial court shows that the City first mentioned Section 537.610 in its Separate Answer of the City of St. Louis to First Amended Petition, filed on July 9, 2004 (LF 27). ¶ 3 of the Affirmative Defenses in the City's Separate Answer stated:

3. Defendant asserts all defenses and provisions of Section 537.600, 537.610, and 537.615 R.S.Mo.

Plaintiff immediately asserted her claim that Section 537.610 was invalid on constitutional grounds in Plaintiff's Reply to Defendant's Answer to Plaintiff's First Amended Petition, filed on August 19, 2004 (LF 28). Plaintiff stated that Section 537.610 (and Section 537.600 and Section 537.615) were invalid on constitutional grounds, specifically citing Article I, Section 2, Constitution of Missouri, 1945; Article I, Section 14, Constitution of Missouri, 1945; Article I, Section 1, Constitution of Missouri, 1945; Article II, Section 4, Constitution of Missouri, 1945; and Article IV, Section 30 (b), Constitution of Missouri, 1945.

On the same day, August 19, 2004, Plaintiff filed a motion for leave to file her Second Amended Petition (LF 6). On September 21, 2004, Plaintiff's motion was granted and her Second Amended Petition was filed (LF 6, 30). All of the defendants, including the City, the Officer, and the members of the Police Board, then jointly represented by the City Counselor, filed Defendants' Joint Motion to Dismiss and/or for More Definite Statement (LF 33). That motion did not mention

or rely upon Section 537.610. The trial court denied the motion (LF 35). The City did not file an answer at that point but instead filed Defendant City of St. Louis' Motion for Summary Judgment (LF 39). Again, that Motion for Summary Judgment did not mention or rely upon Section 537.610.

While the Motion for Summary Judgment was under submission (LF 8), Plaintiff filed a Motion to Substitute Party Plaintiff to substitute Kimberly Hodges, the daughter of the original plaintiff, Ann Martin, as the party plaintiff, due to the death of Ann Martin. (LF 60). That motion was granted and Plaintiff Hodges was then also given leave to file Plaintiff's Third Amended Petition (LF 8, 64).

Plaintiff's Third Amended Petition was filed on April 20, 2005 (LF 65). The City filed the Separate Answer of Defendant City of St. Louis to Plaintiff's Third Amended Petition on May 2, 2005 (LF 75, 9). This Separate Answer included a reference to Section 537.610 in the Affirmative Defenses in exactly the same words verbatim as in the City's Answer to the First Amended Petition as follows:

3. Defendant asserts all defenses and provisions of Section 537.600, 537.610, and 537.615 R.S.Mo.

At this point, one of the City's arguments that Plaintiff's constitutional claim has not been preserved for review in this Court may be more clearly addressed. Even though, as will be reviewed below, Plaintiff thereafter repeatedly raised her constitutional claims in the trial court (immediately before the commencement of trial, during colloquy with the trial court and counsel for the

City after the return of the jury's verdict, and again in post trial motions), the City contends that Plaintiff waived her constitutional claim because at this point in the proceedings she did not file an additional reply to the Separate Answer of Defendant City of St. Louis to Plaintiff's Third Amended Petition.

In colorful language, the City argues that Plaintiff thereby "failed to keep her constitutional claim alive long enough for this Court to issue its diagnosis. Plaintiff's claim cannot be revived, once its natural life has expired. And there are no Lazarus-like miracles by which it can now return from the dead." City's Second Brief at 37-38.

The City's argument, however colorful, is without merit. That is because it rests on the false premise that a new and additional reply was then required to the City's word-for-word verbatim repetition, in its Answer to the Third Amended Petition, of its previous assertion of defenses based on Section 537.600, 537.610 and 537.615 in its Answer to the First Amended Petition, even though Plaintiff had filed a reply to the Answer to the First Amendment Petition that explicitly raised her contention that Section 537.610 was invalid on constitutional grounds, and even though the City's statement of this defense was *identical* in both its Answer to the First Amended Petition and its Answer to the Third Amended Petition.

That is simply not the case. Plaintiff was not required to file any further reply at that point.

“No new response to an amended pleading is required where the amendment does not raise new matters or where an amended petition is filed and the original answer on file raises the issues. *Kroh Brothers Development Company v. State Line Eighty-Nine, Inc.*, 506 S.W.2d 4, 14 (Mo.App.1974).” *Mahurin v. St. Luke’s Hospital*, 809 S.W.2d 418, 421 (Mo.App.W.D. 1991).¹ See also *Trotter v. Carter*, 353 Mo. 708, 183 S.W.2d 898, 901 (1944). The City’s brief recognizes that the same principles that govern when an answer setting forth an affirmative defense is required are equally applicable to determining when a reply setting forth an affirmative avoidance is required, inasmuch as an affirmative avoidance is simply an affirmative defense to an affirmative defense. See p. 31 of the Second Brief of Appellant/Cross Appellant City of St. Louis.

Here, the City’s Answer to the Third Amended Petition asserted the City’s defense based on Section 537.610 in exactly the same words as its Answer to the First Amended Petition. In Response to the City’s Answer to the First Amended

¹ *Mahurin* is cited with approval in the City’s cited case of *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 846 (Mo.banc 1997), for *Mahurin*’s additional discussion of the slightly different issue of the effect of the opposing party’s failure to object to a failure to file a required reply. “If the case is tried without a reply to the affirmative defense, on appeal the matter is treated as if a reply traversing the defense has been filed in accordance with the evidence.”

Warren, 950 S.W.2d at 846, citing and relying on *Mahurin*.

Petition, Plaintiff filed Plaintiff's Reply to Defendant's Answer to Plaintiff's First Amended Petition and Plaintiff set forth and raised her constitutional claims in that Reply. For these reasons, no further Reply with respect to Plaintiff's constitutional claims was required after the City filed its Answer to the Third Amended Petition. Since no further reply was required, Plaintiff's claim was not waived when she did not file a further reply. The City's argument that Plaintiff's constitutional claims somehow died at that point, never to be revived, is accordingly completely without merit and should be rejected by this Honorable Court.

Additionally, thereafter Plaintiff continued to repeatedly assert her constitutional claim before the trial court.

Plaintiff settled her claim against the Officer and the Police Board prior to trial (L.F. 108), and the case was tried to a verdict with the City as the sole remaining defendant. At the very beginning of the trial, on October 31, 2005, Plaintiff again raised her claim that the cap contained in Section 537.610 was invalid on the constitutional grounds. (T. 2-4). The following proceedings were had:

MR. SCHLAPPRIZZI: On behalf of the plaintiff, if the Court please, in the initial answer filed by the City, they sought to impose a protection of Section 537.600, 610 and 615, imposing a limitation on their liability by reason of a statutory cap.

On August the 19th, 04, at our first available opportunity, we replied to that and challenged the constitutionality of that claim of protection. It was done because it is our understanding that a constitutional challenge must be initiated at the first available point in time, which that was. To reiterate and confirm our position today again on our record, we challenge the constitutionality of those capped sections and impose the authority that was cited in our original reply, August 19th, 2004.

THE COURT: Okay. Mr. McDonnell.

MR. MCDONNELL: On behalf of the City of St. Louis, your Honor, the statutory cap is presumed to be constitutional on its face.

THE COURT: It's this Court's understanding -- and you gentlemen will correct me if I'm wrong -- that if the jury comes back in excess of the capped amount, that's fine, but I cannot grant more than the capped amount. And that would be a matter that would have to go up on appeal in terms of anything over and above the cap. Am I right or wrong about this?

MR. MCDONNELL: That is correct, Judge. The actual verdict would have to be -- if it exceeds the cap, the verdict would have to be for the cap amount itself.

THE COURT: I don't think this has been ruled on yet by the Missouri Supreme Court. I think there are cases in the pipeline. I'm not sure.

MR. MCDONNELL: Judge, this statutory cap for municipalities has been held over and over.

THE COURT: Wait, I'm thinking of –

MR. MCDONNELL: Tort reform?

THE COURT: Yes. Okay. Back on planet Earth, there is a cap. The cap will hold.

MR. SCHLAPPRIZZI: Of course, the Court, being persuaded that it was unfair, unconstitutional, could certainly make a decision that it shouldn't be.

THE COURT: I am a court of first impression. I cannot make those decisions.

(T. 2:21-4:13).

At no time during the proceedings in the trial court did the City argue or in any way indicate that it thought the issue had been waived because no reply was filed to the Separate Answer of Defendant City of St. Louis to Plaintiff's Third Amended Petition.

On November 3, 2005, the jury returned its verdict in favor of Plaintiff and against the City in the sum of \$1,200,000 (LF. 149-150).

Immediately after the jury returned its verdict in favor of Plaintiff and against the City in the sum of \$1,200,000, the City made an oral motion to the trial court to apply the cap on damages contained in Section 537.610, and reduce the verdict and judgment against the City to the amount permitted under the cap, \$335,118 (T. 276). The following proceedings were had:

(The jurors were dismissed at 12.07 p.m.)

(The following proceedings were had in chambers:)

THE COURT: Let's go on the record, Mr. McDonnell.

MR. MCDONNELL: Yes, Judge. On behalf of Defendant City of St. Louis, even taking into consideration the setoff the City's entitled from the settlements of the Board of Police Commissioners and the individual police officer, the City's cap is still exposed and we would request that on the verdict -- the judgment form that you reduce the judgment to the amount of the cap, which is (sic) 335 118.

THE COURT: And Mr. Schlappizzi.

MR. SCHLAPPRIZZI: Yes. The plaintiff objects to the proposed court action to reduce the verdict. We continue to challenge the constitutionality of the provisions in 537.600, 537.610, 537.615, et cetera, for the reasons that we have previously on August the 19th 2004, placed before the Court. That was the first opportunity to challenge the constitutionality

of the described cap. And we, at the beginning of this trial, continued that this cap was unconstitutional. And at this juncture, when the City is now asking for the imposition of the cap, we reiterate our position that the cap is unconstitutional for the cascade of reasons that we set forth in our reply of August 19th, 2004.

THE COURT: Okay. Anything additional from the City?

MR. MCDONNELL: No, Judge.

MR. SCHLAPPRIZZI: And further, for the record, the amount that the City is responsible for, giving it credit for the 670,226 -- \$670,236 amount previously paid on behalf of the police officer and the Board of Police Commissioners, leaves a net amount towards the City's responsibility of \$549,764, and we ask the Court enter that judgment against the City in the amount of \$549,764, and not to reduce it because of the unconstitutionality of the cap. And state for the record that the only credit that the City's entitled to is that which has already been paid by concurrent or joint tortfeasors.

THE COURT: And because this is a court of first impression, I cannot make constitutional determinations. I'm limited to the \$335,118. If you'll review this and tell me if that adequately reflects.

MR. MCDONNELL: Yes, Judge.

(T. 276:5-277:24).

The trial court then applied the cap contained in Section 537.610 (T. 277) and entered a judgment in favor of Plaintiff and against the City, reciting the jury verdict of \$1,200,000, but specifically stating that “Plaintiff Kim Hodges recovery shall be limited to the City of St. Louis cap of \$335,118.” (LF 145-146).

Plaintiff then filed Plaintiff’s Objections to Imposition of Statutory Cap of Section 537.610, R.S.Mo. And Further Objection To the Imposition of Any Provisions of Section 537.600, and 537.615, R.S.Mo. (LF 112-144). She continued to specifically cite Article I, Section 2, Constitution of Missouri, 1945; Article I, Section 14, Constitution of Missouri, 1945; Article I, Section 1, Constitution of Missouri, 1945; Article II, Section 4, Constitution of Missouri, 1945; and Article IV, Section 30 (b), Constitution of Missouri, 1945. She argued, among other points, that the cap was unconstitutional because the reduction of Plaintiff’s verdict to the cap amount in this particular case deprived Plaintiff of the recovery of “economic damages” (LF. 113, ¶ 4), more specifically “medical expenses, loss of employment, and other economic damages due to the negligence of a governmental agency.” (LF 113, ¶ 3).

Plaintiff also filed her Motion to Set Aside Judgment entered November 3, 2005 and To Enter A New Judgment and Alternative Motion For Additur Pursuant to Section 537.068, R.S.Mo. Plaintiff again set forth her objection that the cap in Section 537.610 was invalid on constitutional grounds and requested the trial court

to enter a new judgment without imposition of the cap in the sum of \$529,764, or in the alternative to grant an additur to that amount (LF 115-116). She specifically cited Article I, Section 1; Article 1, Section 2; Article I, Section 14; Article I, Section 22(a); and Article 4, Section 30 (b) of the Missouri Constitution. She further set forth that the application of the Section 537.610.2 cap deprived her of the sum of \$194,646.00 – the difference between the net verdict (after credit for the settlement with the Officer and the Police Board) of \$529,764.00, and the actual judgment entered by the trial court after application of the cap of \$335,118.00 (LF 115-116). Plaintiff further presented her position to the trial court at the motion hearing on January 30, 2006 (T. 293-296). After that hearing, the trial court denied the Motion to Set Aside Judgment entered November 3, 2005 and To Enter A New Judgment and Alternative Motion For Additur Pursuant to Section 537.068, R.S.Mo. (L.F. 151). The trial court also specifically denied Plaintiff's Objections to Imposition of Statutory Cap of Section 537.610, R.S.Mo. (L.F. 151). By these orders the trial court thereby denied plaintiff's claim that Section 537.610 was invalid on constitutional grounds. (T. 295: 9-14; 296:7-10).

Plaintiff has carried her position as to the validity of Section 537.610 forward in her appeal to this Honorable Court. The foregoing procedural history demonstrates that Plaintiff's constitutional claims were properly asserted in the trial court at the earliest possible time, that her assertion of her claims was renewed repeatedly during the proceedings in the trial court, that the trial court

ruled upon and denied her claims, and that her claims were thereby properly preserved throughout the proceedings in the trial court for review by this Court.

With respect to the City's argument that facts showing the constitutional violation were not stated in the trial court, the Court's attention is invited to *Village of Beverly Hills v. Schluter*, 344 Mo. 1098, 130 S.W.2d 532 (1939). That was a suit to collect a license tax on the sale of gasoline. Defendant's answer asserted that the ordinance authorizing the license tax violated a number of specified state and federal constitutional provisions. Plaintiff Village claimed the answer was insufficient to raise the constitutional issues because the answer did not allege "how the sections (of the Constitution) are violated by the ordinance." 344 Mo. at 1102, 130 S.W.2d at 534. This Court rejected the Village's argument, and considered the constitutional arguments on their merits, observing that the way in which the ordinance violated the constitution "is apparent here, if defendant is correct respecting validity on constitutional grounds." *Id.* If the ordinance authorizing the tax was unconstitutional, then the collection of the tax was the fact that showed the constitutional violation. The same reasoning applies in this case. Here, where a cap on damages is challenged, the fact that the cap is imposed to reduce a jury verdict is the fact that constitutes and shows the constitutional violation. In this case, it is noteworthy that the City does not indicate in this Court what additional facts Plaintiff should have presented to the trial court prior to the jury verdict, and never once in the trial court argued that the issue was not properly before the trial court due to a lack of a sufficient factual

statement. The City does not claim that any alleged insufficiency in the manner in which Plaintiff asserted her claim prevented the City from developing or presenting to the trial court any evidentiary facts needed by the City to fully present its position on the constitutional validity of Section 537.610 to the trial court. Further, after the jury verdict, Plaintiff clearly did set forth more detailed facts in support of her claim, based upon the specifics of the impact of the application of the cap in light of the verdict returned by the jury. In short, she supplied specific facts as the developments in the trial enabled her to do so.

Based on the record in the trial court, as outlined above, the purposes of the rules concerning preservation of constitutional claims were fully met here.

Plaintiff gave notice of her intent to challenge the validity of the cap on constitutional grounds at the earliest opportunity, in her reply to the City's to the First Amended Petition – long, long before the commencement of the trial – not as an after-thought in a post-trial motion. There is no legitimate claim of surprise to City, and the trial court was given the opportunity to fairly identify and rule on the issues, notwithstanding her stated view that as a “court of first impression” she did not have the authority to find the cap invalid on constitutional grounds. The trial court ruled on and rejected Plaintiff's constitutional arguments.

Plaintiff's constitutional claims were properly and sufficiently asserted in the trial court at the earliest possible time. Plaintiff specifically designated the constitutional provisions on which she relied. Plaintiff's claims were properly preserved throughout the proceedings in the trial court for review by this Court.

See State ex rel. Tompras v. Board of Election Commissioners of St. Louis County, 136 S.W.3d 65, 66 (Mo. banc 2004) (constitutional claim preserved as to section of Chapter 115 specifically identified in the trial court). The City's contentions to the contrary are without merit, and should be rejected by the Court. The Court should address the substance of Plaintiff's argument.

II. Section 537.610's cap on recovery violates equal protection under Article I, Section 2, of the Missouri constitution because it denies Plaintiff recovery of the full amount of her economic damages, unlike medical negligence claims in which full economic damages plus a capped amount of non-economic damages may be recovered, and unlike any other claims under Missouri law, which have no caps on recovery at all.

Plaintiff's substantive argument that Section 537.610's cap violates equal protection is fully set forth in her initial Brief. There are, however, several aspects of the City's response that should be addressed.

The City refers to Section 537.610 as a Sovereign Immunity Cap, emphasizing that "a sovereign may prescribe the terms and conditions under which it may be sued, and the decision to waive immunity, and to what extent it may be waived, lies within the legislature's purview." City's Second Brief at 46. In this the City almost seems to be asserting, without saying in so many words, that this statute should for that reason be treated differently and more deferentially than a cap on damages against a private non-governmental entity. Such an

assertion would be wrong, however, because regardless of sovereign immunity, the General Assembly generally has the authority, within constitutional limits, to create and abolish causes of action, including the power to limit recovery in those causes of action. *Adams By and Through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 907 (Mo. banc 1992). For purposes of this case, there is no practical difference between the two. In either event, such limitations must still conform to constitutional requirements and there is no reason to accord this cap on recovery against governmental entities a more deferential treatment than any other.

The City's Second Brief reviews in detail in the prior decisions of this Court in *Richardson v. State Highway and Transportation Commission*, 863 S.W.876 (Mo. banc 1993), and *Fisher v. State Highway Commission*, 948 S.W.2d 607 (Mo. banc 1997), decisions Plaintiff directly acknowledged in her initial Brief. The equal protection issue Plaintiff presents here, however, was not directly addressed, nor was it decided, in either *Richardson* or *Fisher*.

Section 537.610 places a cap on the recovery of *all* damages, including damages that are solely economic in nature. With the exception of medical negligence claims, no other class of claims is subject to any cap under Missouri law. And the cap on medical negligence claims is not even remotely as harsh as that imposed by Section 537.610. Medical negligence claims have no cap at all on economic damages. In medical negligence cases, the *full* amount of economic damages may be recovered plus up to \$350,000 in non-economic damages.

Nowhere in the City's Second Brief does it make any attempt defend or to articulate a rational basis for this gross and harsh disparity between the treatment of victims of governmental negligence and the victims of medical negligence, much less to show that this disparity is substantially related to the achievement of an important governmental objective. There is a very substantial and remarkable degree of similarity in the legislative purposes attributed to both caps. With respect to medical negligence, it is to attempt to assure the availability and affordability of health care services by limiting awards. *See Adams*, 832 S.W.2d at 704. With respect to governmental negligence, it is to attempt to avoid insolvency or increased taxes by limiting awards, *See Fisher v. State Highway Commission*, 948 S.W.2d 607, 610-612 (Mo. banc 1997). In other words, to attempt to assure that governmental services will be available and affordable. Yet despite this congruity of legislative purpose, in medical negligence cases a plaintiff may recover the full amount of economic damage and up to \$350,000 in non-economic damage. In claims against a public entity, such as the instant case, the cap may well, as it does here, deny recovery of even the full amount of economic damages.

The City does not explain the rational (or any other) basis for the extreme disparity in the treatment of these two classes of claimants, an omission that is all the more glaring because in *Adams*, the cap on non-economic damages was said by this Court to have a rational basis at least in part because it did *not* limit the recovery of economic damages. *Adams*, 832 S.W.2d at 904.

It is for these reasons that Plaintiff submits this disparity does not have a rational basis for equal protection purposes. It certainly is not substantially related to the achievement of an important governmental objective. The cap on damages in Section 537.610 violates equal protection. Article I, Section 2 of the Missouri constitution of 1945.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Plaintiff-Respondent/Cross-Appellant's first brief filed in this Court, the limit or cap on recovery contained in Section 537.610.2 violates equal protection under Article I, Section 2 of the Missouri Constitution. The trial court therefore erred in reducing the verdict against the City to the amount of the cap. Because there was no valid statutory cap or limitation on the damages as assessed by the jury in its verdict, the trial court should have entered a net judgment against the City in the amount of \$529,764, representing the jury verdict less the amount of the settlement with Officer and the Police Board. Plaintiff therefore respectfully prays this Honorable Court to reverse the trial court's action in applying the cap and remand to the trial court with directions to enter judgment in favor of plaintiff in the sum of \$529,764.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Reply Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 5060 words, as calculated by Microsoft Word, and is in 13 point Times New Roman font;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief and a copy in electronic format on a 3 ½" disk were sent U.S. Mail, postage prepaid, to the following parties on this 21st day of December, 2006:

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