IN THE SUPREME COURT OF MISSOURI

CASE NO. SC90107

JAMES KLOTZ AND MARY KLOTZ

Appellants/Cross-Respondents

vs.

MICHAEL SHAPIRO, M.D. AND METRO HEART GROUP, LLC

Respondents/Cross-Appellants.

On Appeal from the Circuit Court of St. Louis County
Case No. 06CC-4826
Honorable Barbara Wallace, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES IV

INTRODUCTION 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF FACTS 4

POINTS RELIED ON 7

ARGUMENT 12

I. THE TRIAL COURT ERRED IN HOLDING THAT THE RETROSPECTIVE APPLICATION OF AMENDED § 538.210 TO THIS CASE DOES NOT VIOLATE ARTICLE 1, § 13 OF THE MISSOURI CONSTITUTION. 12

II. H.B. 393 VIOLATES THE CLEAR TITLE AND SINGLE SUBJECT MANDATE OF ARTICLE III, SECTION 23 OF THE MISSOURI CONSTITUTION. 21

III. THE CAP ON NON-ECONOMIC DAMAGES IN AMENDED § 538.210 VIOLATES NUMEROUS PROVISIONS OF THE MISSOURI CONSTITUTION. 28

A. The Revised Cap on Non-Economic Damages Differs Significantly From the Prior Cap. 29

B. The Legislature Lacked a Rational Basis for Enacting the Revised Cap. 31

1. There was no malpractice liability crisis in Missouri. 32

2. 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..... 35

3. There was no evidence that doctors were fleeing Missouri, whether due to liability concerns or for any other reason..... 39

a. 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 39

b. The number of high-risk medical specialists was rising—not falling—in Missouri in 2005..... 42

4. 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. 43

C. The Revised Cap Violates the Missouri Constitution. 46

1. Amended § 538.210 Violates the Equal Protection Clause of the Missouri Constitution, Article I, Section 2. 46

2. Amended § 538.210 Violates the Prohibition Against Special Legislation, Article III, Section 40..... 56

3. Amended § 538.210 Violates the Due Process Clause of the Missouri Constitution, Article I, Section 10. 60

4. Amended § 538.210.4 Violates Mary Klotz's Right to Open Courts and Certain Remedies, Article I, § 14. 64

5. Amended § 538.210 Violates the Right to Trial By Jury, Article I, Section 22(a). 69

a. The Right to Trial By Jury, Properly Understood, Includes the Right to Have a Jury Determine the Amount of Damages, And that Determination Cannot Be Overridden By Legislative Decree 71

b. This Court in *Adams* Erred in Concluding that a Non-Economic Damages Cap Such as Amended § 538.210 Does Not Infringe Upon the Right to a Jury Trial, and Thus *Adams* Should Be Overruled 77

6. Amended § 538.210 Violates the Separation of Powers, Article II, Section 1. 79

CONCLUSION 84

TABLE OF AUTHORITIES

Cases

ABC Liquidators, Inc. v. Kansas City, 322 S.W.2d 876 (Mo. banc 1959)..... 58

Adams v. Children's Hospital, 832 S.W.2d 898 (Mo. banc 1992)..... passim

Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978) 56

Barbieri v. Morris, 315 S.W.2d 711 (Mo. 1958) 19

Batek v. Curators of University of Missouri, 920 S.W.2d 895 (Mo. banc 1996)..... 57

Bauldin v. Barton County Mutual Insurance Co., 666 S.W.2d 948 (Mo. App. S.D. 1984)..... 2

Bernat v. State, 194 S.W.3d 863 (Mo. banc 2006)..... 47

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

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. banc 1991)..... 57, 58

Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991) 55

Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. banc 1989)..... 2

Carson v. Maurer, 424 A.2d 825 (N.H. 1980) 9, 48

Carter v. Pottenger, 888 S.W.2d 710 (Mo. App. S.D. 1994)..... 15

Community Resources for Justice v. City of Manchester, 917 A.2d 707 (N.H. 2007)..... 48

*Condemarin v. University Hosp*ital, 775 P.2d 348 (Utah 1989) 55

Cook v. Newman, 142 S.W.3d 880 (Mo. App. W.D. 2004)..... 14, 19, 30

Craig v. Boren, 429 U.S. 190 (1976) 47

Dahnke-Walker Milling Co. v. Blake, 145 S.W. 438 (Mo. 1912) 2

Department of Social Services v. Villa Capri Homes, Inc., 684 S.W.2d 327 (Mo. banc 1985) 21

Dimick v. Schiedt, 293 U.S. 474 (1935) 70, 72

Director of Department of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens, 555 S.W.2d 293 (Mo. banc 1977) 10, 63

Doe v. Phillips, 194 S.W.3d 8331 (Mo. banc 2006) 7, 13, 14, 20

Doe v. Roman Catholic Diocese, 862 S.W.2d 338 (Mo. banc 1993) 13, 20

Duren v. Suburban Community. Hospital, 495 N.E.2d 51 (Ohio Ct. C.P. 1985) 76

Dye v. Division of Child Support Enforcement, 811 S.W.2d 355 (Mo. banc 1991) 3

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) 11, 72, 74, 78

Ferdon ex. Petrucelli v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440 (Wis. 2005) 9, 55

Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99 (Mo. banc 1985). 80, 81

FormyDuval v. Bunn, 530 S.E.2d 96 (N.C. App. 2000) 39

Foster v. St. Louis County, 239 S.W.3d 599 (Mo. banc 2007) 54

Frison v. City of Pagedale, 897 S.W.2d 129 (Mo. App. E.D. 1995) 61

Fust v. Attorney General, 947 S.W.2d 424 (Mo. banc 1997) 22, 58, 83

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 72

H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. App. E.D. 1995) 15, 19

Hampton v. Big Boy Steel Erection, 21 S.W.3d 220 (Mo. 2003) 7

Hanvey v. Oconee Memorial Hosp., 416 S.E.2d 623 (S.C. 1992) 55

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758 (Mo. banc 2007) 14

Home Builders Association v. State, 75 S.W.3d 267 (Mo. banc 2002).....passim

Independence-National Education Association v. Independence School District, 223 S.W.3d 131 (Mo. banc 2007) 70

Jackson County Sports Complex Authority v. State, 226 S.W.3d 156 (Mo. banc 2007).....8, 22, 23, 25

Jaycox v. Brune, 434 S.W.2d 539 (Mo. 1968) 77

Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988)..... 76

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

Kyger v. Koerper, 207 S.W.2d 46 (Mo. banc 1946) 12, 83

Lakin v. Senco Products, Inc., 987 P.2d 463 (Or. 1999)..... 11, 74

Lane v. State Commission of Psychologists, 954 S.W.2d 23 (Mo. App. E.D. 1997)..... 61

LaRose v. Washington University, 154 S.W.3d 365 (Mo. App. E.D. 2004)..... 29

Lee v. Conran, 111 S.W. 1151 (1908)..... 11, 71

Lile v. Hancock Place School District, 701 S.W.2d 500 (Mo. App. E.D. 1985)..... 61

Lucas v. Murphy, 156 S.W.2d 686 (Mo. 1941)..... 19

Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) 56, 76

Magerstadt v. LaForge, 303 S.W.2d 130 (Mo. 1957)..... 10, 63

Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. banc 1991)9, 32, 47, 55

Medical Shoppe International, Inc. v. Director of Revenue, 156 S.W.3d 333 (Mo. banc 2005) 70

Mendelsohn v. State Board of Registration for the Healing Arts, 3 S.W.3d 783, 786 (Mo. banc 1999) 14

Missouri State Medical Association v. Missouri Department of Health, 39 S.W.3d 837 (Mo. banc 2001) 22

Moore v. Mobile Infirmary Association, 592 So. 2d 156 (Ala. 1991)..... 55

Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991)..... 55

Nestlehutt v. Atlanta Oculoplastic Surgery, P.C., No. 2007-EV-002223-J (Fulton County Ct. Feb. 9, 2009), *appeal pending*, No. S09A1432 (Ga. Sup. Ct.)..... 77

Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47 (Mo. banc 1999) 2

Roy v. Missouri Department of Corrections, 23 S.W.3d 738 (Mo. App. W.D. 2000)..... 61

Scott v. SSM Healthcare, 70 S.W.3d 560 (Mo. App. E.D. 2002) 30

Sibley v. Board of Supervisors of Louisiana State University, 477 So. 2d 1094 (La. 1985)..... 56

Simpson v. Kilcher, 749 S.W.2d 386 (Mo. banc 1988)..... 83

Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987)..... 76

Snodgras v. Martin & Bayley, Inc., 204 S.W.3d 638 (Mo. banc 2006) 11, 66

Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (Cir. Ct. N.H. 1814)..... 19

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

Spitcaufsky v. Hatten, 182 S.W.2d 86 (Mo. 1944)..... 10, 63

Squaw Creek Drainage District v. Turney, 138 S.W. 12 (1911) 14

St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. banc 1998)..... 8, 22, 24, 25

St. Mary Hospital Inc., v. Phillipe, 769 So. 2d 961 (Fla. 2000)..... 11, 49, 53

State ex rel. Dickason v. Marion County Court, 30 S.W. 103 (Mo. 1895) 28

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003) 11, 71

State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) 55

State ex rel. St. Louis-San Francisco Railway Co. v. Buder, 515 S.W.2d 409 (Mo. banc 1974) ..... passim

State v. Stokely, 842 S.W.2d 77 (Mo. banc 1992) 47

Stillwell v. Universal Construction Co., 922 S.W.2d 448 (Mo. App. W.D. 1996) 7, 18

Strahler v. St. Luke's Hospital, 706 S.W.2d 7 (Mo. banc 1986) 11, 67, 68

Theodosis v. Keeshin Motor Express Co., 92 N.E.2d 794 (Ill. App. Ct. 1950) 15

Trujillo v. City of Albuquerque, 965 P.2d 305 (N.M. 1998) 55

Tull v. United States, 481 U.S. 412 (1987) 77

Vance v. Bradley, 440 U.S. 93 (1979) 32

Vargas v. Cummings, 149 F.3d 29 (1st Cir. 1998) 39

Wheeler v. Briggs, 941 S.W.2d 512 (Mo. banc 1997) 66

Wiley v. Henry Ford Cottage Hospital, 668 N.W.2d 402 (Mich. Ct. App. 2003) 76

Wilkes v. Missouri Highway & Transportation Commission, 762 S.W.2d 27, 28 (Mo. banc 1988) 14

Wright v. Barr, 62 S.W.3d 509 (Mo. App. W.D. 2001) 29

Constitutional Provisions

FLA. CONST. art. I, § 22 76

KAN. CONST. Bill of Rights, § 5 76

MO. CONST. art. I, § 10 ..... 10, 60

MO. CONST. art. I, § 13 ..... passim

MO. CONST. art. I, § 14 ..... 11, 64

MO. CONST. art. I, § 2 9

MO. CONST. art. I, §10 2

MO. CONST. art. I, §2 ..... 2, 47

MO. CONST. art. I, §22(a) 2, 69

MO. CONST. art. II, § 1 ..... 12, 80

MO. CONST. art. III, § 23 ..... passim

MO. CONST. art. III, § 40 ..... 2, 57

MO. CONST. art. III, § 40(30) 9

MO. CONST. art. III, § 40(6) 9, 59

MO. CONST. art. III, §1 2

MO. CONST. art. V, § 3 1

OHIO CONST. art. I, § 5 76

TEX. CONST. art. I, § 15 76

U.S. CONST. amend XIV 47

Rules

Sup. Ct. Rule 72.01(b) 3

Sup. Ct. Rule 74.01 3

Sup. Ct. Rule 78 3

Sup. Ct. Rule 81.04(a) 4

Sup. Ct. Rule 81.05(a) 3, 4

Sup. Ct. Rule 81.05(b) 4

Statutes

1986 Mo. Laws 879 ..... 15, 16, 25

2005 Mo. Legis. Serv. H.B. 393 ..... 1, 23, 25, 26

H.B. 700, §44 (1987) 81

Mo. Rev. St. § 538.300 (2008) 1, 15

Mo. Rev. Stat. § 355.176 (2008) 24, 25

Mo. Rev. Stat. § 512.020 (2008) 4

Mo. Rev. Stat. § 537.068 (1987) 81

Mo. Rev. Stat. § 538.210 (1986) 77

Mo. Rev. Stat. § 538.210 (2008) ..... passim

Mo. Rev. Stat. § 538.210.1 (2000) 30

Mo. Rev. Stat. § 538.210.4 (2000) 16, 17, 29, 67

Mo. Rev. Stat. § 538.210.4 (2008) 29

Mo. Rev. Stat., § 508.010 (2008) 25

S.B. 280, 92nd Gen. Assembly, Reg. Sess. (Mo. 2003) 26, 27

Other Authorities

AMA, *Press Online Catalog*, available at https://catalog.ama-assn.org (last visited July 29, 2009) 39

Casolino, Lawrence P., *Physicians and Corporations: a Corporate Transformation of American Medicine*, 29 J. HEALTH POL. POL'Y & L. 869 (2004) 40

Cortez, Nathan, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 IND. L.J. 71 (2008) 40

Finley, Lucinda M., *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263 (2004) 54

Hyman, David A., "Not Worth the Pain and Suffering," FORBES MAGAZINE, Sep. 15, 2008 62

MDI, *Missouri Medical_Malpractice Insurance Report* (Oct. 2005) 32

MHA, *An Overview of the Medical Malpractice Insurance Market for Physicians* (Oct. 2002) 37

Missouri House of Representatives, *Summary of the Truly Agreed Version of H.B.* 27

Missouri Senate, *Summary of Truly Agreed to and Finally Passed Version of S.B. 280* 27

Peck, Robert S., *Violating the Inviolate: Caps on Damages and the Right to Trial By Jury*, 31 U. DAYTON L. REV. 307 (2006) 74

INTRODUCTION

This is an appeal in a medical malpractice action in which the jury awarded Appellants/Cross-Respondents James and Mary Klotz (hereinafter "the Klotzes") more than $1,000,000 in non-economic damages. Respondents/Cross-Appellants Michael Shapiro, MD and Metro Heart Group, LLC (hereinafter "MHG") sought, and the trial court granted—over the Klotzes' objections, a reduction in the verdict for non-economic damages pursuant to the revised statutory cap on such damages found in Mo. Rev. Stat. § 538.210 (2008), as amended by 2005 Mo. Legis. Serv. H.B. 393 ("H.B. 393"). The trial court rejected the Klotzes' constitutional arguments that H.B. 393 and the revised cap (hereinafter "amended § 538.210") violated numerous provisions of the Missouri Constitution, especially as retrospectively applied to the Klotzes, who had been injured prior to the effective date of the 2005 act. This appeal thus presents the Court with its first opportunity to consider the constitutionality of H.B. 393 and amended § 538.210.

JURISDICTIONAL STATEMENT

The Supreme Court has exclusive appellate jurisdiction of constitutional challenges to state statutes. MO. CONST. art. V, § 3. This appeal includes challenges under the Missouri Constitution to the changes in tort law imposed in 2005 by H.B. 393. In particular, the Klotzes contend that the application of H.B. 393, by Mo. Rev. Stat. § 538.300 (2008), to causes of action that accrued before August 8, 2005, violates the Missouri Constitution's prohibition against the retrospective operation of law, MO. CONST. art. I, § 13; and that House Bill 393 is unconstitutional in its entirety as violative

of the clear title and single subject matter mandate, MO. CONST. art. III, § 23. In addition, the Klotzes contend that H.B. 393's revised cap on non-economic damages awards in medical negligence cases, amended § 538.210, violates equal protection, art. I, § 2; the prohibition against special legislation, art. III, § 40; the due process clause, art. I, § 10; the right to open courts, art I, § 14; the right to trial by jury, art. I, § 22(a); and the separation of powers, art. III, § 1.

Although this Court upheld a 1986 non-economic damages cap against certain constitutional challenges in *Adams v. Children's Hospital*, 832 S.W.2d 898 (Mo. banc 1992), to date no appellate court has addressed the constitutionality of H.B. 393, nor did *Adams* have an opportunity to address certain constitutional objections to statutory caps on damages that are at issue here. The constitutional issues involved in this appeal are, therefore, "real, substantial," made in "good faith," and within the exclusive jurisdiction of this Court. *Rodriguez v. Suzuki Motor Corp*., 996 S.W.2d 47, 52 (Mo. banc 1999).

The Klotzes presented their constitutional objections to the trial court in a timely fashion and with the requisite specificity. *See Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989) (citations omitted). Plaintiffs fully complied with this rule by raising their constitutional objections to amended § 538.210 before trial and in their replies to Defendants' answers. *See Bauldin v. Barton County Mut. Ins. Co*., 666 S.W.2d 948, 951 (Mo. App. S.D. 1984) (noting that raising the constitutional issue by reply to the amended answer is a legitimate way to challenge the constitutionality of the statute); *Dahnke-Walker Milling Co. v. Blake*, 145 S.W. 438, 440 (Mo. 1912) (holding that where the plaintiff in its reply failed to question the constitutionality of the statute relied on by

the garnishee in its answer, such question was waived); *see also Dye v. Div. of Child Support Enforcement*, 811 S.W.2d 355, 357-58 (Mo. banc 1991) (rejecting the suggestion that a constitutional point not set out in an initial pleading cannot be added by amendment).

The Klotzes' appeal concerns the January 22, 2009, Order/Judgment of the trial court applying amended § 538.210 and its caps to reduce the jury's non-economic damage awards against Respondents/Cross-Appellants Dr. Michael Shapiro and MHG. *See* App. A1-A12*;* Legal File, at 1437-48. This Order/Judgment is a "judgment" within the meaning of Supreme Court Rule 74.01 in that it was a writing denominated "judgment" and signed by the trial judge, disposing of all the claims of all the parties on the merits. *Id*. Finality of the January 22, 2009 judgment was suspended by operation of Supreme Court Rule 81.05(a) by timely filed post-trial motions under Rules 72.01(b) and 78. Legal File, at 1449-1521. Defendants' post-trial motions were denied by the trial court's order of March 30, 2009. Supplemental Legal File, 2308. The Klotzes' motion to amend the judgment as to the interest rate applicable to the award of past damages against Defendant St. Anthony's Medical Center ("SAMC") was granted on that same date, and the trial court issued an amended judgment on March 30, 2009, changing the interest rate for plaintiffs' past damages against SAMC, but leaving the other aspects of the January 22, 2009 judgment unchanged. Supplemental Legal File, at 2309. The Klotzes' notice of appeal was filed on April 3, 2009, within 10 days of the rulings on the

post-trial motions, and is timely under Supreme Court Rules 81.04(a) and 81.05(b).[1] Supplemental Legal File, 2310-2313; 2328-2345.

Both James and Mary Klotz are authorized to appeal as a "party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited" within the meaning of Mo. Rev. Stat. § 512.020 (2008). James Klotz's jury award against Dr. Shapiro and MHG was reduced by $274,430.00 when the trial court, in its Judgment, applied HB 393's cap. App. A1-A12; Legal File, at 1437-48 (Order/Judgment). Mary Klotz's non-economic damage award against Dr. Shapiro and MHG totaling $220,430.00 was entirely eliminated by the trial court's application of HB 393's cap to her award.

The Judgment/Order against SAMC is not being appealed by the Klotzes, and SAMC's appeal has been dismissed. Mo. Ct. of App. Order, April 11, 2009.

STATEMENT OF FACTS

James Klotz suffered sepsis, amputation, and organ failure in March 2004 when an implanted pacemaker became infected. He and his wife, Mary Klotz, filed suit against SAMC for medical malpractice and loss of consortium on December 4, 2006 (Legal File,

[1] If, however, the trial court's issuance of an amended judgment on March 30, 2009 is considered the judgment appealed from, then that judgment becomes final after 30 days under Supreme Court Rule 81.05(a)(2)(B), and plaintiffs' notice of appeal is premature but timely under Supreme Court Rule 81.05(b).

at 17),[2] and amended that petition to add Dr. Shapiro and MHG as defendants on March 1, 2007 (Legal File, at 18-21). By the time of trial, the case was proceeding under the Second Amended Petition filed March 13, 2008 (Legal File, at 48-50). That petition alleged, against SAMC, that it "failed to timely remove an IV catheter inserted into James Klotz' right hand by EMS on 3/17/04, allowing phlebitis and or an infection to develop at the IV site," along with an allegation regarding a failure to train its nursing staff. Legal File, at 48. The allegations against Dr. Shapiro and MHG included allegations that Dr. Shapiro "failed to adequately treat the phlebitis and or infection in James Klotz' right hand before implanting a permanent pacemaker on 3/22/04, resulting in the spread of infection to the pacemaker," and "failed to inform plaintiff James Klotz of the heightened risk of infection at the right wrist IV site." Legal File, at 50.

The case was tried to a jury in July 2008. The jury found SAMC, MHG, and Dr. Shapiro negligent in their medical treatment of James Klotz. The jury assessed 33% of the fault to SAMC and the remaining 67% of the fault to Dr. Shapiro and MHG. Supplemental Legal File, at 2301. The jury awarded Mr. Klotz damages totaling $2,067,000, which included non-economic damages in the amount of $760,000. *Id*. The jury also awarded Mary Klotz damages totaling $513,000, which included non-economic damages in the amount of $329,000 for loss of consortium. Supplemental Legal File, at 2302.

[2] Two earlier suits had been dismissed without prejudice.

Following post-trial motions, the trial court found that the award against SAMC was governed by § 538.210's non-economic damages cap, as it existed prior to its amendment in 2005, and therefore did not require reduction. Legal File, at 1437-48. The court otherwise concluded that the non-economic damages awards against MHG and Dr. Shapiro were governed by § 538.210 as amended in 2005 by HB 393, and it accordingly reduced James Klotz's award of non-economic damages against those defendants from $509,200 to $234,500. Legal File, at 1446-47. Likewise, pursuant to amended § 538.210.4, the court reduced Mary Klotz's award of non-economic damages against Dr. Shapiro and MHG from $220,430 to $0. Legal File, at 1447. The court rejected the Klotzes' argument that amended § 538.210 was unconstitutional in any respect.[3]

The Klotzes appealed that judgment in a timely fashion to this Court. Legal File, at 2310-13. The appeal against SAMC was subsequently dismissed following a settlement agreement.

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[3] In its January 22, 2009 Order/Judgment, the trial court provided its reasons for rejecting the Klotzes' argument that application of amended § 538.210 to their claims, which had accrued in March 2004, violated the constitutional prohibition against retrospective legislation, MO. CONST. art. I, § 13. As to all of the Klotzes's other constitutional arguments, however, the court merely stated that those arguments "have been considered and DENIED." Legal File, at 1443.

POINTS RELIED ON

1. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because application of amended § 538.210 to the jury's award of non-economic damages to the Klotzes violates the prohibition against retrospective legislation in article I, § 13 of the Missouri Constitution, in that the statutory change in the non-economic damage cap in malpractice actions is a law affecting substantive rights and therefore it cannot be applied retrospectively to the Klotzes' claims which accrued in March 2004, well before the effective date of H.B. 393.

Doe v. Phillips, 194 S.W.3d 8331 (Mo. banc 2006).

State ex rel. St. Louis-San Francisco Ry. Co. v. Buder, 515 S.W.2d 409 (Mo. banc 1974).

Stillwell v. Universal Constr. Co., 922 S.W.2d 448 (Mo. App. W.D. 1996), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 21 S.W.3d 220 (Mo. 2003).

MO. CONST. art. I, § 13.

2. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because H.B. 393, the legislation that amended § 538.210, unconstitutionally violates the clear title and single subject requirements of article III, § 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.

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).

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

MO. CONST. art. III, § 23.

3. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the equal protection clause of the Missouri Constitution, article I, § 2, in that the revised cap on non-economic damages in malpractice actions 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, the spouses of severely injured victims 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 revised cap is 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.

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

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

Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

MO. CONST. art. I, § 2.

4. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the prohibition against special legislation in article III, § 40 of the Missouri Constitution, in that the revised 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.

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

MO. CONST. art. III, § 40(6) and (30).

5. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the due process clause of the Missouri Constitution, article I, § 10, in that—as the General Assembly knew—the revised cap on non-economic damages in malpractice actions was wholly irrational 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 and also in that the revised cap on non-economic damages interferes with the ability of malpractice victims who suffer primarily non-economic injury to obtain counsel to represent them in violation of their fundamental right to be represented by counsel.

Magerstadt v. LaForge, 303 S.W.2d 130 (Mo. 1957)

Spitcaufsky v. Hatten, 182 S.W.2d 86 (Mo. 1944), *overruled on other grounds by Dir. of Dep't of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens*, 555 S.W.2d 293 (Mo. banc 1977).

MO. CONST. art. I, § 10.

6. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, and in completely eliminating the award of non-economic damages to Mary Klotz for loss of consortium because, as applied to Ms. Klotz's claim, amended § 538.210.4 violates the right to open courts and certain remedies in Missouri Constitution, article I, § 14, in that amended § 538.210 arbitrarily and unreasonably restricts the ability of spouses of malpractice

victims to access the courts to vindicate claims for loss of consortium, by making their recovery of any damages for loss of consortium contingent upon their malpractice victim spouses recovering less than $350,000 in damages for their own non-economic injuries.

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

Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. banc 1986).

Snodgras v. Martin & Bayley, Inc., 204 S.W.3d 638 (Mo. banc 2006).

St. Mary Hosp. Inc., v. Phillipe, 769 So. 2d 961 (Fla. 2000).

MO. CONST. art. I, § 14.

7. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the right to trial by jury guaranteed by article I, § 22(a) of the Missouri Constitution, in that, as understood at common law, that right encompasses the substantive right to have the plaintiffs' damages determined by the jury, the jury here determined that the Klotzes' non-economic injuries merited an award of damages in excess of the revised cap, and amended § 538.210 thereby prevented the jury's award from having its full and intended effect.

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).

Lakin v. Senco Products, Inc., 987 P.2d 463 (Or. 1999).

MO. CONST. art. I, § 22(a).

8. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the constitutional separation of powers prescribed by article II, § 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 with a fixed "legislative remittitur" which takes no account of the facts in a particular case.

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

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

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

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

MO. CONST. art. II, § 1.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT THE RETROSPECTIVE APPLICATION OF AMENDED § 538.210 TO THIS CASE DOES NOT VIOLATE ARTICLE 1, § 13 OF THE MISSOURI CONSTITUTION.

Point Relied on #1. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because application of amended § 538.210 to the jury's award of non-economic damages to the Klotzes violates the prohibition against retrospective legislation in Article I, Section 13 of the Missouri Constitution, in that the statutory change in the non-economic damage

cap in malpractice actions is a law affecting substantive rights and therefore it cannot be applied retrospectively to the Klotzes' claims which accrued in March 2004, well before the effective date of H.B. 393.

The trial court held that amended § 538.210 affects the Klotzes' substantive rights but may nonetheless operate retrospectively in spite of Article I, § 13 of the Missouri Constitution's clear command to the contrary, because, in its view, the Legislature had "cogent reasons" for directing that the law operate retrospectively. Legal File, at 1443 (Order/Judgment) (concluding that the "cogent reason" here is a "perceived health care crisis"). The trial court's conclusion misconceives the nature of the constitutional guarantee. The constitutional bar to laws that are retrospective in operation is not a matter of legislative grace. Rather, as this Court has consistently affirmed, "clear legislative intent to apply [a] law retrospectively [cannot] supersede the specific prohibition on retrospective laws." *Doe v. Phillips*, 194 S.W.3d 833, 851 (Mo. banc 2006) (citing *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. banc 1993)). Thus, upon concluding that the law operates retrospectively and affects the Klotzes' substantive rights, the trial court should have invalidated amended § 538.210.

It is well established that the Missouri Constitution prohibits laws that are retrospective in operation. MO. CONST. art. I, § 13 ("That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."). The prohibition reflects "the underlying repugnance to the retrospective application of laws." *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1974). It

has been "part of Missouri law since this State adopted its first constitution in 1820," and is recognized as being "broader than the *ex post facto* bars in other states." *Phillips*, 194 S.W.3d at 850

The constitutional ban forbids the retrospective application of a law affecting substantive rights. *Id*. But "[p]rocedural and remedial statutes 'not affecting substantive rights, may be applied retrospectively, without violating the constitutional ban on retrospective laws.'" *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc 2007) (quoting *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783, 786 (Mo. banc 1999)).

"The distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *Cook v. Newman*, 142 S.W.3d 880, 893 (Mo. App. W.D. 2004) (citing *Wilkes v. Mo. Highway & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988)); *accord Hess*, 220 S.W.3d at 769. As the Court explained in *Phillips*:

> A retrospective law is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired.

194 S.W.3d at 850 (quoting *Squaw Creek Drainage Dist. v. Turney*, 138 S.W. 12, 16 (1911)).

This Court has cautioned, however, that the distinction "between substance and procedure cannot be made 'in terms which require only the application of logic to reach the right conclusion in a particular case.'" *Buder*, 515 S.W.2d at 411 (quoting *Theodosis v. Keeshin Motor Express Co.*, 92 N.E.2d 794, 801 (Ill. App. Ct. 1950). "[N]otions of justice and fair play in a particular case are always germane" to the question whether the retrospective application of a law affects substantive rights, and "[m]erely to label certain consequences as substantive and others as procedural does not give sufficient consideration to this principle." *Id*.

H.B. 393, by its terms, operates retrospectively. "The provisions of the act . . . shall apply to all causes of action filed after August 28, 2005," Mo. Rev. St. § 538.300 (2008), even if the causes of action accrued before that date, *see Carter v. Pottenger*, 888 S.W.2d 710, 713 (Mo. App. S.D. 1994) ("In a negligence case the cause of action accrues when there is a breach of a duty owing to the plaintiff resulting in injury.").[4]

James Klotz's cause of action for medical negligence accrued in March 2004, *see Carter*, 888 S.W.2d at 713, and Mary Klotz's "separate and distinct" claim for loss of consortium accrued at that time as well, *see H.R.B. v. J.L.G.*, 913 S.W.2d 92, 99 (Mo. App. E.D. 1995). Therefore, because the Klotzes' causes of action against MHG and Dr.

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[4] By contrast, the prior cap on non-economic damages in medical malpractice cases, enacted in 1986 and upheld in *Adams*, operated only prospectively. *See* 1986 Mo. Laws 879, § 538.300 ("The provisions of sections 538.205 to 538.230 shall apply only to causes of action arising on or after February 3, 1986.").

Shapiro accrued before the effective date of H.B. 393, its provisions, including amended § 538.210, would apply retrospectively to this suit.

The effect of retrospectively applying amended § 538.210 in this case would be to alter the rights and liabilities of the parties. The Klotzes, rather than being entitled to the full $729,630 in non-economic damages awarded by the jury for Dr. Shapiro and MHG's proven acts of negligence, were deemed by the trial court to be entitled jointly only to $234,500 in non-economic damages; Mary Klotz, in particular, saw her recovery for non-economic damages entirely eliminated.

Before the enactment of 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*." 1986 Mo. Laws 879, § 538.210 (emphases added). The prior statute also provided that the amount of the cap would be adjusted annually for inflation, § 538.210.4, Mo. Rev. Stat., and the cap in effect for judgments entered in 2008 was $628,000.[5] The jury awarded Mr. Klotz $509,200 in non-economic damages from

[5] With the repeal of the inflation adjustment in § 538.210.4 , the Missouri Department of Insurance, Financial Institutions and Professional Regulation (DIFP) no longer publishes annual recalculations of the old cap. The department had determined that the old cap applicable in 2007 was $608,000. Legal File, at 558 (Memorandum from Jackie Kuschel to Linda Bohrer, Division Director, Market Regulation, DIFP (Jan. 16, 2008)). Applying the same formula employed by the department, that cap would have increased to

Dr. Shapiro and MHG; Mrs. Klotz was awarded $220,430 in non-economic damages from these same defendants. Because none of these amounts exceeds $628,000, the jury awards would not have been capped under the prior cap.

By contrast, as discussed in greater detail below, *infra*, at 29-30, amended § 538.210 imposes a single, unadjusted cap of $350,000 on non-economic damages in medical malpractice actions, regardless of the number of defendants or the number of acts of negligence. Mo. Rev. Stat. § 538.210 (2008). In addition, the new cap treats Mary Klotz as "the same plaintiff" as her spouse, so that she would not be entitled to any damages at all for loss of consortium once her husband had been awarded the capped amount. *See* Mo. Rev. Stat. § 538.210.4 (2008).

As this comparison demonstrates, the amendments to § 538.210, which took effect between the time of the negligent acts at issue here and the time of trial, affect the Klotzes' substantive rights to, as well as Dr. Shaprio and MHG's substantive liability for, non-economic damages. Thus, they cannot be applied retrospectively without violating article I, § 13.

State ex rel. St. Louis-San Francisco Ry. Co. v. Buder, 515 S.W.2d 409 (Mo. banc 1974), fully supports this view. There, the Court reviewed the application of a change in a statute that set a $50,000 recovery limitation in wrongful death actions. *Id*. at 409-10. The Missouri Legislature had repealed the limit after the decedent's death but before trial.

$628,000 for judgments rendered in 2008. Legal File, at 557 (Mary Coffey Affidavit, Ex. 15).

Id. The Court recognized that the application of the amended law would alter the rights and liabilities of the parties by subjecting them to a different set of legal effects than those in place at the time of the act of negligence. *Id*. at 410. It therefore refused to apply the amended law retrospectively, reasoning that the statutory limit had served to protect defendants from verdicts in excess of the limit. *Id*. at 411.

Stillwell v. Universal Construction Co., 922 S.W.2d 448 (Mo. App. W.D. 1996), also supports the Klotzes' arguments. There, the court considered the application of a workers' compensation statute that was amended to increase the monetary limit of an employer's liability for burial expenses for work-related death. *Id*. at 455-56. The amended law went into effect after the accident in question. *Id*. at 455. The court held that the amended statute could not be applied retrospectively. *Id*. at 456. It reasoned that the statutory increase affected the substantive rights of the employer because it possessed a vested right under the statute that its liability for burial expenses could not exceed a certain amount. *Id*.

Here, as in *Buder* and *Stillwell*, a legislative change to a statutory ceiling on damages that takes effect during the life of a cause of action is substantive and thus cannot be applied retrospectively. The rights and liabilities of the parties in effect at the time the acts of negligence occurred were such that each Defendant could be found to be separately liable to Jim and Mary Klotz for a certain amount of non-economic damages and the Klotzes could recover the full amount awarded to them by the jury. The effect of applying amended § 538.210 to this suit would be to impair the Klotzes' substantive rights and "attach a new disability in respect to transactions or considerations already

past." *Barbieri v. Morris*, 315 S.W.2d 711, 714 (Mo. 1958) (quoting *Lucas v. Murphy*, 156 S.W.2d 686, 690 (Mo. 1941)); *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 765 (Cir. Ct. N.H. 1814) (No. 13,156) (Story, J.), *accord Buder*, 515 S.W.2d at 410. James Klotz's recoverable non-economic damages against Dr. Shapiro and MHG would fall by almost $275,000 (from $509,200 to $234,500), and Mary Klotz would recover nothing at all of her $220,430 jury award against these defendants for her "separate and distinct" loss-of-consortium claim. *See H.R.B.*, 913 S.W.2d at 99.

Thus, the retrospective application of amended § 538.210 to this suit would drastically alter the rights and liabilities of the parties by subjecting them to a different set of legal effects than those in place at the time the acts of medical negligence occurred. That is precisely the result that article I, section 13, of the Missouri Constitution forbids. *See also Cook*, 142 S.W.3d at 894 (recognizing that art. I, § 13 would bar an amendment to a statutory limitation on damages if the statute were enacted during the life of the cause of action).

MHG and Dr. Shapiro, in the court below, argued that the amendments to § 538.210 are procedural and therefore may be applied retrospectively to this case without constitutional objection. *Buder* itself acknowledged the "logical appeal" of the argument that an amendment to a statutory ceiling "goes only to the . . . remedy—the manner of compensation and not the right thereto." *Buder*, 515 S.W.2d at 410. But the Court ultimately rejected that view because it fails to give sufficient consideration to principles of justice and fair play, which are always germane to the question whether the retrospective operation of a law affects substantive rights. *Id*. at 411 (concluding that

"[t]he decision to eliminate this protection cannot *justly* be applied to acts which occurred when the protection was afforded, and we decline to do so.") (emphasis added).[6]

Those principles weigh heavily against the retrospective application of amended § 538.210 to this case. H.B. 393's amendment to a statutory ceiling on damages, which took effect during the life of a cause of action, cannot justly be applied to acts that occurred when greater protections were in existence.

It is immaterial that there might be "cogent reasons" for amended § 538.210 to operate retrospectively. The constitutional bar to the retrospective operation of law cannot be superseded by the Legislature, "cogent reasons" or no. *See Phillips*, 194 S.W.3d at 851. The trial court misread this Court's decision in *Buder* when it reached the opposite conclusion. Indeed, this Court has twice admonished lower courts that *Buder* does not support that view. *See Roman Catholic Diocese*, 862 S.W.2d at 341 (rejecting this reading of *Buder* and concluding: "Regardless of legislative intent, it should be obvious that a statute cannot supercede a constitutional provision."); *Dep't of Soc. Servs.*

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[6] It is of no significance that in *Buder* and *Stillwell* it was the defendants, rather than the plaintiffs, whose substantive rights were adversely affected by amendments to statutory ceilings on damages. *Buder* itself repeatedly stressed that the legal effect of the amendment at issue in that case was on the "parties" to the suit. 515 S.W.2d at 410. In any event, because notions of fair play and justice are not confined to one side of the courtroom, these principles are no less determinative of the retrospectivity issue in this case, than they were in *Buder* or *Stillwell*.

v. Villa Capri Homes, Inc., 684 S.W.2d 327, 332 n.5 (Mo. banc 1985) ("[T]he legislative intent is pertinent only to the construction of the statute and whether the presumption against retroactivity should not apply. This was . . . intended by our holding in *State ex. Rel. St. Louis-San Francisco Ry. Co. v. Buder*.").

For these reasons, the Court should hold that the retrospective application of amended § 538.210 to this case violates article 1, section 13 of the Missouri Constitution, and accordingly should reverse the judgment of the lower court.

II. H.B. 393 VIOLATES THE CLEAR TITLE AND SINGLE SUBJECT MANDATE OF ARTICLE III, SECTION 23 OF THE MISSOURI CONSTITUTION.

Point Relied on #2. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because H.B. 393, the legislation that amended § 538.210, unconstitutionally violates the clear title and single subject requirements of article III, § 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.

The trial court, without explanation, rejected the Klotzes' constitutional challenge to H.B. 393 based on article III, § 23 of the Missouri Constitution, which requires that legislation have a clear title and concern only a single subject. This was error: HB 393

runs afoul of these constitutional requirements, and thus the act should be held unconstitutional in its entirety.

Article III, § 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: "[t]his provision contains two distinct but related procedural limitations—a single subject rule and a clear title requirement." *Jackson County Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007).

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 v. State*, 75 S.W.3d 267, 269 (Mo. banc 2002). A title is clear where it "indicate[s] in a general way the kind of legislation that was being enacted." *Fust v. Attorney Gen.*, 947 S.W.2d 424, 429 (Mo. banc 1997). 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 County*, 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 v. State*, 968 S.W.2d 145, 147 (Mo. banc. 1998). 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 County*, 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 the H.B. 393's title suggests that the act itself concerns a single subject within the meaning of article III, § 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 County*, 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.

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, § 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 (2008) (governing service of process on a corporation in civil actions generally); Mo. Rev. Stat. § 508.010 (2008) (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 County*, 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.[7]

Similarly, in 2003, the Legislature passed Senate Bill 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.[8] *Compare* S.B. 280, 92nd Gen. Assembly, 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

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[7] The Klotzes take no position on whether the title of the 1986 Act is itself clear in a constitutional sense, but reference the title for comparative purposes. The Missouri Supreme Court, in *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 904 (Mo. banc 1992), considered the constitutionality of the 1986 Act but did not address whether the 1986 Act's title violates article III, section 23 of the Missouri Constitution because the plaintiffs in that case had failed to preserve that objection for appellate review. *Id*. at 907-908.

[8] S.B. 280 was vetoed by Governor Bob Holden and did not become law.

single subject requirement is rendered meaningless. *See Home Builders Ass'n*, 75 S.W.3d at 270.

MHG and Dr. Shapiro 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 July 29, 2009). 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 Version of S.B.*, *available at* http://www.senate.mo.gov/03info/summs/tat/SB280.htm (last visited July 29, 2009) ("SS/SS/SCS/SB 280 - This act enacts several tort reform measures."). Given that the Missouri Legislature's publications evince their *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 County Court*, 30 S.W. 103, 105 (Mo. 1895).

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 under art. III, § 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. THE CAP ON NON-ECONOMIC DAMAGES IN AMENDED § 538.210 VIOLATES NUMEROUS PROVISIONS OF THE MISSOURI CONSTITUTION.

The cap on non-economic damages in § 538.210, Mo. Rev. Stat. (2008), as amended by H.B. 393, also violates numerous other provisions of the Missouri Constitution. Although the pre-existing cap was upheld against certain constitutional challenges in *Adams*, the revised cap differs in significant respects from that prior cap. Amended § 538.210 does not withstand constitutional scrutiny because the Legislature lacked any rational basis for adopting the revised cap. Moreover, the constitutionality of the new cap is also subject to challenge on constitutional grounds not considered in *Adams*.[9]

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[9] The *Adams* court rejected challenges to the prior cap on equal protection, open courts, trial by jury, and due process grounds, but declined to consider challenges based on, *inter alia*, single subject, special legislation, and separation of powers. 832 S.W.2d at 907-08.

A. The Revised Cap on Non-Economic Damages Differs Significantly From the Prior Cap.

Amended § 538.210 differs substantially from the pre-existing cap.[10] There are at least four significant differences between the old and the new cap that are relevant to this case:

First, under the prior law, each plaintiff, James and Mary Klotz, would have been entitled to his or her own cap on non-economic damages. *See LaRose v. Washington Univ.*, 154 S.W.3d 365, 372-73 (Mo. App. E.D. 2004); *Wright v. Barr*, 62 S.W.3d 509, 536-38 (Mo. App. W.D. 2001). By contrast, under the amended provision, "any spouse claiming damages for loss of consortium of their spouse shall be considered to be the same plaintiff as their spouse." Mo. Rev. Stat. § 538.210.4 (2008). Where, as in this

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As discussed earlier, under the pre-existing 1986 cap, the Klotzes would be entitled to the full non-economic damages awarded by the jury. Therefore, the correctness of the decision in *Adams* would not appear to be at issue in this case. Nevertheless, should the Court conclude that its decision in *Adams* is controlling regarding issues in this appeal, the Klotzes urge the Court to reconsider its *Adams* holding for the reasons discussed herein.

[10] Prior to H.B. 393, section 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.

case, the person injured by medical malpractice incurs more than $350,000 in non-economic damages, his spouse's claim for loss of consortium is effectively lost. After reducing the jury's award of non-economic damages to Mr. Klotz to the statutory cap, the trial court was obliged to "zero out" Ms. Klotz's award for loss of consortium, depriving her of any recovery for her injury whatsoever.

Second, 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. App. E.D. 2002); *Cook*, 142 S.W.3d at 889-91. In this case, the jury found at least two separate instances of malpractice, one committed by SAMC and the other by Dr. Shapiro and MHG. In the amended provision, the "per occurrence" language has been deleted, limiting the Klotzes here to a single cap regardless of how many acts of malpractice may have been committed against Mr. Klotz.

Third, 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"). Thus, the Klotzes were each entitled to recover non-economic damages up to the cap separately from each of the three defendants. *See Cook*, 142 S.W.3d at 891-92. Under the amended provision, however, a single cap applies "irrespective of the number of defendants." Mo. Rev. Stat. § 538.210.1.

Fourth, under the prior law, the cap on non-economic damages increased each year to take account of inflation. Mo. Rev. Stat. § 538.210 (2000). The cap had grown from an initial $350,000 in 1986 to $628,000 at the time judgment was entered in this case.

See, *supra*, at 16 n.5. By contrast, under the amended provision, the cap remains permanently set at $350,000, which means, as a practical matter, that the non-economic damages cap will decline—in real dollars—with each passing year. Today, the new cap represents less than 56% of the prior cap on non-economic damages, or less than $200,000 in 1986 dollars.

Under the old cap, James Klotz would have been eligible to recover $ 509,200 in non-economic damages from Dr. Shapiro and MHG—their full 67% share of the $760,000 awarded to him by the jury, and Mary Klotz would have been entitled to recover $220,430, the share of the full $329,000 in non-economic damages awarded to her. Applying the cap as revised by H.B. 393, the trial court reduced their combined recovery by nearly $500,000.

B. 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 legislation, many of 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 v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512-13 (Mo. banc 1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

1. 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*. 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. Legal File 561-682 (MDI, *2003 Missouri Medical Malpractice Insurance Report*, Executive Summary ("2003 MMMI Report") (Exhibit 17 to Affidavit of Mary Coffey)); MDI, *Missouri Medical Malpractice Insurance Report*, Executive Summary (Oct. 2005) ("2004 MMMI Report"), available at http://www.insurance.mo.gov/reports/medmal/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* Legal File, at 683-733 (MDI,

Medical Malpractice Insurance in Missouri: the Current Difficulties in Perspective (Feb. 2003) ("Current Difficulties Report") (Coffey Affidavit, Ex. 18)).

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. Legal File, at 700 (Current Difficulties Report) ("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."); Legal File, at 565-67 (2003 MMMI Report). 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." Legal File, at 700 (Current Difficulties Report); *see also* Legal File, at 685-86 (Peters Affidavit).

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. Legal File, at 685-86 (Current Difficulties Report). 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. Legal File, at 566 (2003 MMMI Report).[11]

Thus, any claim that there was a malpractice litigation explosion or crisis in Missouri was belied by the facts; it simply was not true.[12]

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[11] 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. Legal File, at 566 (2003 MMMI Report). 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.; see also* Legal File, at 754 (Angoff Affidavit).

[12] 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.*, Legal File, at 778 (Daniels & Martin Affidavit) ("Our published research demonstrates that the claims of 'crisis'—e.g., 'skyrocketing numbers of claims' and 'awards that are exploding in size'—incorporated in tort reform rhetoric generally and with regard to medical malpractice specifically are not empirically substantiated"); Legal File, at 832 (Finley Affidavit) ("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.") (quoting Lucinda M. Finley, *The*

2. 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.

Hidden Victims of Tort Reform: Women, Children and the Elderly 53 EMORY L.J. 1263, 1268 (2004)).

Professor Neil Vidmar, for example, explained in his affidavit that several medical malpractice studies have found that despite the high rate of injury caused by medical negligence, relatively few victims file malpractice claims. Legal File, 909-10 (Vidmar Affidavit). Moreover, empirical research demonstrates that juries, rather than favoring those few plaintiffs who in fact file suit, view plaintiffs' claims with skepticism, *id*. at 912; that jury verdicts tend to be consistent with judgments of neutral medical experts, *id*. at 913; and that damage awards tend to correlate with the severity of injury, *id*. at 914-15.

Professor Philip G. Peters, Jr., has reached similar conclusions: "Damage caps reflect, at least in part, a legislative presumption that juries are biased in favor of malpractice plaintiffs. . . . [T]hree decades of empirical research is contrary to these assumptions." Legal File, at 882 (Peters Affidavit); *see id*. at 882-83 (concluding that "the empirical evidence reveals that juries in medical malpractice cases do their job pretty well. Moreover, they consistently treat physicians very favorably, perhaps unfairly so.").

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.

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. *See generally* Legal File, at 737-41 (Angoff Affidavit). 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.

Legal File, 684 (Current Difficulties Report).

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. *See* Legal File, at 754-55 (Angoff Affidavit) (citing 2004 MMMI Report, Executive Summary 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%. Total malpractice premiums paid in 2003 totaled $121.3 million, as compared with an inflation-adjusted total of $120.8 million for 1990. Legal File, at 567 (2003 MMMI Report). 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. *Cf.* Legal File, at 928-29 (Vidmar Affidavit) ("Empirical research establishes that insurance premiums, while periodically rising (and falling) and always irksome, constitute a comparatively small and historically declining part of the expenses of running a medical practice.").

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.

3. 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 their 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.

a. 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.[13] Indeed, as

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[13] The AMA describes the PC&D as "the most accurate and complete source for statistical data about Doctors of Medicine . . . supply in the United States." AMA, *Press Online Catalog*, *available at* https://catalog.ama-assn.org (last visited July 29, 2009). PC&Ds are routinely relied upon by courts and scholars. *See, e.g.*, *FormyDuval v. Bunn*, 530 S.E.2d 96, 101 (N.C. App. 2000); *Vargas v. Cummings*, 149 F.3d 29, 35 (1st Cir. 1998); Nathan Cortez, *Patients Without Borders: The Emerging Global Market for*

shown by the affidavit of Professor Neil Vidmar (Legal File, at 925-30) and the charts attached thereto as Exhibits 2 and 3 (Legal File, at 936 & 965), AMA data make several things abundantly clear:

First, the number of licensed physicians in Missouri consistently has increased over the last four and half decades. The number of licensed physicians in Missouri grew constantly from 1963 (the earliest year for which comprehensive data was publicly available from the AMA) to 2005 (the year the cap was enacted). Most significantly for present purposes, the number of licensed physicians in the state increased each and every year for which data is available in the years leading up to the 2005 act, rising from 10,759 in 1990 to 12,525 in 1995, to 14,052 in 2001, to 15,322 in 2005. At no time was there a decline in the total number of licensed physicians, due to rising malpractice premiums or for any other reason. Legal File, at 926 (Vidmar Affidavit)

If one focuses only on those physicians engaged in patient care, the pattern is the same. 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. The net number of physicians engaged in "patient care" in Missouri steadily increased from 9,109 in 1990 to

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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).

12,486 in 2005. *See* Legal File, at 965 (Vidmar Affidavit, Ex. 3) Here again, 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 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 has more than doubled, rising from 121 physicians per 100,000 persons in 1963 to 264 physicians per 100,000 persons in 2005. *See* Legal File, at 963 (Vidmar Affidavit, Ex. 2).

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. *Id.* 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. 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.

b. 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. *See* Legal File, at 965 (Vidmar Affidavit, Ex. 3). The number of neurosurgeons increased by 33%, from 88 to 117; the number of orthopedic surgeons grew by 32.5%, from 329 to 436; and the number of OB/GYNS climbed from 644 to 722, an increase of 12%. And these numbers held steady or grew slightly in the years leading up to 2005.

Thus, like the earlier rationales for H.B. 393, the fear of doctor's fleeing the state did not provide a rational justification for the statute.

4. 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." Legal File, at 685 (Current Difficulties). "[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 720. Moreover, only 2-3% 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.*[14]

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." Legal File, at 566 (2003 MMMI Report). 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% of total malpractice losses. *Id.* Again, the typical case implicating the 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.*" Legal File, at 685 (Current Difficulties

[14] 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.

Report) (emphasis in original).[15] Moreover, any savings realized by a cap reduction would be "much smaller . . . than physicians are demanding." *Id.* at 718.

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 recover as economic losses. *Id.*[16] Moreover, a lowered cap would disproportionately affect those most seriously injured by medical malpractice: "[L]owering the caps still

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[15] 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." Legal File, at 696. In particular, the 1986 changes "did not have an effect on premium costs for Missouri physicians for several years." *Id.*

[16] Professor Lucinda Finley elaborated extensively on the unfairness and disproportionate impact of a cap on non-economic damages on these groups in her affidavit, which was submitted to the circuit court. *See generally* Legal File, at 816-19, 858-59 (Finley Affidavit).

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).

C. The Revised Cap Violates the Missouri Constitution.

1. Amended § 538.210 Violates the Equal Protection Clause of the Missouri Constitution, Article I, Section 2.

Point Relied on #3. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the equal protection clause of the Missouri Constitution, article I, § 2, in that the revised cap on non-economic damages in malpractice actions 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, the spouses of severely injured victims 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 revised cap is 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, §2 of the Missouri Constitution guarantees the right to equal protection of the law. Missouri's equal protection clause is coextensive with that in the Fourteenth Amendment to the U.S. Constitution. *Bernat v. State*, 194 S.W.3d 863, 867 (Mo. banc 2006).

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. *Id.* at 864. 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*, 807 S.W.2d at 512.

The legislative classifications created by amended § 538.210, should be obliged to survive strict scrutiny, because they impinge upon the fundamental constitutional rights to trial by jury, right to counsel, open courts and certain remedy, as discussed later in this memorandum.[17] Alternatively, they should be subject to heightened scrutiny because

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[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 New Hampshire Supreme Court has held that they do merit heightened

they disproportionately and adversely affect women, racial minorities, children and the elderly, as discussed below. It should not be necessary, however, for the court to evaluate amended § 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. *A fortiori*, amended § 538.210 cannot survive intermediate or strict scrutiny.

Amended § 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;

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

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scrutiny. In *Carson v. Mauer*, 424 A.2d 825 (N.H. 1980), the New 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. Resources for Justice v. City of Manchester*, 917 A.2d 707 (N.H. 2007).

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 malpractice victims who have been injured by multiple acts of malpractice and those who have been injured only by a single act of malpractice, by arbitrarily and irrationally reducing the amount of non-economic damages that may be recovered for each distinct injury;

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

g) discriminates between the spouses of severely injured malpractice victims and the spouses of other malpractice or tort victims, by denying the former any opportunity to recover damages for loss of consortium;[18]

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[18] *Cf. St. Mary's Hosp. v. Phillipe*, 769 So. 2d 961, 971-72 (Fla. 2000) (interpreting cap on non-economic damages "per incident" to establish separate cap for each claimant):

> "[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

h) 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

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Legislature intended to limit noneconomic damages to $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."

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. *See, e.g.*, *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1075-1076 (Ill. 1997) (striking down Illinois non-economic damage cap on these grounds).

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.*

The revised version of the cap creates new arbitrary and irrational classifications. 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 James Klotz;

[19] This list is taken from MDI's Current Difficulties Report at 35. Legal File, at 718.

Dr. Shapiro and MHG did not seek merely to reduce their $509,200 share of Mr. Klotz's non-economic damages to the cap; they argued, and the trial court agreed, that they are liable only for their 67% fraction of the cap, or $234,500. Thus, the new cap works to deprive Mr. Klotz of damages from each defendant that he would have been able to recover if that defendant alone had committed malpractice against him. It is wholly arbitrary and irrational to deny a plaintiff such as Mr. Klotz the right to collect at least the full amount of the cap from any health care provider who has injured him.

The new cap also discriminates between present and future victims of malpractice. Current malpractice victims may recover something close to $350,000 in real 2005 dollars under the cap; because the cap does not adjust for inflation, however, future victims will effectively be capped at much lower amounts. MDI 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." Legal File, at 716 (Current Difficulties Report). 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 seventh arbitrary distinction arises from the Legislature's decision to treat a spouse's claim for loss of consortium as part of the malpractice victim's claim for purposes of the cap. Loss of consortium is, by definition, a form of non-economic injury. The spouses of malpractice victims who suffer only medical damages and lost wages, like

the spouses of victims of other torts, remain wholly eligible to recover up to the amount of the cap for loss of consortium. But, the spouses of malpractice victims who themselves suffer non-economic injury in excess of the cap, like Mary Klotz, can recover nothing for loss of consortium. The cap effectively strips them of their claim in its entirety. It is arbitrary and irrational to deny such spouses a form of relief that has long been recognized in Missouri and that remains available to other spouses of malpractice victims. *Cf. St. Mary's Hosp. v. Phillipe*, 769 So. 2d at 971-72 ("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.").

Finally, as explained at greater length in the affidavit of Professor Lucinda Finley that was filed with the circuit court (Legal File, 811-880), and in her academic writing, the cap on non-economic damages necessarily discriminates against women, as well as against children, 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 men and, as a result, juries award such victims a greater proportion of their overall compensatory damages in the form of noneconomic damages. *See* Legal File, at 816-19 (Finley Affidavit).

Professor Finley has also identified another way in which caps on non-economic damages adversely affect women:

> Several types of injuries that are disproportionately suffered by women—sexual assault, reproductive harm, such as

> pregnancy loss or infertility, and gynecological medical malpractice—do not affect women in primarily economic terms. Rather, the impact is felt more in the ways compensated through noneconomic loss damages: emotional distress and grief, altered sense of self and social adjustment, impaired relationships, or impaired physical capacities, such as reproduction, that are not directly involved in market based wage earning activity. Many of these most precious, indeed priceless, aspects of human life are virtually worthless in the market, and there is social resistance to seeing them solely or primarily in commodified, market-based terms.

Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263, 1281 (2004). For these reasons as well, the cap imposed by amended § 538.210 should be held unconstitutional, under either rational basis review or intermediate scrutiny.

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

and/or arguments to show that the classifications effected by the act are not rational. *Mahoney*, 807 S.W.2d at 513. That is exactly what the Klotzes have 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 amended § 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 supra*, at 32-42. And there was no rational justification for many of the new, arbitrary classifications created the by revised cap. Evidence in support of the act's irrationality can be found in the pages above, in the documents submitted to the circuit court in opposition to the motion for verdict reduction, Legal File, at 447-510, and in the affidavits the Klotzes submitted from six experts who offered evidence in support of their constitutional challenge. Legal File, at 510-966.

Numerous courts in other states have invalidated damage caps on equal protection—or, closely related, special legislation—grounds. *See, e.g., Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 465 (Wis. 2005); *State ex rel. Ohio Acad. 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 v. Taylor Mach. Works*, 689 N.E.2d 1057, 1077 (Ill. 1997); *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 v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 169 (Ala. 1991); *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 353 (Utah 1989); *Sofie v.*

Fibreboard Corp., 771 P.2d 711, 715-23 (Wash. 1989); *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, invalidate the revised cap on non-economic damages in amended § 538.210 as violative of article I, § 2 of the Missouri Constitution.

2. Amended § 538.210 Violates the Prohibition Against Special Legislation, Article III, Section 40.

Point Relied on #4. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the prohibition against special legislation in article III, § 40 of the Missouri Constitution, in that the revised 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, § 40 of the Missouri Constitution prohibits the General Assembly from enacting "special law[s]".[20] A "special law" is a law that "includes less than all who are similarly situated . . . but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." *Batek v. Curators of Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996).[21]

The prohibition against special legislation is essentially the flip-side of the guarantee of equal protection. The equal protection clause prohibits the State from unreasonably treating some people worse than others who are similarly situated, while

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[20] Two separate subsections of Art. III, § 40 are implicated in this case. Subsection (6) bars the enactment of special laws "for limitation of civil actions," while subsection (30) prohibits special laws "where a general law can be made applicable." Because there does not appear to be any distinction between the manner in which the courts apply these two subsections, *see, e.g.*, *Batek*, 920 S.W.2d at 899 (applying subsection (6)); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991) (applying both sections without distinction), Appellants/Respondents will analyze them together for purposes of this brief.

[21] The *Adams* court did not consider the applicability of the prohibition against special laws to the prior cap on non-economic damages in medical malpractice actions, 832 S.W.2d at 907-08, so the question is one of first impression in this state. However, as just noted, a number of courts in Missouri's sister states have invalidated damage caps on special legislation grounds. *See supra*, at 55-56.

the proscription against special legislation bars the Legislature from arbitrarily treating some classes better than similarly situated classes. *See ABC Liquidators, Inc. v. Kansas City*, 322 S.W.2d 876, 885 (Mo. banc 1959) ("[T]he test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes."). For this reason, Missouri courts analyze special law violations in exactly the same manner as equal protection violations: "In essence, the test for 'special legislation' . . . involves the same principles and considerations that are involved in determining whether the statute violates equal protection in a situation where neither a fundamental right nor suspect class is involved, i.e., where a rational basis test applies." *Fust v. Attorney General*, 947 S.W.2d 424, 432 (Mo. banc 1997); *Blaske*, 821 S.W.2d at 832.

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

a) arbitrarily treats health care providers who severely injure their malpractice victims more favorably than those who only moderately injure their victims;

b) arbitrarily treats health care providers who cause their malpractice victims to suffer severe non-economic losses more favorably than those who cause their victims to suffer comparably severe economic losses;

c) arbitrarily treats health care provider tortfeasors more favorably than other tortfeasors;

d) arbitrarily treats health care providers who commit malpractice against the same patients as other providers more favorably than those who commit malpractice alone;[22]

e) arbitrarily treats health care providers who commit multiple acts of malpractice against a patient more favorably than those who commit only a single act of malpractice;

f) arbitrarily treats health care providers who will commit malpractice in the future more favorably than those who commit malpractice today;

g) arbitrarily treats health care providers who severely injure married patients more favorably than those who less severely injure married patients, as well as other tortfeasors, by protecting the former group against claims for loss of consortium;

h) arbitrarily treats health care providers who provide medical services to women, racial and ethnic minorities, children, the elderly, and the poor more favorably than health care providers who serve middle-aged men, by shielding them from a higher proportion of tort judgments against them.

There can be no doubt that amended § 538.210 is a law "for limitiation of civil actions," MO. CONST. art. III, § 40(6), that singles out one class of tortfeasors—health

[22] In this case, for example, the circuit court applied a cap of only $234,500 to Dr. Shapiro and MHG jointly, because the jury had found a separate tortfeasor, SAMC, to be 33% responsible for Mr. Klotz's malpractice injuries.

care providers who commit malpractice—for special treatment. The Klotzes have already discussed at length how the classifications created by amended § 538.210 are arbitrary and irrational, and not rationally related to any legitimate state purpose. For those same reasons, amended § 538.210 violates the constitutional prohibition against special laws.

3. Amended § 538.210 Violates the Due Process Clause of the Missouri Constitution, Article I, Section 10.

Point Relied on #5. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the due process clause of the Missouri Constitution, article I, § 10, in that—as the General Assembly knew—the revised cap on non-economic damages in malpractice actions was wholly irrational 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 and also in that the revised cap on non-economic damages interferes with the ability of malpractice victims who suffer primarily non-economic injury to obtain counsel to represent them in violation of their fundamental right to be represented by counsel.

The Legislature's lack of a rational justification for enacting the revised cap implicates at least one additional constitutional protection, the Due Process clause of article I, § 10 of the Missouri Constitution, which provides that "no person shall be deprived of life, liberty or property without due process of law." As discussed earlier in

the section on retroactivity, James and Mary Klotz have a property interest in their malpractice claims against Dr. Shapiro and MHG. The doctrine of substantive due process requires that "the state action which deprives one of life, liberty or property, be rationally related to a legitimate state interest." *Lane v. State Comm'n of Psychologists*, 954 S.W.2d 23, 24 (Mo. App. E.D. 1997); *Roy v. Mo. Dep't of Corrs.*, 23 S.W.3d 738, 746 (Mo. App. W.D. 2000); *Lile v. Hancock Place Sch. Dist.*, 701 S.W.2d 500, 507 (Mo. App. E.D. 1985). "To assert a substantive due process claim one must establish that the government action complained of is 'truly irrational,' more than arbitrary, capricious, or in violation of state law. *Lane*, 954 S.W.2d at 24-25 (quoting *Frison v. City of Pagedale*, 897 S.W.2d 129, 132 (Mo. App. E.D. 1995)). The Klotzes have made just such a showing here. Amended § 538.210 should therefore be invalidated on substantive due process grounds as well.[23]

The revised cap on non-economic damages in malpractice actions interferes with the constitutional guarantee of due process in another way as well: it seriously undermines the ability of malpractice victims, especially those whose injuries are

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[23] In *Adams*, the Court rejected a due process challenge to the prior cap on non-economic damages. 832 S.W.2d at 907. The claim rejected in *Adams*, however, was a procedural due process claim. *See id.* (under Missouri due process clause, "a claimant is entitled to whatever process is constitutionally mandated or permitted under the laws extant at the time of claim") (internal quotation and citation omitted). Thus, this Court has not previously considered a substantive due process challenge to either cap.

primarily non-economic in nature, to obtain counsel to represent them. As explained in greater detail in the affidavits of Stephen Daniels & Joanne Martin (Legal File, at 783-85) and Neil Vidmar (Legal File, at 910-11), many victims of medical malpractice lack the resources to hire counsel on an hourly fee basis to litigate their claims; they must, instead, find counsel willing to accept their case on a contingency fee basis. Under such a fee arrangement, counsel runs the risk that she will receive no compensation for her work (and may lose whatever funds she has advanced to cover the expenses of litigation) if the lawsuit is unsuccessful; in return, if the suit is successful, counsel will be entitled to a percentage of the recovery. Plaintiffs' counsel in malpractice cases must carefully weigh the risk of uncompensated work against her potential reward if the case is successful.

Statutes such as amended § 538.210 that limit the damages that plaintiffs may recover, also thereby limit the potential fee that plaintiff's counsel may earn through a contingency fee. The more severe the limits on damages, the more heavily the risk/reward balance weighs toward risk, making the case, *regardless of its merits*, much less attractive to potential counsel. This is not merely a hypothetical concern. Daniels and Martin have documented how the enactment of a cap on malpractice damages led to a significant reduction in malpractice case filings. *See* Legal File, at 783-85 (Daniels & Martin Affidavit); Legal File, at 910-12 (Vidmar Affidavit); *see also* David A. Hyman, "Not Worth the Pain and Suffering," FORBES MAGAZINE, Sep. 15, 2008, *available at* www.forbes.com/forbes/2008/0915/034.html.

"The right of a litigant to be represented by counsel is fundamental and well

accepted in Missouri." *Magerstadt v. La Forge*, 303 S.W.2d 130, 133 (Mo. 1957).[24] The right of a party to be represented by counsel applies to civil cases, and is "a part of due process of law guaranteed by our constitution . . . ." *Id*. As the Court in *Magerstadt* observed, "[t]he right itself has never been challenged. The only recorded controversies relate to the extent or representation or number of attorneys to which a litigant is entitled." *Id.* And, the court concluded, "[i]f a represented party has the right to employ additional counsel and as many as he sees fit, *the right of a litigant without counsel to be represented is all the more evident*." *Id.* (emphasis added).

In *Spitcaufsky v. Hatten*, 182 S.W.2d 86 (Mo. 1944), *overruled on other grounds by Dir. of Dep't of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens*, 555 S.W.2d 293, 297 (Mo. banc 1977), a constitutional challenge to the Land Tax Collection Act, the plaintiffs contended, *inter alia*, that the statute had the effect of denying them their right to counsel of their choosing to litigate special tax liens. The Supreme Court disagreed with this reading, but acknowledged that a statute that did deprive plaintiffs of their right to counsel would raise serious due process concerns: "But if it be true, as respondents assert, that the assembling of these liens in the Collector's suit would . . . deprive them of the right to be represented by their own counsel, we should say it would be a very serious and unconstitutional violation of their rights." *Hatten*, 182 S.W.2d at 105.

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[24] Because amended § 538.210 impinges on this "fundamental" right to counsel, it should be subject to strict scrutiny under the Equal Protection Clause. *See supra*, at 47.

Amended § 538.210, by severely limiting the damages that some malpractice victims with meritorious claims may recover, substantially and arbitrarily interferes with those victims' ability to obtain counsel to represent them in a malpractice action. In so doing, it unconstitutionally deprives them of their right to due process of law.

4. Amended § 538.210.4 Violates Mary Klotz's Right to Open Courts and Certain Remedies, Article I, § 14.

Point Relied on #6. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, and in completely eliminating the award of non-economic damages to Mary Klotz for loss of consortium because, as applied to Ms. Klotz's claim, amended § 538.210.4 violates the right to open courts and certain remedies in Missouri Constitution, article I, § 14, in that amended § 538.210.4 arbitrarily and unreasonably restricts the ability of spouses of malpractice victims to access the courts to vindicate claims for loss of consortium, by making their recovery of any damages for loss of consortium contingent upon their malpractice victim spouses recovering less than $350,000 in damages for their own non-economic injuries.

Article I, § 14 of the Missouri Constitution provides: "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." In *Adams*, this Court ruled that the prior cap on non-economic damages did not violate Article I, Section 14, because that constitutional provision does not restrict the

Legislature's prerogative to modify substantive law by repealing or restricting causes of action. As the Court said:

> In sum, the constitutional right of access assures Missourians of the "right to pursue in the courts the causes of action the substantive law recognizes." *Mahoney* [*v. Doerhoff Surgical Servs., Inc.*], 807 S.W.2d [503,] 510 [(Mo. banc 1991)]; *Findley* [*v. Kansas City*], 782 S.W.2d [393,] 396 [(Mo. banc 1990)]. It does not assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination.

Adams, 832 S.W.2d at 906.

Since the ruling in *Adams*, this Court has more fully explicated the constitutional "right to pursue in the courts the causes of actions the substantive law recognizes." In *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), the Court reviewed its recent precedent and:

> distilled . . . a coherent line of reasoning that . . . will ensure that article I, section 14 retains its vitality while permitting proper deference to legislative enactments. Put most simply, article I, section 14 "prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury."

Id. at 549 (quoting *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. banc 1997) (Holstein, C.J., dissenting) (emphasis in *Kilmer*). The Court reiterated the holding in *Kilmer*, and reconfigured it into a three-part test, in *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006): "An open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable." *Id.* at 640 (citing *Kilmer*, 17 S.W.3d at 549-50). Under this standard, the revised cap on damages in amended § 538.210 violates Article I, section 14, at least as applied to Mary Klotz, because she has a recognized cause of action that the law arbitrarily restricts her from pursuing.[25]

Under Missouri law, Mary Klotz has a recognized cause of action for loss of consortium as a result of the injuries suffered by her husband, up to the $350,000 cap on non-economic damages established by amended § 538.210. Pursuant to that cause of action, Ms. Klotz sought and obtained a jury verdict for $220,430 against Dr. Shapiro and MHG[26] for loss of consortium.[27] The circuit court, however, in accordance with amended

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[25] Mary Klotz's claim that amended § 538.210.4 violates article I, § 14 is a distinct claim, different from the Open Courts constitutional challenge rejected in *Adams*. As such, it is an issue of first impression before this Court.

[26] This figure represents Dr. Shapiro and MHG's 67% share of the total jury award to Ms. Klotz of $329,000 in non-economic damages.

§ 538.210.4,[28] completely eliminated that jury award, because Ms. Klotz's spouse had obtained a jury award in excess of the cap for his own, distinct injuries.

Amended § 538.210.4, thus, arbitrarily and unreasonably interfered with Mary Klotz's ability to receive her remedy for loss of consortium, by making her recovery of damages for that cause of action contingent upon her husband not obtaining non-economic damages for his own injuries. Where, as in this case, her husband sought and obtained a verdict for more than $350,000 in non-economic damages for his own injuries, the new law denies her any ability to obtain her own remedy and that restriction is both arbitrary and unreasonable.

The case most closely on point is *Strahler v. St. Luke's Hospital,* 706 S.W.2d 7 (Mo. banc 1986). In *Strahler*, this Court struck down Missouri's two-year statute of limitations on medical malpractice actions as applied to a 15-year old minor, on the ground that the limitations period was "too severe an interference with a minor's state constitutionally enumerated right of access to the courts" under article I, § 14. *Id.* at 12.[29]

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[27] Ms. Klotz also obtained a separate verdict for $184,000 for wages she lost while caring for her husband. Those economic damages are separate from her damages for loss of consortium.

[28] Section 538.210.4 provides: "[A]ny spouse claiming damages for loss of consortium shall be considered to be the same plaintiff as their spouse."

[29] The Court accepted as legitimate the Legislature's purpose in enacting a fixed statute of limitations for malpractice actions, but concluded that "the method employed by the

Defendants argued that the statute of limitations did not prevent the minor from seeking redress for her injuries, because her parents could have brought suit on her behalf, or else she could have sought appointment of another adult as her next friend to pursue her claim, but the Court found these arguments unconvincing. In its view, the statute violated article I, § 14 because it "deprives minor medical malpractice claimants [of] the right to assert their own claims individually, [and] makes them dependent on the actions of others to assert their claims." *Id.*[30]

Legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price from minor plaintiffs like Carol Strahler and all other minors similarly situated. For minor plaintiffs like Carol Strahler, the cure selected by the Legislature would prove no less pernicious than the disease it was intended to remedy." *Id.* at 11.

[30] *See also Kilmer v. Mun*, in which this Court invalidated under article I, § 14 a statutory provision that permitted a plaintiff to bring a "dram shop" cause of action against a restaurant only where the liquor licensee had been convicted or had received a suspended sentence for supplying liquor to an intoxicated person. The statute thus made the plaintiff's remedy contingent upon "the decision of an elected county prosecuting attorney" to charge the licensee. 17 S.W.3d at 552. The court ruled that this precondition to suit was an arbitrary and unreasonable restriction on the constitutional right to a remedy. *Id.* at 553.

In a remarkably similar manner, amended § 538.210.4 interferes with the ability of spouses of malpractice victims to assert their own claims for loss of consortium, and "makes them dependent on the actions of others [their spouses] to assert their claims." James and Mary Klotz are separate individuals with their own distinct injuries, yet Mary can only pursue her claim for loss of consortium if her husband foregoes his own claim for non-economic damages. As in *Strahler*, this is an arbitrary and unreasonable restriction on her access to the courts and her right to a remedy under article I, § 14.

5. Amended § 538.210 Violates the Right to Trial By Jury, Article I, Section 22(a).

Point Relied on #7. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the right to trial by jury guaranteed by article I, § 22(a) of the Missouri Constitution, in that, as understood at common law, that right encompasses the substantive right to have the plaintiffs' damages determined by the jury, the jury here determined that the Klotzes' non-economic injuries merited an award of damages in excess of the revised cap, and amended § 538.210 thereby prevented the jury's award from having its full and intended effect.

The trial court rejected the Klotzes' argument that amended § 538.210 violates the right of trial by jury guaranteed in article I, § 22(a) of the Missouri Constitution. That conclusion was consistent with this Court's decision in *Adams*. 832 S.W.2d at 906-07 (rejecting trial by jury challenge to prior cap). But *Adams* itself is erroneous insofar as it concludes that a non-economic damages cap does not infringe upon this constitutional

right. As explained below, the right to a jury trial, properly understood, includes the right to have a jury determine the amount of damages, if any, awarded to medical malpractice plaintiffs such as the Klotzes. Indeed, there is clear and direct historical evidence that juries set the amount of damages awarded to a successful plaintiff, and that this core function is beyond the reach of hostile legislation. *See Dimick v. Schiedt*, 293 U.S. 474, 480 (1935) (concluding that the common law rule as it existed at the time of the adoption of the United States 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" (citations omitted)). Applying a damages cap to override the jury's determination impermissibly infringes on this core, fact-finding function of the jury in violation of the right to trial by jury. The contrary conclusion expressed in *Adams* is plainly erroneous and thus should not be accorded *stare decisis* effect but should be overturned. *See Independence-Nat. Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137 (Mo. banc 2007) (recognizing that *stare decisis* "'is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.'" (quoting *Med. Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 335 (Mo. banc 2005)). Instead, this Court, based on a correct understanding of the scope of the constitutional right, should hold that amended § 538.210 violates the Klotzes' constitutional right to trial by jury.

a. The Right to Trial By Jury, Properly Understood, Includes the Right to Have a Jury Determine the Amount of Damages, And that Determination Cannot Be Overridden By Legislative Decree

Article I, § 22(a) of the Missouri Constitution provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." These words are "intended to guarantee a right, not restrict a right." *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 84 (Mo. banc 2003). They are, moreover, "a more emphatic statement of the right"—it shall remain "inviolate"—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, ...'" *Id*.

This Court engages in an historical analysis when considering the scope of the constitutional right, using the year 1820 as a reference point. *See id*. 84-85. This approach mirrors the U.S. Supreme Court's approach to interpreting the Seventh Amendment, reflecting the commitment of both the Missouri and federal constitutions' commitments to preserving the right as it existed at common law. Accordingly, this Court recognized in *Lee v. Conran*, 111 S.W. 1151, 1153 (1908), that the trial by jury right in the Missouri Constitution:

> 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.

See also Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998) (recognizing that the Seventh Amendment applies to common-law causes of action and to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)).

What, then, are the "substantial incidents and consequences" of the right to trial by jury that rest beyond the reach of "hostile" legislation? The United States Supreme Court decisions in *Dimick* and *Feltner* establish as historical fact that, according to the common law rule as it existed at the time of the adoption of the United States Constitution, "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." *Dimick*, 293 U.S. at 480 (citations omitted). Sixty-three years later the Court in *Feltner* confirmed that juries are the judges of damages. In *Feltner*, the Court considered whether the Seventh Amendment provides a right to jury trial on all issues pertinent to an award of statutory damages in a copyright infringement action, including a determination of the amount of damages itself. 523 U.S. at 347. Surveying the historical role of common law juries, "both as a general matter and in copyright cases," the Court determined:

> The right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any, awarded to the copyright owner. It has long been recognized that "by the law the jury are judges of the damages." *Lord Townshend*

v. Hughes, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C.P. 1677). Thus in *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), the Court stated that "the 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." Id., at 480, 55 S.Ct., at 298 (internal quotation marks and citations omitted). And there is overwhelming evidence that the consistent practice at common law was for juries to award damages. See, e.g., *Duke of York v. Pilkington*, 2 Show. 246, 89 Eng. Rep. 918 (K.B.1760) (jury award of £100,000 in a slander action); *Wilkes v. Wood*, Lofft 1, 19, 98 Eng. Rep. 489, 499 (C.P.1763) (jury award of £>1,000 in an action of trespass); *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C.P.1763) (upholding jury award of £300 in an action for trespass, assault and imprisonment); *Genay v. Norris*, 1 S.C.L. 6, 7 (1784) (jury award of £400); *Coryell v. Colbaugh*, supra (sustaining correctness of jury award of exemplary damages in an action on a promise of marriage); see also K. Redden,

> Punitive Damages § 2.2, p. 27 (1980) (describing "primacy of the jury in the awarding of damages").

Id. at 353-54; *see also* Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial By Jury*, 31 U. DAYTON L. REV. 307 (2006) (explicating common-law history of trial by jury in state and federal constitutions, and concluding that the assessment of damages is at the core of the common-law jury's fact-finding prerogative).

This historical view is consistent with the decisions of the Oregon and Washington Supreme Courts, whose constitutions, like Missouri's, preserve the jury trial right as "inviolate." *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 468 (Or. 1999) (using the year 1857 as a reference point); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 716 (Wash. 1989) (using the year 1889 as a reference point). Both these sister Supreme Courts concluded, following an extensive review of the common-law history of the right to trial by jury, that a jury's determination of damages is a core, fact-finding function that is inviolate and thus beyond legislative encroachment. Thus, for instance, the Oregon Supreme Court in *Lakin* found a statutory cap on non-economic damages (similar to the cap at issue in this appeal) to infringe Oregon's right to trial by jury. 771 P.2d at 473. It reasoned:

> Although it is true that ORS 18.560(1) does not prohibit a jury from assessing noneconomic damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect. We conclude that to permit the Legislature to override the effect of the jury's determination of noneconomic

> damages would "violate" plaintiffs' right to "Trial by Jury," guaranteed in Article I, section 17. Limiting the effect of a jury's noneconomic damages verdict eviscerates "Trial by Jury" as it was understood in 1857 and, therefore, does not allow the common-law right of jury trial to remain "inviolate."

Id.

Similarly, the Washington Supreme Court in *Sofie* found a non-economic damages cap unconstitutional under the state's constitutional guarantee of right to trial by jury. The *Sofie* court explained:

> Respondents also contend that the damages limit affects only the judgment as entered by the court, not the jury's finding of fact. This argument ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Respondents essentially are saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function. This court will not construe constitutional rights in such a manner. As we once stated: "'The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the

> name.... If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.'" *State v. Strasburg*, 60 Wash. 106, 116, 110 P. 1020 (1910), quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1866).

771 P.2d at 721.

The Oregon and Washington Supreme Courts are not alone; at least four other states with jury trial provisions in their constitutions containing operative language that is nearly identical to Missouri's, *see* KAN. CONST. Bill of Rights, § 5 ("The right of trial by jury shall be inviolate"); TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate"); OHIO CONST. art. I, § 5 ("The right of trial by jury shall be inviolate"); FLA. CONST. art. I, § 22 ("The right of trial by jury shall be secure to all and remain inviolate"), have found such damage caps unconstitutional, *Kan. Malpractice Victims Coal. v. Bell*, 757 P.2d 251 (Kan. 1988) (right to trial by jury); *Duren v. Suburban Comty. Hosp.*, 495 N.E.2d 51 (Ohio Ct. C.P. 1985) (striking limit on a number of constitutional grounds); *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987) (flat limit violates right to jury); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (holding unconstitutional statutory limit on damages because it invades jury's fact-finding province); *see also Wiley v. Henry Ford Cottage Hosp.*, 668 N.W.2d 402, 415 (Mich. Ct. App. 2003) (recognizing that Michigan's "constitutional right to trial by jury extends to the determination of damages"); *Nestlehutt v. Atlanta Oculoplastic Surgery, P.C.*, No. 2007-EV-002223-J, slip op. 6-10 (Fulton County Ct. Feb. 9, 2009), *appeal pending*, No.

S09A1432 (Ga. Sup. Ct.) (holding non-economic damages cap unconstitutional pursuant to Georgia's "inviolate" right to trial by jury guarantee), App. A45-A66.

These state and federal authorities thus establish as historical fact that at common law the jury's assessment of damages is an aspect of its fact-finding function that cannot be overridden by legislative decree if the right itself is to remain "inviolate."

b. This Court in *Adams* Erred in Concluding that a Non-Economic Damages Cap Such as Amended § 538.210 Does Not Infringe Upon the Right to a Jury Trial, and Thus *Adams* Should Be Overruled

In *Adams*, this Court held that § 538.210, Mo. Rev. Stat. (1986), did not deny plaintiffs their constitutional right to trial by jury. 832 S.W.2d at 907-08. "A jury's primary function," the *Adams* court recognized, "is fact-finding," and "[t]his includes a determination of plaintiff's damages." *Id.* (citing *Jaycox v. Brune*, 434 S.W.2d 539, 542-43 (Mo. 1968)). The Court, nevertheless, concluded that "[b]ecause Section 538.210 is not applied until after the jury has completed its constitutional task, it does not infringe upon the right to a jury trial." *Id.* (citation omitted).

Adams's understanding of the constitutional dimensions of the jury's role in determining damages was shaped by the U.S. Supreme Court decision in *Tull v. United States*, 481 U.S. 412 (1987), which had held that Congress could lawfully authorize judges, not juries, to assess the amount of civil penalties under the Clean Water Act. *Adams* construed *Tull* to mean that "[t]here 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.

Six years after *Adams* was decided, the U.S. Supreme Court decisively rejected that understanding of *Tull* when it decided *Feltner*. In *Feltner*, the Court considered whether the Seventh Amendment provides a right to jury trial on all issues pertinent to an award of statutory damages in a copyright infringement action, including a determination of the amount of damages itself. 523 U.S. at 347. Surveying the historical role of common law juries, "both as a general matter and in copyright cases," the Court determined, as discussed above, that the right to a jury trial includes the right to have a jury determine damages. *Id.* at 353-54.

Feltner distinguished the earlier ruling in *Tull* on the ground that, in the former case, the Court had been "presented with no evidence that juries historically had determined the amount of civil penalties to be paid to the Government." *Id.* at 355. By contrast, the Court held that "there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff." *Id.*

Feltner's conclusion that a party had a right at common law to have a jury determine the severity of the injury through an assessment of damages is plainly in conflict with the *Adams* court's understanding of the common law role of juries. Moreover, *Adams* is inconsistent with the decisions of sister Supreme Courts, discussed above, which persuasively demonstrate that allowing the jury's determination of damages to be usurped by statute contravenes the "inviolate" right to trial by jury. A proper

understanding of the common law role of juries admits no reasonable conclusion other than that juries are the judges of damages, and statutory caps applicable to common law causes of action such as medical negligence run afoul of this "inviolate" constitutional right.

For these reasons, this Court should overrule *Adams* and conclude that amended § 538.210 indeed infringes upon Missouri's "inviolate" jury trial right. The judgment of the lower court, which sustained § 538.210's constitutionality under article I, § 22(a), should therefore be reversed.

6. Amended § 538.210 Violates the Separation of Powers, Article II, Section 1.

Point Relied on #8. The trial court erred in granting Dr. Shapiro and MHG's motion for verdict reduction pursuant to amended § 538.210, because amended § 538.210 violates the constitutional separation of powers prescribed by article II, § 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 with a fixed "legislative remittitur" which takes no account of the facts in a particular case.

Finally, amended § 538.210 violates the constitutional separation of powers prescribed in Article II, section 1 of the Missouri Constitution.[31] 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. The cap on non-economic damages invades the province of the judiciary by superseding this judicial power with a fixed "legislative remittitur." *See Best*, 689 N.E.2d at 1078-81.

In most states, as historically in Missouri, courts exercised their power to review the size of damages awards through the doctrines of additur and remittitur, under which the court gave a litigant a choice of accepting an altered damage award in lieu of granting a new trial. In medical malpractice actions in Missouri, however, courts review awards for excessiveness or inadequacy through consideration of motions (or on their own motion) for a new trial.[32] This in no way affects the traditional judicial authority to

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[31] Art. II, § 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."

[32] In *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. banc 1985), the Missouri Supreme Court abolished the doctrine of remittitur on the grounds that remittitur adulterated the practice of judicial consideration of a motion for new trial

police damages awards for excessiveness or inadequacy. As this Court observed in *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99 (Mo. banc 1985), "Abolishment of the remittitur practice in Missouri does no violence to the power and discretion of trial courts to control jury verdicts." *Id.* at 110.

This Court has not previously considered whether a cap on non-economic damages violates the separation of powers.[33] But sister courts in other states have considered the question and found caps on non-economic damages to be inconsistent with the constitutional separation of powers. *See, e.g., Best*, 689 N.E.2d at 1078-81; *Sofie*, 771 P.2d at 720-21.

In *Best*, 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 essential to the

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by permitting the trial court to find error in its trial and yet excuse the error upon remittitur of a commanded portion of the jury's verdict. *Id.* The Legislature promptly restored the judicial power to grant remittiturs or to increase the size of jury verdicts a court found to be inadequate. Mo. Rev. Stat. § 537.068 (1987). However, the legislation restoring the practice expressly excluded malpractice actions from its reach. *See* H.B. 700, §44 (1987). Thus, in such actions, a motion for new trial on the grounds that the size of the verdict is against the weight of the evidence remains the method by which trial courts review a verdict for excessiveness or inadequacy.

[33] 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.

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.* Moreover,

> [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.; see also Sofie, 771 P.2d at 720-21 (court reasons 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.").[34] Precisely the same analysis—and

[34] *A fortiori*, the cap on non-economic damages in amended § 538.210 also "encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment

conclusion—are appropriate under article II, § 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).

Dr. Shapiro and MHG will no doubt respond to this argument with a citation to *Fust v. Attorney General*, 947 S.W.2d 424, 430-31 (Mo. banc 1997), in which 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." But *Fust* should no longer be considered good law on this point. In support of this proposition, the *Fust* court 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, *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 issue, 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.

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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 a new trial at which the plaintiff could obtain an appropriate recovery.

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

CONCLUSION

For the reasons discussed above, Appellants/Respondents James and Mary Klotz respectfully request that this Court declare H.B. 393 and amended § 538.210 unconstitutional, reverse the decision of the circuit court granting Dr. Shapiro and MHG's motion for verdict reduction, and remand to the circuit court for reinstatement of the full jury award against MHG and Dr. Shapiro for James Klotz and Mary Klotz.

Dated: July 31, 2009. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, and the signature block contains, 23,441 words (as determined by Microsoft Word 2003 software);

(2) That the CD-ROM filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, the appendix, and a copy of the CD-ROM containing a copy of the brief, were mailed, Federal Express Overnight Delivery, this 31st day of July, 2009, to:

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