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 Twenty-First Judicial Circuit, St. Louis County
Case No. 06CC-4826
Honorable Barbara Wallace, Circuit Judge, Division 13

APPELLANTS/CROSS-RESPONDENTS' SECOND BRIEF

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SECOND BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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REPLY TO RESPONDENTS' JURISDICTIONAL STATEMENT

A. The Klotzes' Constitutional Objections to HB 393 Are Properly Before the Court.

Respondents/Cross-Appellants, Metro Heart Group of St. Louis Inc. and Michael Shapiro, MD (defendants below and hereafter MHG), argue that the Appellants/Cross-Respondents James and Mary Klotz (plaintiffs below and hereafter James Klotz, Mary Klotz or the Klotzes), have waived their constitutional objections because they: (1) failed to raise them in a timely fashion; (2) failed to notify the Attorney General of their suit; and (3) failed to raise their constitutional objections in a motion for a new trial. The trial court implicitly rejected these arguments when it ruled on the constitutional issues.[1] This Court should reject these arguments because: (1) the constitutional issues were timely raised, and MHG were not prejudiced by the timing; (2) the requirement that notice be given to the Attorney General is mandatory only for declaratory judgment actions—which this is not; and (3) the obligation to keep alive constitutional questions in a motion for new trial arises only where such a motion is in fact filed, and the Klotzes filed no such motion here because the jury had returned a verdict in their favor.

[1] MHG did not raise this third issue in the trial court, but did raise the first two issues. The circuit court implicitly rejected these arguments when it decided the constitutional issues.

B. The Klotzes' Presented Their Constitutional Objections in a Timely Fashion.

Missouri courts have long recognized that "a constitutional question must be presented at the earliest possible moment 'that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.'" *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989) (citations omitted). The rule prevents surprise to the opposing party and permits the trial court an opportunity to fairly identify and rule on the issue. *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008).

The Klotzes fully complied with this rule by raising their constitutional objections to amended §538.210, RSMo Supp. 2008[2] before trial and in their reply to MHG's answer. The Klotzes filed their Second Amended Petition on March 13, 2008. In that Petition, James Klotz sought damages for MHG's medical negligence, and Mary Klotz sought damages for loss of consortium. MHG filed an Answer to the Second Amended Petition, in which they raised, *inter alia*, §538.210 as an affirmative defense. Legal File 51-54: MHG's Answer to Second Am. Pet. ¶ 3 (filed Mar. 26, 2008). Subsequently, the Klotzes' filed a reply to MHG's Answer, asserting, with specificity, that if amended §538.210 applies to this case, it is unconstitutional. Legal File 64-68: Pls.' Reply to Defs.' Answer to Second Am. Pet. (filed on Apr. 17, 2008). Notably, MHG *never*

[2] All statutory references are to RSMo Supp. 2008 unless otherwise indicated.

challenged the propriety of the Klotzes' constitutional objections prior to trial, thus implicitly accepting that such issues would be argued post-trial.

The fact that the constitutional issues were not raised in the original petition does not mean the issues were untimely pleaded. They were raised prior to trial, in a reply, which is a "legitimate" pleading in which to challenge the constitutionality of a statute. *Bauldin v. Barton County Mut. Ins. Co*., 666 S.W.2d 948, 951 (Mo. App. S.D. 1984) ("plaintiff did not raise the constitutional issue by reply to the amended answer, which, though not required by Rule 55.01, would have been a legitimate way to challenge the constitutionality of the statute . . . ."); *see 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).

MHG criticize the Klotzes' reliance on *Bauldin* because in that case the plaintiff did not raise the issue in his reply. Thus, according to MHG, the Court in *Bauldin* did not squarely consider whether a plaintiff who follows that procedure has in fact properly presented their constitutional objections. Contrary to MHG's strained reading of *Bauldin*, the Court in that case stated that raising "the constitutional issue by reply to the amended answer . . . would have been a legitimate way to challenge the constitutionality of the statute." 666 S.W.2d at 951. That is precisely the procedure the Klotzes employed in this case; their claims thus were timely raised.

Further, a constitutional challenge first raised in amended pleadings can be considered to relate back to the time of original filing. Indeed, this Court has "reject[ed]

the suggestion that a constitutional point not set out in an initial pleading cannot be added by amendment. It is the sense of our rules that amendments be liberally allowed and that the principle of relation back be freely applied." *Dye v. Div. of Child Support Enforcement*, 811 S.W.2d 355, 357-358 (Mo. banc 1991). The Klotzes' constitutional challenges, even though not raised in their original pleading, were raised in subsequent pleadings and accordingly can be considered to relate back to the original pleadings. The constitutional challenges were thus appropriately and timely raised in the replies.

C. MHG Was Not Prejudiced By the Timing of the Klotzes' Constitutional Objections.

The purposes of the rule requiring that constitutional issues be raised at the earliest opportunity—to prevent surprise to the opposing party, to permit the trial court an opportunity to fairly identify and rule on the issues, and to foster a full and fair opportunity for the parties to litigate the issues—were served here. *See Carpenter*, 250 S.W.3d at 701 (describing the purposes of the rule). MHG were well aware prior to trial that the Klotzes would challenge the constitutionality of amended §538.210, if MHG, in a post-trial motion, sought to reduce the verdict in accordance with the statutory limits set forth in that provision. The Klotzes set forth their specific constitutional objections in their Replies to Defendants' Answers, discussed the issue at the pre-trial conference on July 11, 2008 in response to St. Anthony's Medical Center's Motion to Apply Tort Reform, and reiterated their position at the July 14, 2008 hearing on MHG's Motion in Limine that 2005 Mo. Legis. Serv. House Bill. 393 (hereafter HB 393) was either

inapplicable or, if applicable, unconstitutional. Hr'g Tr. 9:5-22.[3] Accordingly, MHG cannot reasonably claim that they were "surprised" when the Klotzes, in response to MHG's Motion to Reduce the Verdict Based on Amended §538.210, filed a memorandum addressing HB 393's application to this case and its constitutionality.

Neither can MHG reasonably claim that they have been denied a full and fair opportunity to litigate these constitutional issues, or that they have been disadvantaged by the course of the proceedings in the trial court. The Defendants, in the trial court, collectively filed approximately 100 pages of briefing on these constitutional issues.[4] Legal File, Vol. 6- Vol. 8, pp. 978-1349. In addition, MHG submitted an affidavit of an expert responding to the affidavit of one of the Klotzes' experts. Legal File, Vol. 8, p.1378. The trial court, informally and with the Klotzes' consent, provided MHG additional time to file memoranda and prepare for oral argument on these issues. *See*, MHG's Motion to Strike which asks, in the Alternative, for more time, Legal File, Vol. 6, p. 972. MHG thus unquestionably had a full and fair opportunity to present their arguments—an opportunity they seized—and their claims to the contrary are groundless.

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[3] At an off-the-record portion of the pretrial conference, the Court indicated a preference for postponing consideration of the constitutional issues until after the trial and after it was determined whether the jury would award a verdict in excess of the cap on non-economic damages. Missouri precedent requires only that constitutional issues be raised in a timely manner, not that the Court resolve them before trial.

[4] This includes filings by St. Anthony's Medical Center.

In sum, MHG cannot establish that they or the trial court were prejudiced by the timing of the Klotzes' objections. *See Carpenter*, 250 S.W.3d at 701 ("The purpose of the rule is *not* to prevent parties from litigating issues that arise during the course of a lawsuit if there is no prejudice to the opposing party.")(emphasis added). Both the trial court and the parties had a full and fair opportunity to address these constitutional issues. *See Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324, 327 (Mo. 1982). There is no prejudice here. Because these issues were properly raised and presented in the trial court, as the trial court itself implicitly found, this Court has jurisdiction to consider these issues.

D. The Klotzes Were Not Required to Notify the Attorney General of Their Constitutional Challenge and Thus Their Failure to Do So Cannot Constitute Waiver.

MHG further contends that the Klotzes cannot challenge the constitutionality of amended §538.210 because they failed to notify the Attorney General of their challenge. *See* Respondents/Cross-Appellants' Brief (hereafter MHG Br.), at p. 5. That is not the law. This Court has held that the requirement that notice be given to the Attorney General is mandatory only for declaratory judgment actions—which this is not. *See Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 507 (Mo. banc 1991). And, contrary to MHG's suggestion, the Court did not depart from that view in *Dye*, a case decided in the same term as *Mahoney*. *See Dye*, 811 S.W.2d at 357 (concluding that "there is no jurisdictional problem in the failure to formalize the Attorney General's status" in a non-declaratory judgment action). Although the *Dye* Court recommended

that litigants challenging the child support statute at issue in that case "should notify the Attorney General" of such a challenge, the Court did not *require* litigants to do so in a non-declaratory judgment action, either when challenging the statute at issue in *Dye* or when challenging any other statute. *See id*.

E. The Klotzes Were Not Obligated to Raise Their Constitutional Issues in Motions They Never Had Any Reason to File, Such as a Motion for New Trial.

MHG's most bizarre basis for challenging this Court's jurisdiction is their contention that the Klotzes were "required" to raise their constitutional objections in a motion for new trial. *See* MHG Br. 3. But because the Klotzes received a favorable verdict, they had no reason to file a motion for new trial. MHG's suggestion that the Klotzes were nonetheless required to file such a motion (thereby abandoning their verdict) in order to preserve their constitutional objections to a statute limiting the damages awarded by that very verdict is nonsensical, and none of the cases MHG cites (*id*. at 3) supports that procedural claptrap. In any event, the Klotzes did reiterate their constitutional objections in their motion to amend the judgment (Legal File 1449-50: Pls. Mot. to Amend 1) which was, if any were in fact required, the most appropriate after-trial motion under the circumstances. *See* Rule 78.07(c)(in all cases, allegations of error relating to the form or language of the judgment including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review). Thus, they raised their constitutional objections repeatedly in post-trial motions.

ARGUMENT

Standard of Review

The Klotzes inadvertently omitted the standard of review in their opening brief. But the standard of review is not in dispute: this Court's review of the trial court's judgment is de novo insofar as the constitutional questions are concerned. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). Moreover, "if a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid." *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002).

I. The Trial Court Erred in Holding That the Retrospective Application of Amended §538.210 to This Case Does Not Violate Missouri Constitution, Article I, §13 the Constitutional Ban on Retrospective Legislation.

The Klotzes, in their initial brief, explained that the trial court erred in holding that §538.210 may be applied retrospectively to this suit consistent with Missouri Constitution, article I, §13. Appellants' Initial Br. 12-21. This Court, accordingly, should reverse.

MHG, in their response, offer *no* defense of the reasoning that underlies the trial court's holding: that amended §538.210 affects the Klotzes' substantive rights but may nonetheless operate retrospectively, in spite of Missouri Constitution, article I, §13's clear command to the contrary, because the legislature had "cogent reasons" for directing that the law operate retrospectively. Legal File 1437-1448: Appendix to the Second Brief of Appellants/Cross Respondents (hereafter 2 Apdx) at A2. And for good reason. This Court has already—on multiple occasions—rejected the argument that the legislature

may enact laws that contravene Missouri Constitution, article I, § 13, whether for cogent reasons or not. *See* Appellants' Initial Br. 20-21 (discussing *Doe v. Phillips*, 194 S.W.3d 833, 851 (Mo. banc 2006)); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. banc 1993); *Dep't of Soc. Servs. v. Villa Capri Homes, Inc*., 684 S.W.2d 327, 332 n.5 (Mo. banc 1985).

Instead, MHG argues that amended §538.210 operates prospectively, not retrospectively, and affects procedural, not substantive, rights. Notably, on both these questions the trial court agreed with the Klotzes that amended §538.210 operates retrospectively and violates substantive rights. Legal File 1437-1448: 2 Apdx at A2.

A recent decision of a Florida court of appeals, finding the Florida cap on non-economic damages in medical malpractice actions to be unconstitutional retroactive legislation as applied to case in which the medical malpractice occurred before the effective date of the Florida law, fully supports the Klotzes' position. *See Raphael v. Shecter*, 18 So. 3d 1152 (Fla. Dist. Ct. App. 2009). At issue in *Raphael* was whether a statute limiting non-economic damages in medical malpractice cases, which was adopted after an emergency room physician's alleged negligence in treating patient, applied retroactively to the patient's negligence action against the physician, even though the suit was filed nearly two years after the statute became effective. Applying the same analysis that this Court applies in assessing retroactivity under the Missouri Constitution, *compare id*. at 1156 *with Doe v. Phillips*, 194 S.W.2d at 851-52, the Florida court concluded that the Florida legislature had intended to apply the cap on non-economic damages retrospectively. The Florida cap applies to causes of action filed on or after September 13, 2005, even if the

cause of action accrued before that date. *Raphael*, 18 So. 3d at 1157; *see id*. (noting that a cause of action accrues at the time of injury). Accordingly, the *Raphael* court found that it was the intent of the Florida legislature to apply the cap retroactively to such suits. *Id*.

The statute at issue in this case, amended §538.210, is, in its form, indistinguishable from the Florida statute that the Florida court found to be retroactive. Section 538.210 applies to "all causes of action filed on or after August 28, 2005," even if the cause of action accrued before that date, *see Carter v. Pottenger*, 888 S.W.2d 710, 713 (Mo. App. S.D. 1994) (negligence cause of action accrues when there is a breach of a duty to plaintiff causing injury). Because the Klotzes' claims accrued prior to August 28, 2005, and because suit was filed after that date, amended § 538.210 applies retroactively to this suit.[5] *See* Appellants' Initial Br. 15-16.

[5] MHG surmise that if the Klotzes had filed suit prior to August 28, then §538.210 would not apply at all to this suit, and this Court would not have to engage in retroactivity analysis. Respondents' Br. 16. But the filing of the suit after H.B. 393's effective date is not material to the constitutional retroactivity analysis. The terms of the statute state that it applies to suits filed after the effective date of the act, without regard to the date of injury (i.e., accrual of a cause of action). The constitutional analysis then begins by considering whether the cause of action accrued before or after that cut-off date, not the date of filing.

Next, the Florida court of appeals considered whether the retroactive application of the statutory limit on non-economic damages affects substantive or procedural rights, noting that only the former is constitutionally proscribed. *Raphael*, 18 So. 3d at 1157. It acknowledged that "no one has a vested right in the common law, which the legislature may change prospectively." *Id*. (citation omitted). Thus an "inchoate cause of action—one that has not yet accrued—is not a vested right." *Id*. But once a cause of action accrues, a vested or substantive right exists that shall not be affected by the application of retrospective legislation.

MHG disagree. They contend that a vested or substantive right comes into existence only at the time that a cause of action has evolved into a money judgment—and at no earlier point in time. That is not a correct understanding of vested or substantive

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The novel theory that MHG propose is plainly incorrect because it would render the constitutional bar against retroactivity a dead letter. Under that theory, plaintiffs who are injured even one day prior to the effective date of a statute, and who file suit on that day, are not subject to the new law. But the same plaintiffs, should they fail to file suit in that one-day window, will have waived their right to challenge the statute on retroactivity grounds. No other set of plaintiffs could possibly have cause to challenge a law on retroactivity grounds. Given the implications of MHG's bizarre theory, it is not surprising that no Missouri court has ever adopted such an understanding of the scope of the protections of the constitutional bar against retroactive laws.

rights. As the *Raphael* court persuasively explained, even before a money judgment has been entered, "a right is indeed vested and may not be abrogated by legislation" if

> *an act or event has already occurred affecting a claimant* and has been transformed into an accrued right to sue. *Suit may not yet have been brought*, on the one hand; or suit may have already been brought, on the other hand, but no outcome has been reached in any litigation. As it turns out, *both of these stages involve vested rights.*

Id. at 1157 (emphasis in original) (citing *Williams v. Am. Optical Corp.*, 985 So. 2d 23, 27-28 (Fla. Dist. Ct. App. 2008)). Based on this reasoning, the court found that the retroactive application of the Florida statutory limit on non-economic damages in that case to be constitutionally improper "because it is an impairment of the substantive and vested rights of the [plaintiff] for the cause of action which accrued and vested" at the time of injury and prior to the statutory cap's enactment. *Id*. at 1158.

As in *Raphael*, this Court should hold that the retroactive application of the Missouri statutory limit on non-economic damages is constitutionally improper because it impairs the Klotzes' substantive and vested rights in their causes of action, which accrued at the time of injury and prior to the statutory cap's enactment. Moreover, that conclusion is fully supported by *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409 (Mo. banc 1974), and *Stillwell v. Universal Construction Co.*, 922 S.W.2d 448 (Mo. App. W.D. 1996). As the Klotzes have explained (Appellants' Initial Br. 18), both *Buder* and *Stillwell* held that 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. Here, too, 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.

MHG engage in question-begging when they argue that in *Buder* and *Stillwell* the retrospective application of the laws at issue there effected a legal change, but here no such legal change is effected by the application of amended §538.210. That is, of course the question on appeal, and *Buder* and *Stillwell* fully support the Klotzes' arguments that the application of amended §538.210 to this suit would impair the Klotzes' substantive rights, because the law "attach[es] a new disability in respect to transactions or considerations already past." *Barbieri v. Morris*, 315 S.W.2d 711, 714 (Mo. 1958). James Klotz's recoverable non-economic damages would fall by almost $275,000, and Mary Klotz would recover nothing at all of her award for $220,430 based on her loss-of-consortium claim. To conclude that the retrospective application of §538.210 does not attach a disability to a cause of action that accrued prior to the statute's enactment, as MHG argue, this Court would have to ignore principles of justice and fair play, principles that are always germane to the question whether the retrospective application of a law affects substantive rights. *Buder*, 515 S.W.2d at 411.

Yet, that is precisely how MHG arrive at their flawed conclusion; their retroactivity analysis fails to take into account, let alone mention, these central considerations. Moreover, that is precisely why MHG misunderstand *Buder*, which

governs this case. This Court in *Buder* rejected their argument that an amendment to a statutory ceiling goes only to the remedy, because that conclusion, though perhaps logically appealing, fails to take due account of the principles of justice and fair play, which do not permit amendments to statutory ceilings to be applied retroactively during the life of a cause of action. There is no reason for this Court to abandon that precedent. The retroactive application of amended §538.210's statutory ceiling effects an impairment of the Klotzes' substantive and vested rights for their causes of action, which accrued and vested at the time of injury and prior to the statutory cap's enactment. Thus, this Court should find its application here unconstitutional.[6]

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[6] If this Court rules that the revised cap in amended §538.210 may not be retroactively applied to the jury award in the Klotzes' case, it need not reach the broader, facial challenges to that provision's constitutionality, discussed below. Nevertheless, the Klotzes urge this Court to invalidate the revised cap on the broadest constitutional grounds possible. To be sure, judicial restraint normally counsels against holding a statute facially unconstitutional where a finding of unconstitutionality in some but not all applications is all that is necessary to decide the case. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, ---, 128 S. Ct. 1184, 1190 (2008). Such restraint is typically warranted because courts should be cautious about prematurely interpreting statutes in areas where their constitutional application might be cloudy. *See id*. But there is no reason to exercise that restraint here. The application of amended §538.210, by its terms, to this case is in no sense hypothetical; indeed, all agree that it

II. HB 393 Violates the Clear Title Mandate of Article III, §23 of the Missouri Constitution.

As the Klotzes explained in their initial brief, HB 393's title—"An Act . . . relating to claims for damages and the payment thereof," HB 393 is so unduly broad and amorphous that it describes the better part of all legislation passed by the General

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does apply. The issue then is fully joined, and this Court can reach the Klotzes' facial challenges to the cap and reverse the decision of the trial court on those grounds without rendering an advisory opinion. While this case may be resolved on retroactivity grounds, there are numerous other cases coming down the pike—in which the plaintiff's injury occurred after the effective date of H.B. 393—that cannot be so narrowly decided. The broader constitutional challenges to amended §538.210 raised here will be raised again, and the lower courts, bound by this Court's ruling in *Adams*, may well feel disempowered to consider these constitutional arguments. These constitutional questions will not be ultimately resolved, therefore, until they are decided by this Court. To postpone deciding these facial challenges to the constitutionality of the revised cap would thus inevitably result in a substantial waste of legal and judicial resources. The law on these issues has been comprehensively and ably briefed by the parties and their *amici*. The Klotzes, therefore, urge this Court to consider, and resolve, each of the constitutional questions raised in this appeal, and to invalidate amended §538.210 on the broadest possible constitutional grounds.

Assembly, and thus it violates article III, §23 of the Missouri Constitution.[7] *See Jackson County Sports Complex Auth. V. State*, 226 S.W.3d 156, 161 (Mo. Banc 2007). That broad and amorphous title, MHG respond, is not unconstitutional because it may be read to mean: "[T]he institution and trial of lawsuits for damages and the collection of these damages in both tort and non-tort civil actions." *See* MHG Br. 25. MHG's inventive reading, however, is not what the title says and it is not at all self-evident on the face of the title itself. MHG are able narrowly to construe the title because they are intimately familiar with HB 393's content.[8] But the public, by contrast, when presented with such a broad and amorphous title, cannot possibly understand this Act to concern a single

[7] MHG deem it "[n]oteworthy" that the Klotzes do not rely on what they describe as the "single subject test." *See* MHG' Answer Br. 22. Given that the Klotzes' constitutional challenge is trained on the absence of a clear title, it is not noteworthy that the Klotzes rely on the clear-title test articulated in *Jackson County*, as opposed to the related but distinct single-subject test described by MHG. *See* MHG' Br. 22 (citing *State v. Salter*, 250 S.W.3d 705, 709 (Mo. banc 2008). What is noteworthy, if anything, is that MHG have erected a straw man devoted to a single-subject challenge not at issue here, and spend several pages of argument addressing that issue before turning to the Klotzes' main argument regarding clear title. *See* MHG' Answer Br. 21-23.

[8] Contrary to MHG's suggestion, the fact that the title lists the sections to be repealed only further serves to obscure the Act's contents. *See* Appellants' Initial Br. 24-25.

subject within the meaning of Missouri Constitution, article III, § 23.[9] *See Home Builders Ass'n v. State*, 75 S.W.3d 267, 269 (Mo. Banc 2002)(title must be clear such that "individual members of . . . the public [are] fairly apprised of the subject matter of pending laws").

MHG's reading of the title is indeed imaginative; it envisages language that the General Assembly itself did not employ. For instance, MHG glean from HB 393's title the following limitation: this Act is limited to "tort and non-tort civil actions." *See* MHG' Br. 25. But nothing on the face of the title supports that limiting construction. The word "tort" is not present in the title. Neither is the phrase "non-tort"—which, in any event, hardly serves to qualify "civil actions," another phrase that MHG read into the title. Even read that way, the title is unduly broad because it could reasonably be understood to describe legislation affecting "claims for damages and the payment thereof" in the distinct contexts of bankruptcy, copyright infringement, or regulatory takings, or breach of warranty, or trespass, or defamation, or the failure to pay child support, or the improper distribution of corporate shares. These individual subjects run

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[9] As the Klotzes acknowledged in their opening brief, bills may have as their subject "some broad umbrella category," *Missouri State Medical Association v. Missouri Department of Health*, 39 S.W.3d 837, 841 (Mo. banc 2001), but the title expressing such a subject may not approach a level of abstraction that would prevent "individual members of . . . the public from being fairly apprised of the subject matter of pending laws," *Home Builders Association v. State*, 75 S.W.3d 267, 269 (Mo. banc 2002).

the gamut of "law" with which the legislature could possibly concern itself—such as family, corporate, property, tort, copyright, trademark, debtor-creditor, or contract law—and thus in no sense identify a single subject.

What is more, the title, on its face, is not limited to "civil actions"—words that, again, do not even appear in the title. *See* HB 393. The actual words of HB 393's title could reasonably be read to describe claims brought by the State against a person who has caused damage to property. Such "claims for damages" could include property damage in the second degree. *See, e.g.*, §569.120 RSMo 2000. The title, accordingly, can be understood to encompass *criminal* actions in addition to civil actions.

MHG also argue that the title may be read to concern "the institution and trial of lawsuits for damages." *See* MHG' Br. 25. Nowhere does the Act's title contain the words "institution," "trial," or "lawsuits." *See* HB 393. What HB 393's title does say is that this legislation concerns "claims for damages," language that could reasonably be understood to encompass "claims" made in administrative hearings involving the State or in an arbitral setting. *See* HB 393. Nothing in the language of the title, however, indicates that this legislation is strictly limited to "trials" or "lawsuits."

Lastly, it is of no small significance that the search engine Westlaw—when prompted to search the terms "claims" "for" "damages" "and" "the" "payment" "thereof" in the database Missouri Statutes Annotated—does not return any results because these terms, even taken together, are "too common" to identify any discernible set of state laws. Surely the public cannot be expected to discern the subject of an act based on such

a broad and amorphous title when Westlaw itself concludes that the title *does not* delimit a finite set of subjects.

Troublingly, it does not even appear to have been the aim of the Missouri legislature to educate the public about the contents of HB 393 through its title. *See State ex. Rel. Dickinson v. Marion County Court*, 30 S.W. 103, 105 (Mo. 1895)(recognizing an unduly broad and amorphous title as being "designed to mislead as to the subject dealt with"). As the Klotzes have explained, the titles of HB 393's predecessors, which amended or repealed virtually identical sections of the Missouri statutory code, were more specific. *See* Appellants' Initial Br. 23-25. But the legislature, in enacting HB 393, opted instead to use the phrase "claims for damages and the payment thereof," which plainly does not indicate that HB 393 was primarily "tort reform" legislation, or legislation relating to health care providers. *Compare id*. *with* 1986 Mo. Laws 879 ("An Act . . . relating to health care providers"), and S.B. 280, 92nd Gen. Assembly, Reg. Sess. (Mo. 2003) ("relating to tort reform"). Given that the contents of these bills were virtually the same, the change in title, to one with a broader and more amorphous phraseology, should be viewed with suspicion. *Cf*. Missouri Constitution, art. III, §21 ("No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose.").

To this MHG respond that if the title more clearly stated that the Act related to "health care providers" or "tort reform," then similarly-situated medical malpractice victims would argue that the title is too restrictive or vague. *See* MHG' Br. 25. This argument appears to presume that the HB 393's title is so broad and amorphous by

necessity; in other words, the legislature had to use the broadest title imaginable to describe the multiplicity of subjects addressed therein. Of course, it was not "necessary" for the legislature to enact a law that is so large and contains multitudes that would make Walt Whitman blush. *See* Walt Whitman, Leaves of Grass: Song of Myself (Sec. 51). Missouri Constitution, article III, §23 calls for multiple laws in instances where, as here, the subjects dealt with are so broad and disconnected that they may only be expressed in a title describing the better part of all legislation passed by the General Assembly.

No layperson presented with HB 393's title could reasonably be expected to ascertain the Act's subject—however encompassing that subject may constitutionally be. Because its title is so general that it obscures the contents of the Act, and because it is so broad that it renders the single subject mandate meaningless, this Court should hold HB 393 unconstitutional in its entirety. *See Home Builders Ass'n*, 75 S.W.3d at 272.

Seeking to avoid this conclusion, MHG argue that the Klotzes' clear-title challenge is untimely under §516.500, RSMo 2000. But §516.500 is inapplicable here because that provision only governs the timing for raising "procedural" defects in statutes. *See, e.g.*, Missouri Constitution, article III, §21 (requiring the following procedure: "Every bill shall be read by title on three different days in each house."). The Klotzes' clear-title challenge, by contrast, concerns a *substantive* defect, which, like all of

the Klotzes' constitutional claims, was timely raised in pre-trial pleadings.[10] *See* Appellants' Jurisdictional Statement, *supra*, p. 19-26

III. The Revised Cap on Non-Economic Damages in Amended §538.210 Violates the Missouri Constitution.

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

MHG, and their amici, devote hundreds of pages of their briefs to deluging the Court with citations to data, reports, and anecdotal information that they assert provide a rational basis for the Missouri legislature to have enacted §538.210's revised cap on non-economic damages. As explained below, the vast majority of this information is irrelevant, self-serving, and not properly before the Court, and should not be considered in this appeal. More importantly, none of this information undermines in the least the central assertion to many of the Klotzes' constitutional claims: in Missouri in 2005 it was simply not rational for the legislature to believe that a reduced cap on non-economic damages was an appropriate response to rising malpractice insurance rates, because there was indisputable evidence that payouts on malpractice claims were not the cause of rising malpractice insurance premiums. They could not have been the cause because, continuing a fifteen-year trend, the number of malpractice claims being filed, and the number of claims on which payment was made, had been falling steadily, and the

[10] It would be odd indeed if the Legislature could enact a statute insulating unconstitutional legislation from legal challenges based on article III, §23—a power that the Constitution itself does not commit to the Legislature.

amounts paid out to malpractice victims had been increasing at less than the rate of inflation, *i.e.*, declining in real terms. Lowering the cap on non-economic damages may have been a politically expedient response to rising malpractice insurance premiums, but it was not a rational one. *See* Appellants' Initial Brief 31-46.

1. This Court Should Ignore the "Factual" Claims Made by MHG and Dr. Shapiro and Their Amici in Their Briefs.

Benjamin Disraeli is reputed to have coined the expression: "There are three kinds of lies: lies, damned lies, and statistics." Mark Twain, "Chapters From My Autobiography," *North American Review*, No. DCXVIII (1907)(attributing remark to Disraeli). MHG and their *amici* have bombarded this Court with more than 300 pages of briefs replete with citations to articles, reports, and statistics that purport to establish the wisdom of caps on malpractice damages as an effective tool for combating the rising cost of medical care. Few, if any, of these citations have anything to do with the situation that confronted the Missouri legislature in 2005: an existing statutory cap on non-economic damages, a falling number of malpractice claims and malpractice payouts that were declining in real terms, and yet a problem—brought on by the insurance business cycle—in the availability and affordability of malpractice insurance. This Court should therefore grant little credence to this purported evidence.

To begin with, none of this information is in the record in this case. When the Klotzes, in the trial court, opposed MHG's efforts to apply the amended cap on constitutional grounds, they supported their opposition with a number of documentary submissions and expert affidavits. Legal File 511-966: Coffey & Experts' Affs. &

exhibits attached thereto.[11] MHG could have responded in kind and submitted relevant information for the court's consideration. Instead, they chose only to submit a single affidavit taking issue with the affidavit of one of the Klotzes' experts, former Director of the Missouri Department of Insurance Jay Angoff. Having failed to make an adequate evidentiary record in the trial court, they should not now be permitted to supplement the record through their—and their *amici's*—appellate briefs.

More importantly, most of the information offered by MHG and their *amici* is irrelevant to the question of the reasonableness of the legislature's decision to enact the revised cap in 2005. Many of the documents they cite were not even in existence at the time HB 393 was enacted.[12] Others relate to time periods or factual circumstances very

[11] MHG criticize the Klotzes' affidavits as deficient because they are based on hearsay and are "full of nothing more than opinions." *See* MHG' Br.29. MHG conveniently ignore the fact that these affidavits come from expert witnesses, who are entitled to offer opinion testimony based on facts or data "of a type reasonably relied upon by experts in the field." §490.065 RSMo 2000. As the trial court implicitly recognized, the Klotzes' expert affidavits fully satisfied these requirements.

[12] *See, e.g.*, American Medical Association, *Medical Liability Reform—NOW!* (Feb. 5, 2008); Congressional Budget Office, Key Issues in Analyzing Major Health Insurance Proposals (Dec. 2008).

different from those that confronted Missouri.[13] Few, if any, even relate to the situation in Missouri.

In addition, many of these so-called authorities are entirely self-serving—documents created by proponents of medical malpractice liability reform to advance their political agendas. Of course, advocates for the malpractice insurance industry contend that severe caps on non-economic damages are necessary to hold down malpractice premiums. *See Amici Curiae* Mo. Chamber of Commerce, *et al*. Br. Of course, the American Medical Association says that there is a medical malpractice liability crisis, AMA, *America's Medical Liability Crisis: A National View* (Mar. 15, 2005), and the Missouri State Medical Association asserts that nearly half of all Missouri physicians were considering retiring or moving out of state due to malpractice premium increases. *See* MHG' Answer Br.43(citing MSMA, *Professional Liability Insurance Survey* (Aug. 2002) for this 2004 data. This Court, in fact, should expect these industry groups to come to this conclusion in spite of the evidence to the contrary, because "[i]t is difficult to get a man to understand something when his salary depends upon his not understanding it."

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[13] *See, e.g.*, Roger A. Rosenblatt, MD, et al., *Tort Reform and the Obstetrics Access Crisis: The Case of the WAMI States*, 154 Western Journal of Medicine 693 (June 1991); U.S. Congress, Office of Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs* (Sept. 1993); Washington State Medical-Education and Research Foundation, *The Impact of Medical Malpractice Insurance and Tort Law on Washington's Health Care Delivery System* (Sept. 2002).

Upton Sinclair, *I, Candidate for Governor: And How I Got Licked* (1935) (repr. Univ. of Cal. Press, 1994, p. 109). Still, their saying it doesn't make it so—or make it rational for the legislature to blindly accept those assertions in the face of contrary, objective evidence. For these reasons, the Klotzes urge this Court to ignore the "factual" claims scattered throughout the briefs from the other side and to focus on the objective evidence.

2. The Objective Evidence Available to the Legislature in 2005 Established that Imposition of a More Restrictive Cap on Non-Economic Damages Was Not a Rational Response to Rising Malpractice Premiums.

Based on the factual findings of the Missouri Department of Insurance, the Klotzes demonstrated in their initial brief that there was no malpractice liability crisis in Missouri at the time that HB 393 was enacted. The number of malpractice claims filed against all health care providers had been steadily decreasing, as had claims against physicians and surgeons. *See* Legal File 561-682: Coffey Aff. Ex. 17, MDI, *2003 Missouri Medical Malpractice Insurance Report* ("2003 MMMI Report"); 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. The number of paid claims had also been falling. 2004 MMMI Report at 20. These decreases continued a fifteen year trend. *See* Legal File 683-733: Coffey Aff. Ex. 18, MDI, *Medical Malpractice Insurance in Missouri: the Current Difficulties in Perspective* (Feb. 2003) ("Current Difficulties Report"). Moreover, total payouts to malpractice victims were

increasing at less than the general rate of inflation, *i.e.*, declining in real terms. *See* Legal File at 685-86: Current Difficulties 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." S*ee* Legal File at 700: Current Difficulties Report. There simply was no malpractice litigation explosion justifying a legislative response.

Malpractice premiums had risen sharply in the early 2000s but, as the state insurance department had informed the legislature, these increases were a function of the "insurance underwriting cycle," not excessive malpractice awards. *See* Legal File at 684: Current Difficulties Report. Even the Missouri Hospital Association (MHA), one of MHG's *amici*, acknowledged that "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." MHA, *An Overview of the Medical Malpractice Insurance Market for Physicians* at IV (Oct. 2002). Moreover, even after these rate increases, malpractice premiums in Missouri were not high by historic standards; adjusted for inflation, malpractice premiums per physician in 2003 were more than a third lower than they had been in 1989. S*ee* Legal File at 567: 2003 MMMI Report.

Finally, while there were anecdotal complaints from physicians that they were considering retiring or relocating their practices to another state because of high malpractice premiums, there was no significant decline in the number of physicians practicing in Missouri; indeed, data from the AMA showed a steady and uninterrupted increase in the number of Missouri doctors over the preceding forty-five years, both in

absolute numbers and also in relation to the state's population. *See* Legal File at 925-30, 963, 965: Professor Vidmar Aff. & exhibits attached thereto.[14]

Under all of these circumstances, there was no rational justification for the imposition of a stricter cap on non-economic damages in malpractice actions. The legislature lacked a rational basis for enacting amended § 538.210.

B. Amended §538.210 Violates the Equal Protection Clause of the Missouri Constitution, article I, §2; the Prohibition Against Special

[14] MHG and their *amici* take issue with this AMA data, claiming that there are some shortcomings to the AMA's methodology. (*See, e.g.*, MHG' Answer Br.42.) They cite statistics from the Missouri Board of Healing Arts (MBHA) that reported a slight decline in the number of licensed physicians in the state between 2000 and 2002. But even the MBHA data reveals that the number of physicians in Missouri had reached a new high—13,633—in 2004, the year before H.B. 393 was enacted. *Id.* (citing MBHA statistics). In any event, while taking issue with the precise figures from the AMA, MHG and their *amici* have not, and cannot, take issue with the historic trends in the data. The number of physicians in Missouri had been rising steadily, both in absolute terms and per capita, for the past forty-five years.

Legislation, Missouri Constitution, article III, §40; and the Due Process Clause, Missouri Constitution, article I, Section 10.

1. This Court Should Apply Heightened Scrutiny to the Revised Cap on Non-Economic Damages.

Contrary to the assertions by some of MHG's *amici* (*see, e.g., Amici Curiae* Missouri State Medical Association *et al.* Br 20)**,** the Klotzes do contend that this Court should apply heightened scrutiny when assessing the constitutionality of amended §538.210. Under Missouri's equal protection clause, legislative classifications that burden a suspect class or impinge upon a fundamental right must pass strict scrutiny in order to be upheld; they must be justified by a compelling state interest and narrowly drawn to further that interest. *Bernat v. State*, 194 S.W.3d 863, 864 (Mo. banc 2006). Similarly, 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)).

Amended §538.210 is subject to heightened scrutiny under both prongs of equal protection analysis. As explained in the Klotzes' initial brief, the legislative classifications created by amended § 538.210 impinge upon the fundamental constitutional rights to trial by jury, right to counsel, and access to the courts,[15] and

[15] 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

therefore should be obliged to survive strict scrutiny. Appellants' Initial Br. 61-79. Moreover, although these classifications are facially neutral, they disproportionately and adversely affect, *inter alia*, women, racial minorities, children, the elderly, and persons with disabilities. *See* Legal File 811-880: Professor Finley Aff.; *Amicus Curiae* NAACP Br.; *Amicus Curiae* AARP Br.; *Amicus Curiae* Paraquad, Inc. Br. Members of these groups receive a disproportionately large percentage of their recoveries for personal injuries in the form of non-economic damages, and they are therefore more severely and adversely affected by the revised cap. *Id.*

For both of these reasons, heightened scrutiny is appropriate. The Klotzes urge this Court to follow the lead of its sister court in New Hampshire, which applied heightened scrutiny in striking down a similar medical malpractice damage cap. *See Carson v. Mauer*, 424 A.2d 825, 830-31 (N.H. 1980) (applying intermediate scrutiny).

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903. MHG's *amici*, the Missouri State Medical Association and the American Medical Association assert that this Court's later decision in *Telling v. Westport Heating & Cooling Serv., Inc.*, 92 S.W.3d 771 (Mo. banc 2003), held that the "open courts provision does not confer a fundamental right" giving rise to strict scrutiny. *See Amici Curiae* Missouri State Medical Association, *et al.* Br 24. But that is incorrect. In *Etling*, this Court simply held that "the open-courts provision [of the Missouri constitution was] not implicated," and thus it could not provide the basis for invoking strict scrutiny in that case. 92 S.W.3d at 775. Here, by contrast, as explained below and in the Klotzes' initial brief, the open courts provision is directly implicated by amended §538.210.

The Klotzes analyze amended §538.210 under the rational basis test in this brief, not because they believe that it is the appropriate legal test, but because they do not believe that the revised cap can survive even that limited scrutiny; *a fortiori*, amended §538.210 cannot survive any heightened form of equal protection analysis.

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

Under rational basis review, the Court will start with a presumption of constitutionality, 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 Klotzes have made just such a showing here. As explained above, at the time amended §538.210 was enacted, the rapid run-up in premiums for medical malpractice insurance—the problem that the legislation was ostensibly designed to address—had not been caused by rising tort liability. In fact, the number of malpractice claims filed and payments made was falling, continuing a fifteen year trend. Total claims payments were falling in real terms. Appellants' Initial Br. 32-42. Under these circumstances, it was simply irrational to view a more severe cap on malpractice damages as an appropriate response to the problem of rising malpractice premiums.[16] *Cf. Ferdon*

[16] To draw a rough analogy, it would be like the driver of a car that has run out of gas deciding that his engine needed a tune-up to address his vehicle's lack of forward movement. By way of comparison, the New Jersey legislature is currently considering legislation that would limit annual medical malpractice insurance premium increases to a

v. Wis. Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005) (striking down Wisconsin damage cap on non-economic damages in medical malpractice cases on equal protection grounds because the legislature lacked a rational basis for enacting the caps); *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978) (striking down $300,000 cap on medical malpractice on equal protection grounds because court found that the legislature had been "misinformed"; there was no malpractice insurance availability or cost crisis in North Dakota).

Undoubtedly, there were some legislators who believed the claims of advocates for tort reform that frivolous malpractice claims and runaway juries were responsible for rising malpractice premiums. But it was neither rational nor reasonable to believe such claims in the face of the contrary objective evidence available in reports from the state department of insurance. Thus, this is the rare case where "'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. Dearhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512-13 (Mo. banc 1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

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designated range. "Bill would limit rate hikes for medical malpractice insurance," The Star-Ledger (Dec. 14, 2009), *available at* http://www.nj.com/politics/index.ssf/2009/12/bill_would_limit_rate_hikes_fo.html. Such an approach would have been a logical and reasonable legislative response to the situation that confronted the Missouri legislature in 2005.

Amended §538.210 creates a number of arbitrary and irrational classifications between various categories of tort victims, as well as various categories of tortfeasors. *See* Appellants' Initial Br. 48-54, 58-60. Because the legislature lacked even a rational basis for enacting the revised cap, amended §538.210 violates the constitutional guarantees of equal protection and substantive due process, as well as the constitutional prohibition against special legislation. *Id.* at 46-64.

C. Amended §538.210.4 Violates Mary Klotzes' Right to Open Courts and Certain Remedies, Missouri Constitution, article I, §14.

Subsection 4 of amended §538.210 provides that "any spouse claiming damages for loss of consortium shall be considered to be the same plaintiff as their spouse." Pursuant to this provision, the circuit court completely eliminated Mary Klotz's jury award of $220,430 against MHG for loss of consortium, because her husband's separate award of non-economic damages exceeded the revised cap.

As the Klotzes explained in their initial brief, amended §538.210.4, by subsuming Mary Klotz's claim for loss of consortium into her husband's claim for malpractice, violates Article I, §14, the open courts provision of the Missouri Constitution. As this Court has explained: "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." *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006). Amended §538.210.4 violates Mary Klotz's rights under Missouri Constitution, article I, §14, because she has a recognized cause of action for loss of consortium that the law arbitrarily restricts her from pursuing, by making her

recovery of damages contingent on her spouse not obtaining a jury award in excess of the cap on non-economic damages for his own, distinct injuries. Where, as in this case, her husband sought and obtained a verdict in excess of $350,000 in non-economic damages for his own injuries, this provision denies Mary Klotz any opportunity to obtain her own remedy and that restriction is both arbitrary and unreasonable.

In response, MHG argue that the Klotzes have misconstrued former Chief Justice Holstein's dissenting opinion in *Wheeler v. Briggs*, 941 S.W.2d 512 (Mo. banc 1997), the opinion that was subsequently adopted by this Court as the proper test for analyzing open courts violations. *See Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000). They contend that the Klotzes have "glossed over the fact" that Chief Justice Holstein had concurred with the result in *Wheeler*. MHG' Answer Br.69.[17] In their view, this establishes the principle that only procedural barriers to suit can violate Missouri Constitution, article I, §14. *Id.*

[17] *Wheeler* held that §516.170 RSMo 2000 which excluded medical malpractice actions from the tolling of the statute of limitations for minors and persons who are mentally incapacitated, did not violate Article I, §14. Chief Justice Holstein concurred in the result only "in part." 941 S.W.2d at 515. In his view, the non-tolling provision in medical malpractice cases was constitutional for the period of time after the appointment of a conservator to protect the interest of the mentally incapacitated person. *Id.* at 517-18. Prior to that point, however, the statute violated Article I, §14.

It is MHG who have misread Chief Justice Holstein's dissent and this Court's precedents. Justice Holstein specifically criticized the majority in *Wheeler* for creating "an unfounded dichotomy between those statutes that impose a legal barrier to court access and those statutes that result in an actual barrier to court access." 941 S.W.2d at 515. In his view, the majority opinion "provides no explanation for how any meaningful access to courts in medical malpractice cases is provided by merely the technical legal ability of a mentally incapacitated person . . . to prosecute an action on his or her own behalf. *Id.* at 517.

Chief Justice Holstein's opinion relied on the rationale of this Court's earlier ruling in *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7 (Mo. banc 1986), which had struck down the two-year limitations period on medical malpractice actions as applied to minors as violative of the constitutional right of access to the courts. In *Strahler*, this Court rejected the argument that the statute was constitutional because the minor could have brought suit through a parent or next friend, concluding that it violated Missouri Constitution, 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.* at 12.

Amended §538.210.4 is remarkably similar to the statute struck down in *Strahler* and that Chief Justice Holstein would have invalidated in *Wheeler*. While the statute may not impose a procedural bar to claims for loss of consortium, as a practical matter Mary Klotz and other spouses of severely injured malpractice victims know that they will not be able to recover for their loss of consortium unless their spouse foregoes his own claim

for non-economic damages. It poses, in Chief Justice Holstein's phrase, "an actual barrier to court access" for spouses of malpractice victims, because it "it makes them dependent on the actions of others [their spouses] to assert their claims." As in *Strahler*, this is an arbitrary and unreasonable restriction on Mary Klotz's access to the courts and her right to a remedy under Missouri Constitution, article I, §14.[18]

D. Amended §538.210 Violates the Missouri Constitution's "Inviolate" Right to Trial by Jury, Article I, § 22(a), and *Adams'* Holding to the Contrary Should be Overruled.

As the Klotzes explained in their initial brief, this Court's conclusion in *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), that a cap on non-economic damages in medical malpractice suits does not violate the right to trial by jury

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[18] MHG also cite to *Richardson v. State Highway & Transportation Commission*, 863 S.W.2d 876 (Mo. banc 1993), and *Fisher v. State Highway Commission of Missouri*, 948 S.W.2d 607 (Mo. banc 1997), in opposition to the Klotzes' open courts claim. MHG' Br.70-71. Neither case is relevant. Both cases involved constitutional challenges to the $100,000 statutory cap on state liability for motor vehicle accident injuries. §537.610 RSMo 2000. As such, they are straightforward applications of the doctrine of sovereign immunity. Moreover, in neither case did plaintiffs assert a constitutional challenge to the application of a single cap to the claims of both the accident victim and her spouse for loss of consortium; that issue was only raised as a matter of statutory construction in *Richardson*, 863 S.W.2d at 880-81, and not at all in *Fisher*.

preserved by article I, §22 of the Missouri Constitution, is erroneous and should be overruled. *Adams* effectively read the word "inviolate" out of the Constitution's text, *see* Missouri Constitution, article I, § 22, when it concluded that the legislature could in fact interfere with the jury's core common-law authority to decide issues of fact, such as the amount of damages due, by directing judges to discard the jury's assessment of that factual issue whenever that assessment exceeds an arbitrary limit set by the legislature, and to award instead damages in an amount pre-determined by the legislature. *See id*. at 907. This Court, of course, does not overrule its precedents lightly, but neither does it adhere to prior decisions that contradict the plain meaning of a constitutional provision. *See Independence-Nat. Educ. Ass'n v. Independence Sch. Dist*., 223 S.W.3d 131, 137 (Mo. banc 2007) (overruling *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (Mo. banc 1947), because that decision contradicted the plain meaning of article I, § 29 of the Missouri Constitution). Adherence to such precedents does not promote the rule of law, this Court recognized in *Independence-National Education Association*, because only the citizens of this State retain the authority to amend the plain terms of the Missouri Constitution.[19] *Id*. at 137.

[19] For example, the Texas Supreme Court held that a statutory limit on non-economic damages applicable in medical-malpractice actions violates the Texas Constitution's open courts provision. *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988). The plain language of the Texas Constitution thus barred the Texas legislature from limiting non-economic damages in common law actions. *See id.* The bar was subsequently lifted by

Adams committed precisely this type of error: it gave the word "inviolate" in Missouri Constitution, article I, §22(a) *no office* when it considered the scope of the jury's role at common law in assessing monetary damages. *See* 832 S.W.2d at 907. [20] This Court should not perpetuate that error by adhering to *Adams* in this case, as MHG urge the Court to do. Rather, it must overrule *Adams* for two reasons. First, the U.S. Supreme Court has concluded that, in actions at common law, the right to trial by jury includes, at its core, the right to have a jury determine damages. *Feltner v. Columbia Pictures Television*, Inc., 523 U.S. 340, 348 (1998). That conclusion is correct and there is no sound historical basis for concluding that a jury's factual determination of damages need not be given effect, and MHG offer none. Second, if that right is to remain "inviolate," as the plain language of article I, §22 of the Missouri Constitution commands, then the legislature may not override the effect of the jury's determination of damages by directing judges to substitute its preferred award of damages.

1. The U.S. Supreme Court in Feltner is Correct: In Actions at Common Law, the Right to Trial by Jury Includes, at Its Core, the Right to Have Juries Determine Damages.

Texas citizens, when they amended their state constitution so as to permit their legislature to enact such statutory limits. *See* Texas Constitution, article III, §66 (added Sept. 13, 2003).

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

The *Adams* Court appears to have read the less-than-crystalline decision in *Tull v. United States*, 481 U.S. 412 (1987), which the U.S. Supreme Court itself acknowledges "presented [] no evidence that juries historically had determined the amount of civil penalties to be paid to the Government," *Feltner*, 523 U.S. at 355, as fatal to the view that the legislature cannot enact a law that directs judges to interfere with a jury's determination of the amount of civil penalties. *See Adams*, 832 S.W.2d at 907 (citing *Tull*). But the subsequent decision of the U.S. Supreme Court in *Feltner* makes plain that *Tull* addressed solely the historical role of juries in assessing penalties "against the Government"—actions which were not cognizable at common law.[21] 523 U.S. at 355. On the issue whether juries historically had determined the amount of monetary damages in actions recognized at common law, the U.S. Supreme Court in *Feltner* concluded that such factual determinations are indeed at the core of the right to trial by jury. *Id.*

This Court is now presented with a stark choice: either the right to trial by jury in common law actions includes the right to have a jury determine the amount of monetary

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[21] Although *Feltner* did not overrule *Tull*, it expressed doubt that *Tull* itself was correct on this point. *See Feltner*, 523 U.S. at 355 n. 9 ("It should be noted that *Tull* is at least in tension with *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. 492, 2 Pet. 492, 7 L.Ed. 496 (1829), in which the Court held in light of the Seventh Amendment that a jury must determine the amount of compensation for improvements to real estate, and with *Dimick v. Schiedt*, 293 U.S. 474 (1935), in which the Court held that the Seventh Amendment bars the use of additur.").

damages, or it does not. The choice is stark because there can be only one right answer; history either supports one conclusion or the other. The Klotzes urge this Court to conclude, as have the U.S. Supreme Court, and the Oregon, Washington, Florida, and Kansas Supreme Courts,[22] that the jury trial right includes the right to have a jury determine the amount of monetary damages in common law actions, such as medical negligence actions.

MHG's suggestions to the contrary should be rejected. First, MHG misunderstand *Feltner* entirely when they claim that the Court "*found* that [] letting the jury determine damages (subject to a cap) was appropriate." (MHG' Br. 74 (emphasis added).) The *Feltner* Court in fact found the "cap" statute to be *unconstitutional*. 523 U.S. at 355 (majority opinion); *id*. at 355-56 (Scalia, J., concurring in the judgment) (acknowledging the majority's holding). Clearly, then, it did not "find," as MHG claim, that the legislature could unilaterally "correct" a jury's determination of damages through a cap statute.

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[22] *See* Appellants' Initial Br. 76 (collecting these and other authorities). To be clear, the Kansas Supreme Court reached this conclusion in *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988). It subsequently reached the opposite conclusion based in large part on the decision in *Tull*. *See Samsel v. Wheeler Transport Services*, Inc., 789 P.2d 541, 551 (1990). The Kansas Supreme Court recently accepted for review *Miller v. Johnson*, No. 99818, in which it is again considering the scope of the jury trial right, this time post-*Feltner*.

Second, and more critically, MHG are wrong to suggest that there is no tension between *Feltner*'s understanding of the right to trial by jury and this Court's conclusion in *Adams* that a jury can determine damages, but that determination need not be given *any* effect by the judge upon the entry of judgment, who instead must follow the dictates of the legislature as to factual determinations of damages. These decisions are at loggerheads: *Feltner* rejects the understanding of the jury trial right that *Adams* embraced.[23] Compare *Feltner*, 523 U.S. at 355 ("[I]f a party so demands, a jury must determine the actual amount of [ ] damages [in actions recognized at common law] in order to preserve 'the substance of the common-law right of trial by jury.")(internal quotations and citations omitted)), with *Adams*, 832 S.W.2d at 907 (citing *Tull* for the proposition that: "There is no substantive right under the common law to a jury determination of damages under the Seventh Amendment.").

In *Feltner*, the Supreme Court considered the constitutionality of a statute that permitted a "court" to revise—upward or downward—its determination of damages. 523 U.S. at 345-46. The Court read the statutory language "court" to refer to judges, not

[23] It is no answer that *Feltner* concerned the federal right to trial by jury and *Adams* concerned Missouri's right to trial by jury. Both preserve the right to trial by jury as it was understood at common law. Compare U.S. Constitutional amendment VII with Missouri Constitution, article I, §22(a). If anything, the Missouri Constitution is arguably more protective of the right because it requires that that it "shall remain inviolate." Missouri Constitution, article I, §22(a).

juries. *Id*. at 346. Because the statute did not permit a party to request that a jury make the ultimate determination respecting damages, the Court in *Feltner* found the statute unconstitutional under the Seventh Amendment to the U.S. Constitution. *Id*. at 354. The Court specifically rejected the argument, based on *Tull*, that "a jury determination of the amount of [] damages [*in actions known at common law*] is not necessary 'to preserve 'the substance of the common-law right of trial by jury.'" *Id*. (quoting *Tull*, 481 U.S. at 426)). It held, in no uncertain terms: "[I]f a party so demands, a jury *must* determine the actual amount of statutory damages under § 504(c) in order "to preserve 'the substance of the common-law right of trial by jury.'" *Id*. (emphasis added). The word "must" leaves no room for lawyer's play: the substance of the right to trial by jury is *only* preserved when the jury determines damages in actions recognized at common law and that determination is accepted as final.[24] *See id*.

[24] Remittitur is distinguishable, as the U.S. Supreme Court has acknowledged, because a party is not forced to accept a reduction in damages, but is given the choice to have a jury make that assessment again. Thus, even with remittitur, it is the jury that has the final word on this issue of fact. *See Dimick v. Schmidt*, 293 U.S. 474, 486 (1935). Moreover, contrary to MHG's reading of *Dimick* (MHG' Br. 74-75), *Dimick* fully supports the Klotzes' arguments because in *Dimick* the Supreme Court characterized an assessment of damages as a factual issue. Accordingly, even though a judge decides the law and a jury the facts, a judge's decision that a verdict is palpably gross or inadequate cannot run roughshod over the right to have a jury assess damages. The right to trial by jury commits

2. The Right to Trial By Jury Is in No Sense "Inviolate" If the Legislature May Override a Jury's Factual Determination as to the Amount of Damages.

This Court in *Adams*, 832 S.W.2d at 907, citing the Virginia Supreme Court's decision in *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989), concluded that the legislature may override the jury's determination of damages because, while juries must make a factual determination as to the amount of non-economic damages, it is the province of judges to apply the law to the facts, including, as in this case, a statutory limit that effectively orders the judge to give no effect to the jury's determination and to award instead damages in an amount determined by the legislature itself. *See also* MHG' Br. 76 (agreeing that *Adams* applied "the same rationale" as did the *Etheridge* court). Both the Washington and Oregon Supreme Courts found this reasoning to be erroneous, when they considered the *identical* legal question as was at issue in *Adams*—whether

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to the jury in the first instance, *and in all subsequent instances*, the final say as to the amount of damages, which is a question of fact. *See id*. at 486 ("Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact."). By contrast, under amended §538.210, parties do not "remain entitled," after the judge applies the law, to have a jury assess damages.

such a statutory cap runs afoul of the constitutional command that the right to trial by jury remain "inviolate." *See* Appellants' Initial Br. 74-76. By contrast, the Virginia Supreme Court in *Etheridge* reached a different conclusion, but the question was *not* identical: the Virginia Constitution does not protect the jury trial right as inviolate. *See Lakin v. Senco Prods., Inc*., 987 P.2d 463, 473 (Or. 1999) (distinguishing *Etheridge* on this ground); *Sofie v. Fibreboard Corp*., 771 P.2d 711, 724 (Wash. 1989) (same).

The *Adams* Court's reliance on *Etheridge* indicates that the Court failed to appreciate that in Missouri the right to trial by jury "shall remain inviolate." Missouri Constitution article I, §22(a). Based on *Etheridge*, it rejected the argument that "this right includes the right to have the jury determine all damages without interference by the legislature." *Adams*, 832 S.W.2d at 907. But if the term "inviolate" is to be given its common meaning, as it must, then the legislature cannot in fact impair or "interfere" with that right, as the *Adams* Court erroneously concluded. Indeed, that is precisely what the term "inviolate" proscribes. As the Florida Supreme Court has explained, in the context of its state constitutional right to trial by jury, which too is preserved "inviolate":

> This term does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be impaired. The word inviolate is defined by approved Lexicographers to mean unhurt, uninjured, unpolluted, unbroken. Inviolate says Webster is derived from the latin word "inviolatus" which is defined by Ainsworth to mean, not corrupted, immaculate, unhurt, "untouched." From the

> plain and obvious meaning of these words therefore, we conclude that the General Assembly has no power to impair, abridge, or in any degree restrict the right of trial by jury as it existed when the Constitution went into operation.

Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 1848 WL 1257, at *5 (Fla. 1848). Surely the right to trial by jury is not "inviolate" if the legislature may impair or interfere with the jury's determination of facts by directing judges to enter judgment for an amount that is different from that determined by the jury. The *Adams* Court's decision to the contrary gives the word "inviolate" in Missouri Constitution, article I, §22(a) no office and thus is contrary to the plain meaning of that constitutional provision.

This Court, therefore, should conclude, as did its sister supreme courts in *Lakin* and *Sofie*, that the legislature cannot, consistent with Missouri's inviolate right to trial by jury, enact a statutory limitation on damages that renders the jury's determination of damages a nullity. Accordingly, it should overrule *Adams* and hold that the statutory limitation at issue here violates the right to trial by jury under Missouri Constitution, article I, §22(a).

E. Amended §538.210 Violates the Separation of Powers, Missouri Constitution, article II, §1.

Finally, the Klotzes argue that the revised cap on non-economic damages violates the constitutional separation of powers. Specifically, the cap operates as a fixed "legislative remittitur," which overrides and interferes with the judiciary's traditional function of assessing whether a particular jury award is excessive or inadequate and

against the weight of the evidence. While this Court has not previously considered whether a cap on non-economic damages violates the separation of powers, sister courts in other states have struck down such caps on separation of powers grounds. *See Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1078-81 (Ill. 1997); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 720-21 (Wash. 1989).

In Plaintiffs' Initial Brief, the Klotzes acknowledged that this Court has on one prior occasion stated that "[p]lacing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function." *See* Appellants' Initial Br. 83 (quoting *Fust v. Attorney General*, 947 S.W.2d 424, 430-31 (Mo. Banc 1997).[25] The Klotzes explained, however, that that statement from *Fust* should no longer be regarded as good law, because the case that *Fust* cited for that proposition, *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988), was subsequently overruled in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000). Moreover, in *Kilmer*, this Court expressly disavowed *Simpson's* analysis of the separation of powers issue, dismissed the earlier decision's discussion as "circular reasoning," and held that the dram shop liability statute at issue "violates separation of powers." *Id.* at 552-53.

In response, MHG assert that *Fust*'s statement about reasonable limitations on common law causes of action remains good law, because one of the cases on which

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[25] *Fust* did not involve a cap on damages, but rather a constitutional challenge to a state statute mandating that 50% of any punitive damage award shall be deemed rendered in favor of the state. *Id.* at 427.

Simpson relied, *Chapman v. State Social Security Commission*, 147 S.W.2d 157 (Mo. App. 1941), remains good law. *See* MHG' Br.80-81. But MHG's citation to *Chapman* only further reveals the flaw in the *Fust* court's reasoning.

Chapman involved a challenge to a denial of old age assistance benefits by the State Social Security Commission. In affirming the commission's determination, this Court emphasized that the right to old age existence was not a right that existed at common law: "The right to old age assistance being purely statutory, and nonexistent at common law, the claim of any person under the statutes is subject to the provisions and limitations which the legislature creating the right has placed thereon, whether in matters of substance, procedure, or remedy." 147 S.W.2d at 158-59. And it was this proposition for which *Chapman* was cited in *Simpson*: "the legislature is entitled to provide reasonable restriction or expansion of *causes of action which it creates*. Restrictions on *causes of action created by statute* in the area of tort law have been consistently upheld." *Simpson*, 749 S.W.2d at 391 (emphasis added; citations omitted).

Thus, even before *Simpson* was overruled, the *Fust* court was wrong to rely upon it for the proposition that limitations on *common law causes of action* do not invade the judicial function. To the contrary, *Simpson* and *Chapman* were quite clear that the legislature's authority to place limits on causes of action applied only to those causes of action created by statute. Neither case stands for the proposition that the legislature may place limits on common law causes of action.

The Klotzes' tort claims in this case are common law claims. In this context, it is the role of the judiciary, not the legislature, to assess and control jury verdicts based on

the weight of the evidence. Amended §538.210's cap on non-economic damages interferes with that judicial function and thus violates the separation of powers guaranteed by the Missouri Constitution article II, § 1.

STATEMENT OF FACTS

This medical negligence case was filed by the Klotzes against MHG and was ultimately tried under a second amended petition which alleged that MHG were negligent in "failing to adequate treat the phlebitis in plaintiff James Klotz's right hand before implanting a permanent pacemaker on 3/22/04 resulting in the spread of the infection to the pacemaker." Legal File, pp. 48-50. The amended petition also alleged that MHG's negligence caused "sepsis, shock, organ failure, amputations, respiratory failure, hemodialysis, pacemaker explantation, a GI bleed, a right subarachonid hemorrhage, neuropsychological damage and removal of a kidney." Legal File, Vol. I, pp. 48-50. The second amended petition also alleged that as a result of MHG's negligence, Mary Klotz "experienced great anxiety, provided nursing care to her husband . . . has lost and will in the future continue to lose into the future some of the companionship, comfort and support of her husband …." Legal File, Vol. I, pp. 48-50.

Prior to trial, MHG filed a motion to determine, pursuant to §490.715.5(2), the amount of medical bills which would be submitted to the jury. Legal File, Vol. I, p. 147. The Klotzes filed a response (Legal File, Vol. II, p. 228), and the trial court held a hearing on the issue (Transcript, "Motion in Limine, 7/14/08"). The Klotzes, preserving the objection that the statute was unconstitutional, (Tr. Motion in Limine 7/14/08, p. 9), presented evidence that there were liens being asserted against any recovery (*Id.* at pp. 8, 14, 16). It was also shown that some of the providers had the Klotzes sign agreements that they were responsible for amounts charged, regardless of what insurance paid. Legal

File, Vol. 2, pp. 233, 236 - 238; 2 Apdx, p. A13. After the hearing, the Court issued the following Order:

> After reviewing all memoranda and upon consideration of the oral argument of the parties, the Court finds Plaintiffs have rebutted the presumption with regard to those bills in which a reduced amount was accepted by the provider because Plaintiffs presented expert testimony the bills were reasonable, Plaintiffs are still subject to liens for unpaid bills, and the medical providers have not provided any release of obligation by Plaintiffs to pay for any amounts charged, but not received, by the provider.

Legal File, Vol. 2, p. 289; 2 Apdx, p. A13.

The case was tried between 7/21/08 and 7/30/08. Legal File, Vol. 1, p. 12. At the trial, there was evidence that, at the time the pacemaker was implanted, there was an infection of the vein, or phlebitis, at a two-day old IV site. Transcript, Vol. 4, p. 149-150, 154, 155, 165, 166 (hereinafter Tr. Vol. __, p.__) There was testimony that Mr. Klotz did not want the permanent pacemaker and he and his family were arranging for a transfer out of St. Anthony's to get a second opinion on the need for it. Tr. Vol. 4, p. 278-279-288; Tr. Vol. 5, p. 200-201. But, the family was told that he was too sick to move and the implantation of the pacemaker went in as planned. *Id.* Some weeks after the implantation, Mr. Klotz presented to a hospital in Phoenix, AZ with sepsis, an infection of his blood stream, and, vegetation, growth caused by the infection, was found on and

around the pacemaker wires. Tr. Vol. 3, p. 29-30, 33-34, 48. After some 71 days in the hospital, the doctors were finally able to eradicate the infection, but in the meanwhile Mr. Klotz had lost, among other things, his right leg below the knee and much of his left foot. Tr. Vol. 3, p. 33 – 34; Vol. 5, p.11– 12.

The Klotzes put the defendant Dr. Michael Shapiro on in their case in chief. Tr. Vol. 4, p. 146– 258. Dr. Shapiro admitted in his trial testimony that he knew there was a possible infection at the old IV site before he implanted the pacemaker. Tr. Vol. 4, p. 149 -150, 154, 155, 165-166. Dr. Shapiro admitted that the possible infection at the IV site created a risk of the blood becoming infected, which is dangerous when a foreign body is being implanted and admitted that he did not discuss that danger with Mr. Klotz. Vol. 4, p. 149 - 151. Dr. Shapiro testified that he did not inform Mr. Klotz of any additional risk of infection because he thought the potential IV site infection did not impose such an additional risk. Vol. 4, p. 153–154. He testified that he did disclose the standard infection risks of the surgery with Mr. Klotz the night before the implantation and before he knew about the possible infection at the old IV site. Tr. Vol. 4, p. 210 - 211.

In support of their case, the Klotzes' presented expert testimony from three physicians: Dr. Michael Siegal, a cardiologist; Dr. Robert Clark, James. Klotzes' treating infectious disease doctor; and Dr. Norbert Belz, a rehabilitation specialist.

Dr. Siegal was the first to testify, and, after explaining his opinions concerning Dr. Shapiro in detail (Tr. Vol. 2, p.118 - 119, 168–220), testified in summary that Dr. Shapiro's failure to timely treat the right wrist infection with IV antibiotics appropriate for MRSA, or failure to obtain an infectious disease consult in conjunction with

implantation of the permanent pacemaker, and his failure to inform James Klotz of an added risk of infection due to the right wrist condition, was negligent (Tr. Vol. 2, p. 222). He testified specifically that Dr. Shapiro, before implanting the permanent pacemaker, had an obligation to talk Mr. Klotz and inform him that a possible infection at the right wrist IV site had been identified that morning and that its presence increased the risk of infection in connection with the surgical implantation of the permanent pacemaker. Tr. Vol. 2, p. 119, 206–207. He further testified that Dr. Shapiro's failures directly caused or directly contributed to cause the pacemaker infection, the sepsis, or the amputations. Tr. Vol. 2, p. 222. Dr. Siegal also testified that more likely than not, if Dr. Shapiro had timely treated the right wrist infection with IV antibiotics appropriate for MRSA, or obtained an infectious disease consult in conjunction with implantation of the permanent pacemaker, the pacemaker infection, the sepsis, and the amputations would have been avoided. Tr. Vol. 2, p. 222 - 223.

During Dr. Siegal's testimony, the Klotzes' moved to admit into evidence certain of Mr. Klotzes medical records from the hospital in Phoenix. Tr. Vol. 2, p.213. The records included a statement from the doctors in Phoenix that this was an "infection of the permanent pacemaker which likely occurred at the time of his implantation." Tr. Vol. 2, p. 218–219. The parties had agreed, before trial, to stipulate that all medical records were business records. Tr. Vol. 2, p. 214. Dr. Siegal testified that he relied upon medical records in which the statement appeared in forming his opinions. Tr., Vol. 2, p. 217. Dr. Siegal explained that the timing of Mr. Klotz's infection is important to "try to explain what caused the problem." Tr. Vol. 2, p.213. Dr. Clark's, who was a colleague of the

doctors who made the statement, testified that he did not know why they made the statement (Tr. Vol. 3, p. 51 -52, 186) but that he agreed with it (Tr. Vol. 3, p.54). The only objection raised at trial to the admission of the statement was that it was hearsay. Tr. Vol. 2, p. 213 - 218. It was admitted over this objection. *Id.*

Dr. Clark, Mr. Klotzes' treating infectious disease doctor, after testifying to his opinions concerning Dr. Shapiro in detail (Tr. Vol. 3, p. 84 – 86, 116-117, 128 - 145), also testified in summary that Dr. Shapiro's failure to timely treat the right wrist infection with IV antibiotics appropriate for MRSA before implanting the permanent pacemaker, or his failure to get an infections disease consult before implanting the permanent pacemaker, was negligent (Tr. Vol. 3, p. 150 - 151). Specifically, Dr. Clark testified that Dr. Shapiro should have delayed the implantation of the permanent pacemaker and treated Mr. Klotz with antibiotics. Tr. Vol. 3, p. 85 – 86, 136 - 137. He further testified that Dr. Shapiro's failures directly caused or directly contributed to cause the pacemaker infection, the sepsis and the amputations. Tr. Vol. 3, p. 150. Dr. Clark also testified that but for those failures, the pacemaker infection, the sepsis, and the amputations would have been avoided. Tr. Vol. 3, p. 150.

Dr. Clark testified that the hospital infection data kept by St. Anthony's Medical Center regarding the incidences of particular infections in the hospital at particular times, "are important data that are useful every day to all the doctors, nurses and pharmacists in the hospital." Tr. Vol. 3, p. 133. He testified that if Dr. Shapiro were unsure of what antibiotic to prescribe, he had the option of consulting an infectious disease doctor, or he could call the bacteriology or pharmacy departments to find out what antibiotic is

recommended. Tr. Vol. 3, p. 135. Dr. Clark testified that if Dr. Shapiro did not take either of these options, then he was taking responsibility for choosing the correct antibiotic and waiting the correct period of time. Tr. Vol. 3, 136. There was testimony that the in-hospital infection data is "how doctors decide what to use based on these things that are printed by the hospital to say that you've got to be careful because you're dealing with a very significant portion of your bacteria that are resistant to your old antibiotic choices and you need to think this over and start covering for the resistant ones." Tr. Vol. 3, p. 110. "If the doctor … comes on a patient and is going to make an antibiotic choice they have to consider the risk in their own hospital of MRSA…" Tr. Vol. 3, p. 113-114.

Finally, the Klotzes presented testimony regarding damages from Dr. Belz. Dr. Belz, a medical doctor with a specialty and board certification in preventive medicine, and a certified Life Care Planner, reviewed all the medical records and spent several hours personally interviewing and evaluating the Klotzes in developing a "life-care plan" which was submitted as Exhibit 10. Tr. Vol. 3, p. 217 – 218, 230, 240; Vol. 4, p. 16 - 17; Supp. Legal File, Vol. 12, p. 1978 – 2032 (life care plan); 2 Apdx, p. A14 (life care plan). Dr. Belz is not an economist, a lawyer, or an expert in the interpretation and application of legislation. Tr. Vol. 4, p. 108-111.

Dr. Belz testified, to a reasonable degree of medical certainty, that the future costs listed in the life care plan, totaling $905,716.89, were reasonable, necessary and as a result of the infection and sepsis. Tr. Vol. 4, p. 64 – 65, 73. Dr. Belz specifically testified, in response to MHG's question suggesting that the future costs were

speculative, that the future numbers in the life care plan were not speculation, but were, to a reasonable degree of medical certainty, necessary for Mr. Klotz. Tr. Vol. 4, p. 95. In fact, Dr. Belz's life-care plan separately listed but included no amounts for those events which were determined to be based upon possible future complications. Tr. Vol. 4, p. 61 - 62; Supp. Legal File, Vol. 12, p. 2016 – 2017 (life care plan); 2 Apdx, p. A52-A53 (life care plan). Dr. Belz explained that his "life care plan," was a plan of necessary evaluations and interventions designed to prevent future, more expensive, complications from the injuries that had already occurred. Tr. Vol. 3. p. 226, 229 - 230; Vol. 4, p. 61-62, 95 - 96; Supp. Legal File, Vol. 12, p. 1978 – 2032 (life care plan); 2 Apdx, p. A14 (life care plan). The total future economic damages presented by Dr. Belz were $905,716.89. Tr., Vol. 4, p. 72 - 73. The jury awarded $547,000.00, or 60% of the amount claimed. Supp. Legal File Vol. 13, p. 2301; 2 Apdx, p. A80

MHG's only objection at trial to Dr. Belzes' testimony regarding future costs was that the costs were not reduced to present value. Tr. Vol. 3, p. 9 - 12; Vol. 4, p. 64. There is a notation on Dr. Belzes' life care which states "submit report to economist for present value determination." Supp. Legal File, Vol. 12, p.1978; 2 Apdx, p. A14. When their request to cross-examine Dr. Belz about this notation was denied, MHG made an offer of proof on the issue. Tr. Vol. 4, p. 108 - 111. The offer revealed that Dr. Belz was not an economist, did not know how or whether an economist would do any present value determination and only put the statement regarding present value on his report to indicate that no calculations have been made. *Id.* None of the parties put on evidence regarding

the present value of projected future damages in front of the jury. MHG were granted permission by the trial court to tell the jury in closing argument that the Klotzes' future economic damage figures were not reduced to present value and that any such award should be expressed at present value. Tr. Vol. 7, p. 81, 85. Although stating an intention to argue this to the jury (Tr. Vol. 7, p. 84), they did not (Tr. Vol. 8, p. 41 - 63).

As to Dr. Belzes' cross-examination otherwise, the Klotzes presented the trial court with *Elam v. Alcolac, Inc*. 765 S.W.2d 42, 199 (Mo. App. W.D.1988), *cert. denied,* 493 U.S. 817 (1989), and obtained a ruling that MHG would not be allowed to cross-examine Dr. Belz concerning the amount of money he made as an expert in other cases as *Elam* held such questioning was inappropriate. Tr. Vol. 3, p. 8 - 9. MHG offered no authority for their contrary position. *Id.* In an offer of proof, MHG established that life care planning was a very small part of Dr. Belzes' professional activity and that he had no estimate of the portion of his annual income that life care planning generated. Tr. Vol. 4, p. 65 - 68.

MHG were allowed to question Dr. Belz, in the presence of the jury, about the amount of money he made in this case, the number of hours he spends on medical legal work generally and his hourly rate. Tr. Vol. 4, p. 74 - 78, 106. In closing argument, MHG did not do the math for the jury, so to speak, and left it to them to draw the inference readily available from these numbers about the average, approximate amount of money Dr. Belz made on expert witness work generally. Tr. Vol. 8, p. 41 - 63.

At the very end of the case, a part of Dr. Shapiro's deposition was read, without objection, to the jury during cross-examination of one of MHG's experts. Tr. Vol. 7, p. 68 - 69. This deposition testimony re-iterated what Dr. Shapiro had testified to on the stand, that he was aware of a chance of infection at the old IV site. *See e.g.* Tr. Vol. 4, p.155. Specifically, the deposition excerpt established that he had prescribed an antibiotic for Mr. Klotz the morning of the implantation on the presumption that there was an infection involved at the old IV site. Tr. Vol. 7, p. 68 - 69. This portion of the deposition was then displayed to the jury in the Klotzes' rebuttal-closing in response to an argument of MHG's counsel that Dr. Shapiro did not think there was an infection at the IV site. Tr. Vol. 8, p. 63 - 64. The Court asked counsel to take down the display of the deposition immediately after it was briefly discussed and counsel complied. *Id.*

The case was submitted to the jury against MHG under a director which stated, in relevant part, that the jury must assess a percentage of fault against MHG if they believed:

> First, defendant Michael Shapiro, MD, either:
>
> failed to properly treat the right wrist symptoms in connection with the placement of the permanent pacemaker, or
>
> failed to inform James Klotz of an added risk of infection due to the right wrist signs and symptoms before implanting the permanent pacemaker, and

> Second, defendant Michael Shapiro, MD, in any one or more of the respects submitted in paragraph First, was thereby negligent, and
>
> Third, such negligence directly caused or directly contributed to cause damage to plaintiff James Klotz."

Legal File Vol. 3, p. 400; 2 Apdx, p. A74. During closing argument and in the questioning of witnesses, counsel for MHG discussed the issue of whether the IV site presented an increased risk of infection to Mr. Klotz and whether that fact was appreciated by Dr. Shapiro. Tr. Vol. 2, p. 269 - 270; Tr. Vol. 4, p. 149 - 151; Tr. Vol. 8, p. 49 - 51.

The jury began deliberations at 11:00 am. Supp Trans., 7/30/08, p.1. At 3:55pm the Court received a note stating: "We as 8 juror have come to an agreement. 1 juror is holding out. 3 are not in agreement. We are at a standstill." Legal File Vol. 3, page 391; 2 Apdx, p. A68. At 4:10pm the Trial Court, without objection, sent an instruction reading:

> You should make every reasonable effort to reach a verdict, as it is desirable that there be a verdict in every case. Each of you should respect the opinions of your fellow jurors as you would have them respect yours, and in a spirit of tolerance and understanding endeavor to bring the deliberations of the whole jury to an agreement upon a verdict. Do not be afraid to change your opinion if the discussion persuades you that

you should. But as a juror should not agree to a verdict that violates the instruction of the Court, nor find as a fact that which under the evidence and his/her conscience he/she believes to be untrue.

Supp. Legal File Vol. 13, p. 2300; 2 Apdx, p. A70. Shortly before 4:25 pm the jury sent a second note asking for the "Life Care Report" which was sent. Supp. Legal File, Vol. 3, p. 392; 2 Apdx, p. A69. At 5:15pm the jury sent a third note:

Juror #2 will not come to a reasonable conclusion. Will only settle for 3,000,000 and we as 8 feel 2.5 is adequate.

Supp. Legal File, Vol. 3, p. 392; 2 Apdx, p. A69. At this point MHG and Dr. Shapiro requested a mistrial because of "deadlock." Supp. Tr. 7/30/08, p.1. The following exchange then occurred:

THE COURT: The Court is not going to do it at this time. It is going to let them deliberate a little bit longer. And I'll -- Do you want me to bring them into the courtroom and tell them that or go back with Rhonda so there's a record of what is said? I want you to have the last say on the record.

MR. ECKENRODE: I'm at the Court's discretion.

Supp. Tran., 7/30/08, p. 2. The trial judge then entered the jury room and told the jury:

The attorneys know that I'm in here talking to you all and have allowed me to do it rather than bring you into the courtroom.

> A lot of time and effort, a lot of expense has gone into this case, and if you are unable to reach a verdict what happens is the case is retried, not with you all but with a different jury, and, just to let you know, that's the procedure. So I'm going to ask that you continue to deliberate and try to reach a verdict, and I'll let you go 'til 6 o'clock tonight and then come back tomorrow morning, because this is – I'd like you to give it your best effort to see if you can reach a verdict. I'll let you go till 6 o'clock tonight, we'll stop, go home, think about it, have dinner, whatever you want to do, and come back then tomorrow, but why don't you come back by 9:00 or 9:30. You can't deliberate until everybody is here. But give it another 45 minutes or so, unless you want to just call it quits now and come back tomorrow morning. I'll let you guys decide what you want to do. I'll give you two minutes, decide whether or not you want to come back tomorrow morning, go now, keep going for 45 minutes.

Appendix to Respondents/Cross-Appellants' brief, p. A75 – A 76**.** The jury returned its verdict signed by 9 jurors at 5:55 pm, about 40 minutes after the last note. Supp. Legal File Vol. 13, p. 2301, 2 Apdx, p. A80 (verdict); Tr. Vol. 8, p. 74 (time of return of verdict); Legal File Vol. 3, p. 392, 2 Apdx, p. A69 (time of last note sent).

The verdict apportioned 33% fault to defendant St. Anthony's Medical Center and 67% fault to MHG. *Id.* The verdict then assessed the damages of James Klotz as follows:

Past economic damage	$760,000
Past non-economic damage	$488,000
Future medical damages	$525,000
Future economic damages	$ 22,000
Future non-economic damages	$272,000
TOTAL DAMAGES	$2,067,000

The jury also found in its verdict that Mary Klotz did sustain damages as direct result of injury to her husband and assessed her damages as follows:

Past economic damages	$184,000
Past non-economic damages	$211,000
Future non-economic damages	$118,000
TOTAL DAMAGES	$513,000.

ARGUMENT

I. The Trial Court Did Not Err In Allowing Dr. Robert Clark To Testify Because Dr. Clark Was Qualified Under The Expert Witness Statute §490.065 RSMo 2000, And MHG's Arguments Under §538.225 and MAI 11.06 Are Not Legally Supported.

A. Standard of review

A trial court's decision to admit evidence is "within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. 2000). An abuse of discretion occurs only when a trial court's ruling "is untenable and clearly against reason and . . . works an injustice," *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009), or "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration" *Nelson*, 9 S.W.3d at 604 (internal citations omitted).

In addition, even if this Court were to find an abuse of discretion in allowing Dr. Clark to testify, MHG must still show that the admission of the evidence had some prejudicial effect and materially affected the merits of the action. *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009)(abuse of discretion to admit hearsay but not reversible error because had no prejudicial effect); *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 589 (Mo.App. W.D. 2008)(improper admission of evidence not reversible error unless it was prejudicial and materially affected the merits of the action); Rule 84.13(b)(no reversal unless error materially affected the merits).

B. Section 490.065 RSMo 2000 Is The Controlling Statute Governing The Admissibility Of Expert Witness Testimony At Trial.

In its first point relied on, MHG argue that the affidavit of merit statute, §538.225 and MAI 11.06 should control the admissibility of expert testimony in medical malpractice trials. They first reason that because plaintiffs, when filing an affidavit of merit, are required to consult a licensed health-care provider, the admission of expert testimony at trial from one who is not licensed is an abuse of discretion. The Klotzes' expert Dr. Clark was not licensed at the time of his trial testimony. Tr. Vol. 3, p. 12. MHG are correct that the affidavit statute defines a "legally qualified health care provider" as "a health care provider licensed in this or any other state…." §538.225.1. However, they are incorrect that this statute governs the admissibility of expert testimony at trial. The affidavit statute explicitly states: "As used in this section, the term 'legally qualified health care provider shall mean. . . ." §538.225.1. To apply the statute's definition of "legally qualified health care provider" to the question of the admissibility of expert testimony at trial would be contrary to the legislature's stated intent that it apply only to the section in question and would effectively re-write the statute.

MHG also argue that MAI 11.06's definition of the standard of care as the ordinary care of defendant's "profession" somehow translates into a requirement that expert testimony at trial be limited to persons within defendant's specialty (cardiology) and subspecialty (electrophysiology). Again, no such requirement is recognized in the case law. In *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146,

156-157 (Mo. 2003), this Court defined the relevant field of expertise under §490.065 RSMo 2000 as doctors treating the condition in issue, as opposed to doctors who performed the specific therapy at issue, and cited with approval Judge Stith's opinion in *Yantzi v. Norton*, 927 SW2d 427 (Mo. App. W.D. 1996). In *Yantzi*, the Western District Court of Appeals recognized that persons with differing professional credentials can work in the same field, and give expert testimony concerning the standards for all who are qualified to work in the field, even though their particular credentials differ. *Id.* at 432. Similar results were reached in *MacDonald v. Sheets*, 867 S.W.2d 627 (Mo. App. E.D.1993)(dentist and otolaryngologist was qualified to testify against oral surgeon); *Laws v. St. Luke's Hosp.*, 218 S.W.3d 461 (Mo. App W.D. 2007)(physician laryngologist properly allowed to testify against physician anesthesiologist).

In contrast to both §538.225 and MAI 11.06, §490.065 RSMo 2000 explicitly governs the admissibility of expert testimony in this case. Unlike §538.225, §490.065 RSMo 2000 applies to "[a]ny civil action." Unlike MAI 11.06, §490.065 RSMo 2000 is a standard to be used by a trial court in determining whether an expert should be allowed to testify at trial. As Judge Wolff stated in his concurrence *In State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 160 (Mo. 2003: "[t]hose straightforward statutory words are all you really need to know about the admissibility of expert testimony in civil proceedings."

MHG make much of the fact that the affidavit statute was drafted after the expert witness statute and that it is more specialized in that it applies specifically to medical malpractice cases. However, when the legislature acts it is presumed "to have acted with

a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent." *Harding v. Lohman*, 27 S.W.3d 820, 824 (Mo.App. W.D. 2000). The legislature was, therefore, aware of the holding in *McDonagh* that §490.065 RSMo 2000 applies to all civil actions (including medical malpractice cases) and aware that the expert statute contained no specific provisions regarding medical malpractice cases and no requirement of licensure. If the legislature intended to overturn this Court's decision and supplant the requirements of §490.065 RSMo 2000 with either §538.225.2 or MAI 11.06, it could have done so. Instead, its use of the qualifying phrase "as used in this section" indicates its intent not to do so.

C. Dr. Clark Was Qualified To Testify Under §490.065, RSMo 2000.

Section 490.065 RSMo 2000 provides that an expert can be qualified to testify at trial by "knowledge, skill, experience, training or education ...." No argument is made that Dr. Clark lacked sufficient "knowledge, skill, experience, training, or education" under §490.065 RSMo 2000. Dr. Clark was Mr. Klotzes' treating infectious disease doctor and well qualified by knowledge, skill, experience, training, and education. Tr. Vol. 3, p. 24 - 27.

Like the expert witness statute, case law contains no requirement of licensure. This Court has recognized that under §490.065 RSMo 2000 an expert witness may be qualified on foundations other than the expert's licensure. *Johnson v. State*, 58 S.W.3d 496, 499 (Mo. 2001). Most directly on point, in *Eichelberger v. Barnes Hospital*, 655 S.W.2d 699, 704 (Mo. App. ED 1983) the Eastern District Court of Appeals found no error in the admission of expert testimony by a physician who had surrendered her

license because of a firearms conviction. The Western District has also noted that the language of §490.065 RSMo 2000 "makes it clear that witness may be qualified as an expert based upon something other than his education or license." *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 174 (Mo.App. W.D. 2006). *See also Noble v. Lansche*, 735 S.W. 2d 63, 64-65 (Mo. App. E.D. 1987)(reversible error to permit cross examination of an expert in a medical malpractice case with the fact that the expert has surrendered his license to dispense narcotics).

D. MHG's Arguments Are Not Legally Supported.

MHG's arguments that it was an abuse of discretion to admit the testimony of Dr. Clark are without citation, ignore the plain words of the controlling statutes, and are contrary to existing case law. "Conclusory arguments presented without applicable authority preserve nothing for appellate review." *Sidebottom v. State*, 781 S.W.2d 791, 800 (Mo. 1989). These conclusory arguments should be denied and the trial court's decision should be upheld.

II. The Trial Court Did Not Err In Allowing The Evidence Of Future Damages And Future Medical Expenses Because There Was Evidence, To A Reasonable Degree Of Medical Certainty, That They Were Reasonable, Necessary And As A Result Of The Infection And Sepsis, And, The Objections Now Made To This Evidence Were Not Preserved For Review.

A. Standard Of Review

A trial court's decision to admit evidence is "within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson v. Waxman*, 9

S.W.3d 601, 604 (Mo. 2000). An abuse of discretion occurs only when a trial court's ruling "is untenable and clearly against reason and . . . works an injustice," (*Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009) or "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Nelson*, 9 S.W.3d at 604 (internal citations omitted). In addition, even if this Court were to find an abuse of discretion in allowing evidence of certain future damages, MHG must still show that the admission of the evidence had some prejudicial effect and materially affected the merits of the action. *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009)(abuse of discretion to admit hearsay but not reversible error because had no prejudicial effect); *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 589 (Mo.App. W.D. 2008)(improper admission of evidence not reversible error unless it was prejudicial and materially affected the merits of the action); Rule 84.13(b) (no reversal unless error materially affected the merits); Rule 78.09 (objection and the grounds therefore is required at the time the evidence is offered).

B. Future Economic Damages Were Supported By Expert Testimony.

The Klotzes' expert Dr. Belz, a medical doctor with a specialty and board certification in preventive medicine, and a certified Life Care Planner, reviewed all of the medical records and spent several hours personally interviewing and evaluating the Klotzes. Tr. Vol. 3, p. 217 – 218, 230, 240; Vol. 4, p. 16 - 17. He testified, to a reasonable degree of medical certainty, that every future cost listed on Exhibit 10, the "life-care plan", for a total of $905,716.89, was reasonable, necessary and as a result of

the infection and sepsis. Tr. Vol. 4, p. 64 – 65, 73; Supp. Legal File p. 1978 – 2032 (life care plan); 2 Apdx, p. A14 (life care plan). Dr. Belz specifically testified, in response to MHG's question suggesting that the future costs were speculative, that the future care plan was not speculation, but was, to a reasonable degree of medical certainty, necessary for Mr. Klotz. Tr. Vol. 4, p. 95. Further, the future damages testified to by Dr. Belz were not contingent on future complications occurring. In fact, the plan separately listed but included no amounts for those events which were determined to be based upon possible future complications. Tr. Vol. 4, p. 61 - 62; Supp. Legal File, Vol. 12, p. 2016 – 2017 (life care plan); 2 Apdx, p. A52-53 (life care plan). Dr. Belz explained that his life-care plan, was a plan of necessary evaluations and interventions designed to prevent future, more expensive, complications from the injuries that had already occurred. Tr. Vol. 3. p. 226, 229 - 230; Vol. 4, p. 61-62, 95 - 96; Supp. Legal File, Vol. 12, p. 1978 – 2032 (life care plan); 2 Apdx, p. A14 (life care plan).

In *Mitchem v. Gabbert*, 31 S.W.3d 538, 543 (Mo. App. S.D. 2000), the defendants argued on appeal that the plaintiffs' life care plan contained items that were not reasonably certain to occur. The Court rejected the argument, stating:

> Dr. Winkler is a medical doctor. He examined plaintiff and interviewed her concerning her injuries. He is board certified in physical medicine and rehabilitation and sub-board certified in spinal cord injury medicine. He testified he is a wound care specialist; that he is certified by the Commission

> on Disability Evaluations as a Life Care Planner. Dr. Winkler testified that the items contained in the life care plan he prepared for plaintiff were based upon a reasonable degree of medical certainty.

Id. Substantially the same is true of Dr. Belz, and the same result should follow.

C. The Objections Now Made To Evidence Of These Damages Were Not Preserved For Review.

Further, MHG's only objection at trial to Dr. Belz's testimony regarding future costs was that the costs were not reduced to present value. Tr. Vol. 3, p. 9 - 12; Vol. 4, p. 64. Their statement in their brief that the uncertainty of the future medical costs was "discussed at trial" does not amount to an objection and the testimony they cite does not contain any objections; the citation is to one page of questioning of Dr. Belz on cross-examination. *Compare* Respondents/Cross-Appellants' brief at p. 100 *with* Tr. Vol. 4, p. 78. Therefore, their new arguments regarding "speculation" based on alleged concerns that the proposed treatment "may or may not occur" or "may or may not be adjusted due to health insurance" are not preserved. *State v. Johnson*, 207 S.W.3d 24, 43 (Mo. banc. 2006)(noting that arguments on appeal are limited to those stated at trial; a point is preserved for appellate review only if it is based on the same theory presented at trial; and, that unpreserved issues merit only plain error review, if any); Rule 84.13(a) (allegations of error not presented to the trial court shall not be considered in any civil appeal in a jury tried case).

III. The Trial Court Did Not Err: In Not Requiring That Evidence Of Future Damages Be Presented At Present Value Because No Such Requirement Exists; In Not Reducing The Klotzes' Future Damages To Present Value Because There Is No Requirement That The Court Make Such A Reduction; In Not Allowing The Cross-Examination Of Dr. Belz On An Issue To Which He Was Not An Expert And Would Have Confused The Jury; In Using An Approved MAI Instruction; And, MHG Cannot Show That Any Of These Errors Had Any Prejudicial Effect.

A. Standard Of Review

1. Evidentiary Rulings

A trial court's decision to admit evidence is "within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. 2000). An abuse of discretion occurs only when a trial court's ruling "is untenable and clearly against reason and . . . works an injustice, " *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009), or "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Nelson*, 9 S.W.3d at 604 (internal citations omitted). In addition, even if this Court were to find an abuse of discretion in allowing evidence of certain future damages, MHG and Dr. Shapiro must still show that the admission of the evidence had some prejudicial effect and materially affected the merits of the action. *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009)(abuse of discretion to admit hearsay but not reversible error because had no prejudicial effect); *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583,

589 (Mo.App. W.D. 2008)(improper admission of evidence not reversible error unless it was prejudicial and materially affected the merits of the action); Rule 84.13(b)(no reversal unless error materially affected the merits); Rule 78.09 (objection and the grounds therefore is required at the time the evidence is offered).

2. Rulings on instructions

Whether a jury was properly instructed is a question of law that this Court reviews *de novo. Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003). Review is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by any theory, then its submission is proper. *Oldaker v. Peters*, 817 S.W.2d 245, 251-52 (Mo. banc 1991). Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action. *Ploch v. Hamai*, 213 S.W.3d 135, 139 (Mo.App. E.D. 2006).

B. There Is No Requirement That Plaintiff Put On Evidence Of The Present Value Of Any Future Damages.

MHG correctly point out that §538.215.2 RSMo 2000 requires that in medical negligence cases "[a]ll future damages … shall be expressed by the trier of fact at present value." None of the parties put on evidence regarding the present value of projected future damages. MHG, of course, had every right to do so, but did not: MHG were granted permission by the trial court to tell the jury in closing argument that the Klotzes' future economic damage figures were not reduced to present value and that any such award should be expressed at present value. Tr. Vol. 7, p. 81, 85. Although stating an

intention to argue this to the jury (Tr. Vol. 7, p. 84), they did not (Tr. Vol. 8, p. 41-63). As this Court stated in *Nesselrode v. Executive Beechcraft, Inc*., 707 S.W.2d 371, 388 (Mo. 1986): "The fact of the matter is that defendants did not make any credible effort to contest the issue of present value. Whether defendants failure to do so was a result of trial strategy - rooted in the concern that to do so would emphasize or further legitimate plaintiffs' claim of damages - or whether it was tied to some other reason, they now seek relief from the consequences of their own actions."

MHG essentially argue that §538.215.2, by requiring the jury to express future damages at present value, impliedly puts the burden on the plaintiff in a medical negligence case to present future damage figures at present value. A similar argument was rejected by this Court in *Anglim v. Missouri Pacific R. Co*., 832 S.W.2d 298, 308 - 309 (Mo. 1992). In *Anglim*, the Court recognized that future damages must be reduced to present value in F.E.L.A. cases, but held that because the jury was capable of making a present value reduction without the aid of expert testimony, and because the defendant railroad was free to argue the need for the reduction to the jury, the plaintiff could present future damages without reducing them to present value. *Id.* This lack of any requirement that plaintiff, or anyone else, introduce expert testimony to support a present value analysis of future damages was also recognized by this Court in *Bair v. St. Louis-San Francisco Ry. Co*., 647 S.W.2d 507, 513 (Mo. banc 1983), *cert denied*, 464 U.S. 830 (1983), where the Court stated: "The fact that a dollar today is not the same thing as a dollar payable some years from now, furthermore, is the matter of plainest fact which could be appropriately argued without the need for expert testimony."

C. The Trial Court Did Not Err In Not Itself File Making A Reduction To Present Value.

MHG's argument that the trial court should have made a present value reduction is unsupported by citation to any authority. Again, conclusory arguments presented without applicable authority preserve nothing for appellate review. *Sidebottom v. State*, 781 S.W.2d 791, 800 (Mo. 1989); Rule 84.13(a)(allegations of error not briefed or not properly briefed shall not be considered in any civil appeal).

The statute, §538.215.2 RSMo 2000, says only that the trier of fact – in this case the jury – should express the future damages at present value. There is no language suggesting the Court must make a reduction. MHG also have not shown that they ever requested the trial court to take this action.

D. The Trial Court Did Not Err In Disallowing Cross-Examination Of Dr. Belz On The Issue Of Present Value.

In assuming that the burden is on the plaintiff to present evidence of present value, MHG claim prejudicial error in the trial court's decision to disallow cross-examination of Dr. Belz on the issue. MHG point out a note on Dr. Belz's life-care plan which states "submit report to economist for present value determination." Supp. Legal File, Vol. 12, p.1978; 2 Apdx, p. A14. The decision of what cross-examination to allow is left to the sound discretion of the trial court and the decision will not be disturbed unless an abuse of discretion is clearly shown. *Trident Group, LLC v. Mississippi Valley Roofing, Inc.*, 279 S.W.3d 192, 200 (Mo.App. E.D. 2009).

First, to allow the cross-examination of Dr. Belz as to whether his figures should be reduced to present value would have been contrary to this Court's ruling in *Anglim*, *supra* at 308-309, that plaintiff is not required to make the reduction, even if the jury is required to do so. To allow impeachment of Dr. Belz on the issue would have implied that he should have done so despite Missouri law to the contrary.

In addition, it was not an abuse of discretion to disallow this cross-examination as "[t]estimony is not expert testimony, regardless of the witness' academic or teaching credentials or experience, unless the witness is utilizing and applying scientific, technical, or other specialized knowledge. . . In order to be able to offer his or her opinion, the expert's competence on the subject must be superior to that of the ordinary juror." *Vittengl v. Fox*, 967 S.W.2d 269, 279 (Mo.App. W.D. 1998). The issue of whether Dr. Belz' figures should have been reduced to present value, is of course, a legal one; the issue of what reduction should have been made is, only arguably, an economic one. Both of these issues are outside of Dr. Belz' expertise in rehabilitative medicine. Tr. Vol. 4. p. 108-111. As stated in *Bair v. St. Louis-San Francisco Ry. Co*., 647 S.W.2d 507, 513 (Mo. banc 1983), *cert denied*, 464 U.S. 830 (1983), the issue of present value is "the matter of plainest fact" which it would be appropriate to argue to the jury without expert evidentiary support. Under such circumstances, to allow MHG to cross-examine Dr. Belz on the issue of whether his figures should have been reduced to present value would have confused or misled the jury and it was not error to disallow it. *Vittengl v. Fox*, 967 S.W.2d 269, 279 (Mo.App. W.D. 1998)(finding that allowing expert testimony may

confuse or mislead a jury when expert is offering conclusions about a matter which is not a proper subject of expert testimony such as matters outside of his expertise).

Finally, it must be said that cross-examining Dr. Belz on this issue would not impeach his credibility or veracity as he is not the arbiter of whether figures need to be reduced to present value. Instead, this cross-examination seems designed to impugn the motives of plaintiff's counsel for failing to have the numbers reduced. Attacks on the motives of opposing counsel are inappropriate. *See Giddens v. Kansas City Southern Ry. Co.*, 937 S.W.2d 300, 308 (Mo.App. W.D. 1996) (attack on opposing counsel's integrity in closing argument grounds for new trial).

E. The Trial Court Did Not Err In Using An Approved Instruction Directly On Point

MHG also argue in the body of their brief that the trial court should have instructed the jury that any award of future damages must be reduced to present value. Instruction numbers 13 and 14, with regard to the itemization of damages, tracked the language of MAI 21.03 [1988 New] and 21.05 [1988 New]. Legal File Vol. 3 pp. 404 and 405 (as given); 2 Apdx, p.A78-A79 (as given) 2 Apdx, p. A82-A84 (MAI standard). The relevant language of Instruction 13 and MAI 21.03 allows the jury to award plaintiffs "such sum as you believe will fairly and justly compensate plaintiffs for any damages you believe [s]he sustained and is reasonably certain to sustain in the future…." With regard to itemization of damages, the instructions state only that "Any damages you award must be itemized by the categories set forth in the verdict form[s];" they say

nothing about reduction to present value. Instruction 14 and MAI 21.05, in defining the categories of damages, define future damages but likewise say nothing about present value.

The verdict form used in this case, was based on the approved verdict forms for medical negligence cases, including MAI 36.22 [1988 New]. 2 Apdx, p. A86. They contain lines for future damages, but similarly say nothing about present value. Section 538.215 RSMo 2000, the statute stating that in medical negligence cases the jury must express future damages at present value, was originally adopted in 1986, two years before this Court approved the damage instructions and verdict forms for actions against health care providers. The Committee Comments (1996 Revisions) to MAI 21.03 and 21.05 state that the approved instructions are applicable to causes of action subject to §§538.205- 538.230, which, of course, includes §538.215.2. The 2005 tort reform made no changes to this section. §538.215.2 RSMo 2000; HB 393.

Failure to use an applicable MAI is error. Rule 70.02(c); *Hudson v. Carr*, 668 S.W.2d 68, 71 (Mo. 1984). This Court's Rule 70.02 provides that "[w]henever Missouri Approved Instructions contains an instruction applicable in a particular case …such instruction shall be given to the exclusion of any other instruction on the same subject. MAI 21.03 [1988 New] and 21.05 [1988 New]. As explained above, MAI 21.03 and 21.05 were applicable to the Klotzes' damage claims and contain no language directing the jury to reduce future damages to present value. The Trial Court's actions in giving applicable MAI instructions cannot be denominated as reversible error, *Kenton v. Hyatt*

Hotels Corp., 693 S.W.2d 83, 96 -97 (Mo. 1985). This is especially true where MHG declined the opportunity to present evidence of present value and declined the opportunity to argue a need for a reduction to the jury. *See Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 388 (Mo. 1986)(cannot complain to higher court for failure to take offered opportunity). *See also Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507, 513 (Mo. banc 1983), *cert denied*, 464 U.S. 830 (1983)(appropriate to argue present value without expert evidentiary support).

MHG cite *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409 (1985) and *Eagle American Insurance Company v. Frencho*, 675 N.E.2d 1312, 1317 (Ohio Ct. App. 10th D. 1996) on the instructional issue. These cases obviously do not represent the law of Missouri. Again, Missouri law on the issue of the appropriate damage instructions is contained in MAI 21.03 and 21.05, which were followed in this case. Further, as explained above, MHG could have presented present-value evidence, and told the jury in argument that future damages must be expressed in present value, but failed to do so.

F. None Of The Claimed Errors Regarding Present Value Were Prejudicial.

MHG fail to explain how any of the claimed errors regarding present value prejudiced them. For error to require reversal, it must have been prejudicial to the complaining party. *Wilcox v. St. Louis-Southwestern Ry. Co*., 418 S.W. 2d 15, 20 (Mo. 1967). Particularly with regard to instructions, MHG must show that the error was prejudicial. *Burns v. Elk River Ambulance, Inc*., 55 S.W.3d 466, 475 -476 (Mo.App. S.D.

2001)(allegation of instructional error based on §538.215.2 rejected for failure to show prejudice).

Prejudice is hard to show since it is entirely possible that the jury reduced the claimed future economic damages to present value: the total future economic damages presented by Dr. Belz were $905,716.89. Tr., Vol. 4, p. 64-65, 73. The jury awarded $547,000.00, or 60% of the amount claimed. Supp. Legal File Vol. 13, p. 2301; 2 Apdx, p. A80. MHG's offer of proof concerning the cross examination of Dr. Belz on the present value issue revealed that Dr. Belz was not an economist, did not know how or whether an economist would do any present value determination and only put the statement regarding present value on his report to indicate that no calculations had been made. Tr. Vol. 3, p. 108 - 111. It is simply not plausible that allowing these statements to come before the jury would materially affect the outcome of the case. The Trial Court's decisions regarding the issues surrounding present value should be affirmed.

IV. The Trial Court Did Not Err In Admitting Statements From The Medical Records Regarding Causation Because The 6th Amendment To The US Constitution Does Not Apply And The Statements Were Admissible As Business Records.

A. Standard Of Review

In order to preserve a claimed error in the admission of evidence, an objection must have been made on the grounds asserted in the appeal, at the time the evidence was offered. Rule 78.09. A trial court's decision to admit evidence is "within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion."

Nelson v. Waxman, 9 S.W.3d 601, 604 (Mo. 2000). An abuse of discretion occurs only when a trial court's ruling "is untenable and clearly against reason and . . . works an injustice," *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009), or "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration" *Nelson*, 9 S.W.3d at 604 (internal citations omitted). In addition, even if this Court were to find an abuse of discretion in allowing in the statements in the medical records, MHG must still show that the admission of the evidence had some prejudicial effect and materially affected the merits of the action. *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009)(abuse of discretion to admit hearsay but not reversible error because had no prejudicial effect); *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 589 (Mo.App. W.D. 2008)(improper admission of evidence not reversible error unless it was prejudicial and materially affected the merits of the action); Rule 84.13(b)(no reversal unless error materially affected the merits).

B. The Sixth Amendment To The US Constitution Applies Only In Criminal Cases.

MHG argue that the admission into evidence of statements in the medical records violated their 6th Amendment right to confront witnesses against them, presumably referring to the 6th Amendment of the United States Constitution. That amendment, however, applies only to "all criminal prosecutions …," (U.S. Constitution Amend. X1), and, therefore, has no application here. *Krieg v. Director of Revenue,* 39 S.W.3d 574,

576 (Mo.App. E.D. 2001)(The Sixth Amendment right to confrontation applies, by its own terms, only in criminal prosecutions, not in civil proceedings).

C. The Statements In The Medical Records By Mr. Klotzes' Treating Physicians Were Admissible As Business Records.

The parties at trial stipulated to the business record nature of the medical records. Tr. Vol. 2, p. 214/12-14. Medical records relating to observations, treatment, and diagnoses are generally admissible as business records. *Tendai v. Missouri State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 366 (Mo. 2005). A business records foundation for medical records eliminates an objection based on hearsay. *Allen v. St. Louis Public Service Co*., 285 S.W.2d 663, 666-667 (Mo. 1956). Entries in medical records made by treating physicians for the purpose of diagnosis and treatment are admissible when qualified as business records, unless subject to specific objection such as irrelevancy or an inadequate source of information. *Id*. at 666. Statements of medical opinions in medical records which qualify as business records are admissible in civil cases. *Smith v. Wal-Mart Stores, Inc*, 967 S.W.2d 198, 205 (Mo. App. E.D. 1998); *Miller v. Engle*, 724 S.W.2d 637 (Mo. App. W.D. 1987); *Tyron v. Case*, 416 S.W.2d 252, 256-257 (Mo. App. E.D. 1967); *Sigrist by and through Sigrist v. Clark*, 935 S.W.2d 350, 353-355 (Mo. App. S.D. 1996). Medical records, to which there is no dispute as to authenticity, are almost always admissible to prove history, diagnosis, treatment and prognosis. *Friese v. Mallon*, 940 S.W.2d 37, 40 (Mo.App. E.D. 1997).

Given the above, MHG are apparently arguing that the statements in issue were not made as part of the physician's history, diagnosis, treatment or prognosis. This was

not an objection raised at trial (Tr. Vol. 2, p. 213 - 218), and the assertion is unsupported by evidence and law. The statement in issue, that this was an "infection of the permanent pacemaker which likely occurred at the time of his implantation" (Tr. Vol. 2, p. 218- 219) has to do with the length of time Mr. Klotz had the infection, a factor which on its face is relevant to history, diagnosis, treatment and prognosis. The Klotzes' expert Dr. Siegal in fact testified that the timing of the infection is important to "try to explain what caused the problem." Tr. Vol. 2, p.213. MHG cannot and have not shown that the timing of the infection, and thus, the statement that the infection "likely occurred at the time of implantation," was irrelevant to treating Mr. Klotz. The suggestion that a reviewing court should make such a factual determination now misconstrues the role of the Court. The citation to Dr. Clark's comment regarding his lack of knowledge as to why the other doctors wrote the statement, hardly shows irrelevancy to medical treatment, much less as a matter of law. Tr. Vol. 3, p. 51-52, 186.

V. The Trial Court Did Not Commit Reversible Error When It Refused To Allow Cross Examination Of Dr. Belz Regarding The Amount Of Money He Made From Other Expert Witness Work Because The Ruling Was Within The Trial Court's Discretion, The Information Was Before The Jury Anyway, And No Substantial Impeachment Was Shown In The Offer Of Proof.

A. Standard Of Review

The decision of what cross-examination to allow is left to the sound discretion of the trial court and the decision will not be disturbed unless an abuse of discretion is clearly shown. *Trident Group, LLC v. Mississippi Valley Roofing, Inc.*, 279 S.W.3d 192,

200 (Mo.App. E.D. 2009). An abuse of discretion occurs only when a trial court's ruling "is untenable and clearly against reason and . . . works an injustice," *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009), or "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Nelson*, 9 S.W.3d at 604 (internal citations omitted). In addition, even if this Court were to find an abuse of discretion in disallowing the cross-examination of Dr. Belz regarding money made from expert witness work generally, MHG, in order to obtain a reversal, must still show prejudice which materially affected the outcome of the case. *Trident Group, LLC v. Mississippi Valley Roofing, Inc.*, 279 S.W.3d 192 (Mo.App. E.D. 2009) (defendants claim of error in trial court's refusal to allow cross-exam on a subject denied when no claim of prejudice made on appeal and no offer of proof); Rule 84.13(b)(no reversal unless error materially affected the merits).

B. The Ruling Was Within The Trial Court's Discretion.

MHG claim error in the Trial Court's decision to disallow cross-examination of Dr. Belz as to the amount of money he has made on other cases. At trial, the Klotzes presented the trial court with *Elam v. Alcolac, Inc*. 765 S.W.2d 42, 199 (Mo. App. W.D.1988), *cert. denied*, 493 U.S. 817 (1989), in support of their position that cross-examination of Dr. Belz concerning the amount of money he made as an expert in other cases was inappropriate. Tr. Vol. 3, p. 8 - 9. MHG offered no authority for their contrary position. *Id.*

MHG now cite *State v. Love*, 963 S.W.2d 236, 242 – 244 (Mo. App. W.D. 1997), which affirmed a trial court's decision to allow cross examination on actual amounts made by an expert in expert witness work. However, both *Elam, supra,* and *Lov*e recognize that the decision, either way, is one within the trial courts discretion. *Elam* affirmed the trial courts' decision to refuse the cross examination and *Love* affirmed the decision to allow it. There is no Missouri case reversing a trial court's discretionary decision on the issue. MHG offer no explanation as to why the trial court's decision was outside of its discretion in the circumstances of this case or why it prejudiced them to the extent that reversal is required.

C. The Information Was Before The Jury Anyway, And The Offer Of Proof Was Insubstantial.

In fact, despite the ruling, Dr. Belz was cross-examined on the issue of the time he spent on expert witness work in other cases, specifically the number of hours spent, and although no totals were mentioned, he did testify to his hourly rates. He also testified to how much money he made in this case specifically. Tr. Vol. 4, p.74-78, 106. In other words, the jury had the information to make the inference desired, and MHG were free to draw this inference for the jury in closing argument but did not do so. Tr. Vol. 8, p. 41 - 63. Finally, nothing substantial would have been added had the jury heard the offer of proof where Dr. Belz testified that expert work was a small part of his practice and he did not know what percentage of his income was from expert witness work. Tr. Vol. 4, p. 65 - 68. The trial court's ruling was, therefore, within its discretion, and no prejudice has been shown. For error to require reversal, it must have been prejudicial to the

complaining party. *Wilcox v. St. Louis-Southwestern Ry. Co.*, 418 S.W. 2d 15, 20 (Mo. 1967).

VI. The Trial Court Did Not Err In Allowing the Klotzes' Counsel To Argue And Display A Part Of Dr. Shapiro's Deposition In Closing Because It Was In Evidence And There Was No Prejudice.

A. Standard Of Review

A trial court's decision to overrule an objection to closing argument is reviewed for an abuse of discretion. *Hemann v. Camolaur, Inc.*, 127 S.W.3d 706, 710 (Mo.App. W.D.2004). An abuse of discretion occurs only when a trial court's ruling "is untenable and clearly against reason and . . . works an injustice," *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009), or "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. 2000)(internal citations omitted). In addition, the trial court's ruling on MHG's objection during closing argument should be interpreted in light of the entire record and should be overturned only if the statements were plainly unwarranted and clearly injurious. *Hemann v. Camolaur, Inc.*, 127 S.W.3d 706, 710 (Mo. App. W.D. 2004).

B. Argument

In response to MHG's argument in closing that Dr. Shapiro did not think there was an infection at the IV site (Tr. Vol. 8, p. 61), Plaintiff's counsel showed the jury a portion of Dr. Shapiro's deposition stating that he had prescribed an antibiotic on the

presumption that there was an infection involved. Tr. Vol. 8, p. 63-64. This portion of the deposition had been read, without objection, during the testimony of the defense expert, Dr. Beshai. Tr. Vol. 7, p. 68 - 69. Simply put, MHG and Dr. Shapiro are mistaken in their assertion that this portion of Dr. Shapiro's deposition was not read, shown or displayed to the jury during trial. *Compare* Respondents/Cross-Appellants' brief, p. 110 *with* Tr. Vol. 7, p. 68 - 69. As the Eastern District stated in *Powderly v. South County Anesthesia Associates, Ltd.*, 245 S.W.3d 267, 273 (Mo.App. E.D. 2008)(internal citations omitted): "When evidence of one of the issues in the case is admitted without objection, the party against whom it is offered waives any objection to the evidence . . . a trial court commits no error by permitting counsel to review admissible evidence in argument before the jury after the evidence is in the record."

Finally, even if the deposition testimony had not been in evidence, no prejudice can be shown because Dr. Shapiro admitted in his trial testimony that he knew there was a possible infection at the IV site. Tr. Vol. 4, p. 149 – 150, 154, 155, 165 - 166. For error to require reversal, it must have been prejudicial to the complaining party. *Wilcox v. St. Louis-Southwestern Ry. Co*., 418 S.W.2d 15, 20 (Mo. 1967).

VII. The Trial Court Did Not Err In Submitting Instruction Number 9 Regarding "Added Risk Of Infection" Because It Did Not Mislead The Jury, No Prejudice Is Shown, And The Claim Of Failure To Make A Submissible Case Is Not Adequately Briefed.

A. Standard Of Review

Claims of "roving commission" in jury instructions are reviewed by examining whether the instruction misled the jury in the context of the evidence, construed in the light most favorable to the instruction. *Edgerton v. Morrison*, 280 S.W.3d 62, 66 - 67 (Mo. 2009). A trial judge's decision to allow an instruction, made with the benefit of firsthand knowledge of how the evidence was presented at trial, should not be assumed to have been carelessly made. *Id.* Evidentiary detail is to be avoided in instructions, and technical detail is not required for a jury to be informed of the meaning of expert terminology. *Id.* Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action**.** *Bach v. Winfield-Foley Fire Protection Dist.*, 257 S.W.3d 605, 608 (Mo. 2008).

B. The Instruction Did Not Mislead The Jury.

MHG argue that the words "added risk of infection" in Instruction No. 9, the verdict director, was so vague that it allowed the jury to impose liability on facts not supported by evidence. Legal File, Vol. 3, p. 400; 2 Apdx, p. A74. First, it must be said that the phrase used in the director was actually "failed to inform James Klotz of an added risk of infection due to the right wrist signs and symptoms before implanting the

permanent pacemaker" and not just failed to inform of an "added risk of infection." Legal File, Vol. 3, p. 400; 2 Apdx, p. A74. The language of the director was limited in time, limited to a particular part of the body and was adequately explained in the evidence.

Where the testimony in a case explains a phrase used in a verdict director, there is no "roving commission." *Williams v. Daus*, 114 SW3d 351, 371 (Mo. App. S. D. 2003)("performed a surgery without proper indications" not a roving commission when expert testimony explained); *Laws v. St. Luke's Hosp.*, 218 S.W.3d 461, 471 (Mo. App. W.D. 2007)("failure to adequately communicate" not a roving commission, especially when given flesh and meaning by expert testimony); *Lindquist v. Scott Radiological Group, Inc*., 168 SW3d 635,652 (Mo.App. E.D. 2005)("failed to take an adequate history" and "failed to perform an adequate physical examination" not roving commission because the terms are understandable to a jury and the submissions were fleshed out by expert testimony).

The phrase "failed to inform Mr. Klotz of the added risk of infection due to the right wrist signs and symptoms" is much more specific than the submission found too vague in *Grindstaff v. Tygett*, 655 S.W.2d 70 (Mo. App. 1983), that a procedure was "not medically proper." And unlike a submission requiring a finding that the defendants "failed to disclose all material complications, dangers or risks of the operation," *Rogers v. Bond* 839 S.W.2d 292, 295 (Mo. 1992), the risk which the Klotzes contend should have been disclosed was specifically identified in the instruction as the added risk infection of infection from the right wrist symptoms. This phrase was used to make sure the jury

would not base liability on a failure to disclose the standard infection risks of the surgery which Dr. Shapiro testified he had discussed with Mr. Klotz the night before. Tr. Vol. 4, p. 210 - 211.

The Klotzes' expert Dr. Siegal testified that Dr. Shapiro, before implanting the permanent pacemaker, had an obligation to talk Mr. Klotz and inform him that a possible infection at the right wrist IV site had been identified that morning and that its presence increased the risk of infection in connection with the surgical implantation of the permanent pacemaker. Tr. Vol. 2, p. 119, 206-207.

Dr. Shapiro admitted that the possible infection at the IV site created a risk of the blood becoming infected, which is dangerous when a foreign body is being implanted and admitted that he did not discuss that danger with Mr. Klotz. Vol. 4, p. 149 - 151. Despite his admissions that all final decisions are with the patient and all the doctor can do is make recommendations based on a risk/benefit analysis, Dr. Shapiro testified that he did not inform Mr. Klotz of any additional risk of infection because he thought the potential IV site infection did not impose an additional risk. Vol. 4, p. 153 - 154.

The Klotzes' expert Dr. Siegal disagreed, testifying that a conclusion that there was no added risk was a deviation of the standard of care, that Dr. Shapiro's failure to inform Mr. Klotz of the added risk of infection was negligent, and that it directly caused or directly contributed to cause the pacemaker infection and sepsis. Tr. Vol. 2, p. 269 - 270 (failure to inform was deviation from standard of care); Tr. Vol. 2, p. 222 (failure to inform was negligent and caused the damages).

C. No Prejudice Is Shown.

MHG fail to explain how the instruction prejudiced them, do not explain what is vague about the term "added risk of infection" or how the jury might have misinterpreted it. In fact, it appears from the questioning and argument that Dr. Shapiro and his counsel understood the phrase. Tr. Vol. 2, p. 269 - 270; Tr. Vol. 4, p. 149 - 151; Tr. Vol. 8, p. 49 - 51. A judicial finding of prejudice is a prerequisite of reversal based on instructional error. Rule 70.02(c); *Hudson v. Carr*, 668 S.W.2d 68, 71 (Mo. 1984).

D. Submissiblity Is Not Briefed.

Finally, although contending in their point relied that the Klotzes failed to make a submissible case, the point is not argued in the body of MHG's argument, and therefore, will not be addressed.

VIII. The Trial Court Did Not Commit Reversible Error In Refusing To Declare A Mistrial Or In Her Oral Instruction Encouraging Continued Deliberation, Because These Decisions Were Within Her Discretion, There Was No Objection To The Oral Instruction, No Prejudice And, Conclusory Arguments That The Instruction Violated MHG's Constitutional Rights Should Be Disregarded.

A. Standard Of Review

In criminal cases, Missouri has approved "hammer" instructions designed to help a jury avoid a complete deadlock. MAI-CR 3d 312.10, formerly MAI-CR 1.10 (1973), at 2 Apdx, p. A89-A90. The decision of whether and when to read a "hammer" instruction lies within the discretion of the trial court, and the court abuses that discretion only if the

instruction coerces the jury's verdict. *Smith v. State,* 276 S.W.3d 314, 318 - 319 (Mo.App. E.D. 2008). A verdict is considered coerced when, under the totality of the circumstances, it appears that the trial court virtually directed that a verdict be reached and implied that it would hold the jury until it returned a verdict. *Id.* Urging the jury to reach a verdict by a certain time or telling the jury that it is required to reach a verdict is also deemed coercive. *Id.*

There is no hammer instruction in MAI for civil cases. The decision, in civil cases, in the face of a deadlock, to declare a mistrial or urge the jury to continue deliberating is one within the discretion of the trial court. *Anderson v. Bell*, 303 S.W.2d 93 (Mo. 1957); *Nash v. Plaza Electric, Inc.*, 363 S.W.2d 637 (Mo. 1962); *Garner v. Jones*, 589 S.W.2d 66, 68 (Mo. App. W.D. 1979); *Klein v. General Elec. Co.*, 714 S.W.2d 896, 906 (Mo. App. E.D. 1986). Hammer instructions have been used in civil cases, and are reviewed by examining whether the instruction given was prejudicial by coercing a verdict or improperly informed the jury, to the prejudice of the complaining party. *Cowan v. McElroy*, 549 S.W.d 543, 546 (Mo. App. W.D. 1977); *Garner v. Jones* , 589 S.W.2d 66,68 (Mo. App. W.D. 1979). Whether a jury was properly instructed is a question of law that this Court reviews *de novo. Harvey v. Washington,* 95 S.W.3d 93, 97 (Mo. banc 2003). Generally, instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action. *Ploch v. Hamai,* 213 S.W.3d 135, 139 (Mo.App. E.D. 2006). Specific objections to instructions considered erroneous are required by Rule 70.03.

B. The Trial Court Did Not Commit Reversible Error In Not Granting A Mistrial And Giving The Oral Instruction.

MHG argue that the case should be reversed because the Court erred in giving an oral instruction to continue deliberating and in not granting a mistrial.

1. What Happened At Trial

The jury began deliberations at 11:00 am. Supp Trans., 7/30/08, p.1. At 3:55 pm the Court received a note stating: "We as 8 juror have come to an agreement. 1 juror is holding out. 3 are not in agreement. We are at a standstill." Legal File Vol. 3, page 391; 2 Apdx, p. A68. At 4:10 the Trial Court, without objection, sent an instruction reading:

> You should make every reasonable effort to reach a verdict, as it is desirable that there be a verdict in every case. Each of you should respect the opinions of your fellow jurors as you would have them respect yours, and in a spirit of tolerance and understanding endeavor to bring the deliberations of the whole jury to an agreement upon a verdict. Do not be afraid to change your opinion if the discussion persuades you that you should. But as a juror you should not agree to a verdict that violates the instruction of the Court, nor find as a fact that which under the evidence and his/her conscience he/she believes to be untrue.

Supp. Legal File Vol. 13, p. 2300; 2 Apdx, p. A70. Shortly before 4:25 pm the jury sent a second note asking for the "Life Care Report" which was sent. Supp. Legal File Vol. 3, p. 392; 2 Apdx, p. A69. At 5:15 pm the jury sent a third note:

> Juror #2 will not come to a reasonable conclusion. Will only settle for 3,000,000 and we as 8 feel 2.5 is adequate.

Supp. Legal File Vol. 3, p. 392; 2 Apdx, p. A69. At this point MHG requested a mistrial because of "deadlock." Supp. Tr. 7/30/08, p.1. The following exchange then occurred:

> THE COURT: The Court is not going to do it at this time. It is going to let them deliberate a little bit longer. And I'll -- Do you want me to bring them into the courtroom and tell them that or go back with Rhonda so there's a record of what is said? I want you to have the last say on the record.
>
> MR. ECKENRODE: I'm at the Court's discretion.

Supp. Tran. 7/30/08, p. 2. The trial judge then entered the jury room and told the jury:

> The attorneys know that I'm in here talking to you all and have allowed me to do it rather than bring you into the courtroom.
>
> A lot of time and effort, a lot of expense has gone into this case, and if you are unable to reach a verdict what happens is the case is retried, not with you all but with a different jury, and, just to let you know, that's the procedure. So I'm going to ask that you continue to deliberate and try to reach a

> verdict, and I'll let you go 'til 6 o'clock tonight and then come back tomorrow morning, because this is – I'd like you to give it your best effort to see if you can reach a verdict. I'll let you go till 6 o'clock tonight, we'll stop, go home, think about it, have dinner, whatever you want to do, and come back then tomorrow, but why don't you come back by 9:00 or 9:30. You can't deliberate until everybody is here. But give it another 45 minutes or so, unless you want to just call it quits now and come back tomorrow morning. I'll let you guys decide what you want to do. I'll give you two minutes, decide whether or not you want to come back tomorrow morning, go now, keep going for 45 minutes.

Appendix to Respondents/Cross-Appellants' brief, p. A75 – A 76. The jury returned its verdict signed by 9 jurors at 5:55 pm, about 40 minutes after the last note. Supp. Legal File Vol. 13, p. 2301, 2 Apdx, p. A80 (verdict); Tr. Vol. 8, p. 74/23 (time of return of verdict); Legal File Vol. 3, p. 392, 2 Apdx, p. A69 (time of last note sent).

2. The Trial Court's Discretion

The decision, in the face of a deadlock, to declare a mistrial or urge the jury to continue deliberating is one within the discretion of the trial court. *Anderson v. Bell*, 303 S.W.2d 93 (Mo. 1957); *Nash v. Plaza Electric, Inc.*, 363 S.W.2d 637 (Mo. 1962); *Garner v. Jones*, 589 S.W.2d 66, 68 (Mo. App. W.D. 1979); *Klein v. General Elec. Co.*, 714

S.W.2d 896, 906 (Mo. App. E.D. 1986). That is all the trial judge did here – decide to encourage the jury to continue deliberating and encourage them to reach a verdict.

3. No Objection To Oral Instruction, No Prejudice, And Constitutional Arguments Are Not Adequately Briefed

If MHG are suggesting that they objected to the trial judge going into the jury room and delivering an oral instruction to continue deliberating after the last note, they are mistaken. *Cf.* Cross-Appellants'/Respondents' brief, p. 113 *with* Supp. Tran. 7/30/08, p. 2. No objection was made to the Court giving an oral instruction in the jury room. Supp. Tran. 7/30/08, p. 2. Whether this is because defense counsel did not want the jury to see that Dr. Shapiro had already left the courthouse, or for some other reason, MHG cannot make an objection now. The only objection that was made at trial was the Court not declaring a mistrial at the time of the second note.

In addition, MHG fail to show any prejudice from the fact that the Trial Court's second instruction was made orally and complain of no specific language in that instruction. They claim that the verdict was coerced but offer no specifics as to how. They argue that *Pasilich v. Swanson*, 89 S.W.3d 555, 557 (Mo. App. W.D. 2002), affirmed a trial court's grant of a new trial because it gave a hammer instruction only orally but, again, they are mistaken. The Court of Appeals in *Pasilich*, finding that a new trial was justified on another basis, did not reach the argument regarding the hammer instruction. *Pasilich*, 89 S.W.3d at 564.

There is nothing in the record here to support a conclusion that the jury was coerced. In fact, the opposite is true. The judge's oral instruction told them that if they could not reach a verdict, the case would have to be retried with a different jury. Appendix to Respondents'/Cross-Appellants' brief, p. A75 – A 76. Further, no argument is made that anything the judge told the jury in the second instruction was a misstatement of law. She simply encouraged them to continue trying to reach a verdict, a decision entirely within her discretion.

Lastly, MHG, in a single sentence, claim that the second instruction violated various constitutional rights, without further explanation. Conclusory constitutional arguments, made without discussion or citation of any supporting authority, are not preserved for appeal. *Jackson County v. State*, 207 S.W.3d 608, 614 (Mo. 2006); Rule 84.13(a)(allegations of error not briefed or not properly briefed shall not be considered in any civil appeal).

IX. The Trial Court Did Not Err In Denying MHG's Motions For Directed Verdict And/Or Motion For Judgment Notwithstanding The Verdict Because All Of the Klotzes' Submissions In The Verdict Director Were Supported By Expert Testimony Or Were Subjects Upon Which Expert Testimony Is Not Necessary.

A. Standard Of Review

In determining whether the evidence was sufficient to support the jury's verdict, an Appellate Court views the evidence in the light most favorable to the verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences

that conflict with that verdict. *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 818 (Mo. 2000). This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion. *Id.* MHG's argument concerning the submissibility of causation does nothing more than cite out of context statements by the Klotzes' experts solicited on cross-exam, and does not give plaintiffs the benefit of the required standard of review.

B. The Klotzes' Experts Testified That MHG's Negligence Directly Caused Or Directly Contributed To Cause The Klotzes' Damages.

The verdict director against MHG, in relevant part, told the jury it must assess a percentage of fault against MHG if they believed:

> First, defendant Michael Shapiro, MD, either:
>
> failed to properly treat the right wrist symptoms in connection with the placement of the permanent pacemaker, or
>
> failed to inform James Klotz of an added risk of infection due to the right wrist signs and symptoms before implanting the permanent pacemaker, and
>
> Second, defendant Michael Shapiro, MD, in any one or more of the respects submitted in paragraph First, was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff James Klotz.

Legal File Vol. 3, p. 400; 2 Apdx, p. A74. Each of these submissions was supported by testimony.

Dr. Siegal, after explaining his opinions concerning Dr. Shapiro in detail (Tr. Vol. 2, p. 118 – 119, p. 168 - 220), testified in summary that Dr. Shapiro's failure to timely treat the right wrist infection with IV antibiotics appropriate for MRSA, or failure to obtain an infectious disease consult in conjunction with implantation of the permanent pacemaker, and his failure to inform James Klotz of an added risk of infection due to the right wrist condition, was negligent (Tr. Vol. 2, p. 222). He further testified that Dr. Shapiro's failures directly caused or directly contributed to cause the pacemaker infection, the sepsis, and the amputations. Tr. Vol. 2, p. 222. Dr. Siegal also testified that more likely than not, if Dr. Shapiro had timely treated the right wrist infection with IV antibiotics appropriate for MRSA, or obtained an infectious disease consult in conjunction with implantation of the permanent pacemaker, the pacemaker infection, the sepsis, and the amputations would have been avoided. Tr. Vol. 2, p. 222 - 223. Although a few of the questions had to be restated to overcome objections to form, all of the above testimony came in without any substantive objection (*Id*.) and is, without anything more, sufficient to support the instruction.

Dr. Clark, after testifying to his opinions concerning Dr. Shapiro in detail (Tr. Vol. 4, p. 84 – 86, 116-117, 128-145), testified in summary that Dr. Shapiro's failure to timely treat the right wrist infection with IV antibiotics appropriate for MRSA before implanting

the permanent pacemaker, or his failure to get an infections disease consult before implanting the permanent pacemaker, was negligent (Tr. Vol. 3, p. 150 - 151). He further testified that Dr. Shapiro's failures directly caused or directly contributed to cause the pacemaker infection, the sepsis and the amputations. Tr. Vol. 3, p. 150 - 151. Dr. Clark also testified that but for those failures, the pacemaker infection, the sepsis, and the amputations would have been avoided. Tr. Vol. 3, p. 150 - 151.

C. The Klotzes' Informed Consent Submission On Causation Was Within The Ordinary Experience Of The Jury.

MHG may argue in reply that there was no expert testimony that, but for Dr. Shapiro's failure to inform Mr. Klotz of an added risk of infection due to the right wrist symptoms, the injuries would have been avoided. Expert testimony on the issue of causation in an informed consent case is not required because the issue is what a reasonable person in the patient's position would have done – an issue within the jury's abilities, without the need for an expert. *Wilkerson v. Mid-America Cardiology*, 908 S.W.2d 691, 697 – 600 (Mo. App. W.D. 1995). As Judge Stith stated in *Wilkerson* "once the jury is told what a proper warning would have consisted of, it knows what the patient would have known when deciding what course to follow, and thus it has all the information it needs to make the determination as to what option a reasonable person in Plaintiff's situation would have followed." *Id.* Similarly, there is no requirement that the patient personally testify that if he would have known, he would not have consented. *Aiken v. Clarly*, 396 S.W.2d 668, 675 (Mo. App. 1965).

The Klotzes' expert Dr. Siegal testified that Mr. Klotz should have been informed of the option of delaying implantation of the permanent pacemaker and treating the infection. Tr. Vol. 2, p. 119, 206-207. Dr. Clark testified that Dr. Shapiro should have delayed the implantation of the permanent pacemaker and treated Mr. Klotz with antibiotics. Tr. Vol. 3 p. 85 – 86, 136 - 137.

In addition, there was ample evidence from the which the jury could have concluded that a reasonable person in Mr. Klotzes position, had he been told of the risk of infection to the permanent pacemaker from the infection at the right wrist IV site, would have opted to wait on the implantation of the permanent pacemaker, refused the pacemaker outright or opted to get a second opinion. Mr. Klotz did not want the permanent pacemaker and he and his family were arranging for a transfer out of St. Anthony's to get a second opinion on the need for it. Tr. Vol. 4, p. 278-279, 288; Tr. Vol. 5, p. 200 - 201. There was sufficient evidence for the jury to conclude that informing Mr. Klotz of the risk of infection of to the permanent pacemaker would have likely resulted in him delaying or refusing the implantation.

X. The Trial Court Did Not Err In Allowing Testimony Regarding Dr. Shapiro's Knowledge Of St. Anthony's Infection Rate Because The Testimony Described What Dr. Shapiro Would Have Or Should Have Known Under Normal Medical Practice, Was Therefore Relevant On The Issues Of Negligence, And Was Admissible As Contradiction.

A. Standard Of Review

A trial court's decision to admit evidence is "within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. 2000). An abuse of discretion occurs only when a trial court's ruling "is untenable and clearly against reason and . . . works an injustice," *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009), or "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. 2000) (internal citations omitted). In addition, even if this Court were to find an abuse of discretion in allowing evidence of the infection rates, MHG must still show that the admission of the evidence had some prejudicial effect and materially affected the merits of the action. *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009)(abuse of discretion to admit hearsay but not reversible error because had no prejudicial effect); *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 589 (Mo. App. W.D. 2008)(improper admission of evidence not reversible error unless it was prejudicial and materially affected the merits of the action).

B. The Infection Data Was Relevant To What Dr. Shapiro Knew Or Should Have Known When Treating Mr. Klotz, and Admissible as Contradiction.

MHG claim reversible error because of the admission into evidence expert testimony concerning what Dr. Shapiro would have or should have known regarding his hospital's infection data. The Klotzes' expert Dr. Clark testified that the infection data in issue "are important data that are useful every day to all the doctors, pharmacists and nurses in the hospital." Tr. Vol. 3, p. 133. He testified that if Dr. Shapiro were unsure of what antibiotic to prescribe, he had the option of consulting an infectious disease doctor, or he could call the bacteriology or pharmacy departments to find out what antibiotic is recommended. Tr. Vol. 3, p. 135. Dr. Clark testified that if Dr. Shapiro did not take either of these options, then he was taking responsibility for choosing the correct antibiotic and waiting the correct period of time. Tr. Vol. 3, 136. There was testimony that the in-hospital infection data is "how doctors decide what to use based on these things that are printed by the hospital to say that you've got to be careful because you're dealing with a very significant portion of your bacteria that are resistant to your old antibiotic choices and you need to think this over and start covering for the resistant ones." Tr. Vol. 3, p. 110. "If a doctor … comes on a patient and is going to make an antibiotic choice they have to consider the risk in their own hospital of MRSA…" Tr. Vol. 3, p. 113 - 114.

MHG argue that because Dr. Shapiro denied knowing of the data, none of this evidence should have been admitted. The jury is not required to believe a defendant's denial of knowledge of facts he could have easily known. *LeCave v. Hardy*, 73 S.W.3d 637, 644 (Mo. App. E.D. 2002). The jury, as trier of fact, is free to believe or disbelieve all, part or none of the testimony. *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 795 (Mo. App. W.D. 2008); *Hensley v. Jackson County*, 2006 WL 2945427, 3 (Mo. App. W.D. 2006); *Schulze v. C & H Builders*, 761 S.W.2d 219, 224 (Mo. App. E.D. 1988). The information was relevant to show how Dr. Shapiro could have treated the right wrist symptoms correctly, how he could have discovered the dangers involved, and correctly included Mr. Klotz in the decision to take them. The fact that Dr. Shapiro may not have appropriately appreciated the extent of the danger does not make inadmissible evidence that he should have. Finally, the testimony was offered in contradiction to Dr. Shapiro's position that he didn't know of the data, and, therefore, was admissible. *Talley v. Richart*, 185 S.W.2d 23, 26 (Mo.1945).

XI. The Trial Court Did Not Err In Allowing Testimony Of The Full Amount Charged For The Medical Bills Because It Was Within The Court's Discretion To Find That The Amounts Charged Represented The Value Of The Medical Treatment Under §490.715.5.

A. Standard Of Review

A trial court's decision to admit evidence is "within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson v. Waxman*, 9

S.W.3d 601, 604 (Mo. 2000). An abuse of discretion occurs only when a trial court's ruling "is untenable and clearly against reason and . . . works an injustice," *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009) or "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration" *Nelson*, 9 S.W.3d at 604 (internal citations omitted). In addition, even if this Court were to find an abuse of discretion in allowing evidence of the amount billed to the Klotzes, MHG must still, to obtain a reversal, show that the admission of the evidence had some prejudicial effect and materially affected the merits of the action. *Saint Louis University v. Geary*, 2009 WL 3833827, 4 (Mo. 2009)(abuse of discretion to admit hearsay but not reversible error because had no prejudicial effect); *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 589 (Mo.App. W.D. 2008)(improper admission of evidence not reversible error unless it was prejudicial and materially affected the merits of the action).

B. It Was Within The Discretion Of The Trial Court To Allow As Evidence The Amount Billed To The Klotzes Notwithstanding Amounts Actually Paid On Their Behalf.

The statute in question, §490.715.5 provides:

> (1) Parties may introduce evidence of the value of the medical treatment rendered to a party that was reasonable, necessary, and a proximate result of the negligence of any party.

> (2) In determining the value of the medical treatment rendered, there shall be a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered. Upon motion of any party, the court may determine, outside the hearing of the jury, the value of the medical treatment rendered based upon additional evidence, including but not limited to:
>
> (a) The medical bills incurred by a party;
>
> (b) The amount actually paid for medical treatment rendered to a party;
>
> (c) The amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery.
>
> Notwithstanding the foregoing, no evidence of collateral sources shall be made known to the jury in presenting the evidence of the value of the medical treatment rendered.

MHG are apparently arguing that once it has been shown that medical providers accepted less from the patient's medical insurance than the amount charged, the Court has no discretion but to order that the lesser amount be presented to the jury. This position, however, is not supported by the statute, which creates a presumption in favor of the "amount necessary to satisfy the financial obligation to the health care provider,"

not the amount paid. Further, the Court is expressly authorized to consider "additional evidence, including but not limited to (a) The medical bills incurred by a party … and (c) [t]he amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery." §490.715.5.

Prior to trial, MHG filed a motion to determine, pursuant to §490.715.5(2), the amount of medical bills which would be submitted to the jury. Legal File, Vol. I, p. 147. The Klotzes filed a response (Legal File, Vol. II, p. 228), and the trial court held a hearing on the issue (Transcript, "Motion in Limine, 7/14/08"). The Klotzes, preserving the objection that the statute was unconstitutional, (Tr. Motion in Limine 7/14/08, p. 8), presented evidence that there were liens being asserted against any recovery, an appropriate consideration under 490.715.5(c). *Id.* at p. 5 – 6, 7, 15. It was also shown that some of the providers had the Klotzes sign agreements that they were responsible for amounts charged, regardless of what insurance paid. Legal File Vol. 2, p. 233, 236 – 238. This was appropriate evidence under 490.715.5(2), relevant to the issue of the amount necessary to satisfy the financial obligation.

The Court then issued the following Order:

> After reviewing all memoranda and upon consideration of the oral argument of the parties, the Court finds Plaintiffs have rebutted the presumption with regard to those bills in which a reduced amount was accepted by the provider because Plaintiffs presented expert testimony the bills were reasonable, Plaintiffs are still subject to liens for unpaid bills,

> and the medical providers have not provided any release of obligation by Plaintiffs to pay for any amounts charged, but not received, by the provider.

Legal File, Vol. 2, p. 289; 2 Apdx, p. A13. The evidence the Court relied upon was appropriately considered under §490.715.5(1) which specifically refers to reasonableness, as well as the statutes' authority to consider "other evidence" and "the medical bills incurred by a party." §490.715.5(2) & (2)(a).

The argument that the trial court may only consider the dollar amount paid was recently rejected in *Berra v. Danter*, 2009 WL 3444814, 5 (Mo. App. E.D. 2009). The *Berra* Court stated: "The trial court did not misapply section 490.715.5 when it considered the amount reflected in the Klotzes' billing statements in determining the reasonable value of plaintiff's medical treatment." *Id.* MHG's similar argument here should be rejected.

CONCLUSION

For all the reasons discussed in Appellants/Respondents' briefs, James and Mary Klotz respectfully request that this Court declare HB 393 unconstitutional, vacate the 1/22/09 judgment reducing the verdicts, and enter its own judgment, Rule 84.14, or, remand to the circuit court for a judgment, reflecting the full verdict against MHG for the Klotzes' of $1,728,600.00, with post judgment interest from the date of the original judgment, 1/22/09, *Sebastian County Coal & Mining Co. v. Mayer*, 274 S.W. 770, 773 - 774 (Mo.1925), at 9% per annum, pursuant to §408.040.1, RSMo 2000.

Such a judgment would order, consistent with the trial court's original percentages and timetables, §538.220, RSMo 2000 and §408.040, RSMo 2000: for James Klotz, $836,160.00 in past damages, plus simple interest at 9% per annum from the date of the judgment, 1/22/09; future damages of $151,131.70 (29%) immediately payable, with simple interest at 9% per annum from 1/22/09, and, $389,598.30 (71%) payable in 13 yearly equal installments on January 22, beginning in 2009, with simple interest at 9% per annum from the date the payment was due until payment. Legal File, 1446 and 1447; 2 Apdx, A2-12. For Mary Klotz: the full $343,710.00, payable immediately, with simple interest at 9% per annum from 1/22/09.

84.06(c) Certification and Certificate of Service

Mary Coffey, counsel for Appellants/Cross-Respondents, certifies that this Second Brief for Appellants/Cross-Respondents, contains 29,214 words, exclusive of the cover, certificate of service, this certificate, signature block and appendix and therefore, complies with the limitations contained in Rule 84.06(b)(1), being under 31,000 words.

The CD ROM filed with this brief , and containing a copy of this brief and appendix, has been scanned for viruses and is virus free.

Counsel also certifies pursuant to Rule 84.05(a) that she mailed, postage prepaid, two complete copies, and e-mailed one complete copy, of this Second Brief of Appellants/Cross-Respondents, and its appendix, on this 21st day of December, 2009, to:

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