IN THE SUPREME COURT OF MISSOURI

CASE NO. SC 90107

JAMES KLOTZ AND MARY KLOTZ

Appellants/Cross-Respondents,

v.

MICHAEL SHAPIRO, M.D. AND METRO HEART GROUP OF ST. LOUIS, INC.

Respondents/Cross-Appellants.

Appeal from the Twenty First Judicial Circuit Court
County of St. Louis, State of Missouri, Division No. 13
Case No. 06CC-4826

The Honorable Barbara W. Wallace

BRIEF OF RESPONDENTS/CROSS-APPELLANTS MICHAEL SHAPIRO, M.D. AND METRO HEART GROUP OF ST. LOUIS, INC.

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JURISDICTIONAL STATEMENT

Respondents/Cross-Appellants acknowledge that the Supreme Court has exclusive appellate jurisdiction over appeals that raise constitutional challenges to state statutes. MO. CONST. ART. V, §3. Likewise, Respondents/Cross-Appellants recognize that Appellants/Cross-Respondents have brought their appeal as a challenge to the constitutionality of the changes in Missouri law effectuated following the passage of House Bill 393 (H.B. 393) in 2005, and in particular, those portions of the legislation now codified as §538.210 (2008), as amended in 2005. However, Respondents/Cross-Appellants contend that Appellants/Cross-Respondents James and Mary Klotz did not properly preserve their constitutional challenges at the trial court, and as such, have waived their right to raise constitutional claims in this appeal, which should therefore be dismissed, and that, as a consequence, this court does not have jurisdiction to hear this appeal.

Appellants/Cross-Respondents never raised any constitutional issues in their original Petition in cause number 21066CC-01066 (filed on March 14, 2006), or in their First Amended Petition in this case in 06CC-4286 (filed March 1, 2007) or any subsequently filed amendment thereto in the instant lawsuit. Constitutional issues were first raised by Appellants/Cross-Respondents in their response to Respondents/Cross-Appellants' Affirmative Defenses, which was filed in April 2008, just 3 months before trial, against Dr. Shapiro and MHG, and none of these

constitutional issues were ruled upon by the trial Court until January 22, 2009, after trial. Defendants originally filed affirmative defenses in 2007. Appellants/Cross-Respondents' Constitutional challenge should have been raised, and a ruling should have been pursued at the Trial Court, if at all, **prior** to trial. *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 340 (Mo. banc 2007).

When challenging the constitutionality of a Missouri statute or ordinance, it has consistently been held that a constitutional question is waived unless raised in the trial court at the earliest opportunity that an orderly procedure would allow. *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 340 (Mo. banc 2007); *Crittenton v. Reed*, 932 S.W.2d 403, 406 (Mo. banc 1996); *Hatfield v. McCluney*, 893 S.W.2d 822, 829 (Mo. banc 1995); *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 613 (Mo. 1964); *Boyer v. Grandview Manor Care Center*, 805 S.W.2d 187, 191 (Mo. App. WD 1991); *Creamer v. Banholzer*, 694 S.W.2d 497, 499 (Mo. App. E.D. 1985),

The requirement to raise constitutional issues at the earliest possible opportunity applies to plaintiffs as well as defendants. *Massage Therapy Training Institute v. Missouri State Board of Therapeutic Massage*, 65 S.W.3d 601, 608-09 (Mo. App. 2002). Appellants/Cross-Respondents rely on *Bauldin v. Barton County Mut. Ins. Co.*, 666 S.W.2d 948, 951 for the proposition that raising their constitutional issues by their reply to the answer to Plaintiffs' Second Amended Petition is a legitimate way to challenge the constitutionality of the statute. However, the court in *Bauldin* merely noted that in that case the Plaintiff there did

not even do that in their case, and therefore waived the ability to argue the constitutionality of the statute in question. *Id.* In addition, Appellants/Cross-Respondents never mentioned any constitutional issues by way of a reply to Appellants/Cross-Respondents' Answer to Plaintiffs' First Amended Petition, which was filed on April 27, 2007.

Appellants/Cross-Respondents were required to raise any constitutional issues throughout the pendency of this case and in a Motion for New Trial. *Burns v. Prudential Ins. Co. of America*, 295 Mo. 680 (Mo. banc 1922), *State ex rel. KLRKS v. Allen*, 250 S.W.2d 348, 350 (Mo. banc 1952), *State ex rel. Thompson v. Roberts*, 264 S.W.2d 314, 317 (Mo. banc 1954), *Record Newspaper Co. v. Industrial Comm., Div. of Employment*, 340 S.W.2d 613, 614 (Mo. 1960), *In re Estate Bierman*, 396 S.W.2d 545, 547 (Mo. 1965), *Blue Ridge Shopping Center, Inc. v. Schleininger*, 416 S.W.2d 633, 635 (Mo. 1967), *Kansas City v. Howe*, 416 S.W.2d 683, 686-687 (Mo. App. 1967), *Severson v. Dickinson*, 248 S.W.595, 596 (Mo. 1923), *Red School District No. 1 of St. Charles County, MO v. West Alton School Dist. No. 2 of St. Charles County, Mo.*, 159 S.W.2d 676, 677 (Mo. banc 1942) ("It is well settled law that a constitutional question must be kept alive in a motion for new trial…").

Appellants/Cross-Respondents did not raise the constitutional issues consistently throughout the case in the trial court and did not raise the issues in a Motion for New Trial. H.B. 393 was enacted, and became effective law, months before Appellants/Cross-Respondents filed suit against Respondents/Cross-

Appellants herein. As such, Appellants/Cross-Respondents should have raised any constitutional challenge in their initial Petition, at their earliest opportunity. They ultimately raised their challenges as a reply to Respondents/Cross-Appellants' affirmative defenses filed in response to the 2nd Amended Petition in this case. As already noted, Respondents/Cross-Appellants had already raised the same affirmative defenses in their Answer to Plaintiffs' First Amended Petition many months earlier (March 23, 2007). In that regard, considering that House Bill 393 contains many provisions that are **not** affirmative defenses (venue provisions, affidavit requirements, and in particular, the non-economic damage "cap" etc…), Appellants/Cross-Respondents should not have waited to raise these challenges in a reply to affirmative defenses pled by Respondents/Cross-Appellants, but were required to plead their challenge to House Bill 393 in their original Petition. Appellants/Cross-Respondents did not meet this burden. Appellants/Cross-Respondents failed to raise the constitutional issue at the earliest opportunity (when Petition was filed) or at least much earlier than 3 months before trial; therefore their constitutional arguments must be stricken as untimely.

In addition, Appellants/Cross-Respondents failed to otherwise raise constitutional issues throughout the case. In fact, the trial court actually applied the provisions of H.B. 393 to this case before trial, and without constitutional objection, on July 17, 2008, when it entered an Order denying Respondents/Cross-Appellants' motion in limine with respect to Appellants/Cross-Respondents' medical bills (see Respondents/Cross-Appellants' Appeal, Point Relied on XII)

and A65. Before that Order was entered, Appellants/Cross-Respondents themselves filed a "Memorandum of Law Regarding the Medical Bills under MO. REV. STAT. §490.715", relying on the legislative intent of H.B. 393 in support of their argument in their Memorandum, stating, "On February 10, 2005, the language of this proposed bill was revised by the House Committee on the Judiciary and was passed in its current form."). A66-A73. Moreover, in making their arguments under the revised version of §490.715 (2008) (part of H.B. 393 which they now challenge), Appellants/Cross-Respondents raised **no** objection to its application in this case, nor any constitutional issues whatsoever.

Additionally, Appellants/Cross-Respondents further waived the right to challenge the constitutionality of H.B. 393 because they did not give notice to the Attorney General of their Constitutional challenge to a state statute. MO. REV. STAT. §527.110 (2008) and Missouri Rule of Civil Procedure 87.04. In construing the language of that statute and rule, Missouri courts have held that the requirement that notice be given to the Attorney General (the "notice requirement") is **mandatory** in declaratory judgment actions. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 507 (Mo. banc 1991) and *Land Clearance for Redev. Authority v. City of St. Louis*, 270 S.W.2d 58 (Mo. banc 1954). This Court, in *Dye v. Division of Child Support Enforcement*, 811 S.W.2d 355 (Mo. banc 1991) extended at least the spirit and purpose of the notice requirement to non-declaratory judgment actions, by holding that "Although no statute or rule requires as much, **hereafter** an aggrieved parent **should notify** the

Attorney General when challenging the constitutionality of the statute so that he may seek leave to intervene." *Id*. at 358 (emphasis added).

If this court should conclude that Appellants/Cross-Respondents have not waived their right to raise constitutional issues, these Respondents/Cross-Appellants have addressed each of their challenges herein, but suggest to this court that Appellants/Cross-Respondents' constitutional claims have been waived, and their appeal should be dismissed, and further, that Respondents/Cross-Appellants' appeal be remanded to the Missouri Court of Appeals.

Respondents/Cross-Appellants, Michael Shapiro, M.D. and Metro Heart Group of St. Louis (hereinafter "MHG"), bring their respective appeal under MO. REV. STAT. §512.020(5) (2009), as parties to a suit aggrieved by the final judgment of a trial court in a civil case. Respondents/Cross-Appellants believe that their appeal falls under MO. CONST. ART. V, §3, which vests general appellant jurisdiction to the Court of Appeals for all appeals, with limited exceptions. Respondents/Cross-Appellants further contend that their appeal is within the territorial jurisdiction of the Missouri Court of Appeals, Eastern District, under MO. REV. STAT.§477.050 (2008) because it involves an appeal from a judgment of St. Louis County Circuit Court. In that regard, Respondents/Cross-Appellants filed their appeal (Appellate Cause # ED92563) in the Missouri Court of Appeals for the Eastern District of Missouri following judgment entered in the trial court below, and the subsequent denial by the trial court of Respondents/Cross-Appellants' timely motion for new trial.

Judgment was entered by the trial court on January 22, 2009 upon the jury's verdict of July 30, 2008, in favor of James and Mary Klotz and against Michael Shapiro, M.D., MHG, and St. Anthony's Medical Center[1], who were adjudicated to pay a total of $2,084,870 in damages to Appellants/Cross-Respondents. (L.F. 1437). The portion of that attributable to Shapiro and MHG was $1,233,470. (L.F. 1437). Respondents/Cross-Appellants, Michael Shapiro, M.D. and MHG seek review of the judgment against them and in favor of the Appellants/Cross-Respondents.

Thereafter, while Respondents/Cross-Appellants appeal was pending in the Missouri Court of Appeals for the Eastern District, Appellants/Cross-Respondents herein filed a motion to transfer the appeal of Respondents/Cross-Appellants to this court, because of the pendency of Respondents/Cross-Appellants' appeal herein. Their motion was granted on April 28, 2009, and Respondents/Cross-Appellants' appeal in the Missouri Court of Appeals was transferred to this court, consolidating it with the appeal filed directly with this court by Appellants/Cross-Respondents.

[1] SAMC subsequently settled and is not a party to this appeal.

STATEMENT OF FACTS

James Klotz first began seeing Respondent/Cross-Appellant, Michael Shapiro, M.D., for medical care in March 2004. (Tr. Vol. 4/160, 184). Shapiro is an electrophysiologist. (Tr. Vol. 4/152, 181-184). He was asked to consult because of the possible need to provide Appellant/Cross-Respondent Klotz with a pacemaker. (Tr. Vol. 4/155, 160). On March 17, 2004, Mr. Klotz had pain in his chest, an EKG showed he was having a heart attack, and after he arrived at the hospital his heart stopped. (Tr. Vol.2/130-131). Mr. Klotz had an IV line inserted by other medical personnel before arriving at the hospital. (Tr. Vol. 2/131). A temporary pacemaker was implanted into Mr. Klotz on March 20, 2004 to prevent his heart from going too slowly. (Tr. Vol. 2/153-154). Shapiro saw Mr. Klotz on March 21, 2004. (Tr. Vol. 4/143, 157). At that point in time he felt that Mr. Klotz needed a permanent pacemaker, given his medical condition. (Tr. Vol. 4/238). A permanent pacemaker was then implanted into Mr. Klotz on March 22, 2004. (Tr. Vol. 2/155). Mr. Klotz was discharged from St. Anthony's Medical Center on March 24, 2004. (Tr. Vol. 2/155). Mr. Klotz did not go to another hospital or see any physician for any illness until April 27, 2004, over one month later. (Tr. Vol. 3/29). At that time, while on vacation in Arizona, he became ill and went to a hospital in Arizona where he was diagnosed with a staph infection. (Tr. Vol. 3/29, 58). On December 14, 2004, Appellants/Cross-Respondents filed their case against former defendant St. Anthony's Medical Center. On April 28, 2005, Appellants/Cross-Respondents amended their Petition against St. Anthony's

Medical Center to include Mrs. Klotz's claim for loss of consortium. On December 2, 2005 the cause of action was voluntarily dismissed and re-filed on December 4, 2006 against St. Anthony's Medical Center. (L.F. 17). Appellants/Cross-Respondents filed a First Amended Petition on March 13, 2007 adding Shapiro and MHG as Defendants. (L.F. 18). Appellants/Cross-Respondents alleged that the Respondents/Cross-Appellants, Michael Shapiro, M.D. and MHG failed to adequately treat phlebitis and/or an infection in James Klotz' right hand before implanting the pacemaker on March 22, 2004 and failed to inform James Klotz of the heightened risk of infection at the time of the pacemaker implantation due to an alleged ongoing infection at the right wrist IV site. (L.F. 18).

Via Motion in Limine, argued several weeks before trial, these Respondents/Cross-Appellants objected to any testimony or evidence of any medical bill that had been adjusted or otherwise not "paid" by, or on behalf of, the Appellants/Cross-Respondents pursuant to MO. REV. STAT. §490.715 (2008). (L.F. 143, 280 and S.L.F. 1092). Respondents/Cross-Appellants filed copies of all bills, along with a table, identifying those which had been paid or adjusted, and the amounts of each. (L. F. 280 and S.L.F. 1092). The trial court ruled on this issue before trial, on July 17, 2008 holding that there were liens outstanding on some of the bills, and that the Appellants/Cross-Respondents' expert stated or would state that the bills were reasonable, and therefore allowed the entire amount of each bill to come into evidence. (L.F. 289).

The case was tried to a jury in St. Louis County between July 21, 2008 and July 30, 2008. (Whole Tr.). Dr. Norbert Belz, Appellants/Cross-Respondents' "life care" expert, was permitted to testify, over objection, as to Appellants/Cross-Respondents' **projected** future economic damages, without any comment as to what the present value of those future damages would be. (Tr. Vol. 3/9-12, 126-127, 216-269; Vol. 4/17, 64, 68-73, and 108-111) Appellants/Cross-Respondents were allowed to submit a claim for future damages, but neither the future damages evidence (nor ultimate verdict) were reduced to present value. (Tr. Vol. 3/9-12, 126-127; Vol. 4/17, 64, 68-73, and 108-111). Appellants/Cross-Respondents did **not** offer testimony from an economist during the trial. (Tr. Vol. 3/9-12; Vol. 4/69, 109-110) Since the trial court refused all of Respondents/Cross-Appellants' requests to reduce the future damages to their present value, Respondents/Cross-Appellants requested that the court reduce the future damages itself via a motion post-verdict. (L.F. 413). The trial court ruled "as a matter of law" that it would not follow the mandatory requirement of MO. REV. STAT. §538.215 to reduce future damages to present value. (Tr. Vol. 3/126-127; Vol. 4/71-73). The written report (S.L.F. 1978) prepared by Appellants/Cross-Respondents' life care planning expert, Dr. Belz, originally contained a statement that his calculations contained therein needed to be adjusted to present value. (S.L.F. 1978). However, that statement was redacted by Appellants/Cross-Respondents' counsel from the copy of the report that was initially admitted into evidence (Exhibit 10 redacted) and shown to the jury (S.L.F. 2033). In addition, the Respondents/Cross-Appellants

were not allowed to question Appellants/Cross-Respondents' expert, Dr. Belz, regarding the amount of income he makes from his expert witness work. (Tr. Vol. 3/8-9, 51-54).

Appellants/Cross-Respondents offered "statements" into the record through medical records, over objection, of two cardiologists in Arizona (Drs. Caskey and Brady) regarding the source of the plaintiff's, James Klotz, MRSA infection. (Tr. Vol. 2/213-219, 253-254; Vol. 3/186), which was one of the ultimate issues in the trial. Drs. Caskey and Brady were not present in the Court and were never deposed. (Entire Transcript).

None of the experts that the Appellants/Cross-Respondents called to testify implant pacemakers as part of their practice. (Tr. Vol. 2/113 & Vol. 3/180-181). Appellants/Cross-Respondents' expert, Dr. Robert Clark, is an infectious disease physician. (Tr. Vol. 3/31, 180). However, he was not a licensed physician at the time of trial. (Tr. Vol. 3/4-7, 29, 151-152). Appellants/Cross-Respondents' expert, Dr. Michael Siegal, is a cardiologist who does not implant pacemakers. (Tr. Vol. 2/113, 237-239).

Appellants/Cross-Respondents, during rebuttal closing argument, showed the jury a portion of Respondent/Cross-Appellant Shapiro's deposition that had **never** been introduced to the jury as evidence. (Tr. Vol. 8/63-64).

During jury deliberations, the jury sent a note back at approximately 3:55 p.m. indicating that the jury was at a "standstill". (S.L.F. 2297). The judge sent a "hammer" instruction. (S.L.F. 2300). At approximately 5:08 p.m., the jury sent

another note that one juror would not come to a reasonable conclusion. (S.L.F. 2299). Respondents/Cross-Appellants moved for a mistrial because the jury was deadlocked and the jury was already given a "hammer" instruction. (Supplemental Trial Tr. 7/30/08). The trial judge, over Appellants/Cross-Respondents' objections, personally spoke with the jury and gave another non-MAI "hammer". (A75-A78). The jury returned with a verdict in favor of Appellants/Cross-Respondents July 30, 2008 at 5:55 p.m. (S.L.F. 2301). The Court entered judgment on January 22, 2009. Respondents/Cross-Appellants filed a motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial on February 20, 2009. (L.F. 1451). The Court denied the motion on March 30, 2009, and Respondents/Cross-Appellants filed its instant appeal thereafter. (L.F. 1534).

The case was tried under the Second Amended Petition filed March 13, 2008 (L.F. 48-50). The jury found St. Anthony's Medical Center, MHG and Dr. Shapiro negligent. The jury assessed 33% of the fault to St. Anthony's Medical Center and the remaining 67% of the fault to Dr. Shapiro and MHG. S.L.F. 2301. Following post-trial motions, the trial court concluded that the non-economic damages awards against Respondents/Cross-Appellants (but not as to SAMC, who had been named in the suit before August 28, 2005) were governed by MO. REV. STAT. §538.210 as amended in 2005 by HB 393, and reduced Appellants/Cross-Respondents' award of non-economic damages against Respondents/Cross-Appellants. L.F. 1446-47. The trial court rejected the Appellants/Cross-

Respondents' argument that amended MO. REV. STAT. §538.210 (2008) was unconstitutional in any respect. L.F. 1443.

STANDARD OF REVIEW

Appellants/Cross-Respondents' brief, and the various amicus briefs filed in support of Appellants/Cross-Respondents, merely seek to continue a long-standing debate about health care in Missouri. However, such debates about pressing problems, appropriate remedies, and wise public policy are entrusted to the legislative process, and the Missouri legislature has heard these issues argued at length in many sessions. An appeal to the Supreme Court of Missouri **is** not and **should** not be a legislative debate. Appellants/Cross-Respondents carry a heavy burden here.

"A statute is cloaked in a presumption of constitutional validity" and "may be found unconstitutional only if it clearly contravenes a specific constitutional provision." *Weigand v. Edwards*, 2009 WL 2381337 at 2 (Mo. banc 2009). "This Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute". *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006) (internal quotations omitted). "Courts will enforce a statute unless it plainly and palpably affronts fundamental law embodied in the constitution. When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional." *United C.O.D. v. State of Missouri*, 150 S. W. 3d 311, 312 (Mo. banc 2004). "When a challenger asserts a statutory classification is violative of equal protection doctrine he must prove abuse of legislative discretion **beyond a reasonable doubt**, and

short of that, the issue must settle on the side of validity". *Winston v. Reorganized School Dist. R-2*, 636 S.W.2d 324, 327 (Mo. banc 1982) (emphasis added).

Appellants/Cross-Respondents must also overcome *stare decisis*. This Court has already upheld comparable provisions regarding "caps" on damages in medical malpractice litigation in this state. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992).

Appellants/Cross-Respondents' arguments, however, relate to whether the statute is unwise or unfair, but those arguments must be addressed to the legislature. *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 63-64 (Mo. banc 1989). There is a "well settled rule that in determining the validity of an enactment, the judiciary will not inquire into the motives or reasons of the legislature or the members thereof." *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 169 (Mo. 1967). Appellants/Cross-Respondents complain that the 2005 legislation was influenced by lobbyists. That is immaterial as this Court recognized in *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 835 (Mo. banc 1991), which states, "lobbying is an essential and important function in the legislative process".

"It is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute, as these are matters for the legislature's determination". *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 277-78 (Mo. banc 2002).

RESPONDENTS/CROSS-APPELLANTS' "RESPONSE" ARGUMENT

I. H.B. 393, does not violate the prohibition against Retrospective Application under MO. CONST. ART. I, §13.

Since H.B. 393, and specifically MO. REV. STAT. §538.210 (2008), is prospective legislation, affecting causes of action filed after August 28, 2005, it is not retrospective legislation. The Appellants/Cross-Respondents claim that MO REV. STAT. §538.210 (2008) is retrospective because Mr. Klotz was injured prior to August 28, 2005. Even assuming, arguendo, that MO. REV. STAT. 538.210 (2008) affects a substantive right, that purported substantive "right" of non-economic damages did not accrue until a jury found in Mr. Klotz favor and found him to be entitled to non-economic damages. *Barbieri v. Morris*, 315 S.W.2d 711, 714 (Mo. 1958) ("But it has been held specifically that 'a statute is not retrospective because it merely relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of a person for the purpose of its operation'") *citing State ex rel. Sweezer v. Green*, 232 S.W.2d 897, 900 (Mo. 1950). "It is said to be retroactive 'only when it is applied to rights acquired prior to the enactment'". *Barbieri*, supra (*emphasis added*). In addition, Appellants/Cross-Respondents could have filed their cause of action against Respondents/Cross-Appellants prior to the law change in August 2005. They chose not to. MO. REV. STAT. §538.210 (2008) applies prospectively because it

relates to damages that may be awarded after a trial. MO. REV. STAT. §538.210 (2008) did not impact the Appellants/Cross-Respondents' right to bring suit. As this court well knows, medical malpractice filings in the state of Missouri increased significantly in the days leading up to the effective date of H.B. 393, August 28, 2005, as plaintiffs statewide knew how the amended statute might impact previous modalities of calculation damages. To that end, Appellants/Cross-Respondents already had filed suit against former co-defendant St. Anthony's Medical Center with regard to the medical care giving rise to this lawsuit, and certainly knew or could have known of their cause of action against Respondents/Cross-Appellants in sufficient time to file their suit before the effective date of H.B. 393 on August 28, 2005, but chose not to do so. Moreover, this statute applies only prospectively because the effect on a jury verdict on non-economic damages would not take place until a future date after which trial had taken place, and a verdict rendered, and was not, therefore, a known act as of the date the statute was enacted.

Even assuming that MO. REV. STAT. §538.210 (2008) is not prospective legislation as it relates to non-economic damages, MO. CONST. ART. I, §13 would still not forbid retrospective application of MO. REV. STAT. §538.210 (2008) since MO. REV. STAT. §538.210 (2008) clearly does **not** affect substantive rights. This Court defines a retrospective law as one which, "creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different

effect from that which it had when it transpired." *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006).

Appellants/Cross-Respondents acknowledge that in order to be found unconstitutional, legislation must both apply retrospectively, and affect a litigants "substantive" rights. However, as Appellants/Cross-Respondents also acknowledge, legislation that affects only the procedural or remedial rights, or are procedural or remedial in nature, may be applied retrospectively without violating the constitutional band on retrospective laws. Appellants/Cross-Respondents' brief, p. 14, *citing Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc 2007) (quoting *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783, 786 (Mo. banc 1999)).

MO. CONST. ART. I, §13 seeks to protect vested/substantive rights. A vested right "must be something more than a mere expectation based upon an anticipated continuance of the existing law". *Fisher v. Reorganized School Dist., Etc.*, 567 S.W.2d 647, 649 (Mo. banc 1978) quoting *People ex rel. Eitel et al. v. Lindheimer et al.*, 21 N.E.2d 318, 321 (Ill. 1939). This court further noted that a "procedural law prescribes a method of enforcing rights or obtaining redress for their invasion…". *Wilkes v. Missouri Highway and Transportation Commission*, 762 S.W.2d 27, 28 (Mo. banc 1988) *citing Shepherd v. Consumers Cooperative Association*, 384 S.W.2d 635, 640 (Mo. banc 1964) and *Robinson v. Heath*, 633 S.W.2d 203, 205 (Mo. App. 1982) (*emphasis added*). Since Mo. Rev. Stat. §538.210 (2008) addresses the issue of damages, it clearly relates to a manner of

"obtaining redress", or is otherwise remedial in nature. Similarly, this court, in *Vaughn v. Taft Broadcasting Co.*, 708 S.W.2d 656 (Mo. banc 1986), held that an amendment restricting punitive damages was a remedial or procedural change and could be applied retrospectively. The Court stated therein that, "Under Missouri law, punitive damages are remedial and a Plaintiff has no vested right to such damages prior to the entry of judgment". *Id*. at 660 citing *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (Mo. App. 1983).

In essence, one has no "substantive right" to an award of damages, and the only right thereto accrues at the conclusion of a trial, which, in this case did not occur until long after the effective date of the statute. Appellants/Cross-Respondents cite both *State ex rel. St. Louis-San Francisco Ry. Company v. Booter*, 515 S.W.2d 409 (Mo. banc 1974) and *Stillwell v. Universal Construction Company*, 922 S.W.2d 448 (Mo. App. 1996) to suggest that retrospective changes in the law related to damages violate the constitution. *Stillwell* and *Buder* are both distinguishable from the current case because in both cases the subsequently enacted statutes impaired a vested right of a party to an expectation of a damage limit, and did not impair a speculative future claim. *Stillwell* involved payment of burial expenses of the Plaintiff's children under the worker's compensation statute. *Stillwell, supra.* Stillwell requested $4,000 in actual expenses. The statute in effect at the time of the judgment limited such exposure to the defendant to $5,000, but the prior statute in effect at the time of the death reduced the limit of $2,000. *Id*. The court refused to permit a retroactive interpretation of the statute

to permit recovery greater than the statute in effect at the time. *Id*. Similarly in *State ex rel. St. Louis-San Francisco Railway Co. v. Buder*, 515 S.W.2d 409 (Mo. banc 1974), the statutory limitation on damages that the defendant faced for the death claim brought was $50,000 at the time of death, but the limit was subsequently removed by new law. The court refused to retroactively apply the statute. *Id*. As in *Buder*, the enactment of the statute impaired the vested right of the defendant to an expectation of an established damage limit. *Id*. In both cases, the new law would have imposed a new duty or disability with respect to an occurrence which has already happened before enactment of new law, and therefore retroactive application cannot occur. *Barbieri v. Morris at 714.*

In the current case, however, at the time of the patient's injury, there had been no rights that had vested, and no such rights would vest prior to the judgment in the case. When the statute was enacted in 2005, it was to prospectively apply to future cases; the fact that it merely relates to prior facts or transactions does not make it retroactive. *Barbieri v. Morris* (a 'statute is not retrospective because it merely relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of a person for the purpose of its operation.).

In our case, the Appellants/Cross-Respondents have no vested right to non-economic damages, and the purpose of a limit on non-economic damages is not to

punish. Changes in how non-economic damages are measured or computed can be applied retrospectively.

II. H.B. 393 does not violate the Clear Title and Single Subject Mandate of MO. CONST. ART. III, §23.

H.B. 393's title is clear. H.B. 393's title provides: "An Act to repeal §355.176, 408.040, 490.715, 508.010, 508.040, 508.070, 508.120, 510.263, 510.340, 516.105, 537.035, 537.067, 537.090, 538.205, 538.210, 538.220, 538.225, 538.230, and 538.300, Mo. Rev. Stat., and to enact in lieu thereof twenty three new sections relating to claims for damages and the payment thereof." 2005 Mo. Legis. Serv. H.B. 393 (Vernon's). MO. CONST. ART. III, §23 imposes two distinct procedural limitations on Missouri's legislature when it enacts legislation: 1) A bill cannot contain more than one subject, and; 2) the subject of the bill must be clearly expressed in the title. *Trout v. State*, 231 S.W.3d 140, 145 (Mo. banc 2007); *C.C. Dillon Company v. City of Eureka*, 12 S.W.3d 322, 328 (Mo. banc 2000). The Missouri Supreme Court has consistently held that it will "interpret procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act clearly and undoubtedly violates the constitutional limitation". *Id.*; *Stroh Brewery Company v. State*, 954 S.W.2d 323, 326 (Mo. banc 1997); *Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424, 427 (Mo. banc 1997); *United Brotherhood of Carpenters and Joiners of America, District Council, of Kansas City and Vicinity v. Industrial Commission*, 352 S.W.2d 633 (Mo. 1962).

Appellants/Cross-Respondents argue that H.B. 393 violates the single subject limitation because those sections contained therein, "while primarily concerning claims for damages against health care providers, also appear to concern claims for declaratory or injunctive relief". To buttress their argument that H. B. 393 violates the single subject limitation, Appellants/Cross-Respondents rely on *St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. banc 1998) from which they cite that "even if a legislator or the public could be required to read, or could be assumed to know, the contents of the sections listed in the title of [the bill] in order to discern the bill's single subject, no single subject could be discerned from the sections [listed in its title]." *Id*. at 149. Noteworthy is the fact that Appellants/Cross-Respondents do not rely on the "single subject test", that is applied by the Missouri Supreme Court. In deciding whether a bill contains more than one subject, the test is not whether individual provisions of the bill relate to each other, but whether the challenged provision 1) fairly relates to the subject described in the title of the bill, 2) has a natural connection to the subject, or 3) is a means to accomplish the law's purpose. *State v. Salter*, 250 S.W.3d 705, 709 (Mo. banc 2008); *Trout*, 231 S.W.3d at 146; *Missouri State Medical Association v. Missouri Department of Health*, 39 S.W.3d 837, 840 (Mo. banc 2001); *Stroh*, 954 S.W.2d at 327; *Westin Crown Plaza Hotel Company v. King*, 664 S.W.2d 2, 6 (Mo. banc 1984); *Lincoln Credit Co. v. Peach*, 636 S.W. 2d 31, 39 (Mo. banc 1982); *State ex re. Atkinson v. Planned Industrial Expansion Authority of St. Louis*, 517 S.W.2d 36, 42 (Mo. banc 1975); *United Brotherhood of Carpenter and*

Joiners, 352 S.W.2d at 635. The various matters in a bill must be germane to the subject expressed in the title. *Id*. Citing to Black's Law Dictionary 687 (6th ed.), the Missouri Supreme Court has defined "germane" as: "in close relationship, appropriate, relative, pertinent. Relevant to or closely allied." *C.C. Dillon Company*, 12 S.W.3d at 327. Recognizing that some bills consist of multiple and diverse topics within a single, overreaching subject, the bill's subject may be clearly expressed by stating some broad umbrella category that includes all the topics within its cover. *Missouri State Medical Association*, 39 S.W.3d at 841. The single subject analysis turns on the general core purpose of the proposed legislation—more specifically, MO. CONST. ART. III, §23 dictates that the subject of a bill include all matters that fall within or reasonably relate to that general core purpose. *Trout*, 231 S.W.3d at 146.

The phrase "relating to claims for damages and the payment thereof" contained in the title of H.B. 393 pertains to civil causes of action, a general core purpose. The bill contains 23 new sections. Some sections address tort actions; some sections address non-tort actions; and some sections are inclusive of both tort and non-tort actions. Further, some sections apply to causes of actions involving medical malpractice claims, and other sections apply to tort actions not involving medical malpractice claims. The test is not whether individual provisions of the bill relate to each other. Rather, each section of H.B. 393 is fairly related and connected to the subject of the bill's title, which relates to

procedures for instituting and pursuing lawsuits for civil damages. As such, H.B. 393 does not violate the single subject limitation.

Appellants/Cross-Respondents also argue that H.B. 393's title is unclear because the bill could describe a majority of all legislation, and that the title does not mention tort reform. A clear title may be violated in two ways: 1) The subject may be so general or amorphous as to violate the single subject requirement; or 2) the subject may be so restrictive that a particular provision is rejected because it falls outside the scope of the subject. *Trout*, 231 S.W.3d at 145; *Missouri State Medical Association*, 39 S.W.3d at 841; *Fust*, 947 S.W.2d at 428. Because of this, legislators often walk a fine line between the bill being either too broad or too restrictive. *St. Louis County Water Company v. Public Service Commission v. Conway*, 579 S.W.2d 633, 635-36 (Mo. App. E.D. 1979). Therefore, a title should indicate in a general way the kind of legislation that was being enacted. *Trout*, 231 S.W.3d at 145; *Missouri State Medical Association*, 39 S.W.3d at 841; *Fust*, 947 S.W.2d at 429. The title may omit particular details of the bill, so long as neither the legislature nor the public is misled. *Missouri State Medical Association*, 39 S.W.3d at 841. The title to the act is valid if it indicates the general contents of the act, and mere generality of title will not prevent the act from being valid unless it is so obscure or amorphous as to tend to cover up the contents of the act. *C. C. Dillon Company*, 12 S.W.3d at 329; *Fust*, 947 S.W.2d at 429; *Westin Crown Plaza Hotel Company*, 664 S.W.2d at 6; *Lincoln Credit Co.*,

636 S.W.2d at 39; *State ex rel. Wagner v. St. Louis County Port Authority*, 604 S.W.2d 592, 601 (Mo. banc 1980).

The cases cited by Appellants/Cross-Respondents, *St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. banc 1998) and *Home Builders Association of Greater St. Louis v. State*, 75 S.W.3d 267 (Mo. banc 2002) are distinguishable from the case at bar in that the titles at issue in both of those cases could be interpreted as related to almost all legislation passed by the legislature affecting, respectively, entities and property. In this case, H.B. 393 clearly does not relate to almost all legislation passed by the legislature, but rather, it generally describes procedures for instituting, trying, and collecting claims for civil damages. That is not so overbroad or amorphous that it affects almost all legislation.

Appellants/Cross-Respondents also find disfavor with the fact that H.B. 393's title does not mention that the bill pertains to either tort reform or to health care. This assertion is without merit as H.B. 393 does not entirely pertain to health care, or, for that matter, entirely to tort actions. Had H.B. 393 mentioned that it pertained to either tort reform or health care, Appellants/Cross-Respondents no doubt would argue that the title was too restrictive or vague rather than being amorphous and overlybroad.

H.B. 393 applies to the institution and trial of lawsuits for damages and the collection of these damages in both tort and non-tort civil actions. The title for H.B. 393 clearly put the public on notice that the bill was amending "sections

relating to claims for damages and the payment thereof". Therefore, H.B. 393's title does not violate MO. CONST. ART. III, §23.

Moreover, Appellants/Cross-Respondents' challenge to H.B. 393 is untimely. MO. REV. STAT. §516.500 (2000) requires a challenge to a procedural defect to be asserted before the adjournment of the next legislative session. A later lawsuit is permitted only if (1) "there was no party aggrieved who could have raised the claim within that time," (2) the plaintiff is the first party aggrieved, and (3) the claim was filed not later than adjournment of the next legislative session following the first person being aggrieved. MO. REV. STAT. §516.500 (2000).

In this case, the next legislative session adjourned by operation of law on May 30, 2006. MO. CONST. ART. III, §20(a). Appellants filed their first lawsuit against these parties (Respondents/Cross-Appellants) on March 14, 2006 in 21066-01066, but did not raise their claim then or even by March 13, 2007 when their First Amended Petition was filed in the underlying suit therein (cause number 06CC-4826, as they could have. (L.F. 48). They did not file their reply raising their clear title and single subject challenges until July 11, 2008, more than two years after the limitations period had run. (L.F. 216). Accordingly, their claims are barred by MO. REV. STAT. §516.500 (2000).

III. The cap on non-economic damages in MO. REV. STAT. §538.210 (2008), as amended by H.B. 393, does not violate the Missouri Constitution.

A. The legislature had a rational basis for adopting the revised cap.

The Legislature considered voluminous evidence supporting its decision to enact H.B. 393. Hearings were held and various parties had an opportunity to provide comments. The rational basis test does not even require the Legislature to compile any evidence before it adopts legislation. The cap in MO. REV. STAT. §538.210 (2008), as amended by H.B. 393, would satisfy rational basis even if it were based solely on speculation that it would help resolve a pressing liability and health care crisis. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004) *citing FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L.Ed.2d 211 (1993).* However, it is clear there was a medical liability crisis in Missouri as of 2005. U.S. Congress, Joint Economic Committee, *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, May 2003 and American Medical Association, *Medical Liability Reform-NOW!*, February 5, 2008.

In their brief, Appellants/Cross-Respondents continue to rely on articles and reports from prior to 2005. Therefore, those arguments were likely propounded by opponents to the new law during hearings before the Legislature prior to the enactment of H.B. 393. Appellants/Cross-Respondents, therefore,

simply rehash all the arguments that were previously made before the state Legislature as it considered the merits of enacting H.B. 393.

In addition, Appellants/Cross-Respondents attempt to use affidavits from various individuals and rely on information from those affidavits, which are, however, mere conclusions and personal opinions. For instance, the opinions of Jay Angoff were previously stricken in other states because his affidavits were rife with his own personal conclusions and opinions. *See McClain v. Shelter Insurance Co.*, No. 97-1139-CV-W-FJG, 2007 WL 844769 (U.S. Dist. Ct. W.D. MO 2007) and *Canady v. Allstate*, No. 96-0174, 1997 WL 33384270 (W.D. Mo. June 19, 1997)

The Maryland Insurance Administration stated that Angoff's testimony in 2003 rate hearing lacked any merit. Stephen Daniels, Joanne Martin, and Neil Vidmar all submitted affidavits in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997). The Court there noted that, to the extent the affidavits have been offered to contest the wisdom of the legislative enactment, "we reiterate that the legislature is not required to convince the court of the correctness of its judgment that the civil justice system needs reform." *Id* at 389-90. So affidavits that purport to show how wrong, unsupported, or unwise certain legislation may be should not be considered for those points. *Id*.

The Court should not look behind the legislature's enactment of the statute to the process or reason they enacted the statute, as this violates Separation of Powers. *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo.

banc 1996), *U.S. v. Des Moines Navigation & Railway Co.*, 142 U.S. 510, 544-45, 12 S.Ct. 308, 317-18, 35 L.Ed. 1099 (1892); *Soon Hing v. Crowley*, 113 U.S. 703, 710-11, 5 S.Ct. 730, 734-35, 28 L.Ed. 1145 (1885); *State ex rel. City of Creve Coeur v. Weinstein*, 329 S.W.2d 399, 406 (Mo.App.1960). Therefore, this Court should view with skepticism Appellants/Cross-Respondent' various affidavits and arguments about what the legislature considered or reasoned when it enacted the statute.

Moreover, Appellants/Cross-Respondents' affidavits in support of their Constitutional challenges should not be considered because they are deficient. Affidavits must be based on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. *Jones v. Landmark Leasing, Ltd.*, 957 S.W.2d 369 (Mo. App. E.D. 1997). An affidavit must be made by a person with personal knowledge of the matters sworn to, and not based on any hearsay. *Hinton v. Proctor & Schwartz, Inc.*, 99 S.W.3d 454, 459 (Mo. App. E.D. 2003). Here, the affidavits do not contain facts that would be admissible into evidence. The affidavits are full of nothing more than opinions and legal conclusions. "An affidavit …is to state facts and not conclusions." *First Community Bank v. Western Sur. Co.*, 878 S.W.2d 887 (Mo. App. S.D. 1994). "Legal conclusions are not admissible facts." *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 635 (Mo. App. E.D. 2005); *Cardinal Glennon Children's Hospital v. St. Louis Labor Health Institute*, 891 S.W.2d 560, 561 (Mo. App. E.D. 1995).

1. There was a malpractice liability crisis in Missouri.

To the extent that this court believes that it can or should consider the merits of Appellants/Cross-Respondents' arguments, the Respondents/Cross-Appellants point out that Appellants/Cross-Respondents are completely incorrect to say that there was no malpractice liability crisis in Missouri. The documents Appellants/Cross-Respondents submitted in "support" of their position did not specifically relate just to Missouri alone, and data from other states skewed true Missouri-only data.

"In the period of 1980 to 1984, the average defense cost in Missouri was $4700; in the period of 1995 and 1999, it increased to almost $19,000—an increase of more than 300%". U.S. Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, Office of Disability, Aging, and Long-Term Care Policy, *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, March 3, 2003 *citing* Missouri Department of Insurance, *2001 Missouri Medical Malpractice Insurance Report*, September 2002. "Payments made on claims are increasing". *Id*. In Missouri, the average payment per defendant rose 38% between 1999 and 2001. *Id.*

In a chart in *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra, Missouri was shown as a full-blown

crisis. "Direct tort reform, including but not limited to **reasonable** limits on non-economic damages would reduce national health care costs by that amount. At the height of the recent crisis, the AMA identified **Missouri** as a **crisis** state". *Medical Liability Reform-NOW!*, February 5, 2008, supra.

"Money spent on malpractice premiums (and the litigation costs that largely determine those premiums) raises health care costs". *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, supra. "The litigation system also imposes large indirect costs on the health care system. Defensive medicine that is caused by unlimited and unpredictable liability awards not only increases patients' risk but it also adds costs". *Id*. "A leading study estimates that reasonable limits on non-economic damages, such as California has had in effect for 25 years, can reduce health care costs by 5-9% without 'substantial effects on mortality or medical complications'". *Id*. citing U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Council Of Economic Advisors' Estimates*, February 2003. The Congressional Budget Office supplemented their previous analysis and stated that tort reform provides cost savings by reducing malpractice premiums and causing an overall decrease in health care expenditures such as less defensive medicine. Douglas W. Elmendorf, *Letter to Senator Orrin G. Hatch*, U.S. Congress, Congressional Budget Office, October 9, 2009.

"Unless a state has adopted limitations on non-economic damages, the system essentially gives juries a blank check to award huge damages". *Id*. "When there are recoveries, they often are based on sympathy, attractiveness of the plaintiff, and the plaintiff's socio-economic status (educated, attractive patients recover more than others)". *Id*. citing Brian Kelly and Jeffrey O'Connell, *The Blame Game: Injuries, Insurance, and Injustice* (Lexington Books, 1986), *p. 125;* Christopher J. Dodd, *A Proposal for Making Product Liability Fair, Efficient, and Predictable, Symposium on Product Liability*. 14 J. Legis. 133 (1987) *p. 139; Punitive Damages: Tort Reform and FDA Defenses, Hearings before the Committee on the Judiciary of the U.S. Senate*, 104th Congress (April 4, 1995) (statement of George Priest), *p. 85*. "The cost of these awards for non-economic damages is paid by all other Americans through higher health care costs, higher health insurance premiums, higher taxes, reduced access to quality care, and threats to quality of care". *Id*.

According to Physician's Insurance Association of America, the median jury award in medical liability cases more than tripled from 1997 to 2006, increasing from $157,000 to $487,500. Just because physicians sometimes win at trial does not negate the fact that they still incur significant costs and expenses in their defenses.

"A 2003 HHS report estimated the cost of defensive medicine to be between $70 and $126 billion per year". *Medical Liability Reform-NOW!*, February 5, 2008, supra *citing Addressing the New Health Care Crisis: Reforming*

the Medical Litigation System to Improve the Quality of Health Care, supra. Updating to 2005, the cost is $99 to $179 billion per year. *Id*. "Hamm, Wazzan, and Frech (2005) concluded that MICRA (California's tort reform) has led to a reduction in medical liability costs both through a reduction in the filing of legally weak claims and a reduction in the severity of paid claims. After comparing claim frequency in California to that in other states, they also concluded that MICRA did not reduce access to the courts". *Id*.

"A cap on non-economic damages that is set too high will also have a limited effect". *Id*. "The benefits of reform are significant and could 1) yield significant savings on health care spending; 2) reduce unnecessary tests and treatments motivated out of fear of litigation; 3) encourage systematic reform efforts to identify and reduce medical errors; 4) halt the exodus of doctors from high-litigation states and specialties; 5) improve access to health care, particularly benefiting women, low-income individuals and rural residents; 6) produce $12.1 billion to $19.5 billion in annual savings for the federal government; and 7) increase the number of Americans with health insurance by as many as 3.9 million people." *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra. "…the median damage award in the medical malpractice cases jumped 176% from 1994 to 2001….". *Id*. citing Jury Verdict Research, *Current Award Trends in Personal Injury: 2002 Edition*, (2002).

"Since pain and suffering (or non-economic) damages are intrinsically impossible to measure objectively, the size of such payments varies considerably

across homogenous groups of claims (i.e., different amounts for the same injury in different people)". *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra.

Although this Court should not attempt to second guess either the rationale or correctness of the legislature's decision to enact H.B. 393, clearly there is good data to support that rationale.

2. Increases in malpractice liability insurance premiums were caused by increases in tort liability; moreover, malpractice premiums were high by historic standards and constituted a significant percentage of the costs of operating a medical practice.

a. Appellants/Cross-Respondents affidavit of Jay Angoff contains claims that are unreliable and conclusory.

In the affidavit Appellants/Cross-Respondents filed of Jay Angoff, he looked at national medical malpractice data of the 15 largest carriers in the United States prior to tort reform, in support of his theory. *See Table I of Angoff's Affidavit* (L.F. 743). However, the 15 largest medical malpractice insurers conveniently excluded Medical Liability Insurance Company, one of the nation's largest monoline carriers. In addition, Mr. Angoff relied upon nationwide data, which is not relevant to Missouri. Mr. Angoff stated that the 15 largest national carriers included Medical Protective, The Doctor's Company, and Medical Assurance, three of the top insurers in Missouri, and cited information about their incurred losses having decreased between 2003 and 2006. However, Mr. Angoff

used those three companies' systemwide data, and not their Missouri experience. And even if it were strictly Missouri data, as it should be, part of 2005 and all of 2006 would have included post "tort reform" data. If the tort reforms were effective, one would expect to see some decline in losses.

Mr. Angoff's comparison of paid claim values to the premiums collected in a period from 2000 to 2006 is an apples to oranges comparison because premiums collected in any year will be applied to claims paid as many as ten years into the future, and is therefore meaningless. Large insurers, such as St. Paul Companies, are no longer in the market, but still make substantial claim payments that are not included in Mr. Angoff's calculations. Premiums paid by physicians previously insured by St. Paul are obviously included in the premiums paid to the current insurers. Regarding Angoff's analysis of paid claims and incurred claims, he inexplicably excludes allocated loss adjustment expenses (money spent to defend claims) and operating expenses, which can exceed indemnity losses. Mr. Angoff omits the fact that the loss ratios in 2001-03 produced record levels of unprofitable results. Lowering of the loss ratios was essential to the continued viability of the industry. Regarding Mr. Angoff's assessment that the retained surplus and the aggregate surplus for the top 12 malpractice carriers increased, Mr. Angoff fails to note that the aggregate surplus is far short of the 800% industry average of the property and casualty insurers. The medical liability insurance industry endured a financial crisis from 1998 until 2004, when the industry barely broke even.

Premiums rose dramatically during that period and many insurers left the Missouri market, including St. Paul's and Farmers, or became insolvent (PIE, PHICO, etc.).

Mr. Angoff stated that paid losses nationwide were constant in 2000, 2001, and 2002; declined in 2003; increased in 2004; then declined in 2005 and 2006. However, that was national data and is not relevant to the environment within Missouri's borders.

Mr. Angoff stated that "Nothing in the national paid loss data could lead a reasonable legislator to conclude that medical malpractice claims payments had been increasing substantially prior to the introduction of the tort reform bill, and nothing in the data since the enactment of that bill indicates that its enactment was justified". But that is a conclusory statement, predicated upon irrelevant nationwide data. The General Assembly had drafted prior tort reform legislation on two separate occasions, in two consecutive years (2003 and 2004) prior to H.B. 393, both of which were vetoed, and only after intense scrutiny, thought, debate, and even some compromise, was H.B. 393 passed and signed into law in 2005.

Mr. Angoff stated that the drop in incurred losses in Missouri has been greater than nationwide. However, his affidavit contains data suggesting that incurred losses did drop in 2004, but increased dramatically in the 4 years prior to that. One would expect to see aggregate industry loss data decline when the number of insurers writing business and reporting data in Missouri fell and the number of self-insured providers increased.

Mr. Angoff relied on the Department of Insurance's 2003 Medical Malpractice Insurance Report to suggest that the legislature had no rational basis for enacting tort reform. However, when Mr. Angoff suggested that new claims against all health care providers fell by more than 14% during that time period, the Department's claims data was incomplete and materially flawed. They did not include claims filed against self-insured providers, including such large hospital systems as BJC, Tenet, Sisters of Mercy, and others. In 2006, the year after H.B. 393 was passed, the General Assembly acknowledged the deficiency of this data collection and revised the law to require self-insured entities to report data as well. To demonstrate the breadth of the data's unreliability, in 2001 the Department reported 190 claims closed with payment for physicians. The National Practitioner Data Bank, however, reported 299 physician claims closed with payment that same year. The Department's figures that year were off by a factor of almost 50%. The data also did not include claims filed with the Missouri Insurance Guaranty Association (MIGA), which handled claims filed against insolvent insurers that had been liquidated in the few years leading up to tort reform. Fully 197 claims were filed with MIGA in 2003, and 304 claims were closed. None of these were included in the Department's data. Nor did the data include claims filed against surplus lines companies. They did not include any claim in which a corporate entity was named. At the time of that 2003 report, the Department rejected any claim in which a physician's professional corporation was named. In its 2004 Medical Malpractice Report, the Department publicly

admitted its claims data were deficient. As such, so were Mr. Angoff's conclusions.

Mr. Angoff claimed that Loss Adjustment Expenses fell 28% per the 2004 MMMI report. That is not accurate. According to the 2004 report Angoff cites, the average Loss Adjustment Expense on closed claims (a statistic that combines the actual claims paid plus the costs of defending the case, administrative costs, overhead, etc.), actually increased from $17,208 to $21,804, a jump of almost 27%.

Mr. Angoff cited the 2006 Department of Insurance Medical Malpractice Report and states that the combined ratio hit an all time low of 76.9%, the incurred loss ratio hit a new low of 33.7%, and the average payment per claim declined. However, by the end of 2006, tort reform had been in effect in Missouri for 16 months. One would expect the climate to improve. The General Assembly's rational intent and goal was to lower incurred loss ratios and average payments per claim. Therefore, that is yet more evidence of successful reform, and validation of the legislatures rational basis for the passage of H.B. 393.

b. Increase in premiums before 2005 were caused by increases in tort liability.

Payments of claims are the most significant costs that malpractice insurers face, accounting for about 2/3 of their total expenses. *See* Physicians Insurers Association of America, *Average Insurance Payment for Closed Malpractice Claims,* 1986-2002. That increase represents an annual growth rate of nearly 8%,

which was more than twice the general rate of inflation. *Id*. In 1993, The Office of Technology Assessment issued a report summarizing the first wave of studies on the experience of states that set limits on malpractice liability in the 70's and 80's. The report concluded that caps on damage awards consistently reduced the size of claims and, in turn, premium rates for malpractice insurance. U.S. Congress, Office of Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs*, September 1993. A 2003 study that examined state data from 1993 to 2002 found that a cap on non-economic damages and a ban on punitive damages would reduce premiums by more than 1/3. Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms*, Health Affairs: Web Exclusive, January 21, 2004 at W 4-20 *available at* http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.20v1.

In a summary of Congressional Budget Office (CBO) article, U.S. Congress, Congressional Budget Office, *Cost Estimate of H.R. Bill 5*, March 10, 2003, it was determined that, "H.R. 5 would impose limits on medical malpractice litigation in state and federal courts by capping awards and attorney fees, modifying the statute of limitations, eliminating joint and several liability, and changing the way collateral-source benefits are treated. Those changes would lower the cost of malpractice insurance for physicians, hospitals, and other health care providers and organizations. That reduction in insurance costs would, in turn, lead to lower charges for health care services and procedures, and ultimately, to a decrease in rates for health insurance premiums". "H.R. 5 would place caps on

awards by limiting non-economic damages, such as pain and suffering, to $250,000". U.S. Congress, Congressional Budget Office, *Cost Estimate of H.R. Bill 5*, March 10, 2003. The CBO's analysis stated that caps on awards effectively reduce average premiums, noting "….the litigation crisis that has made insurance premiums unaffordable or even unavailable for many doctors, through no faults of their own. This is currently making it more difficult for many Americans to find care, and threatening access for many more. This crisis affects patients, physicians, hospitals, and nursing homes all across the U.S." U.S. Congress, Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice*, Economic and Budget Issue Brief, January 8, 2004 *(emphasis added)*.

Insurers are forced to increase premiums more rapidly and more steeply in non-reform states than in states that have placed reasonable limits on non-economic damages. *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, supra. The difference cannot be explained by management practices, as Appellants/Cross-Respondents would suggest. The difference is the litigation climate. *Id*. "The argument that the problem is caused by bad investments is similarly specious. In fact, investments by medical malpractice companies have been conservative" *Id*. "Their need to raise premiums can best be reduced by controlling increases in the amounts they must pay out—particularly for unreasonable amounts of non-economic damages. Neither asset allocation nor investment income correlates to, much less causes, the current medical malpractice crisis. Brown Brothers

Harriman & Company analyzed the relationship between premiums and the change in investment yields among malpractice insurers. The results showed that the performance of the economy and interest rates do not determine medical malpractice premiums". *Id*. citing Raghu Ramachandran, *Did Investments Affect Medical Malpractice Premiums?*, January 21, 2003 *available at* http://salsa.bbh.com/news/archives/00283.php?insurance=1. The Appellants/Cross-Respondents' argument that the crisis is from the management practices of the insurers has no validity.

California is able to avoid rapid increases in premiums that states without reasonable caps have experienced. *Id*. A study by Viscusi and Born (2005) found that states with caps on non-economic damages had losses 17% lower and premiums 6% lower than states without caps. In a study done by Kessler and McClellan (1997), premium data was from 1985 through 1993 surveys of physicians. They found direct reforms reduced premiums by 8.4%. The research in this report controls for State differences so it is more credible than other reports. The AMA stated that "….medical liability adds billions of dollars to the cost of health care each year, which means higher health insurance premiums and higher medical costs for all Americans." *Medical Liability Reform-NOW!*, February 5, 2008, supra *(emphasis added)*. Kilgore, Morrisey, and Nelson (2006) results showed that enacting a $250,000 cap in states without caps, or with higher level caps, would reduce premiums by 8%. *Id*. "The Congressional Budget Office (1998) concluded that caps on non-economic damages were one of two reforms

that, "have been found extremely effective in reducing the amount of claims paid and medical liability premiums". *Id*.

"In 2001, premiums for medical malpractice insurance topped $21 billion, double the amount ten years earlier". *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra.

There is no dispute that the Missouri legislature was presented with and had available information from nonpartisan sources that states with noneconomic damages caps had slower premium growth, and therefore, more affordable and available medical care for its citizens.

3. There was evidence before 2005 that doctors were leaving Missouri, whether due to liability concerns or for any other reason.

Data from the Missouri Board of Healing Arts belies Appellants/Cross-Respondents claim the doctors were not fleeing Missouri. According to Board records, 13,305 physicians were practicing in Missouri in 2000, when the medical liability crisis first began to stir. In 2001, the number dropped to 13,192. In 2002, the number fell again to 13,080. Data for 2003 and 2004, as used by Appellants/Cross-Appellants, however, are skewed and unreliable because beginning in 2002, physicians were put on a first-ever two-year license cycle. At the end of that cycle, in 2004, the number of physicians licensed to practice here ostensibly had increased to 13,633, but this number included two years worth of physicians who retired (perhaps as much as a year or two earlier, in some

instances) or took their practice across state lines, but still maintained Missouri licenses. Missouri State Board of Registration for the Healing Arts.

In support of their arguments, Appellants/Cross-Respondents claim that the AMA numbers represent "licensed physicians in the state". This is not accurate. The AMA does produce very good data on physician demographics nationwide, but its numbers are based on the physician's "preferred address", irrespective of where he or she may actually practice. Indeed, the AMA warns that the measure of physician mobility is not an exact science. American Medical Association, *Medical Liability Reform-NOW!*, July 14, 2004 p.49.

There is evidence that doctors were "fleeing". In a 2002 survey of 545 Missouri physicians, nearly one-third of them indicated they were considering leaving practice altogether. Missouri State Medical Association, *Professional Liability Insurance Survey*, August 2002. A 2004 survey, involving 835 Missouri physicians, found that insurance rate increases had caused 29% of them to consider relocating to another state, and 17% to consider leaving the practice of medicine altogether. In that study, 49% of the respondents admitted that the cost of professional liability insurance caused them to cut staff positions or to put off hiring new help, and 28% said they were compelled to forego updating or acquiring new technology. *Professional Liability Insurance Survey*, August 2002, supra.

Several major carriers have stopped selling malpractice insurance. "According to the Missouri Insurance Commissioner's office, of the 32 companies

writing medical malpractice coverage in the state in 2001, only 8 were still writing or licensed to write policies for doctors" in 2002. *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, supra, *citing 2001 Missouri Medical Malpractice Insurance Report*, supra *citing* Randy McConnell, *ASPE/HHS Communication*, December 20, 2002. "The companies that are still in business are charging more and offering fewer discounts". *Id*. "Five specialties in Missouri are facing particular problems in getting coverage: OB/GYN, orthopedics, neurosurgery, radiology and trauma". *Id*.

But "states with caps experienced a more rapid increase in their supply of physicians". Fred J. Hellinger & William E. Encinosa, *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians*, U.S. Department of Health and Human Services, Agency for Healthcare Research and Quality, July 3, 2003. States with caps on non-economic damage awards or total damage awards benefit from about 12% more physicians per capita than States without caps. Limits on non-economic damages increase the number of physicians. *Id*. "Moreover, we found that States with relatively high caps were less likely to experience an increase in physician supply than States with lower caps." *Id*.

In an article in the Journal of American Medicine Association, "Impact of Malpractice Reforms on the Supply of Physician Services" (June 1, 2005), the authors concluded that "Tort reform increased physician supply".

45% of hospitals reported that the professional liability crisis resulted in the loss of physicians or reduced coverage in emergency departments. American Hospital Association, *Professional Liability Insurance Survey*, March 2003.

"Matsa (2007) examined how physician supply responds to caps on non-economic or total damages over the period from 1970 to 2000. He found that the number of physicians per capita in most rural counties is about 4% larger when a State has caps than in similar counties in States without caps. His work also suggests that it takes at least 6-10 years for full effect of caps on physician supply to be felt…". *Medical Liability Reform-NOW!*, February 5, 2008, supra.

The medical liability system unfortunately reduces access to health care in the U.S. by reducing the affordability and supply, such as inducing doctors to retire or avoid high-litigation specialties or geographic areas. *A Joint Economic Committee Study from May 2003, Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra. In fact, "74% of the uninsured identify high costs as a major reason for going uninsured." *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra, *citing* Catherine Hoffman & Alan Schlobohm, *Uninsured in America: A Chart Book, Second Edition*, (Kaiser Commission on Medicaid and the Uninsured, May 2000).

To the contrary of Appellants/Cross-Respondents assertion that laborers or the underprivileged are hurt by tort reform, it has been noted that "when excessive

malpractice litigation pushes up the cost of health insurance, low wage workers often bear the brunt of the impact". *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra.

"A recent study found that the number of doctors at the state level is sensitive to the malpractice insurance costs: higher premiums reduce the number of practicing physicians". *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra, *citing* Washington State Medical-Education and Research Foundation, *The Impact of Medical Malpractice Insurance and Tort Law on Washington's Health Care Delivery System*, September 2002.

"A 1991 study of four Western states reported that medical liability problems resulted in decreased access to obstetric services, an effect found to be particularly harmful to poor women and rural residents". *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra, *citing* 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).

Tort reform and/or caps benefit a compelling state interest. "Among those groups most benefiting from such changes are women, low-income households, and rural residents. Female patients are often put at a disadvantage in the current system because OB's pay some of the highest malpractice insurance rates and the result has been fewer OB's that are able to afford continuing their obstetrics

practice or accept new patients." *Id*. (*emphasis added*) The faults of current medical liability system further reduce the health care access options to rural residents. *Id*.

For the reasons stated above, it is apparent that the liability crisis did cause physicians to leave Missouri before 2005 and therefore had a substantial effect on the overall delivery of health care to Missourians generally, prior to the enactment of H.B. 393.

Since 2005, the number of medical malpractice claims has declined dramatically and remained steady at levels roughly 1/3 lower than they were between 2000 and 2004. Missouri Department of Insurance, Financial Institutions & Professional Regulation, *2008 Medical Malpractice Insurance Report*, July 2009, *at iv*. The average medical malpractice award has significantly decreased. In 2008, the average award was $202,612, which is approximately 20% less than in 2005. *Id. at 25*. These more manageable average award amounts have enabled several insurers to cut malpractice rates. Terry, Ganey, *Doctors v. Lawyers*, Colum. Daily Trib., Oct. 4, 2009, *available at* http://www.columbiatribune.com/news/2009/oct/04/fleeing-physicians/ . In addition, physicians and other medical personnel are returning to Missouri. According to the Board of Healing Arts, Missouri lost 225 physicians in the 3 years leading up to 2005 reform. Since the first full year the new law was in place, however, the state has **added** 486 doctors.

4. The legislature knew and should have known that lowering the cap on noneconomic damages is an effective response to the medical crisis and that such cap benefits society as a whole.

This Court has already observed that the preservation of public health and the maintenance of generally affordable health care costs are reasonably conceived legislative objectives which may possibly be achieved (even if only inefficiently), by a similar statutory provision to the one Appellants/Cross-Respondents herein claim is unconstitutional. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992).

Contrary to Appellants/Cross-Respondents' suggestion, the General Assembly had objective evidence upon which to base its conclusion that there existed a medical crisis in Missouri. The literature is replete with studies and reports demonstrating conclusively that limits on non-economic damages are effective. For example, a 2002 report issued by the Department of Health and Human Services reported: "Reform of medical liability systems in several states convincingly demonstrates that tort reform works. California's MICRA-Medical Injury Compensation Reform Act [including its $250,000 cap on non-economic damages] is one such example. It reduces the cost of insurance premiums and provides that truly injured people get properly compensated for their injuries." U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Update on the Medical Litigation Crisis: Not the Result of the "Insurance Cycle"*, September 25, 2002 *available at*

http://aspe.hhs.gov/daltcp/reports/mlupd2.htm, *p. 4*. A 2003 Milliman USA study found that "the pattern is still clear, caps on non-economic damages are highly correlated to medical malpractice costs." The report stated:

> There is ample historical evidence that state caps on non-economic damages tend to incur lower medical malpractice costs than states without caps. The best example is California…where the cost of medical malpractice claims per physician has averaged less than 50% of the nationwide average over the 1990s. Other examples of states with caps are Colorado (69% of countrywide average), Indiana (86% of countrywide average), and Maryland (64% of countrywide average).

In the other direction, some states without caps are District of Columbia (144% of countrywide average), Florida (136% of countrywide average), Illinois (144% of countrywide average), New Jersey (131% of countrywide average), New York (156% of countrywide average), and Pennsylvania (171% of countrywide average). Richard S. Biondi, *Developments on Med Mal Tort Reform*, P & C Perspectives, Summer 2003 *available at* http://www.captive.com/service/milliman/pdf/PCP01_SUMMER_2003.pdf, *p. 1*. Further, the January 21, 2004 Health Affairs Journal reported that "empirical results indicate caps on awards adopted by several states were associated with lower loss ratios and lower premiums." The literature further observed that premiums in states with a cap on awards were 17.1% lower than states without such caps. Thorpe, supra at W 4-20 *available at*

http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.20v1, *p. 26*. Moreover, the Office of Technology Assessment issued a comprehensive report in 1993 evaluating several studies on various efforts to limit medical malpractice liability in states during the 1970s and 1980s. That report found that caps on damage awards established consistent, significant impacts in reducing medical malpractice cost indicators. *Impact of Legal Reforms on Medical Malpractice Costs*, supra. The CBO published a follow up to this report underscoring the OTA's findings, stating the damages cap consistently reduced the size of the claim and, as a result, the premium rates for malpractice insurance. In addition, the CBO stated, "[m]ore recent studies have reached similar conclusions." *Liability for Medical Malpractice: Issues and Evidence, A Joint Economic Committee Study*, supra, *p. 1*9.

As a more specific example, The Doctors Company, the leading physician-owned medical malpractice carrier in the nation, significantly reduced premiums in Texas as a result of a 2003 tort reform enactment that capped non-economic damages at $250,000. The average decrease was 14%, but some reductions were as much as 30%. The Doctors Company, *The Doctors Company Announces Rate Decrease in Texas*, Press Release, February 25, 2005 *available at* http://www.thedoctors.com/TDC/PressRoom/PressContent/CON_ID_000251.

Appellants/Cross-Respondents suggest negative consequences of lowering the cap on non-economic damages to women who do not work outside the home. Appellants/Cross-Respondents wholly ignore the obvious fact that life care plan

specialists account for the replacement costs of work now done by the spouse in view of the injury. Further, the far immediate threat for women as a whole is the threat of medical care being unavailable to underinsured and uninsured women. *See Liability for Medical Malpracitce: Issues and Evidence*, supra*; Medical Liability Reform- NOW!, July 14, 2004, supra p. 43*. Tort reforms will preserve access of children, women and the elderly to specialists, home-health services, and other important health care when they need such care. *Id.*

IV. The Revised Cap <u>does not</u> violate the Missouri Constitution.

A. The cap does not violate the Equal Protection Clause of the MO. CONST. ART. I, §2.

"In terms of equal protection, a statute that neither operates to the disadvantage of a suspect class nor impinges on a fundamental right will withstand constitutional challenge if the classification bears some rational relationship to a legitimate state purpose." *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement System v. Pemiscot County*, 256 S.W.3d 98, 102 (Mo. banc 2008) Citing *Kohring v. Snodgrass, 999 S.W.2d 228, 231-32 (Mo. banc 1999).* "The rational basis test requires only that the challenged law bear some rational relationship to a legitimate state interest". Id. The non-economic cap is consistent with the Equal Protection Clause because it is a rational response to a health care crisis caused by medical malpractice litigation. Appellants/Cross-Respondents would have this court believe that strict scrutiny applies, and not a rational basis. However, strict scrutiny requires a suspect class (or a fundamental right) and there

is neither a suspect class nor a fundamental right involved here. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 903 (Mo. banc 1992) and *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d at 512. The classification of the statute has a rational relationship to a legitimate purpose. Aside from Appellants/Cross-Respondents' race and gender arguments, which merely suggest, without proof, that women and/or minorities might be impacted more by a "cap", there is no suspect class. Further, Appellants/Cross-Respondents do not establish any fundamental rights in their arguments. The case of *Batek v. Curators of University of Missouri*, 920 S.W.2d 895 involved provisions of MO. REV. STAT. §516.170, which were attacked on the grounds that statute violated the Equal Protection Clause. The court held that distinguishing between non-medical malpractice plaintiffs and medical malpractice plaintiffs for purposes of a statute of limitations does **not** violate the Equal Protection Clause. *Id*. at 899. In that case, as should be determined here, the statute was found not to impinge upon the plaintiff's fundamental rights. *Id*. at 898. Fundamental rights are only related to a classification of basic liberties explicitly or implicitly guaranteed by the United States Constitution, such as freedom of speech, freedom of the press, freedom of religion, the right to vote, and the right to procreate. *Id*. *citing Mahoney v. Doerhoff Surgical Servs., 807 S.W.2d at 512 citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34, 93 S. Ct. 1278, 1296-97, 36 L.Ed.2d 16 (1972).* This Court has also previously and repeatedly rejected the argument that victims of medical malpractice are members of a suspect class. *Batek*, supra. *See also*

Adams v. Children's Mercy Hospital, 832 S.W.2d at 903.

Appellants/Cross-Respondents argue that the cap discriminates between slightly and severely injured malpractice victims. Slightly and severely injured malpractice victims are not a suspect class and these types of victims do not have a fundamental right to any particular damages.

Appellants/Cross-Respondents claim that MO. REV. STAT. §538.210 (2008) creates a number of arbitrary and irrational classifications that implicate equal protection. None of the people that Appellants/Cross-Respondents suggest have been discriminated against are a suspect class and none of those allegedly discriminated against have a fundamental right. The status of suspect class is reserved for classifications of race, national origin, and illegitimacy. *Call v. Heard*, 925 S.W.2d 840, 846-847 (Mo. banc 1996) *citing Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d at 512*. Therefore, equal protection does not apply on its face in this case. In addition, "as the general purpose of the equal protection guarantees is to safeguard against invidious discrimination, differentiations between classes, not suspect or specially protected, are permissible, unless the classification rests on grounds irrelevant to the achievement of the State's objectives". *Winston*, 636 S.W.2d at 327-328. (constitutional for victims of public torts to limit recovery to those injured by negligent operation of motor vehicles or because of the dangerous condition of property). The differentiations of the "classes" that the Appellants/Cross-Respondents hypothesize are not suspect or specially protected. The only

"classification" in MO. REV. STAT. §538.210 (2008) (all persons claiming damages for alleged medical malpractice) rests on grounds completely relevant to the achievement of the State's objectives. "If the question of the legislative judgment remains at least debatable, the issue settles on the side of validity". *Id.* at 327.

This Court said in *Adams* that the 1986 version of MO. REV. STAT. §538.210 was enacted to confront a medical malpractice insurance crisis that "threatened adversely to affect primary health care in Missouri." *Adams*, 832 S.W.2d at 904. This Court further held that the statute attacked therein (the precursor to the current §538.210) was enacted in an effort by the legislature to reduce rising medical malpractice premiums and discourage physicians from leaving specialties that carried a higher risk of a malpractice claim. *Id*. This Court said that while the existence of the crisis was "debatable", its obligation to resolve all doubt was in favor of the General Assembly. *Id*. "While some clearly disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists". *Id*. This same deference is owed to the General Assembly's 2005 amendments to the damage limitation of MO. REV. STAT. §538.210 (2008). Under the principle of *stare decisis*, this Court should decline to revisit the validity of the damage limitation in MO. REV. STAT. §538.210, as amended in 2005. Since the legislature's changes affect only the amount of the limitation, rather than the principle underlying its imposition, there is no reason to deviate from this Court's earlier holding regarding the validity of the statute. *Eighty Hundred Clayton*

Corp. v. Director of Revenue, 111 S.W.3d 409, 410 (Mo. banc 2003) (Court bound by earlier interpretation of statute where legislature amended only the rate of applicable tax rather than governing language); *Hodges v. City of St. Louis*, 217 S.W.3d 278, 281-82 (Mo. banc 2007) (declining to revisit constitutionality of limitation on damages payable by a public entity on grounds of *stare decisis*).

"Under the 'deferential rational relationship' test, a number of courts, such as the court in *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985) have upheld damages caps as a permissive and rational means of achieving the legitimate state goal of reducing insurance premiums paid by physicians. *Medical Liability Reform - NOW!, July 14, 2004,* supra. Other societal goals supporting the implementation of caps that have been upheld by the court include ensuring the availability of physicians in the state. *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So.2d 365 (Fla. 1981). Courts have held it constitutional for damage caps to differentiate between medical liability tort claimants who have suffered injuries valued at a level below the damage cap, and those who have suffered damages valued above the damages cap amount based upon the legitimate purpose of the legislature". *Medical Liability Reform - NOW!, July 14, 2004*, supra and *Fein*, 695 P.2d at 682-683.

"As long as there is any reasonably conceivable state of facts showing that the legislation is rational, it must be upheld". *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement System v. Pemiscot County*, 256 S.W.3d at 102-103 *citing Miss Kitty's Saloon, Inc. v. Mo. Dep't of Revenue, 41 S.W.3d 466, 467 (Mo.*

banc 2001). "Whether a statute is wise or whether it is the best means to achieve the desired result are matters left to the legislature, and not the courts". *People v. Shephard*, 605 N.E.2d 518, 525 (Ill. 1992). "A legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data". *United C.O.D.*, 150 S.W.3d at 313 *citing FCC, 508 U.S. 307 (1993).* "The constitution does not require things which are different in fact or opinions to be treated in law as though they were the same". *Tigner v. Texas*, 310 U.S. 141, 147 (1940). "The 14th Amendment does not deny to states the power to treat different classes of persons in different ways". *Reed v. Reed*, 404 U.S. 71 (1971) .

"….all statutes are 'presumed to be constitutional and will not be held unconstitutional unless they clearly and undoubtedly contravene the constitution'". *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement System*, 256 S.W.3d at 100 *citing United C.O.D., 150 S.W.3d at 313*.

A statute will be enforced "unless it plainly and palpably affronts fundamental law embodied in the constitution". *United C.O.D.*, 150 S.W.3d at 313. "…a classification is constitutional if any set of facts can be reasonably conceived to justify it." *Id*. *citing FCC, 508 U.S. at 315*. "With respect to the claim that a statutory classification is violative of equal protection, a challenger must prove abuse of legislative discretion beyond a reasonable doubt and, short of that, the statute is valid". *Blaske*, 821 S.W.2d at 829 *citing Winston*, 636 S.W.2d

at 327. Appellants/Cross-Respondents have failed to prove an abuse of legislative discretion beyond a reasonable doubt.

The case of *Hoskins v. Business Men's Assur*., 79 S.W.3d 901 (Mo. banc 2002), involved MO. REV. STAT. §537.675, authorizing the state to assert a lien on 50% of any final judgment for punitive damages. The Court held the statute was constitutional. *Id*. at 902. "An act of the legislature approved by the governor carries with it a strong presumption of constitutionality. This Court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature". *Id*. at 904 citing *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). *See also Westin Crown Plaza Hotel Co.*, 662 S.W.2d at 2.

A rational legislature could have based its decision to classify malpractice plaintiffs separately on the basis of a number of considerations, including, but not limited to, limiting burdens and disruptions that malpractice litigation imposes on the delivery of accessible health care; reducing uncertainty and expense toward goal of preserving affordable health care for the greatest number of individuals; or, to stem the tide of a perceived crisis. *Batek*, 920 S.W.2d at 899.

Appellants/Cross-Respondents would like this court to question the process by which the legislature arrived at its conclusion. However, "Courts absolutely may not look behind the legislature's enactment of a statute to second guess the process by which the legislature arrived at its conclusion". *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d at 835.

"Every line drawn by a legislature leaves out some that might well have been included. That exercise of discretion, however, is a legislative, and not a judicial function". *Village of Belle Terre v. Boraas*, 94 S. Ct. 1536, 1540 (1974).

Appellants/Cross-Respondents claim that non-economic damage caps disproportionately impact the young, seniors, and women. This is inaccurate, and actually, the opposite is true. The U.S. Congress's Joint Economic Committee, in its 2003 report on the state of tort system in the United States: "The negative aspects of the medical liability system have a particularly adverse effect on women, low-income individuals and rural residents." *"Liability for Medical Malpractice: Issues and Evidence"*, supra. The "system does not direct appropriate compensation to victims of negligence, nor does it effectively deter negligent behavior". *Id*. Moreover, "the medical liability system impedes efforts to improve patient safety, and may actually increase the number of errors". *Id*. *(emphasis added)*. The negative aspects of the medical liability system on low-income individuals is the fact that premiums become so high that they will not be insured or their employers will not offer health insurance. *Id*. Regarding the young, one looks no further than California which has a $250,000 cap on non-economic damages. According to the AMA report, children there have received multi-million dollar verdicts "precisely because economic damages include measurement of future wages. If an injury prevents a child from pursuing a livelihood, the wages and benefits of unrealized work can still be calculated." *"Medical Liability Reform-NOW!", July 14, 2004, p. 43*, supra. As for non-

working women, a far more immediate threat is the loss of OB-GYN physicians – considered high-risk specialists-as the result of a medical liability crisis. As one report found, "States without proven reforms are losing physicians who provide obstetrical care in urban and rural areas. States without reforms are losing physicians willing to read mammograms-putting women at increased risk for delaying detection of preventable breast cancers…..Should the current cap be raised, as suggested by Appellants/Cross-Respondents, serious public health consequences for women are inevitable." *Id*.

Appellants/Cross-Respondents further contend that another discriminatory impact of MO. REV. STAT. §538.210 (2008) is found with regard to a spouse's consortium claim. Specifically, Appellants/Cross-Respondents contend that in this case, Mary Klotz, was affectively stripped of her claim for non-economic damages in its entirety because of the impact of the cap upon the damages assessed. As to the claim that a consortium spouse is affectively stripped of their claim, the fact is that a consortium spouse has the right to bring their claim, offer facts and evidence in support thereof, and obtain a jury verdict in their favor. To the extent that a non-economic cap may ultimately cause a consortium award to be reduced it can only be seen on an individualized basis, and is not a forgone conclusion. Nor, however, is there necessarily an expectation of a consortium claim verdict that would undoubtedly lead to an award that, combined with the primary plaintiff's non-economic verdict, would unquestionably exceed the cap value, such that the consortium claim in itself would be entirely wiped out. The cap itself does not

arbitrarily or irrationally deny a consortium spouse any relief, and in many cases, the consortium spouse may receive the entire amount of a jury award, depending on the overall verdict returned. Since the overall rational basis of the legislature's enactment of a cap cannot be established as clearly arbitrary or irrational, and do not clearly impact any "suspect class" or violate a fundamental right, the legislation meets the requirements of due process and equal protection under the Missouri Constitution.

Appellants/Cross-Respondents never acknowledge that nearly every statute on the books can be interpreted as affecting different individuals or groups in a slightly different manner. It is completely irrational to assert that every potential subject that a statute impacts should be identically situated, so that the statute has the precisely identical effect on each and every individual. There is not any language in the statute indicating a direct and invidious intention to classify and treat people differently. MO. REV. STAT. §538.210 (2008) does not violate the Equal Protection Clause.

B. The cap does not violate the prohibition against Special Legislation, MO. CONST. ART. III, §40.

Appellants/Cross-Respondents state that the cap violates the prohibition against Special Legislation, MO. CONST. ART. III, §40. Appellants/Cross-Respondents' argument could succeed only if they establish that the Legislature had no rational basis for adopting the statutory damages limitations. Appellants/Cross-Respondents cannot meet that very high burden. A "special

law" is a law that "includes less than all who are similarly situated ... but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." *Batek*, 920 S.W.2d 895 *citing Blaske,* 821 S.W.2d at 831 (quoting *Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 400 (Mo. banc 1980).*

MO. REV. STAT. §538.210 (2008) is not a "special law" because it applies to all persons who bring "any action against a health care provider". There are no members of the stated class omitted "whose relationship to the subject-matter cannot by reason be distinguished from that of those included". *Blaske,* 821 S.W.2d at 831 *quoting State v. County Court of Greene County*, 667 S.W.2d 409, 412 (Mo. banc 1984).

Other states have upheld limitations on noneconomic damages that were challenged on "special legislation" grounds. *Gourley ex rel. Gourley v. Nebraska Methodist Health System*, 663 N.W.2d 43, 66 (Neb. 2003); *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989); and *Kirkland v. Blaine County Medical Center*, 4 P.3d 1115, 1120 (Idaho 2000).

"[T]he test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special but what it excludes." Citing *ABC Liquidators, Inc. v. Kansas City, 322 S.W.2d 876, 885 (Mo. banc 1959).*" The Legislature rationally chose to limit non-economic damages in medical malpractice cases because it was addressing a health care crisis caused by medical malpractice litigation.

Constitutional litigation under the rational basis test is not like a trial. This Court's role is not to sift through the evidence to evaluate witness credibility and determine whether the legislature "got it right". All that is required to sustain the legislation is that the legislation had a rational basis for acting.

Appellants/Cross-Respondents suggest that the dollar amount of the cap is "irrational". Rather, as the United States Supreme Court has recognized, a statute that adopts a numerical limit is not unconstitutional unless the line it draws is "wholly unrelated to the objective of the statute". *Mass. Bd. Of Ret. V. Murgia,* 427 U.S. 307, 316 (1976).

The legislature is not required to treat all members of the class the same as long as some characteristic of the portion of the class excluded provides a reasonable basis for its exclusion". *Batek*, supra.

MO. REV. STAT. §538.210 applies to all persons bringing medical malpractice claims. The classification is a reasonable one, including, but not limited to, seeking to lower the medical malpractice crisis, lower insurance premiums, and to improve the healthcare system in Missouri. There is no purpose or language in MO. REV. STAT. §538.210 (2008), which expresses any intent to create irrational classifications and treat different tortfeasors unequally. Although Appellants/Cross-Respondents identify examples of how people with different characteristics are allegedly affected differently by the statute, they cannot provide a single example of a certain class of people excluded by the statute, and then prove that this class was excluded for an irrational or arbitrary reason, as is

required, at the least, to demonstrate a violation of the Special Legislation Clause of the Missouri Constitution. *Batek*, supra. "A law based on open-ended characteristics is not facially special and is presumed to be constitutional". *Alderson v. State of Missouri*, 273 S.W.3d 533, 538 (Mo. banc 2009). "Such laws are not special if the classification is made on a reasonable basis". *Blaske*, 821 S.W.2d at 832. The test for special legislation involves the same principles and considerations that are involved in deciding whether a statute violates equal protection. *Id*. For the reasons discussed above with regard to equal protection, as well as the matters discussed herein regarding special legislation, §538.210 (2008) is not prohibited special legislation under MO. CONST. ART. III, §40.

C. The cap does not violate the Due Process Clause of MO. CONST. ART. 1, §10.

The cap does not violate the Due Process Clause of MO. CONST. ART. I, §10. For a complete discussion, see also discussion on Right to Open Courts (section D, infra) since these issues are basically the same. Two elements must be established to demonstrate a substantive due process violation: first, that there is a protected interest to which due process protection applies; and second, that the governmental action was truly irrational. *Reagan v. County of St. Louis*, 211 S.W.3d 104, 111 (Mo. App. E.D. 2006); and *Lane v. State Committee of Psychologists*, 954 S.W.2d 23, 24-25 (Mo. App. E.D. 1997). The Appellants/Cross-Respondents cannot demonstrate either element.

Appellants/Cross-Respondents acknowledge their argument requires that they establish that the government action complained of is "truly irrational," which Appellants/Cross-Respondents characterize as more than "arbitrary, capricious, or in violation of state law." *See* Appellants/Cross-Respondents' *brief*, pgs. 60-64. Appellants/Cross-Respondents have not met their burden of proof on this issue.

"Court analysis of due process challenges also has proceeded under the rational relationship test, where damages caps have been found to be neither arbitrary nor irrational legislative goals". *"Medical Liability Reform-Now!" (February 5, 2008)*, supra; *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Fein*, 695 P.2d 665; *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990); *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989); *Adams v. Via Christi Reg'l Med. Ctr.*, 19 P.3d 132 (Kan. 2001); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329 (Mass. 1989), *cert. denied*, 493 U.S.1056 (1990); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Greist v. Phillips*, 906 P.2d 789 (Or. 1995); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877 (W. Va. 1991)

In *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, Appellants therein argued that portions of Chapter 538, as enacted at the time (1986 version), violated the Due Process clause. The Due Process Clause guarantees that a claimant is entitled to whatever process is constitutionally mandated or permitted

under the laws existent at the time of the claim. This Court has held that "whether a statute is socially undesirable, unwise or unfair is irrelevant if the legislature's classification advances the legislature's legitimate policy, which, as we [Missouri Supreme Court] have stated, it does." *Id*. at 903-904. The cap is consistent with the due process clause because it protects Missouri citizens' access to health care and does not deprive Appellants/Cross-Respondents of any vested property interest. Appellants/Cross-Respondents do not have a property right to receive unlimited non-economic damages. Because the cap merely relates to a possible adjustment of a remedy that Appellants/Cross-Respondents have no vested right to receive, it does not violate their due process rights.

Appellants/Cross-Respondents claim the medical malpractice cap limits effectively deny injured individuals a right to counsel is circular and conclusory. First, there is no constitutional right to unlimited non-economic damages. Second, the statute does not prohibit a person's "right" to be represented by counsel. *Spitcaufsky v. Hatten*, 353 Mo. 94, 105 (Mo. banc 1944), cited by Appellants/Cross-Respondents, involved the suggestion the statute at issue enabled the Collector of Revenue to usurp control of the causes of action belonging to the private holders of special tax liens and thereby deprive them of their right to be represented by their own counsel. The other case cited by Appellants/Cross-Respondents, *Magerstadt v. LaForge*, 303 S.W.2d 130, 133 (Mo. banc 1957), recognizes that the right to counsel in civil cases has never been challenged. The right of a litigant to be represented by counsel is ordinarily

secured to him by express constitutional or statutory provisions, although it has been said not to be a natural right but to be a creature of positive law. *Id*. Third, the affidavits Appellants/Cross-Respondents rely upon do not establish that decreased filings of malpractice suits are related to lack of attorneys willing to take on meritorious medical malpractice claims. To the contrary, the fact that Daniels and Martin (as cited by Appellants/Cross-Respondents) conclude that malpractice filings decrease with the existence of damage caps, only goes to prove the absolute rationality of the Missouri legislatures implantation of the MO. REV. STAT. §538.210 (2008) cap. The reduction of filings anticipated by the existence of a cap (and verified by Appellants/Cross-Respondents' supporting affidavits) will necessarily reduce the cost of litigation in the health care system, to the benefit of all of Missouri residents. In the past frivolous medical malpractice lawsuits have been rampant in Missouri. In 2001, fully 70 percent of all closed physician liability claims resulted in no payment to plaintiffs. *See 2001 Missouri Medical Malpractice Insurance Report*, supra p.6. The average cost of defending these frivolous lawsuits was more than $11,000 each or $5 million total. *Ibid.*, p. 12. The percentage of meritless claims increased in 2002 to 71.5 percent, and in 2003 to nearly 73 percent. Missouri Department of Insurance, *2003 Missouri Medical Malpractice Insurance Report, p. 17.* A reduction in frivolous suit filings alone demonstrate rationality of the legislation. Therefore, the non-economic cap in MO. REV. STAT. §538.210 (2008) does not violate the Due Process Clause.

D. The cap does not violate the right to Open Courts and Certain Remedies, MO. CONST. ART. I, §14.

Medical malpractice cases, as in the case at bar, constitute substantive causes of action. *Adams*, 832 S.W.2d at 905. Missouri's legislature has the power to modify the substantive law to eliminate or restrict some causes of action. *In re Dyer*, 163 S.W.3d 915, 921 (Mo. banc 1991); *Adams*, 832 at 907; *Blaske*, 821 S.W.2d at 832; *Harrell*, 781 S.W.2d at 62. It thus logically, and rightfully, follows that if Missouri's legislature has the constitutional power to create and abolish causes of action, it also has the power to limit recovery in those causes of action. *Fisher v. State Highway Commission of Missouri*, 948 S.W.2d 607, 611 (Mo. banc 1997); *Richardson v. State Highway & Transportation Commission*, 863 S.W.2d 876, 879 (Mo. banc 1993); *Adams*, 832 S.W.2d at 907; *Winston*, 636 S.W.2d at 328.

Under MO. CONST. ART. I, §14, the right of access means simply the right to pursue in the courts the cause of action the substantive law recognizes. *Kilmer v. Mum*, 17 S.W.3d 545, 549 (Mo. banc 2000); *Wheeler v. Briggs*, 941 S.W.2d 512, 514 (Mo. banc 1997); *Fisher*, 948 S.W.2d at 611; *Mahoney*, 807 S.W.2d at 510; *Harrell*, 781 at 62; *Missouri Highway and Transportation Commission v. Merritt*, 204 S.W.3d 278, 285 (Mo. App. E.D. 2006). Missouri courts have distinguished between statutes that impose procedural bars to access, and statutes that change the common law by the elimination or limitation of a cause of action. The former are impermissible and the latter are a valid exercise of a legislative

prerogative. *Fisher*, 948 S.W.2d at 611; *Wheeler*, 941 S.W.2d at 514; *Adams*, 832 S.W.2d at 905; *Missouri Highway and Transportation Commission*, 204 S.W.3d at 285; *Baker v. Empire District Electric Co.*, 24 S.W.3d 255, 265 (Mo. App. S.D. 2000).

Caps do not deny a litigant access to the courts. "After a plaintiff is awarded damages up to the amount of the statutory cap, the determination of damages is removed from consideration by the jury and given to the court. This is not a denial of the right to trial by jury, since the jury already has completed its fact-finding mission, determining that the plaintiff is owed compensation. Deciding how much a patient will recover is a question of law for the court. The court implements the policy decision of the legislature." *"Medical Liability Reform-Now!" (February 5, 2008)*, supra. Courts have struck down the argument that a damage cap impermissibly allows the legislature to intrude on the judicial process. *Fisher*, 948 S.W.2d at 611; *Wheeler*, 941 S.W.2d at 514; *Adams*, 832 S.W.2d at 905; *Missouri Highway and Transportation Commission*, 204 S.W.3d at 285; *Baker*, 24 S.W.3d 255, 265 (Mo. App. S.D. 2000) "Instead of being an impermissible barrier to the courts, the cap is merely a limitation on recoveries." *"Medical Liability Reform-Now!" (February 5, 2008)*, supra.

As the genesis for their argument that the cap denies medical malpractice claimants and their spouses open access to Missouri's courts, Appellants/Cross-Respondents refer to Chief Justice Holstein's "dissenting" opinion in *Wheeler*, supra. Appellants/Cross-Respondents' ultimate argument against the cap rests

upon two cases evolving from Chief Justice Holstein's opinion therein: *Kilmer*, supra, and *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638 (Mo. banc 2006). However, Appellants/Cross-Respondents misinterpret the facts and the law in those three cases in attempting to apply them here.

The *Wheeler* Court held that the statute of limitations set out in MO. REV. STAT. §516.170 (1996) did not procedurally bar the mentally incapacitated access to the courts because the legislature had a legitimate reason to enact the limitation period and the mentally incapacitated are not legally prohibited from filing suit. *Wheeler*, 941 S.W.2d at 515. As in *Wheeler*, Appellants/Cross-Respondents here were not procedurally barred from bringing and pursuing their causes of action in court. Rather, the Missouri legislature's limitation on non-economic damages, just as the change in the statute of limitations in *Wheeler*, is not in violation of MO. CONST. ART. I, §14. Although Appellants/Cross-Respondents noted in their Brief that Chief Justice Holstein dissented in *Wheeler*, they glossed over the fact that while he dissented as to the principal opinion's rationale he nonetheless **concurred** with its result. *Id*. at 515.

The *Kilmer* case is distinguishable from this case in that the *Kilmer* case involved a *procedural* bar to bringing suit. In that case, criminal charges had to be filed by the prosecuting attorney before the plaintiff could bring suit regarding a violation of the Missouri Dram Shop Act. Appellants/Cross-Respondents here were not procedurally barred from litigating their case. The Appellants/Cross-Respondents were able to pursue recognized causes of action, and no barriers were

imposed upon them from doing so. If anything, MO. REV. STAT. §538.210 (2008) simply placed some limit on their recovery of non-economic damages, only one aspect of the ultimate damages claimed. Neither Mr. or Mrs. Klotz was prevented in any way from filing suit, pursuing their claims, arguing their case, or obtaining a jury verdict thereon, and in fact, of course, they both fully litigated their claims.

Appellants/Cross-Respondents also argue in their Brief that because Mr. Klotz sought and obtained a verdict for more than $350,000 in non-economic damages for his own injuries, the new law acts to deny Mrs. Klotz of any ability to obtain her own remedy and that restriction is both arbitrary and unreasonable. Their rationale is without merit as Missouri courts have upheld the constitutionality of imposing limits on recovery for damages, including loss of consortium. In *Richardson*, supra, the plaintiff-wife sustained severe injuries in an automobile accident and filed suit against the other driver's estate and Missouri's State Highway and Transportation Commission. Her husband filed a loss of consortium claim. The jury assessed fault at 40% to State Highway and Transportation Commission, and 60% to the other driver, awarding $500,000 to plaintiff-wife and $50,000 to plaintiff-husband on his loss of consortium claim. Pursuant to Missouri's sovereign immunity statute under MO. REV. STAT.§537.610, however, judgment against the State Highway and Transportation Commission was limited to a total of $100,000. In addition to other constitutional challenges, the plaintiffs claimed that MO. REV. STAT. §537.610 (1996) was unconstitutional as it denied them the right to trial by limiting them to $100,000 in

recovery. Finding that the statute was constitutional, the Court held that, "If the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit *recovery*." *Richardson*, 863 at 879. (*Emphasis added*.)

In *Fisher*, supra, Plaintiff-wife filed a cause of action against Missouri's State Highway Commission for injuries she sustained in a motorcycle accident, and her husband filed a loss consortium claim. Although the jury returned a verdict of $2,500,000 on plaintiff-wife's claim and $500,000 on plaintiff-husband's loss of consortium claim, the entire judgment was reduced to $100,000 pursuant to MO. REV. STAT. §537.610 (1996). Upholding the constitutionality of the statute, the Court found that the legislature can create a cause of action or limit it. *Fisher*, 948 S.W.2d at 611.

As in *Richardson* and *Fisher*, Missouri's legislature has the power to modify the substantive law by limiting the recovery of non-economic damages in medical malpractice claims. Further, MO. REV. STAT. §538.210 (2008) was a change in the substantive law and did not impose a procedural bar, as Appellants/Cross-Respondents were permitted to fully litigate their causes of action. Therefore, Appellants/Cross-Respondents were not denied access to the courts and their rights, under MO. CONST. ART. I, §14, remained inviolate.

E. The cap <u>does not</u> violate the Right to Trial by Jury, MO. CONST. ART. I, §22(a).

The controlling case law in Missouri with respect to the constitutionality of capping non-economic damages in medical malpractice cases is *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898. There, the jury awarded the plaintiffs over $20,000,000 in total damages, which included approximately $14,000,000 in non-economic damages. Pursuant to the cap formula which was in effect at that time under MO. REV. STAT. §538.210 (1986), the non-economic damages were reduced to $860,000. The plaintiffs appealed, claiming that MO. REV. STAT. §538.210 (1986) violated their right to a trial by jury. This Court held that the plaintiffs' constitutional right to trial by jury was not violated. This Court's reasoning in *Adams* still applies today.

Courts from foreign jurisdictions have likewise held that limitations on the recovery of damages, in both medical malpractice actions and personal injury actions, do not violate a plaintiff's right to trial by jury. *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Franklin v. Mazda Motor Corporation*, 704 F. Supp. 1325 (D. Md. 1989); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *Gourley v. Nebraska Methodist Health System, Inc.*, 663 N.W.2d 43 (Neb. 2003); *Evans v. State*, 56 P.3d 1046 (Alaska 2002); *Kirkland v. Blaine County Medical Center*, 4 P.3d 1115 (Idaho 2000); *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Robinson v. Charleston Area*

Medical Center, Inc., 414 S.E.2d 877 (W. Va. 1991); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); *Wright v. Colleton County School District*, 391 S.E.2d 564 (S.C. 1990); *English v. New England Medical Center, Inc.*, 541 N.E.2d 329 (Mass. 1989); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002).

In the present case, the jury resolved the disputed facts and assessed the damages. Appellants/Cross-Respondents, therefore, were accorded a jury trial as guaranteed by the Missouri Constitution. Once the jury had determined the facts and damages, its constitutional task was completed. At this point, it now became the duty of the court to apply the law and reduce the verdict in compliance with the non-economic damage cap prescribed by MO. REV. STAT. §538.210 (2008). In so doing, the court fulfilled its obligation without infringing upon the Appellants/Cross-Respondents' right to trial by jury. *Richardson*, 863 S.W.2d at 880; *Adams*, 832 S.W.2d at 907. Courts from other jurisdictions have applied the same reasoning. *Boyd*, 877 F.2d at 1196; *Judd*, 103 P.3d at 144; *Gourlely*, 663 N.W.2d at 75; *Evans*, 56 P3d at 1051; *Kirkland*, 4 P3d at 1120; *Wright*, 391 S.E.2d at 569; *Etheridge*, 376 S.E.2d at 529; *Murphy*, 601 A2d at 117; *Zdrojewski*, 657 N.W.2d at 736.

Appellants/Cross-Respondents take issue with the *Adams* Court's reference to *Tull v. United States*, 481 U.S. 412 (1987), where it noted that "[t]here is no substantive right under the common law to a jury determination of damages under the Seventh Amendment." *Adams*, 832 S.W.2d at 907. They contend that *Tull* "shaped" the *Adams* Court's understanding of the jury's role in determining

damages, and attempt to undermine its holding by arguing that the U.S. Supreme Court later, in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), "decisively rejected that understanding of *Tull*." Relying on *Feltner*, Appellants/Cross-Respondents incorrectly assert that MO. REV. STAT. §538.210 (2008) violates their right to trial by jury.

Feltner is a case in which Columbia Pictures sued Feltner, the owner of three TV stations, for airing programs without making the royalty payments. Columbia elected to pursue statutory damages, which were defined as an amount between $500 and $20,000 per occurrence, to be determined by the "court." The issue was whether "court" refers to the judge or the jury. Feltner appealed the judgment in which the judge imposed the maximum damage allowable for each occurrence. The holding of the Court was that the jury, not the judge, is the one to make the determination; there was not an issue with the fact that there was a cap (and a floor) on the jury's authority to determine damages. Because *Feltner* itself had a cap on damages, and the court found that by letting the jury determine damages (subject to a cap) was appropriate, it clearly does not support the Appellants' assertion that damage caps impermissibly infringe upon the right to trial by jury.

Appellant's reliance on *Dimick v. Schiedt*, 293 U.S. 474 (1935) is misplaced. *Dimick* involved a case in which the trial court increased the jury verdict. The Court (in 1935) recognized that the right to decrease the amount of jury verdicts had a century long history, and the question was whether that would

apply to the converse. *Dimick,* 293 U.S. at 300. Further cases have also held that the *Dimick* decision was directed at the power of judges, not of the legislature and, by virtue of the very context of the decision, related to modification of a jury verdict by a judge, not an enactment of a statute. *Franklin v. Mazda Motor Corp.,* 704 F.Supp. 1325 D.Md.,1989.

With respect to the right of a jury trial under the Seventh Amendment of the U.S. Constitution, it does not appear that the U.S. Supreme Court has addressed the constitutionality of state statutory caps. However, three Federal circuit courts of appeals have held that damage caps in medical malpractice suits do not violate a plaintiff's right to a jury trial under the Seventh Amendment. *Smith v. Botsford General Hospital,* 419 F.3d 513 (6th Cir. 2005); *Davis,* supra; *Boyd,* supra.

Although Appellants/Cross-Respondents are critical of this Court's reference to *Tull* in *Adams, supra,* they make no reference to the other case cited in tandem, *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989), in which the Supreme Court of Virginia upheld the State's cap on damages in medical malpractice cases. There, the plaintiffs were awarded $2,750,000 against two healthcare providers. In accordance with the State's statute, the total award was reduced to $750,000. Plaintiffs challenged the constitutionality of the statute, asserting that it violated their right to a trial by jury. The Court held that the plaintiffs' right to trial by jury was not violated, stating:

> "The limitation on medical malpractice recoveries . . . does nothing more than establish the outer limits of a remedy provided by the General Assembly. A remedy is a matter of law, not a matter of fact. . . . A trial court applies the remedy's limitation only *after* the jury has fulfilled its fact-finding function. Thus, [the statute] does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function in the judicial process."

Id. at 529. (Emphasis original.) This is the same rationale applied by the *Adams* Court. In addition, other courts have looked to *Etheridge* in upholding the constitutionality of damage limitations. *Boyd*, 877 F.2d at 1196 ("[O]nce the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function."); *Judd*, 103 P.3d at 144 ("[I]t's the jury's duty to determine the amount of damages a plaintiff in fact sustained, but it is up to the court to conform the jury's finding to applicable law."); *Gourley*, 663 N.W.2d at 75 ("The primary function of a jury has always been factfinding, which includes a determination of a plaintiff's damages. . . . The court, however, applies the law to the facts. . . . The remedy is a question of law, not fact, and is not a matter to be decided by the jury. . . . Instead, the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function."); *Evans*, 56 P3d at 1051

("Once the jury has ascertained the facts and assessed the damages . . . the constitutional mandate is satisfied, [and] it is the duty of the court to apply the law to the facts."); *Kirkland*, 4 P3d at 1120 ("[The statute] does not violate the right to a jury trial because the statute does not infringe upon the jury's right to decide cases. The jury is still allowed to act as the fact finder in personal injury cases. The statute simply limits the legal consequences of the jury's finding."); *Murphy*, 601 A.2d at 117 ("Once the jury has ascertained the facts and assessed the damages, however, the constitutional mandate is satisfied. . . . Thereafter, it is the duty of the court to apply the law to the facts."); *Wright*, 391 S.E.2d at 569 ("[T]he limitation in the Tort Claims Act does nothing more than establish the outer limits of a remedy provided by the legislature. A remedy is a matter of law, not a matter of fact.").

In the United States, at least 35 states establish that the right to trial by jury is "inviolate" in their respective State Constitutions, as does Missouri. Many states with this language in their Constitutions also have similar damage caps that have been upheld against constitutional challenges, including *Fein*, supra; *Kirkland v. Blaine County Med. Ctr.*, 4 P. 3d 1115 (Idaho 2000); *Murphy v. Edmonds*, 601 A. 2d 102 (Md. 1992); *Gourley*, supra; *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002); A*rbino v. Johnson & Johnson*, 880 N.E. 2d 420 (Ohio 2007); and *Knowles v. United States*, 544 N.W. 2d 183 (S.D. 1996).

Based upon Missouri case law, as well as similar holdings from foreign jurisdictions, the cap on non-economic damages does not offend the Right to Trial by Jury. Appellants/Cross-Respondents were allowed to fully litigate their causes of action, and have a jury determine the verdict and damages. As such, they were not denied their right to trial by jury under MO. CONST. ART. I, §22(a).

F. The cap does not violate the Separation of Powers, MO. CONST. ART. II, §I.

The non-economic damage limitations do not violate the Separation of Powers Clause. They do not function as a legislative "remittitur". Rather, they prescribe, as a matter of law, the outer limit of the remedy available against a particular defendant. Missouri's jury trial guarantee does not extend to the assessment of damages, so there would be no constitutional problem even if the statute did limit a particular jury's award, which it does not. *Gourley*, 663 N.W.2d 43.

The statute does not determine the amount of damages that can be awarded to a particular plaintiff, but rather sets the outer limit of liability for certain defendants as a matter of law. MO. REV. STAT. §538.210 (2008).

Appellants/Cross-Respondents place much reliance upon two foreign cases, *Best*, 689 N.E.2d 1057, and *Sofie v. Fireboard Corp.*, 771 P.2d 711 (Wash. 1989), to support their argument that MO. REV. STAT. §538.210 (2008) violates the separation of powers between Missouri's judicial and legislative branches by establishing a legislative remittitur. Both of those cases are distinguishable from

the case at hand. In Missouri, trial courts are authorized to exercise remittitur. MO. REV. STAT. §537.068 (2008). However, such a power does not extend to medical malpractice cases. MO. REV. STAT. §538.300 (2008). Unlike Illinois and Washington, Missouri courts are not empowered with remittitur in medical malpractice cases. It logically follows that since Missouri courts do not have the power to exercise remittitur in medical malpractice cases, the Missouri legislature did not usurp any such power by establishing damage caps in those types of cases.

Even in those states where remittitur and statutory damage caps co-exist, the caps have not been found to be in violation of the separation of powers by infringing upon the court's power of remittitur. *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. banc 2004); *Evans*, 56 P.3d 1046; *Kirkland*, 4 P.3d 1115. Missouri's legislature has the right to modify the common law and substantive law to eliminate or restrict causes of action. *In re Dyer*, 163 S.W.3d at 921; *Adams*, 832 S.W.2d at 905; and *Blaske*, 821 S.W.2d at 833. It thus logically, and rightfully, follows that if Missouri's legislature has the constitutional power to create and abolish causes of action, it also has the power to limit recovery in those causes of action. *Fisher*, 948 S.W.2d at 611; *Richardson*, 863 S.W.2d at 879; and *Winston*, 636 S.W.2d at 328. Given the holdings in these cases, MO. REV. STAT. §538.210 (2008) does not establish a legislative remittitur, but rather changes the substantive law by limiting recovery applicable to all medical malpractice cases.

The above rationale is consistent with holdings in other jurisdictions recognizing the constitutionality of statutory damage caps. In *Gourley*, 663

N.W.2d 43, the court held that statutory caps in medical malpractice cases did not constitute legislative remittitur or otherwise violate principles of separation of powers. The cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy. The ability to cap damages in a cause of action is a proper legislative function. *Id*. at 77. *See also Evans*, 56 P.3d at 1055-56; *Kirkland*, 4 P.3d at 1122; *Verba v. Gaphery*, 552 S.E.2d 406, 411 (W. Va. 2001) (citing *Franklin*, 704 F. Supp. at 1336).

For three sound reasons, Appellants/Cross-Respondents are incorrect in their assertion that the ruling in *Fust*, 947 S.W.2d 424 is no longer good law. First, Appellants/Cross-Respondents incorrectly state that the *Kilmer* Court held that the Missouri Dram Shop Act violated the separation of powers. Rather, the *Kilmer* Court held that the prerequisite, i.e., that the prosecuting attorney first file charges and obtain a conviction before a Dram Shop Claim could be pursued, violated the separation of powers, but otherwise left the constitutionality of the remainder of the Missouri Dram Shop Act intact. An individual was still restricted to bringing a cause of action only against establishments that served alcohol to an obviously intoxicated person. Second, the provision at issue in the Missouri Dram Shop Act was a procedural bar to a cause of action, while authorizing suit against an establishment for serving alcohol by the drink to an obviously intoxicated patron was a limitation on a cause of action. Third, the fact that *Simpson* was the only case cited by the *Fust* Court in support of its holding should not negate that holding. The *Simpson* Court supported its holding by citing *Chapman v. State*

Social Security Commission, 147 S.W.2d 157, 1580-59 (Mo. App. 1941), where it was noted that "the legislature is entitled to provide reasonable restriction or expansion of causes of action which it creates". This is still good law. Further, it has long been held that the Missouri legislature has large discretion in determining the means through which the laws shall be exercised. *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 650 (Mo. 1931).

The Missouri legislature has the power to create and limit causes of action and modify the common law, especially with respect to recovery. This includes the right of the legislature to place damage caps on causes of action and does not constitute a legislative remittitur. Damages limitations are part of the remedy. The legislature may alter the common law and change or abrogate remedies. Therefore, MO. REV. STAT. §538.210 (2008) does not violate MO. CONST. ART. II, §I.

CROSS-APPELLANTS' APPEAL

STANDARD OF REVIEW

The standard of review as to Points Relied on I, II, IV, V, VI, X and XI is an abuse of discretion when the point asserts error regarding the admission of evidence. *Roy v. Missouri Pacific Railroad Co.*, 43 S.W.3d 351. Abuse of discretion occurs when the trial court's ruling is against the logic of the circumstances and is so unreasonable and arbitrary that the ruling shocks the court's sense of justice and indicates a lack of careful consideration. *State v. Moore*, 88 S.W.3d 31, 35-36 (Mo. App. E.D. 2002). A defendant must show there was a reasonable probability that without the admission of the evidence, the verdict would have been different. *Id*.

The standard of review for Points Relied on III and VII is de novo. "Whether or not a jury was properly instructed is a question of law, which the court reviews *de novo*" *Kopp v. Home Furnishing Center*, 210 S.W.3d 319, 328 (Mo. App. W.D. 2006) *citing Harvey v. Washington*, 95 S.W.3d 93, 98 (Mo. banc 2003). An instruction shall be given or refused by the trial court, according to the law and the evidence in the case. Supreme Court Rule 70.02(a). "To reverse on grounds of instructional error, the party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury." If the Court determines that Points Relied on III and VII are admission of evidence arguments, then the standard of review is abuse of discretion. *Roy v. Missouri Pacific Railroad Co.*, 43 S.W.3d 351 (Mo. App. W.D. 2001). Abuse of discretion occurs

when the trial court's ruling is against the logic of the circumstances and is so unreasonable and arbitrary that the ruling shocks the court's sense of justice and indicates a lack of careful consideration. *Moore*, 88 S.W.3d at 35-36. A defendant must show there was a reasonable probability that without the admission of the evidence, the verdict would have been different. *Id*.

The standard of review for Point Relied on VIII is de novo, but this Court may determine it is an abuse of discretion. "Whether or not a jury was properly instructed is a question of law, which the court reviews *de novo*" *Kopp*, 210 S.W.3d at 328 *citing Harvey*, 95 S.W.3d at 98. An instruction shall be given or refused by the trial court, according to the law and the evidence in the case. Supreme Court Rule 70.02(a). "To reverse on grounds of instructional error, the party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury." "The length of time a jury is allowed to deliberate and the decision whether to give the hammer instruction is within the discretion of the trial court. Abuse of that discretion arises only if giving the hammer instruction coerces the jury's verdict". *City of St. Charles v. Hal-Tuc, Inc.*, 841 S.W.2d 781, 782 (Mo. App. E.D. 1992) *quoting State v. Starks*, 820 S.W.2d 527, 529 (Mo. App. 1991).

The standard of review for Point IX is whether the Appellants/Cross-Respondents made a submissible case. A reviewing court determines if the trial court erred in denying a motion for a directed verdict by determining if the plaintiff has made a submissible case. *Coggins v. Laclede Gas Co.*, 37 S.W.3d

335, 338 (Mo. App. E.D. 2000). To be submissible, a Plaintiff must present legal and substantial evidence on each and every fact essential to liability. *Giddens v. Kansas City S. Ry. Co.*, 29 S.W. 3d 813, 818 (Mo. banc 2000). In determining whether the Appellants/Cross-Respondents made a submissible case, the Court must consider the evidence, and all reasonable inferences therefrom, in the light most favorable to the Appellants/Cross-Respondents. *Cline v. Friedman & Associates, Inc.*, 882 S.W.2d 754, 758 (Mo. App. E.D. 1994). Determining whether the Appellants/Cross-Respondents made a submissible case is a matter of pure law. *Envtl Prot., Inspection, and Consulting, Inc. v. City of Kansas City, Missouri*, 37 S.W.3d 360, 369 (Mo. App. W.D. 2000). When a grant or denial of a directed verdict is based on a matter of law, the trial court's decision must be reviewed de novo, and the reviewing Court may substitute its own judgment for that of the trial court. *See Kinetic Energy Dev. Corp. v. Trigen Energy Corp.*, 22 S.W.3d 691, 697 (Mo. App. W.D. 1999). "The standard of review is essentially the same for the denial of a motion for JNOV and a motion for directed verdict". *Dhyne v. State Farm Fire and Casualty Co.*, 188 S.W.3d 454, 456 (Mo. banc 2006).

POINTS RELIED ON

1. THE TRIAL COURT ERRED IN ALLOWING DR. ROBERT CLARK TO TESTIFY AND OFFER "EXPERT" OPINIONS BECAUSE HE IS NOT A LICENSED PHYSICIAN AND IS NOT LEGALLY QUALIFIED TO OFFER MEDICAL OPINION TESTIMONY AND HE LACKS THE APPROPRIATE QUALIFICATIONS TO TESTIFY ABOUT THE STANDARD OF CARE OF AN ELECTROPHYSIOLOGIST OR CARDIOLOGIST.

CASES:

Hiers v. Lemley, 834 S.W.2d 729 (Mo. banc 1992)

State v. Love, 963 S.W.2d 236 (Mo. App. W.D. 1997)

II. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY AND/OR EVIDENCE AS TO PROJECTED FUTURE DAMAGES AND FUTURE MEDICAL EXPENSES BECAUSE SUCH EVIDENCE WAS SPECULATIVE AT BEST.

CASES:

Greer v. Continental Gaming Co., 5 S.W.3d 559 (Mo. App. W.D. 1999)

McKersie v. Barnes Hospital, 912 S.W.2d 562, 566 (Mo. App. E.D. 1995)

Smith v. AF & L Ins. Co., 147 S.W.3d 767, 780 (Mo. App. E.D. 2004)

Wilson v. Lockwood, 711 S.W.2d 545 (Mo. App. W.D. 1986)

III. THE TRIAL COURT ERRED IN NOT REDUCING APPELLANTS/CROSS-RESPONDENTS' FUTURE DAMAGES TO PRESENT VALUE, AS REQUIRED BY STATUTE, OR IN REQUIRING THAT THE EVIDENCE THEREOF BE PRESENTED AT PRESENT VALUE.

CASES:

Eagle American Insurance Company v. Frencho, 675 N.E.2d 1312, 1317 (Ohio Ct. App. 10th D. 1996)

St. Louis Southwestern Railway Company v. Dickerson, 470 U.S. 409 (1985)

IV. THE TRIAL COURT ERRED IN PERMITTING APPELLANTS/CROSS-RESPONDENTS TO ADMIT UNSWORN STATEMENTS BY OUT OF COURT DECLARANTS (CARDIOLOGISTS IN ARIZONA) INTO EVIDENCE REGARDING THE SOURCE OF APPELLANTS/CROSS-RESPONDENT'S MRSA INFECTION, DENYING RESPONDENTS/CROSS-APPELLANTS THE RIGHT OF CROSS-EXAMINATION.

CASES:

Long v. St. John's Regional Health Center, Inc., 98 S.W.3d 601, 607 (Mo. App. S.D. 2003)

State v. Bell, 2009 WL 62896 (Mo. App. W.D. 2009)

State v. Davidson, 242 S.W.3d 409, 416-417 (Mo. App. E.D. 2008)

State v. Kemp, 212 S.W.3d 135, 146 (Mo. banc 2007)

V. THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW RESPONDENTS/CROSS-APPELLANTS TO CROSS-EXAMINE APPELLANTS/CROSS-RESPONDENTS' EXPERT (DR. BELZ) REGARDING THE AMOUNT OF INCOME HE MAKES FROM HIS EXPERT WITNESS WORK.

CASES:

State ex rel. Creighton v. Jackson, 879 S.W.2d 639 (Mo. App. W.D. 1994)

State v. Love, 963 S.W.2d 236 (Mo. App. W.D. 1997)

VI. THE TRIAL COURT ERRED BY IMPROPERLY ALLOWING APPELLANTS/CROSS-RESPONDENTS TO ARGUE AND SHOW THE JURY IN CLOSING ARGUMENT A PRINTED PORTION OF DR. SHAPIRO'S DEPOSITION SINCE SAID DEPOSITION WAS NEVER IN EVIDENCE.

CASES:

Friend v. Yokohama Tire Corporation, 904 S.W.2d 575 (Mo. App. S.D. 1995)

Kopp v. C.C. Caldwell Optical Company, 547 S.W.2d 872 (Mo. App. K.C. 1977)

Robinson v. Empiregas Inc. of Hartville, 906 S.W.2d 829, 837

(Mo. App. S.D. 1995)

VII. THE TRIAL COURT ERRED IN ALLOWING JURY INSTRUCTION #9, WHICH WAS THE VERDICT DIRECTOR AGAINST THESE RESPONDENTS/CROSS-APPELLANTS, SINCE APPELLANTS/CROSS-RESPONDENTS DID NOT MAKE A SUBMISSIBLE CASE AND THE WORDS "ADDED RISK OF INFECTION" ARE VAGUE, OVERBROAD, AND CONSTITUTED A ROVING COMMISSION.

CASES:

Grindstaff v. Tygett, 655 S.W.2d 70, 72 (Mo. App. 1983)

Newall Rubbersmaid, Inc. v. Efficient Solutions, Inc., 252 S.W.3d 164, 174 (Mo. App. 2007)

VIII. THE TRIAL COURT ERRED IN DENYING RESPONDENTS/CROSS-APPELLANTS' MOTION FOR MISTRIAL WHEN THE JURY WAS DEADLOCKED, AND IN SENDING A SECOND "HAMMER" INSTRUCTION, THEREBY VIOLATING RESPONDENTS/CROSS-APPELLANTS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND MO. CONST. ART. I, §10 AND §18(a), THEREBY COERCING A VERDICT IN FAVOR OF APPELLANTS/CROSS-RESPONDENTS.

CASES:

Klein v. General Electric Company, 714 S.W.2d 896, 906 (Mo. App. E.D. 1986)

Pasalich v. Swanson, 89 S.W.3d 555, 557 (Mo. App. W.D. 2002)

State v. Johnson, 948 S.W.2d 161, 164 (Mo. App. E.D. 1997)

State v. Wells, 639 S.W.2d 563, 568 (Mo. banc 1982)

IX. THE TRIAL COURT ERRED IN DENYING RESPONDENTS/CROSS-APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND/OR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE APPELLANTS/CROSS-RESPONDENTS FAILED TO MAKE A SUBMISSIBLE CASE BECAUSE THEY FAILED TO PROVE THAT THE ALLEGED NEGLIGENCE OF THE RESPONDENTS/CROSS-APPELLANTS CAUSED THE CLAIMED INJURY TO THE APPELLANTS/CROSS-RESPONDENTS.

CASES:

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993)

Mueller v. Bauer, 54 S.W.3d 652 (Mo. App. E.D. 2001)

Townsend v. Eastern Chemical Waste Systems, 234 S.W.3d 452 (Mo. App. 2007)

X. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE THAT WAS SPECULATIVE, TO THE DETRIMENT AND PREJUDICE OF THESE RESPONDENTS/CROSS-APPELLANTS.

CASES:

Burns v. Elk River Ambulance, Inc., 55 S.W.3d 466 (Mo. App. S.D. 2001)

Perkins v. Kroger Co., 592 S.W.2d 292 (Mo. App. E.D. 1979)

XI. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY AND/OR EVIDENCE REGARDING THE FULL AMOUNT OF ANY MEDICAL BILL THAT HAD BEEN ADJUSTED OR OTHERWISE WAS NOT "PAID" BY, OR ON BEHALF OF, THE APPELLANTS/CROSS-RESPONDENTS, IN VIOLATION OF STATUTE.

CASES:

Ameristar Jet Charter, Inc. v. Dodson Intern'l Parts, Inc., 155 S.W.3d 50 (Mo. banc 2005)

Kansas City Star Co. v. Fulson, 859 S.W. 2d 934 (Mo. App. W.D. 1993)

Katiuzhinsky v. Perry, 152 Cal. App. 4th 1288 (Cal. App. 3rd Dist. 2007)

MFA Petroleum Company v. Director of Revenue, 279 S.W.3d 177 (Mo. banc 2009)

ARGUMENT

1. THE TRIAL COURT ERRED IN ALLOWING DR. ROBERT CLARK TO TESTIFY AND OFFER "EXPERT" OPINIONS BECAUSE HE IS NOT A LICENSED PHYSICIAN AND IS NOT LEGALLY QUALIFIED TO OFFER MEDICAL OPINION TESTIMONY AND HE LACKS THE APPROPRIATE QUALIFICATIONS TO TESTIFY ABOUT THE STANDARD OF CARE OF AN ELECTROPHYSIOLOGIST OR CARDIOLOGIST.

ARGUMENT

These Respondents/Cross-Appellants sought, via motion in limine, and throughout the trial, to preclude Appellants/Cross-Respondents from offering any purported expert testimony by Dr. Robert Clark on the grounds that Dr. Clark was not legally qualified to testify in this case. (L.F. 143 and Tr. Vol. 3/4-7, 29, 151-152). The definition of "legally qualified" is set out in MO. REV. STAT. §538.225 (2008), which states, "legally qualified health care provider" means a health care provider **licensed** in this state or any other state. Dr. Clark is not a licensed physician (Tr. Vol. 3/4-7, 29, 151-152), and as such, would have been legally incapable of providing the required "affidavit of merit" under MO. REV. STAT. §538.225 (2008) and therefore, should have been prohibited from testifying as an

expert at trial in this case. The Appellants/Cross-Respondents will argue that MO. REV. STAT. §490.065 (2008) is the only statute that governs the qualifications of an expert to testify, which states simply that an expert is qualified based on his knowledge, skill, experience, training, or education. However, MO. REV. STAT. §490.065 was enacted in 1989 prior to Revised MO. REV. STAT. §538.225 (2008). In addition, MO. REV. STAT. §538.225 (2008) applies specifically to medical malpractice cases and not other types of cases, unlike MO. REV. STAT. §490.065 (2008). The outcome of this case was materially affected by allowing Dr. Clark to testify, which was improper and prejudicial to Respondents/Cross-Appellants.

In addition, the trial court erred when it allowed Dr. Clark to testify on issues related to the cardiology or electrophysiology "standard of care", as Dr. Clark lacks the appropriate qualifications in that specialty. Appellants/Cross-Respondents' attorney asked Dr. Clark whether the permanent pacemaker needed to be put in at the time it was. (Tr. Vol. 3/84-87, 136-141, 160-151, 180-182, 189-190). These Respondents/Cross-Appellants objected to such inquiry because Dr. Clark was not qualified to answer such a question as he is not a cardiologist or electrophysiologist. (Tr. Vol. 3/31). Appellants/Cross-Respondents' attorney asked Dr. Clark whether Respondent/Cross-Appellant Shapiro failed to timely treat Mr. Klotz with antibiotics or whether his failure to get an infectious disease consult was below the standard of care. (Tr. Vol. 3/109-112, 117, 129-131, 135-136, 150-151, 178-179).

The definition of the standard of care is articulated in MAI 11.06, which states that a defendant must fail to exercise the degree of skill ordinarily used under the same or similar circumstances by members of his or her profession. Dr. Clark was not qualified to testify about the standard of care as it related to Respondent/Cross-Appellant Shapiro since Dr. Clark was not a member of Dr. Shapiro's profession and never was a member of his profession, i.e. a cardiologist or electrophysiologist.

Dr. Clark was not an expert in the area in which he proposed to testify, i.e. cardiology or electrophysiology, and therefore such testimony should have been excluded. *State v. Love*, 963 S.W.2d at 241. Even if the plaintiffs allege that an expert does not have to testify only in his specialty, Dr. Clark had limited or no experience or training in cardiology or electrophysiology either. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo. banc 1992).

The trial court incorrectly overruled these Respondents/Cross-Appellants objections and allowed Dr. Clark to testify on the subject matter even though he was not qualified to do so, thereby prejudicing Respondents/Cross-Appellants.

II. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY AND/OR EVIDENCE AS TO PROJECTED FUTURE DAMAGES AND FUTURE MEDICAL EXPENSES BECAUSE SUCH EVIDENCE WAS SPECULATIVE AT BEST.

ARGUMENT

Allowing testimony and/or evidence as to projected future damages and future medical expenses was speculative and highly prejudicial. The trial court erroneously allowed Appellants/Cross-Respondents' expert, Dr. Norbert Belz, to testify to the cost of the alleged future medical care needs of the Plaintiff. (Tr. Vol. 3/216-269). In addition, future medical expenses are not only speculative, but because they are likely to be "adjusted" from the projected figures by any healthcare provider who provides such services to Appellants/Cross-Respondents, it would result in a double windfall recovery if awarded, in violation of Missouri law limiting economic damages to only those paid by, or on behalf, of Appellants/Cross-Respondents. *Greer v. Continental Gaming Co.*, 5 S.W.3d 559 (Mo. App. W.D. 1999).

Where evidence of alleged money damages is speculative on its face (that is, where such events may or may not happen), it should not be permitted. *Greer*, 5 S.W.3d at 566 ("consequences which are contingent, speculative or merely possible are not proper to be considered by the jury in ascertaining the damages,

for it would be plainly unjust to compel one to pay damages for results that may or may not ensue".) *See Smith v. AF & L Ins. Co.*, 147 S.W.3d 767, 780 (Mo. App. E.D. 2004) (holding that an insured under a long-term care insurance policy could not recover damages based on her life expectancy at the time of trial, as such an award was impermissibly speculative as it might allow the insured or her estate to recover excess funds should she die before her calculated life expectancy or recover payments which, by reason of the insured's death, might never accrue).

In *McKersie v. Barnes Hospital*, 912 S.W.2d 562, 566 (Mo. App. E.D. 1995), the court held, "To receive an award of future damages, the plaintiff must adduce competent medical evidence showing future physical conditions of the kind asserted as damages will result from the original injury". *citing Zoeller v. Terminal Railroad Ass'n of St. Louis*, 407 S.W.2d 73, 78 (Mo. App. St. L. 1966). "The degree of probability of such damages must be greater than a mere likelihood; it must be reasonably certain to ensue." Id. "Consequences which are contingent, speculative, or merely possible may not be considered". Id. *See also Wilson v. Lockwood*, 711 S.W.2d 545 (Mo. App. W.D. 1986). The uncertainty of Mr. Klotz's future medical needs was discussed at trial (Tr. Vol. 4, 78)

Allowing testimony of speculative future care needs and future medical expenses such as, driver's evaluation and training, a power scooter and a wheelchair (which Mr. Klotz does not use now), a personal care assistant, a licensed practical nurse, a housecleaner, and an elevator, etc., into evidence significantly prejudiced Respondents/Cross-Appellants.

III. THE TRIAL COURT ERRED IN NOT REDUCING APPELLANTS/CROSS-RESPONDENTS' FUTURE DAMAGES TO PRESENT VALUE, AS REQUIRED BY STATUTE, OR IN REQUIRING THAT THE EVIDENCE THEREOF BE PRESENTED AT PRESENT VALUE.

ARGUMENT

Appellants/Cross-Respondents' future damages, if even legitimately allowed, should have been presented to the jury in terms of the present value of those damages pursuant to MO. REV. STAT. §538.215 (2008), or the Court should have reduced the verdict on those damages to present value. Respondents/Cross-Appellants continually contended before and during trial that the Appellants/Cross-Respondents were required to put on evidence of present value so that the jury could assess damages, in the event of a verdict for Appellants/Cross-Respondents, in terms of present value. Respondents/Cross-Appellants filed a proposed alternative Jury Instruction. (L.F. 390 and Tr. Vol. 7/79-88). Appellants/Cross-Respondents did not offer the testimony of an economist during the trial who could have calculated their future damage claims in terms of present value, and the trial court erred in allowing the Appellants/Cross-

Respondents to present future damage evidence without such "present value" testimony.

Throughout the trial, these Respondents/Cross-Appellants requested that the trial court follow MO. REV. STAT. §538.215 (2008), which states "All future damages which are itemized…**shall** be expressed by the trier of fact at present value" and to give instructions to the jury that the jury was to reduce any future damages to their present value.

The trial court erred in denying all of Respondents/Cross-Appellants' requests during trial which sought to have any future damages evidence presented at present value, and in further refusing to otherwise reduce assessed future damages to present value before judgment as required by statute. The trial court, in ruling that it would not utilize the mandatory requirement of MO. REV. STAT. §538.215 (2008), stated that its rulings on the subject were being made "as a matter of law", and as such, directly contradicted MO. REV. STAT. §538.215 (2008). (Tr. Vol. 3/126-127; Vol 4/64, 71-73).

Respondents/Cross-Appellants further objected to the testimony of Appellants/Cross-Respondents' expert, Dr. Norbert Belz, regarding his opinion about Appellants/Cross-Respondents' future damages. The trial court overruled Respondents/Cross-Appellants' objections and allowed Dr. Belz to testify about the Appellants/Cross-Respondents' future damages, without any comment as to what the present value of those future damages would be. (Tr. Vol. 3/126-127; Vol. 4/64; 71-73). Dr. Belz even stated on his report (S.L.F. 1978), that his

calculations needed to be adjusted to present value. (S.L.F. 1978). That statement was redacted from the report that was initially shown by Appellants/Cross-Respondents to the jury. (S.L.F. 2033).

The trial court erroneously ruled numerous times throughout the trial, as a matter of law, that evidence as to present value did not need to be offered by Plaintiff, and that Respondents/Cross-Appellant could not question Dr. Belz regarding his comments at the beginning of his report about his acknowledged need to reduce his future damage figures to present value. (Tr. Vol. 3/126-127; Vol. 4/64, 71-73). Later in the trial Appellants/Cross-Respondents' attorneys apparently reconsidered the Court's previous rulings regarding present value, and the refusal to allow Respondents/Cross-Appellants to cross-examine about present value and suggest that they would allow the original (unredacted) Belz report to go into evidence. (Tr. Vol. 4/68-73; Vol. 4/110; Vol. 7/80-87). However, Appellants/Cross-Respondents' concession about present value issues was not made until **after** Dr. Belz had left not only the witness stand, but the courtroom and the courthouse entirely. While Appellants/Cross-Respondents offered, and the Court agreed to allow, Respondents/Cross-Appellants to read their "offer of proof" of Dr. Belz to the jury, that would have been extremely ineffective and prejudicial to the Respondents/Cross-Appellants. (Tr. Vol. 7/80-87). Respondents/Cross-Appellants were unable to fully cross-examine Dr. Belz before the jury, and the jury was never provided with any evidence as to present value, or what the amount of damages would have been had they been reduced to present value. (Whole Tr.).

In *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409 (1985) the U.S. Supreme Court dealt with a Missouri case which involved claims under Federal Employment Labor Act (FELA) While our case is not a FELA case, the relevant statute here (MO. REV. STAT. §538.215 (2008)) is similar to the law in FELA cases. Under FELA, future damages must be expressed in terms of their present value. *Id*. The Supreme Court stated, "it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damages award is error". *Id*. at 412. The same result was reached in *Eagle American Insurance Company v. Frencho*, 675 N.E.2d 1312, 1317 (Ohio Ct. App. 10th D. 1996) which held that the failure to instruct the jury on present value of future damages was incorrect as a matter of law.

Like FELA, the requirement to express future damages at present value is mandated by statute in medical malpractice cases. Mo. Rev. Stat. §538.215 (2008) Therefore, failure to properly instruct the jury on how to express their damage award pursuant to that statute is manifest error.

The evidence presented, over Respondents/Cross-Appellants' objections, with regard to future damages was misleading and prejudicial, as it artificially inflated damages. The trial court erred in overruling all of Respondents/Cross-Appellants' objections regarding the above, including overruling Respondents/Cross-Appellants' proffered Instruction A.

IV. THE TRIAL COURT ERRED IN PERMITTING APPELLANTS/CROSS-RESPONDENTS TO ADMIT UNSWORN STATEMENTS BY OUT OF COURT DECLARANTS (CARDIOLOGISTS IN ARIZONA) INTO EVIDENCE REGARDING THE SOURCE OF APPELLANTS/CROSS-RESPONDENT'S MRSA INFECTION, DENYING RESPONDENTS/CROSS-APPELLANTS THE RIGHT OF CROSS-EXAMINATION.

ARGUMENT

The trial court erroneously permitted Appellants/Cross-Respondents to question witnesses and present to the jury statements (through medical records) made by cardiologists in Arizona (Drs. Caskey and Brady) regarding the source of the Appellant/Cross-Respondent's, James Klotz, MRSA infection. (Tr. Vol. 2/213-219, 253-254; Vol. 3/186). Drs. Caskey and Brady were not present in the Court and were never deposed. (Whole Tr.) "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value". *State v. Kemp*, 212 S.W.3d 135, 146 (Mo. banc 2007).

Such evidence/statements violated the confrontation clause. See *State v. Bell*, 2009 WL 62896 (Mo. App. W.D. 2009) where the "admission of a medical examiner's testimony about the opinions of a former medical examiner who prepared an autopsy report violated defendant's Sixth Amended right of

confrontation". The business-record exception to the hearsay rule, which Appellants/Cross-Respondents suggest resolve this issue, in fact does not overcome a defendant's Confrontation Clause right. *State v. Davidson*, 242 S.W.3d 409, 416-417 (Mo. App. E.D. 2008). The medical records of Drs. Caskey and Brady that were shown to the jury were not the opinions of the Appellants/Cross-Respondents' retained experts, but instead, were offered as the conclusions of Drs. Caskey and Brady, two of plaintiffs' treating physicians, impliedly reliable therefore, and without the stigma of having been paid for their testimony.

No stipulation as to the authenticity of medical records can cover statements that are otherwise exludable such as those that are self-serving, not necessary for treatment or diagnosis, or not covered by a hearsay exception. *Long v. St. John's Regional Health Center, Inc.*, 98 S.W.3d 601, 607 (Mo. App. S.D. 2003). See also *Kauffman v. Tri-State Motor Transit Company*, 28 S.W.3d 369, 372 (Mo. App. S.D. 2000) citing *Kitchen v. Wilson*, 335 S.W.2d 38, 43 (Mo. 1960), in which the Court stated:

> "Business records as an exception to the hearsay rule, the Law does not make relevant that which is not otherwise relevant, nor make all business and professional records competent evidence regardless of by whom, in what manner, or for what purpose they were compiled or offered, and when the business record is not of the character

comprehended by the Uniform Law, it is relegated to the status of hearsay and as such is not admissible in evidence."

When, where and how Mr. Klotz' MRSA infection was contracted was irrelevant to Drs. Caskey and Brady's roles in the case as treating physicians, because regardless of where it was contracted, it had to be treated and managed the same way. Here, however, the evidence/statements by these doctors, contained only in medical records and not given under oath or subject to cross-examination, were impermissible hearsay (*Long*, 98 S.W.3d at 601, *Kemp*, 212 S.W.3d at 146, and *Bell*, 2009 WL 62896) and were prejudicial to Respondents/Cross-Appellants. The cause or origin of Mr. Klotz' infection was the central "causation" issue at trial. It is unclear how much weight the jury placed on the statements read into evidence from the medical records which quoted Dr. Caskey and Brady on this central issue--but it was clearly so critical to Plaintiffs' case that they explicitly referred to these statements in closing argument as supportive of their causation theory. (Tr., Vol. 8/66-68). Without the opportunity to cross-examine these doctors, the jury did not have a chance to learn if their comments were strongly supported by data, or simply rogue speculation based on their limited knowledge at the time. In fact, no foundation was laid for the basis of their opinions, which, had they been retained experts, would have been an evidentiary prerequisite to the testimony.

Clearly it was improper to allow these definitive statements into evidence over Respondents/Cross-Appellants' objections. There is a reasonable probability

that if this evidence was excluded, as it should have been, the verdict would have been different.

V. THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW RESPONDENTS/CROSS-APPELLANTS TO CROSS-EXAMINE APPELLANTS/CROSS-RESPONDENTS' EXPERT (DR. BELZ) REGARDING THE AMOUNT OF INCOME HE MAKES FROM HIS EXPERT WITNESS WORK.

ARGUMENT

The trial court refused to allow Respondents/Cross-Appellants to question Appellants/Cross-Respondents' expert, Dr. Belz, regarding the amount of income he makes from his expert witness work. (Tr. Vol. 3/8-9). Such inquiry was proper and appropriate cross-examination of an expert witness to test the expert's credibility and bias. *State v. Love*, 963 S.W.2d 236, *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639 (Mo. App. W.D. 1994).

The trial court's refusal to allow such evidence severely prejudiced Respondents/Cross-Appellants.

VI. THE TRIAL COURT ERRED BY IMPROPERLY ALLOWING APPELLANTS/CROSS-RESPONDENTS TO ARGUE AND SHOW THE JURY IN CLOSING ARGUMENT A PRINTED PORTION OF DR. SHAPIRO'S DEPOSITION SINCE SAID DEPOSITION WAS NEVER IN EVIDENCE.

ARGUMENT

During the Appellants/Cross-Respondents' rebuttal closing, the Appellants/Cross-Respondents' attorney displayed a portion of Respondent/Cross-Appellant Shapiro's pre-trial deposition. (Tr. Vol. 8/63-64). Respondents/Cross-Appellants objected because none of Dr. Shapiro's deposition was read, shown or displayed to the jury during the trial. (Tr. Vol. 8/63-64). The Appellants/Cross-Respondents' use of Shapiro's deposition was improper in closing since it was not ever introduced to the jury as evidence. *Robinson v. Empiregas Inc. of Hartville*, 906 S.W.2d 829, 837 (Mo. App. S.D. 1995).

"Closing arguments of counsel must be based upon the evidence". *Id*. In *Kopp v. C.C. Caldwell Optical Company*, 547 S.W.2d 872 (Mo. App. K.C. 1977), counsel for the defendant, in closing argument, referenced excluded portions of a document. The court stated, "A statement by counsel in argument of facts not in evidence or a misstatement of the evidence is generally regarded as reversible error". *Id*. at 878-879. *See also*, *Friend v. Yokohama Tire Corporation*, 904 S.W.2d 575 (Mo. App. S.D. 1995).

The trial court ruled that it did not recall if the deposition was in evidence, but overruled Respondents/Cross-Appellants ' objection. (Tr. Vol. 8/63-64). Such ruling was improper and significantly prejudiced Respondents/Cross-Appellants.

VII. THE TRIAL COURT ERRED IN ALLOWING JURY INSTRUCTION #9, WHICH WAS THE VERDICT DIRECTOR AGAINST THESE RESPONDENTS/CROSS-APPELLANTS, SINCE APPELLANTS/CROSS-RESPONDENTS DID NOT MAKE A SUBMISSIBLE CASE AND THE WORDS "ADDED RISK OF INFECTION" ARE VAGUE, OVERBROAD, AND CONSTITUTED A ROVING COMMISSION.

ARGUMENT

Jury Instruction #9 was improper because it continued the words "added risk of infection" in the second disjunctive statement. (L.F. 400 and Tr. Vol. 7/78-79). Such words are vague, overbroad, and constituted a roving commission. See *Grindstaff v. Tygett*, 655 S.W.2d 70, 72 (Mo. App. 1983). An instruction results in a "roving commission" when "it assumes a disputed fact or posits an 'abstract legal question that allows the jury to roam freely through the evidence and choose any facts that suited its fancy or its perception of logic to impose liability." *Newall Rubbersmaid, Inc. v. Efficient Solutions, Inc.*, 252 S.W.3d 164, 174 (Mo. App. 2007).

The trial court's error resulted in misleading and confusing the jury and causing prejudice to Respondents/Cross-Appellants.

VIII. THE TRIAL COURT ERRED IN DENYING RESPONDENTS/CROSS-APPELLANTS' MOTION FOR MISTRIAL WHEN THE JURY WAS DEADLOCKED, AND IN SENDING A SECOND "HAMMER" INSTRUCTION, THEREBY VIOLATING RESPONDENTS/CROSS-APPELLANTS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND MO. CONST. ART. I, §10 AND §18(a), THEREBY COERCING A VERDICT IN FAVOR OF APPELLANTS/CROSS-RESPONDENTS.

ARGUMENT

The jury sent a note back at approximately 3:55 p.m. on July 30, 2008 during jury deliberations indicating that there was a "standstill" in the jury room. (S.L.F. 2297). The judge sent a "hammer" instruction. (S.L.F. 2300). At approximately 5:08 p.m., the jury sent another note indicating that a juror would not come to a reasonable conclusion. (S.L.F. 2299). Respondents/Cross-Appellants moved for a mistrial because the jury was deadlocked and the jury had already been given a "hammer" instruction. (Tr. Vol. 8/74 and Supplemental Trial Tr. 7/30/08). Over Respondents/Cross-Appellants' objections, the trial judge personally spoke to the jury and gave a non-MAI "hammer" instruction. (Supplemental Trial Tr. 7/30/08, A75-A78).

The trial court erred in denying Respondents/Cross-Appellants' motion for mistrial and instead went and spoke directly with the jury, outside the present of the attorneys and gave a non-approved second "hammer" instruction. This "hammer" instruction did **not** conform with the Notes on Use. (A75-A78). *State v. Johnson*, 948 S.W.2d 161, 164 (Mo. App. E.D. 1997), *State v. Hayes*, 563 S.W.2d 11 (Mo. banc 1978). The jury deliberated for a significantly short period of time after the second "hammer" instruction was given. (Tr. Vol. 8/74).

"A trial court's admonitions to a jury regarding its duties and powers when the jury is deadlocked has been held proper. Specifically, the use of MAI-CR 1.10 ("hammer" instruction) has been held proper in civil cases". *Klein v. General Electric Company*, 714 S.W.2d 896, 906 (Mo. App. E.D. 1986) (parenthetical added). Here, however, the trial court's 2nd hammer instruction was not proper because it was not given to the jury in writing. In addition, "When this instruction is given, however, 'in addition to being read to the jury, it shall be handed to the jury. It shall be numbered and, when returned by the jury, filed with the other instructions of the court as provided in Rule 20.02(f)'…The requirement that this instruction be given in writing to the jury appears to be absolute". *State v. Wells*, 639 S.W.2d 563, 568 (Mo. banc 1982). In the civil case of *Pasalich v. Swanson*, 89 S.W.3d 555, 557 (Mo. App. W.D. 2002), the trial court granted a new trial on the grounds that the "hammer" instruction was only given to the jury orally. The granting of the new trial on those grounds was upheld by the Court of Appeals. *Id*. at 564.

The trial court erred by violating Respondents/Cross-Appellants rights to due process and a fair trial under the U.S. CONST. AMEND. 5th and 14th and MO. CONST. ART. I, §10 and §18(a). The trial court's second "hammer" coerced a verdict, thereby prejudicing Respondents/Cross-Appellants. Such actions of the trial court were an abuse of discretion.

IX. THE TRIAL COURT ERRED IN DENYING RESPONDENTS/CROSS-APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND/OR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE APPELLANTS/CROSS-RESPONDENTS FAILED TO MAKE A SUBMISSIBLE CASE BECAUSE THEY FAILED TO PROVE THAT THE ALLEGED NEGLIGENCE OF THE RESPONDENTS/CROSS-APPELLANTS CAUSED THE CLAIMED INJURY TO THE APPELLANTS/CROSS-RESPONDENTS.

ARGUMENT

The Appellants/Cross-Respondents failed to prove any causal connection between the alleged negligence and the injury that was claimed. The evidence of causation that the Appellants/Cross-Respondents produced was strictly opinion testimony that was tenuous and speculative. On March 17, 2004, Mr. Klotz had pain in his chest, an EKG showed he was having a heart attack, and after he arrived at the hospital his heart stopped. (Tr. Vol.2/130-131). Mr. Klotz was given an IV before arriving at the hospital. (Tr. Vol. 2/131). A temporary pacemaker was put into Mr. Klotz on March 20, 2004 to prevent his heart from going too slowly. (Tr. Vol. 2/153-154). A permanent pacemaker was then put into Mr. Klotz on March 22, 2004. (Tr. Vol. 2/155). Mr. Klotz was discharged from St. Anthony's Medical Center on March 24, 2004. (Tr. Vol. 2/155). Mr. Klotz did not go to another hospital or see any physician for any sickness until

April 27, 2004. (Tr. Vol. 3/29). At that time, he went to the hospital in Arizona where he was diagnosed with a staph infection. (Tr. Vol. 3/29, 58).

Appellants/Cross-Respondents' expert, Dr. Siegal, testified that nobody knows what caused the infection that he had in Phoenix. (Tr. Vol. 2/252). Dr. Siegal only believed there was a possibility of infection that the patient received while he was in the hospital in St. Louis, and not an actual infection. (Tr. Vol. 2/272). Dr. Siegal acknowledged that the infection could have gotten into Mr. Klotz' bloodstream any number of ways. (Tr. Vol. 2/273). Dr. Clark testified that a person could get a blood borne infection from any break in the skin. (Tr. Vol. 3/152, 164). There are cases of patients with sepsis where it is never known the actual source of the sepsis. (Tr. Vol. 3/152). Mr. Klotz looked well the day he was discharged from St. Anthony's Hospital. (Tr. Vol. 3/170). Dr. Clark assumed that Mr. Klotz had an infection at St. Anthony's Hospital when he testified about his opinions. (Tr. Vol. 3/170-173). There was no culture or documentation of any sort to truly reflect that he had an MRSA infection on March 22, 2004. (Tr. Vol. 3/171). What was documented at St. Anthony's Hospital is an inflammation. (Tr. Vol. 3/172-173). Mr. Klotz was asymptomatic from the time he left St. Anthony's Hospital until over one month later after he got to Arizona, at least a couple of days before his hospitalization in Arizona. (Tr. Vol. 3/176). Mr. Klotz could have obtained this infection after leaving the hospital in St. Louis. (Tr. Vol. 3/176-178).

To establish causation, the tortfeasor's conduct must be both the cause in fact and the proximate, or legal cause of the Appellants/Cross-Respondents' injury.

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993). Appellants/Cross-Respondents ' expert's opinions were not supported by sufficient facts in evidence, and are instead, speculative and conclusory. Where an expert's opinion is mere conjecture and speculation, it does not constitute probative evidence on which a jury could find ultimate facts and liability. See *Mueller v. Bauer*, *supra*, 54 S.W.3d 652 (Mo. App. E.D. 2001). To have probative value, an expert's opinion must be founded on the facts and data and not mere conjecture or speculation.

Appellants/Cross-Respondents' evidence on causation also failed to establish a submissible case against Respondents/Cross-Appellants because Appellants/Cross-Respondents failed to present sufficient competent evidence that these Respondents/Cross-Appellants' conduct was the "but for" cause of any damage to the Appellants/Cross-Respondents. Under the "but for" test, Appellants/Cross-Respondents must prove that the injury would not have happened "but for" defendants' conduct. *Townsend v. Eastern Chemical Waste Systems*, 234 S.W.3d 452, 466 (Mo. App. 2007).

There was no objective evidence that the MRSA infection was in Mr. Klotz's bloodstream while at St. Anthony's Medical Center. (Tr., Vol. 2/252-253). Therefore, Appellants/Cross-Respondents failed to prove any causal connection between the alleged negligence and the injury that was claimed. The verdict was against the weight of the evidence in that Mr. Klotz could not have had an MRSA infection at St. Anthony's Medical Center because he did not have any symptoms

for over 5 weeks. Therefore, the trial court erroneously denied Respondents/Cross-Appellants' motions for directed verdict thereby prejudicing Respondents/Cross-Appellants.

X. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE THAT WAS SPECULATIVE, TO THE DETRIMENT AND PREJUDICE OF THESE RESPONDENTS/CROSS-APPELLANTS.

ARGUMENT

The Appellants/Cross-Respondents' attorney asked various witnesses whether Dr. Shapiro knew about St. Anthony's infection rate data, to which they responded that they "presumed" he did, or that he "must have", etc. (Tr. Vol. 3/131-132, 189; and Vol. 5/99-101). Respondents/Cross-Appellants continually objected to such testimony as speculative and assuming facts not in evidence. This court erred in allowing such speculative testimony. In *Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466, 482 (Mo. App. S.D. 2001), the court states, "A witness should not be allowed to testify about things in which the witness indulges in mere speculation, guess, and conclusions." Testimony of an expert must be based on facts in evidence and not a guess. *Perkins v. Kroger Co.*, 592 S.W.2d 292, 294 (Mo. App. E.D. 1979). Allowing witnesses to attribute knowledge to Dr. Shapiro that he did not have, had the effect of improperly and unjustly tying Dr. Shapiro to various "infections" in the hospital wholly unrelated to the subject issue and establishing some tenuous and meritless connection to the infection that Plaintiff James Klotz ultimately developed. It was improper and prejudicial, and by itself could very easily have led to a verdict for Plaintiffs that would not have occurred otherwise.

XI. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY AND/OR EVIDENCE REGARDING THE FULL AMOUNT OF ANY MEDICAL BILL THAT HAD BEEN ADJUSTED OR OTHERWISE WAS NOT "PAID" BY, OR ON BEHALF OF, THE APPELLANTS/CROSS-RESPONDENTS, IN VIOLATION OF STATUTE.

ARGUMENT

Respondents/Cross-Appellants objected to any testimony or evidence of any medical bill that has been adjusted or otherwise not "paid" by, or on behalf of, the Appellants/Cross-Respondent. (Tr. MIL 2-28; Vol. 3/259-272; Vol. 4/8-16). Prior to trial, Respondents/Cross-Appellants filed a copy of all of Plaintiff's medical bills, along with a table describing what bills have been paid or "adjusted". (S.L.F. 1092). MO. REV. STAT. §490.715 (2008) states, "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.". Any bills that were otherwise adjusted or not paid by or on behalf of Appellants/Cross-Respondent were irrelevant to this cause of action.

MO. REV. STAT. §490.715 (2008) sets forth a presumption that if the bills were adjusted, written off, or are not paid, that the value of those expenses are those bills which were actually paid. Appellants/Cross-Respondents had the burden to overcome this presumption. Appellants/Cross-Respondents failed to

overcome this presumption. In the court's ruling on this issue, the court stated that the Appellants/Cross-Respondents rebutted the presumption because there were liens on some of the bills and the Appellants/Cross-Respondents' expert stated that the bills were reasonable. (L.F 289) All medical bills that were paid or reflected a "zero balance" due, which were demonstrated to the court, were ignored by the court and Plaintiffs and the Appellants/Cross-Respondents did not overcome the presumption. (L. F. 607-1563).

The Missouri legislature enacted changes to MO. REV. STAT. §490.715 in 2005. Specifically, the legislature added paragraph five and its subparagraphs to MO. REV. STAT. §490.715 (2008). In so doing, the legislature expressly modified the traditional "collateral source rule" by broadening the scope and use of collateral source in Missouri. See MO. REV. STAT. §490.715 (2008) and *James l. Stockberger & Brian Kaveny, Missouri Tort Reform, 62 J. Mo. B. 378 (November-December 2008)* ("The new law retains the collateral source rule, but significantly modifies it.").

If the legislature felt that an expert's testimony as to the "reasonableness" of a plaintiff's bills was sufficient to determine "value", they would not have amended MO. REV. STAT. §490.715 (2008) because that was all that was required before the law was changed in 2005. "When interpreting statutes, the goal is to determine the intent of the legislature from the plain language of the statute". *MFA Petroleum Company v. Director of Revenue,* 279 S.W.3d 177 (Mo. banc 2009). Clearly, following statutory construction, the plain language of the statute

says that the value of the medical treatment rendered is what was paid. MO. REV. STAT. §490.715 (2008).

In this case the trial court was charged with applying the statute using its plain meaning. *Kansas City Star Co. v. Fulson*, 859 S.W.2d 934, 938 (Mo. App. W.D. 1993) (citing *Brownstein v. Rhomberg-Haglin & Assoc.*, 824 S.W.2d 13, 15 (Mo. banc 1992)). "A fundamental objective of statutory interpretation is to ascertain the intent of the legislature from the language of the statute and, if possible, give effect to that intent. *Id*. "It is presumed that the legislature does not intend to enact absurd laws." *Id*. (citing *David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. banc 1991)).

A damage award for past medical expenses in an amount greater than its actual cost constitutes over-compensation. *Katiuzhinsky v. Perry*, 152 Cal. App. 4th 1288 (Cal. App. 3rd Dist. 2007). The California court noted that when evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate. *Id*. at 1294 *citing Hanif v. Housing Authority*, 200 Cal. App. 3d 635 (Cal. 1988). A party should be fully compensated for its loss, but not recover a windfall." *Ameristar Jet Charter, Inc. v. Dodson Intern'l Parts, Inc.*, 155 S.W.3d 50, 54 (Mo. banc 2005) (*citation omitted*). A party should not be permitted to recover a loss which he never sustained. *Morris v. Grand Ave. Ry. Co.*, 46 S.W.170 (Mo. 1898) (*emphasis added*). According to

the Missouri Supreme Court, a jury in a personal injury suit is authorized to award a plaintiff for his suffering and physical injuries as well as pecuniary losses actually sustained, but not those which might or would have occurred but for the interposition of others. *Morris*, 46 S.W.at 170.

The trial court committed manifest error by ignoring MO. REV. STAT. §490.715 (2008), thereby causing prejudice to Respondents/Cross-Appellants by inflating the medical expenses. Without the trial court's error, the damages, if any, awarded by the jury, would have been markedly reduced and a different overall verdict amount reached.

CONCLUSION

Respondents/Cross-Appellants respectfully pray that his Honorable Court find that Appellant/Cross-Respondents have waived their right to challenge the constitutionality of H.B. 393, and/or to deny said appeal and rule in favor of the constitutionality of H.B. 393, and in particular, Mo. Rev. Stat. §538.210, and further, to remand Respondent/Cross-Appellants' appeal to the Missouri Court of Appeals, Eastern District (should this court determine that it has no jurisdiction over any aspect of the appeals herein now before it), or alternatively, to rule in favor of Respondents/Cross-Appellants on their appeal and to therefore reverse the judgment of the trial court and remand the matter for new trial on all issues.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, and the signature block contains, 30,234 words (as determined by Microsoft Word 2003 software);

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

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and mailed via U.S. Mail and sent via electronic mail, this 5th day of November, 2009, to:

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