IN THE SUPREME COURT OF MISSOURI

CASE NO. SC 91492

RONALD SANDERS

Appellant/Cross-Respondent,

v.

IFTEKHAR AHMED, M.D. and DR. IFTEKHAR AHMED, P.A.

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS IFTEKHAR AHMED, M.D. AND DR. IFTEKHAR AHMED, P.A.

Appeal from the Sixteenth Judicial Circuit Court
County of Jackson, State of Missouri, Division No. 15
Case No. 0516-CV12867

The Honorable Robert M. Schieber

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JURISDICTIONAL STATEMENT

Respondents/Cross-Appellants, Iftekhar Ahmed, M.D. and Dr. Iftekhar Ahmed, P.A. ("Dr. Ahmed"), 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. Dr. Ahmed believes that this appeal falls under MO. CONST. ART. V, § 3 which vests general appellate jurisdiction in the Court of Appeals for all appeals, with limited exceptions. Dr. Ahmed further contends that this appeal is within the territorial jurisdiction of the Missouri Court of Appeals, Western District, under MO. REV. STAT. § 477.050 (2008) because it involves an appeal from a judgment of Jackson County Circuit Court. In that regard, Dr. Ahmed filed this appeal (Appellate Cause # WD 73471) in the Missouri Court of Appeals for the Western District of Missouri following an amended judgment entered in the trial court below, and the subsequent denial by the trial court of a timely motion for new trial.

An Order denying the Motion for New Trial was entered on January 18, 2011 following the trial court's Amended Judgment entered on October 22, 2010. (LF 223-224). Thereafter, while Dr. Ahmed's appeal was pending in the Missouri Court of Appeals for the Western District, Appellant/Cross-Respondent Ronald Sanders ("Mr. Sanders") herein filed a motion to transfer the appeal of Dr. Ahmed to this Court, because of the pendency of his appeal herein. Mr. Sanders' motion was granted on February 15, 2011, and Dr. Ahmed's appeal in the Missouri Court

of Appeals was transferred to this Court, consolidating it with the appeal filed directly with this Court by Mr. Sanders.

STATEMENT OF FACTS

On May 21, 2003, Paulette Sanders presented to the Emergency Department of the Medical Center of Independence due to pain in her lower extremities and difficulty with walking. (Tr. Vol. 2, p. 7-8). Earlier that day, Ms. Sanders had been directed to go to the hospital by her primary care physician, Carol Kirila, D.O. (Tr. Vol. 2, p. 7-8). Consultations with various specialists were ordered, including a request that Ms. Sanders be seen by a neurologist, Iftekhar Ahmed, M.D. (Tr. Vol. 2, p. 9-10). Ms. Sanders was seen by Dr. Ahmed, the next day, May 22, 2003. (Tr. Vol. 1, p. 231). After a review of her symptoms, and physical examination, Dr. Ahmed used his medical judgment to place Ms. Sanders on Depakote and begin weaning her off of Dilantin, drugs used to treat her long history of seizure disorder. (Tr. Vol. 1, p. 231-233).

Ms. Sanders remained in the hospital and by May 26, 2003, she became lethargic. (Tr. Vol. 2, p. 17). At that time, Dr. Ahmed was not made aware of this development by any of the doctors or nurses involved in the care and treatment of Ms. Sanders. (Tr. Vol.1, p. 269-270). Depakote, Dilantin, Primidone and Phenobarbital, all drugs ordered by Dr. Ahmed were held by the nurses on May 26, 2003. (Tr. Vol. 1, p. 87). On May 27, 2003, Ms. Sanders had a significant change in mental status that required emergency intervention. (Tr. Vol. 2, p. 19-23). She was suffering from a focal seizure. (Tr. Vol. 1, p. 242). Dr. Ahmed was not made aware of Ms. Sanders' physical and mental changes for six or more hours. (Tr. Vol. 1, p. 241-243). Dr. Ahmed arrived to assist in the care and

treatment of Ms. Sanders at approximately 4:17 p.m. on May 27, 2003. (Tr. Vol. 1, p. 251). After an EEG, Dr. Ahmed ordered that Depakote be discontinued on May 28, 2003. (Tr. Vol. 1, p. 335-336).

During the trial of this case, Mr. Sanders' counsel made arguments concerning sending a message to Dr. Ahmed, or the medical community at large, with a large award of damages, to which objections were made and sustained. (Tr. Vol. 1, p. 18; 378).

In his opening statement, counsel for Mr. Sanders made comments about the need for the jury to return "a very substantial verdict" in order to deter other health care providers from like conduct. (Tr. Vol. 1, p. 18). More specifically, counsel stated "[t]he main reason is to make sure that another family never has to go through what they went through and that's really the only way to ensure that." (Tr. Vol. 1, p. 18). Counsel for Dr. Ahmed objected to the impropriety of those remarks, and that objection was sustained by the trial judge. (Tr. Vol. 1, p. 18-19).

In his closing argument, counsel for Mr. Sanders began by telling the jury of the far-reaching implications of its verdict, "I told you this case would have significance beyond this courtroom, actually beyond this city. It could affect this whole region. It could affect this whole country." (Tr. Vol. 1, p. 356). Then, in arguing the amount of damages the jury should award, counsel for Plaintiff suggested one way to determine damages might be $1 million for every act of negligence by the defendant physician, "[t]here's a lot of ways you can figure damages in this case. You have Dr. Ahmed who ran five medical stop signs. You

can say, well, five stop signs, $5 million dollars ….” (Tr. Vol. 1., p. 361). Counsel for Mr. Sanders then proceeded to suggest a kind of “per diem” argument for damages “…or you can look at Paulette Sanders who spent 26 months bedridden, mentally aware….” (Tr. Vol. 1, p. 361). Counsel later tied those amounts together for the jury in arguing dollar amounts of damages, “[a]s I said, I think the range is anywhere from $5 to $26 million is fair in this case….” (Tr. Vol. 1, p. 378).

Counsel for Mr. Sanders told the jury of the effect its verdict would have beyond the case itself, “I can tell you it will make health care a lot safer for everybody within our community. Because within 72 hours of your verdict, every doctor and every hospital in this region is going to hear about it. And that’s going to make them say, We’re going to have to do what the practice of medicine says we ought to do.” (Tr. Vol. 1, p. 362-363). Counsel also told the jury they needed to send a message to Dr. Ahmed that he would understand, “[a]s I said, I think the range is anywhere from $5 to $26 million is fair in this case. I think that’s what you’ve got to do, because a doctor like this isn’t going to get the word. He isn’t going to understand.” (Tr. Vol. 1, p. 378). Counsel for Dr. Ahmed objected to that improper argument, and the objection was sustained. (Tr. Vol. 1, p. 378). Later, counsel for Plaintiff warned the jury that a verdict for defendant would be a “signal to all doctors.” (Tr. Vol. 1, p. 388-389). Specifically, counsel stated “[b]ut a verdict for the defendant in this case is a signal to all doctors that they don’t have to pay attention to what the manufacturers tell them, they don’t have to

pay attention to the standard of care. They can go about doing what they want to and make the world more dangerous." (Tr. Vol. 1, p. 388-389). Finally, counsel argued, "[t]hese rules are there to protect society. That's the reason they're there and unless you let them know, this is going to keep right on happening." (Tr. Vol. 1, p. 388-389).

In this case, Dr. Ahmed pleaded, as an affirmative defense, reduction (sometimes called set-off) pursuant to § 537.060 in their answer to Plaintiff's Third Amended Petition for Damages. (LF 95-99). Following plaintiff's settlement with every other defendant, they also filed a Motion for Setoff. (LF 150-151). On September 28, 2006, when the trial court issued its original judgment, it did not apply § 537.060. (LF 118-120).

Following the initial entry of judgment, Dr. Ahmed again requested that the trial court reduce the verdict by the amount paid by former co-defendants/joint tort-feasors in an amended judgment. (LF 121-123). Subsequently, the trial court issued an Amended Judgment but, again, failed to apply § 537.060. (LF 131-135).

Dr. Ahmed then filed a Motion to Modify the Amended Judgment requesting, once again, that the trial court apply § 537.060. (LF 136-137). Subsequently, a Stipulation was filed by the parties indicating that the settling co-defendants/joint tort-feasors paid a total of $625,000 in exchange for settlement agreements. (LF 222). The trial court ultimately denied Dr. Ahmed's request for application of § 537.060 in the amount of $625,000. (LF 145-147).

Dr. Ahmed timely requested that the Court order periodic or installment payments should the jury award future damages. (LF 165-166). Ultimately, the jury awarded future damages and the total damages were in excess of $100,000. Dr. Ahmed renewed his request for periodic or installment payments prior to the entry of judgment. (LF 108; 169-170). In its original judgment, the trial court did not apply § 538.220.2. Subsequently, Dr. Ahmed asked the trial court to amend the judgment to include periodic or installment payments. (LF 118-120; 121-123). When the trial court entered its Amended Judgment it, again, did not apply § 538.220.2. (LF 131-135). Finally, Dr. Ahmed filed motions seeking to amend the trial court's Amended Judgment to apply § 538.220.2. Ultimately, the trial court denied each of these requests. (LF 136-137; 145-146).

On October 10, 2010, Defendant Dr. Ahmed timely filed his Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial. (LF p. 184-191). The trial court denied that Motion. (LF 136-137; 145-146).

STANDARD OF REVIEW

This appeal arises out of a wrongful death action. Mr. Sanders challenges the constitutionality of the non-economic damage cap. MO. REV. STAT. § 538.210 (1986). In his brief, he seeks to have this Court overturn long-standing Missouri law limiting the award of non-economic damages that can be recovered in suits against medical professionals. In 1992, this Court found the very statute at issue to be constitutional. *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992). Under the doctrine of *stare decisis*, a decision of this Court should not be lightly overruled, particularly where, as here, the opinion has remained unchanged for many years. *S.W. Bell Yellow Pages, Inc. v. Dir. Of Revenue*, 94 S.W.3d 388, 390 (Mo. 2002).

"A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution. Courts will enforce a statute unless it plainly and palpably affronts fundamental law embodied in the constitution." *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. 2004). "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). "The party attacking the statute must show that a constitutionally required procedure has been 'clearly and undoubtedly' violated." *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. 2006).

RESPONDENTS/CROSS-APPELLANTS' "RESPONSE" ARGUMENT

A. MO. REV. STAT. § 538.210 (1986)[1] does not Violate Right to Trial as known at Common Law.

1. Wrongful Death Cause of Action is a Creature of Statute and did not exist at Common Law:

This case arises out of a claim by Ronald Sanders for the wrongful death of his wife Paulette Sanders. Mr. Sanders claims that MO. REV. STAT. § 538.210 violates MO. CONST. ART. I, § 22(a) in that it substantially interferes with the right to trial by jury as enjoyed at common law by depriving him of the substantive right to have damages determined by the jury.

MO. CONST. ART. I, § 22(a) provides, in pertinent part, "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate…." Mr. Sanders' challenge to the constitutionality of § 538.210 is misplaced because, as applied, the statute does not affect a right which existed at common law. It is well settled that, at common law, an action for personal injuries did not survive the death of the tort victim. Rather, the right died with the injured person. *Cummins v. Kansas City Public Service, Co.*, 66 S.W.2d 920, 922 (Mo. banc 1933). Similarly, a claim for loss of services of a deceased spouse did not exist at common law. *Id.*

[1] All references to MO. REV. STAT. § 538.210 are to the 1986 version of the statute.

"Citizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted." *Hammons v. Ehney*, 924 S.W.2d 843, 848 (Mo. 1996). The phrase "as heretofore enjoyed," in Art. I, § 22(a), MO. CONST., first adopted in the 1875 Constitution, has been interpreted to mean that the right to trial by jury exists for proceedings in existence at common law and before the adoption of the *first* constitution – in 1820. *Hammons*, 924 S.W. 2d at 848; s*ee also Adams*, 832 S.W.2d at 907.

Prior to the adoption of Missouri's first Constitution in 1820, a cause of action for wrongful death did not exist. Rather, it is a statutory cause of action adopted 35 years later. *Denton v. Soonattrukal*, 149 S.W.3d 517, 520 (Mo. App. 2004). The common law rule, that one could not recover for the wrongful death of another, was established by Lord Ellenborough in 1808 where he held "in a civil court, the death of a human being could not be complained of as an injury." *Baker v. Bolton*, 1 Camp. 493 (1808). In 1848, seven years before Missouri enacted its first wrongful death statute, the English Parliament created the first right to recover for the wrongful death of another. *See* LORD CAMPBELL'S ACT, St. 9 to 10 Vict. It was not until 1855 that Missouri granted citizens the right to maintain an action for wrongful death. *See* MO. REV. STAT. § 2121-2123 (1855).

At common law, Paulette Sanders' cause of action for personal injuries would have been extinguished at her death. But for the creation of the statutory "wrongful death" cause of action, Mr. Sanders would not have been able to maintain such a claim against Dr. Ahmed. Because "no cause of action existed at

common law and the wrongful death statute created one, the various provisions of the statute are deemed to be substantive law and must be strictly construed." *State ex rel. Jewish Hosp. of St. Louis v. Buder*, 540 S.W.2d 100, 104 (Mo. App. 1976). "The well-established principle is that where a cause of action is created by legislative enactment, where none theretofore existed, such right may be conditioned as the legislative body sees fit." *Id.*; *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 779 (Mo. 2010). When the statute gives the right of action, provides a remedy and imposes conditions as to the exercise of that remedy, the conditions imposed qualify any right of recovery and form a part of the right itself. *Buder*, 540 S.W.2d at 104.

Appellant's argument that § 538.210 is unconstitutional ignores clearly established case law. The legislature has the authority to create a wrongful death cause of action that did not exist at common law. The legislature also has the absolute right to limit damages recoverable or eliminate the cause of action altogether, so long as there is not a retrospective application. *See e.g., State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409 (Mo. 1974). Therefore, § 538.210, already deemed constitutional in 1992, does not violate any common law right that existed in favor of Mr. Sanders. *See Adams*, 832 S.W.2d 898.

2. Cause of Action is Wrongful Death, not "Garden-Variety Personal Injury"

In his brief, Mr. Sanders asserts that his cause of action was nothing more than a "garden-variety personal injury action." However, the cause of action presented to the jury for consideration was one for wrongful death. The pleadings in this case, evidence presented at trial and the jury instructions all demonstrate that the jury was charged with determining whether Dr. Ahmed was negligent, and whether such negligence directly caused, or directly contributed to cause, the death of Paulette Sanders.

This case was originally filed in May 2005. Subsequently, while her case was pending, Paulette Sanders died on August 26, 2005. At common law, Ms. Sanders' death prevented her "garden-variety personal injury action" from going forward, absent a substitution of the plaintiff to pursue a "survival" action under MO. REV. STAT. § 537.020 (1979), or changing the cause of action to one for "wrongful death," pursuant to MO. REV. STAT. § 537.080 (1991), *et seq*. "If a party dies and the claim is not thereby extinguished, the court shall on motion order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party." MO. REV. STAT. § 507.100 (1983). This statutory provision preserves the ability for a successor of a deceased plaintiff to maintain a personal injury action, something prohibited by common law. *Cummins*, 66 S.W.2d, at 922.

In May 2008, Mr. Sanders filed a Second Amended Petition. In that pleading, he asserted a claim for wrongful death. Based upon that filing, Mr. Sanders chose to convert the lawsuit to a wrongful death claim, not a survival action. *See* MO. REV. STAT. §§ 537.020; 537.080.

The "garden-variety personal injury action" could not have proceeded after Ms. Sanders' death. It required a change of the parties or cause of action as "[c]ourts have jurisdiction to render judgments only for or against viable entities and a dead person is not a viable entity." *Cone v. Missouri Dept. of Soc. Services, Family Support Div.*, 227 S.W.3d 540, 542 (Mo. App. 2007). "A judgment, whether for or against the plaintiff, entered after the plaintiff's death without substitution of parties, is void and there is no final judgment…." *Id.*

In his brief, Mr. Sanders asserts:

> "[t]he Second Amended Petition filed in May 2008 alleging that the defendants' conduct caused Paulette Sanders' death did not alter, impair or destroy the right to trial by jury as recognized at common law that <u>had attached</u> to the suit filed in May 2005." (Emphasis added.)

His assertion is based upon a misapplication of law. As set forth above, at common law, Paulette Sanders' personal injury suit was extinguished at her death. There was no "attachment" at common law which permitted a personal injury action, already filed before a tort victim's death, to go forward unchanged after his/her death. The subsequent amended pleading changed the cause of action – as

it necessarily had to – because the Ms. Sanders' death extinguished the cause of action.

"The wrongful death act creates a new cause of action where none existed at common law and did not revive a cause of action belonging to the deceased." *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. 2009) (emphasis in original). "The right of action thus created is neither a transmitted right nor a survival right." *Id.* A claim for wrongful death is a separate cause of action, completely distinct from any underlying tort claim. *See e.g.*, *Sullivan v. Carlisle*, 851 S.W.2d 510, 514–15 (Mo. banc 1993); *American Family Mutual Insurance Company v. Ward*, 774 S.W.2d 135, 136–37 (Mo. banc 1989). If there is no "transmitted" right, there is also no "attachment" of a personal injury claim which survives the plaintiff's death recognized in the law.

It is undisputed that, following the death of Paulette Sanders, Mr. Sanders initiated a wrongful death claim against Dr. Ahmed. A claim for wrongful death is not a "garden-variety personal injury action," and did not exist at common law. Contrary to Appellant's assertion, the § 538.210 limitations on damage recovery do not affect a right held at common law. Thus, the application of a statutory cap to the jury's verdict did not impair Mr. Sanders' right to trial by jury, as enjoyed at common law.

3. Appellant's "Trial by Jury" Argument Has Previously Been Rejected by Prior Decision of This Court

Mr. Sanders seeks to have this Court overturn a nearly twenty-year precedent establishing the constitutionality of § 538.210. He asserts that this statute violates his right to a trial by jury. However, this Court has previously expressly rejected a challenge to Chapter 538, including specifically § 538.210, on the grounds that it violated the Missouri Constitution's guarantee to trial by jury. *Adams*, 832 S.W.2d 898. In support of his challenge to the statute, Mr. Sanders has failed to present any arguments that were not previously considered by this Court in *Adams*. *Id.*

The issue raised by Mr. Sanders in this action has already been squarely addressed and decided by this Court in *Adams*. *Id.* The legal doctrine of *stare decisis* should be given great weight by this Court, for that doctrine provides the essential underpinnings in "a government of laws, not men"[2] for a code of conduct which is logical, understandable, predictable and capable of being both obeyed and enforced. Long-standing precedent which is ignored or cast aside on no more strength of reasoning than that is was "wrongly decided" creates uncertainty in the law by depriving it of logical predictability, and thereby undermines the "government of laws."

[2] *See* MASS. CONST. ART. 30; *see also*, John Adams, *Novanglus Papers No. VII*, BOSTON GAZETTE, (1775).

In *Adams*, which *was* a "garden-variety personal injury action," not a statutorily created cause of action, this Court was faced with a jury award of approximately $14,000,000 in non-economic damages which had been reduced to $860,000 by the trial court, pursuant to § 538.210. 832 S.W.2d 898.[3] The plaintiffs appealed, arguing that §538.210 violated their right to a trial by jury. *Id.* This Court held that the plaintiffs' constitutional right to trial by jury was not violated. *Id.* at 907.

This Court's reasoning in *Adams* still applies today. In *Adams*, this Court determined that because § 538.210 was not applied until after the jury had completed its constitutional task, the statute did not infringe upon the right to trial by jury;

> The court applies the law to the facts. Section 538.210 establishes the substantive, legal limits of the plaintiffs' damage remedy. In this sense, the permissible remedy is a matter of law, not fact, and not within the purview of the jury. Because Section 538.210 is not applied until after the jury has completed its constitutional task, it does not infringe upon the right to trial by jury.

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[3] The cap on non-economic damages in 1991, when the trial of *Adams v. Children's Mercy Hospital* took place, was $430,000 per defendant. There were two defendants, Children's Mercy Hospital and Dr. Jane Jelinek, and therefore, the non-economic damages were reduced to $860,000.

832 S.W.2d at 907 *(citing Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (1989); *Tull v. United States*, 481 U.S. 412 (1987)).

Like this Court in *Adams*, other courts have looked to *Etheridge* in upholding the constitutionality of damage limitations. *See Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) ("[O]nce the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function."); *Judd v. Drezga*, 103 P.3d 135, 144 (Utah 2004) ("[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 v. Nebraska Methodist Health System, Inc.*, 663 N.W.2d 43, 75 (Neb. 2003) ("The primary function of a jury has always been fact finding, 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 fact finding function."); *Evans v. State*, 56 P.3d 1046, 1051 (Alaska 2002) ("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 v. Blaine County Medical Center*, 4 P.3d 1115, 1120 (Idaho 2000) ("[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 v. Edmonds*, 601 A.2d 102, 117 (Md. 1992) ("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 v. Colleton County School District*, 391 S.E.2d 564, 569 (S.C. 1990) ("[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."). This line of cases recognizes a basic legal concept which defines the boundaries between the distinct roles of the jury and the judge in any trial: juries render *verdicts*; judges render *judgments* which conform those verdicts to the law.

Like Missouri, numerous states have established that the right to trial by jury is "inviolate" in their respective state constitutions. Many of these states also have similar damage caps that were enacted by their legislatures. The courts in a number of those states have determined that those damage caps are constitutional. *See Fein v. Kaiser Permanente Medical Group*, 695 P.2d 665 (Cal. 1985); *Kirkland*, 4 P. 3d 1115; *Murphy v. Edmonds*, 601 A. 2d 102 (Md. 1992); *Gourley* 663 N.W.2d at 75; *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002); *Arbino v. Johnson & Johnson*, 880 N.E. 2d 420 (Ohio 2007); and *Knowles v. United States*, 544 N.W. 2d 183 (S.D. 1996).

4. Statutory Limitations on Damage Awards Do Not Infringe 7th Amendment's Right to Trial by Jury

The Seventh Amendment to the Constitution of the United States provides "[i]n suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

Several federal courts have addressed the issue of damage caps as they relate to the Seventh Amendment to the United States Constitution. Those courts have held that damage caps in medical malpractice suits do not violate a plaintiff's right to a jury trial under the Seventh Amendment. *See Smith v. Botsford General Hospital*, 419 F.3d 513 (6th Cir. 2005); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Boyd* 877 F.2d 1191.

Again, this Court addressed the issue of the Seventh Amendment right to trial by jury in the *Adams* case, as well. On this issue, the Court noted "[t]here is no substantive right under the common law to a jury determination of damages under the Seventh Amendment. The assessment of a civil penalty is not one of the 'fundamental elements' preserved by the common law right to a jury trial." 832 S.W.2d 898, 907 (Mo. banc 1992)

This Court in *Adams* also cited, with approval, *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* which held that common law never recognized a right to a full recovery in tort. 832 S.W. 2d at 907; 438 U.S. 59, 88-89, (1978).

Ultimately, this Court determined "[i]n sum, the legislature has the right to abrogate a cause of action cognizable under common law completely. If the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery in those causes of action." 832 S.W. 2d at 907.

Based upon Missouri law and similar decisions from other jurisdictions, the statutory cap on non-economic damages does not offend the right to trial by jury, under either Art. I, §22(a) of the Constitution of Missouri, or under the Seventh Amendment to the Constitution of the United States. The decision of this Court in *Adams* remains valid and should not be disturbed. Mr. Sanders was not denied his right to trial by jury.

B. § 538.210 Does Not Violate the Separation of Powers.

In his brief, Mr. Sanders asserts that the non-economic damage limitation imposed by the legislature violates the Separation of Powers Clause. Mr. Sanders asserts that by reducing jury awards, § 538.210 in essence forces a legislative version of remittitur upon the judiciary.

First, there is a difference between statutory caps and remittitur. Caps are applied uniformly in cases where the amount of a jury award for non-economic damages exceeds the statutory limit, regardless of the specific facts of the case. Remittitur, on the other hand, is applied on a case-by-case basis, based upon the trial judge's individual view of the evidence introduced in a specific trial. In the case of caps, all awards that exceed the cap are reduced down to the amount of the

cap – the same amount. In remittitur, the trial judge acts as a 13th juror, superimposing his view of the evidence over that of the jury, resulting in different individual judgments in each case in which remittitur is exercised. It does not have the uniformity of statutory caps.

Second, § 538.210 does not force "remittitur" upon the judiciary. In fact, it does just the opposite. It does not force the trial court to exercise its judgment based upon its individual view of the specific evidence introduced at the trial. It merely places the outer limit on the remedy available against any health care provider. Because Missouri's common law right to a jury trial did not extend to a jury determining the damages to award, § 538.210 does not violate any such right.

"The courts recognize that the separation of the powers is far from complete, and that the line of demarcation between them is often indefinite." *Clark v. Austin*, 101 S.W.2d 977, 987 (1937). "Each of the three departments normally exercises powers which are not strictly within its province." *Id.* "The line of demarcation between legislative, executive, and judicial functions is not easy to draw. These functions shade into one another as imperceptibly as the mountain merges into the valley, or the river into the sea." *Id.* (citations omitted).

The statute does not determine the amount of damages that can be awarded to a particular plaintiff. Rather, it sets the general outer limit of liability for all health care providers as a matter of law. Missouri's legislature has the right to modify the common law and substantive law to eliminate or restrict causes of action, such as the creation of a wrongful death cause of action and subsequent

limitation on the recovery available. *In re Dyer*, 163 S.W.3d 915, 921(Mo. banc 2005); *Adams*, 832 S.W.2d at 905; and *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 833 (Mo. 1991). Given the legislature's right to create causes of action, it also has the right to limit or even abolish the same. *Fisher v. State Highway Comm'n of Mo.*, 948 S.W.2d 607, 611 (Mo. 1997).

"This Court has 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." *Adams*, 832 S.W.2d at 905 (citations omitted). Statutory changes to common law are a valid exercise of a legislative prerogative; however, statutory changes creating a procedural bar to access are not. *Id.* "The constitutional right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes." *Id.* (citations omitted); *see also Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 879 (Mo. 1993); *Winston v. Reorganized Sch. Dist. R-2, Lawrence County, Miller*, 636 S.W.2d 324, 328 (Mo. 1982).

Section 538.210 does not establish a legislative remittitur. Rather, it changes the substantive law by limiting the recovery applicable to this case. This does not violate the separation of powers between the branches of government. But for the enactment of the wrongful death statute by the legislature, the judicial branch would not even have the ability to adjudicate the cause of action brought by Mr. Sanders. Furthermore, the limitations placed upon the court by § 538.210 do not affect any right in existence at common law.

This rationale is consistent with holdings in other jurisdictions recognizing the constitutionality of statutory damage caps. Recently, the Nebraska Supreme Court addressed this issue. *See Gourley*, 663 N.W.2d 43. In *Gourley*, the court held that statutory caps in medical malpractice cases did not constitute legislative remittitur or otherwise violate principles of separation of powers. *Id.* The cap merely imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy. *Id.* The ability to cap damages for a cause of action is a proper legislative function. *Id.* at 77. Other jurisdictions have reached a similar conclusion. *See e.g.*, *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 v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1336 (D. Mar. 1989)).

The legislature is entitled to provide reasonable restriction or expansion of causes of action which it creates and the Missouri legislature has large discretion in determining the means through which the laws shall be exercised. *Chapman v. State Social Secur. Commission*, 147 S.W.2d 157, 158–59 (1941); *Nistendirk v. McGee*, 225 F.Supp. 881, 882 (W.D. Mo.1963); *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, especially with respect to damage recovery. This includes the right of the legislature to place damage caps on causes of action and does not constitute a form of legislative remittitur or a violation of the separation of powers. Damage limitations are part of the remedy. The legislature may alter the common law and change or abrogate remedies.

Mr. Sanders' "wrongful death" claim was created by the legislature and, therefore, the legislature is free to alter, amend, revise or revoke such causes of action as it sees fit, consistent with the public welfare, so long as it does not do so retroactively. The application of § 538.210 does not constitute a violation of the separation of powers between the legislative and judicial branches of government. As such, Mr. Sanders' appeal should be denied for this additional reason.

CROSS-APPELLANTS' APPEAL

STANDARD OF REVIEW

In Points 1 and 2, Dr. Ahmed seeks review of two of the trial court's legal rulings. In each of those rulings, the trial court interpreted and applied a statute. On appeal, this Court's review is a *de novo* determination of these legal issues. The question presented is whether the trial court drew the proper legal conclusions from the undisputed record and applied the law accordingly. *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. 1979); *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 127 (Mo. 1985); *Cottey v. Schmitter*, 24 S.W.3d 126, 128 (Mo. 2000).

In Point 3, Dr. Ahmed seeks review of the trial court's rulings on his Motion for Judgment Notwithstanding the Verdict. On appeal, this Court must determine whether 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. 2000). To be submissible, a plaintiff must present legal, substantial and competent 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 Mr. Sanders made a submissible case, the Court must consider the evidence, and all reasonable inferences therefrom, in the light most favorable to Mr. Sanders. *Cline v. Friedman & Associates, Inc*., 882 S.W.2d 754, 758 (Mo. App. 1994). Whether Mr. Sanders made a submissible case is an issue to be determined as a matter of law. *Envtl Prot., Inspection, and*

Consulting, Inc. v. City of Kansas City, Missouri, 37 S.W.3d 360, 369 (Mo. App. 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. 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).

In Point 4, Dr. Ahmed seeks review of the trial court's denial of his Motion for New Trial. The standard of review for the denial of a motion for new trial is abuse of discretion by the trial court. *Echard v. Barnes–Jewish Hosp.*, 98 S.W.3d 558, 567 (Mo. App. 2002). "A new trial will be available only upon a showing that trial error or misconduct of the prevailing party incited prejudice in the jury." *Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co.*, 168 S.W.3d 488, 495 (Mo. App. 2005).

POINTS RELIED ON

1. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR REDUCTION PURSUANT TO MO. REV. STAT. § 537.060 (2000), BECAUSE THE STATUTE REQUIRES THE COURT TO REDUCE THE CLAIM WHEN AN AGREEMENT IS ENTERED BETWEEN ONE OR MORE PERSONS LIABLE FOR THE SAME WRONGFUL DEATH, IN THAT MR. SANDERS, PRIOR TO TRIAL, ENTERED INTO AGREEMENTS WITH SEVERAL JOINT TORT-FEASORS WHICH REDUCED THE CLAIM AND DR. AHMED TIMELY REQUESTED RELIEF UNDER THE STATUTE.

CASES:

Norman v. Wright, 153 S.W.3d 305 (Mo. 2005)

SSM Health Care St. Louis v. Schneider, 229 S.W.3d 279 (Mo. App. 2007).

Eckenrode v. Director of Revenue, 994 S.W.2d 583 (Mo. App. 1999)

STATUTE:

MO. REV. STAT. § 537.060 (2000)

2. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR PERIODIC PAYMENTS PURSUANT TO MO. REV. STAT. § 538.220.2 (1986) BECAUSE THE STATUTE REQUIRES THE COURT TO GRANT A MOTION BY EITHER PARTY, IN THAT DR. AHMED REQUESTED RELIEF UNDER THE STATUTE AND MR. SANDERS WAS AWARDED IN EXCESS OF ONE HUNDRED THOUSAND DOLLARS WHICH INCLUDED FUTURE DAMAGES.

CASES:

Allen v. Public Water Supply Dist. No. 5 of Jefferson County,

7 S.W.3d 537 (Mo. App. 1999)

Hutchison v. Cannon, 29 S.W.3d 844 (Mo. App. 2000)

STATUTE:

MO. REV. STAT. § 538.220 (1986)

3. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR DIRECTED VERDICT AND/OR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE MR. SANDERS FAILED TO MAKE A SUBMISSIBLE CASE IN THAT HE FAILED TO PROVE THAT THE ALLEGED NEGLIGENCE OF DR. AHMED CAUSED THE CLAIMED INJURY TO MR. SANDERS.

CASES:

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

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

Tompkins v. Cervantes, 917 S.W.2d 186, 190 (Mo. App. 1996)

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

4. THE TRIAL COURT ERRED WHEN IT DENIED DR. AHMED'S MOTION FOR A NEW TRIAL BECAUSE DR. AHMED WAS DENIED A FAIR TRIAL IN THAT ARGUMENTS MADE BY COUNSEL FOR MR. SANDERS WERE IMPROPER AND SO UNDULY PREJUDICIAL THAT THEY INFLAMED THE PASSIONS AND PREJUDICES OF THE JURY.

CASES:

Beis v. Dias, 859 S.W.2d 835, 840 (Mo. App. 1993)

Pierce v. Platte-Clay Elec. Co-op., Inc., 769 S.W.2d 769 (Mo. 1989)

ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR REDUCTION PURSUANT TO MO. REV. STAT. § 537.060 (2000), BECAUSE THE STATUTE REQUIRES THE COURT TO REDUCE THE CLAIM WHEN AN AGREEMENT IS ENTERED BETWEEN ONE OR MORE PERSONS LIABLE FOR THE SAME WRONGFUL DEATH, IN THAT MR. SANDERS, PRIOR TO TRIAL, ENTERED INTO AGREEMENTS WITH SEVERAL JOINT TORT-FEASORS WHICH REDUCED THE CLAIM AND DR. AHMED TIMELY REQUESTED RELIEF UNDER THE STATUTE.

Argument:

Prior to trial, defendants Carol E. Kirila, D.O., Kansas City University of Medicine and Biosciences, and Midwest Division M.C.I., L.L.C., settled all claims against them brought by the plaintiff. Plaintiff was paid $100,000 on behalf of defendant Dr. Kirila, $100,000 on behalf of defendant Kansas City University of Medicine and Biosciences, and $425,000 on behalf of defendant Midwest Division M.C.I., L.L.C. Prior to any settlement, Dr. Ahmed timely requested relief in his Answer to Mr. Sanders' Third Amended Petition for Damage pursuant to MO. REV. STAT § 537.060. Additionally, Dr. Ahmed filed a Motion asking that, in the event of a verdict in favor of the plaintiff, the trial court reduce the verdict by the total amount of these settlements ($625,000). The issue was raised again

following the jury's verdict. Ultimately, the trial court improperly refused the request for reduction.

By statute, in general, a party remaining as a defendant following a settlement by one or more co-defendants is entitled to a reduction of damages equal to the amounts paid to the plaintiff by the settling defendants. Specifically § 537.060 provides in pertinent part:

> Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. (emphasis added.)

Section 537.060 clarifies the effect of settlements with respect to the settling tort-feasor's liability for contribution to the non-settling tort-feasor. *See* DAVID A. FISCHER, THE NEW SETTLEMENT STATUTE: ITS HISTORY AND EFFECT, 40 J. Mo. B. 13 (1984). The clarifying effect of the statute is to "discharge the

tort-feasor to whom (a settlement agreement) is given from all liability for contribution." § 537.060. "Reduction under § 537.060 is similar in nature to the common law defense of satisfaction. In order to obtain the statutory relief sought, defendant must both plead and prove the matter as an affirmative defense." *Walihan v. St. Louis-Clayton Orthopedic Group, Inc.*, 849 S.W.2d 177, 180 (Mo. App. 1993).

In this case, Dr. Ahmed plead, as an affirmative defense, reduction (sometimes called set-off) pursuant to § 537.060 in their answer to Plaintiff's Third Amended Petition for Damages. (LF 95-99). Following plaintiff's settlement with every other defendant, they also filed a Motion for Setoff. (LF 150-151). On September 28, 2006, when the trial court issued its original judgment, it did not apply § 537.060. (LF 118-120).

Following the initial entry of judgment, Dr. Ahmed again requested that the trial court reduce the verdict by the amount paid by former co-defendants/joint tort-feasors in an amended judgment. (LF 121-123). Subsequently, the trial court issued an Amended Judgment but, again, failed to apply § 537.060. (LF 131-135).

Dr. Ahmed then filed a Motion to Modify the Amended Judgment requesting, once again, that the trial court apply § 537.060. (LF 136-137). Subsequently, a Stipulation was filed by the parties indicating that the settling co-defendants/joint tort-feasors paid a total of $625,000 in exchange for settlement agreements. (LF 222). The trial court ultimately denied Dr. Ahmed's request for application of § 537.060 in the amount of $625,000. (LF 145-147).

Section 537.060 states that the court "shall reduce the claim by the stipulated amount of the agreement." "When a statute mandates that something be done by providing that it 'shall' occur and also provides what results 'shall' follow a failure to comply with the statute, it is clear that it is mandatory and must be obeyed." *SSM Health Care St. Louis v. Schneider*, 229 S.W.3d 279, 281 (Mo. App. 2007). Statutory construction is a question of law, not judicial discretion. *Eckenrode v. Director of Revenue*, 994 S.W.2d 583, 585 (Mo. App. 1999). "The primary rule of statutory interpretation requires this Court to ascertain the intent of the legislature by considering the language used while giving the words used in the statute their plain and ordinary meaning." *Benoit v. Missouri Highway and Transp. Comm'n*, 33 S.W.3d 663, 673 (Mo. App. 2000). It is presumed that the legislature intended what the statute says; therefore, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction. *Eckenrode*, 994 S.W.2d at 586.

As set forth above, Dr. Ahmed both pleaded and proved the existence of settlements by joint tortfeasors. Applying the rules of statutory construction, clearly, the trial court did not have the discretion to deny Dr. Ahmed relief under § 537.060. Dr. Ahmed requested a reduction and the trial court should have amended its judgment to reduce damages in the amount of $625,000. Its failure to do so contradicts the clear and unequivocal language of the statute. In doing so, it permitted Mr. Sanders to collect more than once for the same damages, something the legislature sought to prevent through § 537.060.

Under the circumstances, the trial court improperly denied the request for reduction of the judgment. The trial court should have applied § 537.060 and issued an amended judgment in the amount of $1,560,953.52. This Court should remand to the trial court the October 22, 2010, Amended Judgment with instructions to amend it to include a reduction/set-off in the amount of $625,000.

2. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR PERIODIC PAYMENTS PURSUANT TO MO. REV. STAT. § 538.220.2 (1986) BECAUSE THE STATUTE REQUIRES THE COURT TO GRANT A MOTION BY EITHER PARTY, IN THAT DR. AHMED REQUESTED RELIEF UNDER THE STATUTE AND MR. SANDERS WAS AWARDED IN EXCESS OF ONE HUNDRED THOUSAND DOLLARS WHICH INCLUDED FUTURE DAMAGES.

Argument:

Pursuant to MO. REV. STAT. § 538.220.2, Dr. Ahmed timely requested that the court order future damages to be made in periodic or installment payments. The trial court denied this request.

In Missouri, where damages are awarded in excess of $100,000 a party may request that future damages be paid in periodic or installment payments. Specifically, § 538.220 provides in relevant part:

> 1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, past damages shall be payable in a lump sum.
>
> 2. At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in

periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars. (emphasis added.)

Statutory construction is a question of law, not judicial discretion. *Eckenrode,* 994 S.W.2d at 585. The Court lacks discretion in determining whether to apply § 538.220.2 because "[t]he use of the word 'shall' in a statute is generally interpreted as mandatory." *See Hutchison v. Cannon,* 29 S.W.3d 844, 847 (Mo. App. 2000); *Allen v. Public Water Supply Dist. No. 5 of Jefferson County,* 7 S.W.3d 537, 540 (Mo. App. 1999). "In addition, we consider a statute in the context of the entire statutory scheme on the same subject in order to determine legislative intent." *Burns v. Elk River Ambulance, Inc.,* 55 S.W.3d 466, 484-85 (Mo. App. 2001).

The provisions of § 538.220.2 give the trial court, in the absence of a court-approved agreement between the parties, discretion in establishing the plan for future payments—with two exceptions. First, all past damages must be paid in a lump sum at the time of judgment. § 538.220.1. Second, it is presumed that, absent the attorney's agreement, attorney's contingent fees will be paid at the time of judgment. § 538.220.4. *Vincent by Vincent v. Johnson*, 833 S.W.2d 859, 866 (Mo. 1992).

Dr. Ahmed timely requested that the trial court order periodic or installment payments should the jury award future damages. (LF 165-166). Ultimately, the jury awarded future damages and the total damages were in excess of $100,000. Dr. Ahmed renewed his request for periodic or installment payments prior to the

entry of judgment. (LF 108; 169-170). In its original Judgment, the trial court did not apply § 538.220.2. Subsequently, Dr. Ahmed asked the trial court to amend the judgment to include periodic or installment payments. (LF 118-120; 121-123). When the trial court entered its Amended Judgment it, again, did not apply § 538.220.2. (LF 131-135). Finally, Dr. Ahmed filed motions seeking to amend the trial court's Amended Judgment to apply § 538.220.2. Ultimately, the trial court denied each of these requests. (LF 136-137; 145-146).

The trial court's denial of the Motion for Periodic Payments also affected a substantial right of Dr. Ahmed. As a Kansas resident, Dr. Ahmed is required to participate in laws requiring him to obtain a portion of his medical malpractice insurance coverage from the Kansas Health Care Stabilization Fund ("the Fund"). *See* K.S.A. 40-3402, 40-3403. The Fund was created in 1976, when the Kansas legislature responded to a medical malpractice insurance "availability crisis" by enacting the Health Care Provider Insurance Availability Act. *Kansas Malpractice Victims Coal. v. Bell*, 757 P.2d 251, 254 (1988); K.S.A. 60-3401 *et seq.* "This act required all health care providers to carry medical malpractice insurance as a condition precedent to practicing in Kansas." *Id.*; K.S.A. 40-3402. It also applies to resident Kansas physicians. *Id.*

K.S.A. 40-3403(d) governs the amount the Fund can pay, per fiscal year, to satisfy a judgment. "[I]f the amount for which the fund is liable is $300,000 or more, it shall be paid, by installment payments of $300,000 or 10% of the amount of the judgment including interest thereon, whichever is greater, per fiscal

year…." *Id.* The amount of the Amended Judgment in this case activates the contingencies of K.S.A. 40-3403(d). Article IV, § 1 of the Constitution requires that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State." Pursuant to the protections afforded to Dr. Ahmed pursuant to Art. IV, § 1 of the Constitution, he is entitled to an expectation that the contingencies of K.S.A. 40-3403(d) will be recognized by a Missouri Court and, therefore, applied in conjunction with his request for relief denied by the trial court pursuant to § 538.220.

Section 538.220.2 does not permit the trial court discretion in determining whether to order periodic payments if future damages are awarded by a jury in a medical malpractice action and the total amount of damages exceed $100,000. Dr. Ahmed timely requested application of the statute and did not waive that request. Under the circumstances, the trial court improperly denied the request for periodic or installment payments. The trial court should have applied § 538.220.2 and issued an amended judgment setting forth the amount and duration of those payments. This Court should remand to the trial court the October 22, 2010, Amended Judgment with instructions to amend it to include such periodic or installment payments.

3. THE TRIAL COURT ERRED IN DENYING DR. AHMED'S MOTION FOR DIRECTED VERDICT AND/OR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE MR. SANDERS FAILED TO MAKE A SUBMISSIBLE CASE IN THAT HE FAILED TO PROVE THAT THE ALLEGED NEGLIGENCE OF DR. AHMED CAUSED THE CLAIMED INJURY TO MR. SANDERS.

Argument:

Mr. Sanders failed to prove a causal connection between the alleged negligence of Dr. Ahmed and the death of Paulette Sanders. The evidence of causation that Mr. Sanders produced for the jury was strictly opinion testimony from retained expert witnesses and was tenuous and speculative. The causation testimony was not sufficient to support a verdict under Missouri law. Therefore, the trial court erred in not granting Dr. Ahmed's Motions for Directed Verdict and Motion for New Trial.

On May 21, 2003, Paulette Sanders presented to the Emergency Department of the Medical Center of Independence due to pain in her lower extremities and difficulty with walking. (Tr. Vol. 2, p. 7-8). Earlier that day, Ms. Sanders had been directed to go to the hospital by her primary care physician, Carol Kirila, D.O. (Tr. Vol. 2, p. 7-8). Consultations with various specialists were ordered, including a request that Ms. Sanders be seen by a neurologist, Iftekhar Ahmed, M.D. (Tr. Vol. 2, p. 9-10). Ms. Sanders was seen by Dr. Ahmed, the next day, May 22, 2003. (Tr. Vol. 1, p. 231). After a review of her symptoms, and

physical examination, Dr. Ahmed used his medical judgment to place Ms. Sanders on Depakote and begin weaning her off of Dilantin, drugs used to treat her long history of seizure disorder. (Tr. Vol.1, p. 231-233).

Ms. Sanders remained in the hospital and by May 26, 2003, she became lethargic. (Tr. Vol. 2, p. 17). At that time, Dr. Ahmed was not made aware of this development by any of the doctors or nurses involved in the care and treatment of Ms. Sanders. (Tr. Vol.1, p. 269-270). Depakote, Dilantin, Primidone and Phenobarbital, all drugs ordered by Dr. Ahmed, were held by the nurses on May 26, 2003. (Tr. Vol.1, p. 87). On May 27, 2003, Ms. Sanders had a significant change in mental status that required emergency intervention. (Tr. Vol. 2, p. 19-23). She was suffering from a focal seizure. (Tr. Vol.1, p. 242). Dr. Ahmed was not made aware of Ms. Sanders physical and mental changes for six or more hours. (Tr. Vol.1, p. 241-243). Dr. Ahmed arrived to assist in the care and treatment of Ms. Sanders at approximately 4:17 p.m. on May 27, 2003. (Tr. Vol.1, p. 251). After an EEG on May 28, 2003, Dr. Ahmed ordered that Depakote be discontinued. (Tr. Vol.1, p. 335-336).

Mr. Sanders' expert, Richard Bonfiglio, M.D., testified that the care provided by Dr. Ahmed contributed to the patient "subsequently developing complications that led to her death" even though the death "took some time." (Tr. Vol. 1, p. 62). Dr. Bonfiglio testified Ms. Sanders' condition was made worse when administered Depakote on May 27 and 28, 2003, even though she was already comatose. (Tr. Vol. 1, p. 252). Dr. Bonfiglio's pronouncement, that Dr.

Ahmed's care caused or contributed to cause the death of Paulette Sanders, was despite the fact she had aspirated vomit into her lungs before Depakote was restarted on May 27, 2003. (Tr. Vol. 1, p. 90). He held his opinion in spite of the fact that he admitted Ms. Sanders may have been hypoxic around 9:00 a.m., and for hours before, on May 27, 2003 which could have aggravated her condition. (Tr. Vol. 1, p. 90-91). Dr. Bonfiglio also admitted that the seizure activity on the morning of May 27, 2003 could have contributed to Ms. Sanders condition. (Tr. Vol. 1, p. 92). Ms. Sanders did not die until August 24, 2005, more that two years after treatment by Dr. Ahmed. (LF 80-94).

To establish causation, the tortfeasor's conduct must be both the cause in fact and the proximate, or legal, cause of the plaintiff's injury. *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852 (Mo. banc 1993). Causation, in fact, is evaluated through the familiar "but for" test; that is, it must be shown that, but for the tortfeasor's conduct, the injured party would not have been damaged. *Tompkins v. Cervantes*, 917 S.W.2d 186, 190 (Mo. App. 1996). "The second facet of causation is proximate cause, which is often described as a limitation on liability, absolving those actors whom it would be 'unfair' to punish because of the attenuated relation which their conduct bears to the plaintiff's injury." *Id.* "The most basic formulation of Missouri's proximate cause test is that conduct can constitute the proximate cause of any harm which is its 'natural and probable result.' This has been described as a 'look back' test, in which the naturalness and

probability of the result is assessed from the point in time after the injury has occurred." *Id.*

This Court has long held that the existence of facts essential to recovery may not depend on guess-work, conjecture or speculation; instead, the evidence must tend to exclude every reasonable conclusion other than that sought. *Stark v. American Bakeries Co*., 647 S.W.2d 119, 125 (Mo. banc 1983); *Herberholt v. de Paul Com. Health Center*, 625 S.W.2d 617, 623 (Mo. banc 1981). Where the evidence at trial affords no more than equal support for either of two inconsistent and contradictory inferences as to the ultimate and determinative fact, liability is left in the field of conjecture, and there is a failure of proof. *Id.*

The Missouri Court of Appeals has previously addressed the issue of speculative causation testimony under circumstances similar to this case. *See Delisi v. St. Luke's Episcopal-Presbyterian*, 701 S.W.2d 170 (Mo. App. 1985). In *Delisi*, the plaintiff's hand wound became infected after treatment by the defendant physician, which did not include prescription of antibiotics. *Id.* at 172. The plaintiff testified that he had told the doctor he had run an old rusty knife through his hand. *Id.* The doctor denied this but conceded that a dirty wound would warrant administering an antibiotic and that he had not done so. *Id.* On appeal, the court found the evidence sufficient to support a determination that the doctor had violated the standard of care. *Id.* at 174. However, the plaintiff offered no direct proof that, had the doctor prescribed antibiotics, the infection plaintiff suffered would have been avoided. Noting that the therapeutic properties of

antibiotics are not within the realm of knowledge of the average juror, the court held that the facts were insufficient to permit the jury to infer causation and that a finding of causation would inevitably require the jury to engage in conjecture and surmise. 701 S.W.2d, at 177.

Dr. Bonfiglio's opinions were not supported by sufficient facts in evidence. Instead the opinions are speculative and conclusory, in contravention of Missouri case law. 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*, 54 S.W.3d 652 (Mo. App. 2001). To have probative value, an expert's opinion must be founded on the facts and data and not mere conjecture or speculation.

Mr. Sanders' evidence on causation also failed to establish a submissible case against Dr. Ahmed because Mr. Sanders failed to present sufficient competent evidence that Dr. Ahmed's conduct was the "but for" cause of the death of Paulette Sanders. Under the "but for" test, Ms. Sanders must prove that the injury would not have happened "but for" Dr. Ahmed's conduct. *Townsend v. Eastern Chemical Waste Systems*, 234 S.W.3d 452, 466 (Mo. App. 2007).

As discussed above, Dr. Bonfiglio offered testimony despite the fact that he admitted several events occurred before Depakote was reintroduced on May 27, 2003 including a seizure, aspiration of vomit and a likely hypoxic event that caused Ms. Sanders injury. As in *Delisi*, Mr. Sanders did not offer any proof that damage would not have been suffered by Ms. Sanders, "but for" the acts of Dr.

Ahmed. In fact, plaintiff's evidence offered the opposite. Dr. Bonfiglio admitted that the events of May 27, 2003 – which occurred before Dr. Ahmed's arrival and treatment of Ms. Sanders – *did* cause her complications. The jury was therefore forced to engage in conjecture and speculation as to what caused Ms. Sanders' death in order to arrive at its verdict. In doing so, the jury ignored Dr. Bonfiglio's own admissions.

Simply put, the evidence presented at trial did not support the finding that "but for" Dr. Ahmed's actions, Ms. Sanders would not have ultimately died, over two years after his care and treatment of Ms. Sanders had ceased. The evidence presented showed that events occurred, absent Dr. Ahmed's actions, which caused Ms. Sanders injury.

Mr. Sanders failed to prove any causal connection between the alleged negligence of Dr. Ahmed and the death of Paulette Sanders. The verdict was unsupported by the evidence because the evidence presented to the jury failed to demonstrate that Ms. Sanders would not have sustained brain injury "but for" Dr. Ahmed's actions. Finally, Ms. Sanders' death, over two years after treatment by Dr. Ahmed, occurred after continued treatment by medical professionals and other intervening events such that any causal link between the alleged negligence of Dr. Ahmed and Ms. Sanders' subsequent death is too speculative to support a verdict.

Therefore, the trial court erroneously denied Dr. Ahmed's Motions for Directed Verdict and Motion for New Trial thereby prejudicing Dr. Ahmed.

4. THE TRIAL COURT ERRED WHEN IT DENIED DR. AHMED'S MOTION FOR A NEW TRIAL BECAUSE DR. AHMED WAS DENIED A FAIR TRIAL IN THAT ARGUMENTS MADE BY COUNSEL FOR MR. SANDERS WERE IMPROPER AND SO UNDULY PREJUDICIAL THAT THEY INFLAMED THE PASSIONS AND PREJUDICES OF THE JURY.

Argument:

By the time trial began, all of the other health care providers who had been named as defendants in the action had reached settlement agreements with plaintiff and had been released from the case. Only Dr. Ahmed remained as a defendant.

There was no claim for punitive damages pleaded in Plaintiff's original Petition or the First Amended Petition in this case. (LF p. 44-53; 54-65.) In the Second Amended Petition and in the Third Amended Petition, which was the operative pleading under which Plaintiff's claim was tried and submitted to the jury, the only prayer for punitive damages was against Dr. Nathan Knackstedt and Medical Center of Independence. (LF p. 66-79; 80-94). Neither of those defendants was still in the case at the time of submission of the case to the jury. (LF 108).

There were never, in any of the iterations of Mr. Sanders' Petitions filed in this case, allegations seeking or warranting an award of either punitive damages, or damages taking into consideration "aggravating circumstances attending the death" of Ms. Sanders, against Dr. Ahmed. (LF p. 44-94). Nevertheless, when it

came time for closing arguments in the case, when only Dr. Ahmed remained as a defendant, Mr. Sanders' counsel embarked repeatedly on arguments geared toward punishing Dr. Ahmed, or delivering a message to him, or deterring other doctors from like conduct – the function served by punitive damages. Mr. Sanders' counsel continued to make such improper arguments even after objections to the impropriety of such arguments had been sustained by the trial judge on two separate occasions (Tr. Vol. 1, p. 18; 378).

In a wrongful death case, where there have been no allegations of "aggravating circumstances attending the death" of the decedent, the proper measure of damages is what award will compensate the statutory heirs of the deceased in regard to certain factors set forth in MO. REV. STAT. § 537.090. The statute states:

> In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support of which those on whose behalf suit may be brought have been deprived by reason of such death …

Nowhere in the statute does it say that the jury can award an amount of damages having regard for what it will take for the defendant to "get the word … to

understand" what conduct is inappropriate, nor does the statute provide for an amount of damages to send a "signal" not just to the party defendant, but to all non-parties similarly situated – "all doctors" – regarding what conduct is to be avoided in the future. (Tr. Vol. 1, p 378).

"Missouri courts have long shown displeasure with 'send a message' arguments in which punitive damages are not sought." *Beis v. Dias*, 859 S.W.2d 835, 840 (Mo. App. 1993). "When the message argument becomes the theme of the entire closing, it constitutes reversible error." *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 779 (Mo. 1989).

Telling the jury first that its decision will have an effect beyond the parties to the case is improper and untrue. In this case, Mr. Sanders' counsel told the jury "I told you this case could have significance beyond this courtroom, actually beyond this city. It could affect this whole region. It could affect this whole country." (Tr. Vol. 1, p 356). Such grandiose claims of the impact of the case at bar is a calculated ploy to pressure the jury into using a different yardstick for awarding damages than is proper or permissible under the wrongful death statutes. Why else would Mr. Sanders' counsel be talking to the jury about their decision sending "a signal to all doctors" unless it was to cause the jury to mistakenly believe their decision would have a more far-reaching effect than it, in fact, would? With such supposed regional, or even national, implications to the case, wouldn't a jury believe that to send the appropriate message, it would need to award a large sum of money, regardless of what the evidence adduced at trial

indicated the damages were "having regard to the pecuniary losses suffered by reason of the death"?

Mr. Sanders counsel's repeated exhortations to the jury to award a huge sum of money – "anywhere from $5 to $26 million" – without any relationship to the evidence of damages suffered by the statutory heirs, but only in regard to sending a message to others, were unduly prejudicial and clearly inflamed the passions and prejudices of the jury. (Tr. Vol. I, pg. 378). That is the surest explanation for the jury's verdict in excess of $10,000,000.00. (LF 108-109). An award in that amount was unsupported by the evidence introduced at trial.

After trial, Dr. Ahmed timely filed a Motion for New Trial based upon the undue prejudice suffered by Dr. Ahmed due to the improper arguments of Plaintiff's counsel in closing arguments. (LF 184-197). The trial judge overruled Dr. Ahmed's motion. (LF 145-147).

Refusing to grant a new trial to Dr. Ahmed after seeing the effect that Mr. Sanders counsel's improper arguments had on the jury was error by the trial court, especially in light of the "send a message" theme. Allowing Mr. Sanders' counsel to continue making improper arguments, to which previous objections had been sustained, and then refusing Dr. Ahmed the appropriate relief in the aftermath of such prejudicial arguments, was an error by the trial court that calls out for correction. Only a new trial will correct the damage done by such improper closing arguments.

CONCLUSION

Respondent/Cross-Appellants Iftekhar Ahmed, M.D. and Dr. Iftekhar Ahmed, P.A. pray that this Court deny Appellant/Cross-Respondents appeal and rule in favor of the constitutionality of MO. REV. STAT. § 538.210 (1986), and further to rule in favor of Respondent/Cross-Appellants on their appeal and enter Judgment Notwithstanding the Verdict or, alternatively, to reverse the amended judgment of the trial court and remand the matter for new trial on all issues or, alternatively, to remand to the trial court for correction of its amended judgment with instructions to apply MO. REV. STAT. § 537.060 (2000) and MO. REV. STAT. § 538.220 (1986).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, this certificate and the signature block contains 11, 234 words (as determined by Microsoft Word 2007 software); and

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

(3) That a true and correct copies of the brief and a copy of the CD-ROM containing a copy of the brief, were mailed via U.S. Mail and sent via electronic mail, this 11th day of July, 2011, to:

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