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JURISDICTIONAL STATEMENT

This appeal arises out of a medical malpractice/wrongful death action and challenges the constitutionality of §538.210 RSMo (1986) which imposes a limitation upon non-economic damages. The trial court's Amended Judgment reduced those parts of the jury's verdict for past non-economic and future non-economic damages from $9,200,000 to $1,265,207.64 (two defendant caps of $632,603.82 each). The Supreme Court has

jurisdiction. Missouri Constitution, Art. V, §3.

Preservation of Constitutional Questions. The constitutional issues involved in this appeal are "real, substantial," and made in "good faith," and within the exclusive jurisdiction of this Court. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 52 (Mo.banc 1999). Although this Court upheld §538.210 against certain constitutional challenges in Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo.banc 1992), including trial by jury, the other basis claimed on appeal here (separation of powers) was not addressed in that case. Furthermore, this Court has signaled its willingness to re-examine the Adams analysis and holding with respect to trial by jury. *See* Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752, 773, 781-2 (Mo.banc 2010) (Wolff, J., concurring; Teitelman, J., concurring).

Mr. Sanders timely presented his constitutional objections to the trial court with the requisite specificity. Callier v. Dir. of Revenue, 780 S.W.2d 639, 641 (Mo.banc 1989). He raised his constitutional objections to §538.210 at the first opportunity, in his amended reply to defendants' answer to the third amended petition (LF 104-105).

The verdict amounts for past and future non-economic damages moved the issue beyond hypothetical possibility to the real and immediate stage and made some action by the court necessary. Plaintiff then brought the court's attention to each statute's constitutional infirmity by filing specific objections in writing before the judge was compelled to make a decision on applying the statute -- *i.e.,* before entry of the initial judgment. These included Art. II, §1 (separation of powers) and Art. I, §22(a) (trial by jury), and other provisions not further pursued on this appeal (LF 112-115).

He need not have done that earlier in the proceedings. Raising constitutional objections *sua sponte* in a petition charging negligence and seeking money damages is superfluous and unnecessary because not part of the cause of action. Constitutional infirmity is sometimes a matter of avoidance to be pleaded in a reply to an affirmative defense. *See, e.g.,* Barnes v. City of Kirksville, 266 Mo. 270, 180 S.W. 545, 546 (banc 1915); Hanks v. Hanks, 218 Mo. 670, 117 S. W. 1101, 1103 (1909). After defendants' joint answer generally invoked "all available aspects of Missouri Revised Statutes Chapter 538, "including but not limited to the cap on non-economic damages" (LF 96), plaintiff amended his reply to challenge the constitutionality of Chapter 538 (LF 104-105). *See* Woodling v. Westport Hotel Operating Co., 331 Mo. 812, 55 S.W.2d 477, 479 (1932) ("A constitutional question must be raised timely in the course of orderly procedure. Accordingly, it should be raised in the pleadings if due to be found there; if not, then at the first opportunity, and kept alive.").

Plaintiff kept the issues alive in his pre-judgment objections to application of §538.210 (LF 112-15, 127), as well as in his Motion to Amend Judgment (LF 138), giving the judge an opportunity to correct the error of applying the statute. No more is required. Deacon v. City of Ladue, 294 S.W.2d 616, 622 (Mo.App.E.D. 1956). Finally, it was ruled on -- twice -- to the disadvantage of the plaintiff (LF 134, 146). Miller v. Connor, 250 Mo. 677, 157 S.W. 81, 83 (1913).

STATEMENT OF FACTS

Factual Background. On May 21, 2003, Paulette Sanders presented to the Emergency Department of Medical Center of Independence (MCI), with complaints of difficulty walking

and numbness in her legs (LF 84-85, ¶11). She was admitted to the hospital by her primary care physician who requested a consultation by Dr. Iftekhar Ahmed, a neurologist (LF 85, ¶11). Mrs. Sanders had a long history of seizure disorders; Dr. Ahmed ordered a change in her medication from dilantin and phenobarbitol to Depakote (LF 85, ¶12). Over the next several days, her mental and physical condition deteriorated and by the evening of May 27 she was essentially comatose and unresponsive to even painful stimuli (LF 85-86, ¶¶13-17, LF 91, ¶24). Her condition continued to deteriorate, she was transferred from the hospital to a long-term care facility, and she passed away on August 24, 2005 (LF 91-92, ¶24).

Procedural History. Ronald Sanders initially commenced a personal injury action on May 16, 2005, both individually and as Guardian ad Litem for his wife Paulette Sanders, who was then mentally and physically infirm (LF 3, 45-46). The original petition alleged that she sustained personal injury arising out of medical negligence committed on May 27-29, 2003, while a patient at the former Medical Center of Independence (LF 48-49, ¶¶8-14, LF 51-52, ¶19). Mr. Sanders stated his own claim for loss of consortium (LF 52-53). There were six named defendants (LF 44-48).

After Mrs. Sanders' death on August 26, 2005, her Estate was timely substituted as a plaintiff in the First Amended Petition by order on December 5, 2005 (LF 6, 54-55). That pleading retained the essential allegations against the defendants (LF 55-63). The parties engaged in discovery and motion practice for over four years (LF 6-31).

On May 28, 2008, plaintiffs filed their Second Amended Petition with leave of court (LF 15, 66), which added one new party defendant, dropped the Estate as a plaintiff, and

added certain new allegations (LF 66-78). This was the first pleading to allege that the negligence of the various defendants had combined to cause Mrs. Sanders' death (LF 76-77, ¶22). Mr. Sanders also dropped his separate claim for loss of consortium prior to her death.

On September 3, 2008, Mr. Sanders filed a Third Amended Petition with leave of court which added another party defendant (LF 19, 80).

In October 2009 as a trial date was nearing, plaintiff dismissed three individual defendants with prejudice (LF 30), then later settled with and dismissed all remaining defendants except Dr. Ahmed and his employer (LF 31-32). The partial settlement hearing was held on October 30, 2009 (LF 31). The trial date was moved to September 13, 2010 (LF 38).

Plaintiff sought leave on August 31, 2010, to amend the Reply he had filed to the Ahmed defendants' joint answer in September 2008 (LF 37, 99). The amended reply, which was attached to the motion for leave, raised constitutional objections to §538.210 RSMo (LF 103-105). The motion was unopposed and leave was granted on September 14, 2010 (LF 102).

The parties tried the issues from September 13 through 17, 2010 (LF 38-39). Plaintiff submitted the case on the theory that Mrs. Sanders had an unusual genetic defect that prevented her body from properly eliminating ammonia that was produced by the administration of the Depakote Dr. Ahmed had ordered, that he failed to recognize and properly treat her increasing ammonia level (hyperammonemia) with a drug called lactulose, and that as a result thereof she suffered irreversible brain damage that ultimately caused her death.

Plaintiff's verdict directing instruction (LF 107) postulated that Dr. Ahmed was negligent by (1) failing to diagnose and treat Mrs. Sanders' condition of hyperammonemic encephalopathy on May 27, 2003, caused by the use of Depokote after her serum ammonia level was found to be elevated, or (2) by ordering Depakote to be resumed on the evening of May 27, 2003, when her serum ammonia level was elevated, or (3) by re-ordering the use of Depakote on May 28, 2003, and thereafter initiated the withholding of lactulose on May 29, 2003.

The jury returned its verdict on September 17 in favor of Mr. Sanders and against defendants Iftekhar Ahmed, M.D., and Dr. Iftekhar Ahmed, P.A. (his employer) (LF 108-109). The jury awarded damages to Mr. Sanders as follows:

For past economic damages including past medical damages $920,745.88.

For past non-economic damages $1,700,000.

For future non-economic damages $7,500,000.

TOTAL DAMAGES $10,120,745.88.

After the verdict but before entry of the initial judgment, defendants moved for reduction of the non-economic damage award to conform to the limits imposed by §538.210 RSMo (LF 110) and for certain other relief (LF 39). Plaintiff filed his objections and suggestions in opposition (LF 112-115), and defendants filed a reply in support (LF 116). The court entered an initial judgment on September 28, 2010, that reflected the verdict amounts (LF 118-120). Thereafter, the parties agreed that the statutory cap on non-economic damages was $632,603.82 per defendant as of the date of trial and that there were two caps

because two defendants (LF 121, 127, 130). After briefing and argument by counsel, the trial court entered its Amended Judgment on October 22, 2010, reducing plaintiff's non-economic damages from $9.2 million to $1,265,207.64 and apportioning those proceeds among Ronald Sanders and the couple's two daughters (LF 131-134).

Plaintiff timely filed his Motion to Amend the amended judgment under Rule 78.04 on November 17, 2010, asserting error in applying the statutory caps because it was unconstitutional and asking that the non-economic damages awarded by the jury be reinstated (LF 138-143). That motion and all of defendants' other pending motions were overruled on January 14, 2011 (LF 145-146). Plaintiff filed his Notice of Appeal on January 19, 2011 (LF 148).

POINT RELIED ON

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' MOTION TO APPLY §538.220 RSMo (1986 VERSION) AND ENTERING AN AMENDED JUDGMENT THAT REDUCED APPELLANT'S RECOVERABLE DAMAGES FOR PAST AND FUTURE NON-ECONOMIC DAMAGES FROM THE $9.2 MILLION AWARDED BY THE JURY TO JUST $1,265,207.64, FOR THE REASON THAT §538.220 IS UNENFORCEABLE BECAUSE:

(A) IT VIOLATES ART. I, §22(a) OF THE MISSOURI CONSTITUTION IN THAT IT SUBSTANTIALLY INTERFERES WITH THE RIGHT TO TRIAL BY JURY AS UNDERSTOOD AT COMMON LAW BY DEPRIVING APPELLANT OF THE SUBSTANTIVE RIGHTS TO HAVE DAMAGES DETERMINED BY THE

JURY AND OBTAIN THE FULL AND INTENDED EFFECT OF ITS VERDICT, AND BY PREVENTING ENTRY OF A JUDGMENT IN ACCORDANCE WITH THE VERDICT UPON WHICH HE COULD EXECUTE TO RECOVER ALL OF HIS DAMAGES;

Thorne v. Thorne, 350 S.W.2d 754 (Mo. 1961)

State ex rel. Burns v. Whittington, 219 S.W.3d 224 (Mo.banc 2007)

Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752 (Mo.banc 2010)

Sofie v. Fibreboard Corp., 112 Wash.2d 636, 771 P.2d 711, 724 (1989)

(B) IT VIOLATES ART. II, §1 OF THE MISSOURI CONSTITUTION IN THAT IT IS AN IMPERMISSIBLE LEGISLATIVE INTERFERENCE WITH AND USURPATION OF POWERS COMMITTED EXCLUSIVELY TO THE JUDICIAL BRANCH INCLUDING THE INHERENT POWER AND DUTY OF COURTS TO ENTER JUDGMENT IN ACCORDANCE WITH THE JURY VERDICT AND TO ENFORCE SAME, AND THE TRADITIONAL JUDICIAL FUNCTION OF ASSESSING ON A CASE-BY-CASE BASIS WHETHER A JURY'S DAMAGE AWARD IS EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE IT SUBSTITUTES A FIXED DAMAGE CEILING THAT TAKES NO ACCOUNT OF THE FACTS IN A PARTICULAR CASE AND PRECLUDES JUDICIAL INQUIRY AND A NEW TRIAL.

Albright v. Fisher, 164 Mo. 56, 64 S.W. 106 (banc 1901)

Chastain v. Chastain, 932 S.W.2d 396 (Mo.banc 1996)

Thorne v. Thorne, 350 S.W.2d 754 (Mo. 1961)

Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752 (Mo.banc 2010)

ARGUMENT

Standard of Review. A statute is presumed to be constitutional and will not be held unconstitutional unless it clearly and undoubtedly contravenes the constitution. Lester v. Sayles, 850 S.W.2d 858, 872 (Mo.banc 1993). A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution. Id. The burden of proof is upon the party claiming that the statute is unconstitutional. Id. Appellate review is *de novo*. Akers v. City of Oak Grove, 246 S.W.3d 916, 919 (Mo.banc 2008).

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANT'S MOTION TO APPLY §538.210 RSMo (1986 VERSION) AND ENTERING AN AMENDED JUDGMENT THAT REDUCED APPELLANT'S RECOVERABLE DAMAGES FOR PAST AND FUTURE NON-ECONOMIC DAMAGES FROM THE $9.2 MILLION

AWARDED BY THE JURY TO JUST $1,265,207.64, FOR THE REASON THAT §538.210 IS UNENFORCEABLE BECAUSE:

(A) IT VIOLATES ART. I, §22(a) OF THE MISSOURI CONSTITUTION IN THAT IT SUBSTANTIALLY INTERFERES WITH THE RIGHT TO TRIAL BY JURY AS UNDERSTOOD AT COMMON LAW BY DEPRIVING APPELLANT OF THE SUBSTANTIVE RIGHTS TO HAVE DAMAGES DETERMINED BY THE JURY AND OBTAIN THE FULL AND INTENDED EFFECT OF ITS VERDICT, AND BY PREVENTING ENTRY OF A JUDGMENT IN ACCORDANCE WITH THE VERDICT UPON WHICH HE COULD EXECUTE TO RECOVER ALL OF HIS DAMAGES.

Analysis and Discussion. Art. I, §22(a) declares that "the right of trial by jury as heretofore enjoyed shall remain inviolate." These words are "intended to guarantee a right, not restrict a right." State ex rel. Diehl v. O'Malley, 95 S.W.3d 82, 84 (Mo.banc 2003). They are, moreover, "a more emphatic statement of the right than the simply stated guarantee written some 30 years earlier as the 7th Amendment to the United States Constitution that '. . . the right of trial by jury shall be preserved, . . .' " Id.

"[T]his Court has stated multiple times that the right [to trial by jury] applied to actions that existed at common law before the adoption of the first constitution, in 1820." Hammons v. Ehney, 924 S.W.2d 843, 849 (Mo.banc 1996). Furthermore, this constitutional guaranty "means that all the substantial incidents and consequences, which pertained to the right of trial by jury, are beyond the reach of hostile legislation, and are preserved in their

ancient substantial extent as existed at common law." State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow, 133 Mo. 500, 36 S. W. 43, 48 (banc 1896); Lee v. Conran, 213 Mo. 404, 111 S.W. 1151, 1153 (1908).

1. *Common Law Incidents and Consequences*. The function of the jury was fact-finding, and that included a determination of damages. Woodson v. Scott, 20 Mo. 272, 1855 WL 5212 (1855) ("the juries of the country are the most appropriate judges of the amount of injury sustained; and to them is properly assigned the authority, and right to assess the consequent amount of damages therefor"). *See also* Dimick v. Schiedt, 293 U.S. 474, 480, 55 S.Ct. 296, 298, 79 L.Ed. 603 (1935) (at common law "in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it"); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353-4, 118 S.Ct. 1279, 1287, 140 L.Ed.2d 438 (1998) ("It has long been recognized that 'by the law the jury are judges of the damages' ").

Trial by jury included the right of the prevailing plaintiff to the award of the full measure of fair, just and reasonable damages, including noneconomic damages, as determined by the jury upon consideration of a host of factors and proper instructions. Rodefeld v. St. Louis Public Service Co., 275 S.W.2d 256, 262 (Mo. 1955).

Prior to 1820, among the other attributes, incidents and consequences of the right of trial by jury were entry of a judgment *in accordance with the jury verdict* and the judgment creditor's right to immediate enforcement thereof. As noted in Capital Traction Co. v. Hof, 174 U.S. 1, 13-4, 19 S.Ct. 580, 585, 43 L.Ed. 873 (1899):

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, [includes] a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict.

Early Missouri cases adhered to that view. *See* Bank of Missouri v. Anderson, 1 Mo. 244, 1822 WL 1472 (1822); Vaughn v. Scade, 30 Mo. 604, 1860 WL 6183, *2 (1860). A court lacked authority to reach its own verdict in a jury trial.

A verdict is the "definitive answer given by the jury to the court concerning matters of fact committed to the jury for their deliberation and determination." Delaney v. Gibson, 639 S.W.2d 601, 603 (Mo.banc 1982). "A verdict is the *final* decision of a jury." Garland v. National Super Markets, Inc., 696 S.W.2d 342, 344 (Mo.App.E.D. 1985). Verdicts are "solemn pronouncements on which the rights of parties are determined." Crowley v. Rogers, 181 S.W. 434, 437 (K.C.Ct.App. 1915).

At common law, "the only effectual and legal verdict is the *public* verdict; in which [the jurors] openly declare to have found the issue for the plaintiff, or for the defendant." 3 W. Blackstone, *Commentaries on the Laws of England* 377 (1769). Thereafter the jury verdict was recorded on the *postea* and the judge rendered the judgment in accordance with the verdict and the applicable law. Id. at 386-7. This ancient practice of rendering a judgment on the verdict was carried through after Missouri's statehood and is an integral feature of the right of trial by jury to this day. Lummi Bay Packing Co. v. Kryder, 263 S.W.

543, 545 (K.C.Ct.App. 1924) ("before a jury decision is considered final and a 'verdict', it must be submitted to the court, accepted by it and assented to by the jury, and recorded by the court"); Garland v. National Super Markets, Inc., supra 696 S.W.2d at 344.

"A verdict is the *sole* basis of the judgment to be entered in a jury case." Thorne v. Thorne, 350 S.W.2d 754, 757 (Mo. 1961) (emphasis added); Meffert v. Lawson, 315 Mo. 1091, 287 S.W. 610, 612 (1926) (the judgment "must be based upon the verdict"); Lummi Bay Packing Co., supra 263 S.W. at 545 ("the verdict as written and recorded is the basis, and the only basis, of the judgment"); Newton v. St. Louis & S.F.R. Co., 168 Mo.App. 199, 153 S.W. 495, 496 (K.C.Ct.App. 1913) ("The judgment must always follow and conform to the verdict").

Then as now, a court had no authority to amend the jury's verdict after its discharge in matters of substance or materiality, or to substitute a new verdict. Kahn v. Prahl, 414 S.W.2d 269, 278 (Mo. 1967) ("courts, of course, cannot change a verdict in a matter of substance nor can they do so in effect by substituting their verdict for that of the jury and entering a judgment not supported by the verdict"); Henley v. Arbuckle, 13 Mo. 209, 1850 WL 4172, *2 (1850) ("It will not be claimed, that the courts can substitute their findings for those of the juries"); Poulson v. Collier, 18 Mo.App. 583, 1885 WL 7762, *12 (1885) ("The finding of every material fact the jury must make for themselves. No one can do it for them, any more with their consent than without it.").

The right to amend a verdict after discharge "is limited to matters of form or clerical errors manifested by the record, and never extends to matters of substance passed on by the

jury and essential to the determination of the case." Ralston Purina Co. v. Kennedy, 347 S.W.2d 462, 465-6 (Mo.App.S.D. 1961). "[O]nce the verdict is received and the jury discharged, it is only informalities, and not material matters, that the court will have the power to amend, since otherwise the court would be put in the position of substituting its own findings for those of the jury, and would thereby trespass upon the latter's special province as the body constituted to try the facts." Id.

This essential practice prevented re-examination of the issues of fact by courts and preserved the substance of trial by jury, not just its form. Thus the jury's determination of the rights of the parties is given effect; the injured party is afforded "a pecuniary satisfaction in damages," 3 Blackstone at 116; and a final, enforceable judgment according to law is rendered. State ex rel. Whatley v. Mueller, 288 S.W.2d 405, 410 (Mo.App.E.D. 1956) ("It is elementary that the judgment and its enforcement is the end of litigation, and therefore it is essential that the judgment dispose of the matters at issue so that the parties may be able to ascertain with reasonable certainty the extent to which their rights may be fixed").

The right to execution follows immediately upon the rendition of a judgment. State v. Haney, 277 S.W.2d 632, 635 (Mo. 1955); 3 Blackstone at 401 ("After *judgment* is entered, *execution* will immediately follow" unless the losing party obtains a new trial or appeals).

2. Appellant's Right to Trial by Jury by Course of Common Law in this Case. This lawsuit began as a garden-variety personal injury action recognized at common law. Count I of the original petition asserted a claim for damages for Paulette Sanders' injuries (LF 45-52). It was brought by her duly-appointed Guardian ad Litem (her husband) (LF 3, 44).

Count II asserted the husband's claim for loss of consortium (LF 52-53).

The right of trial by jury as recognized at common law, with all its attributes, incidents and consequences, unquestionably attached to Mrs. Sanders' cause of action seeking money damages for personal injury when she filed suit in May 2005. State ex rel. Diehl v. O'Malley, supra 95 S.W.3d at 85.

Similarly, the right of trial by jury as recognized at common law, with all its attributes, incidents and consequences, attached to Ronald Sanders' cause of action for loss of consortium in that suit because such a claim was cognizable at common law. Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 540 (Mo.banc 1963). The first reported English case considering the nature of the husband's cause of action for loss of consortium seems to have been Guy v. Livesey, 2 Cro.Jac. 501, in 1618. The right of action was recognized at common law as a separate cause of action vested in the husband. 3 Blackstone at 140; West v. City of San Diego, 54 Cal.2d 469, 482-3, 6 Cal.Rptr. 289, 297, 353 P.2d 929, 937 (1960).

The 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 had attached to the suit filed in May 2005. This for the reason that the "cause of action" never changed, as this Court has repeatedly recognized for over a century:

> [T]his Court has defined the term "cause of action" as "a group of operative facts giving rise to one or more bases for suing." Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315, 318 (Mo.banc 2002). A cause of action

> remains the same even though additional or different theories of evidence or law might be advanced to support it. *Id.* The term "cause of action" thus refers to the negligent act or omission, as opposed to the injury which flows from the tortious conduct. Although death is the necessary final event in a wrongful death claim, the cause of action is derivative of the underlying tortious acts that caused the fatal injury. Therefore, even though Relator filed an amended petition alleging wrongful death, her cause of action did not change because the lawsuit had been and still is based upon the same operative facts; namely, Mr. Burns' harmful exposure to the Defendants' benzene-containing products. Relator's amended petition did not constitute a new cause of action.

State ex rel. Burns v. Whittington, 219 S.W.3d 224, 225 (Mo.banc 2007). *See also* State ex rel. St. Louis Brewing Ass'n v. Reynolds, 226 S.W. 579, 580 (Mo.banc 1920) ("The cause of action is the wrongful act of defendant in killing the deceased"); Harrell v. Quincy, O. & K.C.R. Co., 186 S.W. 677, 679 (Mo.banc 1916) ("the cause of action is the wrongful act of the defendant in killing the deceased, and that cause of action is involved in every suit brought for the recovery of the damages growing out of it"); and Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S.W. 851, 856 (banc 1906) ("Whether the right of action [for wrongful death] is a transmitted right or an original right; whether it be created by a survival statute or by a statute creating an independent right, the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such

wrongful act but one recovery should be had"). The same essential definition of "cause of action" has been employed in Grue v. Hensley, 357 Mo. 592, 210 S.W.2d 7, 10 (1948) ("the *cause for* action, i.e., the underlying facts combined with the law giving the party a *right* to a remedy of one form or another based thereon"), and Chestnut v. Mertz, 144 S.W.2d 194, 196 (St.L.Ct.App. 1940) ("A cause of action consists of those facts, as between two parties, entitling one of them to a judicial remedy of some sort against the other for the redress of a wrong").

3. §538.210 Substantially Interferes with the Right of Trial by Jury. Sec. 538.210.1 RSMo (1986 version) states (in pertinent part):

> 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, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for noneconomic damages from any one defendant.[1]

"Noneconomic damages have long been recognized as an element of total damages in tort cases, including those involving medical negligence." Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 691 S.E.2d 218, 222 (2010) (citing 3 Blackstone at 122,

[1]Subs. 4 thereof permitted annual adjustments by the director of the division of insurance based upon a formula. At the time of trial, the cap per defendant was $632,603.82. The 2005 amendment to §538.210 imposed an immutable cap of $350,000 for all noneconomic damages in every case.

Scott v. Sheperd, 95 E.R. 1124, 1126 (K.B. 1773), and other authorities).

This limit on juries "did not exist at common law or in statutes when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by jury as heretofore enjoyed shall remain inviolate." Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752, 774 (Mo.banc 2010) (Wolff, J., concurring).

While the General Assembly may regulate the non-essential features of the right to trial by jury (such as the qualification of jurors and the mode of summoning them; Vaughn v. Scade, supra 1860 WL at *2), it may not interfere with the substance of the fundamental attributes as they existed in 1820. Id. At common law, the jury's determination of damages affected the remedy, and so the availability of the remedy was a part of the substance of the constitutional right. Sofie v. Fibreboard Corp., 112 Wash.2d 636, 771 P.2d 711, 724 (1989) ("because the jury's [fact-finding] province includes determining damages, this determination must affect the remedy. Otherwise, the constitutional protection is all shadow and no substance."). The jury's function cannot go unheeded when the time comes for the court to enter a final judgment and to utilize court officers to aid its enforcement. Id. at 721.

It is thus no answer to suggest that the jury's function ends when it reports its verdict and is discharged. At common law, the injured party, if he prevailed, could expect or demand the court to enter a judgment *in conformity with the verdict* that the party could immediately enforce, and courts were inescapably bound to do so. No court could render a judgment differing in substance from the verdict it had accepted and recorded. To impair the full and intended effect of the jury's verdict by annulling it and substituting some other in its

place, and by denying the right or power of full enforcement, pays lip service to the form of trial by jury "but robs the institution of its function." Sofie v. Fibreboard Corp., P.2d at 721; Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d at 223 ("By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, OCGA §51-13-1 clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function"); Lakin v. Senco Products, Inc., 329 Or. 62, 987 P.2d 463, 473-4 (1999) ("to permit the legislature to override the effect of the jury's determination of noneconomic damages would 'violate' plaintiffs' right to 'Trial by Jury' "); Moore v. Mobile Infirmary Ass'n,, 592 So.2d 156, 164 (Ala. 1991) ("Because the statute caps the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeds the damages ceiling, assumes *less* than an advisory status"); Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251, 258 (1988) ("It would be illogical for this court to find that a jury, empaneled because monetary damages are sought, could not then fully determine the amount of damages suffered").

There is no language in Art. I, §22(a), or in any other part of the Missouri Constitution, that authorizes the judiciary to ignore or eviscerate a jury's findings of fact (except in the event of material trial errors or where remittitur is appropriate[2]) and substitute

[2]The arbitrary cap mandated by §528.210.1, to be effectuated by the court under §538.215.3, is not a true remittitur, which is done on an individual basis and allows a plaintiff to consent or have a new trial instead. Klotz, 311 S.W.3d at 777-80 (Wolff, J., concurring).

different verdict. No reason exists to believe that the drafters of the predecessor of Art. I, §22(a) would have tolerated interference with a jury's award of damages in a case such as this as long as the interference originated in the legislature and not in the court. Lakin, P.2d at 472-3.

Thus legislation commanding that the jury's verdict be ignored or nullified, or that its incidents and consequences be impaired, cannot pass constitutional scrutiny. This Court should overrule Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo.banc 1992), and hold §538.210 unconstitutional as a violation of the right of trial by jury.

(B) IT VIOLATES ART. II, §1 OF THE MISSOURI CONSTITUTION IN THAT IT IS AN IMPERMISSIBLE LEGISLATIVE INTERFERENCE WITH AND USURPATION OF POWERS COMMITTED EXCLUSIVELY TO THE JUDICIAL BRANCH INCLUDING THE INHERENT POWER AND DUTY OF COURTS TO ENTER JUDGMENT IN ACCORDANCE WITH THE JURY VERDICT AND TO ENFORCE SAME, AND THE TRADITIONAL JUDICIAL FUNCTION OF ASSESSING ON A CASE-BY-CASE BASIS WHETHER A JURY'S DAMAGE AWARD IS EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE IT SUBSTITUTES A FIXED DAMAGE CEILING THAT TAKES NO ACCOUNT OF THE FACTS IN A PARTICULAR CASE AND PRECLUDES JUDICIAL INQUIRY AND A NEW TRIAL.

Sec. 1 of Article II of the Missouri Constitution reads:

> The powers of government shall be divided into three distinct departments -- the legislative, executive and judicial -- each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

This Court has frequently observed that the separation of powers is "vital to our form of government" because it "prevent[s] the abuses that can flow from centralization of power." Coalition for Environment v. Joint Committee on Administrative Rules, 948 S.W.2d

125, 132 (Mo.banc 1997) (internal quotations and citations omitted). While "it was not the purpose [of the Constitution] to make a total separation of these three powers[, each branch of government] ought to be kept as separate from and independent from, each other as the nature of free government will admit, or as is consistent with that chain of connection which binds the whole fabric of the Constitution in one indissoluble bond of union and amity." Id. at 132-3 (internal quotation and citation omitted). This Court long ago observed that the constitution

> carefully divides the powers of government into three distinct and named departments; sedulously segregates each from the other; confides each to a separate magistracy; and then, not satisfied with such strict demarkation [*sic*] of the boundaries of their respective jurisdictions, peremptorily forbids either of such departments from passing the prohibitory precincts thus ordained by the exercise of powers properly belonging to either of the others, and then concludes by giving the sole exception to the unbending rule by saying, "except in the instances in this constitution expressly directed or permitted." . . . Lacking such express direction or express permission, the act done must incontinently be condemned as unwarranted by the constitution. . . . Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority

made by the constitution, and the laws made in pursuance thereof.

Albright v. Fisher, 164 Mo. 56, 64 S.W. 106, 108-9 (banc 1901). "The constitutional demand that the powers of the departments of government remain separate rests on history's bitter assurance that persons or groups of persons are not to be trusted with unbridled power. . . . Thus, '[t]he doctrine of the separation of powers [is not meant to] promote efficiency but to preclude the exercise of arbitrary power.' " State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228, 231 (Mo.banc 1997).

Two broad categories of acts that violate the constitutional mandate of separation of powers have been recognized: "One branch may interfere impermissibly with the other's performance of its constitutionally assigned [power] . . . . Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power] . . . that more properly is entrusted to another." Id. (citations omitted).

Both categories are implicated by the terms of §538.210.

The "judicial power" vested in the courts by the constitution (Art. V, §1) includes the power to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. Chastain v. Chastain, 932 S.W.2d 396, 399 (Mo.banc 1996) (constitution places "exclusively in the judicial department . . . the power of courts to decide issues and pronounce and enforce judgments"); Harris v. Pine Cleaners, Inc., 274 S.W.2d 328, 333 (Mo.App.E.D. 1955); Muskrat v. United States, 219 U.S. 346, 355, 31 S.Ct. 250, 254, 55 L.Ed. 246 (1911). "The entry of a judgment remains 'the quintessential function of a court.' " State ex rel. Hilburn v. Staeden, 91 S.W.3d 607, 610

(Mo.banc 2002) (quoting Carr v. North Kansas City Beverage Co., 49 S.W.3d 205, 207 (Mo.App.W.D. 2001). "The rendition of a judgment is the judicial act of the court." Fleming v. Clark Township of Chariton County, 357 S.W.2d 940, 942 (Mo. 1962).

As noted above, the jury's public verdict cannot be considered "final" until it has been submitted to the court, accepted by it and assented to by the jury, and then recorded by the court. Garland v. National Super Markets, Inc., supra 696 S.W.2d at 344. Before the jury's discharge, the court can require the jury to retire again to correct insufficient, defective or inconsistent verdicts or to find a new one; a verdict could even be corrected or clarified with the jury's consent in open court. Thorne v. Thorne, supra 350 S.W.2d at 757. But after discharge, a court cannot make changes matters of substance passed on by the jury and essential to the determination of the case," Ralston Purina Co. v. Kennedy, supra 347 S.W.2d at 465-6; and cannot substitute a new verdict different from the jury's findings. Kahn v. Prahl, supra 414 S.W.2d at 278; Henley v. Arbuckle, supra; Poulson v. Collier, supra.

Thereafter, the court renders a judgment that perforce follows and conforms to the verdict. Thorne v. Thorne, supra 350 S.W.2d at 757; Meffert v. Lawson, supra 287 S.W. at 612; Lummi Bay Packing Co., supra 263 S.W. at 545; Newton v. St. Louis & S.F.R. Co., supra 153 S.W. at 496. A judgment on the verdict gives rise to the right to enforce same through execution. 3 Blackstone at 401; Capital Traction Co. v. Hof, supra 174 U.S. at 14, 19 S.Ct. at 585; State v. Haney, supra 277 S.W.2d at 635.

Thus through §538.210, the legislature has interfered impermissibly with the judiciary's performance of its constitutionally assigned power to render judgments in

conformity with the jury's verdict by compelling a court to render one differing substantially from the verdict. Sec. 538.210 is also a direct legislative interference with the constitutional power and duty of the courts to enforce judgments upon the verdict by entirely preventing the collection of part of the damages duly found to be fair, reasonable and appropriate.

Simultaneously, the legislature has assumed the power to sit as a super-juror in medical malpractice cases and impose an amount for noneconomic damages that the actual jurors unanimously found to be inadequate, unfair and unjust compensation. As Judge Wolff astutely observed, §538.210 has displaced "the right that the people of Missouri have reserved to themselves, as jurors, to perform a vital role in the adjudication process," thereby undermining a "source of legitimacy for judicial judgments." Klotz, supra 311 S.W.3d at 781 (Wolff, J., concurring).

No part of the constitution authorizes the judicial branch to materially alter a verdict or substitute a new verdict after the jury's discharge, and no reason exists to believe that its framers intended to allow such interference by the legislative branch in its stead.

CONCLUSION

Sec. 538.210 fails constitutional scrutiny because its terms plainly violate the provisions (a) that guarantee the ancient right of trial by jury in its full and intended substance and (b) that maintain the separation of powers between the legislative and judicial branches of government. That part of the trial court's Amended Judgment giving effect to §538.210 should be vacated and the cause remanded for rendition of a judgment in strict accordance with the jury verdict.

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03; that it contains 7,378 words/626 lines and complies with the word/line limitations contained in Rule 84.06(b); that a compact disc of the Brief is included herewith in WordPerfect 12 format; that the compact disc was scanned for virus using Norton Antivirus and found to be free of virus; and that one copy of the compact disc and one copy of Appellant's Brief were mailed, by U.S. Mail, postage prepaid, this _____ day of February, 2011, to Timothy M. Aylward/Brent G. Wright, Horn, Aylward & Bandy, 2600 Grand, Suite 1100, Kansas City, MO 64108.

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