IN THE MISSOURI SUPREME COURT

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No. SC 91492

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RONALD SANDERS,

Appellant/Cross-Respondent,

v.

IFTEKHAR AHMED, M.D, et al.,

Respondents/Cross-Appellants.

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Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
Hon. Robert M. Schieber, Judge

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APPELLANT'S SECOND BRIEF

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REPLY ARGUMENT

A. SEC. 538.210 RSMo VIOLATES ART. I, §22(a) OF THE MISSOURI CONSTITUTION (RIGHT TO TRIAL BY JURY).

The Ahmed defendants' premise that a civil action for damages for the death of another is purely statutory and was unknown at common law is historically inaccurate. So, too, is the long-held notion that Missouri's Wrongful Death Act created a new and different cause of action for which damages can be constitutionally limited.[1] The basis for these errors has been blind adherence to a roundly criticized trial court decision in England in 1808, cited

[1]Significantly, a cap exists here only because it is a medical malpractice action resulting in death. It is not §537.080 *et seq*. that imposes a cap on non-economic damages in this case. There have been no damage caps in wrongful death cases as such since 1979. Their constitutional validity prior to that time appears not to have been challenged.

by defendants, and the failure of the courts to examine the history of the matter closely.

This Court has been apprised of this issue on previous occasions, notably by the dissent of Judge Bardgett (with whom Judge Seiler joined) in State ex rel. Kansas City Stock Yards Co. of Main v. Clark, 536 S.W.2d 142, 150-6 (Mo.banc 1976), where he wrote:

> When one considers the historical development of death claims under the common law and colonial practice, in my opinion, one cannot help but conclude that the origin of the death damage claim is firmly rooted in the common law and is not merely of statutory origin.

Id. at 153. One cannot know all the sources informing Judge Bardgett's opinion but there are many more than those he cited. Recently this Court lost a chance to consider the matter when transfer was not sought or ordered in Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748 (Mo.App.W.D. 2008), where the principal opinion noted, "There is apparently some debate regarding whether an action for wrongful death existed at English common law." Id. at 761 n.6 (citing Long v. McKinney, 897 So.2d 160, app. at 179-80 (Miss. 2004), and Storm v. McClung, 334 Or. 210, 47 P.3d 476, 482 n. 4 (2002), both of which and others are drawn upon liberally in this Brief). Plaintiff submits the time has come to address it.

Defendants, following the path of many U.S. courts, have quoted the statement in Baker v. Bolton, 1 Camp. 493, 170 Eng.Rep. 1033 (1808), where the plaintiff's wife was killed in a stagecoach accident, that "in a civil court, the death of a human being could not be complained of as an injury." Ostensibly the enactment in England of "An act for compensating the families of persons killed by accidents" (commonly called Lord

Campbell's Act), St. 9 to 10 Vict., ch. 93, §6 in 1846, lends weight to the theory, as does a similar act in Missouri in 1855, often called the Damage Act at the time but now usually referred to as its first wrongful death statute.

Baker v. Bolton and its author have been severely criticized. Justice John M. Harlan of the U.S. Supreme Court has noted the decision was written by Lord Ellenborough sitting *nisi prius* -- *i.e.*, it was a case tried in the local court before a single judge rather than *en banc* in the superior court at Westminster. The opinion "did not cite authority, or give supporting reasoning, or refer to the felony-merger doctrine" in making this announcement. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 382-3, 90 S.Ct. 1777, 1778, 26 L.Ed.29 339 (1970). *See also* 1 S. Speiser, *Recovery for Wrongful Death* §1:2 (2d ed. 1975); Smedley, *Wrongful Death – Bases of the Common Law Rule*, 13 Vand.L.Rev. 605 (1960) (concluding that the case was wrongly decided as well as overbroad). Dean Prosser declared that Lord Ellenborough's "forte was never common sense." W. Prosser, *Law of Torts* §127 at 901 (4th ed. 1971). The decision was bitterly criticized as "barbarous" and "anomalous" in England (Moragne, supra U.S. at 381-4, S.Ct. at 1778-9) and "not brought up for discussion" in its courts until 1873. Malone, *The Genesis of Wrongful Death*, 17 Stan.L.Rev. 1043, 1059 (1965). Scotland rejected that rule and continued its long recognition of a common-law action for wrongful death. Moragne, U.S. at 398 n.13, S.Ct. at 1786 n.13.

An American court was the first anywhere to treat Baker v. Bolton as precedent -- Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475, 48 Am.Dec. 616 (1848), ignoring pertinent American decisions. In that 40 year interim, no reported opinion in American courts denied

a wrongful death claim while several recognized such a common law action. Malone, *The Genesis of Wrongful Death*, supra at 1066-7. Massachusetts overruled Carey in Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222, 229 (1972).

Lord Ellenborough's statement was likely based on the "felony-merger" rule in England -- a doctrine that disallowed civil recovery for an act that constituted both a tort and a felony. "The tort was treated as less important than the offense against the Crown, and was merged into, or pre-empted by, the felony." Moragne, U.S. at 382, S.Ct. at 1778. In practical terms, the punishment for the felon in England was death and forfeiture of his property to the Crown, so that "nothing remained of the felon or his property on which to base a civil action." Id. Both intentional and negligent homicide were treated as felonious. Id. That feature of English law was never adopted in this country, in part because forfeiture of property was not a punishment for a felony here. Nothing barred a subsequent civil suit in this country, although occasionally it might be delayed until after the criminal trial. Id. U.S. at 384, S.Ct. at 1779; Nash v. Primm, 1 Mo. 178, 1822 WL 1432 (1822) (holding that the civil remedy for intentionally killing a slave is not barred or to be suspended). Indeed, the court in Carey v. Berkshire R.R. recognized the inapplicability of the felony-merger rule as a legal justification since the killing there was accidental. 55 Mass. at 478.

Thus if the felony-merger rule was the doctrinal underpinning and legal basis for Baker v. Bolton, then the case was not made part of the common law that Missouri adopted either as a territory in 1816 or after statehood. Both the territorial law (Act of Jan. 19, 1816) and the 1825 statute (now §1.010 RSMo) declined to adopt any part of the English common

law that was "local to that kingdom." The former also refused to adopt any common law that was "contrary to the law of this territory," and the latter barred adoption of common law "repugnant to or inconsistent with . . . the statute laws in force for the time being." *See also* Moragne, U.S. at 386, S.Ct. at 1780 ("[o]ur ancestors brought with them and adopted only that portion [of the common law] which was applicable to their situation").

It is also possible that Lord Ellenborough's dictum was merely a restatement of the principle that the action for injuries did not survive the death of the injured person. *See* Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q.Rev. 431, 434-5 (1916). But as Gaudette has noted, "the common law principles governing survival of actions could have no applicability to an action brought by the dependents or heirs of the deceased in their own right for damage directly suffered by them as a result of the defendant's wrong-doing." 284 N.E.2d at 68-9. Added Justice Harlan, "it is now universally recognized that because this principle pertains only to the victim's own personal claims, such as for pain and suffering, it has no bearing on the question whether a dependent should be permitted to recover for the injury he suffers from the victim's death." Moragne, U.S. at 385; S.Ct. at 1780.

The Baker dictum is also contrary to the general course of development of the common law, embodied in the ancient maxim, "For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action." 3 W. Blackstone, *Commentaries on the Laws of England* 123 (1768). Dean Prosser declared that "the result was that it was more profitable for the defendant to kill the plaintiff than to scratch him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without

a remedy." Prosser, *Law of Torts*, at 902. Justice Harlan observed:

> One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result, dictated by elementary principles in the law of remedies. Where existing law imposed a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notices of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. . . . Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter. Moragne, U.S. at 381-2, S.Ct. at 1778.

The "rule" announced in Baker, unsupportable in logic or precedent, also lacked historical accuracy. In fact, "a variety of civil wrongful death claims were allowed under the English common law, going back at least as far as the Middle Ages and the Norman Conquest in 1066." Long v. McKinney, 897 So.2d at app. at 179. The "wer" was "a sum certain to be paid to the decedent's kin, the amount of which depended upon the status or rank of the decedent." Id. at 179 and n.23, citing Malone, *The Genesis of Wrongful Death*, supra at 1055 (who cited 2 Holdsworth, *A History of English Law* 43-46 (3rd ed. 1923)).[2]

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[2]Prof. Malone's research reveals that the proceeding for accidental killing was both civil and criminal in nature, its purpose being to discourage a blood feud. In fact, the accidental killing of a human being was a compensable wrong even before the Norman

See Black's Law Dictionary 1594 (6th ed. 1990) (defining "wergild" as "the price of homicide, or other atrocious personal offense, paid partly to the king for the loss of a subject, partly to the lord for the loss of a vassal, and partly to the next of kin"). "The amount was not regulated originally nor fixed at any certain rate, but left to the discretion of the deceased's relatives, limited only by their inability to refuse a reasonable amount." Tatum v. Schering Corp., 523 So.2d 1042, 1055 (Ala. 1988) (Houston, J., dissenting) (citing 1 Sullivan, *Lectures on the English Law* 117 (1st American ed. 1805)). "The payment was compensatory." Id. Judge Houston also noted, "If a man killed another, the slayer was to *compensate his death by the payment of a certain sum,* greater or less, according to the circumstances of the case." Id. at 1056 (quoting Crabb, *English Law* 35 (1829) (emphasis in Tatum). *See also* 4 W. Blackstone, *Commentaries* 308 (1769) (describing a "weregild" as "a private pecuniary satisfaction").

Another remedy was the "wite" (Long v. McKinney, at 179 and n. 24), a reparation or "atonement among the early Germans by a wrong-doer to the king or the community" (Black's Law Dictionary, at 1601).

A third was "appeal of murdrum," technically not a civil cause of action but a means to "exact monetary payment from the accused" for an accidental killing. Long, at 179 and n. 25 (citing 2 Holdsworth, *A History of English Law* 47-9). *See also* Black's Law

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Conquest in 1066. 1 F. Pollock & F. Maitland, *The History of English Law* 46-8 (2d ed. 1898); F. Maitland and F. Montague, *A Sketch of English Legal History* 20-1 and n.1 (1915).

Dictionary, at 1019 (defining "murdrum" as "The fine formerly imposed in England upon a person who had committed homicide *per infortunium* or *se defendendo*"). Blackstone described an "appeal" as "an original suit" denoting "an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public." 4 Blackstone, at 308. Noting the practice was still in force in 1769, an appeal (he wrote) was a "private process, for the punishment of public crimes" by which "a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offenses," probably having its origin from "our ancestors, the antient Germans." Id. at 308-9. As to this remedy, Judge Houston observed in Tatum (supra 523 So.2d at 1056):

> By the late 13th Century, all homicides in England, even most of those that were accidental, had become criminal offenses. Hay, *Death as a Civil Cause of Action in Massachusetts*, 7 Harv.L.Rev. 170, 171 (1893). An involuntary or accidental homicide (*homicide per infortunium*) was not a felony, and the killer was not put to death; however, as in a felony, the killer's property was forfeited to the Crown. As long as the killer's property belonged to the Crown, it was useless for the decedent's relatives to attempt to obtain it. Hay, supra, p. 172. Therefore, to say that there was no cause of action for wrongful death at common law is not entirely correct.
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> Until 1819, when abolished by statute, there existed a quasi-civil remedy for the benefit of the heir or widow of the deceased in a homicide that

> was felonious. This was the right of "appeal." The heir or widow could release his or her right to have the felon put to death, just as a king could grant a pardon. In some cases this had great pecuniary value. Hay, supra, p. 173.

See also Ballentine's Law Dictionary 82 (3rd ed. 1969) ("appeal of felony").

Among the earliest U.S. cases cited as allowing recovery of damages for wrongful death prior to statutory authorization is the Missouri case of James v. Christy, 18 Mo. 162, 1853 WL 4581 (1853), decided two years ***before*** the legislature enacted the Damage Act here. A man brought an action to recover damages for the death of his 15-year old son from an explosion while a passenger on a steamboat. After commencing suit, the father died. His personal administrator entered his appearance as plaintiff, but the suit was abated. The issue on appeal was whether an action survived to the administrator or died with the deceased father. This Court held that the deceased father's action survived to his administrator and remanded for trial. The opinion also discussed the nature of damages recoverable:

> Here, the father was entirely deprived of all property in his son's services. The recovery will be limited to the actual value of the services, as they may be ascertained by a jury. The administrator will not be entitled to any remuneration for the loss of the society or comforts afforded by a child to his parent.[3]

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[3]This for the reason that, while the father's claim for the value of lost services was an economic injury that survived to his administrator under a statute then in force (R.S. 1835, p. 48, Administrator, art. II, §§24-25 (Appdx A1) -- the predecessor to §537.010), an

> Damages of this character died with the parent, and his estate is entitled to compensation only so far as it has been lessened by the loss of the son's services. The father was no longer entitled to those services than during his life.

No question was raised but that the father had the right to sue and collect damages for his own losses -- loss of services and loss of society and comforts -- for his son's death. Thus that decision stands as a rejection and repudiation of Lord Ellenborough's expressed view. Remarking on James v. Christy, Judge Bardgett quoted the opinion in full to show that

> the supreme court of this state was cognizant of the loss to a parent occasioned by the death of his minor son and . . . the father was in 1853 allowed to recover for at least *the same items of loss that the subsequently enacted wrongful death statute allowed*. And so, James v. Christy, although not called a wrongful death action, was an action by which the father could recover what is now compensatory wrongful death damages. Additionally, it might be noted that *the damages to the father* in James v. Christy *included loss of society and comfort and there was no limitation on the amount*. Although courts of this and other states have repetitively said there was no action for wrongful death prior to the enactment of death damage statutes, the fact is that in Missouri

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exception existed in the act for "actions on the case for injuries to the person of the plaintiff," which did not survive to the administrator *See* Higgins v. Breen, 9 Mo. 497, 1845 WL 3790, *2 (1845); Stanley v. Bircher's Executor, 78 Mo. 245, 1883 WL 9428, *1-2 (1883).

there was a cause of action available, at least to the parent when the minor child was negligently killed, for loss of services during minority and the other damages spoken of in James v. Christy, supra.

What is also rather striking about the opinion in James v. Christy, supra, is that it simply states the situation as it existed in and prior to 1853. In other words, here were judges of this court who had practiced law in Missouri and by their experience knew what was going on at that time simply reciting that this type of suit was then being entertained in courts of this state. I can hardly believe that the judges of this court would have acknowledged the existence of such a cause of action unless it did actually exist.

State ex rel. Kansas City Stock Yards Co., 536 S.W.2d at 151 (emphasis added).[4] To that

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[4]Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S.W.2d 920, 922 (banc 1933), criticized James v. Christy as in conflict the "common law precedents" including Baker v. Bolton, but that of course begs the question: Cummins did not examine relevant history or the claimed legal basis for Lord Ellenborough's statement of the supposed "common law rule." And Mennemeyer v. Hart, 359 Mo. 423, 221 S.W.2d 960, 961-2 (1949), attempted to undercut James v. Christy by asserting it "must have proceeded on the theory that the relationship between the plaintiff father and his minor son was the contractual relationship of master and servant," so that the father's recovery was for his "property right in the contract of employment." But this overlooks the James Court's emphatic statement

observation another might be added: between 1821 and 1855, this Court did not demand, encourage or implore the legislature to "mend" the manifest injustice in the common law by passing a wrongful death statute as England had done in 1846.

Prof. Malone discussed statutes and cases in colonial America (where the felony-merger rule "had no appreciable influence"), finding that where "the verdict was for 'manslaughter,' or 'accidental discharge of weapons,' or killing through 'chance medley,' both fine and compensation to the surviving family were imposed indiscriminately." 17 Stan. L.Rev. at 1063-4 and nn. 99-105 (citing nine such cases by name). From the research, he "discovered no observation in colonial statutes or decisions lending any support to a belief that a death claim would have been denied by our colonial ancestors." Id. at 1065-6.

In Cross v. Guthery , 2 Root 90 (Conn. 1794), a man engaged a physician to treat his wife's condition, but she died about three hours after the surgery. His complaint alleged the doctor's failure to perform the operation skillfully and safely, and sought damages for this "great cost and expense" and for the deprivation of "the *service*, *company and consortship of his said wife*." After a jury verdict in his favor, the doctor moved in arrest of judgment, arguing that the complaint failed to state a cause of action sufficient to support a judgment because of the felony-merger law. The court disagreed, holding that the plaintiff's complaint was sufficient and that the felony-merger law applied only in England to capital crimes.

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that the father's unchallenged right to recover damages for "the loss of the society or comforts afforded by a child to his parent" had been lost with his own death.

In Plummer v. Webb, 1 Ware 75, 19 F.Cas. 894 (D.Maine 1825), a father's right to damages for loss of services by reason of the death of his son was clearly recognized (and the felony-merger rule put to death).

In Ford v. Monroe, 20 Wend. 210 (N.Y.Sup. 1838), the plaintiff filed suit after his 10-year old son died when run over by a carriage. His pleaded damages were for "the loss of service of the child, and expenses occasioned by the sickness of the plaintiff's wife, caused by the shock to her maternal feelings." The court held, "The damages were specially laid in the declaration, and were clearly proved to have been the direct consequence of the principal act complained of; they therefore come within the well settled rule respecting *special damage.*" No question was raised whether the complaint stated a valid cause of action.

And in Shields v. Yonge, 15 Ga. 349, 1854 WL 1606 (1854), a father was allowed to sue for "the private injury" to him caused by the death of his 18-year old son.

More cases might have been reported had it not been for the flurry of legislative enactments of wrongful death states in the wake of Lord Campbell's Act in 1846. Instead, the statutes became the focus of the litigation. Most American decisions recognizing Baker v. Bolton were decided after the adoption of state wrongful death statutes and demonstrate a "reluctance to recognize any common-law right that would compete with" the statutory framework. Malone, 17 Stan.L.Rev. at 1073.

In 1855 Missouri passed "An act for the better security of life, property and character," often termed the Damage Act (R.S. 1855, pp. 647-9, Ch. 51, §§2-4; Appdx A1). At that time, the common law maxim *actio personalis moritur cum persona* was still in place,

and the death of the person injured could terminate an existing cause of action and prevent any recovery by his estate or his representative. Lord Campbell's Act had passed in England in 1846, and James v. Christy had been decided just two years earlier. Furthermore, Missouri's survival act (enacted in 1835 and left unchanged for decades) only permitted actions by and against administrators for wrongs done to "property, rights, or interest of another," but this provision did "not extend to . . . actions on the case for injuries to the person of the plaintiff." R.S. 1835, p. 48, Administration, art. II, §§24-25 (Appdx A2).

The Damage Act had three sections. The first (§2) imposed a fixed penalty of $5,000 for the death of any person caused by the negligence of the servant operating the defendant's instrument of transportation, whether a locomotive, car, train of cars, steamboat, its machinery, stagecoach or other public conveyance. That provision (later codified at §537.070) was repealed in 1955 (though portions relating to who may sue and the limit of liability were transferred elsewhere). This §2 was first considered in Schultz v. Pac. R. R., 36 Mo. 13, 1865 WL 2648 (1865), noted to be "somewhat careless, involved, and obscure," and construed by a unanimous court so as to put deceased railroad employees and paying passengers on an equal footing and to allow the survivors of both to recover damages. As pertinent here, the court observed (WL at *7) that the legislative purposes were to provide

> some greater security for life and property in these cases, and some more adequate compensation and redress for injuries suffered in this way, than has been heretofore attainable by the ancient principles of the common law alone; and at the same time, *in many of those instances in which the common law has*

> *afforded an ample remedy*, it has been felt that there was need that the sympathies and extravagances of *inconsiderate juries, not unfrequently resulting in unreasonable and inordinate damages*, should be controlled by some limitation and restraint.[5]

This italicized language from that opinion fully bears out Judge Bardgett's comments (State ex rel. Kansas City Stock Yards Co., 536 S.W.2d at 151) that James v. Christy proves that (i) in Missouri there was a common law cause of action available for wrongful death before 1855, (ii) the trial courts were entertaining it, (iii) the Supreme Court judges who had practiced law in the first half of that century were aware of it, (iv) damages were not confined to loss of services but included intangibles, (v) there was "no limitation on the amount" of damages recoverable, and (vi) some Missouri juries had awarded "unreasonable and inordinate damages" with enough frequency that the legislature stepped in to place a limitation on damages and to specify the persons entitled to bring suit and the nature of damages that could be recovered.

The precise holding in Schultz allowing recovery for the death of railroad employees for the negligence of fellow servants (WL at *10) was assailed by two judges in Connor v. Chicago, R.I. & P. R. Co., 59 Mo. 308, 1875 WL 7901 (1875), while three others adhered to it. The Schultz holding was eventually overruled in Proctor v. Hannibal & St. J. R. Co.,

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[5]This appears to be Missouri's first foray into so-called "tort reform." The constitutionality of damage limitations was not challenged, however, for over a century.

64 Mo. 112, 1876 WL 9853 (1876).

Secs. 3 and 4 of the Damage Act relate to this case. The former provided: "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." Virtually identical language appears in §537.080.1. Sec. 4 provided: "All damages accruing under the last preceding section shall be sued for and recovered by the same parties, and in the same manner, as provided in the second section of this section; and in every such action, the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also, having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default." The substance of this section now appears in §537.090, with significant additions.

Sec. 3 cannot *reasonably* be seen as anything other than a survival statute.[6] With only

[6]Survival statutes are remedial and are intended to permit recovery by a designated representative of the decedent for damages she could have recovered had she lived. Survival actions accrue, or come into existence as a legally enforceable right, not at the time of the death of the injured party, but at the time the deceased was first injured. Such statutes merely

one exception, it was uniformly viewed as a survival statute for 60 years. The Schultz Court noted it was "almost literally copied from the British act; and, like that act, it does not change or affect the common law principles constituting the original ground of liability." WL at *7.

A decade later in Connor (apart from the three judges' adherence to Schultz), Judge Napton opined that the common law axiom that a personal action died with the person "was the mischief which the legislature wished to abolish, and at the same time to point out the survivors who should have the right of action." WL at *4. "[T]he 3rd section clearly announces the object of the legislature, which was to give no new cause of action, to legislate into existence no new grounds of recovery; but to give certain representatives of a dead man a right of action, which did not before exist in such representatives, where the man if living would have had one, and in no other case" (WL at *5) and "to extend a pre-existing responsibility to certain representatives of the injured party, in case of his death" (WL at *6). Writing separately, Judge Hough generally agreed, concluding (WL at *7):

> [T]he purpose of the legislature in the second section, was simply to cause those actions to survive to certain representatives of the deceased, in the cases there named, which according to the rules of the common law died with the

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continue in existence an injured person's claim after death as an asset of the estate. R.S. 1835, p. 48, Administration, art. II, §24 (now §537.010); §537.020 RSMo. There have never been limits on damages in these suits in Missouri. Id. As a survival action, the original Damage Act did contain a limitation on recovery that was eliminated in 1979.

person, and to limit the amount of the recovery in such cases. No new right of action is given by the third section; no new right of action is given as to passengers or strangers in the second section; that is to say, the right of action which the passenger himself or a stranger, would have had, if injured, but not killed, is made in the event of death , to survive[.] . . . The legislature . . . was concerned only in making common law remedies to survive. . . . [T]he object of the third section was to give in all other cases, where an action could have been maintained at common law, such sum as the jury might deem fair and just, not exceeding five thousand dollars, regard being had to the attendant circumstances.

One year later, this Court in Proctor v. Hannibal & St. J.R. Co. (1876 WL 9853 at *4), declared:

It is conceded by all that the third section of the act was only designed to transmit a right of action, which but for the section would have ceased to exist, or would have died with the person; in other words, that under section three whenever a person dies from such wrongful act of another as would have entitled the party to sue had he lived, such cause of action may be maintained by certain representatives of the deceased, notwithstanding the death of the party receiving the injury. It creates no new cause of action but simply continues or transmits the right to sue, which the party whose death is occasioned would have had, had he lived. It is not only a right transmitted, but

> it is restricted by limitations as to the persons who are to enjoy the right, the time within which it is to be enjoyed and the amount of damages to be recovered.

Even the dissenting judge agreed: "The third section was adopted with no other view than to give an action to the representatives named therein, in a case where the deceased person could have recovered for the injury if he had lived" (WL at *9); and "The third section completely accomplishes the purpose of its enactment, which was to prevent the abatement of common causes of action" (WL at *10).

Additional cases include: White v. Maxcy, 64 Mo. 552, 1877 WL 9108, *5 (1877) (where defendant shot plaintiff's husband, who died the next day; *held* §3 of the Damage Act did not "create[] any new cause of action, but provided for a survival of a cause of action which existed at the common law, where the death of the party injured occurred, to certain representatives of the deceased party, and limited the amount of the recovery to a specific sum;" and, the statute "provides for the survival of the action"); Elliott v. St. Louis & I.M.R. Co., 67 Mo. 272, 1878 WL 9545, *2 (1878) (reversing judgment entered for survivors of deceased railroad employer under §2, holding that only §3 was available to survivors; "The suit can only be maintained when the deceased, if he had lived, could have recovered damages for his injury"); Crumpley v. Hannibal & St. J.R. Co., 98 Mo. 34, 11 S.W. 244, 245 (1889) (the damage act "give[s] to the representatives of the deceased person a cause of action where none existed in their favor at common law. In other words, if the injured party would have had a cause of action had death not ensued, then these sections give to the

designated representatives a cause of action"); Gray v. McDonald, 104 Mo. 311, 16 S.W. 398, 400 (1891) (§3 "does not, as is often supposed, create a new cause of action when the injured person would have had one had death not ensued. It transmits to the designated persons a cause of action when the injured person would have had one had death not ensued. In other words, the cause of action does not abate by reason of the death of the person injured. If the injured party would have had a common-law or statutory cause of action had death not ensued, then the cause of action survives to the designated person."); Miller v. Missouri Pac. Ry. Co., 109 Mo. 361, 19 S.W. 58, 61-2 (1892) (citing Connor and Proctor for the principle that §§2 and 3 were "not intended to create an entirely new liability, but were designed to continue or transmit the right to sue, which the injured party would have had, had he lived"); Hennessy v. Brewing Co., 145 Mo. 104, 46 S. W. 966, 967 (1898) ("under the statute, the father and mother . . . recover, in tort, on the right which the child would have had if he had survived the injury, and which right died with the injured party at common law, but has been by our statute expressly transmitted to them, eo nomine. No new right of action is given by our statute. It is solely a preserved, transmitted right. . . . By the common law, no such right of action was transmitted to any one. . . . Our statute, upon which the right alone rests, and by which it has been transmitted from the child, vests it expressly in the father and mother, eo nomine"); Strode v. St. Louis Transit Co., 87 S.W. 976, 979 (Mo. 1905) ("The right given by the statute is not an independent right, because it depends for its existence on the right that would have existed in the deceased person, if he had not died, and it is a transmitted right in the sense that it came to the widow through the death of her husband, and

through circumstances that would have given him a right of action, if he had lived. In the same sense in which it is used in the Proctor Case, this court has since in several other cases used the term 'transmitted right,' or its equivalent."); Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S.W. 851, 853-4 (banc 1906) ("Our own court, however other courts have decided, look upon the right of the widow and children as a transmitted right and not strictly an independent right of action"); Bates v. Sylvester, 205 Mo. 493, 104 S.W. 73, 74-5 (1907) (quoting Proctor); Millar v. St. Louis Transit Co., 216 Mo. 99, 115 S.W. 521, 522 (1908) (plaintiff's right "is and was, not a new cause of action, but by the very damage act the right of her deceased husband to sue was transmitted to her"); Hawkins v. Smith, 242 Mo. 688, 147 S.W. 1042, 1045-6, 1050-2 (banc 1912); Harrell v. Quincy, O. & K.C.R. Co., 186 S.W. 677, 678-9 (Mo.banc 1916) (quoting Strode, Proctor, White and Hennessy); State ex rel. St. Louis Brewing Ass'n v. Reynolds, 226 S.W. 579, 580 (Mo.banc 1920) (citing Harrell). There are probably others. *See also* Matz v. Chicago & A.R. Co., 85 F. 180, 187 (D.C.Mo. 1898) ("I think the logic of the Missouri decisions, supra, is to the effect that the damage act of Missouri is a survival statute; that it transmits, but does not create, a cause of action. . . . Certainly the statute does not create any new 'situation or state of facts.' It does give to the persons designated in the statute a right to sue on a 'situation or state of facts' upon which such persons could not have sued before the enactment of the statute.").

This settled law was suddenly reversed in a decision authored by the same judge who had written the second Strode opinion. In State ex rel. Thomas v. Daues, 283 S.W. 51, 314 Mo. 13, 23 (Mo.banc 1926), where the issue was admissibility of testimony from the railroad

engineer (who was not a party to the suit) under the Dead Man's Statute in a case brought by the decedent's husband against the railroad only. The trial court had ruled the engineer's testimony inadmissible; the court of appeals reversed and this Court considered the point by writ of certiorari. Judge Graves wrote that the Damage Act created a new cause of action unknown at common law and did not transmit to the survivors any right the decedent had before his death. It did so on the basis of one case, Entwhistle v. Feighner, 60 Mo. 214, 1875 WL 7955 (1875), where the issue was application of the Dead Man's Statute and in which it misstated Missouri and common law on the meaning of "cause of action." Entwhistle was a wrongful death action under §1 of the Damage Act. The plaintiff widow presented evidence of her late husband's dying declarations immediately after his fatal injury. The defendant then offered his own deposition, but the plaintiff's objection was sustained. At that time the Dead Man's Statute provided that "in actions where one of the original parties to the contract or cause of action in issue and on trial is dead . . . the other party shall not be admitted to testify in his own favor." WL at *1. The Entwhistle Court said:

> [T]here was no contract or cause of action to which the deceased husband was a party. . . . When the husband was killed, then it was for the first time that the cause of action accrued to the plaintiff as his widow. Had the husband survived, this action never could have been brought. It is an action in which plaintiff and defendant only could be parties, for it did not arise till after the husband's death.

It held that the defendant's testimony was outside the Dead Man's Statute and admissible.

Entwhistle was imprecise and failed to distinguish between the various "causes of action" arising from the defendant's wrong. It was true that the decedent's widow had no right to sue unless and until her injured husband died from his injuries[7] and that the husband (dead or alive) had no right to sue for his own wrongful death. But the injuries occasioned by the defendant's wrongful conduct gave ***him*** a right to sue (*i.e.*, a cause of action, to which the defendant clearly was a party) that the husband could have commenced in his lifetime, and which passed on to his widow at death by reason of §3 of the Damage Act.[8]

In 1875, the term "cause of action" was pretty clearly defined in the context of a

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[7]A ***wife*** had no right to sue for loss of consortium for injuries to her husband until Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo.banc 1963). But of course a tortious injury to a married woman gave the husband a separate and immediate cause of action for medical expenses, loss of services and loss of consortium. If the injured wife later died, whether from that injury or another cause, the surviving spouse's damages were limited to his loss between injury and death. That was recognized even in Baker v. Bolton and still today in Bridges v. Van Enterprises, 992 S.W.2d 933, 325-6 (Mo.App.S.D. 1999).

[8]Whitford v. Panama R. Co., 23 N.Y. 465, 486 (1861) (Comstock, Ch.J., dissenting): "The death may be sudden; in common language, instantaneous. But in every fatal casualty there must be a conceivable point of time, however minute, between the violence and the total extinction of life. . . . During its continuance, the right of compensation for the wrong belongs to the victim, and is capable of devolution, like other rights, upon his representative."

wrongful death case: the nucleus of facts giving the right to a judicial remedy in one form or another for redress of a wrong. Connor, handed down in the same term as Entwhistle, said as much (WL at *10 -- "Any negligence, producing injury, should . . . give a right of action, and not negligence producing only mortal injury"), as had Schultz a decade earlier (WL at *12 -- "In all cases which can arise under this clause, the negligence, unskillfulness, or criminal intent, necessarily constitutes the gravamen and very gist of the cause of action"). Contemporary treatises agreed. *See, e.g.*, Shearin & Redfield, *A Treatise on the Law of Negligence* §301, p. 349 (1869) ("The foundation of every action of this kind is the injury which caused the death, and not the death itself"). Sec. 3 of the statute itself points to the "wrongful act, neglect or default of another" as entitling a party to maintain an action if it produced injury or death. In 1875 this matter was also settled.

Entwhistle had never been cited as authority for the idea that the Damage Act created a new cause of action rather than merely transmitted the decedent's cause of action to his survivors until Judge Graves wrote the Daues opinion. As he was doing so, Judge Graves should have known of Entwhistle's error because its fallacy had been resolved, first, in the Strode decision he himself authored in 1906 for this principle (95 S.W. at 853, 854):

> Whether the cause of action given to the widow or children, be denominated a transmitted right, a survival right, or an independent cause of action, it yet remains true that *the foundation and gist of each and all is the negligent act which produced the injury. The negligent act was the basis at common law for the cause of action in the husband, and it is likewise the gist and basis of the*

> *cause of action in favor of the widow or children, or of the administrator as in some states provided.*
>
> . . . [O]ur court recognizes the right of action involved in the case at bar as purely a transmitted right of action. That is to say, *the right of action which first existed in deceased, but which, under the terms of the common law, would have died with the deceased, but for these statutes which have preserved and transmitted the same*. Our court has not looked upon it as a separate and distinct cause of action.

Strode recited a lengthy passage from an Indiana case containing this statement: "the gist of the action, the principal and paramount right of recovery, is on account of the destruction of the capacity and power of the intestate to earn money and accumulate wealth for his own support and benefit, and the support and benefit of his family or next of kin" -- in further support because "it clearly expresses our ideas as to the construction which should be given to our statutes." Id. at 855.

And in the case of Harrell v. Quincy, O. & K.C.R. Co., 186 S.W. at 678-9, decided just 10 years before he wrote Daues, Judge Grave's opinion in Strode was quoted as to the meaning of "cause of action" in wrongful death cases. The full passage from Strode contains a passage from Shearin & Redfield, *A Treatise on the Law of Negligence* §140 p. 343 (6th ed. 1913), as well as the entire court's conclusion as expressed by Judge Graves (id. at 856):

> "Where the right of action is given only by a survival statute; that is, continuing the right of the injured person, after his death, it is too plain for

> argument that a release from the deceased in his lifetime is a bar to any action. But, furthermore, it has been held, under the broader statutes, that *the foundation of every action of this kind is in the injury which caused the death, and not merely in the fact of death itself*."
>
> . . .
>
> Whether the right of action is a transmitted right or an original right, * * * *the gist and foundation of the right in all cases is the wrongful act*. . . . Under the holdings in this state, . . . there must have been a right of action in the deceased, had he lived, before there exists a right of action in the widow or children.

When §3 of the Damage Act (now §537.080.1) is properly viewed as a survival act that transmits the decedent's claim for personal injuries to his survivors, as it should be and was for the first 60 years after passage, the clause in Schultz (WL at *7) that it was passed to provide "some more adequate compensation and redress for injuries suffered in this way, than has been heretofore attainable by the ancient principles of the common law alone" takes on significantly greater meaning. Sec. 3 of the Damage Act went beyond the narrow scope of §§24-25 of the 1835 survival statute so as to permit survival of ***some*** "actions on the case for injuries to the person of the plaintiff" -- those ending in death of a person who left a spouse, child or parent. It changed the common law by transmitting the decedent's existing cause of action. And by §4 the decedent's survivors could recover in a single suit not only the damages sustained by the decedent in the interval between injury and death as referred

to in §3, but also those damages defined as "the necessary injury resulting from such death, to the surviving parties" that had been recognized in James v. Christy and the other early cases cited above and that had its origins in the common law. This included funeral expenses (Owen v. Brockschmidt, 54 Mo. 285, 1873 WL 7762, *3 (1873)) and "loss of a parent's care in the education, maintenance, and pecuniary support of children" (Stoher v. St. Louis, I.M. & S. Ry. Co., 91 Mo. 509, 4 S.W. 389, 393 (1887)) -- obviously items not recoverable under §3. *See also* Browning v. Wabash Western Ry. Co., 24 S.W. 731, 735-6 (Mo. 1893) (discussing meaning of "necessary injury"). Thus §4 ***codified*** the survivors' common law right of recovery upon death that had been acknowledged and litigated in Missouri but has since become obscured by slavish repetition of the dictum in Baker v. Bolton. No Missouri decision prior to 1926 declared that §4 created a new right.

The Missouri legislature placed no limits on the other survival statutes it enacted and in fact added language providing that these common law causes were to be prosecuted in Missouri consistently with the common law modes -- that is, decided by jury trial and without damage limitations. The first in 1835 was limited to "wrongs done to the property, rights or interest of another: "such action may be brought . . . by his executor or administrator against such wrong doer . . . in the same manner and with the like effect, in all respects as actions founded upon contracts." R.S. 1835, p. 48, §24. That language appears today in §537.010.

Similarly, in the 1907 anti-abatement statute whereby actions for personal injury were made to survive (Laws, 1907, p. 252; Appdx A2), the same incidents, attributes and protec-

tions as existed at common law were written in: "such action shall survive to the personal representative . . . and the liability and the measure of damages shall be the same as if such death or deaths had not occurred." That language is still to be found in §537.020 RSMo.

The Damage Act in 1855 was different because the legislature intended to create a penal statute relating to railroads and other common carriers in §2 with fixed damages of $5,000 if the jury found liability; and to limit recovery in all §3 cases to damages not exceeding $5,000 that the jury found to be fair and just under the circumstances for the decedent's injuries before death (the survival action) and the survivor's "necessary injury resulting from such death" (the common law wrongful death action recognized in James v. Christy). Thus §§3 and 4 combined an action for the losses of the decedent with one for the losses suffered by "third parties who had an interest in the continuance of the life of the decedent." Smedley, 13 Vand.L.Rev. at 610.

But nothing in the Damage Act suggests the legislature meant to withhold or obliterate any of the other incidents, attributes and consequences of the right to trial by jury as known at common law. And when the damage limitation was discarded in 1979, the right to trial by jury was restored to its original form and function.

The Damage Act reduced the harshness of a judicial system that made it more profitable to kill a plaintiff than to injure him. Prosser, supra. It was remedial, "designed to mend the fabric of the common law, not to weaken it," thus deserving not a strict construction but an application "with a view to promoting the apparent object of the legislative enactment." O'Grady v. Brown, 654 S.W.2d 904, 907-8 (Mo.banc 1983).

Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo.banc 2009), is the most recent decision relating to wrongful death actions. While the result can certainly be justified on various theories, four statements appearing therein (and in an untold number of other decisions over the previous 85 years), id. at 527, require re-examination. Two are wholly inaccurate, and a third partly inaccurate. As they are stated in the opinion, they have very serious implications and perhaps unintended consequences.

- "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."

Both clauses are incorrect. First, as shown by the authorities cited above, damages were recoverable at common law for wrongful death, either as part of ancient English custom and usage (the source of common law), or as part of a criminal prosecution (as in the colonial courts and others), or in an ordinary civil action (James v. Christy and other cases).

Second, the 1855 Damage Act revived a cause of action that belonged to the deceased, for which she could have recovered had she lived, for her own injuries at the hands of the wrongdoer.

- "The right of action thus created is neither a transmitted right nor a survival right."

This is only partly accurate. Secs. 2 and 3 of the 1855 Damage Act were survival statutes that transmitted existing causes of action that would have expired (under the common law doctrine *actio personalis*) to designated survivors of the decedent. The present §537.080 is substantially identical to the original §3, and so must be considered in that respect a survival statute that transmits the decedent's cause of action to the statutory beneficiaries.

In addition, §537.090 allows the plaintiff to recover "such damages as the deceased may have suffered between the time of injury and the time of death."

Furthermore, §4 of the Damage Act codified the existing common law right of action for wrongful death (James v. Christy), and then defined who may sue and recover therefor. It is accurate to say this codified cause of action is neither a transmitted nor a survival right.

- "Wrongful death is a cause of action distinct from any underlying tort claims."

This is inaccurate. A wrongful death plaintiff, in 1855 and now, may sue and recover damages caused by the underlying tortious conduct that the decedent, had she survived, could have claimed and recovered. In addition, a wrongful death plaintiff in 1855 was authorized to recover damages she personally sustained from "the necessary injury resulting from such death" (former §4); and now, "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 he and others "have been deprived by reason of such death." §537.090. Moreover, the "cause of action" for wrongful death is the same as for the cause of action engendered by the underlying wrong that produced the injury. Shearin & Redfield, supra at 301 ("The foundation of every action of this kind is the injury which caused the death, and not the death itself"). State ex rel. Burns v. Whittington, 219 S.W.3d 224, 225 (Mo.banc 2007), correctly defines the "cause of action" for wrongful death. Plaintiff's cause of action has not changed since the first Petition.

- "The wrongful death claim does not belong to the deceased or even to a decedent's estate."

This is correct. The deceased could neither have sued during her lifetime for her own wrongful death since it had not come to pass, nor bring any lawsuit after her death. Moreover, a claim for wrongful death never belonged to a decedent's estate in Missouri, either before 1855 or afterward.

A serious problem arises when an injured plaintiff settles with or recovers a judgment from a tortfeasor and then dies from the injury: Does the settlement or judgment preclude her statutory heirs from commencing their *new cause of action* that *had not existed before her death* and was *not transmitted to them from her* and that is *distinct from any underlying tort claims*? Faced with this conceptual inconsistency, two members of the Western District Court of Appeals in Smith v. Brown & Williamson Tobacco Corp. believe that the survivors are not barred from bringing their new action (275 S.W.3d at 780, 782), while a third dissented from that view (id. at 824). The majority based their conclusion on the theory frequently appearing in decisions since 1926 (including O'Grady v. Brown and Lawrence v. Beverly Manor) that the cause of action is new, not revived, and not derivative or transmitted, with damages wholly distinct from the underlying tort claim (id. at 781-2). The dissent relied upon Strode and its description of the cause of action that was the product of court cases spanning the statute's first 61 years (id. at 827-9).

The practical problems of this debate include these: In a situation involving serious injuries from which the plaintiff might reasonably later expire, what circumspect defendant would settle the plaintiff's personal injury claim if after the plaintiff's death he was again sued for wrongful death by the plaintiff's survivors who sought new and different damages?

What defense attorney could recommend settlement in that situation without obtaining a release of any wrongful death action? How can an injured plaintiff, while living, purport to give a release of a potential wrongful death claim she has no right to commence or prosecute? If a defendant attempts to obtain signed releases from all future statutory beneficiaries as part of a global settlement with the injured but still living plaintiff, but one or more refuses to sign the release, how can a defendant then settle and "buy his peace"? Why should one future statutory beneficiary (or several), by refusing to execute a release, be allowed to deprive the injured plaintiff of the right to settle and obtain the proceeds during her remaining life? Are the rights of future statutory beneficiaries compromised and concluded if they were not alive at the time the injured plaintiff and the living beneficiaries executed a release?

These problems can be avoided by understanding the history of the cause of action, affording the terms of the wrongful death statute their intended meaning, and turning to the wisdom of the decision in Strode.

In Missouri, the cause of action defined in the wrongful death statute is a hybrid, with clearly identifiable components glued together into a whole. It is an action for personal wrongs -- one to the decedent and one to her survivors -- "the kind of case triable by juries from the inception of the state's original constitution." State ex rel. Diehl v. O'Malley, 95 S.W.3d 82, 92 (Mo. banc 2003). Whether the common law right of action for wrongful death lives on or has been wholly displaced by the statute is not raised in this appeal. However, since the right to sue for wrongful death and recover for the plaintiff's own damages arising

from the death itself has its origin in the common law and was recognized before 1855, the constitutional right to trial by jury in its common law dimensions attaches to an action in our courts, and to Mr. Sanders' lawsuit in particular. That component of the present statute reversing abatement and permitting recovery for his late wife's injuries and suffering was once subject to a limitation that was removed 31 years before trial, and since no restrictions have been placed on any jury deciding survival actions in this state, all of the incidents, attributes and consequences of the common law right of trial by jury attend a lawsuit brought under the present statute.

B. SEC. 538.210 RSMo VIOLATES ART. II, §1 OF THE MISSOURI CONSTITUTION (SEPARATION OF POWERS).

Plaintiff has not argued in his brief that §538.210 creates "legislative remittitur," but rather that it impermissibly interferes with (1) the judiciary's performance of its constitutionally-assigned power to render judgments in conformity with the jury's verdict, and (2) the constitutional power and duty of the courts to enforce judgments upon the verdict because it prevents the collection of part of the damages the jury found to be fair, reasonable and appropriate. These are not matters committed to the legislative or executive branches.

Defendants' conclusion is wrong because their assumptions about the history and nature of the right to recover for wrongful death under §537.080 *et seq.* are wrong for the reasons set out above in Point I-A. A plaintiff seeking damages for wrongful death under the Missouri statute has the same constitutional right to a jury trial, with all the incidents, attributes and consequences known at common law, as any other litigant pursuing or

defending an action at law. The General Assembly may not encroach upon that right or alter its consequences without violating the separation of powers doctrine.

ARGUMENT IN CROSS-APPEAL

I. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR SET OFF, CREDIT OR REDUCTION BECAUSE IT IS AN AFFIRMATIVE DEFENSE THAT DEFENDANTS WAIVED BY (A) FAILING TO PLEAD ANY SUPPORTING FACTS IN THEIR ANSWER SO AS TO PRESERVE SAME, AND (B) FAILING TO PRESENT ANY EVIDENCE WHATSOEVER TO CARRY THEIR BURDEN OF PROOF THEREON.

STANDARD OF REVIEW. The sufficiency of a pleading raising an affirmative defense is a question of law reviewed *de novo*. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 383-4 (Mo.banc 1993). Just as when assessing the sufficiency of a petition, "all facts properly pleaded [in an affirmative defense] are assumed true, the averments are given a liberal construction, and the [pleading] is accorded all reasonable inferences fairly deductible from the facts stated." Commercial Bank of St. Louis County v. James, 658 S.W.2d 17, 21-2 (Mo.banc 1983). "Mere conclusions of

the pleader not supported by factual allegations are disregarded." Id.

The denial of a motion to amend under Rule 75.01 appears to raise a question of law that is reviewed *de novo*. Love v. Park Lane Medical Center, 737 S.W.2d 720, 723-5 (Mo.banc 1987). On the other hand, it has been held that the standard of review for a trial court's denial of a motion to amend a judgment is for abuse of discretion. LaRose v. Washington University, 154 S.W.3d 365, 370 (Mo.App.E.D. 2004).

The sufficiency of evidence presented by a party seeking to prove an affirmative defense so as to support a finding by the court is a question of law reviewed *de novo*. Fleshner v. Pepose Vision Institute, P.C., 304 S.W.3d 81, 95 (Mo.banc 2010).

DISCUSSION. Setoff/credit/reduction is an affirmative defense (in the nature of satisfaction) that defendants must plead and prove. Rule 55.01; Rule 55.08; Norman v. Wright, 100 S.W.3d 783, 785 (Mo.banc 2003) (*Norman I*); Stevenson v. Aquila Foreign Qualifications Corp., 326 S.W.3d 920, 929-30 (Mo.App.W.D. 2010). Defendants's burden was to prove Mr. Sanders[9] has had a double recovery for the same injury (Stevenson, at 930) -- *i.e.*, that one or more of the former defendants who settled and were released were joint or concurrent tortfeasors with Dr. Ahmed and shared common liability for Paulette Sanders' death (id. at 925, 929; State ex rel. Normandy Orthopedics, Inc. v. Crandall, 581 S.W.2d 829,

[9]The terms "plaintiff" and "Mr. Sanders" in the context of post-judgment issues are generally intended to refer throughout this Brief not only to him but to the couple's daughters who, by virtue of the Amended Judgment, have a beneficial interest therein.

831 n.1 (Mo.banc 1979); Walihan v. St. Louis-Clayton Orthopedic Grp., Inc., 849 S.W.2d 177, 180 (Mo.App.E.D. 1993)). Defendants were thus required to plead and prove a medical malpractice action against every former defendant for whose payment they claimed a credit or setoff. Reduction is not automatically granted. And proof that Mr. Sanders settled with other persons, standing alone, does not meet that burden. State ex rel. Normandy Orthopedics, Inc., 581 S.W.2d at 834.

The three possible sources of this affirmative defense are:

- §538.230.1 and -.3 RSMo (1986 version) permit a setoff or reduction "by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault" after a properly instructed jury or the court apportions *fault among such released persons and parties*;
- §537.060 RSMo 2000 allows a reduction in the amount of consideration paid by "one of two or more persons *liable in tort for the same injury or wrongful death*"; and
- common law satisfaction allows reduction for partial payment by one of two or more *joint or concurrent tortfeasors who share common liability for the same injury*; Staehlin v. Hochdoerfer, 235 S.W. 1060, 1062 (Mo. 1921).

A. Defendants Failed to Plead Any Facts to Preserve the Affirmative Defense. To plead an affirmative defense, a defendant must file an answer that sets out the ultimate facts in support: "An affirmative defense is asserted by the *pleading of additional facts* not necessary to support a plaintiff's case which serve to avoid the defendants' legal responsibility even though plaintiffs' [sic] allegations are sustained by the evidence." ITT

Commercial Finance Corp., 854 S.W.2d at 383 (emphasis in ITT). *"If [a defendant] intends to rely upon new matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be so relied on*." Id. (emphasis in ITT). A defendant must plead ultimate facts "in the same manner as is required for pleading of claims" under the Rules. Id. at 384.

Defendants' Answer to the Third Amended Petition for Damages (filed in September 2008) contains no facts at all in their statement of this affirmative defense: "4. Defendants seek a set off for any settlement pursuant to Missouri Revised Statutes Section 537.060" (LF 96). Defendants filed five separate documents that touch upon this issue in some way:

- a Cross Claim for Apportionment of Fault (6/25/2008) requesting "apportionment of fault pursuant to Chapter 538 of Missouri Revised Statutes, and in the event of a settlement of a defendant, the application of said chapter, or in the alternative the provisions of a setoff pursuant to RSMO 537.060" (Resp.Supp.LF 237);
- a Motion for Setoff (10/27/2009) that asserts "Plaintiff has settled with all other defendants for monetary consideration," and because plaintiff would not disclose the amounts thereof the "defendants cannot plead with specificity the dollar amount and will be asking the Court to compel the plaintiff to identify said number" (App.Supp.LF 150);
- a post-trial Renewed Motion for Set Off (9/21/2010) declaring, "Come now, Defendants and renew the motion for set off to be applied to the verdict and judgment herein" (App.Supp.LF 171);

- Reply Suggestions in Support of Renewed Motion for Setoff (9/28/2010) stating that relevant case law had been cited to the court but a ruling was deferred "pending the trial, as it was not ripe until a verdict," and the court "should now apply the setoff, as one is entitled to be made whole only once" (App.Supp.LF 182); and
- a Motion for Remittitur (10/20/2010) seeking a reduction of the verdict amount to comply with the statutory cap and then requesting "the application of the setoff" (App.Supp.LF 218).

Even taken all together, these statements are nothing more than conclusions of law wholly devoid of ***any*** facts tending to show another's joint liability and thus some basis for setoff, reduction, credit or satisfaction, and consequently are insufficient to raise an affirmative defense under §538.230, §537.060, or common law satisfaction. Norman I, 100 S.W.3d at 785-6; Norman v. Wright, 153 S.W.3d 305, 305 (Mo.banc 2005) (***Norman II***). In his Reply, plaintiff pointed out this very deficiency (LF 104 [¶3]). Defendants' various statements, added together, do not set out the fundamental elements of a cause of action against any other tortfeasor with common liability for medical malpractice "in the same manner as is required for pleading of claims" -- they identify no person (lay or professional) whose conduct fell below an applicable standard of care so as to cause or contribute to cause injury to Paulette Sanders. Edgerton v. Morrison, 280 S.W.3d 62, 68-9 (Mo.banc 2009). A plaintiff's petition would be rightly dismissed for failure to state a cause of action for medical malpractice if only averred what the Ahmed defendants have stated.

"Bare legal conclusions . . . fail to inform the plaintiff of the facts relied on and,

therefore, fail to further the purposes protected by Rule 55.08." ITT Commercial, 854 S.W.2d at 383. An averment not stating facts is a mere legal conclusion and is "insufficient as a matter of law" to raise an affirmative defense. Id. at 384.

An unpleaded affirmative defense is "simply not raised in the lawsuit." Green v. City of St. Louis, 870 S.W.2d 794, 797 (Mo.banc 1994). Defendants never attempted to amend their answer to restate this defense.

The Ahmed defendants have waived the defense and may not raise it for the first time on appeal. *See* Lea v. Reed, 880 S.W.2d 603, 606 (Mo.App.S.D. 1994) ("bare legal conclusion" of statute of limitations defense; "shorn of the defectively pled five-year statute of limitations defense, Lea's Point I makes no viable challenge to an action or ruling of the trial court" under Rule 84.04(d)); Ashland Oil, Inc. v. Warmann, 869 S.W.2d 910, 911-2 (Mo.App.E.D. 1994) (statement in answer that guaranty agreement "lacks consideration and therefore is unenforceable" *held* legally insufficient and plaintiff was not required to negate it in summary judgment motion); Mobley v. Baker, 72 S.W.3d 251, 258 (Mo.App.W.D. 2002); Curnutt v. Scott Melvin Transp. Inc., 903 S.W.2d 184, 192 (Mo.App.W.D. 1995).

B. Defendants Did Not Meet Their Burden of Proving the Released Parties Were Joint Tortfeasors Sharing Common Liability. Neither Mr. Sanders nor the Ahmed defendants adduced any evidence showing that any former defendant in the case, or any other released person, committed actionable negligence against Mrs. Sanders and was thereby jointly liable with the Ahmed defendants for her fatal injury. State ex rel. Normandy

Orthopedics, Inc., supra 581 S.W.2d at 831 n.1; Walihan, supra 849 S.W.2d at 180.[10] To make a submissible case for apportionment of fault by the jury under §538.230.1 or for a post-trial hearing under §537.060 or common law satisfaction, defendants had to show that the acts or omissions of any such health care professional (1) violated the applicable standard of care; (2) were performed negligently; and (3) caused fatal injury to Paulette Sanders. Edgerton v. Morrison, 280 S.W.3d at 68-9. Medical negligence is "the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession." MAI 11.06.

The trial transcript is devoid of expert testimony establishing the standard of care of any of the physicians (Drs. Carol Kirila and Nathan Knackstedt), or hospitals (Midwest Division - MCI d/b/a Medical Center of Independence ["MCI"] and Kansas City University

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[10]For purposes of this point, had the facts of the affirmative defense been sufficiently pleaded, it is immaterial (i) whether §538.230 applies in all actions against health care providers exclusively and §537.060 is not available, as indicated in Fast v. Marston, 282 S.W.3d 346, 348 (Mo.banc 2009); or (ii) whether §537.060 applies because here, "all the parties agree[d] not to apportion fault under section 538.230," as indicated in Norman I, 100 S.W.3d at 785; or (iii) whether common law satisfaction also applies, as suggested in Stevenson, 326 S.W.3d at 929-30. All three versions of this defense require the same essential predicate -- payment by a joint or concurrent tortfeasor sharing common liability with the non-settling defendant for the same injury.

of Medicine and Biosciences ["KCUMB"]), or nurses (Nathan Kent Jones and Kristi Hunt) formerly in the case (LF 80), or identifying any breach of the proper standard by anyone except Dr. Ahmed, or explaining any aspect of causation.[11]

1. *Standard of Care*. Expert testimony defining the standard of care for every other doctor, the hospitals and the nurses was necessary before a jury or the court could determine that they shared common liability with Dr. Ahmed for Mrs. Sanders' injury and death. Ladish v. Gordon, 879 S.W.2d 623, 628, 634 (Mo.App.W.D. 1994) ("It is not enough that the jury instruction [MAI 11.06] informs the jury of the meaning of negligence. . . . It is necessary in each case that the fact finder be informed as to whether the witness, in offering opinions, is using the standard prescribed by law and not some other standard"). But no expert testimony describing the standard of care applicable to any other health care provider was presented at trial, other than that from Dr. Bonfiglio (plaintiff's expert) who testified against Dr. Ahmed (Tr. 33, 45-59). The testifying non-retained physicians (Drs. Majed Dasouki, John Verstraete, Carol Kirila) stuck to the facts of treatment and avoided any issue of physician standard of care and breach (Tr. 103-124; 127-154; 9/15/10 Tr. 2-41, 43-60).

2. *Breach of Duty*. An adverse result raises no presumption of negligence. Ladish, 879 S.W.2d at 628. Yet defendants have cited no testimony in their brief on the subjects of standard of care, breach and causation with regard to the former defendants. There was little

[11]Defendants did not order the transcript of the post-trial hearings on October 22, 2010 or January 14, 2011 (Rule 81.12(a)), but they presented no evidence at either one.

testimony as to the conduct of any former defendant or his/her/its relationship to others.

Dr. Kirila's Acts/Omissions. Dr. Kirila personally testified (9/15/10 Tr. 2-60), but she was not asked to defend or justify any of her actions. In fact, as to her treatment of Mrs. Sanders, defense counsel made this binding judicial admission: "And no one is indicating that anything you did is negligent in any fashion, I want you to understand that" (9/15/10 Tr. 52). Moore Automotive Group, Inc. v. Goffstein, 301 S.W.3d 49, 54 (Mo.banc 2009). Dr. Ahmed personally testified he had no criticism of her for a seeming delay in calling him on May 27 (Tr. 247-8). At another point, he claimed Dr. Kirila had ordered that lactulose be discontinued because of a diarrhea concern, but said that was "not an issue" and spoke no further of it (Tr. 288-9).

Dr. Knackstedt's Acts/Omissions. He was one of at least two residents at MCI under Dr. Kirila's supervision (9/15/10 Tr. 5) who ordered a serum ammonia level test the evening of May 27 (id. Tr. 27-8). He did not testify. One nursing note seems to indicate that Dr. Knackstedt was notified of Mrs. Sanders' comatose state on the evening of May 26 (9/15/10 Tr. 89). Another nursing note indicates he was notified on May 27 that Mrs. Sanders was having a focal seizure and of lab results (Tr. 242-3; 9/15/10 Tr. 72, 74, 86-7). He was not mentioned by name at any other point in trial.

Nurse Jones' Acts/Omissions. He did not testify. No physician mentioned Nurse Nate Jones by name in the context of criticizing his professional behavior. No party called a nurse expert at trial.

Nurse Hunt's Acts/Omissions. She did not testify. No physician mentioned Nurse

Kristi Hunt by name in the context of criticizing her professional behavior.

Nurses Generally. Dr. Bonfiglio opined that the conduct of unnamed treating nurses in withholding anti-seizure medication (Depakote, dilantin and phenobarbitol) from Mrs. Sanders from May 26 to May 27 when she was unable to swallow "would not have caused her to go into seizures" (Tr. 45) and actually caused her no harm (Tr. 87-8). Dr. Ahmed disagreed, maintaining that the abrupt stopping of these medications on May 26 "eventually triggered her status epilepticus" (Tr. 273). But he did not identify either Nurse Jones or Nurse Hunt by name and did not assert such behavior was below the standard of care for nurses, nor did any other expert. He also testified that he was "upset" that an unidentified "somebody" had not called him on May 26 to report her change in status (Tr. 269-70, 272-3, 320), but did not assert that was a breach of any standard of care or that it caused any harm. His testimony could be read to refer to Nurse Stacy Tyler (Tr. 243), but she was not sued, did not settle and was not released.

MCI's Acts/Omissions. No corporate representative testified. This hospital was mentioned only in passing as the institution where Mrs. Sanders reported to the Emergency Room in May 2003 and all of the relevant care took place. No witness criticized the hospital for the conduct of any identified officer, director, employee or agent, or for breach of independent duties owed to Mrs. Sanders. No party called a hospital expert to the stand.

KCUMB's Acts/Omissions. No corporate representative testified. This institution was identified as Dr. Kirila's employer where she was a full-time faculty member (9/15/10 Tr. 3-5). No witness criticized it or its officers, directors, employees or agents in any way.

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR APPLICATION OF §538.220 RSMO (1986) SEEKING PERIODIC PAYMENTS OF FUTURE NON-ECONOMIC DAMAGES BECAUSE

A. THE STATUTE IS UNCONSTITUTIONAL AND VIOLATES:

(1) ART. I, §22(a) IN THAT IT SUBSTANTIALLY INTERFERES WITH THE RIGHT TO TRIAL BY JURY BY DEPRIVING PLAINTIFF OF HIS RIGHT OF IMMEDIATE EXECUTION UPON THE JUDGMENT ENTERED ON THE JURY'S VERDICT -- AN ATTRIBUTE OF THE RIGHT OF "TRIAL BY JURY" AT COMMON LAW;

(2) ART. II, §1 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 PROVIDE FOR IMMEDIATE ENFORCEMENT OF JUDGMENTS;

(3) ART. I, §26 IN THAT IT TAKES, OR ALLOWS OTHERS TO RETAIN FOR THEIR OWN USE AND BENEFIT, PLAINTIFF'S PRIVATE PROPERTY (*I.E.*, HIS RIGHT TO POSSESSION OF THE FULL AMOUNT OF FUTURE DAMAGES AND HIS RIGHT OF IMMEDIATE ENFORCEMENT OF HIS JUDGMENT TO RECOVER THE PROCEEDS IN FULL) FOR A PUBLIC USE WITHOUT JUST COMPENSATION AS DETERMINED BY A JURY, AND BOTH ALLOWS THE

TORTFEASORS AND THEIR INSURERS TO DISTURB HIS PROPERTY AND DIVESTS HIM OF PROPERTY RIGHTS THEREIN WITHOUT FIRST PAYING THE COMPENSATION DUE; AND

(4) ART. III, §40(4) IN THAT IT IS A SPECIAL LAW THAT CHANGES THE METHOD FOR THE COLLECTION OF DEBTS OR THE ENFORCING OF JUDGMENTS IN SOME MEDICAL MALPRACTICE CASES BUT NOT OTHER CIVIL ACTIONS AND MANDATES THAT COURTS DEPRIVE PLAINTIFF OF HIS RIGHT OF IMMEDIATE ENFORCEMENT OF HIS JUDGMENT AND DELAY EXECUTION PROCEDURES AVAILABLE TO COLLECT ALL OF HIS JUDGMENT FULLY AND PROMPTLY.

B. IF THIS STATUTE IS CONSTITUTIONAL, THE COURT PROPERLY EXERCISED ITS STATUTORY DISCRETION TO TREAT ALL NON-ECONOMIC DAMAGES REMAINING AFTER APPLICATION OF TWO CAPS AS "PAST NON-ECONOMIC DAMAGES" WITHOUT ALLOCATING THEM BETWEEN "PAST" AND "FUTURE" NON-ECONOMIC DAMAGES.

***STANDARD OF REVIEW*.** "Constitutional challenges to a statute are reviewed *de novo.*" Rentschler v. Nixon, 311 S.W.3d 783, 786 (Mo.banc 2010).

Sec. 538.220 has been construed as a "general grant of equity powers" and affords the trial court substantial discretion in its application, "subject to review only on the basis of arbitrariness." Vincent by Vincent v. Johnson, 833 S.W.2d 859, 866 (Mo.banc 1992). Thus

its judgment will be sustained "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976). A court abuses its discretion "when its ruling is clearly against the logic of the circumstances before it and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." Nelson v. Waxman, 9 S.W.3d 601, 604 (Mo.banc 2000).

Statutory construction is a matter of law that this Court reviews *de novo*. Nichols v. Director of Revenue, 116 S.W.3d 583, 585 (Mo.App.W.D. 2003).

***DISCUSSION*. A. THE STATUTE IS UNCONSTITUTIONAL.** It purports to require the trial court to bar a judgment creditor from employing the usual and customary methods of executing on his judgment with respect to some part of "future non-economic damages" exceeding $100,000 (subs. 2), to require forbearance and his acceptance of periodic payments or installments, together with no post-judgment interest or interest at a rate that can vary significantly from that in §408.040 RSMo 2005 (subs. 2), or to prevent entirely the collection of part of a final judgment should the plaintiff expire during the mandatory delay period (subs. 5).

Plaintiff timely raised constitutional objections to application of this statute. In their Answer to the Third Amended Petition, defendants for the first time invoked the whole of Chapter 538 generally without specific reference to §538.220 ("Defendants raise all available aspects of Missouri Revised Statutes Chapter 538, including but not limited to the cap on

non-economic damages" -- App.LF 96). Plaintiff's Reply argued that was a deficient attempt to raise an affirmative defense but also asserted that Chapter 538 violated Art. I, §22(a) (trial by jury) and Art. II, §1 (separation of powers) of the Missouri Constitution (App.LF 104-5).

On the morning of the first day of trial, defendants filed a Motion Pursuant to R.S.Mo. 538.220.2 asking for application of that statute "in the event there is a judgment for future damages" (Suppl.LF 165). Following the verdict, they renewed that motion (Suppl.LF 169). Plaintiff filed Objections and Suggestions in Opposition thereto setting out numerous constitutional objections to that specific statute, including Art. II, §1, Art. I, §22(a), Art. I, §26 (taking of private property for public use without just compensation), and Art. III, §40(4) (prohibiting special laws changing methods of collections of debts or the enforcing of judgments) (Suppl.LF 173-7).

(1) It Violates Art. I, §22(a) (Trial by Jury). Plaintiff has already set out in his First Brief the authorities establishing the applicability of the right of trial by jury as known at common law to this suit and some of the incidents, attributes and consequences thereof. Among those were entry of a judgment *in accordance with the verdict* (Thorne v. Thorne, 350 S.W.2d 754, 757 (Mo. 1961); Meffert v. Lawson, 315 Mo. 1091, 287 S.W. 610, 612 (1926)), and the right of *immediate execution* upon the judgment with assistance of certain officers of the court. Capital Traction Co. v. Hof, 174 U.S. 1, 13-4, 19 S.Ct. 580, 585, 43 L.Ed. 873 (1899). In State v. Haney, 277 S.W.2d 632, 635 (Mo. 1955), this Court observed:

> A judgment is operative from the date of its rendition and the failure of the clerk to perform the ministerial duty of formally entering it upon the record

> cannot delay its operation for any purpose. *The right to execution follows immediately upon the rendition of judgment*. [Emphasis added.]

Multiple authorities were cited; another could have been added. In his opus on the common law, the venerable Blackstone wrote, "After *judgment* is entered, *execution* will immediately follow" unless the losing party obtains a new trial or appeals. 3 Blackstone, at 401.

The General Assembly may not interfere with the substance of the fundamental attributes of the right of trial by jury as they existed in 1820. 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). The jury's function cannot be disregarded after the verdict, either in the judicial acts of entering a final judgment or in providing court officers to aid its enforcement. Id. at 721.

Thus legislation commanding that the exercise of the right of execution be delayed, or that it be diminished, cannot pass constitutional scrutiny. In similar fashion, the Kansas Supreme Court considered a statute capping damages and mandating the purchase of an annuity for the payment of future damages in Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251, 258 (1988). In striking down the statute, it observed:

> It also restricts access to whatever recovery is received, through the requirement of annuities. In other words, for a plaintiff who sustains massive injuries and to whom a jury awards $4,000,000, H.B. 2661 makes the determination that $1,000,000 is all the plaintiff needs. For a plaintiff who

> suffers any extreme pain and disfigurement, a limit of $250,000 is imposed. When the trial judge enters judgment for less than the jury verdict (as H.B. 2661 directs him to do) and orders an annuity contract, he clearly invades the province of the jury. This is an infringement on the jury's determination of the facts, and, thus, is an infringement on the right to a jury trial.

By enacting §538.220 the General Assembly has impaired Mr. Sanders' right to trial by jury and violated the state constitution.

(2) It Violates Art. II §1 (Separation of Powers). Two broad categories of acts that violate the constitutional mandate of separation of powers are 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." State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228, 231 (Mo.banc 1997).

Sec. 538.220 goes beyond an incidental overlap of powers. It is a direct legislative interference with the constitutional power of the courts to enforce judgments by prescribing how and when certain judgment creditors may seek court assistance in collecting their judgments, and in some cases entirely prohibiting the collection of part of a final judgment.

The "judicial power" vested in the courts by the constitution 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 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, 253, 55 L.Ed. 246 (1911).

These inherent powers do not derive from statutory authority. State ex rel. Cain v. Mitchell, 543 S.W.2d 785, 786 (Mo.banc 1976). They confer judicial independence from executive or legislative control. McPherson v. U.S. Physicians Mut. Risk Retention Group, 99 S.W.3d 462, 476 (Mo.App.W.D. 2003).

Plaintiff recognizes that the legislature has the discretion to create or abolish causes of action, and to place reasonable limitations on them. Fust v. Attorney General for the State of Mo., 947 S.W.2d 424, 430-1 (Mo.banc 1997). But the General Assembly's authority in this realm is not absolute. It must be exercised within constitutional bounds. Sec. 538.220 does not alter, abolish or limit the *cause of action* for medical negligence. It interferes with the judicial machinery by which the remedy for a valid judgment can be enforced by mandating that the trial courts shall delay a judgment creditor's right of immediate enforcement (State v. Haney, supra 277 S.W.2d at 635) -- a purely judicial power.

The statute dictates that courts must not make some of their judgments immediately enforceable and that judicial officers cannot act immediately upon the request of a judgment creditor to invoke the court's enforcement machinery. And it places judgment creditors at the mercy of tortfeasors and their insurers, who could over time wilfully conceal themselves or their assets, pass away, be put into receivership or dissolved, declare bankruptcy or through financial mismanagement deplete the reserves and assets that would have been

available earlier to the creditor.[12]

If the General Assembly can prevent immediate enforcement of a valid judgment, it follows that any limitation on legislative potency both expressed and implied by the constitutional separation of powers doctrine is an illusion having no practical significance. To deny a court the power to enforce its lawful judgments is to nullify its effectiveness as an independent and co-equal branch of government. The legislative branch is made supreme and the judiciary rendered inferior and subservient. When the constitutional limit in Art. II, §1 is exceeded by an act of the legislature exercised in a manner or to an extent that impairs the substance of the duty of courts to carry their judgments into effect as between persons who bring a case to finality and are bound thereby, it is the duty of this Court to declare that such limit has been passed and to maintain the supreme law. The constitution does not allow this Court to abstain.

(3) It Violates Art. I, §26 (Taking of Private Property for Public Use Without Just Compensation). Art. I, §26 states in pertinent part that "private property shall not be taken or damaged for public use without just compensation," requires that a jury or three-member board of commissioners determine the amount of compensation, and specifies that "the

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[12]*See, e.g.*, the mismanagement of PIE Mutual Ins. Co., an Ohio company that formerly sold medical malpractice insurance in Missouri, that led to its liquidation in 1997 in Ohio, detailed by Judge Starcher in his dissent in Verba v. Ghaphery, 210 W.Va. 30, 552 S.E.2d 406, 416 (2001).

property shall not be disturbed or the propriety rights of the owner therein divested" until the compensation "shall be paid to the owner."

It apples to the taking of personal as well as real property. Shade v. Missouri Highway and Transp. Com'n, 69 S.W.3d 503, 516 (Mo.App.W.D. 2001). Cases decided under this provision often involve the exercise of eminent domain and either a direct or an inverse taking by a governmental entity or agency for road-building, public improvements and the like. Akers v. City of Oak Grove, 246 S.W.3d 916, 919 (Mo.banc 2008).

Unlike those situations, §538.220 does not authorize any governmental body, agency or instrumentality to take possession or control of money that belongs to Mr. Sanders. It allows the defendants and their insurers -- private persons -- to retain money or other property already in their possession and it prevents him from executing on his final judgment. But eminent domain also "may be exercised by private corporations to the extent and for the purposes authorized by law" and thereby trigger the "taking" predicate. State ex rel. N. W. Elec. Power Co-op., Inc. v. Waggoner, 319 S.W.2d 930, 934 (Mo.App.W.D. 1959). And this Court articulated a public purpose for §538.220 in Adams v. Children's Mercy Hospital, 832 S.W.2d 898, 904-5 (Mo.banc 1992).

This statute plainly causes Mr. Sanders and other victims of medical malpractice to suffer a loss or deprivation of property. In his situation, if defendants' argument were to be accepted (App.LF 122; Suppl.LF 165, 169), the taking would be partial (that part of the verdict to be allocated to "future non-economic damages" in excess of $100,000) and temporary (although a judgment creditor's death could result in a permanent taking under

§538.220.5). Akers v. City of Oak Grove, supra at 919-20.

When property is taken, the owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken." Id. (citation omitted). The owner is to be paid "just compensation for all that is taken and not for something less." State ex rel. N.W. Elec. Power Co-op, Inc., supra at 934 (citations omitted). "Just compensation means full indemnity or remuneration for the loss or damage sustained by the owner of the property taken or injured. Where only a part of the property is condemned the owner is entitled to compensation not only for the part actually taken but for whatever consequential damages may proximately result to the remainder by reason of the taking of a part." Id.

(a) Jury Trial. Art. I, §26 affords the right of a jury trial to determine the "just compensation" to which Mr. Sanders is entitled as a result of the temporary taking. Here, if the trial court's treatment of all capped non-economic damages as "past" damages is reversed and he is directed to allocate them to both "past" and "future," the value would thereby be fixed. He is also entitled to consequential damages, including interest for delayed payment, beyond that sum. State ex rel. State Highway Commission v. Green, 305 S.W.2d 688, 692 (Mo. 1957). The appropriate interest rate is a question of fact committed by the mandate in Art. I, §26 to a jury's determination, to be included in its verdict. Id.; State ex rel. State Highway Commission v. Kendrick, 383 S.W.2d 740, 747 (Mo. 1964). Because the right to have a jury decide the interest rate derives from this constitutional provision, it follows that statutes setting interest rates (such as §§408.020, 408.040, and 523.045 RSMo) cannot displace or override the constitutional mandate and thus cannot control the jury's

verdict.

Mr. Sanders has not waived his right to a jury trial on his consequential damages and the proper rate of interest. But §538.220.2 purports to take away the right of trial by jury when the rate of interest is in dispute and vests the trial court with that decision. That violates the express language of Art. I, §26, as construed by numerous court decisions, that juries are constitutionally charged with deciding the interest rate. Green, supra; Kendrick, supra.

(b) Payment of Funds Prior to Divestment. Art. I, §26 also specifies that "the property shall not be disturbed or the proprietary rights of the owner therein divested" until the compensation as determined by the jury "shall be paid to the owner, or into court for the owner." This provision has been described as " 'self-enforcing' and an action may be brought 'directly thereunder.' " Roth v. State Highway Com'n of Missouri, 688 S.W.2d 775, 777 (Mo.App.E.D. 1984) (citation omitted).

Sec. 538.220 attempts to reverse the order mandated by Art. I, §26 -- it authorizes the taking first, then delays payment of the compensation for months or years. The constitutional language expressly prohibits altering the protective requirement of paying the compensation at or before the taking. No part of §26 can be interpreted to justify this statutory scheme.

During the period when Mr. Sanders is being deprived of his property, he is barred from commencing a direct action against the defendants and their insurers and is divested of his well-established enforcement rights. But the judgment debtors and their insurers are free to make whatever use of that money they choose. They might invest it wisely and earn a

significant profit that the judgment creditor himself could have realized had he had the same opportunity. Or they might "disturb" his property by losing it altogether through bad investments, mismanagement or profligacy.

It is not within the power of the General Assembly to deprive Mr. Sanders of immediate possession of his property, and of his right to obtain immediate possession thereof, either directly or indirectly, temporarily or otherwise, without requiring payment of just compensation before the taking. The legislature cannot suspend this constitutional provision for persons in Mr. Sanders' shoes. City of St. Louis v. International Harvester Co., 350 S.W.2d 782, 785 (Mo.banc 1961) ("In all condemnation cases, the constitutional mandate as to compensation for the taking of property must be controlling").

(4) Art. III, §40(4) (Special Law Changing Methods for Collection of Debts or Enforcing Judgments). This provision prohibits the legislature from passing any special law "providing or changing methods for the collection of debts, or the enforcing of judgments."

The language appears to have at least two purposes: first, it echoes the separation of powers doctrine by which courts have the exclusive power to pronounce and enforce judgments (Chastain v. Chastain, supra 932 S.W.2d at 399); and second, it protects judgment creditors from special legislation impairing their enforcement rights established in ancient times (State v. Haney, supra 277 S.W.2d at 635).

Sec. 538.220 transgresses both purposes. As noted above, it impermissibly interferes with the judicial machinery for enforcing and collecting debts by compelling trial courts to delay a judgment creditor's right of immediate enforcement, and to withhold the assistance

of judicial officers for that purpose. It also places judgment creditors at the mercy of judgment debtors and their insurers and increases the risk that full recovery of a valid judgment may never be obtained.

Sec. 538.220 is not "open-ended" and will not include all members of the class of judgment creditors. Harris v. Missouri Gaming Com'n, 869 S.W.2d 58, 65 (Mo.banc 1994). It is designed to operate only against a small population of judgment creditors in Missouri -- those who are victims of medical malpractice to whom a jury has awarded future economic damages in an amount that after all permissible offsets[13] is still greater than $100,000 (*i.e.*, the most seriously injured victims of malpractice). That classification is immutable under the statute. Id. Thus it is a facially special law and is presumed unconstitutional. Id. Defendants must show "substantial justification" for the special treatment of this class of judgment creditors (id. at 65-6) -- a task they never shouldered at trial. *See also* Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752, 782-3 (Mo.banc 2010) (Teitelman, J., concurring).

B. ALTERNATIVELY, THE COURT PROPERLY EXERCISED ITS STATUTORY DISCRETION. As noted above, this Court has held that §538.220 is a "general grant of equity powers" entitling the court "to fashion relief in *the best interests of the parties*, subject to review only on the basis of arbitrariness." Vincent by Vincent v. Johnson, 833 S.W.2d at 866 (emphasis added).

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[13]*See* §538.230.4; Davolt v. Highland, 119 S.W.3d 118, 136-9 (Mo.App.W.D. 2003).

The court applied §538.210.1 in its Amended Judgment, found that the 2010 monetary limitation was $632,603.82 per defendant, and applied two caps to reduce the non-economic damages recoverable from $9,200,000 to $1,265,207.64 (App.LF 134).

That figure is less than the $1,700,000 in past non-economic damages awarded by the jury (App.LF 108). At plaintiff's request (Appl.LF 127-8), the court treated the entire recoverable amount as ***past*** non-economic damages (App.LF 134).

The court's decision fully complies with §538.220.1 and the jury's clearly-expressed intent. The jury, uninformed about the capping requirement, intended the plaintiff to receive $1.7 million in compensation for past pain, suffering, mental anguish, loss of consortium, etc. He actually received just over $1.265 million. This disposition also permits his attorneys to recover their contingency fee amount promptly upon collection without having to wait for years, and without substantially reducing the amount immediately available Mrs. Sanders' survivors who have been litigating this case since May 2005. *See* Roesch v. Ryan, 841 F.Supp. 288, 292[1] (E.D.Mo. 1993).

Defendants fail to explain how the court's disposition is inequitable. No part of §538.220 requires a pro rata allocation of damages recoverable after application of the caps between "past" and "future" damages where the final amount is less than the statutory cap and less than the jury's solemn determination of damages. The court's decision violates no provision in §538.220.

Finally, whatever difficulties defendants may have with one of their insurers (the Kansas Health Care Stabilization Fund) are immaterial. Neither the Fund nor the State of

Kansas has any significant relationship with this suit or the plaintiff or a substantial, overriding governmental interest, and defendants have no right to impose its laws on the plaintiff or Missouri courts. Gilmore v. Attebery, 899 S.W.2d 164, 166-9 (Mo.App.W.D. 1995). The defendants were doing business in Missouri, committed their tortious acts here and were properly sued here. Plaintiff resides in Missouri. He has the right to enforce his judgment directly against the defendants and need not concern himself with the Fund.

III. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR JNOV BECAUSE (A) THEY DID NOT PRESERVE THEIR CLAIM THAT PLAINTIFF FAILED TO ESTABLISH CAUSATION IN THAT DEFENDANTS DID NOT MOVE FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S CASE ON THAT ISSUE; (B) THEIR MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE DID NOT STATE THE SPECIFIC GROUNDS THEREFOR; AND (C) IN ANY EVENT PLAINTIFF PRESENTED SUFFICIENT DIRECT AND CIRCUMSTANTIAL EVIDENCE OF CAUSATION.

STANDARD OF REVIEW. Whether defendants preserved their claims of error by complying with Supreme Court Rules is a question of law reviewed *de novo*. Nichols v.

Director of Revenue, 116 S.W.3d 583, 585 (Mo.App.W.D. 2003).

The appellate standard of review for denial of a motion for directed verdict is whether the non-moving party submitted substantial evidence that tended to prove the facts essential to its claim. Lasky v. Union Elec. Co., 936 S.W.2d 797, 801 (Mo.banc 1997). The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict. "A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 818 (Mo.banc 2000).

In considering the sufficiency of plaintiff's evidence of causation, this Court reviews the evidence and reasonable inferences therefrom "in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and *disregarding evidence and inferences that conflict with that verdict*," and can reverse "only where there is a complete absence of probative fact to support the jury's conclusion." Dhyne v. State Farm Fire and Cas. Co., 188 S.W.3d 454, 456 (Mo.banc 2006) (emphasis added).

***DISCUSSION*. A. Motion for Directed Verdict Not Made After Close of Plaintiff's Evidence.** Defendants did not move for a directed verdict at the close of *plaintiff's* case on the issue of causation and so did not preserve a claim that plaintiff failed to make a submissible case (Tr. 213-5). A motion for a directed verdict must be made "at the close of the evidence offered by an opponent." Rule 72.01(a). "The proper procedure for preserving submissibil-ity error in a jury-tried case is clear. *A motion for a directed verdict at the close of plaintiff's case is required.*" Goede v. Aerojet Gen. Corp., 143 S.W.3d

14, 18 (Mo.App.E.D. 2004); Frisella v. Reserve Life Ins. Co. of Dallas, Tex., 583 S.W.2d 728, 731 (Mo.App.E.D. 1979) ("the proper method of preserving the issue of submissibility of a plaintiff's case for appellate review is to submit a motion for directed verdict with the trial court at the close of plaintiff's case and again at the close of all evidence").

B. Motion for Directed Verdict Not Stated with Specificity. Defendants did not preserve their claim because their motion for directed verdict at the close of all evidence did not "state *the specific grounds* therefor" as required by Rule 72.01(a). Pope v. Pope, 179 S.W.3d 442, 451 (Mo.App.W.D. 2005). Defendants' oral motion was general and non-specific, and not further explained by argument: "We think plaintiff failed to make a submissible case on issues of negligent [*sic* though probably "negligence"] causation and damages and also, specifically, on the issue of vicarious liability for the acts of Kirila and, in fact, there's no evidence of that" (Tr. 345-6).

Pope held that such a statement in a motion for directed verdict does not comply with the Rule's requirement. Defense counsel in Pope made similar statements ("Plaintiff has failed to prove a submissible case against this Defendant"; "Plaintiff failed to produce any evidence which would establish that any act of this Defendant caused or contributed to cause any damage allegedly sustained by Plaintiff"; and "Plaintiff failed to prove any actionable negligence against this Defendant"). Id. at 452. Additionally, here as in Pope counsel did not "orally elaborate on the basis for the general claims of error." Id. The Pope Court concluded that the motion for directed verdict "consisted of nothing more than boilerplate generalities and naked conclusions, which . . . preserved nothing for appellate review." Id.

"Where an insufficient motion for directed verdict has been made, a subsequent post-verdict motion is without basis and preserves nothing for review." Pope, at 452; Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 163 (Mo.App.W.D.banc 1997) ("a motion for directed verdict that does not comply with the requirements of Rule 72.01(a) neither presents a basis for relief in the trial court nor preserves the issue in the appellate court"); Dierker Associates, D.C., P.C. v. Gillis, 859 S.W.2d 737, 742 (Mo.App.E.D. 1993) (same).

C. Plaintiff Made a Submissible Case. In any event, plaintiff presented substantial direct and circumstantial evidence of negligence and causation. In his testimony on the first day of evidence, Dr. Richard Bonfiglio described the well-known adverse effects of Depakote on Mrs. Sanders that Dr. Ahmed ordered -- it "can cause an increase in ammonia" (Tr. 31-2). He opined that Dr. Ahmed was negligent on May 27 and 28 in (i) not ordering an ammonia level test and in prescribing additional Depakote by intravenous injection which "immediately lead to an increase in ammonia level" (Tr. 46), (ii) not recognizing "that she was having problems with an elevated ammonia level" which she demonstrated on May 27, and (iii) not stopping the Depakote "as he should when you talk about the known effects" (Tr. 46). When Mrs. Sanders was already having seizures and in a coma on May 27, adding more Depakote was "like trying to put out a fire with gasoline. It's just the worst possible thing you can do is to give more Depakote, further raising the ammonia level and prolonging how long the brain is going to be exposed to ammonia" (Tr. 48).

The consequence of high ammonia level is brain damage: "If the brain is exposed to ammonia long enough, it actually causes the brain cells to die and it can cause a severe brain

injury as it did in this case" (Tr. 47).

As to causation, Dr. Bonfiglio testified (Tr. 59-62):

> It's quite clear from the record that her brain injury was caused by the elevated ammonia level. It stayed elevated for days. There were other contributing factors, including her having a decreased oxygen level at one point that made her brain then prone to the injury. It increased the risk of insult to her brain.
>
> She also had repeated seizures and prolonged seizure activity. I think because it's a status epilepticus that you have a prolonged seizure that contributes to brain injury, as well that are certainly factors that contributed.
>
> Bottom line, its most serious effect on her was the elevated ammonia level from Depakote that caused her very profound brain injury, left her in what's called a minimally conscious state where she just was devastated by this brain injury, could not walk and talk normally, could not take care of herself. She became dependent upon others for all her care. . . .
>
> Her brain injury was so severe from this elevated ammonia level, she was not able to care for herself and unfortunately, she had a number of medical complications that are known for individuals that have severe brain injury. . . . She had quite a number of complications from this severe brain injury and despite her getting extensive medical that was necessary in a number of different hospitals and also in extended care facilities, nursing homes, despite

all that care, *she ended up dying as a consequence of her brain injury*. . . .

My opinion is that the care provided, the substandard care provided by Dr. Ahmed did directly contribute to the patient quickly developing complications that lead [*sic*] to her death. *It took some time, but it was a direct consequence of the care he provided*. The very severe brain injury that she had that left her in a minimally conscious state that caused or significantly contributed to the secondary complications that eventually killed her.

That, coupled with all favorable evidence and reasonable inferences, is sufficient. The principles were explained in Steele v. Woods, 327 S.W.2d 187, 195 (Mo. 1959):

> [I]f the injury could reasonably have come from one of several causes, one or more of which is not the fault of the doctor, then any verdict would be based on speculation and surmise. But absolute and mathematical certainty is not required. It is sufficient if there is substantial evidence which shows that the injury is a natural and probable consequence of the negligent act or omission. And this can be determined by reasonable inference from proven facts or circumstantial evidence. Where the logical conclusion from the evidence is that if certain things were properly done certain results would not have occurred, and they *did* occur, the question of causal connection is sufficient to go to the jury. [Citations omitted.]

Defendants have ignored the guts of Dr. Bonfiglio's causation testimony, "cherry-picked" some other portions, and argue other evidence, but that must be disregarded. Dhyne

v. State Farm Fire and Cas. Co., 188 S.W.3d at 456. The evidence was legally sufficient and the jury was properly instructed with the MAI 19.01 modification (LF 107). Where reasonable minds can differ on the question before the jury, a court may not disturb the jury's verdict. Washington v. Barnes Hosp., 897 S.W.2d 611, 615 (Mo.banc 1995).

IV. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR NEW TRIAL ON THE BASIS OF PLAINTIFF'S OPENING STATEMENT AND CLOSING ARGUMENT BECAUSE (A) THEY FAILED TO PRESERVE ANY CLAIM OF ERROR IN THAT THEY EITHER FAILED TO OBJECT OR ELSE RECEIVED ALL OF THE RELIEF THEY ASKED FOR AT TRIAL; (B) PLAINTIFF'S COUNSEL DID NOT MAKE AN IMPROPER "SEND A MESSAGE" ARGUMENT BY ASKING THE JURY TO PUNISH DEFENDANTS WITH A SIZEABLE DAMAGE AWARD; AND (C) THEY FAILED TO PROVE PREJUDICE OR MANIFEST INJUSTICE.

***STANDARD OF REVIEW*.** "A trial court maintains broad discretion in the control of closing arguments." In re Brasch, 332 S.W.3d 115, 120 (Mo.banc 2011). "This Court reviews preserved objections to errors in closing argument under an abuse of discretion standard." Id. at 121. This Court will not reverse a trial court's ruling about an argument unless "it amounts to prejudicial error." Id. "The decision to grant a mistrial lies in the sound discretion of the trial court." Pierce v. Platte-Clay Elec. Coop., Inc., 769 S.W.2d 769, 778 (Mo.banc 1989). "Absent a manifest abuse of discretion, an appellate court will not

interfere with the trial court's decision." Id. at 778. Discretion is abused "when its ruling is clearly against the logic of the circumstances before it and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." Nelson v. Waxman, 9 S.W.3d 601, 604 (Mo.banc 2000). "[T]o establish a manifest abuse, there must be a grievous error where prejudice cannot otherwise be removed." Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 867 (Mo.banc 1993).

DISCUSSION. Defendants have cited five passages in plaintiff's opening statement and closing argument:

1. Opening Statement (Tr. 18-9):

> MR. McINTOSH: At the end of this case I'm going to come back and ask you for a very substantial verdict and I think once you hear the evidence you'll find that this is not an outlandish sum. The 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.
>
> MR. REICHEL: Objection, improper argument.
>
> THE COURT: Sustained.

No further relief was sought. This passage was not cited in the Motion for New Trial (LF 188, 191-6).

2. Closing Argument (Tr. 356):

> MR. McINTOSH: Last Monday, I told you this was a significant case; that this was an important case, not a hot coffee case, but the death of a very

wonderful woman. 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.

No objection or motion for mistrial was made. This passage also was omitted from the Motion for New Trial (LF 188, 191-6).

3. Closing Argument (Tr. 361, 378):

MR. McINTOSH: And I don't expect you to come back with verdicts in the hundreds of millions. And I'm not asking you that. But I'm telling you that that's a way that you can start to think about what the damages really are in the loss of a life. There'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 or you can look at Paulette Sanders who spend 26 months bedridden, mentally aware. And that's so sad. She knows what's going on. She's aware of that. . . .

As 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.

MR. REICHEL: Your Honor, improper argument.

THE COURT: Sustained.

No further relief was sought.

4. Closing Argument (Tr. 362-3):

MR. McINTOSH: . . . that's not what the Court told you to do. They [*sic*] told you to give full and complete damages in this case, full and complete. You can't deduct for things. It doesn't allow for deductions. You can't say, Well, you know, this might make health care more expensive. I can tell you I don't think it will.

I can tell you it will make health care a lot safer for everybody within your 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.

No objection or motion for mistrial was made.

5. <u>Closing Argument (Tr. 388-9)</u>:

MR. McINTOSH: But 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 [Depakote] 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.

These 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.

No objection or motion for mistrial was made.

A. <u>Claims of Error Not Preserved</u>. Defendants' claims of error as to these passages

were not preserved. First, they did not object at all to passages 2, 4 and 5. "It has long been held that failure to properly object to an argument at the time it is made to the jury results in a waiver of any right to complain of the argument on appeal." Hoskins v. Business Men's Assurance, 116 S.W.3d 557, 575 (Mo.App.W.D. 2003). This for the reason that the trial court has not been afforded the opportunity to take corrective measures, and not every indiscretion during closing argument warrants the drastic remedy of a mistrial. Id. An objection cannot be raised for the first time in a motion for new trial. Amador v. Lea's Auto Sales & Leasing, Inc., 916 S.W.2d 845, 852 (Mo.App.S.D. 1996). The failure to object may be a trial strategy or may signify that defense counsel did not believe plaintiff's argument was prejudicial. *Cf.* Hudson v. Carr, 668 S.W.2d 68, 72 (Mo.banc 1984) (party's failure to raise issue during trial may be considered in determining whether erroneous instruction is prejudicial; "If a defect is not readily apparent to alert counsel preparing to argue the case, there is very little likelihood that the jury will be confused or misled").

Second, defendants received all of the relief sought when objecting to passages 1 and 3. They did not request other relief -- they did not ask the court to instruct the jury to disregard, to take other curative action, or to declare a mistrial. "A party may not assert as error that the trial court failed to do more than was requested." Coats v. Hickman, 11 S.W.3d 798, 805 (Mo.App.W.D. 1999). "Thus, when a trial court sustains an objection to improper argument and no further remedial action is requested by the objecting party, no error is preserved for appellate review." Id. (citations omitted); Rhodus v. Wheeler, 927 S.W.2d 433, 437 (Mo.App.W.D. 1996) ("The responsive ruling by the court without a further request for

relief precludes a finding of reversible error"); MFA Inc. v. Dettler, 817 S.W.2d 658, 661-2 (Mo.App.S.D. 1991) (where objection was sustained to improper argument but plaintiff requested no additional relief, it "waived the prejudicial effect -- or possible prejudicial effect -- of [that] argument"; trial court did not err in failing to take further action *sua sponte*; "A party is not entitled, in such a situation, to gamble on the verdict of the jury, and if he loses then assert in a motion for new trial or on appeal that prejudicial error resulted from the incident"). *See also* McNear v. Rhoades, 992 S.W.2d 877, 883 (Mo.App.S.D. 1999) ("In failing to request a mistrial at the time of the alleged impropriety, Plaintiffs implicitly decided that the argument complained of was not so grievous as to require drastic action").

B. No Improper Argument Was Made. Plaintiff did not discuss or inject punitive damages into the case and made no improper arguments in closing, particularly a "send a message" argument. "[C]ounsel is traditionally given wide latitude to suggest inferences from the evidence on closing argument." Nelson v. Waxman, 9 S.W.3d at 606. This is so "even though the inferences drawn are illogical or erroneous." Id.[14] The court is afforded

[14]That portion of plaintiff's closing argument suggesting methods of calculating damages (passage 3 above, Tr. 361, 378) falls within this principle. Perhaps defendants believe it is illogical to tie damages to the "five medical stop signs" Dr. Ahmed ignored in treating Mrs. Sanders, or to the 26 months she lay essentially bedridden afterward, or to the 26 years of her life expectancy, but plaintiff's counsel did not exceed the proper bounds of argument in doing so. Defendants made no objection so they must have thought it harmless.

broad discretion in ruling on the propriety of a closing argument. Moore v. Missouri Pacific R. Co., 825 S.W.2d 839, 844 (Mo.banc 1992). Indulging a liberal attitude toward closing argument is most appropriate when suggesting a damage figure to the jury, since there is no precise or exact measuring stick for calculating damages for those "certain intangibles" that "do not lend themselves to precise calculation." Alcorn v. Union Pacific R.R. Co., 50 S.W.3d 226, 250 (Mo.banc 2001).

An improper "send a message" argument asks the jury to punish and deter *by the size of its verdict*. *See* Smith v. Courter, 531 S.W.2d 743, 745-7 (Mo.banc 1976), where the effect of the argument was to advise the jury "it could include as part of its compensatory damage award a punitive amount of money." Id. at 747.[15]

More similar is Cornette v. City of North Kansas City, 659 S.W.2d 245, 248-9 (Mo.App.W.D. 1983), where plaintiff's closing argument included statements to "send a message to the City of North Kansas City," that "the people in North Kansas City are paying attention to what you do today," and that the jury was "the conscience of the community." The court denied defendant's objections and motion for new trial. The Western District affirmed, distinguishing Smith on the ground that the argument "did not constitute a plea for punitive damages" because counsel made no reference to "the adequacy of your verdict."

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[15]Here as in Smith, counsel rightly asked the jury to compensate the plaintiff fully for proven damages, and rightly asked the jury to render a verdict against the defendants to hold them accountable for the tortious conduct.

More recently, this Court qualified the rule against "message" arguments in Pierce v. Platte-Clay Elec. Co-Op., Inc., supra 769 S.W.2d 769, where the plaintiff told the jury it could "send a message to the utility world." Id. at 778. An objection was immediately sustained and the court directed the jury to disregard the remark but denied the motion for mistrial. This Court affirmed, holding that "[w]hen the message argument becomes *the theme of the entire closing*, it constitutes reversible error." Id. at 779 (emphasis added).

Here, plaintiff did not tie any "message" statement to the amount or adequacy of the jury's verdict. On the contrary, counsel quoted the damage instruction (No. 7, MAI 5.01 -- Supp.LF 167) and urged a verdict only for full and complete damages (Tr. 361). Plaintiff never strayed beyond the properly admitted evidence.

The argument that plaintiff did make -- that a verdict against the defendant will encourage others to meet their legal obligations -- is proper and not an invitation for punishment through a sizeable damage award. In addition to compensation for injury, the law of torts has always advanced the dual goals of prevention and punishment that inhere in a public trial, after all. Dean Prosser long ago explained:

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of

> providing that incentive. The rule of vicarious liability is intended, among other things, to result in greater care in the selection and instruction of servants than would otherwise be the case; the carrier which is held to the "highest practicable degree of care" toward its passengers will tend to observe it for their safety; the manufacturer who is made liable to the consumer for defects in a product will do what can be done to see that there are no such defects. While the idea of prevention is seldom controlling, it very often has weight as a reason for holding the defendant responsible.
>
> This idea of prevention shades into that of punishment of the offender for what the offender has already done, since one admitted purpose of punishment itself is to prevent repetition of the offense.

W. Page Keeton, *Prosser and Keeton on The Law of Torts* §4 pp. 25-6 (5th ed. 1984). Holding a tortfeasor accountable in a public trial, with published results, advances the public policy of reminding all persons of the need to exercise greater care and awareness in their relations with others so as to reduce or eliminate future injuries.

C. <u>No Prejudice or Manifest Injustice Shown</u>. Defendants have not demonstrated the verdict was the product of passion or prejudice. They do not note the medical bills were $920,745.88 (Tr. 203), nor set out evidence of Mrs. Sanders' pre-injury activities and functioning, involvement with her children and school, and civic service awards (Tr. 208-11; 9/15/10 Tr. 96-9, 110-12), her lingering decline over 26 months until her death, or her limitations, incapacitation, conscious mental anguish and sense of helplessness (Tr. 191-3,

207-8; 9/15/10 Tr. 103-8), or the losses sustained by Ron Sanders and the couple's daughters (Tr. 194-7, 199-200, 204-8, 211-13; 9/15/10 Tr. 103-12). Though defendants have suggested that the survivors' testimony could not support the verdict, they provide no description or analysis of the plaintiff's evidence.

Instead, defendants offer rank speculation about the possible effect of the argument on the jury. But imputing certain rationales or motives to the jury is inappropriate. Neither this Court nor counsel can or should attempt to discern the jurors' thought processes. "We decline to hypothesize about the jury's reasoning. * * * Reviewing courts examine what the jury found, not the possible or even probable reasoning it used. [W]e may not speculate upon what a jury meant by what it said." Children Int'l v. Ammon Painting Co., 215 S.W.3d 194, 200 (Mo.App.W.D. 2006).

The trial court found no prejudice in the opening statement or closing argument, nor even a clue that he considered counsel's unobjected-to comments to be improper. All were isolated and not the theme of the entire closing. Pierce v. Platte-Clay Elec. Co-Op., Inc., 769 S.W.2d at 779; Beis v. Dias, 859 S.W.2d 835, 840 (Mo.App.S.D. 1993); Derossett v. Alton and Southern Ry. Co., 850 S.W.2d 109, 112 (Mo.App.E.D. 1993). The vast majority of the 55 minutes utilized by plaintiff's counsel focused on liability issues, the evidence supporting a plaintiff's verdict, and the nature of the family's losses. Over approximately 32 of the 33 full pages of transcript, plaintiff argued that Dr. Ahmed's trial testimony was inconsistent with the hospital record and the evidence of several other witnesses, lay and expert, that defendant had presented a theory of events that the jury could reasonably have believed was

manufactured, that he adamantly refused to admit his own negligence and attempted to blame others for Mrs. Sanders' death, and that she and her survivors suffered greatly. Moreover, the jury's award fell within the bottom half of the range suggested by counsel, contradicting the defense argument of prejudice. Derossett, at 113.

The trial judge's decision is afforded great deference. Even where argument is admittedly improper, "[w]isdom gathered from long experience tells us that trial courts are better positioned to assess the amount of prejudice injected." Pierce, 769 S.W.2d at 779. "Given the cold record on appeal, appellate courts of this state uniformly uphold trial courts' determinations of the prejudice injected by 'send a message' arguments." Id. Hence few appellate courts second-guess the decision to deny a mistrial or new trial after examining the entire argument. *See* Amador v. Lea's Auto Sales & Leasing, Inc., 916 S.W.2d at 852; Beis v. Dias, 859 S.W.2d at 840; Derossett v. Alton and Southern Ry. Co., 850 S.W.2d at 112.

Defendants have not requested plain error review in light of their failure to preserve objections, but it is not appropriate here. Under that doctrine, the trial court may be reversed only upon a finding that "manifest injustice or miscarriage of justice has resulted." Rule 84.13(c); Moore v. Missouri Pacific R. Co., 825 S.W.2d at 844. The error "must be, on its face, evident, obvious, and clear." Carroll v. Kelsey, 234 S.W.3d 559, 565 (Mo.App.W.D. 2007). Appellate courts seldom grant plain error review in civil cases. Rush v. Senior Citizens Nursing Home Dist. of Ray County, 212 S.W.3d 155, 162 (Mo.App.W.D. 2006).

"Rarely will comments made during closing argument rise to the level of plain error entitling a party to relief . . . because the decision to object is often a matter of trial strategy."

Id. at 163. Plain error occurs only if the "closing argument contains reckless assertions, unwarranted by proof and intended to arouse prejudice, which, therefore, may be found to have caused a miscarriage of justice." Morgan Publications, Inc. v. Squire Publishers, Inc., 26 S.W.3d 164, 170 (Mo.App.W.D. 2000). Manifest injustice or miscarriage of justice is not the same as prejudice. Plain error review requires defendants to "go beyond a mere showing of demonstrable prejudice to show manifest prejudice affecting [their] substantial rights." State v. Hornbuckle, 769 S.W.2d 89, 93 (Mo.banc 1989). Thus a verdict will be reversed only when the moving party has demonstrated that the argument constitutes a manifest injustice or miscarriage of justice that "weaken[s] the very foundations of the process and seriously undermine[s] confidence in the outcome of the case" (Carroll v. Kelsey, 234 S.W.3d at 565) or "had a decisive effect on the trial's outcome" (Rush v. Senior Citizens Nursing Home Dist., 212 S.W.3d at 163). No such showing was or could be made here.

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Second Brief fully complies with the provisions of Rule 55.03; that it contains 23,314 words and complies with the word 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 Second Brief were hand-delivered this _____ day of August, 2011, to Timothy M. Aylward/Brent G. Wright, Horn, Aylward & Bandy, 2600 Grand, Suite 1100, Kansas City, MO 64108.

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