IN THE SUPREME COURT OF MISSOURI
EN BANC

DEBORAH WATTS, as Next Friend of NAYTHON KAYNE WATTS,	)	
Plaintiff/Appellant/Cross-Respondent,	)	
vs.	)	No. SC91867
LESTER E. COX MEDICAL CENTERS, et al.,	)	
Defendants/Respondents/Cross-Appellants.	)	

Appeal from the Circuit Court of Greene County
Case No. 0931-CV01172

Honorable Dan Conklin, Circuit Judge

Amici Curiae Brief
In Support Of Respondents/Cross-Appellants
For American Medical Association, American Osteopathic Association, American College of Radiology, Missouri State Medical Association, Missouri Association of Osteopathic Physicians and Surgeons, Missouri Society of the American College of Osteopathic Family Physicians, Missouri Radiological Society, Missouri Dental Association, Missouri Pharmacy Association and Missouri Health Care Association

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Interest of the Amici with Consent

With the consent of all parties, this brief is submitted on behalf of ten health care associations: the American Medical Association (AMA), the American Osteopathic Association (AOA), the American College of Radiology (ACR), the Missouri State Medical Association (MSMA), the Missouri Association of Osteopathic Physicians and Surgeons (MAOPS), the Missouri Society of the American College of Osteopathic Family Physicians (MSACOFP), the Missouri Radiological Society (MRS), the Missouri Dental Association (MDA), the Missouri Pharmacy Association (MPA), and the Missouri Health Care Association (MHCA).

As providers of health care to the American people, the amici have first hand knowledge of how tort law affects the cost and availability of medical care. They understand the necessity for tradeoffs among competing interests in the extraordinarily complex health care system. The amici support the constitutionality of the § 538.210 R.S.Mo. limits being challenged in this case, because they represent an appropriate response by the Missouri general assembly to the challenges presented by uncontrolled liability costs and are consistent with established precedent of this Court.

The AMA is an Illinois non-profit corporation. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States.

Additionally through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policy making process. The AMA is participating in this case on its own behalf and as a representative of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is an unincorporated association among the AMA and all 50 state medical societies as well as the Medical Society of the District of Columbia. Established in 1995, the purpose of the Litigation Center is to advance AMA policies through the American legal system.

The American Osteopathic Association represents the interests of the more than 78,000 osteopathic physicians (DOs) practicing in the United States and over 19,000 students currently enrolled in accredited colleges of osteopathic medicine. AOA is the primary certifying body for DOs and is the accrediting agency for all osteopathic medical schools and has federal authority to accredit hospitals and other health care facilities. The AOA was founded in 1897 by a group of students at the American School of Osteopathy in Kirksville, Missouri.

The ACR, with more than 34,000 members, is the principal organization of radiologists, radiation oncologists, medical physicists, interventional radiologists, and nuclear medicine physicians in the United States. ACR is a nonprofit, professional society whose primary purposes are to advance the science of radiology, improve radiologic services to the patient, study the socioeconomic aspects of the practice of radiology, and encourage continuing education for

radiologists, radiation oncologists, medical physicists, and persons practicing in allied professional fields.

The MSMA is an organization of physicians and medical students. MSMA has approximately 6,000 members and is located in Jefferson City. MSMA serves its members through the promotion of the science and art of medicine, protection of the health of the public, and betterment of the medical profession in Missouri.

The MAOPS is the principal professional organization for osteopathic physicians and surgeons in Missouri. The MAOPS has approximately 2,800 osteopathic physicians, surgeons, and medical student members. The MAOPS serves its members by preserving and advancing osteopathic medicine in Missouri and by advocating for them in their quest to provide the highest quality of care.

The MSACOFP is a society of osteopathic family physicians that works to defend, preserve, promote, and protect the rights and interests of osteopathic family physicians. The MSACOFP has 350 members who are osteopathic family physicians and osteopathic students. The MSACOFP support osteopathic family physicians through its community, continuing medical education opportunities, and advocacy.

The MRS is an association of Missouri radiologists, medical residents, and fellows headquartered in Jefferson City, Missouri. MRS has approximately 500 members. Its purposes, as defined in its bylaws, include promoting the practice of radiology, advocating for the health of human beings, and promoting high professional standards.

The MDA is an organization of approximately 2,300 individual dentists and dental students. MDA promotes the interests of dentists in Missouri, and is committed to providing the highest quality of care to the public and serves as a resource for advocacy, education, communication, information, and fellowship. MDA is headquartered in Jefferson City, Missouri. MDA represents its members' interests concerning the civil litigation process and regulatory compliance.

The MPA is a professional society representing Missouri pharmacists, united to improve public health and patient care, enhance professional development, and advocate for the interests of the profession. MPA has approximately 1,300 members and is located in Jefferson City.

The MHCA is an association of long-term care facilities, headquartered in Jefferson City, Missouri. MHCA is the largest long-term care trade association in Missouri and represents over 400 long-term care facilities. MHCA assists its members in government and regulatory affairs, convention and education seminars, and through management of a host of programs and services critical to success in the field.

All of the amici advocate on behalf of their members before federal and state legislatures, agencies, and courts to advance their members' interests, including those related to civil liability and regulatory matters.

Argument

I. The Cap On Non-Economic Damages Does Not Infringe Plaintiff's Right To Trial By Jury.

Less than 20 years ago, in Adams by Adams v. Children's Mercy Hosp, 832 S.W.2d 898 (Mo. banc 1992), this Court held that the cap on non-economic damages in medical malpractice cases did not infringe on a plaintiff's right to trial by jury. The vote was six to one. Since the lone dissenting judge did not file a written opinion, one cannot know if the dissent rested on the right to jury trial or some other basis.

Article I, § 22(a) of the Missouri Constitution provides, in pertinent part, that "the right of trial by jury as heretofore enjoyed shall remain inviolate . . . ." As Adams holds, the right protected is the right "which existed at common law before the adoption of the first constitution." 832 S.W.2d at 907, and cases there cited.

The holding in Adams rested on three independent grounds, two of which have never been seriously challenged. First, juries find facts, including the amount of damages, while the trial court applies the law to the facts found by the jury. When the jury returns its verdict, it "complete[s] its constitutional task." 832 S.W.2d at 907. The statute sets a limit on the amount of such damages that plaintiff may legally recover:

> [T]he permissible remedy is a matter of law, not fact, and not within the purview of the jury. Because Section 538.210 is not applied until after the

jury completes its constitutional task, it does not infringe upon the right to a jury trial.

Id.

Second, Adams held that, at common law, there was "no substantive right" to a "jury determination of damages." 832 S.W.2d at 907. Adams relied on Tull v. United States, 481 U.S. 412, 426 (1987), interpreting the Seventh Amendment to the federal Constitution. Like § 22(a), the Seventh Amendment preserves the "substance of the common law right of trial by jury." (internal punctuation omitted).

Adams' third rationale was that the legislature could completely "abrogate a cause of action cognizable under common law." 832 S.W.2d at 907. "If the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery in those causes of action." Id.

In support of that rationale, Adams relied on Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), which made clear that the federal Constitution does not forbid the "abolition of old [rights] recognized by the common law, to attain a permissible legislative object." 438 U.S. at 88 n.32. Thus, "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." Id.

Judge Wolff's concurring opinion in Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752 (Mo. banc 2010), and some of the briefs on behalf of Ms. Watts, do challenge the second of those rationales. But nothing in either the

concurrence or the briefs makes any serious challenge to the first or third, each of which is an independent basis for the result.

Quoting Judge Wolff's concurrence in Klotz, plaintiff claims that Adams arose from the "flawed view" that "the right to trial by jury could be modified or abolished legislatively." Br. at 15-16. Nothing in Adams suggests that the result rested on any such rationale. It rested on the three rationales amici have identified, two of which are not seriously challenged.

The distinction between law and fact is one that courts have recognized for decades. Plaintiff places substantial reliance on Dimuck v. Schiedt, 293 U.S. 474 (1935). Br. at 23-26. Dimuck squarely holds that:

> The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.

293 U.S. at 486. Accord, Richardson v. State Highway & Transp. Com'n, 863 S.W.2d 876, 880 (Mo. banc 1993) (because sovereign immunity cap "does not apply until after the jury has completed its task, § 537.610 does not infringe the right of a jury trial").

Damage caps in no way interfere with the jury's fact-finding function. Amici fully accept the jury's finding that plaintiff's actual non-economic damages were $1,450,000. The trial court's subsequent reduction of that figure in the judgment in no way suggests that the actual damages were any less than what the jury found. It merely reduces the judgment to a figure that conforms to the law.

Numerous legal doctrines restrict a party's right to a jury trial. If the trial court grants a motion to dismiss or to direct a verdict, plaintiff never gets to submit a claim to the jury. The "constitutional provision for right of jury trial does not apply to questions concerning directed verdicts." Twellman v. Lindell Trust Co., 534 S.W.2d 83, 88 (Mo. App. 1976) (McMillian, J.). Nor does it apply to "the sustention of a motion to dismiss where the evidence shows as a matter of law that plaintiff has no cause of action." Knight v. Calvert Fire Ins. Co., 268 S.W.2d 53, 55 (Mo. App. 1954).

The same rule applies to summary judgments; when there are no facts in dispute and the issue is purely one of law, § 22(a) does not prevent the entry of summary judgment. Community Fin. Credit Union v. Lind, 344 S.W.3d 875, 877-78 (Mo. App. 2011); Bydalek v. Brines, 29 S.W.3d 848, 856 (Mo. App. 2000). The reason for all of these holdings is that, whatever the facts may be, the plaintiff's right to recovery must be based on substantive legal principles and those principles are decided by the courts.

Similarly, statutes of limitation or statutes of repose can prevent a plaintiff from submitting an untimely claim to a jury, no matter how meritorious it may otherwise be. Assuming that the cause of action has not yet accrued, this Court has squarely held that "neither the United States Constitution nor the Missouri Constitution purports" to prevent the legislature from enacting such statutes. Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 834 (Mo. banc 1991). In the course of its opinion, the Court quoted with approval that portion of Duke Power

holding that laws limiting liability have consistently been upheld. 821 S.W.2d at 834.

Finally, a statute immunizing an HMO from malpractice claims clearly restricts the plaintiff's ability to submit her claim to the jury. This Court has squarely held that the legislature has the authority to enact such a statute:

> We have consistently held that our legislature has the authority to determine the agencies and political subdivisions that enjoy sovereign immunity.
>
> . . . .
>
> . . . . We know of no case holding that the legislature may not determine which persons and corporations are liable for the consequences of medical malpractice.

Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 62 (Mo. banc 1989), and cases there cited.

To be fair, the latter two cases did not involve challenges based on § 22(a). But the holdings – that the legislature could enact statutes that entirely cut off a plaintiff's right of access to the courts – are completely inconsistent with Ms. Watts' assertion that the right to a jury trial trumps all.

Moreover, each of these cases rests firmly on the same ground as the first rationale for Adams: trial courts have the power to enter judgments that conform to the substantive law, even if that means that the judgment does not incorporate some or all of the facts that a jury might find.

Ms. Watts claims that § 22(a) provides her the "right to have a jury determine the amount of damages" in "a civil action for medical malpractice." Br. at 29. Section 538.210 does not deprive her of that right; to repeat, amici do not dispute that the actual non-economic damages were the $1,450,000 found by the jury.

This appeal, however, presents a very different question: whether she has a legal right to have a judgment in her favor for the full amount of those damages. Section 538.210 says she does not. That presents a question of law and courts, not juries, decide questions of law.

In these circumstances, O'Connor v. Follman, 747 S.W.2d 216 (Mo. App. 1988), is instructive. O'Connor, who lacked a real estate license, worked for a real estate broker soliciting tenants for a commercial office building. Part of her compensation was a commission on leases that she procured. At the time, § 339.150, R.S.Mo. prohibited brokers from paying commissions to unlicensed agents and § 339.160, R.S.Mo. prohibited her from suing for such commissions.

O'Connor sued Follman for fraud, claiming that he had told her she did not need a real estate license to collect commissions. The jury awarded her actual damages in the amount of the claimed commissions. The court of appeals reversed:

> Noting that an unlicensed real estate agent may not recover commissions on any theory under Missouri law, appellants emphasize O'Connor failed to establish she could legally collect such commissions. Appellants conclude

that the failure to establish legally collectible damages defeats respondent's claim against them. We agree.

747 S.W.2d at 220.

Taking the evidence in the light most favorable to O'Connor, there was no question that she had sustained the damages the jury awarded. But she was not entitled to a judgment in that amount because the legislature had provided that she could not legally collect such damages. The same is true here. Ms. Watts cannot legally collect a portion of the non-economic damages she was awarded.

Ms. Watts has nothing to say about this basis for Adams. The Missouri Coalition for Quality Care does acknowledge this rationale, and suggests that the Court should "re-examine" it. Br. at 13. But the only basis for doing so is the argument, repeated several times, that caps on non-economic damages allow the jury's fact-finding function to exist in form but not in substance and some courts have so held. Br. at 13-16

As the Coalition's brief candidly acknowledges, at least as many courts have upheld limits on non-economic damages. One could make precisely the same argument about a successful motion for judgment notwithstanding the verdict, but one would be hard pressed to suggest that Rule 72.01(b) violates the right to a jury trial. The reason is that such motions "present questions of law." Mogley v. Fleming, 11 S.W.3d 740, 747 (Mo. App. 1999).

The Coalition offers an intentionally absurd hypothetical parade of horribles. Br. at 18. The Court has always held that legislative "limitations on

common law causes of action" must be "reasonable." Fust v. Attorney General, 947 S.W.2d 424, 430 (Mo. banc 1997). There are few, if any, objective standards by which to measure intangibles such as non-economic damages. Alcorn v. Union Pacific R.R., 50 S.W.3d 226, 250 (Mo. banc 2001). The $350,000 cap in § 538.210 is reasonably generous and certainly no less arbitrary than a jury award of such damages.

Adams' third rationale was that, if the legislature can eliminate the cause of action altogether, it can certainly limit it. There is no question that the legislature has the constitutional authority to abolish medical malpractice claims, on a prospective basis, should it desire to do so.

A medical malpractice claim is a common law claim. Bregant by Bregant v. Fink, 724 S.W.2d 337, 338 (Mo. App. 1987). The source of the common law in Missouri, however, is a statute, § 1.010, R.S.Mo. If the legislature chose to repeal § 1.010 and replace it with, for example, the Napoleonic Code, nothing in the Constitution would preclude such action.

It logically follows that the legislature can repeal a particular common law cause of action, and numerous cases since Adams have so held. E.g., Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 69 (Mo. banc 2000) ("[w]here the legislature intends to preempt a common law claim, it must do so clearly"); In re Care and Treatment of Lieurance, 130 S.W.3d 693, 699 (Mo. App. 2004) ("[c]ommon law is subject to change by the legislature"); McKinney v. H.M.K.G.&Co., 123 S.W.3d 274, 278 (Mo. App. 2003) ("General Assembly has authority to enact

statutes that override the common law"); Cub Cadet Corp. v. Mopec, Inc., 78 S.W.3d 205, 209 (Mo. App. 2002) ("if a provision of the UCC applies that displaces the common law, the common law contrary to that provision cannot apply").

As Adams held, if the legislature can abolish the tort, it can certainly impose limits upon it. Numerous Missouri cases have so held. The most interesting is Fust, where this Court considered the constitutional status of § 537.675, R.S.Mo., the statute directing that half the proceeds of a punitive damage judgment be paid to the State.

Plaintiffs raised numerous constitutional challenges to this statute, all of which the Court unanimously rejected:

> [T]he statute is a limitation on a common law cause of action for punitive damages. **Placing reasonable limitations on common law causes of action is within the discretion of the legislative branch** and does not invade the judicial function.

947 S.W.2d at 430-31 (emphasis added).[1]

[1] As previously explained, this Court sustained immunity from suits against HMOs in Harrell, holding that the "legislature has frequently enacted immunity statutes, limiting rights of action which the common law recognizes." 781 S.W.2d at 62.

In Glick v. Ballentine Produce, Inc., 396 S.W.2d 609 (Mo. 1965), plaintiffs challenged the then-existing damage limitation in the wrongful death statute on various constitutional grounds. This Court rejected the challenge, finding:

> nothing in plaintiffs' citations or arguments which indicate any constitutional infirmity in a limitation on the amount of recovery in a death action. The legislature created the right of action where none existed before and it may condition the right as it sees fit.

396 S.W.2d at 615 (emphasis original).

Finally, this Court has repeatedly and unanimously sustained the workers compensation scheme against challenges based on the right to jury trial, even though the recovery can be substantially less than the damages that might be available at common law. De May v. Liberty Foundry Co., 37 S.W.2d 640, 648-49 (Mo. 1931); Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 11 (Mo. banc 1992) (holding that the Workers Compensation Act did not violate the constitutional right to trial by jury).

Once again, Ms. Watts' brief is entirely silent on Adams' third rationale. Once again, the Coalition's brief addresses the issue in only a haphazard way. First, the Coalition says that it "does not believe that the legislature has the power to abolish personal injury lawsuits like medical malpractice claims." Br. at 22. It neither explains why nor offers any supporting caselaw. The Coalition entirely ignores § 1.010, on which Adams relied for its holding that "the common law is in

force in Missouri only to the extent that it has not been subsequently changed by the legislature." 832 S.W.2d at 906.

Second, the Coalition argues that, so long as the common law cause of action is permitted to exist, § 22(a) guarantees that a jury decides the amount of damages. Br. at 23. Judge Wolff's concurring opinion in Klotz rests on the same reasoning. Judge Wolff acknowledges that "limits on damages validly have been imposed" on statutory causes of action, or when the statute "substitute[s] administrative proceedings for common law actions." He complains that, here, the legislature retained the common law cause of action but limited the damages. Klotz, 311 S.W.3d at 779.

With all respect, these arguments not only fly in the face of Fust and Goodrum; they are a wholesale elevation of form over substance. Suppose the legislature chose to eliminate the common law cause of action for medical malpractice and replace it with a statutory cause of action. Under cases like Glick and Goodrum, and Judge Wolff's concurring opinion in Klotz, there is no question that the legislature could limit the damages recoverable under the statute.

If the legislature can validly abolish a common law cause of action, it can validly limit it. This Court has repeatedly and unanimously held that reasonable limits on common law rights are within the discretion of the legislature, and § 538.215 plainly falls within that discretion.

II. Basic Principles Of Stare Decisis Counsel Against Overruling Adams.

As previously explained, Adams is less than 20 years old and was decided by a 6-1 margin. Since 1992, this Court and other Missouri appellate courts have repeatedly and unanimously endorsed the principles that underlie the first and third rationales for Adams. Nothing has changed in the intervening 20 years, other than the membership of this Court. And that is not a valid basis for overturning Adams.

This Court has always recognized that, while stare decisis is not absolute, "a decision of this court should not be lightly overruled." Manzara v. State, 343 S.W.3d 656, 662 (Mo. banc 2011). "Mere disagreement by the current Court with the statutory analysis of a predecessor Court is not a satisfactory basis for violating the doctrine of stare decisis." Crabtree v. Bugby, 967 S.W.2d 66, 71-72 (Mo. banc 1998).

There are numerous reasons for this stringent standard. Chief among them is the need to offer "stability and predictability" to those who must conform their conduct to the law. Ronnoco Coffee Co. v. Director of Revenue, 185 S.W.3d 676, 681 n.11 (Mo. banc 2006):

> Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

Hilton v. South Carolina Public Rys. Com'n, 502 U.S. 197, 202 (1991). Accord, State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997) (stare decisis "promotes the even-handed, predictable, and consistent development of legal principles" and "fosters reliance on judicial decisions").

Stare decisis also has important implications for the state of the judiciary itself:

> That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986).

All of these considerations dictate that the Court should retain Adams. First, both insurance companies and medical providers have relied on the validity of the cap, the former in setting premiums and the latter in determining the amount of insurance to purchase. Those decisions cannot be undone retroactively.

Second, any decision to overrule Adams would likely require an extensive legislative response, and not just in medical malpractice cases. When the legislature reinstated sovereign immunity, except for motor vehicles and conditions on public property, it imposed damage caps. § 537.610.2, R.S.Mo.

In Richardson, this Court relied on Adams to uphold § 537.610.2 against constitutional challenges based on § 22(a). The Court has twice since rejected constitutional challenges to the damage limits in § 537.210.2. Fisher v. State

Highway Com'n, 948 S.W.2d 607 (Mo. banc 1997); Hodges v. City of St. Louis, 217 S.W.3d 278, 282 (Mo. banc 2007). The latter opinion specifically relied on stare decisis in "declin[ing] to revisit the issue." Id.

If the Court decides that damage limits on medical malpractice claims violate the right to a jury trial, there is no principled way in which it can sustain them in the context of sovereign immunity. Judge Wolff's suggestion that damage caps in causes of action unknown to the common law might be acceptable, Klotz, 311 S.W.3d at 779, cannot be reconciled with his own opinion for the Court in State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003).

The issue in O'Malley was whether § 22(a) guaranteed plaintiffs a jury trial for claims under the Missouri Human Rights Act. The right to be free from discrimination based on race or gender was, regrettably, entirely unknown to the common law. O'Malley held that this made no difference, because the statutory claim was "analogous to those kinds of actions triable by juries" in 1820. 95 S.W.3d at 87:

> The statutorily based claims are conceptually indistinguishable from other statutory actions for damages that traditionally have carried the right to a jury trial because they seek redress for wrongs to persons.

Id. at 88.

The common law may have barred claims against the sovereign, but claims arising from negligent operation of vehicles or dangerous conditions on property

have existed from time immemorial. Such claims seek redress for wrongs to persons and hence, under O'Malley, are presumptively entitled to a jury trial.

When this Court eliminated sovereign immunity in Jones v. State Highway Com'n, 557 S.W.2d 225 (Mo. banc 1977), it stayed the effect of the opinion for one year to give the legislature an "opportunity to consider the subject." 577 S.W.2d at 231. In a compromise measure, the legislature reinstated sovereign immunity for all purposes except motor vehicles and public property, the latter subject to the statutory cap. If the Court strikes down those caps based on § 22(a), the legislature may decide to reinstate sovereign immunity in full.

With some exceptions, § 510.265 limits punitive damages to five times the actual damages or $500,000, whichever is greater. Numerous cases have held that the amount of such damages is "wholly within the sound discretion of the jury." Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719, 724 (Mo. 1966). There is no obvious reason why the legislature can limit punitive damages if it cannot limit actual damages, leading, once again, to the possibility of eliminating punitive damages.

Finally, the Court should consider the potential effect of overruling Adams on the public's respect for the rule of law. To repeat, Adams is less than 20 years old and was decided by a margin of 6 to 1. Two of the three rationales for its result are mainstream principles of law that subsequent Missouri cases have followed many times.

Ms. Watts invokes Independence-Nat'l Education Ass'n v. Independence S.D., 223 S.W.3d 131 (Mo. banc 2007), for the proposition that a decision that ignores the plain text of the Constitution is entitled to no stare decisis effect. Br. at 17; 31. The case is readily distinguishable.

The issue in Independence was whether public employee unions had the right to bargain collectively. Art. I § 29 of the Constitution provides that "employees shall have the right to organize and to bargain collectively." As Independence observed, 223 S.W.3d at 137, nothing in the plain text of that provision limited those rights to private sector employees.

The overruled case, City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947), engaged in no textual analysis whatever. The entire basis for the opinion was that conferring collective bargaining rights on public employees was bad policy which should not be allowed, regardless of what the Constitution said. The principal basis for the current attacks on § 538.210 is that a cap on non-economic damages is bad policy which should not be allowed, regardless of what the law is.

Ms. Watts may have an "inviolate" right to have juries decide facts in claims at law. She does not have an absolute right to have those facts translated into a judgment, regardless of the substantive law. Courts, not juries, determine issues of law.

Conclusion

For these reasons, amici respectfully submit that the Court should uphold the damage limitations in § 538.210.

Respectfully Submitted,

s/ Mark Arnold

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 4,772 words, exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Office Word 2010. The undersigned counsel further certifies that the accompanying CD has been scanned and is free of viruses.

s/Mark G. Arnold
Mark G. Arnold

Certificate of Service

The undersigned hereby certifies that on January 9, 2012:

- I electronically filed a true and accurate copy of the foregoing brief with the Clerk of the Court by using the Missouri eFiling System and for service on all counsel registered with the eFiling System.
- I provided a CD containing an electronic version of the brief which has been scanned and is virus-free to the Court and to counsel by first class mail, postage prepaid.

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