SC91867

IN THE SUPREME COURT OF MISSOURI

DEBORAH WATTS as Next Fried for NAYTHON KAYNE WATTS,

Appellant/Cross-Respondent,

vs.

LESTER E. COX MEDICAL CENTERS, d/b/a FAMILY MEDICAL CARE CENTER, LESTER E. COX MEDICAL CENTERS, MELISSA R. HERRMAN, M.D., MATTHEW P. GREEN, D.O., WILLIAM S. KELLY, M.D.,

Respondents/Cross-Appellants.

Appeal from the Circuit Court of Greene County, Missouri
The Honorable J. Dan Conklin, Circuit Judge

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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STATEMENT OF FACTS

On March 29, 2005, the Governor approved House Bill 393. *See* http://www.house.mo.gov/content.aspx?info=/bills051/bills/HB393.HTM. The title to the bill, as "truly agreed to and finally passed," was:

> To repeal sections 355.176, 408.040, 490.715, 508.010, 508.040, 508.070, 508.120, 510.263, 510.340, 516.105, 537.035, 537.067, 537.090, 538.205, 538.210, 538.220, 538.225, 538.230, and 538.300, RSMo, and to enact in lieu thereof twenty-three new sections relating to claims for damages and the payment thereof.

Id. (emphasis added). The changes brought about by the passage of House Bill 393, including limitations on claims for medical malpractice damages and payments, went into effect on August 28, 2005. *Id.* And the next legislative session of the Missouri General Assembly adjourned, by operation of law, on May 30, 2006.

Nearly three years later, Plaintiff Naython Watts, through his mother as next friend, Deborah Watts, brought this action for medical malpractice. (LF 13-23). The Petition makes no mention of House Bill 393, nor is there any claim concerning limits on non-economic damages. *Id.* In contrast, Defendants asserted an affirmative defense, to wit, "Defendants are entitled to the application of the provisions of Chapter 538 RSMo, including apportionment of fault, caps on damages, and the right to periodic payment of future damages."

(LF 34). Still, there was no challenge or response by Plaintiff to House Bill 393, the limitation on non-economic damages, or the requirement of periodic payment of future damages.

At trial, Plaintiff submitted evidence of damages, including economic damages totaling $8,540,605, and a life expectancy of 50 years (LF 137; SLF 5). The jury returned a verdict on March 31, 2011, for the Plaintiff and assessed damages as follows:

For past economic damages including past medical damages:	$ 0
For past non-economic damages:	$ 250,000
For future medical damages:	$ 3,371,000
For future economic damages excluding future medical damages:	$ 0
For future non-economic damages:	$ 1,200,000
TOTAL DAMAGES	$ 4,821,000

(LF 54).

Following the jury verdict, and in accordance with their affirmative defense, Defendants submitted a proposed judgment reducing the non-economic damages in accordance with § 538.210, RSMo (2011 Cum. Supp.),[1/] as well as requesting periodic payments for future damages, including future medical damages. (LF 10-12). Plaintiff opposed any reduction or periodic payment, and

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1/ All references to the Revised Statutes of Missouri will be to the 2011 Cumulative Supplement, unless otherwise noted.

argued for the first time on April 2011 – more than five years after the effective date of House Bill 393 – that House Bill 393 and the resulting provisions of §§ 538.210-.220 are unconstitutional. (LF 57-63; LF 72-95).

The trial court, the Honorable J. Dan Conklin presiding, rejected the Plaintiff's arguments and entered a judgment reducing non-economic damages, in accordance with Missouri law, and providing for periodic payment of future medical damages. After a reduction of 40% for attorneys' fees, the total future medical damages awarded by the trial court was $1,747,600. (LF 137). Without any reason or explanation, the trial court split the future medical damages amount and awarded half paid immediately and half in equal annual installments over the next 50 years, or the life expectancy of the Plaintiff. *Id.*

Plaintiff appealed, raising a multitude of constitutional claims and other arguments. Defendants have cross-appealed the trial court's decision to split the future medical damages and award half paid immediately. The Attorney General entered the appeal on behalf of Defendants because the State's Legal Expense Fund covers the judgment. § 105.711.2(3)(b).

SUMMARY OF THE ARGUMENT

Nothing has changed to the controlling principles of law since the Court decided *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992) or *Vincent by Vincent v. Johnson*, 833 S.W.2d 859 (Mo. banc 1992). The Plaintiff's arguments challenging the statutory limits on non-economic damages under § 538.210 are not any more inventive or persuasive than the plaintiffs in *Adams* or *Vincent*. The bedrock constitutional principles remain the same: "The legislative power shall be vested in . . . 'The General Assembly of the State of Missouri,'" Mo. Const. Art. III, § 1;[2/] and, the legislative power includes the right to modify, limit, and even "abrogate a cause of action cognizable under common law." *Adams*, 832 S.W.2d at 907 (citing *De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931), *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. banc 1989), *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503 (Mo. banc 1991), and *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6 (Mo. banc 1992)).

Plaintiff now seeks to plow under the legislative power of the General Assembly with previously rejected arguments, including arguments based on the jury trial right, separation of powers, equal protection, and special legislation. None of these arguments, however, apply or constrain the General Assembly's

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[2/] All references to the Missouri Constitution are to the current version adopted in 1945, unless otherwise noted.

"unlimited and practically absolute" legislative power to create, modify, limit, or even abrogate causes of action or remedies. *Saint Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721, 725 (Mo. banc 2007). In "respect for the principle of *stare decisis*," this Court should "decline[] to revisit the issue[s]" already decided. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 282 (Mo. banc 2007).

The jury trial right, for example, has been repeatedly rejected as a basis for restraining the legislative power as Plaintiff suggests. The General Assembly has always had power to create, alter, or amend causes of action and remedies, including the common law. Indeed, in a precursor to the current § 1.010 of the Missouri Revised Statutes, the Third Territorial Assembly, on January 19, 1816, adopted the common law of England in Missouri but made clear that the common law would be the "rule of decision in this territory, until altered or repealed by the legislature." 1 Terr. Laws, p. 436, § 1 (emphasis added). This is exactly what has happened over the nearly two centuries since the first Missouri Constitution was passed in 1820. Causes of action and remedies have been created, modified, limited, and even abrogated, all without violating the jury trial right. A perfect example is the workers' compensation law, which was sustained by this Court as constitutional nearly 100 years ago in the face of an identical jury trial right challenge. *De May*, 37 S.W.2d 640.

Similarly, challenges based on equal protection, separation of powers, special legislation, and clear title, fail. There is easily a rational basis for the

statutory limitation on non-economic damages. Indeed, legislation is constitutional "if any set of facts can be reasonably conceived to justify it." *Missouri Prosecuting Attorneys and Circuit Attorneys Retirement Sys. v. Pemiscot County*, 256 S.W.3d 98, 103 (Mo. banc 2008). Certainly that is the case where legislatures all over the country, and even Congress, are scrambling to address concerns about the cost and availability of health-care. Likewise, the prerogative of the General Assembly to impose a statutory limitation on remedies does not violate separation of powers principles. As this Court has held, "[p]lacing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function." *Fust v. Attorney Gen. for the State of Missouri*, 947 S.W.2d 424, 430-31 (Mo. banc 1997).

Finally, Plaintiff's challenges to the periodic payment of future medical damages under § 538.220 must fail. It is not a violation of the Equal Protection Clause or Due Process, nor an abuse of discretion, for the trial court to utilize the required statutory interest rate for periodic payment of future medical damages – an interest rate pegged to United States Treasury bills – even if it is a different interest rate (and lower) than the one used by Plaintiff's expert. Accordingly, this Court should affirm the trial court's decision to follow controlling precedent, and reject the Plaintiff's constitutional challenges and other arguments against §§ 538.210-.220.

As to the Defendants' Cross-Appeal, the language of § 538.220 is plain, "future medical periodic payments shall be determined by dividing the total amount of future medical damages [$1,747,600 in this case] by the number of future medical periodic payments [50 in this case]." § 538.220.2 (emphasis added). The trial court did not follow this mandatory language, but instead merely divided, without explanation, the future medical damages and ordered half paid immediately and half divided into annual installments for 50 years. For this reason, the trial court's judgment ordering half of future medical damages paid immediately should be reversed.

ARGUMENT

In this appeal, Plaintiff returns to plow old ground. Ground that many before have plowed and failed. Yet, with broken and worn-out instruments of analysis, Plaintiff seeks to dig up not merely new seeds, but great stands of constitutional principle with roots stemming from settled remedies, such as workers' compensation, to the very legislative power of the General Assembly to create, modify, limit, and even abolish causes of action and remedies. These efforts should be rejected again.

Standard of Review

Constitutional review of a statute is a question of law subject to *de novo* review. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007) (upholding the constitutionality of statutory limitations on damages, both economic and non-economic, payable by a public entity). This *de novo* review is much more than merely an ordinary analysis of the language of the statute in question, because of the importance of upholding legislation generally.

To begin, a "statute is cloaked in a presumption of constitutional validity" and "may be found unconstitutional only if it clearly contravenes a specific constitutional provision." *Weigand v. Edwards*, 296 S.W.3d 453, 456 (Mo. banc 2009). As such, this Court "will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute." *Reproductive Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006). Courts "enforce a

statute unless it plainly and palpably affronts fundamental law embodied in the constitution." *United C.O.D. v. State of Missouri*, 150 S.W.3d 311, 313 (Mo. banc 2004).

"When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional." *Id.* And for purposes of an equal protection claim, as alleged in this case, the plaintiff "must prove abuse of legislative discretion beyond a reasonable doubt, and short of that, the issue must settle on the side of validity." *Winston v. Reorganized Sch. Dist. R-2, Lawrence Co., Miller*, 636 S.W.2d 324, 327 (Mo. banc 1982). Here, the statutes in question – §§ 538.210-.220 – are constitutional, and the trial court's decision to uphold the statutes against Plaintiff's re-manufactured attacks should be affirmed.

I. The Trial Court Correctly Followed Controlling Precedent in *Adams v. Children's Mercy Hosp.*, and Under the Principles of *Stare Decisis* This Court Should Decline to Revisit Issues Already Decided.

* * *

"In respect for the principle of *stare decisis,* the Court declines to revisit the issue." *Hodges*, 217 S.W. 3d at 282.

* * *

Many of the arguments dug up by the Plaintiff in this case have already been considered and rejected by this Court in *Adams*, as well as in *Vincent*. The

principle of *stare decisis*, therefore, should lead the Court not to a new analysis with all the same principles rehashed, but instead this Court should simply decline to revisit the issues altogether. *See Hodges*, 217 S.W.3d at 282. Indeed, that is exactly what this Court did in *Hodges*, when considering a repeat challenge to the statutory limits on damages against public entities. *Id.* If the Court continues to revisit settled issues over and over again, then there is no purpose to the longstanding principle of *stare decisis*. *See, e.g., Payne v. St. Louis Co.*, 8 Mo. 473, 1844 WL 4001 (Mo. 1844) (relying on *stare decisis* to consider "the question settled").

The principle of *stare decisis* directs that, once this Court has "laid down a principle of law applicable to a certain state of facts, it [must] adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." Black's Law Dictionary 1406 (6th ed.1990). This Court has held, under the principle of *stare decisis,* that a decision "should not be lightly overruled, particularly where the opinion has remained unchanged for many years and is not clearly erroneous and manifestly wrong." *Eighty Hundred Clayton Corp. v. Dir. of Rev.*, 111 S.W.3d 409, 411 n3 (Mo. banc 2003) (citing *Southwestern Bell Yellow Pages, Inc. v. Dir. of Rev.,* 94 S.W.3d 388, 391 (Mo. banc 2002)). The decisions in *Adams* and *Vincent* are not clearly erroneous and manifestly wrong, and should therefore be adhered to under the principle of *stare decisis*.

The only basis on which Plaintiff seeks to disregard *stare decisis* and expressly overrule the decisions in *Adams* and *Vincent* (and thereby also overrule *Hodges* and innumerable other decisions applying the same bedrock constitutional principles), is the Court's decision in *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), and the dicta concurrence of Judge Wolff in *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752 (Mo. banc 2010). *See* Appellant's Brief ("App. Br.") at 17 (urging this Court to "overrule *Adams*" and *Vincent*); *see also Klotz*, 311 S.W.3d at 773 (Wolff, J., concurring) (stating that the purpose of his concurrence was to "explain the issue that the court one day will have to confront"). But the decision in *Diehl*, and Judge Wolff's dicta concurrence in *Klotz*, do not come close to establishing *Adams*, *Vincent*, *Hodges*, and the numerous cases recognizing legislative power over causes of action and remedies, as "clearly erroneous and manifestly wrong." *Eighty Hundred Clayton Corp.*, 111 S.W.3d at 411 n3.

It may seem odd that it would take approximately eight years after *Diehl* was handed down for anyone to recognize that the decision there had any impact on the constitutional principles recognized in *Adams*. In fact, it is not at all odd because, as discussed in greater detail below (*see* Part II.A.2.), the decision in *Adams* addresses an entirely different issue than the decision in *Diehl*. In *Adams*, the Court recognized the General Assembly's ability to create, modify, limit, or abrogate a cause of action or remedy. In *Diehl*, the Court recognized that the General Assembly cannot eliminate a jury trial right for a cause of

action. The issues addressed in *Adams* and *Diehl* are, thus, constitutionally different from each other, and the Court should decline to revisit the issues rejected in *Adams*, including the Plaintiff's jury trial right and equal protection claims, "[i]n respect for the principles of *stare decisis*." *Hodges*, 217 S.W. 3d at 282.

II. The Statutory Limitation on Non-Economic Damages in § 538.210 is Fully Within the General Assembly's Power – Responding to Appellant's Points I-V.

The Plaintiff's strategy, like those before, is to raise a multitude of constitutional attacks against § 538.210 in an effort to undermine the General Assembly's power over causes of action and remedies. These efforts cannot be nourished in any degree, not only because they have already been rejected and are without basis, but also because to do so would choke out long-standing remedies and the very roots of legislative power.

A. The General Assembly's Power to Create, Modify, Limit, or Abrogate Causes of Action and Remedies is Not Stripped by the Jury Trial Right – Responding to Appellant's Point I.

* * *

"[L]egislative power is unlimited and practically absolute."

Saint Louis Univ., 220 S.W.3d at 725.

* * *

Even if the Court chooses to revisit the Plaintiff's arguments that were previously rejected in *Adams*, the arguments must still fail. The jury trial right is not violated by the General Assembly's enactment of a statutory limitation on non-economic damages. Put another way, the General Assembly's power to create, modify, limit, or abrogate causes of action or remedies is not stripped fruitless by the jury trial right. Not only has this Court reached this conclusion in *Adams*, but many other courts have as well.[3/] And there are many reasons why this Court should reach the same conclusion, including the plain language of the Constitution and the very nature of legislative power.

[3/] *See, e.g., Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989); *Judd v. Drezga*, 103 P.3d 135 (Ut. 2004); *Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Kirkland v. Blaine Co. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877 (W. Va. 1991); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); *Wright v. Colleton Co. Sch. Dist.*, 391 S.E.2d 564 (S.C. 1990); *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329 (Mass. 1989); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002).

1. The plain language of the Missouri Constitution does not limit the General Assembly's power to create, modify, limit, or abrogate causes of action or remedies.

Article III of the Missouri Constitution provides that "[t]he legislative power shall be vested in . . . '[t]he General Assembly of the State of Missouri.'" Art. III, § 1, Mo. Const.. Although the term "legislative power" is not specifically defined in the Constitution, the parameters and application are evident in the plain language of the Constitution, and have been repeatedly reiterated by this Court. *See Concerned Parents v. Caruthersville Sch. Dist. 18,* 548 S.W.2d 554, 559 (Mo. banc 1977) (concluding that constitutional construction is not required if the words at issue are plain and unambiguous).

The bedrock principle of legislative power in Missouri was established long ago, and provides that the Constitution "delegates to the General Assembly all legislative power; and that in virtue of this grant, the General Assembly can do anything possible to be done by legislation, which is not expressly forbidden by the Constitution." *Hamilton v. St. Louis Co. Court*, 15 Mo. 3 (Mo. 1851). In modern expression, this Court has reaffirmed that "Missouri's constitution is not a grant of legislative power, but, except for its restrictions, legislative power is unlimited and practically absolute." *Saint Louis Univ.*, 220 S.W.3d at, 725 (citing *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.,* 584 S.W.2d 73, 77 (Mo. banc 1979)); *see also State ex rel. Farmers' Elec. Coop., Inc. v. State*

Environmental Improvement Auth., 518 S.W.2d 68, 72 (Mo. banc 1975). This includes the power to create, modify, limit, and even abolish common law causes of action. *See Fisher v. State Highway Comm'n of Mo.*, 948 S.W.2d 607 (Mo. banc 1997); *see also Munn v. Illinois*, 94 U.S. 113, 134 (1876) ("Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.").

In Missouri, "the only limitation of legislative power is the Constitution, and it is by this instrument that we must measure all legislative acts." *Ex parte Taft*, 225 S.W. 457, 461 (Mo. banc 1920); *see also Chapman v. State Social Security Comm'n*, 147 S.W.2d 157, 159 (Mo. App. W.D. 1941) (concluding that "the claim of any person under the statutes is subject to the provisions and limitations which the legislature creating the right has placed thereon, whether in matters of substance, procedure, or remedy"). There is no express limitation in the Constitution on the General Assembly's power to create, modify, limit, or even abrogate the common law, statutory causes of action, or remedies.

Several sections of Article III of the Constitution – setting forth the parameters of the legislative department – do set some limitations. For example, § 39 of Article III specifically provides limitations on the power of the General Assembly, including limitations on pledging credit, extinguishing indebtedness, and moving the seat of government. Art. III, § 39, Mo. Const. Similarly, Art. III, § 20(b) includes limitations on special sessions of the General Assembly, and in Art. III, §§ 23 and 25 there are limitations on the scope and

introduction of bills. Art. III, §§ 20(b), 23 & 25, Mo. Const. But nowhere in the Constitution is there any limitation on the ability of the General Assembly to create, modify, limit, or abrogate causes of action or remedies.

It would surely have been important to incorporate in the Constitution had the framers of the Missouri Constitution wanted to include a limitation on the ability of the General Assembly to create, modify, limit, or abrogate causes of action or remedies. Indeed, evidence that this was not intended is demonstrated by the General Assembly's adoption of the common law in § 1.010, which establishes the common law as the "rule of action and decision in this state" but also makes the common law subservient to the General Assembly. *See* § 1.010 (providing that "no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law").

The precursors to § 1.010 are even more instructive. The common law of England was adopted in Missouri by an act of the Third Territorial Assembly on January 19, 1816, but it was clear in the Act that the common law was the "rule of decision in this territory, until altered or repealed by the legislature." 1 Terr. Laws, p. 436, § 1 (emphasis added). Of course, this was not mentioned in Appellant's Brief or in Judge Wolff's dicta concurrence in *Klotz*.

With this backdrop of legislative power over causes of action and remedies, the first Missouri Constitution was adopted and the right to trial by jury was added and subsequently amended. *See* Art. XIII, Mo. Const. of 1820, § 8; Mo.

Const. of 1875, Art. II, § 28 (as amended Nov. 6, 1900). The jury trial right, as now contained in Art. I, § 22(a), provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." Art. I § 22(a), Mo. Const. Nothing in the plain language of this section mentions or even suggests that the right to trial by jury is in any way associated with the availability of particular causes of action or remedies, much less undoes the recognized power of the General Assembly over the common law, causes of action, or remedies. Thus, constitutional construction is not required because the words at issue are plain and unambiguous. *See Concerned Parents,* 548 S.W.2d at 559.

Moreover, if we were to turn to the construction of these constitutional provisions and terms, and use dictionary definitions, the construction and definitions would still support continuing legislative power over causes of action and remedies. *See Saint Louis Univ.*, 220 S.W.3d at 726 ("When construing a constitutional provision, however, words are to be taken in accord with their fair intendment and their natural and ordinary meaning, which can be determined by consulting dictionary definitions."). The relevant terms are defined in part as follows:

> **Heretofore** – before this : up to this time;
>
> **Enjoyed** – to have in possession for one's use or satisfaction or to have the benefit of.

Webster's Third New International Dictionary 754, 1059 (1993).

Nothing in these terms, either individually or collectively, suggests that the right to trial by jury is in any way associated with the availability of particular causes of action or remedies, or in any way removes the "unlimited and practically absolute" legislative power of the General Assembly. *Saint Louis Univ.*, 220 S.W.3d at 725. Indeed, quite the contrary is the case. The definitions of "heretofore" and "enjoyed" combined with the historical understanding of legislative power over the common law, causes of action, and remedies in 1820 provide that "heretofore enjoyed" includes the power of the General Assembly to create, modify, limit, or abrogate causes of action and remedies, including the common law. Accordingly, legislation limiting causes of action or remedies, such as § 538.210, is not "expressly forbidden by the Constitution," *Hamilton*, 15 Mo. at 9, and should be upheld.

2. The decision in *State ex rel. Diehl v. O'Malley* did not alter the General Assembly's power or change the jury trial analysis for statutory limitations on damages.

Based in large part on the Court's decision in *State ex rel. Diehl*, 95 S.W.3d 82, Plaintiff argues that this Court "should expressly overrule *Adams*." App. Br. at 31. But the Plaintiff misconstrues the actual holding in *Diehl*, which does not impose any sort of limit on the General Assembly's power to create, modify, limit, or abrogate causes of action or remedies. In fact, the Court in *Diehl*

implicitly recognized the continuing power of the General Assembly over causes of action and remedies.

As this Court knows well, the issue in *Diehl* concerned the question: "Does Missouri's constitutional guarantee of a right to jury trial apply to an action for damages under the Missouri Human Rights Act?" *Diehl*, 95 S.W.3d at 84. The essential analysis in *Diehl* involved whether a cause of action under the Missouri Human Rights Act – enacted long after 1820 – was the kind of action "at law" to which the jury trial guarantee applied, or conversely, whether it was an "equitable action" to which the guarantee did not apply. *Id.* at 86. There was no analysis or discussion in the case as to whether the General Assembly had power to create, modify, limit, or abrogate the cause of action or remedy in the first place. It was simply assumed.

The Court in *Diehl*, instead, discussed "whether a claim based upon a later-enacted statute or common law principle is the kind that was tried by jury in 1820." *Id.* at 86. Thus, *Diehl* recognized that neither common law claims nor statutory causes of action are "frozen in time" as of 1820. *Id.* (citing *Briggs v. St. Louis & S.F. Ry. Co.*, 111 Mo. 168 (1892) as dealing with a claim based on a statute enacted after 1820). And the General Assembly remains empowered to create, modify, limit, or abrogate causes of action and remedies. In the end, it did not matter whether the claim was based on a common law cause of action, a statutory cause of action existing in 1820, or a statutory or common law cause of

action arising after 1820; the issue was whether the claim was "'analogous to' actions brought at the time of the state's original 1820 Constitution." *Id.* at 86.

Not only does the analysis in *Diehl* not support the conclusion that the General Assembly has no power to create, modify, limit, or abrogate a cause of action or remedy, it actually supports such a power. It is clear that the existence or creation of a cause of action or remedy is not restricted by the jury trial right. Otherwise, any expansion or retraction of causes of action or remedies would have constituted a violation of the jury trial right from the very beginning. Indeed, the Court in *Diehl* recognized workers' compensation as a specific situation in which the remedy was completely changed, and yet there was no violation of the right to a jury trial. *Id.* at 89-90.

The critical conclusion in *Diehl* is that if there is a civil cause of action, no matter how or when it was created, there is a jury trial right if it is "the kind of case triable by juries from the inception of the state's original constitution." *Id.* at 92. Under such circumstances, the General Assembly cannot remove the jury trial right in civil court proceedings. This is a completely different conclusion, and not at all in conflict, with the long-standing principle affirmed in *Adams*, that the General Assembly can create, modify, limit, or abrogate a cause of action or remedy (as in the workers' compensation remedy or a statutory cap on non-economic damages for medical malpractice claims).

3. The jury resolves disputed facts, and its task is therefore completed at the time the statutory limit on damages in § 538.210 is applied as a matter of law.

Consistent with the legislative power, and a proper understanding of the decision in *Diehl*, it is clear what the constitutional right to a jury trial means in this setting. The jury trial right, as "heretofore enjoyed," is the right to have one's disputed facts resolved by a jury, and not the right to have any specific cause of action or particular remedy. *See Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 880 (Mo. banc 1993) (citing *Jaycox v. Brune,* 434 S.W.2d 539, 542-43 (Mo. 1968) and *Adams*, 832 S.W.2d at 907) ("A jury's primary function is fact-finding, including the determination of damages."); *see also Shephard v. Hunter*, 508 S.W.2d 234, 237 (Mo. App. S.D. 1974) (concluding that the "basic function of the jury as the fact-finding unit in litigation").

Once a jury determines the disputed facts (including damages) its constitutional task is complete. *See Richardson*, 863 S.W.2d at 880; *Adams*, 832 S.W.2d at 907. At that point, it becomes the duty of the court to apply the law and reduce the verdict in compliance with the non-economic damage limitation provided in § 538.210. In doing so, courts fulfill their obligation without infringing upon the right to trial by jury. *See Richardson*, 863 S.W.2d at 880; *Adams*, 832 S.W.2d at 907.

This principle, that the jury resolves disputed facts and not the application of the law, is manifested in other situations as well. The most common is the application of the rules for summary judgment. If, for example, there are no disputed facts (including as to damages), then there is no issue for the jury and the case is decided by the Court on summary judgment. Mo. R. Civ. P. 74.04 ("If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith."). No one suggests that this is a violation of the jury trial right, because a case in which there are no disputed facts leaves nothing for the jury to decide.

In this case, the jury resolved the disputed facts and assessed the damages in accordance with the constitutional guarantee of a jury trial right. The Plaintiff, therefore, was afforded a jury trial as guaranteed by the Missouri Constitution. Only after the jury resolved the disputed facts and assessed the damages did the trial court reduce the non-economic damages in accordance with § 538.210. The process and division of responsibilities was in perfect alignment with the statute, the associated legislative power, and the Constitution.

Courts from jurisdictions all over the country have applied this very same reasoning to the jury trial right.[4/] And although Plaintiff makes much of the term "inviolate" being used in the Missouri Constitution, focusing on that term does nothing to change the result. Indeed, many states with this very same language in their constitutions have found similar statutory damage limitations

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4/ *See, e.g., Boyd*, 877 F.2d at 1196 ("[O]nce the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function."); *Judd v. Drezga*, 103 P.3d at 144 ("[I]t's the jury's duty to determine the amount of damages a plaintiff in fact sustained, but it is up to the court to conform the jury's finding to applicable law."); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989) (same); *Gourley*, 663 N.W.2d at 75 ("The primary function of a jury has always been factfinding, which includes a determination of a plaintiff's damages. . . . The court, however, applies the law to the facts [and] applies the remedy's limitation only after the jury has fulfilled its factfinding function."); *Evans*, 56 P3d at 1051 (same); *Murphy*, 601 at 117 (same); *Wright*, 391 S.E.2d at 569-70 (same); *Peters*, 597 A.2d at 53-54 (same); *Pulliam*, 509 S.E.2d at 312 (same); *Zdrojewski*, 657 N.W.2d, at 736-37 (same); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 431 (Ohio 2007) (same); *Kirkland*, 4 P.3d at 1120 ("[The statute] does not violate the right to a jury trial because the statute does not infringe upon the jury's right to decide cases."); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 602 (Ind. 1980) (same) (*overruled on other grounds*).

constitutional. *See, e.g., Kirkland*, 4 P. 3d 1118 (Idaho 2000); *Gourley*, supra; *Federal Express Corp. v. United States*, 228 F.Supp.2d 1267 (D. N.M. 2002); *Arbino*, 880 N.E. 2d 420 (Ohio 2007); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) (superseded by statute on other grounds as stated in *Homestake Mining Co. v. South Dakota Subsequent Injury Fund*, 644 N.W.2d 612 (S.D. 2002)).

Even federal courts have consistently held that limitations on damages in medical malpractice suits do not violate a plaintiff's jury trial right under the Seventh Amendment. *See, e.g., Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Boyd*, 877 F.2d at 1196. Notably, the United States Supreme Court in *Tull v. United States*, 481 U.S. 412 (1987) held that:

> "The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the substance of the common law right of trial by jury. Is a jury role necessary for that purpose? We do not think so."

Id. at 425-26 (citation omitted). For this reason as well, Plaintiff's jury trial right argument should be rejected.

4. The consequences of rejecting legislative power, as Plaintiff suggests, would be pervasive and landscape-altering.

If we suppose that the Plaintiff is right, and that the guarantee of a jury trial right means that there can be no legislative impact on a cause of action or remedy that would have been subject to a jury trial right in 1820 (*i.e.* what the Plaintiff would call "hostile legislation"), then the consequences would be pervasive and landscape-altering. First, of course, it would undo the long-standing principle that no one has a "'vested right that the law will remain unchanged.'" *State ex rel. Schottel v. Harman*, 208 S.W.3d 889, 892 (Mo. banc 2006) (citing *Doe v. Phillips*, 194 S.W.3d 833, 850-51 (Mo. banc 2006)). The law with respect to causes of action and remedies would have to become unchanging. The General Assembly would therefore become powerless to make any change to a cause of action or remedy because even a change in the applicable statute of limitations would mean a "hostile" impact on the jury trial right.

Adopting the Plaintiff's distorted view of the jury trial right, of course, would also be the undoing of the entire workers' compensation system. Claims arising from injuries in the workplace were certainly subject to a jury trial determination of disputed facts and damages. *See De May*, 37 S.W.2d at 647 ("That which is withdrawn from the employee is merely his right of action against the employer, as determined by the rules of the common law, in the event of his future injury."). The General Assembly, however, completely

changed the remedy with the passage of the workers' compensation law, making it an entirely administrative adjudication. *Diehl*, 95 S.W.3d at 89-90. Yet, according to the Plaintiff, the General Assembly is powerless to alter in any way causes of action that existed in 1820.

Plaintiff clings to this argument that the jury trial right is violated with any limitation on a cause of action or remedy despite the repeated decisions by this Court that the workers' compensation system does not violate the jury trial right. *See, e.g., Goodrum*, 824 S.W.2d at 11; *De May,* 37 S.W.2d at 648-49. Indeed, even the *Diehl* decision, to which Plaintiff is completely beholden, would have to be rejected in part because it easily recognized the constitutional authority of the General Assembly to convert a civil action with a jury trial into an administrative action with no jury trial. *Diehl*, 95 S.W.3d at 89-90.

This Court in *De May* aptly analyzed these very points long ago, and unequivocally recognized the legislative power to change the remedy available to a plaintiff:

> The question is: Was the Legislature without the power to thus completely change the law upon the subject? This inquiry has no concern in the wisdom of the change; it takes no account of the reason for it; it is limited to the naked question of the Legislature's power. That the Legislature possessed the power must be conceded, unless it be true that the employee is

> protected by the Constitution in the continuance of the rules of the common law for his benefit in the determination of the employer's liability for such injuries as those with which the Act deals. That no one has a vested right in the continuance of present laws in relation to a particular subject, is a fundamental proposition; it is not open to challenge. The laws may be changed by the Legislature so long as they do not destroy or prevent an adequate enforcement of vested rights. There cannot be a vested right, or a property right, in a mere rule of law.

De May, 37 S.W.2d at 647-48.

In addition to the demise of the workers' compensation system, gone also would be the sovereign immunity statutes (*see, e.g.*, §§ 537.600, 537.610), despite the recognition by this Court of their constitutionality in *Richardson*, 863 S.W.2d at 880, as well as a host of other causes of action or remedies modified, limited or abrogated by the General Assembly. Plaintiff's argument, taken to its logical extreme, would preclude the General Assembly from imposing any limitation on a cause of action subject to a jury trial, including such things as a statute of limitations (*see* § 516.120), because any limitation would arguably be "hostile" to a jury's determination of damages. App. Brf. at 16-17.

The plain language of the Constitution, the legislative power of the General Assembly, and a host of other reasons support the trial court's decision to follow *Adams* and *Vincent* in this case, not to mention nearly two centuries of authority upholding the General Assembly's power to create, modify, limit or abrogate causes of action or remedies without violating the jury trial right.

B. The Equal Protection Clause is Not Violated by the Statutory Limitation on Non-Economic Damages in § 538.210 – Responding to Appellant's Points III-IV.

* * *

A "classification is constitutional if any set of facts can be reasonably conceived to justify it." *Missouri Prosecuting Attorneys*, 256 S.W.3d at 102.

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Like the Plaintiff's argument concerning the jury trial right, Plaintiff's equal protection arguments have already been expressly rejected in *Adams*. Under the principle of *stare decisis*, this Court should decline to "revisit the issue." *Hodges*, 217 S.W.3d at 282. Even so, the equal protection arguments have certainly not improved with age since they were rejected by the Court.[5/]

[5/] Plaintiff also claims a violation of the constitutional limit on the passage of a "special law," Art. III, § 40(6) & (30), Mo. Const., arguing that it is the "flip-side" of the equal protection argument. App. Brf. at 67. This claim fails as well. "A 'special law' is a law that 'includes less than all who are similarly situated ...

1. The statutory limitation on non-economic damages in medical malpractice cases is not subject to heightened scrutiny.

The first step in any equal protection analysis is the application of the proper level of scrutiny. *See In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003) (citing *In re Marriage of Kohring,* 999 S.W.2d 228, 231 (Mo. banc 1999)). This involves deciding whether the "classification 'operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'" *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003).

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but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.'" *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996) (citing *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 831 (Mo. banc 1992) as quoting *Ross v. Kansas City Gen. Hosp. and Med. Ctr.*, 608 S.W.2d 397, 400 (Mo. banc 1980)). Section 538.210 applies to all persons who bring "any action against a health care provider." Other states have likewise rejected a "special law" challenge to statutory limitations on non-economic damages. *See, e.g., Gourley*, 663 N.W.2d at 66-67 (Neb. 2003); *Etheridge*, 376 S.E.2d 532-33; and *Kirkland*, 4 P.3d at 1120-21.

Plaintiff argues that § 538.210 should be subjected to heightened scrutiny either because victims of medical malpractice are a suspect class or because the imposition of a statutory limitation on damages "impinge[s] upon the fundamental constitutional right of trial by jury." App. Brf. at 41. But the statutory limitation on non-economic damages for medical malpractice cases under § 538.210 does not involve a suspect class or impinge on a fundamental right, and is, therefore, not subject to heightened scrutiny.

Generally, the status of a "suspect class" is reserved for classifications such as race, national origin, and illegitimacy, all needing special protection because of historical reasons. *See Call v. Heard*, 925 S.W.2d 840, 846-847 (Mo. banc 1996). On its face, the statutory limitation on non-economic damages in § 538.210 makes no classification at all (except those claiming damages for alleged medical malpractice), much less based on race, national origin, or illegitimacy.

In addition, "as the general purpose of the equal protection guarantee is to safeguard against invidious discrimination, differentiations between classes, not suspect or specially protected, are permissible, unless the classification rests on grounds irrelevant to the achievement of the State's objectives." *Winston*, 636 S.W.2d at 327-28 (finding it constitutional to limit recovery by victims of public torts to those injured by negligent operation of motor vehicles or because of the dangerous condition of property). Just as this Court concluded in *Adams*, the suggestion that an alleged medical malpractice victim is a "suspect class" is

lacking in "law or reason." *Adams*, 832 S.W.2d at 903; *see also Harrell*, 781 S.W.2d at 63. In fact, the Court has "previously and repeatedly rejected the argument that victims of medical malpractice are members of a suspect class." *Batek*, 920 S.W.2d at 898.

At its essence, Plaintiff's argument is that non-economic damages such as pain and suffering of those who do not have a higher wage earning history is somehow worth more than pain and suffering experienced by someone who happens to have a higher wage earning history. The cap on damages applies equally to all persons alleging negligence by a healthcare provider. All persons are entitled to recover all proven economic damages, and the severity of the injury is certainly included in the consideration of economic damages. The non-economic damages are equally limited for all alleged victims of medical malpractice, regardless of their race, national origin, gender or economic prospects.

Similarly, there is no support for the proposition that a statutory limitation on damages impinges on the jury trial right. Indeed, if it is constitutionally permissible for the General Assembly to create, modify, limit, or abrogate causes of action without violation of the jury trial right, as discussed above, then to do so will not impinge on a fundamental right. Otherwise, every legislative limitation placed on a cause of action or remedy would be subject to strict scrutiny.

In *Batek*, this Court considered similar equal protection challenges to § 516.170. The Court held that distinguishing between non-medical malpractice plaintiffs and medical malpractice plaintiffs for purposes of a statute of limitations does not violate the Equal Protection Clause. *Id.* at 899 (emphasis added). Furthermore, this Court found that the statute did not impinge upon the plaintiff's fundamental rights. *Id.* at 898 (emphasis added). As such, this Court should reject the Plaintiff's efforts at heightened scrutiny, as it has before in *Adams* and *Batek*.

2. The statutory limitation on non-economic damages is rationally related to legitimate state interests.

Absent heightened scrutiny, a "statute will survive an equal protection challenge if its classifications are rationally related to a legitimate state interest." *Adams*, 832 S.W.2d at 903 (citing *Mahoney*, 807 S.W.2d at 512 and *Blaske*, 821 S.W.2d at 829). "Rational basis review is minimal in nature." *Adams*, 832 S.W.2d at 903 (citing *Schnorbus v. Dir. of Rev.*, 790 S.W.2d 241, 243 (Mo. banc 1990)). "The rational basis test requires only that the challenged law bear some rational relationship to a legitimate state interest." *Missouri Prosecuting Attorneys*, 256 S.W.3d at 102.

Furthermore, a statute will be enforced "unless it plainly and palpably affronts fundamental law embodied in the constitution." *Id.* All doubts will be resolved in favor of the constitutionality of the statute. *Id.* Indeed, the "first principle of such an inquiry is that a duly enacted statute is presumed to be

constitutional. That presumption obtains unless the statute clearly contravenes some constitutional provision." *Mahoney*, 807 S.W.2d at 512. Here, the statutory limitation on non-economic damages easily satisfies the rational basis test.

A "classification is constitutional if any set of facts can be reasonably conceived to justify it." *Missouri Prosecuting Attorneys*, 256 S.W.3d at 102-03 (emphasis added); *see also Schnorbus*, 790 S.W.2d at 243 ("A classification will be sustained if any state of facts reasonably can be conceived to justify it."). The statutory limitation on non-economic damages is a rational response to a reasonably conceived health care problem caused by medical malpractice litigation and damages. Therefore, the classification of the statute to reduce non-economic damages has a rational relationship to that legitimate purpose.

The Plaintiff's rational basis challenge appears focused not on whether a set of facts can be reasonably conceived to justify the law, but instead on whether the actual facts of a health care crisis exist. App. Br. at 51 (arguing that "[e]ach of these propositions, however, was demonstrably false"). But this misses the point of rational basis review entirely. As this Court said in *Mahoney*, 807 S.W.2d at 513, "whether *in fact* the distinction" the law makes would work "is not the question." *Id.* (emphasis in original).

"A legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *United C.O.D.*, 150 S.W.3d at 313 (citing *F.C.C. v. Beach Communications, Inc.,*

508 U.S. 307 (1993)). "It is enough to satisfy equal protection that the legislature could have reasonably decided" that the lowering of the statutory damages limitation would help reduce increasing costs and promote the availability of health care services. *Mahoney*, 807 S.W.2d at 513 (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)); *Comm. for Educ. Equality v. State*, 294 S.W.3d 477, 491 (Mo. banc 2009) (holding that "rational basis review does not question '"the wisdom, social desirability or economic policy underlying a statute,' and a law is upheld if it is justified by any set of facts") (citing *Missouri Prosecuting Attorneys*, 256 S.W.3d at 102).

A legislature could rationally base its decision to classify malpractice plaintiffs separately based on a number of considerations, including such things as limiting burdens and disruptions that malpractice litigation imposes on health care; reducing uncertainty and expense for the purpose of preserving affordable health care for the greatest number of individuals; and, to stem the tide of a perceived crisis. *See Batek*, 920 S.W.2d at 899. Not only was the General Assembly actually concerned about the same things the Court recognized in *Adams* and many other cases, but all that is needed is that the General Assembly was conceivably concerned and that the statute is rationally related to that concern.

The General Assembly certainly could have been concerned – and actually was concerned – that the prior statutory damages limitation on non-economic damages was not sufficiently resolving the issues of cost and availability of

health care services. As aptly described in the *amici* filings, the Plaintiff's view of the actual facts is at best slanted, and at worst completely wrong. *See Amici Curiae* Brief of the Missouri Chamber of Commerce and Industry, et al., at 10-20. Indeed, as the Court already observed in *Adams*, the preservation of public health and the maintenance of generally affordable health care costs are reasonably conceived legislative objectives. *Adams*, 832 S.W.2d 898.

At a minimum, the issue is debatable, and "[u]nder equal protection rational review, this doubt must be resolved in favor of the General Assembly." *Adams* , 832 S.W.2d at 904. "While some clearly disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists." *Id.*; *see also Blaske*, 821 S.W.2d at 835 ("Courts absolutely may not look behind the legislature's enactment of a statute to second guess the process by which the legislature arrived at its conclusion.").

Given the few changes from the statute at issue in *Adams*, the underlying reasons for the statutory limitation analyzed by this Court in *Adams* should provide no basis for another challenge. *See Eighty Hundred Clayton Corp.*, 111 S.W.3d at 410 (finding that when the legislature amended only the rate of tax, courts are bound by the earlier interpretation of the statute); *see also Hodges*, 217 S.W.3d at 281-82 (declining to revisit decided issues). Accordingly, Plaintiff's equal protection arguments should be rejected.

C. Separation of Powers is Not Violated by the General Assembly's Passage of a Statutory Limitation on Non-Economic Damages in § 538.210 – Responding to Appellant's Point II.

* * *

"Placing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function."

Fust, 947 S.W.2d at 430-31

* * *

As with the jury trial right, the General Assembly's power to create, modify, limit, or even abrogate causes of action or remedies is the key to the separation of powers analysis. The doctrine of separation of powers, as embodied in Article II, § 1 of the Constitution, is certainly "vital to our form of government." *State on Information of Danforth v. Banks,* 454 S.W.2d 498, 500 (Mo. Banc 1970); *see also* Art. II, §1, Mo. Const., (providing that the "powers of government shall be divided into three distinct departments–the legislative, executive and judicial"). And separation of powers is not at all implicated when the General Assembly enacts a law that limits the recovery of a medical malpractice plaintiff.

The separation of powers doctrine is intended to structurally prevent abuses of power that might result when power is accumulated in one department. *See State Tax Comm'n v. Admin. Hearing Comm'n,* 641 S.W.2d 69,

73-74 (Mo. banc 1982) (stating that the separation of powers doctrine "prevent[s] the abuses that can flow from centralization of power"). Yet, that does not mean legislation can have no impact on claims or remedies before the courts. Otherwise, once again, all parties would be stuck with a system in which the General Assembly could make no changes to the law. That is not the law, nor has it ever been the law.

Instead, the operative principle for purposes of separation of powers is that "[o]nce the legislature 'makes its choice in enacting legislation, its participation ends.' " *Mo. Coalition for the Environment v. Jt. Comm on Admin Rules,* 948 S.W.2d 125, 134 (Mo. banc 1997) (quoting *Bowsher v. Synar,* 478 U.S. 714, 733-734 (1986)). So it is in this case. The General Assembly enacted the statutory limitation on non-economic damages and the trial court applied the statutory limitation after the jury resolved disputed issues of fact. There was no effort by the General Assembly here to adjudicate the case or insert its assessment of the evidence. Thus, the essential components of the judicial department are preserved intact—"judicial review and the power of courts to decide issues and pronounce and enforce judgments." *Corvera Abatement Techs., Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 857 (Mo. banc 1998) (quoting *Chastain v. Chastain,* 932 S.W.2d 396, 399 (Mo. banc 1996)).

Although this Court did not specifically consider and reject the separation of powers argument in *Adams*, this Court did reject it under nearly identical

circumstances in *Fust*, 947 S.W.2d at 430-31.[6/] In *Fust*, the Court considered a separation of powers challenge to a statute providing that 50% of punitive damages assessed by the jury is deemed rendered in favor of the state, thereby reducing the damages received by the plaintiff. This Court recognized that the statute placed "a limitation on a common law cause of action for punitive damages." *Id.* There was nothing particularly unusual about placing a limitation on a common law cause of action, however, because "[p]lacing reasonable limitations on common law causes of action is within the discretion of

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6/ Plaintiff dismisses the decision in *Fust* as no longer good law because it cited a case – *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988) – that was later overruled. App. Brf. at 39. Not so. *Simpson* was overruled on a different basis. In fact, the decision in *Kilmer v. Mun*, 17 S.W.3d 545, 552-53 (Mo. banc 2000), which overruled *Simpson*, actually strengthens the applicable rule in *Fust*. In *Kilmer*, the Court concluded that "[t]his provision violates separation of powers because the determination of whether a civil claim for relief exists is within the province of the legislature, or in the absence of legislative enactment, with the court as a matter of common law." *Id.* at 552 (emphasis added). "Claims for injuries are recognized by common law and by statute. The Legislature may abolish such recognition." *Kilmer*, 17 S.W.3d at 554. The statute at issue in *Kilmer* gave an executive official – the prosecutor – the role of gatekeeper in a class of tort claims.

the legislative branch and does not invade the judicial function." *Id.* Just as in *Fust*, nothing in § 538.210 in any way interferes with the judicial functions protected by separation of powers.

Undeterred by contrary authority in Missouri, Plaintiff reaches out to foreign jurisdictions for support, including remittitur decisions out of Illinois and Washington. *See, e.g., Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997); *Lebron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895, 908-09 (Ill. 2010); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 720-21 (Wash. banc 1989). These cases are easily distinguishable because, unlike in Illinois and Washington, trial courts in Missouri are not authorized to exercise remittitur in medical malpractice cases. *See* § 538.300. Because Missouri courts do not have the power to exercise remittitur in medical malpractice cases, the General Assembly did not even arguably usurp any such power by establishing damage limitations in medical malpractice cases. And even if the courts did have remittitur power in medical malpractice cases, a statutory cap on damages does not interfere with a judicial power to remit damages. The issues are completely different.

It is ironic that Plaintiff urges a separation of powers argument on the basis of judicial remittitur. This Court actually abrogated the doctrine of common law remittitur in *Firestone v. Crown Ct. Redevelopment Corp.,* 693 S.W.2d 99, 110 (Mo. banc 1985). It was the Missouri General Assembly that reinstated remittitur to the courts by statute – in § 537.068 – but not for medical malpractice cases.

There are many states, like Missouri, that have found that statutory limits on damages are not a violation of separation of powers, specifically rejecting some of the same arguments made by the Plaintiff.[7/] Consistent with this Court's decision in *Fust*, not to mention the numerous other decisions reaching the same conclusion, the Plaintiff's separation of powers argument should be rejected.

[7/] *See, e.g., Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581-82 (Colo. banc 2004) (holding that a statutory cap is not a judicial type remitter or a violation of the separation of powers doctrine, but a legitimate exercise of legislative power); *Wright,* 391 S.E.2d at 570 (same); *Edmonds,* 573 A.2d at 861 (same); *Owens-Corning v. Walatka*, 725 A.2d, 579, 591-92 (Md. App. 1999) (same) (abrogated on other grounds); *Etheridge*, 376 S.E.2d at 532 (same); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 415 (W.Va. 2011) (same); *Pulliam*, 509 S.E.2d at 313-14, 319 (same); *Judd*, 103 P.3d at 145 (same); *Zdrojewski*, 657 N.W. 2d at 739 (same); *Gourley*, 663 N.W.2d at 76 (Neb. 2003) (same); *Evans*, 56 P.3d at 1055-56 (same); *Arbino*, 880 N.E.2d at 438 (Ohio 2007) (same); *Kirkland*, 4 P.3d at 1121-22 (same).

D. Clear Title and Single Subject Challenges to House Bill 393 are Untimely and Fail on the Merits – Responding to Appellant's Point V.

Once again, Plaintiff attempts to undermine the General Assembly's "unlimited and practically absolute" legislative power to create, modify, limit, or abrogate causes of action or remedies. *See Saint Louis Univ.*, 220 S.W.3d at 725. Plaintiff argues that House Bill 393 is unconstitutional under Article III, § 23 of the Missouri Constitution, which provides that "No bill shall contain more than one subject which shall be clearly expressed in its title." *Id.* Like the other arguments discussed above, this one fails as well.

1. Clear title and single subject challenges made more than five years after the bill became effective are untimely under § 516.500.

Even before considering the merits of Plaintiff's clear title and single subject challenges, the claim should be rejected as untimely. "The use of these procedural limitations [secs. 21 through 23] to attack the constitutionality of statutes is not favored." *Stroh Brewery Co. v. State,* 954 S.W.2d 323, 326 (Mo. banc 1997). Indeed, this Court resolves all doubts in favor of the "procedural and substantive validity of an act of the legislature." *Hammerschmidt v. Boone Co.,* 877 S.W.2d 98, 102 (Mo. banc 1994). Missouri law requires that a challenge "alleging a procedural defect in the enactment of a bill into law shall be commenced, had or maintained" no later than "the adjournment of the next full

regular legislative session following the effective date of the bill as law." § 516.500.

House Bill 393 became effective August 28, 2005, and the next legislative session adjourned by operation of law on May 30, 2006. Here, Plaintiff did not make a procedural defect claim that House Bill 393 violated the clear title and single subject restrictions until April 21, 2011, well beyond the adjournment of the next full regular legislative session. *Rentschler v. Nixon*, 311 S.W.3d 783, 786-87 (Mo. banc 2010) (rejecting a claim barred by the limitations period on procedural defects); *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 340 (Mo. banc 2007) (holding that constitutional challenges are waived unless raised at the earliest opportunity).

There is an exception, however, providing that a procedural challenge such as this can be made if it can be "shown that there was no party aggrieved who could have raised the claim within that time." § 516.500. To satisfy the burden for an exception, the "complaining party must establish that he or she was the first person aggrieved or in the class of first persons aggrieved, and that the claim was raised no later than the adjournment of the next full regular legislative session following any person being aggrieved." § 516.500. Plaintiff made no such showing in the trial court, and does not even raise the issue in this Court. And it is no wonder that Plaintiff made no such effort; there was certainly a party aggrieved who could have raised the claim within the time provided.

Moreover, § 516.500 also provides that "[i]n no event shall an action alleging a procedural defect in the enactment of a bill into law be allowed later than five years after the bill . . . which is challenged becomes effective." This five year period of repose lapsed no later than August 29, 2010 – almost eight months before Plaintiff made any argument that House Bill 393 was procedurally defective. Accordingly, Plaintiff's claims for violation of the clear title and single subject restrictions fail.

2. The clear title and single subject claims also fail on the merits.

Not only are the Plaintiff's clear title and single subject claims untimely as a matter of law, but they also fail on the merits. As this Court did in *Trout v. State*, 231 S.W.3d 140 (Mo. banc 2007) and *Jackson Co. Sports Complex Auth. v. State of Mo.,* 226 S.W.3d 156 (Mo. banc 2007), the analysis begins with the applicable standard of review for clear title and single subject challenges:

> [L]aws enacted by the legislature and approved by thegovernor have a strong presumption of constitutionality.... [T]he use of procedural limitations to attack the constitutionality of statutes is not favored.... [T]his Court 'interprets procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act clearly and undoubtedly violates the

> constitutional limitation' ... [and] the burden of proof rests on the statute's challenger.

Trout, 231 S.W. 3d at 144 (quoting *Jackson Co. Sports Complex Auth.*, 226 S.W.3d at 160). House Bill 393 does not clearly and undoubtedly violate the constitutional limitations for clear title and single subject.

The title need only "indicate in a general way the kind of legislation that was being enacted." *Fust,* 947 S.W.2d at 429. It is only if the title is "(1) underinclusive or (2) too broad and amorphous to be meaningful is the clear title requirement infringed." *Trout*, 231 S.W.3d at 145. For bills that have "'multiple and diverse topics' within a single, overarching subject, that subject may be 'clearly expressed by ... stating some broad umbrella category that includes all the topics within its cover.'" *Trout*, 231 S.W. 3d at 145 (quoting *Jackson Co. Sports Complex Auth.*, 226 S.W.3d at 161); *see also National Solid Waste Mgmt. Ass'n v. Dir. of Dep't of Natural Res.,* 964 S.W.2d 818, 821 (Mo. banc 1998).

Here, the title to House Bill 393 states that it is "relating to claims for damages and the payment thereof." http://www.house.mo.gov/content.aspx?info=/bills051/bills/HB393.HTM. This kind of title is no different than many legislative titles approved by this Court. For example, in *Trout*, this Court approved a title of "relating to ethics." There have been many others that were similarly approved: "relating to health services," *Mo. State Med. Ass'n. v. Mo. Dept. of Health,* 39 S.W.3d 837, 841 (Mo. banc 2001); "relating to environmental control," *Corvera Abatement Tech,* 973 S.W.2d at 861-62;

"relating to workers' compensation," *State v. Salter*, 250 S.W.3d 705, 710 (Mo. banc 2008); "general not for profit corporations," *State ex rel. St. John's Mercy Health Care v. Neill,* 95 S.W.3d 103, 106 (Mo. banc 2003); and "relating to transportation," *C.C. Dillon Co. v. City of Eureka,* 12 S.W.3d 322, 329 (Mo. banc 2000).

In fact, as the Court found in *Salter*, 250 S.W.3d at 709-10, "[t]he only cases where this Court has found a title to be too broad and amorphous are those in which the title could describe the majority of all the legislation that the General Assembly passes." "In all other cases in which the bill's title 'does not describe most, if not all, legislation enacted' or include nearly every activity the state undertakes, the Court has rejected arguments that a title was overinclusive." *Salter*, 250 S.W.3d at 709-10 (quoting *Jackson Co. Sports Complex Auth.*, 226 S.W.3d at 161).

Plaintiff argues, citing *St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. banc 1998) and *Home Builders Ass'n of Greater St. Louis v. State*, 75 S.W.3d 267 (Mo. banc 2002), that the title to House Bill 393 violates the clear title restriction because it could supposedly "describe any legislation that affects any conduct of individuals or businesses or government employees or agencies in Missouri." App. Br. at 71. This is not the case. The title to House Bill 393 is specific as to "claims for damages and the payments thereof." (emphasis added). This certainly does not describe "the majority of all the legislation that the General Assembly passes." *Salter*, 250 S.W.3d at 709. Indeed, House Bill 393,

as described in the title, provides procedures for instituting, trying, and collecting claims for civil damages. And there are innumerable areas of legislation that do not in any way deal with claims for damages and the payments thereof.

Plaintiff also questions why the title to House Bill 393 does not mention either tort reform or health care. This argument fails because House Bill 393 does not entirely pertain to health care, or, for that matter, entirely to tort actions. Instead, House Bill 393 applies to the institution and trial of lawsuits for damages and the collection of these damages in both tort and non-tort civil actions. Moreover, the title may omit particular details of the bill, so long as neither the legislature nor the public is misled. *Mo. State Medical Association*, 39 S.W.3d at 841. The title for House Bill 393 is not misleading, but put the public on notice that the bill was amending "sections relating to claims for damages and the payment thereof." Therefore, the title does not violate the clear title restriction of Art. III, § 23, Mo. Const.

Nor does House Bill 393 violate the single subject rule. In deciding whether a bill contains more than one subject, the test is not whether individual provisions of the bill relate to each other, but whether the challenged provision (1) fairly relates to the subject described in the title of the bill, (2) has a natural connection to the subject, or (3) is a means to accomplish the law's purpose. *Trout,* 231 S.W.3d at 146. Here, the matters fall within and easily relate to the

title to House Bill 393 – "relating to claims for damages and the payment thereof."

In determining whether House Bill 393 violates the single subject rule it is essential to consider "certain general principles that have been established." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 830 (Mo. banc 1990). For example, a bill will be "liberally and nonrestrictively construed so that provisions connected with or incident to effectuating the central purpose of the proposal will not be treated as separate subjects." *Id.* at 830-31 (citing *Buchanan v. Kirkpatrick,* 615 S.W.2d 6 (Mo. banc 1981); *see also Stroh Brewery Company*, 954 S.W.2d at 326; *Fust*, 947 S.W.2d at 428; *United Brotherhood of Carpenters and Joiners of America, District Council, of Kansas City and Vicinity v. Industrial Comm*, 352 S.W.2d 633, 635 (Mo. 1962). Furthermore, a party asserting that a bill has violated the single subject limitation in Article III, § 23 has the burden to prove that the bill "clearly and undoubtedly has more than one subject." *Missouri Health Care Ass'n v. Attorney Gen. of the State of Missouri*, 953 S.W.2d at 622 (Mo. banc 1997).

Although Plaintiff includes a "single subject" challenge in his point relied on, *see* App. Brf. at 69 ("unconstitutionally violates the clear title and single subject requirements") (emphasis added), Plaintiff apparently recognizes the weakness of this argument and has abandoned the issue because he makes no argument to support it.

III. The Periodic Payment of Future Damages is Constitutional – Responding to Appellant's Points VI – VIII.

Plaintiff also complains that the trial court's application of § 538.220, which provides for periodic payment of future damages, including future medical damages, is a violation of his equal protection and due process rights. The crux of Plaintiff's complaint is that the interest rate Plaintiff's expert used for calculating the present value of future damages is different than the interest rate required for future periodic payments under § 538.220.2 (tied to United States Treasury bills). This is not an equal protection or due process violation.

As set forth above, the first step in any equal protection analysis is the application of the proper level of scrutiny. *See In re Marriage of Woodson*, 92 S.W.3d at 784 (citing *In re Marriage of Kohring,* 999 S.W.2d at 231). Plaintiff has abandoned his sham efforts to claim a suspect class or fundamental right and merely argues that the application of an interest rate based on United States Treasury bills is "arbitrary and irrational." App. Brf. at 85. Thus, the applicable test is rational basis.

"The rational basis test requires only that the challenged law bear some rational relationship to a legitimate state interest." *Missouri Prosecuting Attorneys*, 256 S.W.3d at 102. There are many rational reasons why the General Assembly not only established periodic payments for future damages, but also selected an interest rate for that purpose. Plaintiff, in fact, provides some of those reasons: "spreading the cost of payment for future medical costs over

time, in part assures that the plaintiff will not 'squander' the judgment," "reducing future burdens on government social services," and "assuring full payment of such damages awarded by the judgment." App. Br. at 80 & 84 (citing *Vincent*, 833 S.W.2d at 867); *see also Adams*, 832 S.W.2d at 905 (reciting the rational goals to "reduce costs to insurance companies and reduce insurance premiums, lowering insurance premiums and making medical services less expensive and more available than would otherwise be the case").

To accomplish these rational purposes, the General Assembly established periodic payments for future damages, and adopted a standard interest rate. This Court, in *Vincent*, 833 S.W.2d 859 as well as in *Adams*, 832 S.W.2d 898, considered and approved periodic payments and interest despite the same challenges raised by the Plaintiff in this case. Yet, Plaintiff continues with the claim without citing any authority that the adoption of periodic payment of future damages and an interest rate, much less one tied to United States Treasury bills, is a violation of equal protection as wholly irrational or arbitrary.

The use of United States Treasury bills is by no means unusual or irrational as the General Assembly routinely turns to these types of benchmarks. *See, e.g.,* § 393.130 (providing for an interest rate based on United States Treasury bills). The fact that the rate happens to be low at this point in time, or that it fluctuates over time, is not irrational or arbitrary. Nor is there any requirement that the interest rate be linked or identical to the interest rate used by the Plaintiff's expert for calculating present value of future damages.

Indeed, when House Bill 393 was passed, the United States Treasury bill rate for § 538.220 was approximately 4.4%, and had historically averaged 6.4%.

Even more perplexing is Plaintiff's "due process" claim. Plaintiff does not articulate what "process" was due that was not provided. There was certainly an opportunity to be heard on the issue of periodic payments and interest, and Plaintiff took that opportunity. As such, Plaintiff's constitutional challenges to § 538.220 should be denied.

* * *

RESPONDENTS' CROSS-APPEAL

POINT RELIED ON

The Trial Court Erred in its Immediate Award of Future Medical Damages, Because § 538.220 is Clear as to How Future Periodic Payments are Determined, In That "The Amount of Each of the Future Medical Periodic Payments Shall be Determined by Dividing the Total Amount of Future Medical Damages by the Number of Future Medical Periodic Payments."

At the request of Defendants, and as mandated by § 538.220, the trial court ordered periodic payments for Plaintiff's future damages. Statutory interpretation and application, such as this, is subject to *de novo* review. *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008). The trial court, without explanation, misapplied the plain language of the statute and should, therefore, be reversed and judgment entered in accordance with the requirements of § 538.220.1-.2.

Section 538.220 provides different payment schedules for "past damages," § 538.220.1, for "future damages," § 538.220.2, and for "future medical damages," § 538.220.2. For "past damages" – in this case $250,000 in past non-economic damages – the statute requires that the damages "shall be payable in a lump sum." § 538.220.1. The trial court did that. For future damages in a case such as this, however, the amount shall be paid "in whole or in part in periodic

or installment payments." § 538.220.2. The trial court did award periodic payments for future damages, but did so incorrectly.

There is a difference in how certain future damages are to be paid; namely, how future medical damages are paid. Section 538.220.2 mandates that "the future medical payment schedule shall be for a period of time equal to the life expectancy of the person to whom such services were rendered . . . based solely on the evidence of such life expectancy." *Id.* (emphasis added). The purpose of this provision of the statute, as acknowledged by Plaintiff, "is to spread that cost over time and to guard against squandering of the judgment while reducing future burdens on government social services." *Vincent by Vincent*, 833 S.W.2d at 867; App. Br. at 77.

Furthermore, the use of the term "shall," is clear and "give[s] the trial court no discretion to refuse." *Suffian v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000). And there is no dispute that Plaintiff's life expectancy, based on the evidence, is 50 years. Indeed, the trial court reached this same conclusion. (LF 137). Thus, the trial court was required to find that the future medical payment schedule was 50 years. The court did that, "ordering annual installments over the next fifty years." (LF 137).

The next step in the process of applying the statutory language, and where the trial court went wrong, is for the court to determine the amount of each future medical payment. This is also mandated by the statute, which requires that the amount "shall be determined by dividing the total amount of future

medical damages [in this case $1,747,600] by the number of future medical periodic payments [in this case 50]." § 538.220.2 (emphasis added). The trial court ignored this language and instead simply awarded half of the "future medical damages be paid immediately." (LF 137). This is a clear misapplication of the plain language of the statute and should be reversed.

CONCLUSION

For the foregoing reasons, the trial court's judgment upholding the constitutionality of §§ 538.210 and 538.220 should be affirmed, and its judgment ordering partial periodic payments for future medical damages should be affirmed in part and reversed in part.

Respectfully submitted,

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 14,026 words.

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