

IN THE SUPREME COURT OF MISSOURI

Case No. SC91867

DEBORAH WATTS as Next Friend for
NAYTHON KAYNE WATTS,

Appellant/Cross-Respondent

v.

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
Case No. 0931-CV01172
The Honorable Dan J. Conklin

BRIEF OF *AMICUS CURIAE*
MISSOURI ORGANIZATION OF DEFENSE LAWYERS
IN SUPPORT OF RESPONDENTS

HEPLERBROOM LLC

Kurt A. Hentz #33817

e-mail: kah@heplerbroom.com

Jessica L. Hawkins # 60415

e-mail: jlh@heplerbroom.com

Lindsay T. Leible # 63963

e-mail: ltl@heplerbroom.com

800 Market Street, Suite 2300

St. Louis, Missouri 63101-2506

314-241-6160 telephone

314-241-6116 facsimile

Attorneys for *Amicus Curiae*

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INTEREST OF THE *AMICUS CURIAE*

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of 1,235 lawyers in Missouri who are involved defending litigation, including medical malpractice litigation, involving Missouri citizens. Throughout the past two decades, Missouri courts have applied the statutory cap on noneconomic damages awarded in medical malpractice litigation, relying upon this Court's holding in *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992). This cap has become an integral part of medical malpractice litigation in Missouri. As such, the issue of whether the damages cap is constitutional is of interest to MODL and the clients its members represent.

As discussed in this Amicus Brief, MODL supports the position of Respondents that § 538.210 is constitutional. This Court previously rejected the very same constitutional challenges presented by Watts in this appeal to the prior version of the damages cap. The cap was amended in 2005, but those changes do not affect this Court's prior analysis and holdings which affirmed the constitutionality of the cap. The doctrine of stare decisis applies here, and MODL urges this Court to uphold the constitutionality of § 538.210.

CONSENT OF THE PARTIES

MODL has received consent to file this brief from all parties.

JURISDICTIONAL STATEMENT

MODL hereby adopts the Jurisdictional Statement of Respondents.

STATEMENT OF FACTS

MODL hereby adopts the Statement of Facts of Respondents.

ARGUMENT

I. This Court Has Previously Upheld Missouri's Statutory Cap on Noneconomic Damages in Medical Malpractice Litigation, and the Doctrine of Stare Decisis and the Need For Consistent and Uniform Application of the Law Mandates that this Court Uphold it Again.

In this appeal, Watts asserts a number of constitutional challenges to the trial court's application of the statutory limitation to the noneconomic damages awarded to her by the jury in her medical malpractice action. These challenges, however, must be rejected because the statutory limitation on noneconomic damages set forth in § 538.210, as amended by House Bill 393, is constitutional. This Court previously upheld the constitutionality of the original version of § 538.210 in *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), rejecting many of the same challenges Watts asserts in this appeal. In her brief, Watts asks the court to overrule *Adams*, but offers no compelling basis for this Court to now abandon its nearly twenty-year old precedent. Instead, Watts simply repeats the same arguments already rejected by this Court in *Adams*.

This Court in *Adams* expressly held that § 538.210 did not violate the right to trial by jury or the equal protection clause of the Missouri Constitution. While the statute was amended in 2005, the changes do not affect this Court's prior analysis and holdings in *Adams*. As set forth below, § 538.210, as amended by H.B. 393, is constitutional for the

same reasons that the statute was ruled constitutional in *Adams*. Therefore, this Court should follow its precedent in *Adams*, and reaffirm the constitutionality of the noneconomic damages cap set forth in § 538.210.

A. Missouri Courts Apply Stare Decisis Unless a Prior Decision is “Clearly Erroneous” and “Manifestly Wrong.”

This Court has repeatedly held that the precedential value of its decisions should be given great deference. *See e.g., Crabtree v. Bugby*, 967 S.W.2d 66, 71 (Mo. banc 1998). Under the doctrine of stare decisis, a decision of this court should not be lightly overruled, particularly where the opinion has remained unchanged for many years. *Eighty Hundred Clayton Corp. v. Dir. of Revenue*, 111 S.W.3d 409, 411, n.3 (Mo. banc 2003). *See also Manzara v. State*, 343 S.W.3d 656, 662 (Mo. banc 2011); *Sw. Bell Yellow Pages, Inc. v. Dir. of Rev.*, 94 S.W.3d 388, 390 (Mo. banc 2003). Although the doctrine of stare decisis is not absolute, it should be disregarded only in cases where the decision to be overturned is “clearly erroneous and manifestly wrong.” *Eighty Hundred*, 111 S.W.3d at 411, n.3.

In *Crabtree v. Bugby*, this Court affirmed the importance of upholding its precedent stating, “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*.” 967 S.W.2d at 71-2. Adherence to the doctrine of stare decisis promotes stability and predictability in the law. *See Ronnoco Coffee Co. v. Dir. of Revenue*, 185 S.W.3d 676, 681, n. 11 (Mo. banc 2006).

In *Hodges v. City of St. Louis*, this Court adhered to the principle of stare decisis by declining to revisit a constitutional challenge to the sovereign immunity damages cap. 217 S.W.3d 278 (Mo. banc 2007). The plaintiff argued that the statutory cap on damages payable by a public entity for the negligence of a public employee violated the equal protection clause of the Missouri Constitution. *Id.* at 281. Noting that the constitutionality of this statutory cap had been previously upheld by the Court in two earlier decisions, this Court refused to analyze the plaintiff's constitutional arguments. *Id.* at 282. "In respect for the principle of stare decisis," this Court upheld its precedent that had existed for nearly thirteen years. *Id.*

Similarly here, this Court has previously upheld the constitutionality of the noneconomic damages cap in medical malpractice litigation in *Adams*. The key arguments raised by Watts in this appeal were raised, addressed and rejected in *Adams*. Watts asks this Court to overrule its decision in *Adams*, yet she fails to present a compelling case that would support its reversal. The suggestion that this Court's understanding in *Adams* was somehow "flawed" is not a sufficient basis for overruling *Adams*. While the statute has since been amended, the changes only affect the amount of the limitation. The changes do not affect the constitutional issues addressed in *Adams*. Further, there have been no substantive changes to the Missouri Constitution since *Adams* that would require the Court to revisit its decision. If the rule of stare decisis means anything in our judicial system, it means that prior holdings of this Court are binding precedent which should not be overturned simply because Watts argues that the prior decision was merely "flawed." Nonetheless, Watts argues just that. The *Adams* decision

was not clearly erroneous and manifestly wrong. Accordingly, this Court should reaffirm the constitutionality of § 538.210 under stare decisis.

B. This Court's Opinion in *Adams* Addressed and Rejected Watts' Main Constitutional Challenges in this Appeal.

In *Adams*, this Court upheld the constitutionality of the prior version of § 538.210 limiting noneconomic damages in medical malpractice litigation. 832 S.W.2d at 900. This Court specifically rejected claims that the statute violated the Missouri Constitution's guarantees of the right to trial by jury and equal protection of the laws. In this appeal, Watts asks this Court to revisit its prior analysis and reverse the *Adams* decision. Watts, however, fails to present any arguments that were not considered by the Court in *Adams*. Instead, Watts asserts the same right to trial by jury and equal protection challenges that this Court previously considered and ultimately rejected. Because the reasoning of *Adams* still applies today, this Court should again uphold the constitutionality of the statute.

Although the amended cap denies some plaintiffs a full recovery of noneconomic damages while allowing such a recovery to others, it is not unconstitutional merely because it does so. The differentiation created by the cap is permissible given the cap's purpose of lowering costs and ensuring the continued availability of health care resources, a purpose this Court has previously ruled is valid and legitimate. *Id.* In attempting to meet this purpose, the legislature has not unreasonably or arbitrarily limited recovery. Rather, it chose to place a limit on the recovery of noneconomic damages. These damages are, by their very nature, intangible, inherently subjective, and not readily

ascertainable. Thus, the damages cap is narrowly tailored and targeted to control costs in one area where costs are likely controllable. It has no impact on a plaintiff's recovery of damages for actual expenses, loss of earning capacity, or other economic measures of injury. The damages cap is a reasonable means of reducing medical malpractice insurance premiums, thereby securing the continued availability of affordable health care services for Missourians.

i. Watts' trial by jury challenge has already been heard and rejected by this Court.

In *Adams*, this Court held that plaintiffs' constitutional right to trial by jury was not violated by § 538.210's limitation on noneconomic damages recoverable in medical malpractice cases. *Id.* at 907. There, the jury awarded plaintiffs over \$20 million dollars in total damages, including approximately \$14,000,000 in noneconomic damages, against two healthcare providers. *Id.* at 900. In accordance with § 538.210, the noneconomic damages were reduced to \$860,000. *Id.* Plaintiffs appealed, claiming that the statute violated their right to trial by jury. *Id.* at 906-7.

This Court ruled that the primary function of a jury is fact-finding. *Id.* at 907. Once the jury has assessed liability and determined damages, it has completed its constitutional function. *Id.* It is only once this function is complete that the trial court then applies the statutory limitation to the noneconomic damages award. *Id.* Therefore, this Court ruled that the trial court's application of § 538.210's limitation after the jury had completed its fact-finding task did not violate plaintiffs' right to trial by jury. *Id.* This Court explained:

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

Id. (citing *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989); *Tull v. U.S.*, 481 U.S. 412 (1987)).

This Court further acknowledged that the legislature has the right to create and abrogate common law causes of action. *Id.* (citing *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 649 (Mo. 1931); *accord Mahoney v. Doerhoff Surgical Serv., Inc.*, 807 S.W.2d 503 (Mo. banc 1991); *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6 (Mo. banc 1992); *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. banc 1989)). It went on to reason that since the legislature has the power to create and abolish causes of action, the legislature also has the power to limit recovery in those actions. *Id.*

Because the statute simply modifies the available recovery in medical malpractice cases by establishing the outer limit of a plaintiff's remedy, it is a matter of law and therefore, the duty of the court to apply the limitation. The jury's ability to assess facts and determine liability is in no way hampered by the statute. Because the statutory limit is not applied by the court until after a jury has fulfilled its constitutional role as the fact-finder, the statute does not infringe upon the traditional fact-finding province of the jury.

1. Watts' reliance on *State ex rel. Diehl v. O'Malley* and *Lee v. Conran* is misplaced.

Watts' brief creates the impression that the *Adams* decision is an outlier decision, departing from long-established right to jury trial jurisprudence in this state. As evidence of this alleged right to jury trial jurisprudence, Watts relies upon Judge Wolff's concurring opinion in *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752 (Mo. banc 2010), and two decisions cited by Judge Wolff therein: *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), and *Lee v. Conran*, 111 S.W. 1151 (Mo. 1908). A review of *Diehl* and *Lee*, however, refutes this impression. The facts of *Diehl* and *Lee* are markedly different from the case at bar, making both cases distinguishable, and thereby limiting their application to the issues in this appeal. Although these two cases analyzed the constitutional right to a jury trial, they did so in actions where that right to a jury trial was denied in its entirety.

For instance, *Diehl* involved a case brought under the Missouri Human Rights Act where the plaintiff's request for jury trial was denied outright. 95 S.W.3d at 84. Missouri appellate courts had construed this Act as abolishing plaintiffs' right to a jury trial. *Id.* at 92. *See also Lee*, 111 S.W. at 1153 (trial court denied plaintiff a trial by jury). In both *Diehl* and *Lee*, the plaintiffs were denied a jury trial at the outset. In both cases, the Court ruled that the plaintiffs were wrongfully denied their constitutional right to a jury trial, finding that their actions were the kind triable by juries at the inception of Missouri's Constitution. *Diehl*, 95 S.W.3d at 92; *Lee*, 111 S.W. at 1154. In her brief, Watts asserts that these cases demonstrate that the legislature cannot modify or abolish the right of trial

by jury in particular cases and for that reason, *Adams* must be overruled. The problem with this argument is that § 538.210 does not modify or abolish the right of trial by jury.

In this case, Watts' right to a jury trial was not infringed upon by the application of § 538.210 to the noneconomic damages award. To the contrary, Watts enjoyed her constitutional right to a trial by jury. In the present case, a jury heard all the evidence and argument presented at trial. Then, the jury resolved the disputed facts, assessing liability and damages, both economic and noneconomic, and returned a verdict in Watts' favor. Once the jury had determined the facts and liability, its constitutional task was complete. *See Adams*, 832 S.W.2d at 907. Watts, therefore, was accorded a jury trial as guaranteed by the Missouri Constitution.

Only after the jury returned a verdict in Watts' favor did the trial court then apply the law and reduce the noneconomic damages award in compliance with the statutory cap. By applying the law to the facts, the court fulfilled its obligation. *Id.* Plainly then, the application of § 538.210, after the jury had completed its fact-finding function, did not infringe upon Watts' right to a trial by jury.

Unlike the Missouri Human Rights Act at issue in *Diehl*, Missouri courts have not construed § 538.210 as abolishing the right to a jury trial. Rather, the statute has been interpreted as establishing the outer legal limit of plaintiffs' remedy. *Id.* As such, it is applied *after* the jury has fulfilled its constitutional task of fact-finding and rendered a verdict in excess of the noneconomic damages limit set forth in the statute. Applying the cap after the jury has determined liability, including the amount of noneconomic damages, respects the jury's function as fact-finder. Because Watts, unlike the plaintiffs

in *Diehl* and *Lee*, was afforded her right to a jury trial as guaranteed by the Missouri Constitution, Watts' reliance upon these cases in this appeal is misplaced and therefore, this Court should refrain from relying upon them.

2. This Court has upheld the constitutionality of other statutory caps on damages.

This Court upheld the constitutionality of the damages cap provided in the sovereign immunity statute, § 537.610, in *Richardson v. State Highway & Transportation Commission*, 863 S.W.2d 876 (Mo. banc 1993). There, the plaintiffs filed suit against the State Highway & Transportation Commission for injuries sustained in an automobile accident occurring on a public highway. *Id.* at 879. The jury returned a verdict in plaintiffs' favor, awarding approximately a total of \$565,000 in damages. *Id.* Pursuant to the sovereign immunity damages cap in § 537.610, the judgment entered against the Commission was reduced to a total of \$100,000. *Id.* On appeal, the plaintiffs claimed that the statutory cap was unconstitutional because it denied them the right to a jury trial by limiting them to \$100,000 in recovery. *Id.* at 879-80.

As it did in *Adams*, this Court rejected plaintiffs' argument that the statutory cap violated their right to trial by jury. *Id.* at 880. This Court analyzed the roles of the jury and the court in the judicial process and how those roles differed. This Court acknowledged that the jury's primary function is fact-finding; the court's role is to apply the law to the facts. *Id.* This Court found that the jury in *Richardson* had fulfilled this constitutional task of fact-finding upon its assessment of liability and determination of the damages. *Id.* It is the court's role to apply the statutory cap because it establishes the

substantive, legal limits on the state's liability. *Id.* As a result, this Court held that the statutory cap did not infringe upon the plaintiffs' right to a jury trial because it is not applied until after the jury has completed its role. *Id.*

The *Richardson* decision further refutes Watts' attempt to portray the *Adams* decision as a "flawed," outlier decision that must be overruled in order to "restore the right of trial by jury to its traditional and vital place." Brief, p. 16. As *Richardson* demonstrates, *Adams* is consistent with this Court's analysis of statutory limitations on damages in the face of right to trial by jury challenges. Statutory limitations on damages simply place an outer limit on plaintiffs' remedy. The jury is still the fact-finder in medical malpractice cases. The limitation is not applied until after the jury's role is complete and as a result, does not infringe upon a plaintiff's right to trial by jury.

3. Courts from other jurisdictions have applied the same reasoning as this Court did in *Adams* to uphold statutory limitations on damages.

Several states, with language that is nearly identical to Missouri's constitutional provision stating that the right of a trial by jury shall remain inviolate, have upheld the constitutionality of statutory caps on damages, rejecting claims that the caps violate plaintiffs' right to jury trial. See *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 432 (Ohio 2007); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115, 1120 (Idaho 2000); *Greist v. Phillips*, 906 P.2d 789, 799 (Or. banc 1995); and *Wright v. Colleton County Sch. Dist.*, 391 S.E.2d 564, 569-70 (S.C. 1990).

Similar to this Court's analysis in *Adams*, the Idaho Supreme Court ruled that the state's noneconomic damages cap, applicable in all personal injury cases, did not infringe upon the jury's right to decide cases because the jury was still allowed to act as the fact-finder. *Kirkland*, 4 P.3d at 1120. "[T]he Kirklands had a jury trial during which they were entitled to present all of their claims and evidence to the jury and have the jury render a verdict based on that evidence. That is all to which the right to jury entitles them. The legal consequences and effect of a jury's verdict are a matter for the legislature (by passing laws) and the courts (by applying those laws to the facts as found by the jury)." *Id.* The court further found that because the Idaho legislature had the power to abolish common law rights, the legislature therefore also had the inherent power to limit the remedies available for a common law cause of action. *Id.* at 1119. Thus, similar to this Court's analysis in *Adams*, the Idaho Supreme Court held the statutory damages cap did not violate the right to jury trial.

Utilizing similar reasoning, numerous courts from other jurisdictions have rejected analogous constitutional challenges to statutes containing damage caps, ultimately ruling that the caps did not violate the right to trial by jury. *See e.g., Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005) (cap limiting noneconomic damages in medical malpractice actions); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (cap limiting damages in medical malpractice actions); *Evans v. State*, 56 P.3d 1046, 1051 (Alaska 2002) (cap limiting noneconomic and punitive damages in personal injury and wrongful death actions); *Edmonds v. Murphy*, 573 A.2d 853, 858-59 (Md. 1990) (cap limiting recovery of noneconomic damages in personal injury actions); *English v. New England*

Med. Ctr., Inc., 541 N.E.2d 329, 331 (Mass. 1989) (cap limiting damages of certain tort liability of charitable institutions); *Kenkel v. Stanley Works*, 665 N.W.2d 490, 500 (Mich. App. 2003) (cap limiting recovery of noneconomic damages in product liability actions); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 182 (Mich. 2004) (cap limiting damages of motor vehicle lessors' vicarious liability); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 737 (Mich. Ct. App. 2002) (cap limiting noneconomic damages in personal injury cases); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 75 (Neb. 2003) (cap limiting total damages recoverable in medical malpractice actions); *Judd v. Drezga*, 103 P.3d 135, 144-45 (Utah 2004) (cap limiting noneconomic damages in medical malpractice actions); and *Etheridge*, 376 S.E.2d at 529 (cap limiting recovery of total damages in medical malpractice actions).

ii. Watts' equal protection challenge has already been heard and rejected by this Court.

In *Adams*, this Court rejected plaintiffs' equal protection challenge to § 538.210's limitation on noneconomic damages. 832 S.W.2d at 905. The plaintiffs in *Adams* argued that the damages cap infringed upon the 'fundamental rights' of trial by jury, open courts, and certain remedies. *Id.* at 903. They further claimed that victims of medical malpractice are a suspect class. *Id.* This Court, however, ruled that neither a denial of a fundamental right nor a suspect class was involved. *Id.* This Court specifically rejected the notion that victims of medical malpractice are a suspect class as a claim "without support in either law or reason." *Id.* Because the statute did not infringe upon a fundamental right or a suspect class, this Court ruled that § 538.210 is subject to rational basis review. *Id.*

Rational basis review, this Court explained, is “minimal in nature.” *Id.* A statutory classification will be upheld if “any state of facts reasonably may be conceived to justify it.” *Id.* A court will strike down the challenged legislation “only if the classification rests on grounds wholly irrelevant to the achievement of the state’s objective.” *Id.* Moreover, it is not the Court’s province to question the wisdom, social desirability or economic policy underlying a statute. *Id.* Those matters are for the legislature’s determination. *Id.*

This Court noted that Chapter 538 was enacted in 1986 in an effort to address a perceived malpractice insurance crisis in the health care industry that threatened the availability and affordability of health care services in Missouri. *Id.* at 904. Section 538.210 represented the legislature’s efforts to reduce rising medical malpractice premiums and in turn prevent physicians and others from discontinuing practices and procedures considered “high risk.” *Id.* This Court further noted that both sides had offered “an array of evidence” that both supported and refuted the existence of a crisis in medical malpractice premiums. *Id.* This Court concluded that while the existence of a crisis was “a debatable proposition,” under rational basis review this doubt “must be resolved in favor of the General Assembly”:

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. Here, the preservation of public health and the maintenance of generally affordable health

care costs are reasonably conceived objectives that can be achieved, if only efficiently, by the statutory provision.

Id.

This Court ruled that § 538.210 bears a rational relation to ensuring that health care providers can obtain affordable medical malpractice insurance:

The legislature could rationally believe that the cap on noneconomic damages would work to reduce in the aggregate the amount of damage awards for medical malpractice and, thereby, reduce malpractice insurance premiums paid by health care providers. Were this to result, the legislature could reason, physicians would be willing to continue “high risk” medical practices in Missouri and provide quality medical services at a less expensive level than would otherwise be the case.

Id. This court further noted that the noneconomic damages cap does not take away from any economic or punitive damage award. *Id.* Therefore, this Court held that the statutory limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians. *Id.*

1. The 2005 amendments to § 538.210 are similarly subject to rational basis review.

In 2005, the legislature amended § 538.210 to clarify the applicable limit for noneconomic damages.¹ The amendments were in response to decisions from Missouri appellate courts holding that a separate limit could be applied to each act of negligence because the statute contained the phrase “per occurrence.” *See Cook v. Newman*, 142 S.W.3d 880 (Mo. App. W.D. 2004); *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. E.D. 2002). *See also Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635 (Mo. App. E.D. 2005). As one court explained, “if...only one damage cap per defendant always applied in a malpractice case no matter how many separate occurrences of medical malpractice by a single defendant caused the plaintiff’s injuries, the clearest and most unambiguous way for the legislature to have expressed such an intent would have been to simply leave the words ‘per occurrence’ out of the statute entirely.” *Scott*, 70 S.W.3d at 571. In response to these decisions, the legislature clarified the statute in 2005 by removing the “per occurrence” language and adding the language, “irrespective of the number of defendants,” to make clear that only one damage cap was available.

These changes do not affect this Court’s previous constitutional analysis of § 538.210 in the face of an equal protection challenge. The changes did not affect the class of plaintiffs affected by the statute, but merely clarified the amount of the limit. The only classification created by the 2005 amendments – all persons claiming damages for

¹ The legislature amended § 538.210 in 2005 to clarify that only a single damage cap applied in a medical malpractice action. It also set the cap at \$350,000 without provision for future inflation adjustments.

alleged medical malpractice – is the same classification that existed when this Court upheld the constitutionality of the statute in *Adams*. Moreover, this Court has previously and repeatedly rejected the claim that medical malpractice plaintiffs are members of a suspect class. *Batek v. Curators of the Univ. of Mo.*, 920 S.W.2d 895, 898 (Mo. banc 1996); *Adams*, 832 S.W.2d at 903; *Harrell*, 781 S.W.2d at 63.

Watts, however, claims that the 2005 changes differentiate and create classifications within the class of medical malpractice plaintiffs, such as between slightly and severely injured plaintiffs and between present and future plaintiffs, and that these classifications implicate equal protection. This argument is without merit because none of these alleged groups are suspect classes. *See Mahoney*, 807 S.W.2d at 512 (race, national origin, and illegitimacy are examples of suspect classes). Because “the general purpose of equal protection guarantees 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 v. Reorganized Sch. Dist.*, 636 S.W.2d 324, 327-28 (Mo. banc 1982). *See also Mahoney*, 807 S.W.2d at 512 (“Those challenging the legislative judgment must convince the court that the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”). This is true even where the statute, in practice, creates inequality, as Watts argues the 2005 changes do. *See id.* (“State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.”).

This Court has previously held that the limit on noneconomic damages in medical malpractice actions is rationally related to the legislative goals of preserving public health and maintaining affordable health care costs. *Adams*, 832 S.W.2d at 904. As this Court has also previously acknowledged, a rational legislature could have based its decision to classify medical malpractice plaintiffs separately on the basis of any number of considerations, including limiting the burdens and disruptions that malpractice litigation imposes on delivery of accessible health care; reducing uncertainty and expense toward the goal of preserving affordable health care for the greatest number of individuals; or, to attempt to stem the tide of a perceived crisis. *Batek*, 920 S.W.2d at 899.

Under rational basis review, it “is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.” *Id.* Rather, it is the court’s obligation to discover, if possible, an acceptable rationale that might have influenced the General Assembly and which reasonably supports the legislative determination. *Winston*, 636 S.W.2d at 328. This Court ruled that the original version of § 538.210 was rationally related to the legitimate legislative goal of reducing malpractice premiums. *Adams*, 832 S.W.2d at 904. It is logical to presume that further limiting the noneconomic damages award, as the 2005 amendments did, will decrease the cost of malpractice insurance premiums. Accordingly, differentiation among medical malpractice plaintiffs does not implicate equal protection concerns.

Watts also offers evidence questioning the existence of a medical liability crisis in 2005 in support of her equal protection challenge to the 2005 amendments. Even if there

were doubts as to the crisis' existence, those doubts must be resolved in favor of the General Assembly. In *Adams*, this Court was similarly faced with evidence from both sides that either refuted or supported the existence of a malpractice insurance crisis in 1986, when § 538.210 was originally enacted. This Court responded as follows: “[A]t the very least, it is a debatable proposition that such a crisis does in fact exist. Under equal protection rational review, this doubt must be resolved in favor of the General Assembly.” *Adams*, 832 S.W.2d at 904. Thus, it is not enough for Watts to show that the General Assembly *may* have been wrong. *See id.* The legislature considered the information before it, determined that there was such a crisis, and addressed it by enacting the 2005 amendments. As this Court has previously ruled, “if the question of the legislative judgment remains at least debatable, the issue settles on the side of validity.” *Mahoney*, 807 S.W.2d at 513.

This court has already ruled that the legislature had a legitimate rationale for enacting § 538.210. As set forth in the briefs of other amici, the legislature had the same goal in enacting the 2005 amendments as it had in enacting the 1986 cap: to ensure health care would remain affordable and accessible to all Missourians. The plaintiffs in *Adams* made the same challenges that Watts makes in this appeal: that there was no crisis and that the cap was not rationally related to the goals of lowering insurance premiums and ensuring access to health services. Recognizing that “it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists,” this Court ruled that the legislature could rationally conclude that the noneconomic damages cap would further “the legitimate legislative

purpose of maintaining the integrity of health care for all Missourians.” *Adams*, 832 S.W.2d at 904. This same analysis and conclusion applies to the 2005 amendments. Consistent with its holding in *Adams*, this Court should affirm the amended damages cap as rationally related to the legitimate governmental purpose of ensuring Missourians continued access to affordable health care.

2. Numerous courts have upheld similar damages caps against equal protection challenges.

Numerous courts from other jurisdictions have upheld similar damages caps against challenges that the caps violate equal protection. For example, the Alaska Supreme Court upheld a noneconomic damages cap applicable to personal injuries and wrongful death actions against equal protection challenges. *C.J. v. State Dep’t of Corrections*, 151 P.3d 373, 379 (Alaska 2006). The court adhered to stare decisis and adopted the earlier equal protection analysis of *Evans v. State*, 56 P.3d at 1052 (Alaska 2002), finding the cap was substantially related to the legitimate state purpose of controlling liability insurance premiums. *Id.* The court reasoned that although “[t]he fit between the noneconomic damages cap and reducing insurance premiums may not be perfect, ...it satisfies minimum scrutiny.” *Id.* at 381. *See also* *Fein v. Permanente Med. Group*, 695 P.2d 665, 683 (Cal. 1985); *Hoffman v. U.S.*, 767 F.2d 1431, 1437 (9th Cir. 1985); *Garhart v. Columbia/Healthone, LLC*, 95 P.3d 571, 584 (Colo. 2004); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89, 95-96 (Colo. App. 1997); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 907 (Colo. banc 1993); *Mizrahi v. N. Miami Med. Ctr., Ltd.*, 761 So.2d 1040, 1042 (Fla. 2000); *Edmonds v. Murphy*, 573 A.2d at 868;

Zdrojewski v. Murphy, 657 N.W.2d at 738; *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d at 72; *Fed. Express Corp. v. U.S.*, 228 F.Supp.2d 1267, 1271 (D.N.M. 2002); and *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244, 254 (Tex. App. 1987).

II. Section 538.210, as revised by H.B. 393, is a Proper Exercise of Legislative Power and therefore, Does Not Violate the Separation of Powers Provision of the Missouri Constitution.

It is well-settled law in Missouri that the legislature has the constitutional power to create, and even abolish common law causes of action. *Fisher v. State Highway Comm'n of Mo.*, 948 S.W.2d 607 (Mo. banc 1997); *Adams*, 832 S.W.2d at 907; *De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931). It is further established that the legislature's power to create and abolish causes of action necessarily includes the power to modify and limit those causes of action. *See Fisher; Adams; De May, supra*. Accordingly, the ability to limit damages in a common law cause of action is a proper legislative function.

In fact, this Court previously held that the legislature's enactment of a statutory limitation on certain damages, similar to § 538.210, was a proper exercise of legislative power, and thus, did not violate separation of powers. *Fust v. Attorney Gen. for the State of Missouri*, 947 S.W.2d 424, 431 (Mo. banc 1997). In *Fust*, this Court upheld the constitutionality of § 537.675, which provides that 50% of any punitive damages award is deemed to be rendered in favor of the state. 947 S.W.2d 424. There, the plaintiffs were awarded \$330,000 in punitive damages. *Id.* at 427. The trial court subsequently reduced the award, applying the punitive damages cap set forth in § 537.675.2. *Id.* The plaintiffs appealed, claiming that the statute violated the separation of powers between the

judiciary and legislature because it deprived the court of the power to enforce judgments as they are rendered. *Id.* at 430. This Court rejected this argument. *Id.*

This Court ruled that the statute did not violate the separation of powers provision of the Missouri Constitution because the statute did not interfere with the judicial function. *Id.* at 430-31. “Rather, the 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.” *Id.* Thus, the damages cap was upheld as constitutional. *Id.*

Although this Court has not previously ruled whether § 538.210 violates separation of powers, this Court should follow its analysis and holding in *Fust* and similarly rule that the noneconomic damages cap at issue here does not violate separation of powers. Like the plaintiffs’ failed arguments in *Fust*, Watts similarly argues that the noneconomic damages cap violates the separation of powers principle because it “forces a judge to enter judgment for noneconomic damages in an amount that is contrary to what the evidence and factual findings establish.” Brief, p. 36. This Court squarely rejected this argument in *Fust*. Like the punitive damages cap at issue in *Fust*, nothing in the text of § 538.210 interferes with the judicial function. Further, § 538.210, like the punitive damages cap in *Fust*, merely places a reasonable limitation on the recovery available to plaintiffs in a common law cause of action, medical malpractice claims. Therefore, like this Court previously ruled in *Fust*, this Court should again hold that the damages cap is a permissible exercise of legislative power.

Contrary to Watts' assertion, *Fust* is still good law. Although the case it cites, *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1988), has since been overruled, *Simpson* was not overruled on the issue before this Court – whether the legislature has the authority to establish an outer limit on recovery of a common law cause of action. See *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000) (ruling that the statutory provision requiring that a third party, the prosecuting attorney, first decide to prosecute and obtain a conviction before an injured person could bring a claim under the Dram Shop Act violated the separation of powers). Moreover, the cases that *Simpson* cites for the proposition applicable to this case, i.e., that because the legislature has the power to create causes of actions, it is likewise entitled to restrict those causes of actions –are still good law. 746 S.W.2d at 391. See *Chapman v. State Social Sec. Comm'n*, 147 S.W.2d 157 (Mo. App. 1941). See also *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609 (Mo. 1965) (overruled on other grounds by *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. banc 1995)); *Nistendirk v. McGee*, 225 F.Supp. 881 (W.D. Mo. 1963).

As it did with punitive damages, Missouri's legislature has the power to modify the substantive law by limiting the recovery of noneconomic damages in medical malpractice actions. This is all that § 538.210 does. Section 538.210 establishes the substantive, outer limit of a plaintiff's damage remedy recoverable against certain defendants. It does not determine the amount of damages that can be awarded to a particular plaintiff, but rather limits recovery of noneconomic damages in all medical malpractice cases. Limitations on remedies are modifications of the common law and as such, a proper exercise of legislative power. See *Fust*, 947 S.W.2d at 430-31.

Other states have similarly ruled that statutory damages caps do not violate the separation of powers provisions of their constitutions. *Gourley*, 663 N.W.2d at 76; *Garhart*, 95 P.3d at 581-82; *Kirkland*, 4 P.3d at 1121-22; *Edmonds*, 573 A.2d at 861; *Zdrojewski*, 657 N.W.2d at 739; *Wright*, 391 S.E.2d at 570; and *Judd*, 103 P.3d at 145.

In her brief, Watts relies on cases from two states, Illinois and Washington, to support her argument that § 538.210 violates separation of powers by creating a legislative remittitur. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997); and *Sofie v. Fireboard Corp.*, 771 P.2d 711 (Wash. 1989). All three cases are easily distinguishable. First, the court in *Sofie* did not rule that that a damages cap violated the separation of powers clause of its state's constitution, but simply stated in passing that the limit *may* violate the separation of powers. 771 P.2d at 654. As such, *Sofie* is not persuasive authority. Second, *Best* and *Lebron* (whose ruling rests upon the *Best* decision's analysis) are both premised upon a view of remittitur that is not shared by Missouri courts. In *Best*, the court's conclusion that the damages cap offended the separation of powers clause of the Illinois Constitution rested entirely on the notion that such caps constitute a remittitur, which courts alone have the authority to grant. *Best*, 689 N.E.2d at 1081. In so holding, the Illinois Supreme Court recognized that remittitur has long been a traditional and inherent power of the Illinois courts. *Best*, 689 N.E.2d at 1079; *Lebron*, 930 N.E.2d at 905.

In Missouri, however, remittitur is not a traditional and inherent power of the courts. The Missouri Supreme Court abolished the practice of remittitur in 1985, noting that its "application in the appellate courts has been questioned since its inception in

Missouri.” *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. banc 1985). Although remittitur was later authorized by the Missouri legislature, it is still not permitted in medical malpractice cases. *See* Mo. Rev. Stat. § 538.300; *Myers v. Morrison*, 822 S.W.2d 906, 910 (Mo. App. 1991). Because remittitur is not an inherent and traditional power of the Missouri judiciary as it is in Illinois, the *Best* and *Lebron* decisions and their analysis are not persuasive.

Finally, a damages cap is fundamentally different from the doctrine of remittitur. Remittitur involves an examination of the evidence on a case-by-case basis to determine whether the jury’s damage award is excessive in light of the evidence offered at trial. A damages cap, on the other hand, is not a form of remittitur. As this Court recognized in *Fust*, a damages cap establishes the outer limit of a plaintiff’s damage remedy against certain defendants. Unlike remittitur, a damage cap applies without regard to the facts of a particular case. In this case, § 538.210 limits recovery of noneconomic damages in all medical malpractice cases as a matter of legislative policy. Enacting such a limitation is properly within the inherent power of the legislature to make, amend, and abolish the common law. *See Fust*, 947 S.W.2d at 430-31. As such, the damages cap does not violate the separation of powers provision of the Missouri Constitution.

CONCLUSION

All parties involved in litigation undeniably benefit from the doctrine of stare decisis. Adhering to the doctrine of stare decisis ensures that our judicial system remains focused on predictability and stability in the law. Without predictability in the interpretation and application of the law, the ability of attorneys to counsel clients and

parties in medical malpractice actions will be adversely affected. In order for potential litigants to effectively weigh their risks and benefits before choosing to pursue what is oftentimes exceedingly costly litigation, it is necessary for them to have a complete understanding of how judicial holdings will apply to them.

This Court has previously rejected the very same constitutional challenges presented by Watts in this appeal. *See Adams*, 832 S.W.2d 898; *Fust*, 947 S.W.2d 424. Watts has not presented any arguments in this appeal that would compel a different result from this Court's previous decisions. Throughout the past two decades, courts in Missouri have adhered to and relied upon this Court's holding in *Adams*, applying the cap to noneconomic damage awards in medical malpractice cases. Thus, the damages cap has become an integral component of medical malpractice litigation in Missouri. The statute was amended in 2005, but as set forth above, those changes do not affect this Court's prior analysis and holdings in *Adams*. Accordingly, the doctrine of stare decisis plainly applies here and calls for this Court to adhere to its prior decision in *Adams*.

HEPLERBROOM LLC

By: /s/ Jessica L. Hawkins

Kurt A. Hentz #33817

e-mail: kah@heplerbroom.com

Jessica L. Hawkins # 60415

e-mail: jlh@heplerbroom.com

Lindsay T. Leible # 63963

e-mail: ltl@heplerbroom.com

800 Market Street, Suite 2300

St. Louis, Missouri 63101-2506

314-241-6160 telephone

314-241-6116 facsimile

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Amicus Brief complies with the limitations of Missouri Supreme Court Rule 84.06(b), and that the Brief contains 8,051 words of proportional font, excluding the cover, signature block, certificate of service, and this certificate (as determined by Microsoft Office Word 2007 software). The original signed brief will be maintained for a period not less than the maximum allowable time to complete the appellate process.

HEPLERBROOM LLC

By: /s/ Jessica L. Hawkins

Kurt A. Hentz #33817

e-mail: kah@heplerbroom.com

Jessica L. Hawkins # 60415

e-mail: jlh@heplerbroom.com

Lindsay T. Leible # 63963

e-mail: ltl@heplerbroom.com

800 Market Street, Suite 2300

St. Louis, Missouri 63101-2506

314-241-6160 telephone

314-241-6116 facsimile

CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of January, 2012, I electronically filed the foregoing with the Clerk of the Court and that I sent an electronic copy hereof by email and a printed copy by mail to:

Attorneys for Appellant/Cross-Respondent

Andre M. Mura
777 6th Street, Suite 520
Washington, DC 20001
andre.mura@cclfirm.com

Roger Johnson
JOHNSON, VORHEES & MARTUCCI
510 West 6th Street
Joplin, MO 64801
roger@4stateslaw.com

Attorneys for Respondents/Cross-Appellants

Jeremiah J. Morgan
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102
jeremiah.morgan@ago.mo.gov

Kent O. Hyde
HYDE, LOVE & OVERBY, LLP
1121 South Glenstone
Springfield, MO 65804
kohyde@aol.com

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/s/ Jessica L. Hawkins