Case No. SC91867

IN THE SUPREME COURT OF MISSOURI

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,

Respondent,

MELISSA R. HERRMAN, M.D., MATTHEW P. GREEN, D.O., and WILLIAM S. KELLY, M.D.,

Respondents/Cross-Appellants.

Appeal from the Circuit Court of Greene County, Missouri at Springfield
Case No. 0931-CV01172

APPELLANT/CROSS-RESPONDENT'S SECOND BRIEF

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ARGUMENT

I. SECTION 538.210 VIOLATES THE RIGHT OF TRIAL BY JURY.

A. Legislative Power Is Not Absolute; It Is Qualified By The Bill Of Rights.

Respondents/Cross-Appellants (hereinafter, collectively, "Cox Medical Center") argue that legislative power is absolute and provisions of the Bill of Rights, such as the right of trial by jury, are not "a basis for restraining legislative power . . . ." (Resp'ts Br. 17.) Legislative power, however, is not absolute. "The power or the authority of the General Assembly to act is what power or authority is left after the reservations and restrictions as declared by the people through the organic law." *State ex rel. Lashly v. Becker*, 235 S.W. 1017, 1021 (Mo. banc 1921).

Cox Medical Center ignores this well-established law when it argues that only the provisions of article III itself restrict the General Assembly's power under article III, section 1. (Resp'ts Br. 27-28.) "[N]owhere in the Constitution," it contends, "is there any limitation on the ability of the General Assembly to create, modify, limit, or abrogate causes of action or remedies." (Resp'ts Br. 28.) Finding no such explicit restriction of legislative power, Cox Medical Center reasons that the General Assembly must also be empowered to modify or abrogate *constitutional* rights that inhere in common law causes of action, such as the right of trial by jury. (*See* Resp'ts Br. 29-30.)

The Constitution, to be sure, contains "restrictions in the true sense of the term," "in which the lawmaking body is met with the injunction 'thou shall not,' and two of

such . . . are found in" the Bill of Rights. *Becker*, 235 S.W. at 1021. But in the main the Bill of Rights

> are really reservations of rights in the people, and a withdrawal of such subjects from legislative action. Only in this limited sense can they be called restrictions upon legislative power or authority. They are in fact reservations of rights, *over which there was no grant of power to the legislative department*."

Id. (emphasis added).[1]

[1] Cox Medical Center cites *Saint Louis University v. Masonic Temple Association of St. Louis*, 220 S.W.3d 721, 725 (Mo. banc 2007), in support of its view of unlimited legislative power. (Resp'ts Br. 26.) *Saint Louis University* may not fairly be read as endorsing Cox Medical Center's belief that legislative power is qualified only by explicit restrictions in the Constitution, such as those stated in article III itself, but not by those reservations of rights in the Bill of Rights. The Court in *Saint Louis University* properly recognized that legislation cannot "clearly contravene a constitutional provision." 220 S.W.3d at 725. It is thus consistent with, not contrary to, well-settled law, as expressed in *Becker*, that the scope of legislative power must be understood in view of the Bill of Rights. 235 S.W. at 1021. It must also be understood in view of separation of powers. *See infra* Sec. II.

The right to trial by jury is part of Missouri's Bill of Rights. In the state's first constitution in 1820, the people of Missouri expressly reserved to themselves in perpetuity the same authority to resolve disputes in actions for damages as existed at that time. Mo. Const. art. XIII, § 8 (1820). The people, moreover, declared that this right "shall be inviolate." This is a remarkably clear statement that the right rests with the people, and is not subject to legislative interference. With one notable exception, *Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992),[2] this has long been the Court's understanding of the constitutional guarantee. *See Lee v. Conran*, 111 S.W. 1151, 1153 (Mo. 1908) (stating the right, where it applies, is "beyond the reach of hostile legislation").

The right of jury trial, accordingly, is an explicit reservation of a right in the people to decide factual disputes in common law actions for damages, over which there was no grant of power to the legislative department.

1. The General Assembly's authority to shape litigation must not deny litigants the essential functions of a jury protected by the Constitution.

Cox Medical Center argues that the General Assembly's authority to shape litigation and the common law cannot be "stripped" by the right of trial by jury. (Resp'ts Br. 25.) But that mischaracterizes the issue. No one is arguing that the right of trial by

[2] Watts has explained (Appellant Br. 15-18, 31-33), and will further explain (*infra* Sec. I.C), why this Court should overrule *Adams*.

jury creates or retains a substantive claim or theory of recovery. Instead, Watts argues, consistent with the position espoused by Judge Wolff in his concurrence in *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010), that the constitutional guarantee applies as long as the cause of action continues to exist and litigants have access to a jury.

At issue here is the common law cause of action for medical negligence. Section 538.210 "*retains* the common law action but *displaces* the finding of the juries with a legislated limitation on damages." *Klotz*, 311 S.W.3d at 779 (Wolff, J., concurring) (emphasis added). In this case, Watts had access to a jury, and the jury determined the amount of compensatory damages for non-economic harm. Such actions were triable to juries in 1820 when the people adopted the right. The constitutional guarantee therefore attaches. What is its scope? The scope of the right is defined by the common law through a historical analysis. That historical analysis demonstrates that, at common law in 1820, the jury's determination of damages could not be disturbed absent circumstances not present here, such as a claim that the verdict was not supported by the evidence or was excessive. Section 538.210 overrules the jury's determination of a factual issue on a wholesale basis without regard to the evidence and without the option of a new jury trial. This manner of overruling a jury's factual findings was not recognized at common law in 1820. Section 538.210 therefore impairs the right as heretofore enjoyed. That right is protected by the Constitution as "inviolate." It is plainly violated here.

This understanding of the constitutional guarantee, of course, does *not* bar the General Assembly "from enacting remedies that displace damages actions altogether."

Klotz, 311 S.W.3d at 779 (Wolff, J., concurring) (citing *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 648 (Mo. 1931)). "[I]f the cause of action is completely done away with, then the right to trial by jury becomes irrelevant. Since the right attaches to civil trials, there can be no right—and no constitutional violation—if no civil trial is available." *Sofie v. Fireboard Corp*, 771 P.2d 711, 719 (Wash. 1989); *see also Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 165 (Ala. 1991) ("[T]he right to a trial by jury does not arise in the absence of a cause of action requiring a finder of fact."); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 235 (1917) (same).

This is the precise understanding of the right of jury trial that this Court expressed in *De May*, which concerned the constitutionality of the workers' compensation law. That law "enacted remedies that displace damages actions altogether, in workers compensation proceedings, which substitute administrative proceedings for common law damages actions." *Klotz*, 311 S.W.3d at 779 (Wolff, J., concurring). The Court in *De May* rejected a trial-by-jury objection because the right was not implicated. It stated: "[T]he constitutional provision has reference only to such right as it existed at the time of the adoption of our constitution, and in the class of cases to which it was then applicable." 37 S.W.2d at 648.

Nor does Watts' or Judge Wolff's understanding of the constitutional guarantee bar the General Assembly from creating causes of action and defining their parameters. *See Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, No. SC91369, slip op. at 14 (Mo. banc Jan. 31, 2012) ("the legislature has the authority to choose what remedies will be permitted under a statutorily created cause of action"). As Judge Wolff himself

noted, "There have been instances in which limits on damages validly have been imposed on jury-tried cases when the cause of action was unknown at common law." *Klotz*, 311 S.W.3d at 779 (Wolff, J., concurring). Examples cited by Judge Wolff included wrongful death actions, and suits for damages against the state as sovereign. *Id.*

This Court's recent decision in *Estate of Overbey* provides another such example. At issue there was the constitutionality of a legislated limit on punitive damages as applied to a suit under the Missouri Merchandising Practices Act (MMPA). *Id.*, slip op. at 1. The MMPA did not abrogate common law fraud. *See id.*, slip op. at 15 ("the Overbeys chose to bring a statutory claim under the MMPA rather than a common law fraud claim"). It created a separate cause of action that "serves as a supplement to the definition of common law fraud," and that, unlike common law fraud, does not require proof of an intent to defraud or reliance. *Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 232 (Mo. Ct. App. 2006). In this key respect, then, the statutory claim is not analogous to common law fraud. The Court in *Estate of Overbey* determined the substance of the claim "by reference to the MMPA rather than by reference to the common law."[3] *Id.*, slip op. at 15. The Court ruled that the General Assembly, in setting the parameters of the statutory cause of action, was free to preclude punitive damages altogether. *Id.* And it was free to define the substance of the claim in a manner that

[3] Because the plaintiffs in *Estate of Overbey* did not bring a common law fraud claim, the Court did not consider whether the legislated limit on punitive damages would be constitutional as applied to a common law cause of action. *Id.*, slip op. at 16 n.3.

limited the punitive damages recoverable. *Id.*, slip op. at 15-16. This did not impact the right of trial by jury, the Court held. *Id.*

This greater power to abolish or create causes of actions does not include, however, the lesser power to alter jury functions, including the determination of damages. *Sofie*, 771 P.2d at 719. Cox Medical Center disagrees, citing the general rule that no one has a vested right in the law remaining the same. (Resp'ts Br. 37.) But this objection misses the point. Of course the General Assembly may abrogate the common law in ways that do not impact constitutional rights, as was the case with workers' compensation laws. *Mountain Timber*, 243 U.S. at 237 (state workers' compensation law was a "fair and reasonable exertion of governmental power," not an "abuse of power" in violation of federal due process); *De May*, 37 S.W.2d at 656. But "[t]o effectuate any change in [common law rules embodied in right to jury trial] is not to deal with the common law, *qua* common law, but to alter the Constitution." *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935). Constitutional rights, including those defined by the common law through a historical analysis, are not directly subject to legislative changes. The plain language of article I, section 22(a) compels this conclusion; as heretofore enjoyed, the right must remain inviolate.

This distinction was well observed by the Washington Supreme Court in *Sofie*:

> The scope of the right to trial by jury may be defined by the common law through a historical analysis, but the right itself is protected by the state constitution. . . . Because of the constitutional nature of the right to jury trial, litigants have a

> continued interest in it—it simply cannot be removed by legislative action. As long as the cause of action continues to exist and the litigants have access to a jury, that right of access remains as long as the cause of action does. Otherwise, [the right of trial by jury] means nothing.

771 P.2d at 720; *see also Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 223 (Ga. 2010) ("Though we agree with the general principle . . . that the Legislature has authority to modify or abrogate the common law, we do not agree with the notion that this general authority empowers the Legislature to abrogate *constitutional* rights that may inhere in common law causes of action.") (emphasis in original).

For these reasons, Cox Medical Center's view that the General Assembly has unlimited legislative power to define the scope of constitutional rights that inhere in common law causes of action, such as the right of trial by jury, should be rejected. The Court should enforce the right of trial by jury in accordance with its plain command that the right as heretofore enjoyed shall remain inviolate. Mo. Const. art I, § 22(a).

2. This Court's recent trial-by-jury decisions forbid the General Assembly from intervening in the judicial process. Section 538.210 violates that constitutional prohibition.

In recent decisions this Court has endorsed similar reasoning to that proposed here and by Judge Wolff in *Klotz*. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 84 (Mo. banc 2003), for example, the Court reaffirmed that there is a constitutional right of jury trial that cannot be legislated away. This conclusion is perfectly aligned with the

understanding that the jury trial right is not directly subject to legislative changes. If it were, then the right of trial by jury could be legislated away.

Cox Medical Center argues that *Diehl* does not support Watts' argument that the General Assembly cannot modify or abrogate common law causes of action. (Resp'ts Br. 31.) Of course, as discussed, that is not Watts' argument. (*See supra*, Sec. I.A.1.) Cox Medical Center also repeatedly suggests that *Diehl* supports its position, not Watts'. (Resp'ts Br. 30, 32.) This is mystifying. Judge Wolff, who authored the majority opinion in *Diehl*, cited this case in his concurrence in *Klotz* because it supported the conclusion that § 538.210 violates the right of trial by jury. Judge Wolff's point was that the Court had previously held in *Adams* that statutory law can trump the constitutional right. *Klotz*, 311 S.W.3d at 773. Subsequently, in *Diehl*, the Court recognized, as it had a century prior in *Lee v. Conran*, that there is a right to trial by jury that cannot be legislated away. *Id*. at 774. This, of course, means that the scope of the constitutional right is not *directly* subject to legislative changes; otherwise, its scope could be controlled by legislation and would no longer be inviolate as heretofore enjoyed. Cox Medical Center, in contrast, argues that the scope of the right *is* subject to legislative changes, which is why *Diehl* is directly contrary to its position and fully supports Watts'.

Cox Medical Center is also wrong to suggest that, apart from *Adams*, this Court's current understanding of trial by jury is contrary to Watts' or Judge Wolff's understanding. (*See* Resp'ts Br. 33.) Consider, for example, *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140 (Mo. banc 2005). There, the Court recognized, "the legislature is free to establish the substance of a claim, . . . [but] it is not free to establish a

procedure for adjudicating that substantive claim if the procedure contravenes the constitution." *Id*. at 142. Thus, in *Scott*, the Court cautioned that the General Assembly could not preclude a jury from determining punitive damages once it had permitted recovery of such damages pursuant to a statutory cause of action. *Id*.

This Court has not applied *Scott*'s rule in the context of a legislated limit on compensatory damages awarded in a common law action, which is the issue in this case. Applying that rule here, it is clear that § 538.210 does not establish the substance of the claim but establishes a procedure for adjudicating a common law action. As discussed, § 538.210 retains the common law action but displaces the findings of the jury with a legislated limitation on compensatory damages. Therefore, § 538.210, at least as applied to common law actions, intervenes in the judicial process in a manner prohibited by *Scott*.

B. Section 538.210 Overrules The Jury's Determination Of A Factual Issue In A Manner Unrecognized At Common Law In 1820.

Watts demonstrated in her opening brief that § 538.210 violates the right of trial by jury "as heretofore enjoyed." Cox Medical Center argues for the opposite conclusion, but not by applying this Court's established trial-by-jury analysis. Under that analysis, history is the ultimate touchstone. The Constitution "preserve[s] in their ancient substantial extent as existed at common law" in 1820 "all the substantial incidents and consequences which pertained to the right of trial by jury" and places them "beyond the reach of hostile legislation." *Lee*, 111 S.W. at 1153. This Court therefore looks to the common law at a specific point in time for definition, because it is that definition—"as

heretofore enjoyed"—that the Constitution preserves as "inviolate." Mo. Const. art I, § 22(a).

Applying that analysis, it should be dispositive that § 538.210 "overrules the jury's determination of a factual issue in a way that was unrecognized at common law when the constitutional right [of jury trial] was adopted by the people in 1820." *Klotz*, 311 S.W.3d at 773 (Wolff, J., concurring). This is not a contested or controversial understanding of history. "That legislation even would be enacted to interfere with the jury's decision was unheard of when the voters of Missouri adopted our state's constitution." *Id*. at 781.

Cox Medical Center makes no showing to the contrary. Far from it, Cox Medical Center does not even dispute several key, historical facts anchoring Watts' (and Judge Wolffs' identical) trial-by-jury analysis.

For example, Watts explained that her common law suit for medical negligence is the kind of case triable by juries from the inception of the state's original constitution in 1820. (Appellant Br. 19-21); *see Klotz*, 311 S.W.3d at 775 (Wolff, J., concurring) (citing *Diehl*, 95 S.W.3d at 92). Her suit is thus entitled to constitutional protection under article I, section 22(a). Cox Medical Center does not appear to disagree with this conclusion.

Another critical example: Watts, borrowing heavily from Judge Wolff's concurrence in *Klotz*, explained that courts in this state have recognized only one power to rein in an excessive verdict—the granting of a new trial or the granting of a remittitur that is premised on the court's power to grant a new trial. (Appellant Br. 19-24.) Judicial remittitur, because it requires a case-by-case evaluation of the jury's findings of damages and affords a plaintiff the option of a second jury trial, "shows a deference to the 12 men

and women who constitute this basic unit of democracy." *Klotz*, 311 S.W.3d at 781 (Wolff, J., concurring). That the jury's verdict in a second trial may not be set aside "on the ground that the damages are against the weight of the evidence" shows the ultimate deference to the jury's constitutional role as fact-finders. Mo. Sup. Ct. R. 78.10(e); *see Klotz*, 311 S.W.3d at 778 (Wolff, J., concurring) (noting that Rule 78.10 is modeled on common law practice).

What, then, of *legislative* limits on juries, which, unlike judicial remittitur, arbitrarily reduce the amount of compensatory damages determined by a jury on a wholesale basis without regard to the evidence and without the option of a new trial? The historical evidence is clear: no such limitations existed at common law in 1820 in personal injury actions triable by juries. *Klotz*, 311 S.W.3d at 774 (Wolff, J., concurring). The Legislature's first attempt to limit juries in this manner in common law actions dates back only to 1986, *see* 1986 Mo. Laws 879, § 538.210—166 years after the common law incidents of jury trial were constitutionalized. Such a requirement has no parallel in the jurisprudence of this state and is patently inconsistent with the doctrines of remittitur or new trial as this Court has applied them. *Klotz*, 311 S.W.3d at 779-80 (Wolff, J., concurring). Critically, Cox Medical Center makes no showing to the contrary.

A final example: Watts demonstrated that at common law in 1820 a core function of the jury was fact-finding, and the amount of compensatory damages due to a plaintiff was an ultimate fact to be found by a jury. (Appellant Br. 19-24.) For its part, Cox

Medical Center does not disagree that at common law juries were the judges of damages. (Resp'ts Br. 34.)[4]

Cox Medical Center nevertheless contends that the jury's constitutional task is complete upon making that factual determination. (Resp'ts Br. 33-34.) A trial court, according to Cox Medical Center, may issue a judgment that does not reflect the findings of the jury and that is without regard to the evidence. (*See id.*) This is more magical thinking by Cox Medical Center.

As discussed here and in Watts' opening brief, at common law in 1820, the facts found by a jury, including the amount of compensatory damages, were not advisory;

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[4] Cox Medical Center, however, faults Watts and Judge Wolff for not mentioning that prior to 1820 the common law was the rule of decision unless altered or repealed. (Resp'ts Br. 28 (citing 1 Terr. Laws, p. 436, § 1).) But neither Watts nor Judge Wolff have questioned whether the General Assembly may validly abrogate the common law. *See supra* Sec. I.A.1. The question is whether the General Assembly may abrogate constitutional rights that inhere in common law causes of action. Because that right as heretofore enjoyed must be preserved as inviolate, it is relevant that "Missouri's territorial laws that pre-dated statehood provided for jury trials in 'all civil cases of the value of one hundred dollars . . . if either of the parties require it.'" *Klotz*, 311 S.W.3d at 775 (Wolff, J., concurring) (citing Mo. Terr. Laws 58, § 13). Of course, this was not mentioned in Cox Medical Center's brief, though it was mentioned in Watts'. (Appellant Br. 20.)

absent some legal error or finding of excessiveness, the jury's factual findings were dispositive. That is what it meant in 1820 to have the benefit of a jury trial: twelve citizens of this state resolved factual disputes, such as the amount of compensatory damages; neither a judge nor the General Assembly could arbitrarily and absolutely overrule the jury's verdict. *Klotz*, 311 S.W.3d at 779-80.[5] That is what it must mean today, in actions triable by juries in 1820, if the right as heretofore enjoyed is to remain inviolate.

Cox Medical Center's argument that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment "ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages." *Sofie*, 771 P.2d at 721. This argument "pays lip service to the form of the jury but robs the institution of its function." *Id*. It would allow the General Assembly to limit all compensatory damages to $1 in actions to which the right attaches.

Cox Medical Center's position is especially curious given that it cites *Diehl* for the proposition "that the General Assembly cannot eliminate a jury trial right for a cause of action." (Resp'ts Br. 23-24.) But modifying the jury trial right, such that damages are

[5] Courts agree. *See Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (discussing U.S. Const. amend. VII) ("[I]f a party so demands, a jury must determine the actual amount of . . . damages . . . in order to preserve the substance of the common-law right of trial by jury.") (citation and internal quotation marks omitted).

limited arbitrarily and absolutely, in utter disregard of the jury's determination as to actual damages, is somehow "constitutionally different." (Resp'ts Br. 24.)

The Court should refuse to construe constitutional rights in this manner. The Missouri Constitution "deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.'" *See Sofie*, 771 P.2d at 721 (citation omitted).

In this case, the jurors ably performed their constitutionally assigned role as fact-finders. There was no assertion below by Cox Medical Center, and no finding by the circuit court, that the jury's findings did not conform to the evidence, or that the verdict was excessive—circumstances in which the jury's findings might lose their constitutional protection. *See Moore*, 592 So. 2d at 161. The Legislature accordingly is without authority, pursuant to § 538.210, to override the jury's findings in this case.

C. The Court Should Overrule *Adams*.

As Watts recognized in her opening brief, this Court held in *Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992), that the 1986 version of § 538.210, as applied in a common law medical negligence suit, did not violate the right of trial by jury. *Id*. at 907. The trial-by-jury analysis described here and in Watts' opening brief demonstrates that *Adams* is clearly and manifestly wrong. The Court should "overrule *Adams* to restore the right to trial by jury to its traditional and vital place in our constitutional system." *Klotz*, 311 S.W.3d at 774 (Wolff, J., concurring).

Cox Medical Center suggests that if *Adams* is overruled, and Watts' and Judge Wolff's understanding of the right of trial by jury prevails, then the General Assembly would not be permitted to establish statutes of limitations (Resp'ts Br. 37), summary judgment might be unconstitutional (*see* Resp'ts Br. 34), and "gone also would be" the workers' compensation statute, sovereign immunity statutes, among others. (Resp'ts Br. 39.) Cox Medical Center's "parade of horribles" has no basis in fact. Watts' and Judge Wolff's understanding of the right to trial by jury has already prevailed in several other states with nearly identical constitutional provisions. (Appellant Br. 30-31 (collecting authorities).) Cox Medical Center cannot point to a single one of these states and show that any of these things have come to pass. The reasons why are discussed here, and in these decisions themselves.

Cox Medical Center also suggests, even if *Adams* committed error, the Court should nonetheless adhere to it in respect for *stare decisis*, which ordinarily promotes security in the law by encouraging adherence to previously decided cases. (Resp'ts Br. 22.) But *stare decisis* "is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course." *Medicine Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 335 (Mo. banc 2005). This is such a case. "*Adams*' fundamental error is in concluding that statutory law can trump the constitutional right to jury trial." *Klotz*, 311 S.W.3d at 774. *Adams* thus contradicts the plain meaning of article I, § 22(a): the right, where it applies, is beyond the reach of hostile legislation. With the exception of *Adams* (and *Vincent by*

Vincent v. Johnson, 833 S.W.2d 859, 862 (Mo. banc 1992)),[6] this Court has not wavered from that understanding of the right. *Estate of Overbey*, slip op. at 14; *Diehl*, 95 S.W.3d at 92. The right unquestionably applied in *Adams*; it applies here; and as heretofore enjoyed it must remain inviolate.[7]

This Court has refused to adhere to decisions that, like *Adams*, change the language the people have adopted. *E.g.*, *Independence-Nat'l Educ. Ass'n v. Independence School Dist.*, 223 S.W.3d 131, 137 (Mo. banc 2007) (overruling *City of Springfield v. Clouse*, 206 S.W.2d 539, 542 (Mo. banc 1947) ("This Court will not change the language the people have adopted."). It has properly recognized that "[d]eviations from clear constitutional commands—although longstanding—do not promote respect for the rule of

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[6] The Court in *Vincent by Vincent* did not re-examine these issues but adhered to *Adams* and is erroneous for the same reasons.

[7] (*See* Appellant Br. 31-33.) *Adams* appears to have reached a contrary conclusion based on *Tull v. United States*, 481 U.S. 412 (1987). *See Adams*, 832 S.W.2d at 907. Watts has explained that *Adams*' reliance on *Tull* was misplaced because *Tull*'s understanding of the Seventh Amendment right of jury trial applied only to the determination of civil penalties and not actual damages. (Appellant Br. 32-33.) Cox Medical Center similarly relies on *Tull* (*see* Resp'ts Br. 36) but fails to engage Watts' point (Appellant Br. 32) that the U.S. Supreme Court has itself stated that *Tull*'s reasoning is "inapposite" as to actions for damages recognized at common law. *Feltner*, 523 U.S. at 355.

law."[8] *Id*. It should follow that sage advice here. "If the jury's role is to be abrogated or impaired, then the people ought to approve it by amending their constitution." *Klotz*, 311 S.W.3d at 781 (Wolff, J., concurring). But unless the people do so, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Cf. Dist. of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (emphasis in original) (discussing U.S. Const. amend. II).

II. SECTION 538.210 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.

In her opening brief, Watts argued that § 538.210 also violates the constitutional separation of powers in two ways. First, § 538.210 invades the province of the judiciary by superseding the judicial power of review and the power to pronounce judgments with a fixed legislative remittitur. Second, and relatedly, § 538.210 forces a judge to enter judgment for non-economic damages in an amount that is contrary to what the evidence and factual findings of the jury establish. Watts further noted that, although this Court has not addressed whether a legislated limit on compensatory damages violates the separation of powers, courts in other states have struck down such laws on separation-of-powers grounds, or endorsed this reasoning in *dicta*. (Appellant Br. 36-38 (citing *Lebron v.*

[8] *Adams* was decided 19 years ago. But the Court does not adhere to its prior decisions simply because they may be "longstanding." *See Independence-Nat'l Educ. Ass'n*, 223 S.W.3d at 137 (overruling 50-year-old precedent).

Gottlieb Mem'l Hosp., 930 N.E.2d 895 (Ill. 2010) (legislated limit on compensatory damages violates separation of powers)); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997) (same); and *Sofie*, 771 P.2d at 720-21 (endorsing this view in *dicta*)).) She thus urged the Court to adopt the persuasive reasoning of these cases, and to rule that § 538.210 violates the separation of powers.

In her discussion of Missouri cases, Watts acknowledged that this Court, in *Fust v. Attorney General*, 947 S.W.2d 424, 430-31 (Mo. banc 1997), stated, "Placing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function." But that statement from *Fust*, she explained, should no longer be regarded as good law, because the case that *Fust* cited for that proposition, *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988), was subsequently overruled in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000). Moreover, in *Kilmer*, this Court expressly disavowed *Simpson*'s analysis of the separation of powers issue, dismissed the earlier decision's discussion as "circular reasoning," and held that the dram shop liability statute at issue there "violates separation of powers." *Id*. at 552-53.

In response, Cox Medical Center asserts that *Fust*'s statement about reasonable limitations on common law causes of action not only remains good law but is "strengthened" by *Kilmer*. (Resp'ts Br. 50 n.6.) Cox Medical Center further argues that *Kilmer* overruled *Simpson*'s open-courts ruling, but not its separation-of-powers ruling. (*See id*.) There can be no question, however, that the Court in *Kilmer* was highly critical of *Simpson*'s separation-of-powers analysis. *Kilmer*, 17 S.W.3d at 553. *Simpson* is the *only* case cited by *Fust* for the proposition that the legislature may place reasonable limits

on *common law* causes of action without invading the province of the judiciary in violation of separation of powers. *Fust* was wrong to rely on *Simpson* for that view.

In fairness to *Simpson*, the Court there was discussing the General Assembly's authority to limit statutory causes of action, not common law causes of action. It stated: "[T]he legislature is entitled to provide reasonable restriction or expansion of causes of action *which it creates*." 749 S.W.2d at 391 (emphasis added). One of the cases *Simpson* cited approvingly was *Chapman v. State Social Security Commission*, 147 S.W.2d 157 (Mo. Ct. App. 1941). *Chapman* involved a challenge to a denial of old age assistance benefits by the State Social Security Commission. In affirming the commission's determination, the court emphasized that the right to old age assistance was not a right that existed at common law: "The right to old age assistance being purely statutory, and nonexistent at common law, 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." 147 S.W.2d at 158-59. It was this proposition for which *Chapman* was cited in *Simpson*.

Thus, even before *Simpson* was overruled, the *Fust* court was wrong to rely upon it for the proposition that limitations on *common law* causes of action do not invade the judicial function. To the contrary, *Simpson* and *Chapman* were quite clear that the General Assembly's authority to place limits on causes of action applied only to those causes of action created by statute. Neither case stands for the proposition that the General Assembly may place limits on common law causes of action, let alone limits that

interfere with constitutional rights that inhere in those causes of action.[9] *Fust* was wrong to say otherwise.

Contrary to Cox Medical Center's argument, *Kilmer* does not stand for this proposition either. The Court in *Kilmer* stated, "[T]he 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." 17 S.W.3d at 552 (emphasis added). Statutory causes of action that the General Assembly creates are civil claims for relief that exist within its province. *Kilmer* also recognized that absent such legislative enactments, civil claims for relief are "with the court as a matter of common law." 17 S.W.3d at 552. That is consistent with Watts' understanding of separation of powers.

Watt's view of separation of powers, moreover, is consistent with this Court's recent decision in *Estate of Overbey*, and the line of precedent it cited. In *Estate of Overbey*, the Court concluded that a legislated limit on punitive damages as applied to a statutory cause of action does not violate the separation of powers. *Id*., slip op at 18-19. In reaching this conclusion, this Court relied on U.S. Supreme Court precedent, stating:

[9] Cox Medical Center also argues that, although *Adams* did not consider separation of powers, *Fust* dealt with "nearly identical circumstances." (Resp'ts Br. 49-50.) That is not accurate. *Fust* did not involve a cap on compensatory damages, but rather a constitutional challenge to a state statute mandating that 50 percent of any punitive damage award shall be deemed rendered in favor of the state. 947 S.W.2d at 427.

"When [the legislature] creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or *prescribe remedies*. . . . Such provisions do, in a sense, affect the exercise of judicial power, but they are incidental to [the legislature's] power to define the right that it has created." *Id*., slip op. at 18 (quoting *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 83 (1982)) (alterations and emphasis in *Estate of Overbey*).

U.S. Supreme Court precedent draws a clear distinction between statutory causes of actions and common law causes of action, insofar as separation of powers is concerned. Discussing the latter, Chief Justice Roberts recently explained in an opinion for the Court: "the entry of a final, binding judgment by a court with broad substantive jurisdiction, *on a common law cause of action*, when the action neither derives from nor depends upon any agency regulatory regime" "involves the most prototypical exercise of judicial power." *Stern v. Marshall*, --- U.S. ----, 131 S. Ct. 2594, 2615 (2011) (emphasis added). "If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous 'public right,' then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Id*.

Section 538.210 cannot be said to be "incidental" to any legislative power to define a statutory cause of action, because no such power was exercised here; the legislated limit "retains" the common law cause of action. *Klotz*, 311 S.W.3d at 779 (Wolff, J., concurring). In this context, § 538.210 interferes with a "prototypical" exercise of judicial power in a common law action, in violation of Missouri's separation of

powers. As *Lebron* and *Best* recognize, in common law actions, it is the role of the judiciary, not the legislature, to assess and control jury verdicts based on the weight of the evidence.

Cox Medical Center, in addition, suggests that there can be no intrusion in the judicial function to order remittitur because the General Assembly has provided remittitur by statute in all cases except medical malpractice cases. (Resp'ts Br. 51 (citing § 538.300).) This Court's rules, however, also establish a remittitur procedure. Mo. Sup. Ct. R. 78.10. Cox Medical Center omits this rule from its discussion, though both Judge Wolff and Watts have cited it. *Klotz*, 311 S.W.3d at 778; (Appellant Br. 24). The rule was enacted after the General Assembly provided remittitur by statute. *Klotz*, 311 S.W.3d at 778. The rule reinstated remittitur as practiced at common law; and it extended the procedure to all civil cases, without exception.[10] *Id.*; *see* Mo. Sup. Ct. R. 78.10. So, even if the General Assembly has chosen not to make available its version of remittitur to medical malpractice defendants, this Court has extended the option of remittitur as practiced at common law to these litigants.[11]

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[10] The statute is not strictly patterned after the common law. It seemingly permits remittitur even in a second trial. *See* § 537.068. In contrast, the rule, which is modeled after the common law, expressly prohibits this. Mo. Sup. Ct. R. 78.10(e).

[11] Cox Medical Center states that it is "ironic" that Watts would raise a separation-of-powers claim that in part relies on the judicial power of remittitur given that this Court, in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99 (Mo. banc

Putting aside that the rule allows for remittitur in medical malpractice cases, the General Assembly cannot cure the separation-of-powers violation described here by excluding medical malpractice cases from the category of cases in which it statutorily allows for such a procedure. Judicial remittitur is only one aspect of the judicial power of review protected by the separation of powers. The violation would be prevalent anyway, because § 538.210 forces courts to enter judgment at variance with what the jury actually found, and to do so without regard to the particular evidence or circumstances of the case. The statute thus violates "judicial review and the power of courts to decide issues and pronounce and enforce judgments," which are "exclusive" powers of the judiciary in common law cases. *See Chastain v. Chastain*, 932 S.W.2d 396, 398-99 (Mo. banc 1996); *Stern*, 131 S. Ct. at 2615.

For these reasons, § 538.210 violates the separation of powers under article II, section 1.

1985), held that judicial remittitur is an invasion of the right of trial by jury. (Resp'ts Br. 51.) No, it is ironic that Cox Medical Center would rely on *Firestone* at all, given the Court's ruling regarding trial by jury in that case. Surely if judicial remittitur constitutes an invasion of the province of the jury, as *Firestone* held, then a legislated limit on damages violates trial by jury as well.

III. SECTION 538.210 VIOLATES EQUAL PROTECTION.

A. Cox Medical Center Has Failed To Demonstrate That § 538.210 Furthers A Compelling Interest And Is Narrowly Drawn To Further That Interest.

Watts explained in her opening brief that the legislative classifications created by § 538.210 must survive strict scrutiny, because they impinge upon the fundamental constitutional right of trial by jury. Drawing from the analysis of then Judge Teitelman (now Chief Justice), she argued that § 538.210 cannot meet that test. (Appellant Br. 41-42); *Klotz*, 311 S.W.3d at 781-83 (Teitelman, J., concurring).

Cox Medical Center disagrees that the right of trial by jury is infringed. It thus argues that strict scrutiny is not warranted. Indeed, it calls the argument for heightened scrutiny a "sham" (Resp'ts Br. 60)—strong words given that a member of this Court has endorsed the view that strict scrutiny *is* warranted. *Klotz*, 311 S.W.3d at 781-83 (Teitelman, J., concurring). Cox Medical Center does not contend, however, that if strict scrutiny applies, § 538.210 would be justified by a compelling state interest. It mounts no such defense. This was Cox Medical Center's burden. *See Bernat v. State*, 194 S.W.3d 863, 868 (Mo. banc 2006). It has failed to meet it.

B. The General Assembly Lacked A Rational Basis For Enacting § 538.210.

Under rational basis review, the Court will start with a presumption of constitutionality, but this presumption can be overcome by a clear showing of arbitrariness and irrationality. *Foster v. St. Louis Cnty.*, 239 S.W.3d 599, 602 (Mo. banc

2007). Watts has made that showing here. As explained in her opening brief, at the time § 538.210 was enacted, the rapid run-up in premiums for medical malpractice insurance—the problem that the legislation was ostensibly designed to address—had not been caused by rising tort liability. In fact, the number of malpractice claims filed and payments made was falling, continuing a fifteen year trend. Total claims payments were falling in real terms. (Appellant Br. 51-54.) Under these circumstances, it was simply irrational to view a more severe cap on malpractice damages as an appropriate response to the problem of rising malpractice premiums. *See Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (striking down Wisconsin damage cap on non-economic damages in medical malpractice cases on equal protection grounds because the legislature lacked a rational basis for enacting the caps); *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978) (striking down $300,000 cap on medical malpractice on equal protection grounds because court found that the legislature had been "misinformed"; there was no malpractice insurance availability or cost crisis in North Dakota).

Undoubtedly, there were some legislators who believed the claims of advocates for tort reform that frivolous malpractice claims and runaway juries were responsible for rising malpractice premiums. But it was neither rational nor reasonable to believe such claims in the face of the contrary objective evidence available in reports from the state department of insurance. Thus, this is the rare case where "'the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Mahoney v. Dearhoff Surgical Servs., Inc.*, 807

S.W.2d 503, 512-13 (Mo. banc 1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

Section 538.210 creates a number of arbitrary and irrational classifications between various categories of tort victims, as well as various categories of tortfeasors. (*See* Appellant Br. 43-49.) Because the legislature lacked even a rational basis for enacting § 538.210, the law violates the constitutional guarantee of equal protection.

1. The objective evidence available to the Legislature in 2005 established that imposition of a more restrictive cap on non-economic damages was not a rational response to rising malpractice premiums.

Based on the factual findings of the Missouri Department of Insurance, Watts demonstrated in her initial brief that there was no malpractice liability crisis in Missouri at the time that 2005 Mo. Legis. Serv. H.B. 393 (Vernon's) ("HB 393") was enacted. (Appellant Br. 51-65.) The number of malpractice claims filed against all health care providers had been steadily decreasing, as had claims against physicians and surgeons. *See* MDI, *2003 Missouri Medical Malpractice Insurance Report* (2003) ("2003 MMMI Report"), *available at* http://insurance.mo.gov/Contribute%20Documents/2003_Medical_Malpractice_Report.pdf; MDI, *Missouri Medical Malpractice Insurance Report*, Executive Summary (Oct. 2005) ("2004 MMMI Report"), *available at* http://insurance.mo.gov/Contribute%20Documents/2004_Med_Mal_Rpt.pdf. The number of paid claims had also been falling. 2004 MMMI Report, at 20. These decreases continued a 15-year trend. *See* MDI, *Medical Malpractice Insurance in Missouri: The*

Current Difficulties in Perspective, at 6 (Feb. 2003) ("Current Difficulties Report"). Moreover, total payouts to malpractice victims were increasing at less than the general rate of inflation, *i.e.*, declining in real terms. Current Difficulties Report, at 16. Indeed, as the MDI acknowledged: "Without increases in health care costs and average wages, and if injury severities remained constant, average payments would have decreased fairly significantly during the 1990s." *Id*. at 18. There simply was no malpractice litigation explosion justifying a legislative response.

Malpractice premiums had risen sharply in the early 2000s but, as the state insurance department had informed the General Assembly, these increases were a function of the "insurance underwriting cycle," not excessive malpractice awards. *Id*. at 2.

Moreover, even after these rate increases, malpractice premiums in Missouri were not high by historic standards; adjusted for inflation, malpractice premiums per physician in 2003 were more than a third lower than they had been in 1989. 2003 MMMI Report, Executive Summary, at 3.

Finally, while there were anecdotal complaints from physicians that they were considering retiring or relocating their practices to another state because of high malpractice premiums, there was no significant decline in the number of physicians practicing in Missouri; indeed, data from the AMA showed a steady and uninterrupted increase in the number of Missouri doctors over the preceding 45 years, both in absolute numbers and also in relation to the state's population. (Appellant Br. 60-61.)

Under all of these circumstances, there was no rational justification for the imposition of a stricter cap on non-economic damages in malpractice actions. The legislature lacked a rational basis for enacting § 538.210.

Cox Medical Center largely avoids any discussion of this evidence. It instead tells the Court that rational basis review is so toothless that if the General Assembly could have conceived of objectives that could be justified, even if they were not actually conceived and are not justifiable, then the law is somehow "rational." (Resp'ts Br. 46.) Actual facts, it insists, are beside the point. (*Id*. at 45.) But that is not the law. This Court in *Mahoney* clearly stated, if "the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker," 807 S.W.2d at 512-13 (quotation marks omitted), then the legislation lacks a rational basis. The only way to make that showing is to focus on the actual facts that were before the General Assembly. For this reason, Watts has focused on the reports published by the Missouri Department of Insurance, which were available to the General Assembly. These reports refute any conceivable basis the General Assembly might have had for enacting § 538.210.

Cox Medical Center also argues that any consideration of equal protection is foreclosed by *Adams*, because the legislated limit sustained in that case and the limit at issue in this case, in its view, are the same. (Resp'ts Br. 40, 47.) No, they are not the same. As Watts has explained, there are key differences between the two. (Appellant Br. 46-48.) One key difference is that the legislated limit at issue here is fixed. Even if it somehow were rational to cap non-economic damages at $350,000, it is arbitrary and

irrational to subject future victims to a much lower effective cap, by denying them an adjustment for inflation.

Today, the flat cap of $350,000 represents $168,986 in 1986 dollars.[12] The value of available compensatory damages for non-economic harm will surely decrease over time, given medical and consumer inflation. If § 538.210 is not unconstitutional on some other ground, at some point the Court will have to consider whether a legislated limit not tied to inflation violates equal protection. *Adams* did not address that issue. Should the Court reach this question, it should rule that the General Assembly lacked a rational basis for enacting § 538.210, which does not adjust for inflation.

2. Submissions by Cox Medical Center's *Amici Curiae* do not demonstrate that the Legislature had a rational basis for enacting § 538.210.

Cox Medical Center's *amici curiae* devote hundreds of pages of their briefs to deluging the Court with citations to data, reports, and anecdotal information that they assert provide a rational basis for the Missouri legislature to have enacted § 538.210. The vast majority of this information is irrelevant, self-serving,[13] and should not be

[12] This calculation is based on U.S. government CPI data released on October 19, 2011.

[13] Many of these so-called authorities are documents created by proponents of medical malpractice liability reform to advance their political agendas. Of course advocates for the malpractice insurance industry contend that severe caps on non-

considered in this appeal. Many of the documents these *amici* cite were not even in existence at the time HB 393 was enacted. Others are unpublished and incomplete works. (*See, e.g.*, *Amici Curiae* American Congress of Obstetricians and Gynecologists Br. at 17, 19 (relying on draft of graduate student dissertation).) Yet others relate to time periods or factual circumstances very different from those that confronted Missouri. Few even relate to the situation in Missouri.

More importantly, none of this information undermines in the least (or is even responsive to) the central assertion underlying Watts' equal protection claim: in Missouri in 2005 it was simply not rational for the General Assembly to believe that a reduced limitation on non-economic damages was an appropriate response to rising malpractice

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economic damages are necessary to hold down malpractice premiums. (*See Amici Curiae* Mo. Chamber of Commerce Br. 13-14.) Of course the American and Missouri Medical Associations say that there is a medical malpractice liability crisis, AMA, *America's Medical Liability Crisis: A National View* (Mar. 15, 2005). This Court, in fact, should expect these industry groups to come to this conclusion in spite of the evidence to the contrary, because "[i]t is difficult to get a man to understand something when his salary depends upon his not understanding it." Upton Sinclair, *I, Candidate for Governor: And How I Got Licked* 109 (1935) (repr. Univ. of Cal. Press 1994). Still, their saying it doesn't make it so—or make it rational for the legislature to blindly accept those assertions in the face of contrary, objective evidence in reports of the Missouri Department of Insurance.

insurance rates because there was indisputable evidence that payouts on malpractice claims were not the cause of rising malpractice insurance premiums. They could not have been the cause because, continuing a 15-year trend, the number of malpractice claims being filed, and the number of claims on which payment was made, had been falling steadily, and the amounts paid out to malpractice victims had been increasing at less than the rate of inflation, *i.e.*, declining in real terms. Adopting a stricter limit on non-economic damages may have been a politically expedient response to rising malpractice insurance premiums, but it was not a rational one.[14]

IV. HB 393 VIOLATES THE CLEAR TITLE MANDATE OF ARTICLE III, § 23 OF THE MISSOURI CONSTITUTION.

As Watts explained in her initial brief, HB 393's title—"An Act . . . relating to claims for damages and the payment thereof"—is so unduly broad and amorphous that it describes the better part of all legislation passed by the General Assembly, and thus it violates article III, § 23 of the Missouri Constitution. *See Jackson Cnty. Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. Banc 2007). Cox Medical Center's arguments to the contrary are unavailing. No layperson presented with HB 393's title could reasonably be expected to ascertain the Act's subject—however encompassing that

[14] For many of these same reasons, § 538.210 violates the constitutional ban on special legislation. (*See* Appellant Br. 67-69.) Those arguments are fully presented in Watts' brief. Because Cox Medical Center's response is unavailing, Watts does not repeat those points here.

subject may constitutionally be. Because this title is so general that it obscures the contents of the Act, and because it is so broad that it renders the single subject mandate meaningless, this Court should hold HB 393 unconstitutional in its entirety. *See Home Builders Ass'n v. State*, 75 S.W.3d 267, 272 (Mo. banc 2002).

In response, Cox Medical Center argues that Watts' clear title challenge is untimely given the time limits set by § 516.500. (Resp'ts Br. 54.) Cox Medical Center calculates that Watts should have brought this clear title challenge by May 30, 2006, because none of the exceptions extending the time to bring such a challenge are applicable here. (Resp'ts Br. 54-55.)

In this case, however, Deborah Watts is appearing as next friend of Naython Kayne Watts, who was injured during birth by medical malpractice. Naython was born on November 1, 2006. It should be obvious even to Cox Medical Center why Naython could not have brought a constitutional challenge by May 30th of that year.

Section 516.500 is patterned on Judge Holstein's concurrence in *Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98, 101, 105 (Mo. banc 1994). There, Judge Holstein stated, "Where no individual substantive rights are at stake, a claim that the bill is defective in form should be raised at the first opportunity." *Id.* He proposed that the Court adopt certain time restrictions to deal with such a case, but the Court did not. The Legislature did.[15] The statute it enacted addresses only procedural constitutional defects. *See*

[15] While Judge Holstein's suggestion that the Court set these time limits may have been attractive, nothing in the Constitution authorizes the Legislature to set time limits on

§ 516.500. Consistent with Judge Holstein's concurrence, after which § 516.500 is modeled, the statute should not be read to foreclose a claim that a bill's title is not clear in violation of article III, § 23 in a case where substantive rights are at stake, as they are here. Watts raised her substantive and procedural constitutional objections at the earliest opportunity, and that should be sufficient to preserve the issue for this Court's review.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ORDERING A FUTURE PAYMENT SCHEDULE THAT IS UNREASONABLE AND ARBITRARY.

In this case, Cox Medical Center, based on § 538.220.2, asked the circuit court to order that all of Naython Watts' future medical damages be paid over time. The circuit court, in the judgment, ordered half of all future medical damages—$873,800—must be paid over 50 years at a per annum interest rate of .26 percent. Watts demonstrated in her opening brief that it is against the logic of these circumstances, and arbitrary and unreasonable, to order that fifty percent of all future medical damages be paid at such a punishingly low interest rate, particularly given expert testimony explaining the effect such a payment plan would have on Naython Watts' ability to receive full payment over time.[16] With a per annum interest rate approaching zero, the circuit court should have

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constitutional challenges to its enactments, whether those challenges are substantive or procedural.

[16] The expert testimony addressed the potential impact of ordering all future medical damages to be paid periodically. (Appellant Br. 81-82 (discussing testimony of

ordered that far less than fifty percent of the total award of future medical damages be paid over time. Consistent with this Court's decision in *Vincent by Vincent*, she argued that a periodic payment schedule is only reasonable if it both spreads the cost and assures full payment over time. Because the periodic payment plan established in this case failed to account for this second aim, Watts argued, it was by definition arbitrary and unreasonable and indicated a lack of careful consideration of § 538.220.2's purposes. Watts therefore asked the Court to reverse the judgment insofar as it orders periodic payment of half of all net future medical damages, and remand for reconsideration of Cox Medical Center's request for periodic payments.

Cox Medical Center does not engage these arguments.[17] Instead, it addresses Watts' separate argument that § 538.220.2 violates equal protection and due process. Of

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economist John Ward and affidavit of economist Kurt Kreuger).) Although the circuit court ordered that only half be paid periodically, the expert testimony is nonetheless instructive because the expert concluded that payment over fifty years of any portion of the award at a per annum interest rate approaching zero would run the risk that Naython would not receive full payment of his award. (Appellant Br. 82 & n.31.)

[17] In their cross-appeal, Cross-Appellants read the statute to *require* the circuit court to order that the "whole" future medical damages award be paid periodically. Yet, in answering Watts' appeal, they argue that the circuit court did *not* abuse its discretion in ordering that half of all future medicals be paid over time at a yearly interest rate of .26 percent. (Resp'ts Br. 60-62.) They are wrong in both respects.

course, this Court does not decide constitutional questions unless necessary. *Ordelheide v. Modern Bhd. of Am.*, 125 S.W. 1105, 1107 (Mo. 1910). And it is not necessary to do so here, because the circuit court abused its discretion, as described above and more fully in Watts' initial briefing. Should the Court consider Watts' constitutional objections to § 538.220.2, however, the reasons why this Court should sustain those objections are fully stated in Watts' opening brief.

* * *

RESPONSE TO CROSS-APPEAL

THE TRIAL COURT COMMITTED NO ERROR IN DIVIDING THE TOTAL AMOUNT OF FUTURE MEDICAL DAMAGES BY THE NUMBER OF FUTURE MEDICAL PERIODIC PAYMENTS—RESPONDING TO CROSS-APPELLANTS' POINT 1.

Cross-Appellants are Drs. Herrman, Green, and Kelly, but not Cox Medical Center. They raise a single point in their cross-appeal. They argue that the circuit court "miscalculated" in ordering periodic payments. Their argument is entirely based on a single sentence in § 538.220.2—"future medical periodic payments shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments." (*See* Resp'ts Br. 64-65.) Cross-Appellants read that sentence in isolation, but a "cardinal rule of statutory construction is that the intention of the legislature in enacting the statute must be determined and the statute as a whole should be looked to in construing any part of it." *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. banc 2000). Watts thus looks to the statute as a whole to determine the meaning of the single sentence Cross-Appellants have isolated and misconstrued. Read as a whole, the statute clearly provides that future medical periodic payments are to be calculated by dividing the total amount of future medical damages that are subject to future payment by the number of expected payments. § 538.220.2. The circuit court's calculation tracks this statutory command perfectly. (*See* Legal File 136-39.) The cross-appeal, therefore, is baseless.

The statute begins by stating: "At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that *future damages be paid in whole or in part* in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars." § 538.220.2 (emphasis added). Courts have interpreted that language to mean what it says: circuit courts have the "discretion to make 'whole or part' of the future damages award subject to future periodic payments." *Davolt v. Highland*, 119 S.W.3d 118, 139 (Mo. Ct. App. 2003).

In this case, the circuit court, consistent with the plain language of § 538.220.2, exercised its discretion to order that only "part" of the future medical damages award would be subject to future periodic payments. The circuit court ordered that half be paid over time, and half immediately. (Legal File 136-39.)

It should go without saying that this is consistent with this operative sentence of the statute, which permits a request for periodic payment in the first place. *See* § 538.220.2. "Future damages" plainly encompasses "future medical damages" in this first sentence. *See id*. It was based on this understanding of the first sentence that Cross-Appellants "request[ed] prior to entry of judgment . . . a requirement that future [medical] damages be paid in whole . . . ." *Id*. They invoked that clause, which addresses "future

damages," even though Cross-Appellants' sought periodic payment of future *medical* damages.[18]

This plain reading of the first sentence, moreover, is consistent with the next, which states: "Any judgment ordering such periodic or installment payments shall specify a future medical periodic payment schedule, which shall include the recipient, the amount of each payment, the interval between payments, and the number of payments." § 538.220.2 The first two sentences read together, therefore, clearly permit periodic payment of future medical damages in whole or in part, and any judgment ordering "such" payments shall specify a future medical periodic payment schedule.

The question, then, was how to schedule payment of the total amount to be paid periodically. The statute provided the answer. It says, "The duration of 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." § 538.220.2. (All parties agree that Naython's life expectancy is 50 years.) The statute then states, in the language quoted by Cross-

[18] There is a suggestion in Cross-Appellants' briefing, however, that the language "future damages" in this sentence should not be read to include "future medical damages." (Resp'ts Br. 64 ("There is a difference in how certain future damages are to be paid; namely, how future *medical* damages are paid.") (emphasis added).) But if that were the case, negligent medical professionals such as Cross-Appellants would not have a basis to request that future medical damages be paid periodically. *See* § 538.220.2 (permitting any party to request that "future damages" be paid periodically).

Appellants, "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." § 538.220.2. The court accordingly determined the payment schedule by dividing the *total* amount of future medical damages subject to future payment—$873,800—by the number of expected annual payments—50. (*See* Legal File 136-39.)

Cross-Appellants read that language to require dividing the "total future medical damages" that the circuit court determines in its discretion must be paid periodically, *plus* any future medical damages it determines must be paid immediately, by the number of future payments. (Resp'ts Br. 64-65.) But the statute does not say to divide by "the total amount of future medical damages" awarded by the jury. *See* § 538.220.2 Awarded by the jury is gloss added by Cross-Appellants. Read that way, the fourth sentence of the statute is at war with the first. That reading renders meaningless, and thereby eliminates, the circuit court's discretion to enter in the judgment a requirement that "part" of future medical damages shall be paid periodically. § 538.220.2. In effect, it renders the word "in part" in the first sentence a total superfluity.

And indeed, that is Cross-Appellants' aim—to prevent circuit courts from exercising the discretionary authority the statute vests in them. Based solely on the fourth sentence of the statute, then, Cross-Appellants criticize the circuit court in this case for ordering that only part of all future medical damages be paid periodically (Resp'ts Br. 65)—even though the first sentence of the statute permits exactly that. *See* § 538.220.2.

The Court should reject Cross-Appellants' reading of § 538.220.2. "One may not cull out parts of a statute inconsistent with his view and treat them as mere surplusage." *State ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845, 849 (Mo. Ct. App. 1974). "[S]tatutes will not be fragmented for purposes of construction so as to isolate for consideration language favorable to a certain construction, while at the same time excluding language which would compel a different construction if the statute was construed in its full context." *Id.* Cross-Appellants' attempt to do so here must fail. The plain language of § 538.220.2, read as a whole, demonstrates that the circuit court did not err in calculating future payments by dividing "the total amount of the future medical damages" the court decided in its discretion should be paid over time by the number of years that Naython is expected to live. That is what § 538.220.2 requires.[19] Accordingly, the circuit court's judgment should not be reversed on the basis advanced in this cross-appeal.

CONCLUSION

For the foregoing reasons and those stated in Watts' initial brief, the Court should reverse the judgment below on the ground that § 538.210 violates the Missouri Constitution, and remand for entry of judgment in the full amount of compensatory

[19] Cross-Appellants place undue emphasis on the word "shall" in the statute's fourth sentence. (Resp'ts Br. 64.) The word "shall" simply means the circuit court must make a determination as required by the statute. For the reasons discussed here, the circuit court did just that.

damages awarded by the jury; and it should reverse the judgment below insofar as it orders periodic payment of half of all net future medical damages, and remand for reconsideration of Cox Medical Center's request for periodic payments.

Date: February 23, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Appellant/Cross-Respondent's Second Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, and the signature block contains 10, 904 words (as determined by Microsoft Word 2007 software).

Date: February 23, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was filed with the Missouri Supreme Court via electronic filing and that a true and correct copy was served via the electronic filing service, this 23rd day of February, 2012, to the following counsel:

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