

IN THE SUPREME COURT OF MISSOURI

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THOMAS E. THARP, et al.,	)	
	)	
Appellants/Cross-Respondent,	)	
	)	No. SC 96528
vs.	)	
	)	
ST. LUKE’S SURGICENTER- LEE’S SUMMIT, LLC,	)	
	)	
Respondent/Cross-Appellant.	)	

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APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY  
STATE OF MISSOURI

THE HONORABLE KENNETH R. GARRETT, III,  
PRESIDING CIRCUIT JUDGE

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RESPONDENT’S/CROSS-APPELLANT’S BRIEF OF  
ST. LUKE’S SURGICENTER – LEE’S SUMMIT, LLC

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## JURISDICTIONAL STATEMENT

This appeal arises from Plaintiffs Thomas and Paula Tharp's medical malpractice action against Defendants St. Luke's Hospital of Kansas City, Norman Mutchnick, M.D., and Surgical Services PA. On April 22, 2013, the trial court granted Plaintiffs' Motion to File an Amended Petition, substituting St. Luke's Hospital of Kansas City with Defendant Saint Luke's Surgicenter – Lee's Summit, LLC. (LF 4, 43) On June 3, 2015, the trial court granted Plaintiffs' stipulation dismissing, with prejudice, Plaintiffs' claims against Dr. Mutchnick and Surgical Services. (LF 26) On January 26, 2017, at the conclusion of the trial of this matter, the jury returned its verdict for Plaintiffs, awarding Plaintiff Thomas Tharp \$2,256,000 and Plaintiff Paula Tharp \$50,000. On March 1, 2017, the trial court entered its Judgment on the verdict, subject to any post-trial motions on affirmative defenses or statutory requests. (LF 89-92)

On March 31, 2017, Saint Luke's filed its Motion for Post-Trial Relief. (LF 39) On April 17, 2017, the trial court entered its Amended Judgment, reducing Thomas Tharp's award by \$400,000 based on the settlement proceeds previously paid, and ordering payment of \$550,000 of the jury's future damage award in five annual installments, beginning ten days after entry of the Amended Judgment. (LF 111-16) On May 15, 2017, Saint Luke's filed a Renewed Motion for Post-Trial Relief. (LF 39) On June 20, 2017, the trial court denied all remaining post-trial motions. (LF 128) On June 26, 2017, Plaintiffs filed their Notice of Appeal to challenge the constitutionality of MO. REV. STAT. § 538.220, which requires payment of future damages in periodic installments. (LF 130) On June 29,

2017, Saint Luke's filed its Notice of Cross-Appeal to challenge the denial of its post-trial motions. (LF 144)

This case falls within the exclusive appellate jurisdiction of the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution based on Plaintiffs' challenge to the constitutionality of a Missouri statute.

## STATEMENT OF FACTS

Respondent/Cross-Appellant Saint Luke's Surgicenter – Lee's Summit, LLC ("St. Luke's") submits a separate Statement of Facts to set forth those facts material to the questions presented by this appeal under the appropriate standard of review.

**A. Plaintiff Thomas Tharp suffered a known risk during a laparoscopic cholecystectomy performed by Dr. Mutchnick.**

Dr. Mutchnick performed a laparoscopic cholecystectomy on Plaintiff Thomas Tharp, which involved the removal of his gallbladder through a laparoscope. (STR 56:1-10) Five days after the surgery, he experienced sudden, severe abdominal pain resulting from bile leaking into his abdomen. (STR 61:3-13) During a second procedure, Henry Randall, M.D. found there was a thermal injury to Thomas Tharp's common bile duct allegedly caused by the harmonic scalpel that Dr. Mutchnick used to perform the original surgery. (STR 65:4-12) To repair the injury, Dr. Randall used a piece of intestine to divert the bile from the injury site. (STR 65:15-22)

Plaintiffs' expert witness, David Imagawa, M.D., testified that the injury rate for the type of procedure Dr. Mutchnick performed in this case is one to one-and-one-half percent of all such procedures performed. (STR 87:1-4) Dr. Mutchnick performed more than 4,000 such procedures during his career before operating on Thomas Tharp. (STR 93:24-94:2, 206:6-16) If Dr. Mutchnick had forty cases with resulting injuries, the number of resulting injuries would be within the average injury rate. (STR 95:3-12) However, Dr. Mutchnick had only received complaints on two such procedures. (STR 206:17-22)



**B. Plaintiffs’ experts testified generally that Plaintiff Thomas Tharp had some risk of future complications, although they could provide no specifics, and had no opinion regarding the potential future medical costs other than they would be “expensive.”**

Plaintiffs’ experts, David Imagawa, M.D. and Henry Randall, M.D., testified that following this type of complication during a procedure and follow-up repair procedure, a patient’s risk of strictures increases over time. (STR 70:8-14; SLF A220) They further opined that in rare cases, namely, in about one percent of cases, the patient may ultimately require a liver transplant. (STR 74:10-12; SLF A220-21)

Dr. Randall testified that it is not possible to determine within a medical degree of certainty whether a patient will suffer any of the possible complications. (SLF A220) Also, as acknowledged by Dr. Randall, it is possible that a patient will have no additional problems following the repair procedure. (SLF A220) At the time of trial, Thomas Tharp was five years post-procedure and had no need for any follow-up procedures. (STR 98:20-99:6)

Dr. Imagawa testified that some patients can die ten to fifteen years earlier than someone who has not had the repair surgery. (STR 70:15-20) He also stated that twenty to twenty-five percent of patients will require a follow-up procedure after ten years to remove scar tissue from the repair site. (STR 72:7-12) However, he acknowledged that it was difficult to gauge the number of patients who receive such follow-up procedures because it can be difficult to find patients long after the repair surgery was performed. (STR 72:15-22)

Further, Dr. Imagawa testified that, as a general follow-up, patients should receive blood work every three months and have an ultrasound of their liver every six months. (STR 74:22-25) Dr. Imagawa testified that the follow-up procedures he discussed are expensive; however, he did not provide any specific costs associated with any of the procedures because he does not practice medicine in Missouri. (STR 78:1-3, 105:8-15, 109:9-19)

**C. Dr. Mutchnick applied for staff privileges at St. Luke's to perform the type of procedure he performed on Plaintiff Thomas Tharp.**

The purpose of the credentialing process is to ensure that doctors practicing at St. Luke's are qualified to perform the surgeries or procedures they conduct at the surgery center. (STR 296:12-15) Physicians list on their applications those procedures they intend to perform at the surgery center. (STR 386:13-15)

On Dr. Mutchnick's application for staff privileges at St. Luke's, he was asked whether any professional liability lawsuits had been filed against him as a result of his acts or omissions. (STR 147:5-9) He answered affirmatively. (STR 147:9-11) However, he marked "no" in response to the inquiry as to whether any of these suits had resulted in judgments or settlements. (STR 12-16)

The application also included a request that the applicant provide details for any "yes" answers; for lawsuits, such details were generally to include the name of the case and nature of the allegation. (STR 2-19) Dr. Mutchnick included three separate lawsuits in the details section of his application and indicated the nature of the procedure and the allegations against him. (STR 149-152)

Lawsuits filed against a physician, particularly if there is no known outcome, constituted only one consideration in making the decision to credential a physician. (STR 347:5-10) The type of medicine practiced can have a significant impact on how many lawsuits are filed against a physician. (STR 519:6-17)

St. Luke's hired contractors to ensure it had complete information about physician applicants; then the applications would be sent to the credentialing division and the medical director to ensure they were complete; and the applications would finally be sent to the credentialing committee, consisting of physicians, for consideration. (STR 250:6-251:20) At times, the credentialing committee would identify missing information or request follow-up information, and the process would be paused to allow the credentialing division to secure additional documentation. (STR 252:16-253:2) A pause for additional documentation could include the obtaining of additional information about lawsuits. (STR 256:18-24)

St. Luke's, as part of the credentialing process, would also verify the physician's education, board certification, medical staff memberships, information about complaints and lawsuits available from the National Practitioner Data Bank ("NPDB"), and privileges that the physician maintains at other facilities. (LF 385:20-386:17) The NPDB is a clearinghouse that tracks adverse actions against physicians on a national basis (STR 502:3-13). The NPDB reports what monies have actually been paid as a result of lawsuits and complaints, such that an important claim will generally be reported by the NPDB. (STR 215:2-6, 222:7-12)

As part of the credentialing process, St. Luke's would also contact other physicians with whom the applicant had previously worked to determine their opinions regarding the applicant's competence. (STR 386:18-23, 486:21-24) Often, the opinions of other physicians constitute the most important information in determining whether a physician is credentialed. (STR 508:9-14, 514:1-4) Moreover, St. Luke's would often share credentialing information with other St. Luke's facilities. (STR 340:23-341:23)

**D. St. Luke's received information about lawsuits not included on Dr. Mutchnick's application from the NPDB report and took this information into consideration in reviewing his application.**

The NPDB report, which St. Luke's regularly obtains as part of the credentialing process, provided St. Luke's with details regarding up to five lawsuits, such that St. Luke's had this information at the time it considered Dr. Mutchnick's application, regardless of whether Dr. Mutchnick had failed to provide this information. (STR 156:6-14, 249:5-15, 287:20-25, 549:20-21) St. Luke's considered the NPDB to be a primary source of information and did not look at courthouse records to see whether unresolved allegations were filed in lawsuits. (STR 320:4-24, 366:6-8)

**E. St. Luke's ultimately approved Dr. Mutchnick's application based on the full information it had at the time.**

It is undisputed that Dr. Mutchnick never had his license challenged, limited, suspended, or revoked by any institution. (STR 183:14-18, 522:L5-15) He also had staff privileges, such that he would have necessarily undergone a credentialing process at St. Luke's Surgicenter, St. Luke's East, Lee's Summit Medical Center, St. Joseph Hospital,

and Menorah Medical Center. (STR 187:4-11) Ultimately, based on the full information available to it, St. Luke's credentialed Dr. Mutchnick. (STR 295:24-25)

**F. Plaintiffs' expert opined that St. Luke's should not have credentialed Dr. Mutchnick "right away" based on his failure to provide a complete list of every lawsuit filed against him.**

In St. Luke's Medical Staff Bylaws, there is a guideline indicating that if a physician fails to provide complete and accurate information on an application, the physician shall be automatically removed from consideration. (STR 156:15-20, 228:19-229:3) Those participating in the credentialing process are expected to follow St. Luke's bylaws. (STR 289:21-299:4)

Plaintiffs' expert, John Hyde, II, Ph.D., explained that this bylaw means you "don't credential him right away. If there's some explanation for that, you give people the benefit of the doubt." (STR 157:16-158, 227:1-5)

In addition to the lawsuits noted in the NPDB report, Dr. Hyde noted that the Missouri court filing system indicated that twenty-two lawsuits had been filed against Dr. Mutchnick over the past thirty years. (STR 165:5, 221:23-25) However, Dr. Hyde conceded that such lawsuits contained mere allegations, and were not necessarily evidence that Dr. Mutchnick was negligent. (STR 214:13-24) Nonetheless, Dr. Hyde testified that St. Luke's should have rejected Dr. Mutchnick's application based on his failure to include a complete list of lawsuits filed against him, including all money settlements or judgments.

**G. The jury returned a verdict for Plaintiffs, and the trial court ordered the periodic payment of a portion of the future damage award under Section 538.220.**

The jury entered a verdict for Plaintiffs on their negligent credentialing claim against St. Luke's. (LF 60, 90, 134; STR 673:3-674:5) After the jury was discharged, St. Luke's requested that the trial court apply the Section 537.060 offset or credit, taking into consideration Plaintiffs' prior settlements. (STR 675:19-25) St. Luke's further asked the court to apply Section 538.220 by ordering periodic payments of the jury's future damage award as contemplated by the statute. (STR676:22-677:13)

On March 1, 2017, the trial court entered judgment on the jury's verdict. (LF 89-92) Insomuch as the judgment did not take into consideration the prior settlements or provide for periodic payments under Section 538.220, St. Luke's requested the Court to modify the judgment to address these issues. (LF 93-94)

After further briefing, the trial court entered an Amended Judgment on April 17, 2017. (LF 111-16) In the Amended Judgment, the trial court awarded the jury's total of \$2,256,000, of which \$1,500,000 represented future damages, to Plaintiff Thomas Tharp, and \$50,000 in damages to Plaintiff Paula Tharp, of which \$25,000 represented her future damages. (LF 112-13) Since the total damage award for Plaintiffs was more than \$100,000, the trial court determined that Section 538.220.2 was applicable and ordered that Paula Tharp's \$25,000 in future damages be paid in a lump sum along with her \$25,000 in past damages. (LF 115) The trial court further found that a prior settlement and attorney fees reduced Thomas Tharp's future damages to \$550,000. (LF 114-15) In addition, the trial

court ordered payment of these future damages in period payments of \$110,000 a year for five years, the first payment being due ten days after the entry of the Amended Judgment.

(LF 115)

### CROSS-APPELLANT'S POINTS RELIED ON

- I. The trial court erred in denying Defendant St. Luke's Surgicenter's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict, because the evidence presented by Plaintiffs was insufficient to support a negligent credentialing claim, in that there was no substantial evidence demonstrating that a reasonably prudent health care facility would have refused to credential Dr. Norman Mutchnick, Plaintiffs presented no expert testimony to prove that fact, as required to establish all of the essential elements of a negligent credentialing claim, and, in any event, there was no evidence, expert or otherwise, that Dr. Mutchnick was incompetent to perform the procedure that he performed on Plaintiff Thomas Tharp.

*See LeBlanc v. Research Belton Hosp.*, 278 S.W.3d 201 (Mo. App. W.D. 2008)

*Rule v. Lutheran Hospitals & Homes Society of America*, 835 F.2d 1250 (8th Cir. 1987)

*Taylor v. Singing River Hospital System*, 704 So.2d 75 (Miss. 1997)



II. The trial court erred in denying St. Luke's Motion for New Trial, because the jury's verdict awarding Plaintiffs future damages was against the weight of the evidence, in that Plaintiffs failed to sustain their burden to prove that future expenses were reasonable and necessary to treat Thomas Tharp's injuries in that their medical experts could only speculate as to what potential future complications Thomas Tharp might suffer, along with a general recommendation that he should receive certain periodic monitoring, with no evidence concerning the cost of any such future medical treatment.

*Braddy v. Union Pacific R. Co.*, 116 S.W.3d 645 (Mo. App. E.D. 2003)

*Shackelford v. West Central Electric Coop., Inc.*, 674 S.W.2d 58 (Mo. App. W.D. 1984)

*Wilson v. Lockwood*, 711 S.W.2d 545 (Mo. App. W.D. 1986)

## RESPONDENT'S STANDARD OF REVIEW

Constitutional challenges to a statute are issues of law to be reviewed by the Court *de novo*. *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). “An act of the legislature carries a strong presumption of constitutionality.” *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011) (quoting *Missouri Ass'n of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006)). “A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution; it should be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution.” *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991); *See also State v. Mixon*, 391 S.W.3d 881, 883 (Mo. banc 2012) (quoting *Rentschler*, 311 S.W.3d at 786).

The party challenging the validity of the statute has the burden of proving the statute “clearly and undoubtedly” violates the constitution. *Mixon*, 391 S.W.3d at 883. “If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted.” *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012); *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

## RESPONDENT'S ARGUMENT

I. The trial court did not err in applying the periodic payments provision of Mo. Rev. Stat. § 538.220 to Plaintiff Thomas Tharp's future damage award in excess of \$100,000 because Section 538.220 does not violate Plaintiffs' right to a jury trial in that the statute does not impose an arbitrary "damage cap" on the verdict, does not prevent Plaintiffs from immediately executing on the judgment, and does not require the trial court, either substantially or materially, to alter the jury's verdict.

### A. Introduction

The trial court did not err in applying Section 538.220 to Plaintiff Thomas Tharp's future damage award in excess of \$100,000 because there is no argument that the trial court applied the statute incorrectly, and the statute itself does not unconstitutionally infringe on Plaintiffs' right to a jury trial. Section 538.220 does not mandate an unconstitutional arbitrary damage cap, and indeed, provides for no basis to reduce a plaintiff's damage award whatsoever. Rather, the statute merely allows, when requested, a trial court to enter a judgment providing for the periodic payment of future damages awarded by the jury in excess of \$100,000. The statute does not reduce a plaintiff's damages, does not prevent the immediate execution upon the judgment entered, and does not require any substantial alteration to the verdict as rendered. Moreover, the statute permits the court to use its discretion, based on the evidence adduced at trial, in determining how periodic payments should be structured.

Section 538.220 raises none of the issues that would cause it to run afoul of a plaintiff's constitutional right to a trial by jury. Indeed, when recently asked to address the

constitutionality of this same statute, this Court specifically concluded that the statute could, and should, be interpreted in a manner that renders it constitutional. Since Plaintiffs have not, and cannot, demonstrate that Section 538.220 deprived them of their right to a trial by jury, the Court should once again decline to hold the statute unconstitutional on this basis.

**B. Plaintiffs do not challenge the method by which the trial court applied Section 538.220, but limit their challenge to the statute’s constitutionality.**

Section 538.220, adopted in 1986, provides for periodic payments of future damages awarded. The purpose of the statute’s periodic payments provision is threefold. First, the statute eliminates a potential windfall where future damages are awarded, but not actually incurred. Second, the statute lessens the concern that claimants or caretakers receiving large sums of money could squander the money away early on to the extent that the money would later be unavailable when it is actually needed for life care. Third, the statute provides for a potential tax advantage. *See Ireland, Thomas R., Structured Judgments and Period Payments in Missouri: Uncertainty on the Meaning of Tort Reform*, J. MO. BAR (July/Aug. 2001).

Section 538.220 specifically distinguishes between past and future damages, and only provides for periodic payments of the latter. Section 538.220.1 states that “[i]n any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, past damages shall be paid in a lump sum.” Section 538.220.2 states that “[a]t 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.” (Emphasis added.) The duration of such future payments “shall be for a period of time equal to the life expectancy of the person to whom such services were rendered, as determined by the court.” *Id.*

Under Section 538.220, the trial court, upon St. Luke’s request, entered an Amended Judgment awarding the jury’s total of \$2,256,000 in damages, \$1,500,000 representing future damages, to Plaintiff Thomas Tharp, and \$50,000, \$25,000 of which representing future damages, to Plaintiff Paula Tharp. (LF 112-13) Since the total award of future damages to Plaintiffs was more than \$100,000, the trial court determined that Section 538.220.2 was applicable and ordered that Paula Tharp’s \$25,000 in future damages be paid immediately in a lump sum along with her \$25,000 in past damages. (LF 115) The trial court further found that a prior settlement and attorney fees reduced Thomas Tharp’s future damages to \$550,000. (LF 114-15) The trial court then ordered the periodic payment of these future damages by periodic payments of \$110,000 a year for five years, the first payment being due ten days after the entry of the Amended Judgment. (LF 115)

Plaintiffs have not argued on appeal that the Amended Judgment was not subject to Section 538.220. Nor have they argued that the trial court abused its discretion in determining the amount of the payments or the duration of the payment period. Instead, they limit their appeal solely to an attack on the constitutionality of Section 538.220. Therefore, if the constitutionality of Section 538.220 is upheld, there can be no error.

- C. Section 538.220 does not interfere with Plaintiffs’ right to a jury trial in that the statute does not provide for an arbitrary “damage cap,” does not prevent the execution of the judgment, and does not require the trial court to make a substantial or material alteration to the jury’s verdict.**

Plaintiffs first argue that the periodic payments ordered by the Court under Section 538.220 were entered in error because Section 538.220 is unconstitutional because the statute interferes with the right to a jury trial by placing an arbitrary cap on judgment awards, by preventing an immediate right to execute the judgment in full, and by requiring an alteration of the jury’s verdict such that the verdict is no longer the sole basis for the judgment entered. Plaintiffs’ arguments fail under a plain reading of Section 538.220, which does impose an arbitrary cap, prevent the execution of judgment, and or require any alteration to the substance of the jury’s verdict.

- 1. Section 538.220.2 is not a “damage cap” because the statute does not provide for an arbitrary reduction of the jury’s damage award.**

Plaintiffs first argue Section 538.220.2 violates Article I, Section 22(a) of the Missouri Constitution, which provides “[t]hat the right of a trial by jury as heretofore enjoyed shall remain inviolate.” This provision has been interpreted to mean “that all the substantial incidents and consequences, which pertained to the right of trial by jury, are beyond the reach of hostile legislation and are preserved in their ancient substantial extent as existed at common law.” *State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow*, 36 S.W. 43, 48 (Mo. 1896). Missouri has long recognized that one of the jury’s primary functions

is to determine damages. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 639 (Mo. banc 2012).

This Court has held that “[o]nce the right to a trial by jury attaches, ... the plaintiff has the full benefit of that right free from the reach of hostile legislation.” *Id.* at 640. Therefore, legislation that an attempt to cap damages operates “wholly independent of the facts of th[e] case,” and, thus, “directly curtails the jury’s determination of damages ... [and] necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to trial by jury attaches at common law.” *Id.* Plaintiffs argue Section 538.220.2 provides for an unconstitutional cap on the damages awarded by a jury in common-law negligence claims such as this case.

Plaintiffs’ argument should be denied. This Court has explained that damage caps are found in instances where legislation “arbitrarily reduce[s] the amount of a jury’s award in an entire class of cases without any reference to the evidence in the particular case.” *Klotz v. St. Anthony’s Medical Center*, 311 S.W.3d 752, 779-80 (Mo. banc 2010) (Wolff, J. concurring). *See also Watts*, 376 S.W.3d at 649 (noting that the overturned statute in question capping damages “operates wholly independent of the facts of the case”).

In contrast, Section 538.220.2 not only does not reduce the amount of damages awarded by the jury, the statute is anything but arbitrary because it gives the trial court the discretion to structure the future payments based on the evidence presented at trial. Therefore, Section 538.220.2 in no way meets the definition of “damage cap” that has been applied to hold other statutes that arbitrarily reduce damages unconstitutional.

Indeed, Section 538.220.2 specifically gives the trial court the discretion to determine the amount and length of the payments according to the evidence adduced at trial of the plaintiff's needs and anticipated lifespan, and further permits the trial court to enter a judgment in precise accordance with the verdict by ordering the immediate payment of past damages and future payment of future damages, as determined by the jury. Therefore, there can be no argument that Section 538.220.2 is arbitrary, or that it operates "wholly independent of the facts of the case."

Moreover, Section 538.220.2 is utterly devoid of any language that would require a court to reduce the amount of future damages awarded. Rather, the statute is careful to even include a provision accounting for interest on the future payments so that the damage award is not subject to reduction by virtue of inflation. To interpret this provision as constituting a "damage cap" for purposes of declaring it unconstitutional would be both inaccurate, improper, and contrary to the plain language evidencing the legislature's intent.

In addition, Section 538.220.2 does not more broadly "directly curtail" the jury's determination of damages. In *Sanders v. Ahmed*, this Court noted that a direct curtailment of the jury's determination of damages in essence "nullifies the jury's finding of fact regarding the amount of damage actually suffered by the plaintiff by requiring the court to reduce a non-economic damages award determined by a jury" on the basis of a statutorily imposed limit. 364 S.W.3d 195, 215 (Mo. banc 2012). Section 538.220.2 provides for no reduction of the award, but simply requires that a trial court distribute the full amount of damages awarded by the jury, both past and future, by ordering both immediate and periodic payments of the full damage amount awarded, dependent upon whether the



damages were deemed by the jury to have already been incurred, or will be incurred in the future.

Thus, Section 538.220.2 not only does not “nullify” the jury’s findings of fact regarding the damages suffered, the statute allows a court to award the damages more precisely in conformity with the nature of such damages, as determined by the jury, based on the facts adduced at trial regarding whether such damages have been, or will be, incurred.

**2. The fact that future damages will not be paid if Thomas Tharp dies before the last of the payments is due does not render Section 538.220 a “damage cap.”**

Plaintiffs do not, and cannot, argue that Section 538.220.2 capped Thomas Tharp’s damages so as to cause the trial court to have to reduce the overall damage amount awarded to Plaintiffs. Rather, Plaintiffs can only argue that, because Section 538.220.2 prohibits them from immediately receiving the full amount of future damages awarded, Thomas Tharp could potentially die before receiving all of the payments, or, alternatively, that the funds could be lost through mismanagement or through the bankruptcy of St. Luke’s.

Plaintiffs’ argument fails to advance their position. Plaintiffs cite no case law for the proposition that a speculative future event that has not occurred at the time the judgment is entered, and may never occur, can be a basis for finding a statute that does not provide for the reduction of damages nonetheless imposes an unconstitutional damage cap. Moreover, further demonstrating that the statute is not in any way arbitrary, Section 538.220 takes into account the very concerns raised by Plaintiffs by providing for the

continued payment of any outstanding expenses even after the death of Thomas Tharp, and by allowing the trial court to consider evidence of his anticipated lifespan and St. Luke's potential for bankruptcy, among other things, when determining how to structure the award and the duration of the periodic payments ordered.

In particular, if Thomas Tharp were to die before all four remaining payments were made, the payments would continue to be put to any outstanding medical bills or expenses for his injury, even after his death, as they were intended. *See* Section 538.220.5. Therefore, Plaintiffs' actual complaint is that in the event Thomas Tharp should die before all payments are made, he may lose the potential windfall of any unused future damage payments. There is simply no support for the proposition that periodic payments are unconstitutional because they may prevent a plaintiff's estate from receiving a windfall of unspent future damages.

Moreover, by permitting the trial court the discretion to take into account a plaintiff's anticipated life expectancy in determining the duration and amount of the payments, Section 538.220.2 specifically addresses and accounts for Plaintiffs' hypothetical scenario positing an early death of Thomas Tharp. Similarly, Section 538.220.2 permits the trial court to determine the interest rate on the future periodic payments, and Section 538.220.3 allows the trial court to require that a judgment debtor that is deemed not adequately insured to post security or purchase an annuity adequate to ensure the full payment of the damages awarded. Therefore, Plaintiffs' complaint that Thomas Tharp may not receive the full benefit of his damage award under Section 538.220.2 due to death, mismanagement, or bankruptcy is unfounded.

**3. Plaintiffs' citation to *Watts v. Lester E. Cox Medical Centers* does not compel a different conclusion.**

Plaintiffs place much reliance on *Watts v. Lester E. Cox Medical Centers*, in which this Court held that a statutory cap on damages for common-law claims was unconstitutional. However, Plaintiffs ignore that the Court's decision in *Watts* specifically left the periodic payment provision of Section 538.220.2 intact. The Court in *Watts* examined whether Section 538.210, which limited non-economic damages in medical malpractices cases to \$350,000, unconstitutionally infringed on a plaintiff's right to a jury trial. 376 S.W.3d at 636. In that instance, the Court declared Section 538.210 unconstitutional because the jury awarded the plaintiff more than \$1.4 million in non-economic damages and the statute required the trial court to reduce that amount to a quarter of what was actually awarded.

The plaintiff in *Watts* also argued that Section 538.220 was "arbitrary and unreasonable" because the statute prevents plaintiffs from receiving the full amount of compensation awarded by the jury. *Id.* at 646. The Court recognized that Section 538.220.2's purpose is to spread the cost of medical malpractice liability out over time, and guard against the early squandering of judgments that may result in future reliance of government social services. *Id.* The Court, noting that it "will interpret a statute in a manner that renders it constitutional," determined that the statute was not arbitrary and unreasonable because the statute allowed the trial court to consider the plaintiff's needs as well as the facts of the particular case before deciding how or whether future damages would be paid over a periodic payment schedule. *Id.* at 647.

As to the plaintiff's argument that he would be prevented from the receiving the full amount of compensation awarded, the Court in *Watts* noted the jury had discounted the plaintiff's future medical damages to present value, and, therefore, the payment of that sum in installments would not give him the full value of the jury's award. *Id.* at 648. Therefore, the Court remanded the matter so that the trial court could enter a new periodic payment schedule that aligned the future damage interest rate consistent with the present value deduction that would ensure that the plaintiff would receive the full benefit of the jury's award of damages for future medical care over the payment periods. *Id.* However, the Court did not suggest that the periodic payments themselves in any way deprived the plaintiff of the full amount of compensation awarded, provided that, as here, they added up to a distribution over time of the total amount awarded.

Thus, the Court in *Watts*, while having the opportunity to do so, did not interpret the Section 538.220.2 periodic payment provision as a damage cap such that it would be subject to challenge under the Missouri Constitution, as Plaintiffs now attempt to do.

**4. Section 538.220 does not prohibit the immediate enforcement of the Amended Judgment so as to violate Plaintiffs' right to a jury trial.**

Plaintiffs further argue that before 1820 the right to immediate enforcement and execution of a judgment was considered a fundamental attribute to the right to trial by jury, and, therefore, they have the right to immediate receipt of the entire damage award. However, nothing in Section 538.220.2 prohibits Plaintiff from executing on or enforcing the judgment entered. "A writ of execution is merely a command to the court to carry the

judgment into effect,” and, moreover, an execution “can only correspond with the judgment on which it is founded.” *State ex rel. Turner v. Sloan*, 595 S.W.2d 778, 781 (Mo. App. W.D. 1980). This appeal aside, the trial court’s amended judgment may be immediately enforced and executed as written so as to allow Plaintiffs to collect the damages immediately owed, and begin the collection of damages paid through periodic payments and the running of interest on such payments. Plaintiffs’ argument confuses Thomas Tharp’s ability to execute upon the judgment entered with his disagreement over the manner in which the trial court rendered that judgment.

The issue here comes down not to whether Plaintiffs have been prevented from executing on the judgment, which they have not, but whether the trial court’s amendment of the judgment in conformity with Section 538.220.2 violated their right to a jury trial. While the right to a jury trial may be inviolate, this Court has recognized that the power of the courts to control jury verdicts existed at common law at the time of the adoption of Missouri’s Constitution, including the right to take away a jury’s damage award altogether. In particular, Section 537.068 and Missouri Supreme Court Rule 78.10, reinstating the remittitur and additur procedures, were modeled on common-law practice, and in particular, the courts’ authority and discretion to grant a new trial. *Klotz*, 311 S.W.3d at 778 (Wolff, J., concurring); *Badahan v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013).

Therefore, the Court has recognized that a statute may permit a trial court to exercise some control over a jury verdict without running afoul of the constitutional right to trial by jury, when such control is based on the court’s discretion as guided by the evidence

adduced at trial. *Id.* Here, any alteration to the jury’s verdict under Section 538.220.2 must be based on the trial court’s discretion of how and whether such alternation should be made, on the basis of the evidence adduced at trial. Moreover, similar to remittitur and additur, where a party may opt for a new trial rather than accept the addition or reduction of damages, should a party disagree with the proposed payment schedule, Section 538.220.2 permits any party to call for a post-trial evidentiary hearing on the issue.

Finally, unlike remittitur and additur, which utterly nullify a jury’s verdict, any amendment to a verdict under Section 538.220 may be viewed not as an alteration at all, but rather, merely further clarification of the jury’s verdict. It is the jury that determined the amount of future damages, distinguishing those damages from past damages. In providing for future damages, any amendment to the verdict does not alter the verdict, but merely serves to interpret the verdict precisely as rendered. Therefore, Section 538.220.2 does not even require an examination into the court’s historic right to exercise control over a verdict because, in merely providing for the payment of future damages in the future, Section 538.220.2 requires no alteration to the verdict’s substance. *See, e.g., Kahn v. Prah*, 414 S.W.2d 269, 278 (Mo. 1967) (no error where “entering the judgments did not constitute a substitution of court verdict for jury verdict or change the substance of the verdict”).

**5. The jury’s verdict remains the “sole” basis for the judgment entered under Section 538.220.**

Plaintiffs finally argue the jury’s verdict must be the “sole” basis for the judgment entered by the trial court, and, therefore, by allowing the trial court to amend that verdict by ordering the periodic payment of the future damages awarded under Section 538.220.2

infringes upon this verdict. Yet, as explained above, the jury's verdict in this instance was the "sole" basis for the amended judgment entered. Again, the jury specifically awarded both past and future damages, and the amended judgments reflect those future damages in period payments as required by statute. The statute does not permit the trial court to reduce any damages awarded, or redefine the nature of any damages. By ordering payment of damages deemed "future damages" by the jury in the future, rather than the present, the jury's verdict is being rendered precisely as written, and, therefore, is the "sole" basis for the judgment entered. Therefore, Section 538.220.2 does not permit a trial court to unconstitutionally amend, change, or substitute a jury's verdict, but rather, allows it to give effect to the verdict as written.

Moreover, even if Section 538.220.2 were interpreted to necessitate the redistribution or reclassification damages, the Court has allowed a trial court to make such alterations to a jury's award of damages under Section 538.220, demonstrating that the designation and distribution of damages awarded by the jury is properly within the trial court's purview. In *Sanders v. Ahmed*, the trial court refused to grant periodic payments of future damages under Section 538.220. 364 S.W.3d 195 (Mo. banc 2012). The jury had awarded the plaintiff \$7.5 million in future non-economic damages, and \$1.7 in past non-economic damages. *Id.* at 206. However Section 538.210, which was applicable due to the fact that the action was a wrongful death claim, reduced the recoverable non-economic damages to less than \$1.2 million. *Id.* And, insomuch as the total amount of recoverable non-economic damages was less than the past damages awarded by the jury, the trial court assigned all remaining non-economic damages as "past" damages such that they were

payable immediately under Section 538.220.1. *Id.* On appeal, this Court held that this “assignment” of the remaining damages as “past damages,” such that they were payable immediately, was within the trial court’s discretion. *Id.*

While here there is no issue of damage caps or the reassignment of the nature of the damages awarded, the Court’s decision in *Sanders* can be read more generally for the proposition that while the jury’s damage award must be the “sole” basis for the judgment, the trial court has the discretion to assign and distribute those damages, where required by statute, for purposes of the final judgment entered. The Court in *Sanders* did not question the constitutionality of this permissible use of the discretion. Accordingly, while the jury’s verdict was the “sole” basis for the judgment entered in this case because the full amount was awarded and distributed according to the jury’s designations of such damages, even if Section 538.220.2 had required the trial court to reclassify or redistribute the damages in this instance, any such alterations would have been within the trial court’s discretion and not run afoul of Plaintiffs’ right to a jury trial.

#### **D. Conclusion**

The party challenging the validity of a statute has the burden of proving the statute “clearly and undoubtedly” violates the Missouri Constitution. *Mixon*, 391 S.W.3d at 883. Here, Plaintiffs have failed to show that Section 538.220.2 even arguably violates the Constitution. Therefore, the Court should affirm the trial court’s judgment, including the periodic payment schedule entered, and deny Plaintiffs’ request to hold Section 538.220.2 unconstitutionally infirm on the basis that the statute impedes or infringes upon the right to a trial by jury.



II. The trial court did not err in applying Mo. Rev. Stat. § 538.220 to Plaintiff Thomas Tharp's award of future damages in excess of \$100,000 because Section 538.220 does not violate Article II, §1 of the Missouri Constitution in that the statute does not usurp the trial court's right to enter judgment on the jury's verdict or deprive Plaintiffs of a right to future damages.

**A. Introduction**

Plaintiffs' second argument is somewhat redundant of their first argument. Plaintiffs, in Section (B) of their brief, argue Section 538.220 violates the Missouri Constitution in that the statute's periodic payment provision constitutes an impermissible legislative interference with, and usurpation of the power of, the judicial branch. Plaintiffs base this argument on their assertion that Section 258.220: (1) interferes with the judicial branch's power to pronounce judgments in conformance with the jury's verdict; (2) mandates a legislative cap on future damages; (3) deprives plaintiffs of the judicial assistance to obtain prompt satisfaction of judgment damages; and (4) improperly pronounces an unpaid judgment as satisfied. Accordingly, Plaintiffs' second argument mainly recasts their deprivation of a right to a trial by jury argument as a separation of powers issue.

It is already well-established that the legislature can place reasonable limitations on common-law causes of action and remedies without violating the separation of powers. Therefore, the Court should refuse to find Section 258.220 unconstitutional, and affirm the trial court's judgment providing for periodic payments of the future damages awarded.

**B. Section 538.220 does not unconstitutionally infringe on the separation of powers because the legislature may place reasonable restrictions on common-law remedies.**

Plaintiffs' separation of powers argument in Section B rests principally on broad black-letter law addressing the distinction between the three branches of government, which St. Luke's will not reiterate here. The crux of Plaintiffs' substantive argument, however, appears to be that by requiring a court to enter a judgment containing a periodic payment schedule for the future damages awarded by the jury, Section 538.220 infringes on the judiciary's ability to enter a judgment in accordance with the jury's verdict. Specifically, Plaintiffs argue Section 538.220 "compels the trial court to enter a judgment that significantly differs from the verdict, that substantially alters the fundamental incidents and consequences attending the verdict and original judgment, and that deprives plaintiffs of the enforcement rights the constitution preserves." (App. Br. 34.)

At the outset, Plaintiffs' argument fails because this Court has previously determined that Section 538.220 is a limitation on a remedy, and that "[p]lacing reasonable limitations on common-law causes of action is within the discretion of the legislative branch and does not invade the judicial function." *Fust v. Attorney General for the State of Mo.*, 947 S.W.2d 424, 430-31 (Mo. banc 1997). *See also Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. banc 2012) (holding Section 538.220 does not violate the separation of powers because it is "simply a limitation on a remedy," and the legislature may place limits on statutorily created remedies, while also noting that in *Fust*, the Court had previously held the same for limitations on common-law remedies).

Additionally, Plaintiffs' separation of powers argument necessarily relies on the premise that Section 538.220.2 requires the trial court to enter a judgment substantially different from the verdict rendered by the jury, thus infringing upon the courts' power to pronounce and enforce judgments. *See Chastain v. Chastain*, 932 S.W.2d 396, 399 (Mo. banc 1996) ("The authority that the constitution places exclusively in the judicial department has at least two components—judicial review and the power of the courts to decide issues and pronounce and enforce judgments."). As already explained in detail above, by requiring a court to enter a judgment that provides for the payment of future damages in the future, subject to the court's discretion as to how and when such payments should be made, Section 538.220.2 does not require any substantial or material change to the jury's verdict. Rather, Section 538.220.2 provides for the entry of a judgment precisely in accordance with the jury's damage determinations.

Moreover, judicial review addressing the infringement on the judiciary's power to "pronounce and enforce judgments" has traditionally focused on instances where the legislature enacts legislation that is viewed as granting a non-judicial body the power to enter judgments, not where the legislature enacts legislation that alters the content of the judgment entered. For instance, in *Dabin v. Director of Revenue*, this Court held there was no separation of powers issue where a statute allowed traffic commissioners to hear and make findings on the merits of certain state law violations, so long as the circuit court ultimately entered the judgment that was rendered. 9 S.W.3d 610, 614 (Mo. banc 2000). The Court so ruled because the separation of powers clause "primarily separates powers, not functions." *Id.* (citing *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. banc 1993)).

Here, Section 538.220.2 in no way removes the judiciary’s authority to pronounce and enforce judgments. Indeed, in this instance, the trial court pronounced and entered a judgment, albeit with one that Plaintiffs disagree.

Nor does Section 538.220.2 usurp the court’s discretion in entering a judgment because it remains the court’s function to determine the details of any periodic payment scheduled entered. *See Kyger v. Koerper*, 207 S.W.2d 46, 49 (Mo. banc 1946) (“[T]he Legislature cannot entirely exclude the exercise of the discretion of the Court.”). For example, in *Mahoney v. Doerhoff Surgical Services, Inc.*, this Court refused to find a separation of powers violation stemming from a statute that required a plaintiff seeking to bring a malpractice claim to provide an affidavit from a healthcare provider stating that the claim has merit before the lawsuit may proceed. 807 S.W.2d 503, 510 (Mo. banc 1991). The plaintiff argued that this requirement usurped the judiciary’s inherent power as a factfinder by conferring that power to health providers, and could potentially lead to a denial of relief altogether. *Id.* The Court disagreed, holding the statute ultimately allowed the court, with the guidance of the evidence contained in the medical provider’s affidavit, to determine whether a claim should proceed on the merits, thus preserving the court’s inherent powers. *Id.*

In upholding the affidavit statute, the Court in *Mahoney* further noted that the statute “does no more than aid the court in its inherent function to do those things necessary for the administration of justice in civil actions,” and, moreover, “works to unburden rather than burden the administration of justice.” *Id.* The analysis here is no different. Section 538.220.2 retains the court’s discretion in making findings of fact based on the evidence

presented in entering its judgment, and aids the court in its inherent function to render judgments in accordance with a jury's verdict. Specifically, the statute permits the court to enter a judgment that takes into account the evidence adduced at trial and the jury's designation of damages, fashion a judgment that provides for the payment of future damages when they are incurred, and eliminates the risk that such damages will be immediately squandered, making them unavailable to make future payments as needed.

Therefore, Plaintiffs present no viable theory as to how Section 538.220 infringes on the courts' inherent powers as the statute does not usurp or appropriate any such power, and the legislature has long been held to have the authority to place reasonable limitations on common-law remedies. While Plaintiffs' separation of powers argument should be denied on this basis alone, because Plaintiffs also include a bullet-point list of the various ways in which Section 538.220 may violate the separation of powers, St. Luke's addresses each of those points briefly below.

**C. None of the unsupported, speculative theories that Plaintiffs put forth as to how Section 538.220 violates the separation of powers compels a different result.**

Plaintiffs conclude their argument with a list of bullet points that appears to assert various theories as to how Section 538.220 could be found to violate the separation of powers. These theories are set forth without citation to any supporting law, and without any factual basis in the record. Therefore, St. Luke's only briefly address each of these points in a similar manner for the sake of completeness.

- **Section 538.220.2 does not hinder the immediate enforcement of the judgment entered, and limitations on common-law remedies have been held not to run afoul of the separation of powers.**

Plaintiffs do not explain how their alleged inability to immediately enforce the judgment implicates the separation of powers, but regardless, as explained above, nothing in the statute prevents the enforcement of the judgment as entered. Again, Plaintiffs' issue is with the judgment's content, as entered by the trial court, and, in particular, the periodic payments the trial court ordered, and not with their ability to enforce or execute on the judgment as written. To the extent Plaintiffs are complaining that Section 538.220.2 deprives *the court* of the power to enforce judgments as rendered, as they must for purposes of making a separation of powers argument, as explained above, Section 538.220 does not prevent the courts from rendering a judgment, and this Court has already held that a legislative limitation on a common-law remedy does not invade the judiciary's function to provide for the enforcement of judgments. *See Fust*, 947 S.W.2d at 430-31.

- **Section 538.220.2 does not proscribe how judgment creditors may seek court assistance in collecting a judgment, nor does the statute entirely prohibit the execution of a judgment.**

Barring this appeal, the judgment here may be executed and collected upon as entered. Section 538.220.2 in no way limits a plaintiff's rights to garnishment, collection, or liens. Moreover, even if the statute had an impact on Plaintiffs' collection rights, which it does not, the statute would not implicate the judiciary's powers for purposes of a separation of powers argument.

- **Section 538.220.2 does not relegate the judiciary to an “inferior status” reliant on legislative permission.**

Section 538.220 leaves intact the court’s ability to enter and enforce judgments, and, moreover, provides a mechanism for the courts to craft judgments that better reflect the jury’s verdict, as determined by the court’s discretion. Nothing about this perfectly reasonable safeguard on future damages reduces the courts to “inferior status,” nor does the statute contain language requiring that the courts seek “permission” from the legislature on any matter.

- **Section 538.220.2 does not compel the entry of a judgment that is not based solely on the verdict or impose a “secret reduction” in the award of future damages that can “spring into existence.”**

The application of Section 538.220 requires no substantial or material change to the jury’s verdict, but rather, provides a mechanism for rendering the judgment precisely as defined by the jury. The “secret reduction” upon death that underlies Plaintiffs’ complaint has no impact on the judiciary’s powers, and, moreover, the statute provides the courts with the discretion to consider and account for this very scenario in rendering judgments.

- **Section 538.220.2 does not extinguish the right of recovery upon the event of a plaintiff’s death, and the separation of powers is not implicated by speculation that a plaintiff’s heirs will not receive a windfall.**

Plaintiffs are incorrect that Section 538.220 extinguishes the right to recovery upon the death of a plaintiff because Section 538.220.5 specifically provides for continued

payment of any outstanding related expenses incurred, and, moreover, any alleged hindrance of the recovery rights of Plaintiffs or their heirs has nothing to do with whether the judiciary's power itself is being infringed upon by the statute.

- **Section 538.220.2 does not operate as legislative remittitur because the statute places no caps on damages.**

Remittitur is the lowering or elimination of the amount of damages assessed by a jury. As explained above, Section 538.220 does not limit, reduce, or cap damages. Rather, it requires that all damages assessed by the jury be accounted for in the judgment, and as such, cannot be held to be a "legislative remittitur."

- **Section 538.220.2 does not burden a plaintiff's heirs, nor if it did would such a burden implicate any separation of powers issue.**

Thomas Tharp has not died and his heirs have incurred no hardship. Therefore, the Court should not consider holding a statute unconstitutional on the basis of this speculative scenario that has not yet occurred, and which may never occur, particularly where the statute provides for the court to take this scenario into account when fashioning the final judgment. Moreover, even if this scenario had occurred, the hardship to Plaintiffs' heirs, again, has nothing to do with whether the judiciary's power is being infringed by the statute.

- **Section 538.220.2 does not turn the legislature into a "super-court" able to pronounce unpaid judgments as satisfied.**

Plaintiffs do not explain how this "super-court" legislature pronounces unpaid judgments as satisfied. The statute includes no language or provision that permits the



legislature, the court, or any other authority to deem a judgment satisfied, let alone to deem an unpaid judgment satisfied.

Accordingly, none of the unsupported legal theories or hypothetical scenarios posited by Plaintiffs is sufficient to show that Section 538.220 violates the separation of powers by infringing upon the judiciary's inherent powers. As Plaintiffs note in their closing, juries provide a "source of legitimacy for judicial judgments." By giving the courts the authority and directive to fashion judgments that better reflect the jury's verdict, including the jury's assessment and designation of damages, Section 538.220 works to help the courts better advance the administration of justice, not hinder it. Indeed, juries, and thereby the judicial process, are far more undermined by circumstances where the jury accesses damages intended to provide for a plaintiff in the future, only to have such damages not be available when they are actually needed because they have already been prematurely paid out and squandered.

Section 538.220 not only does not unconstitutionally infringe on the separation of powers, but rather, based on the court's discretion and subject to the parameters of the jury's verdict, works to further aid the judiciary in the execution and administration of its inherent powers.

#### **D. Conclusion**

The party challenging a statute's validity has the burden of proving that the statute "clearly and undoubtedly" violates the Constitution. *Mixon*, 391 S.W.3d at 883. Here, Plaintiffs have failed to set forth any legal theory that could support a finding that Section 538.220 infringes upon the separation of powers. The statute leaves intact both the court's

discretion and its power to enter judgments, and, moreover, provides the courts with a mechanism to enter such judgments in more precise conformity with the jury's verdict, thereby preserving both the judiciary's inherent powers and the jury's vital role within the judicial process. Therefore, the Court should affirm the trial court's judgment, including the periodic payment schedule, and deny Plaintiffs' request to hold Section 538.220.2 unconstitutional on the basis that it violates the separation of powers.

III. Section 538.220 does not violate Article I, Section 26 of the Missouri Constitution, because the “takings clause” prevents the State from taking private property for public use absent just compensation, and periodic payments under Mo. Rev. Stat. § 538.220 do not deprive Plaintiffs of any private property because the judgment and judgment proceeds are not private property as contemplated by the takings clause; the proceeds have not been taken because Plaintiffs maintain the right to immediately execute on the judgment and have lost no right to future medical payments through Section 538.220’s application, and they were justly compensated through the imposition of interest on the future periodic payments.

**A. Introduction**

Plaintiffs next argue Section 538.220 materially interferes with their right of immediate execution on the judgment by requiring periodic payments and, in so doing, violates the takings clause of the Missouri Constitution. They assert Section 538.220 amounts to an appropriation of these funds for a public purpose. Their argument should be rejected. To establish a takings clause violation, Plaintiffs must show that the State took their private property for public use without just compensation. This Plaintiffs cannot do, because there is no private property at issue, there has been no property taken, and there is no lack of just compensation.

In the first instance, Plaintiffs have not been deprived of any private property. Plaintiffs provide no support for their argument that the judgment or judgment proceeds qualify as private property under the takings clause. Further, the taking contemplated by Plaintiffs is the alleged interference with their right to immediate execution of the judgment

presented by Section 538.220's application. As discussed in detail in Points I and II of this Brief, Plaintiffs maintain their right to execute on the judgment as entered by the trial court.

Plaintiffs further complain that if Thomas Tharp were to die before the final periodic payment, they would be deprived of any remaining future periodic payments. However, these payments run only to the award of future medical expenses, which would dissipate in the event of a plaintiff's death, and the termination of the periodic payments after all medical bills are satisfied serves only to prevent a windfall.

Moreover, even if Section 538.220 impacted private property and constituted a taking, the statute would still not violate the takings clause. For a constitutional violation under the takings clause, the Plaintiffs must show that they were not justly compensated for the taking. To the contrary, Section 538.220 explicitly requires imposition of interest on future period payments, such that Plaintiffs will be compensated for the temporary loss of use of these payments. Moreover, there is an immediate redress should Plaintiffs wish to challenge the trial court's exercise of its discretion in determining the amount or length of periodic payments, including the impact of the interest amount, namely, an appeal of the judgment. As discussed above, Plaintiffs have made no such challenge in this case.

**B. The takings clause provides citizens with a redress to balance the State's power to take private property through the exercise of eminent domain.**

"The power of eminent domain is the inherent power of a State to take private property." *City of Kansas City v. Powell*, 451 S.W.3d 724, 734 (Mo. App. W.D. 2014), as modified (Nov. 25, 2014) (citing *City of Kansas City v. Hon*, 972 S.W.2d 407, 409 (Mo. App. W.D. 1998)). The Missouri Constitution limits this power by providing:

That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested.

MO. CONST. ART. I, § 26. The takings clause allows the State to exercise its inherent power of eminent domain so long as the purpose for which land is to be taken is a public purpose and the State pays just compensation. *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 476 (Mo. banc 2013).

Plaintiffs acknowledge there has been no direct condemnation of any private property through eminent domain in this case. (Appellants' Brief at 38) Plaintiffs instead argue they may pursue an inverse condemnation action for the intentional indirect taking of their private property for public use. (*Id.*) Plaintiffs' argument should be denied because the State has not exercised its eminent domain rights through either a direct or indirect taking of Plaintiffs' private property.

**C. The State did not deprive Plaintiffs of any private property by trial court's application of Section 538.220 in entering the final judgment.**

In the first instance, Plaintiffs correctly note that Missouri courts have held that private property subject to the takings clause includes personal property, and not merely real property. *Shade v. Missouri Hwy. and Trans. Comm'n*, 69 S.W.3d 503, 516 (Mo. App. W.D. 2001). However, as in *Shade*, the courts have only addressed tangible personal

property. *Id.* (personal property includes damage to apartment complex from flooding caused by grading of highway); *See also Wolfe v. State ex rel. Mo. Hwy. and Trans. Comm'n*, 910 S.W.2d 294 (Mo. App. W.D. 1995) (plaintiff could seek just compensation for crusher rock acquired by Commission to build highway). However, Plaintiffs provide no authority to support their argument that a judgment, or any amounts owed under a judgment, constitute private property under the takings clause. If the State did not deprive Plaintiffs of any private property, then the takings clause may not be applied to render Section 538.220 unconstitutional.

Moreover, even if the judgment or judgment proceeds constitute private property, which St. Luke's disputes, no proceeds were taken by the application of Section 538.220. Plaintiffs first argue that Section 538.220 "takes" the judgment proceeds by interfering in their right to the immediate execution of the judgment. As discussed in detail above, Plaintiffs retain inviolate the right and ability to immediately execute on this judgment, barring this appeal. That Plaintiffs take issue with the judgment as rendered by the trial court does not prevent their ability to execute upon that judgment, notwithstanding this appeal.

Moreover, the courts' power to exercise the authority to control jury verdicts is well established, including the rights of additur, remittitur, or to take away a jury's damage award altogether, and there has been no suggestion that such actions run afoul of the takings clause. *Klotz v. St. Anthony's Medical Ctr.*, 311 S.W.3d 752, 778 (Mo banc 2010) (Wolff, J., concurring); *Badahan v. Catering St. Louis*, 395 S.W.3d 29, (Mo. banc 2013). Simply

put, Plaintiffs has not been deprived of the judgment proceeds or their right to execute on the judgment to secure those proceeds.

Plaintiffs further invoke the takings clause based on the argument that should Thomas Tharp die within four years of execution on the judgment, before the periodic payments are complete, the remaining payments would not be collectible. As discussed in greater detail above, if Thomas Tharp were to die before all four remaining payments were made, the payments would continue to be made to address any outstanding medical bills or expenses related to his injury, even after his death, as they were intended. *See* Section 538.220.5. Moreover, Section 538.220.2 provides the trial court the discretion to determine how the periodic payments will be made, which allows the trial court to take into account a plaintiff's anticipated life expectancy when determining the duration and amount of the payments.

At most, Plaintiffs complain that Thomas Tharp's heirs would be deprived of a windfall of unpaid future damages in the event of Thomas Tharp's death because any such unpaid damages would remain with Defendants. Under such circumstances, no taking can be held to have been made through eminent domain by the entry of a judgment in compliance with Section 538.220 so as to implicate the takings clause.

**D. Any alleged taking through the application of Section 538.220 is not done so without just compensation so as to trigger the takings clause.**

Finally, even if the judgment or judgment proceeds constitute private property under the takings clause, and even if such property could be deemed taken by Section 538.220's

application, which St. Luke's denies, Section 538.220 provides the constitutionally required just compensation.

Plaintiffs appear to concede that if the imposition of periodic payments is considered a taking, it would only be a temporary taking. When there is a temporary taking, just compensation requires payment for the loss in value or loss of use of the property. *See, e.g., Byrom v. Little Blue Valley Sewer District, et al.*, 16 S.W.3d 573, 577 (Mo. banc 2000); *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 330 (Mo. 2015). Here, Section 538.220 ensures that Plaintiffs are compensated for the loss of use of any funds through the application of interest on future periodic payments. Section 538.220.2 provides, in part:

The court shall apply interest on such future periodic payments at a per annum interest rate no greater than the coupon issue yield equivalent, as determined by the Federal Reserve Board, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills settled immediately prior to the date of the judgment.

This interest payment compensates plaintiffs for any loss of use of the funds during the pendency of the periodic payments. Moreover, trial courts have discretion under Section 538.220 to determine the length and amount of periodic payments in order to ensure that the plaintiff receives the full "benefit of the jury's award for future medical care." *See Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 648 (Mo. banc 2012).

If Plaintiffs wish to challenge the exercise of that discretion, they need not file a separate inverse condemnation action because they have an immediately available remedy,



namely, appealing the trial court's judgment. *Id.* In this case, Plaintiffs chose not to challenge the discretion exercised by the trial court.

Plaintiffs further suggest they have the right to a jury trial to ensure that a just compensation is paid. However, this right would attach if an inverse condemnation action were filed, if at all. Here, Plaintiffs have no right to an inverse condemnation action<sup>1</sup> because they have received just compensation for the periodic nature of the payments under Section 538.220 and may file an appeal to challenge the structure of the periodic payments, including the impact of the interest amount. Thus, insomuch as Section 538.220 ensures that Plaintiffs received just compensation for their loss of use of funds during the periodic payments schedule, the statute does not violate the takings clause.

#### **E. Conclusion**

While Plaintiffs argue Section 538.220 violates the takings clause, they are unable to establish any of the prerequisites for application of this constitutional provision. The takings clause prohibits the State from taking private property for public use without just compensation. Plaintiffs provide no support for their contention that the judgment or judgment proceeds constitutes private property as contemplated by the takings clause.

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<sup>1</sup> Plaintiffs argue, without explanation, that *res judicata* or collateral estoppel likely prevents Plaintiffs from filing an inverse condemnation suit. (Appellant's Brief, pg. 42, fn. 6) Plaintiffs are prevented from bringing an inverse condemnation action because they have received just compensation for the periodic nature of the payments under Section 538.220, and not due to application of *res judicata* or collateral estoppel.

Moreover, even if the judgment proceeds were deemed to be private property for purposes of the taking clause, there is no showing that this property has been “taken” by the State.

Contrary to Plaintiffs’ argument, they retain the right to immediately enforce the judgment, nor will they lose their right to future medical payments should Thomas Tharp die before the payments conclude because the periodic payments will continue on his death until his medical bills are paid. Finally, even if Plaintiffs could overcome these initial hurdles, Section 538.220 would still not be unconstitutional under the takings clause because the statute explicitly requires the imposition of interest on future periodic payments, such that Plaintiffs are compensated for any loss of use of these funds.

IV. The trial court did not err in applying Mo. Rev. Stat. § 538.220 to Plaintiff Thomas Tharp's award of future damages in excess of \$100,000 because Section 538.220 does not violate the prohibition against the enactment of special laws providing or changing methods for the collection of debts or the enforcement of judgment in that Section 538.220 does not meet the definition of a special law in the first instance, and, moreover, does not violate the separation of powers or Plaintiffs' right to a jury trial because Section 538.220 does not require the trial court, substantially or materially, to alter the jury's verdict, does not prohibit the immediate execution on the judgment, and does not prevent Plaintiffs from recovering the full damage award.

**A. Introduction**

Plaintiffs, in their final challenge to Section 538.220, argue the statute violates MO. CONST. ART. III, § 40(4)'s prohibition against the enactment of special laws providing for or changing the methods for the collection of debts or the enforcement of judgments. Plaintiffs claim this constitutional provision "confirms the inviolability of the right to trial by jury ... by protecting judgment creditors from special legislation impairing their enforcement rights ..." and also that it "tends to reaffirm the separation of powers doctrine by which the courts have the exclusive power to pronounce and enforce judgments." (App. Br. 46-47.) Again, Plaintiffs have simply rehashed their right to trial by jury and separation of powers arguments under the guise of a special laws argument. Therefore, as shown above, since Plaintiffs cannot demonstrate that Section 538.220 infringes upon the right to trial by jury or upon the separation of powers, so too must their special laws argument fail.

Moreover, Section 538.220 does not meet the definition of a “special law” such that the statute could run afoul of Article III, Section § 40(4) in the first instance. A “special law” is aimed at certain persons or things of a fixed and immutable class.

Here, Plaintiffs do not even attempt to identify to which particular group of persons or things Section 538.220 is aimed, or how that alleged group consists of those with fixed and immutable traits such that the law can only be intended to target a specific, identifiable group. Thus, insomuch as Plaintiffs have failed to first demonstrate that Section 538.220 is a “special law,” no further analysis addressing the statute’s constitutionality under the constitution’s prohibition against special laws is necessary. Plaintiffs’ request that the Court find Section 538.220 unconstitutional on this basis should therefore be denied.

**B. Plaintiffs make no argument as to how Section 538.220 qualifies as a “special law,” nor can they because Section 538.220 is not aimed at any fixed and immutable class of persons or things.**

The constitutional provision relied upon by Plaintiffs states: “The general assembly shall not pass any local or special law ... providing or changing methods for the collection of debts, or the enforcing of judgments ....” MO. CONT. ART. III § 40(4). A general law is a “statute which relates to persons or things as a class,” while a special law is “a statute which relates to *particular persons or things* of a class.” *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006) (emphasis in original); *see also City of DeSoto v. Nixon*, 476 S.W.3d 282, 286 (Mo. banc 2016) (a special law is “one made for individual cases or for particular places or districts; one operating upon a selected class, rather than upon the public generally.”).

Generally, in determining whether a statute or ordinance qualifies as a “special law,” courts assess “whether the law is based on open-ended or closed-ended characteristics.” *City of DeSoto*, 476 S.W.3d at 287; *see also City of Springfield*, 203 S.W.3d at 184 (“whether a law is special or general can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic”). “Classifications premised upon factors that can change (*e.g.*, population) are “open-ended” and are presumed constitutional.” *Trophy Room v. City of St. Louis*, 534 S.W.3d 340, 348 (Mo. App. E.D. 2017) (citing *City of Normandy v. Greitens*, 518 S.W.3d 183, 191 (Mo. banc 2017)).

For example, the Court has concluded that a statute imposing tax caps on certain cities is a special law, *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 182–87 (Mo. banc 2006), as well as a statute governing funding for all public defender offices that specifically exempted one judicial circuit, *State ex rel. Public Defender Comm’n v. County Court of Greene Cty.*, 667 S.W.2d 409, 412 (Mo. banc 1984). Alternatively, the Court has refused to rule that a statute regulating advertising in residential districts was a special law because the statute at issue targeted “all” advertising in “all” residential districts. *Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 811 (Mo. banc 1985).

Here, Plaintiffs have not explained what specific group Section 538.220 targets or how that group is defined by fixed and immutable characteristics. Nor can they do so because Section 538.220 is applicable to anyone who prevails on a medical malpractice claim. Nor can it be argued that those who bring malpractice claims constitute a fixed,

immutable group of people such that any law aimed at them would constitute a “special law.” Indeed, if this were the case, any statute addressing any cause of action would be susceptible to a special laws challenge on the basis that the statute targets those who bring that cause of action, which is clearly not the state of the law nor the intention of the Constitution. Therefore, Plaintiffs’ argument that Section 538.220 is an unconstitutional “special law” necessarily fails because Plaintiffs have not even explained how Section 538.220 is a special law in the first instance.

**C. Section 538.220 does not “interfere with the judicial machinery” for collecting debts or enforcing judgments in medical malpractice claims.**

Instead of explaining how Section 538.220 falls within the definition of a “special law,” such that it would subject to constitutional analysis under Article III, Section 40(4), Plaintiffs reassert their separation of powers argument, claiming the courts’ ability to collect and enforce judgments is unconstitutionally limited as to a “certain class of personal injury suits.” Again, persons bringing malpractice claims are not a fixed and immutable group so as to fall within Article III, Section 40(4). Moreover, as explained above, Section 538.220 does interfere with the judiciary’s inherent powers because the statute does not: (1) require the courts to enter a judgment materially different from the jury’s verdict; (2) prevent judgment creditors from commencing immediate execution of judgment; (3) bar courts from making available “judicial machinery” for enforcing and collecting debts; or (4) place judgment creditors at the mercy of judgment debtors or their insurers should plaintiff die before all periodic payments are made.

St. Luke's has addressed these arguments already, and needs not get into great detail about them here, particularly where there is no special law at issue to analyze under Plaintiffs' point. As to the first contention, Section 538.220 does not require any substantial or material alteration of the jury's verdict because the full damage award must be accounted for, as designated by the jury's verdict. As to the second contention, nothing, aside from this appeal, is stopping Plaintiffs from commencing execution of the judgment as entered. For Plaintiff's third contention, they have not identified what "judicial machinery" they or the courts have been denied. Again, barring this appeal, Plaintiffs have every right to collect any monies from the judgment immediately owed, and ensure future collection of payments as provided for. Finally, as to the fourth point, the statute provides for the hypothetical scenario asserted by Plaintiffs by ordering the continued payment of medical expenses even after a plaintiff's death, and by providing the court with discretion in fashioning the payment schedule and requiring the payment of interest.

**D. Section 538.220 need not be "strictly scrutinized" for purposes of determining whether it violates equal protection guarantees on Plaintiffs' right to a trial by jury because Section 538.220 does not infringe upon Plaintiffs' right to a trial by jury, nor is it a special law in the first instance.**

Ignoring there is no argument establishing that Section 538.220 constitutes a "special law" aimed at a fixed and immutable group of persons, Plaintiffs nonetheless maintain the statute should be analyzed to determine whether it violates equal protection guarantees by depriving Plaintiffs of their right to a trial by jury.

As an initial matter, an equal protection analysis of an alleged special law is used where laws are alleged to “apply to less than all persons who are similarly situated,” which is determined “in relation to the objects it excludes rather than to what it includes.” *Doe v. Phillips*, 194 S.W.3d 833, 849 (Mo. banc 2006). Accordingly, an equal protection analysis is employed in cases where it is alleged that persons who should have been in the class subject to the special law have been excluded. *Id.*

Here, Plaintiffs are not claiming that persons who should be subject to Section 538.220 have been improperly excluded from the statute’s application. Rather, Plaintiffs argue the statute should not be applied at all. Therefore, Plaintiffs’ equal protection argument fails to advance their position or achieve the end that they seek.

Moreover, even under an equal protection analysis, Plaintiffs’ challenge to Section 538.220 fails. As an initial matter, while “medical malpractice plaintiffs” are not a fixed, immutable group for purposes of holding that Section 538.220 is a special law in the first instance, nor is it a special classification subject to strict scrutiny under the equal protection clause. Indeed, in explaining that an equal protection analysis should be employed to determine whether persons who should have been subject to a special law were excluded from such laws, which again is not the case here, this Court in *Doe* explained that the test for such “special legislation ... involves the same principles and considerations that are involved in determining whether the statute violates equal protection in a situation where neither a fundamental right nor a suspect class is involved, *i.e.*, where *rational basis test applies.*” *Doe*, 194 S.W.3d at 849 (quoting *Harris v. Missouri Gaming Comm’n*, 869 S.W.2d 58, 65 (Mo. banc 1994)).



Thus, even if Section 538.220 were a special law aimed at a fixed and immutable group of persons, and even if Plaintiffs were challenging the law on the basis that certain people were improperly excluded from this group, neither of which are true, the Court would only apply a rational basis test, and not strict scrutiny, for purposes of a special laws equal protection analysis. Section 538.220 clearly survives a rational basis test because the statute requires no substantial or material alteration to the jury's verdict, places no arbitrary cap on damages, and is intended to ensure that future damages are available when future damages are actually incurred.

Moreover, even if the Court were to analyze Section 538.220 on a purely equal protection basis, a claim that Plaintiffs have not made, in contrast to a special law analysis, strict scrutiny would still be inapplicable. Section 538.220 does not infringe on any constitutional right because the statute does not mandate the entry of a judgment that is substantially or materially different from the verdict rendered by the jury, nor does the statute deprive Plaintiffs or the courts of immediate entry and execution of the judgment.

#### **E. Conclusion**

Plaintiffs' last point challenges Section 538.220 on the basis that it is a special law and that St. Luke's cannot assert a "substantial justification" for invoking such a law. However, Plaintiffs' point fails in that they have not established that Section 538.220 meets the definition of a special law, nor can they, as special laws are held to apply to fixed, immutable groups, not to general, open-ended groups such as those who may bring medical malpractice claims. On this basis alone Plaintiffs' argument fails, and Plaintiffs' attempts

to repeat their separation of powers and right to a trial by jury arguments under the guise of a special law argument can be of no avail.

## CROSS-APPELLANT'S ARGUMENT

I. The trial court erred in denying Defendant St. Luke's Surgicenter's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict, because the evidence presented by Plaintiffs was insufficient to support a negligent credentialing claim, in that there was no substantial evidence demonstrating that a reasonably prudent health care facility would have refused to credential Dr. Norman Mutchnick, Plaintiffs presented no expert testimony to prove that fact, as required to establish all of the essential elements of a negligent credentialing claim, and, in any event, there was no evidence, expert or otherwise, that Dr. Mutchnick was incompetent to perform the procedure that he performed on Plaintiff Thomas Tharp.

### A. Introduction

The trial court erred in denying St. Luke's Motion for Directed Verdict. To support a negligent credentialing claim, Plaintiffs had the burden to establish that Dr. Norman Mutchnick was not qualified or sufficiently competent to be credentialed by St. Luke's under the standards employed by a reasonably prudent health care facility. In Missouri, no court has held that a hospital or surgery center can be held liable for negligent credentialing based solely on a physician's negligent act absent an allegation that the physician was otherwise incompetent to render the subject treatment.

At trial, Plaintiffs failed to present any evidence that Dr. Mutchnick was incompetent to perform the gallbladder surgery he performed on Thomas Tharp. Plaintiffs ultimately based their negligent credentialing claim exclusively on the ground that St. Luke's should have terminated Dr. Mutchnick's application, based on its own guidelines,

once St. Luke's learned that Dr. Mutchnick had failed to disclose prior involvement in lawsuits. Regardless of whether Dr. Mutchnick provided the details of those lawsuits, St. Luke's had information on Dr. Mutchnick's "adverse actions," provided through the National Practitioner Data Bank, when credentialing him and otherwise properly investigated his credentials. Based on the entirety of the information available to St. Luke's on Dr. Mutchnick, there was no dispute that Dr. Mutchnick was an experienced and accomplished physician who was widely considered to be competent to perform the type of procedure that he performed on Thomas Tharp. Absent any evidence to the contrary, Plaintiffs failed to make a submissible claim and the verdict for St. Luke's on their negligent credentialing claim should be set aside and held for naught.

#### **B. Standard of Review**

The standards governing review of post-judgment submissibility challenges are weighted in favor of the prevailing party. The appellate court, on review of a trial court's denial of a motion for judgment notwithstanding the verdict, determines whether the plaintiff made a submissible case. *Coggins v. Laclede Gas Co.*, 37 S.W.3d 335, 338 (Mo. App. E.D. 2001). In the first instance, this issue presents a question of law for the Court to decide. *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. E.D. 1997). However, the determination is fact intensive.

The plaintiff, in order to make a submissible case, bears the burden of establishing by substantial evidence every element of the cause of action and every fact essential to liability. *Steward*, 945 S.W.2d at 528. "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a

case.” *Id.* The failure to establish any element or essential fact defeats the plaintiff’s claim as a matter of law. *Id.* Further, this Court, in determining whether the plaintiff has made a submissible case, views the evidence in the light most favorable to the plaintiff and gives the plaintiff the benefit of all reasonable inferences to be drawn from the evidence. *Id.*

**C. To make a submissible negligent credentialing claim, Plaintiffs had the burden to show that Dr. Mutchnick was not qualified or sufficiently competent to be credentialed by St. Luke’s.**

Missouri courts have recognized a cause of action for negligent credentialing where a hospital allows a physician to render treatment for which the physician is not qualified. *See LeBlanc v. Research Belton Hosp.*, 278 S.W.3d 201, 206 (Mo. App. W.D. 2008) (citing *Manar v. Park Lane Med. Ctr.*, 753 S.W.2d 310, 311–12, 14 (Mo. App. W.D.1988) (holding hospital could be held liable where it extended staff privileges to doctor who was not “skilled, experienced or qualified in the procedure” and “allowing him to render treatment for which he was not qualified”)); *see also Gridley v. Johnson*, 476 S.W.2d 475, 484–85 (Mo. 1972) (holding hospital can be held liable for allowing unqualified doctors to practice at its facility).

In *LeBlanc*, the Missouri Court of Appeals concluded that the plaintiff properly pleaded a negligent credentialing claim because she alleged the defendant hospital was negligent in failing “to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the hospital profession” when the hospital permitted surgeons “to perform such extensive surgeries on [her] when the physicians were not qualified by education, training or experience and were not properly credentialed to

perform same.” 278 S.W.3d at 203-04. The Court of Appeals held that allowing a negligent credentialing claim was consistent with the specific duty owed by the hospital, namely, “reasonable care proportionate to the patient’s needs as the patient’s known condition requires.” *Id.* at 206. The Court of Appeals further noted that an employer can be held liable for an independent contractor’s negligence “when the employer fails to exercise reasonable care in hiring a competent contractor.” *Id.*

Restated, the Court of Appeals in *LeBlanc* made clear that the failure to provide a *competent* physician is the central issue in a negligent credentialing claim. The Court of Appeals’ decision comports with prior Missouri cases holding hospitals liable where they allow an unqualified physician to render treatment at their facilities. In contrast, no Missouri court has held that a hospital or surgery center can be held liable for negligent credentialing based solely on a physician’s negligent act absent an allegation that the physician was not otherwise competent to render the subject treatment.

Missouri’s analysis of negligent credentialing claims comports with other jurisdictions. *See, e.g., Rule v. Lutheran Hospitals & Homes Society of America*, 835 F.2d 1250, 1253 (8th Cir. 1987) (evidence supported claim that had hospital conducted sufficient investigation, it would have discovered physician was not qualified to conduct the subject surgery); *Beswick v. Bell*, 940 N.E.2d 338, 345 (Ind. Ct. App. 2010) (to prove a negligent credentialing claim, plaintiff must show that “but for the lack of care in the selection or retention of the doctor, the doctor would not have been granted staff privileges”); *Frigo v. Silver Cross Hospital and Medical Ctr.*, 876 N.E.2d 697, 721-22 (Ill. App. Ct. 2007) (hospital has duty to retain competent independent physicians and will be

held liable for negligence of physician when it fails in that duty); *Larson v. Wasemiller*, 738 N.W.2d 300, 308-309 (Minn. 2007) (based on well-established principles that an employer must exercise reasonable care in selecting independent contractors, hospital will not be held liable on the mere negligence of a physician, but on failure to exercise due care in granting staff privileges to an incompetent physician); *but see Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156, 171-72 (Wis. 1981) (plaintiff is not required to show that physician was actually incompetent, or that hospital knew or should have known of the incompetence before granting privileges to maintain negligent credentialing case).

The decision of the Michigan Court of Appeals in *Ferguson v. Gonyaw*, 236 N.W.2d 543 (Mich. App. Ct. 1975), is instructive on this issue. In *Ferguson*, the plaintiff introduced evidence that the hospital was negligent in allowing staff privileges to the defendant physician, whom the plaintiff claimed had inadequate training for the subject procedure. *Id.* at 550. The plaintiff introduced evidence that the hospital had failed to verify the facts on the physician's application, in violation of credentialing standards used by hospitals generally and the defendant hospital's own credentialing guidelines. *Id.*

On appeal, the Michigan court affirmed a directed verdict for the hospital despite its acknowledgement that the hospital had failed to exercise reasonable care in evaluating the physician's qualifications. *Id.* at 550. The court held that before a hospital may be held liable for negligently allowing the physician to practice, "it must be shown that even if the hospital had made the recommended and acknowledged checks they would have denied staff privileges to [the physician]." *Id.* at 551. The evidence introduced at trial was that had the hospital completed the required investigation, it would have determined that the

physician was sufficiently competent to warrant the approval of his application. *Id.* at 550-51.

Consider also the Mississippi Supreme Court's decision in *Taylor v. Singing River Hospital System*, 704 So.2d 75 (Miss. 1997), which addresses this issue too. In *Taylor*, the defendant hospital failed to verify the credentialing information on the physician's application for renewed privileges. *Id.* at 76. Had it done so, the hospital would have learned that the physician had falsely reported that he was board certified in cardiology when he was merely board eligible. *Id.* In affirming summary judgment for the hospital, the Mississippi Supreme Court held the hospital's lack of investigation did not support a negligent credentialing claim because board certification was not required for the hospital to grant privileges or for the performance of the subject procedure. *Id.* at 76-77. For each of these, board eligibility was sufficient. *Id.* Therefore, the court held that "[w]ithout some evidence that [the physician] was incompetent or unfit to perform heart catheterizations and further that [the hospital] knew or should have known of his incompetence or unfitness, the claims against the hospital would fail under a theory of corporate negligence." *Id.* at 77-78.

**D. Plaintiffs failed to provide any evidence that Dr. Mutchnick was incompetent such that St. Luke's should have denied him staff privileges at its facility.**

Based on the legal standard under Missouri and cases in other jurisdictions, Plaintiffs failed to make a submissible case under their negligent credentialing claim. Plaintiffs' claim fails for want of any evidence that Dr. Mutchnick was incompetent to



operate on Thomas Tharp. Absent in Plaintiffs' case is any evidence, expert or otherwise, that Dr. Mutchnick was not competent to perform the subject gallbladder procedure. To the contrary, the evidence established that Dr. Mutchnick had conducted more than 4,000 similar procedures with only two complaints, well below the accepted average for injuries in such procedures. (STR 93:24-94:2, 206:6-16, 206:17-22)

Moreover, St. Luke's undertook a significant investigation to confirm Dr. Mutchnick's competence before granting him staff privileges. The investigation disclosed that Dr. Mutchnick has never had his license challenged, limited, suspended, or revoked by any institution. (STR 183:14-18, 522:L5-15) The investigation also established that he had staff privileges at other institutions, such that he would have necessarily undergone and passed credentialing investigations at St. Luke's Surgicenter, St. Luke's East, Lee's Summit Medical Center, St. Joseph Hospital, and Menorah Medical Center. (STR 187:4-11)

As part of its credentialing process, St. Luke's also verifies the physician's education, board certification, medical staff memberships, information about complaints and lawsuits reported by the NPDB, and privileges that the physician maintains at other facilities. (LF 385:20-386:17) St. Luke's also contacts other physicians with whom the applicant has worked to determine their opinions regarding the applicant's competence. (STR 386:18-23, 486:21-24) Often, the physician contacts constitute the most important information in determining whether a physician should be credentialed or not. (STR 508:9-14, 514:1-4) St. Luke's would also often share credentialing information with the other St. Luke's facilities. (STR 340:23-341:23)

On Dr. Mutchnick's application, he indicated that he had three lawsuits filed against him. (STR 147:5-11) However, he indicated "no" in response to the inquiry as to whether these lawsuits had resulted in any judgments or settlements. (STR 12-16)

St. Luke's later learned from the NPDB report that Dr. Mutchnick had as many as five additional lawsuits, all of which resulted in settlements or judgments against him. (STR 156:6-14, 249:5-15, 549:20-21) It is undisputed that irrespective of whether Dr. Mutchnick provided the details of these suits, St. Luke's had this information when credentialing him. (STR 287:20-25) The credentialing committee could have requested additional information about the lawsuits before approving his application if it so chose. (STR 256:18-24) The Missouri court filing system further indicated that twenty-two lawsuits had been filed against Dr. Mutchnick over approximately the last thirty years. (STR 165:5, 221:23-25)

Plaintiffs' expert, Plaintiffs' expert, John Hyde, II, Ph.D., testified that a hospital should look at the lawsuits filed against a physician for the purpose of tracking, but conceded there is no certain "magical number of lawsuits" such that "if you have over this you're bad or good or indifferent." (STR 144:15-19)

The purpose of the credentialing process is to ensure that doctors practicing at St. Luke's are qualified to perform the surgeries or procedures they conduct at the surgery center. (STR 296:12-15) Based on all the information gathered, St. Luke's credentialed Dr. Mutchnick. (STR 295:24-25) No information before St. Luke's suggested in any way that Dr. Mutchnick was incompetent.

Plaintiffs ultimately based their negligent credentialing claim solely on their argument that St. Luke's should have terminated Dr. Mutchnick's application, based on its own guidelines, once it learned that he had failed to fully disclose all of the lawsuits brought against him, including full details concerning any settlements or judgments. In St. Luke's Medical Staff Bylaws, there is a guideline for applications for staff privileges that states that if a physician fails to provide complete and accurate information on an application, the physician must be automatically removed from consideration. (STR 156:15-20, 228:19-229:3)

Plaintiffs' expert, Dr. Hyde, explained that this provision means you "don't credential him right away. If there's some explanation for that, you give people the benefit of the doubt." (STR 157:16-158, 227:1-5) Lawsuits filed against a physician, particularly if there was no known outcome, represent only one consideration in the decision to credential a physician or not (STR 347:5-10) because the type of medicine a physician practices can have a significant impact on how many lawsuits are filed against him or her. (STR 519:6-17)

**E. Absent evidence that Dr. Mutchnick was not competent to perform the subject procedure, the trial court should have directed verdict for St. Luke's.**

Absent more, Plaintiffs simply did not make a submissible case on their negligent credentialing claim. While they provided evidence that the credentialing committee did not follow one of St. Luke's procedural guidelines for credentialing, Plaintiffs provided no

evidence that this failure resulted in St. Luke's credentialing a physician who was not competent to perform the procedures for which he had privileges.

Here, Plaintiffs simply provided no evidence that St. Luke's allowed Dr. Mutchnick to render treatment for which he was not qualified, the central issue of a negligent credentialing claim. *See LeBlanc v. Research Belton Hosp.*, 278 S.W.3d 201, 206 (Mo. App. W.D. 2008) (citing *Manar v. Park Lane Med. Ctr.*, 753 S.W.2d 310, 311-12, 14 (Mo. App. W.D.1988)). To make a submissible case, Plaintiffs must show that but for the lack of care in St. Luke's selection or retention of Dr. Mutchnick, he would not have been granted staff privileges. *Beswick v. Bell*, 940 N.E.2d 338, 345 (Ind. Ct. App. 2010). No such evidence was present.

As did the plaintiffs in *Taylor v. Singing River Hospital System*, 704 So.2d 75 (Miss. 1997), and *Ferguson v. Gonyaw*, 236 N.W.2d 543 (Mich. App. Ct. 1975), Plaintiffs merely showed that the St. Luke's violated one of its own policies, and not that Dr. Mutchnick should not have been extended staffing privileges based on incompetence. *Taylor*, 704 So.2d at 77-78; *Ferguson*, 236 N.W.2d at 551.

## **F. Conclusion**

The trial court erred in denying St. Luke's Motion for Directed Verdict and Motion for Judgment notwithstanding the Verdict because Plaintiffs failed to make a submissible negligent credentialing claim. Plaintiffs rest their claim exclusively on their contention that St. Luke's should have terminated Dr. Mutchnick's application based on its staff guidelines, once St. Luke's learned that Dr. Mutchnick had failed to disclose his prior involvement in lawsuits. However, regardless, Plaintiffs failed to establish an essential

element of their claim, namely, that Dr. Mutchnick was incompetent to perform the procedure that he performed on Thomas Tharp. They also failed to establish that a reasonably prudent health care facility would have denied privileges to Dr. Mutchnick under the circumstances.

Absent is any evidence, expert or otherwise, that had St. Luke's made the recommended and acknowledged checks, St. Luke's would have denied Dr. Mutchnick privileges. Moreover, there is no evidence, expert or otherwise, that Dr. Mutchnick was incompetent to perform the gallbladder surgery that he performed on Thomas Tharp or that a reasonably prudent facility would have refused to credential Dr. Mutchnick. Therefore, the judgment entered for Plaintiffs and against St. Luke's should be reversed and held for naught.

II. The trial court erred in denying St. Luke's Motion for New Trial, because the jury's verdict awarding Plaintiffs future damages was against the weight of the evidence, in that Plaintiffs failed to sustain their burden to prove that future expenses were reasonable and necessary to treat Thomas Tharp's injuries in that their medical experts could only speculate as to what potential future complications Thomas Tharp might suffer, along with a general recommendation that he should receive certain periodic monitoring, with no evidence concerning the cost of any such future medical treatment.

**A. Introduction**

The trial court erred in denying St. Luke's Motion for New Trial because the jury's verdict was against the weight of the evidence in that Plaintiffs failed to produce substantial evidence establishing the reasonableness and medical necessity of any future medical expenses. Plaintiffs' medical experts offered nothing more than speculation as to what complications Thomas Tharp might suffer, if any, in the future, and they could not inform the jury as to what any such future medical care might cost. Therefore, insomuch as the jury's award for future medical expenses was against the weight of the evidence admitted, a new trial on damages should be awarded.

**B. Standard of Review**

The trial court has inherent power under MO. R. CIV. P. 78.02 to weigh the evidence and grant a new trial on the ground the verdict is against the weight of the evidence. *Braddy v. Union Pacific R. Co.*, 116 S.W.3d 645, 649 (Mo. App. E.D. 2003). A trial court derives this right from its superior opportunity to hear and observe the witnesses and to give their

testimony the weight and value it deserves. *Reyes v. St. Luke's Hosp. of Kansas City*, 716 S.W.2d 294, 295 (Mo. App. W.D. 1986). Absent a manifest abuse of discretion, a trial court's decision under Rule 78.02 will not be disturbed on appeal. *Braddy*, 116 S.W.3d at 649. When a new trial motion raising weight of the evidence as a ground has been denied, appellate review is limited to considering the evidence that supports the trial court's ruling. *Id.*

“Weight of the evidence” means weight in probative value. *O’Shea v. Pattison-McGrath Dental Supplies*, 180 S.W.2d 19, 23 (Mo. 1944). The phrase refers to the persuasiveness of some evidence in comparison with other evidence. BLACK’S LAW DICTIONARY 1588 (7th ed. 1999). The quantity or amount of evidence is irrelevant. *O’Shea*, 180 S.W.2d at 23. Weight of the evidence determinations are never made mathematically. *Ruddick v. Bryan*, 989 S.W.2d 202, 204 (Mo. App. S.D. 1999). Rather, they turn on a review of the evidence’s effect in inducing belief. *Id.*

**C. To support an award of future medical expenses, Plaintiffs had the burden to present substantial evidence that such expenses were reasonable and medically necessary to treat Thomas Tharp’s injury.**

Items of special damage, such as expenses for future medical care, must be supported by substantial evidence that the expenses are reasonable and that the services are reasonably necessary to treat the injuries as a result of the accident. *Briggs v. Baker*, 631 S.W.2d 948, 952 (Mo. banc 1982); *Harris v. Washington*, 654 S.W.2d 303, 306-307 (Mo. App. E.D. 1983). The standard for recovering damages for future consequences requires evidence of such a degree of probability of those future events occurring as to amount to reasonable certainty.

*Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 210–11 (Mo. banc 1991); *see also Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 131 (Mo. banc 2007) (testimony of future damages is insufficient if it lacks “reasonable certainty”).

Ordinarily, the necessity, reasonable value, and causal connection of future medical costs and treatment are beyond the realm of a jury’s understanding. Thus, the recovery of these damages requires proof offered by expert medical testimony. *Cf., Rech v. AAA Plumbing Co.*, 798 S.W.2d 194, 196 (Mo. App. E.D. 1990). Evidence of possibilities, absent more, is insufficient to make a submissible case. *Shackelford v. West Central Electric Coop., Inc.*, 674 S.W.2d 58, 62 (Mo. App. W.D. 1984) (If the opinion of an expert is couched in terms of “might or could” or possibilities, the evidence has no probative value and is not sufficient to make a submissible case on causation.).

On this point, consider the Missouri Court of Appeals’ decision in *Wilson v. Lockwood*, 711 S.W.2d 545 (Mo. App. W.D. 1986), which addressed trial court error in submitting the issue of future medical expenses. In *Wilson*, the jury returned a verdict in a malpractice action against a physician, hospital, and the manufacturer of a circumcision device, including the award of damages for future surgery and psychological therapy for the injured child. On appeal, the appellate court reversed the jury’s future damage award. The appellate court explained its holding, in part, as follows:

No evidence was offered by the parents as to the likelihood of any such expense for an operation or for psychological therapy for the child during his minority. The [plaintiffs] did offer testimony concerning the child's psychological



impairment due to the scar on his penis, *but they offered nothing specific as to the probability or cost of treatment of the impairment.*

*Id.* at 555 (emphasis added).

**D. Plaintiffs provided only speculative evidence from their experts that Thomas Tharp may or may not suffer future complications that would require treatment and provided no evidence regarding the costs of any such treatment.**

Plaintiffs' medical experts, David Imagawa, M.D. and Henry Randall, M.D., testified that following this type of complication and follow-up repair procedure, a patient's risk of strictures increases over time. (STR 70:8-14; SLF A220) They further opined that in rare cases, about one percent, the patient may ultimately need a liver transplant. (STR 74:10-12; SLF A220-21)

Dr. Imagawa further testified that such patients can die ten to fifteen years sooner than someone who has not had the type of repair surgery that Thomas Tharp underwent. (STR 70:15-20) He claimed that twenty to twenty-five percent of patients will need a follow-up procedure after ten years to remove scar tissue from the repair site. (STR 72:7-12) However, he conceded that it was difficult to gauge the number of patients who receive follow-up procedures because it can be difficult to track patients long after a repair surgery is performed. (STR 72:15-22) Dr. Imagawa also testified that, as a general follow-up, patients should receive blood work every three months and have an ultrasound of their liver every six months. (STR 74:22-25)

Dr. Randall acknowledged that it is also possible that a patient will have no additional problems following the repair procedure. (SLF A220) He further testified that it is impossible to determine within a reasonable degree of medical certainty whether a patient will suffer any of the possible complications. (SLF A221) At the time of trial, Thomas Tharp was five years post-procedure and had no need for any follow-up procedures. (STR 98:20-99:6)

The foregoing review of the evidence adduced by Plaintiffs on their future damage claim demonstrates that the jury's verdict is against the weight of the evidence. The only category of future medical treatment that Plaintiffs' experts could testify to within a reasonable degree of medical certainty was the need for minimal medical monitoring, to include regular blood work and periodic ultrasounds. A verdict of future damages \$1,500,000 far exceeds any reasonable assessment of the cost of any such medical monitoring. Therefore, to the extent that the verdict is based on substantial evidence and not mere speculation, it is against the weight of the evidence and the trial court's denial of St. Luke's Motion for New Trial on this basis was a manifest abuse of discretion.

To the extent the jury's verdict exceeds the cost of medical monitoring, it is not based on substantial evidence and must be set aside. Any award of future medical treatment beyond medical monitoring would be speculative because it could not be forecasted within a reasonable degree of medical certainty. Plaintiffs' expert, Dr. Randall, so testified. (SLF A221)

Moreover, regardless of the possibility of such treatment, Plaintiffs offered no evidence as to what any future treatment might cost. Dr. Imagawa testified that the potential

future procedures he discussed would be expensive, but could not provide any specific cost associated with any of the procedures because he does not practice in Missouri. (STR 78:1-3, 105:8-15, 109:9-19) There was no other evidence submitted on the cost of any of the future procedures mentioned by Plaintiffs' experts. Therefore, insomuch as the jury's verdict awarding future damages rests impermissibly within the realm of speculation and conjecture, the trial court's judgment awarding future damages should be set aside and a new trial on damages only should be granted.

#### **E. Conclusion**

In this instance, the trial court erred in denying St. Luke's Motion for New Trial based on the jury's award of \$1,500,000 in future damages. Under established Missouri law, a jury's damage award must be based on supported by substantial evidence. Plaintiffs' experts testified that Plaintiff would need some medical monitoring, including regularly scheduled blood work and ultrasounds. This testimony, on its own, simply does not support such a large award and, as such, is against the weight of the evidence.

Nor could Plaintiffs provide substantial evidence of any other future medical damages. Even reviewing the evidence in the light most favorable to the verdict, Plaintiffs' experts were unable to testify within a reasonable degree of medical certainty that Thomas Tharp would suffer any of the potential future complications. Absent more, these complication do not provide a foundation for the jury's award. Moreover, even if the jury could consider such complications, Plaintiffs provided no evidence of the potential costs of any necessary procedure other than that it would be "expensive." Simply put, the jury's

award was against the weight of the evidence, and the trial court's denial of the Motion for New Trial on this basis was a manifest abuse of discretion.

## CONCLUSION

Defendant St. Luke's Surgicenter – Lee's Summit, LLC respectfully requests the Court to affirm the trial court's determination that the future medical payments are subject to MO. REV. STAT. § 538.220 and deny Plaintiffs' argument that Section 538.220 violates the Missouri Constitution.

St. Luke's also requests the Court to reverse the trial court's judgment for Plaintiffs and to remand the case for entry of judgment in St. Luke's favor on the Plaintiffs' claim for negligent credentialing based on Plaintiffs' failure to present any evidence that Dr. Mutchnick was not qualified to perform the subject procedure on Plaintiff Thomas Tharp.

Finally, and in the alternative, St. Luke's requests the Court to reverse the trial court's judgment for Plaintiffs and to remand the case for a new trial on damages because the jury's verdict was against the weight of the evidence because Plaintiffs failed to support their claim for future medical damages with substantial evidence.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND CERTIFICATION  
UNDER RULE 55.03(A)**

I hereby certify that a copy of the foregoing pleading was served by the Court's electronic filing system on February 23, 2018, on Mr. H. William McIntosh, Attorney for Plaintiffs, The McIntosh Law Firm, P.C., 1125 Grand Boulevard, Suite 1800, Kansas City, Missouri 64106.

In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that she has signed the original of this Certificate and the foregoing pleading.

*Teresa M. Young*

Teresa M. Young

#53427

### CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. Respondent's/Cross-Appellant's Brief includes the information required by Rule 55.03.
2. Respondent's/Cross-Appellant's Brief complies with the limitations contained in Rule 84.06;
3. Respondent's/Cross-Appellant's Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service, contains 19,933 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Brief was prepared; and
4. Respondent's/Cross-Appellant's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

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