

IN THE SUPREME COURT OF MISSOURI

No. SC 96528

THOMAS E. THARP and PAULA M. THARP,
Appellants/Cross-Respondents,

v.

ST. LUKE'S SURGICENTER - LEE'S SUMMIT, LLC,
Respondent/Cross-Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
Hon. Kenneth R. Garrett, III, Circuit Judge

APPELLANTS' FIRST BRIEF

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The trial court erred in sustaining defendant’s oral request to apply §538.220 RSMo (2005) and entering an amended judgment that ordered payment of plaintiff Thomas Tharp’s future medical and future non-economic damages of \$ 1,500,000 in periodic installments because §538.220 is unenforceable in that its provisions:

(A) violate Art. I, §22(a) of the Missouri Constitution in that they substantially interfere with the right to trial by jury and deprive plaintiffs of substantial incidents and consequences thereof (1) by requiring entry of a judgment materially different from the verdict that prohibits the fundamental right of immediate execution upon the full amount of the damages awarded, and (2) by imposing an arbitrary cap on their unpaid damages by prohibiting recovery of the full amount of future medical damages awarded if plaintiff Thomas Tharp passes away before those are fully paid out 20

(B) violate Art. II, §1 of the Missouri Constitution in that they are an impermissible legislative interference with and usurpation of powers,

prerogatives and functions committed exclusively to the judicial branch for the reasons that they (1) interfere with the judicial branch’s power to decide issues, pronounce judgments to conform with jury verdicts, and enforce its judgments; (2) mandate a legislative cap on certain future damage awards; (3) deprive plaintiffs of the right to judicial assistance to obtain prompt collection and full satisfaction of a judgment for monetary damages awarded by the jury; and (4) pronounce part of a valid judgment as satisfied, though unpaid, and preclude further collection efforts 30

(C) violate the “taking without just compensation” guarantee of Art. I, §26 of the Missouri Constitution in that they authorize the invasion, taking, appropriation of divestment of plaintiffs’ private property for a public use without just compensation for the reason that they preclude plaintiffs from exercising their fundamental rights to immediate execution on their verdict and judgment for future monetary damages and to obtain the full amount thereof, compel them to accept periodic or installment payments while allowing others to retain said money, and fail either to pay the compensation due at the time of the taking or else to permit a subsequent jury trial on the issue of fair and just compensation, including the rate of interest during the deprivation 37

(D) violate the prohibition against enactment of special laws providing or changing methods for the collection of debts or the enforcing of judgments,

contained in Art. III, §40(4) of the Missouri Constitution in that they deprive plaintiffs of their fundamental right to trial by jury, with all its essential incidents and consequences by (1) permitting and requiring alteration of the judgment entered in accordance with the jury verdict in certain medical malpractice cases; (2) prohibiting plaintiffs from utilizing judicial enforcement methods for immediate collection of the full amount of the jury's damage award in the same manner as in other civil actions; and (3) depriving plaintiffs of their right to recover the full damage award, all without a compelling reason

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JURISDICTIONAL STATEMENT

This appeal arises out of a medical malpractice action and challenges the constitutionality of §538.220 RSMo (2005) which mandates that, upon the request of a party in such action where the total award for damages exceeds \$100,000, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments. The court's Amended Judgment declared that \$550,000 of the future damages awarded to plaintiff Thomas Tharp were subject to §538.220.2, and that defendant must pay that amount in five (5) equal installments of \$110,000 each, starting 10 days after judgment and then annually thereafter on January 1. The Supreme Court has jurisdiction. Missouri Constitution, Art. V, §3.

Preservation of Constitutional Questions. The verdict amounts for future medical and future non-economic damages moved the issue beyond hypothetical possibility to the real and immediate stage and made some action by the court necessary. Thus the constitutional issues involved in this appeal are "real, substantial," and made in "good faith," and within the exclusive jurisdiction of this Court. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 52 (Mo.banc 1999). Although this Court upheld the constitutionality of Chapter 538 *as a whole* in Vincent by Vincent v. Johnson, 833 S.W.2d 859, 862 (Mo.banc 1992), it relied entirely on the earlier decision in Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo.banc 1992). But Adams was overruled by Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 636, 641-6 (Mo.banc 2012). Thus Vincent has implicitly been abrogated to that extent

and lacks precedential value.

No constitutional objection to §538.220 was made in Watts. The trial court's decision and method of payment of future damages (other than medical damages) in Watts was reviewed under the "abuse of discretion" standard only for arbitrariness (the standard approved in Vincent, 833 S.W.2d at 866). Watts, 376 S.W.3d at 635-7, 646-8.

Of the constitutional challenges made in Adams, only "trial by jury" is also raised in this appeal. Since Watts reversed Adams on that issue, this appeal presents a blank slate, subject to Watts's analytical framework.

Plaintiffs timely presented their constitutional objections to the trial court with the requisite specificity. Callier v. Dir. of Revenue, 780 S.W.2d 639, 641 (Mo.banc 1989) (citations omitted). They also raised their constitutional objections to §538.220 at the first opportunity. The Surgicenter's only effective invocation of the statute came on January 26, 2017, in an oral request¹ after the verdict was received and the jury discharged. Seven days later, on February 2, 2017, plaintiffs filed their Objections to Defendant's Request for Periodic or Installment Payments of Future Damages (LF 37, 62-66), filed their Brief in Support on February 16, 2017 (LF 71-88), and continued to assert the statute's unconstitutionality to finality (LF 38, 39, 103-10, 117-21), all as noted below (*see* pp. 13-14, 15).

¹Sec. 538.220.2 appears to permit a defendant to make an oral request before entry of a judgment.

Plaintiffs need not have raised these objections earlier in the proceedings. Raising constitutional objections *sua sponte* in a petition charging negligence and seeking money damages is superfluous and unnecessary because it is not part of the cause of action. Constitutional infirmity is sometimes a matter of avoidance to be pleaded in a reply to an affirmative defense. *See, e.g., Barnes v. City of Kirksville*, 266 Mo. 270, 180 S.W. 545, 546 (1915); *Hanks v. Hanks*, 218 Mo. 670, 117 S. W. 1101, 1103 (1909). But no affirmative defense was effectively pleaded by defendant because it never filed an amended answer requesting periodic or installment payments (LF 8-10) as directed (LF 55). *See Green v. City of St. Louis*, 870 S.W.2d 794, 797 (Mo.banc 1994) (“issues not raised in the answer are simply not raised in the lawsuit”); *Woodling v. Westport Hotel Operating Co.*, 331 Mo. 812, 55 S.W.2d 477, 479 (1932) (“A constitutional question must be raised timely in the course of orderly procedure. Accordingly, it should be raised in the pleadings if due to be found there; if not, then at the first opportunity, and kept alive.”).

These written objections were filed before the judge was compelled to make a decision on applying the statute--*i.e.*, before entry of the initial judgment on March 1, 2017 (LF 38, 89-92; App A5-A8). The trial court had the opportunity to correct the error of applying the statute. No more is required. *Deacon v. City of Ladue*, 294 S.W.2d 616, 622 (Mo.App.E.D. 1956). The trial court took up those objections and overruled them on June 20, 2017 (LF 40, 128-29). *Miller v. Connor*, 250 Mo. 677, 157 S.W. 81, 83 (1913).

STATEMENT OF FACTS

Procedural Background. Thomas and Paula Tharp commenced this action on February 13, 2013, seeking damages for personal injury and loss of consortium (LF 1, 43-49). The First Amended Petition alleged that he sustained personal injury during the laparoscopic removal of his gallbladder on December 30, 2011, at St. Luke's Surgicenter - Lee's Summit, LLC (LF 45-46). The general surgeon performing the operation (Norman Mutchnick, M.D.) damaged his hepatic duct and common bile duct, and Mr. Tharp sustained bile leakage in his abdomen, peritonitis, permanent liver damage and pancreatitis (LF 45-47). He had to undergo additional surgeries to repair this damage (*id.*). They also claimed the Surgicenter had negligently granted surgical privileges to Dr. Mutchnick when he was not qualified by education, training or experience or physically competent to do so (LF 47).

After extensive discovery plaintiffs settled with Dr. Mutchnick and his employer and dismissed them with prejudice (LF 26). Trial commenced against the Surgicenter on January 23, 2017 (LF 37, 89). The jury returned a verdict on January 26, 2017, in favor of plaintiff Thomas Tharp as follows (LF 60, 90, 134; App A3):

For past economic damages including past medical damages \$256,000.00.

For past non-economic damages \$500,000.

For future medical damages \$1,000,000.

For future non-economic damages \$500,000.

TOTAL DAMAGES \$2,256,000.00.

The jury also returned its verdict in favor of plaintiff Paula Tharp as follows (LF 60-61, 91, 134-35; App A3-A4):

For past non-economic damages \$25,000.

For future non-economic damages \$25,000.

TOTAL DAMAGES \$50,000.00.

Pre-Judgment, Judgment and Amended Judgment. After the verdict was received and recorded and the jurors discharged, defendant orally requested application of §538.220 RSMo to the award of future damages (Tr. 3-6). Counsel asserted that statute had been raised in an affirmative defense (Tr. 4-5). In fact, though it had been cited, plaintiffs filed a Motion for More Definite Statement of St. Luke's Surgicenter's affirmative defenses and a motion to strike on June 17, 2013 (LF 6). The court (Manners, J.) granted plaintiffs' motion for more definite statement on July 23, 2013, "insofar as it concerns all defenses other than the defense that Plaintiffs' Petition fails to state a cause of action" (LF 8; 55). The court directed that the Surgicenter "shall have 90 days from the date of this Order to file a more definite statement with the Court" (LF 55). Although defendant filed a Brief Regarding Its Affirmative Defenses on October 21, 2013, in which it set out its displeasure with the 90 day deadline (LF 10, 56-58), it never filed an amended answer to the First Amended Petition raising any affirmative defenses within that 90 day period (LF 8-10) or at any other time.

In response to the post-verdict oral motion to apply §538.220 RSMo, plaintiffs filed Objections to Defendant's Request for Periodic or Installment Payments of Future Damages

on February 2, 2017, setting out the constitutional infirmities of the statute (LF 37, 62-66). The Surgicenter filed a response thereto on February 8, 2017 (LF 37, 67-69). Plaintiffs filed their Brief in Support of Their Objections to Application of §538.220 RSMo (2005) Based on Its Unconstitutionality on February 16, 2017 (LF 71-88).

The court entered judgment on March 1, 2017 (LF 38, 89-92; App A5-A8). Periodic or installment payments of future damages were not addressed therein. Defendant then filed a Motion to Modify Judgment on March 7, 2017, raising partial satisfaction under §537.060 regarding the previous settlement and for application of §538.220 (LF 38, 93-97). Plaintiffs filed Additional Suggestions in Response to Defendant's Oral Request for Periodic Payments of Future Damages Under §538.220 and responding to other issues (LF 38, 103-10).

The Amended Judgment, entered April 17, 2017, addressed the future damages (LF 111-16; App A9-A14). The court made certain findings and rulings as follows (LF 113-16):

- Because the judgment exceeded the \$100,000 statutory threshold, plaintiffs' future damage award was subject to an order for periodic payments;

- The previous settlement with former defendants would be applied in its entirety² against the \$1,000,000 in future medical damages awarded to plaintiff Thomas Tharp;

²That settlement amount was subject to a confidentiality agreement between the settling parties. The court and defense counsel were fully advised of its amount and the terms thereof, and a Joint Protective Order was entered on December 22, 2016, to shield the amount from public access to the extent practicable (LF 36).

- The remaining future damages were further reduced so that plaintiffs' counsel could be paid attorney's fees and litigation expenses as contracted up front under §538.220.4;

- The remainder of Mr. Tharp's future damages (\$550,000) were subject to periodic payments, as were Mrs. Tharp's future non-economic damages of \$25,000;

- Mrs. Tharp's total damages of \$50,000 were to be paid in a lump sum upon entry of the Amended Judgment;

- Considering "the interests of the parties, including the amount available to plaintiffs after deducting attorney's fees and litigation expenses, and the evidence at trial that the effect of Mr. Tharp's injury has reduced his life expectancy,"³ Tharp's damages were to be paid in five (5) equal installments of \$110,000, with the first payment due 10 days after entry of the Amended Judgment and each subsequent payment due on January 1 each following year.

On May 2, 2017, plaintiffs filed their Motion to Amend the Amended Judgment, again setting out their constitutional objections to §538.220 in full and incorporating by reference thereto the earlier supporting brief (LF 39, 117-21).

Other post-trial motions and briefing on different subjects followed (LF 39-40). On June 20, 2017, the court issued its Order overruling all pending motions (LF 40, 128-29). Plaintiffs filed their Notice of Appeal on June 26, 2017 (LF 40, 130-38).

³The unchallenged testimony from plaintiffs' expert, Dr. David Imagawa, was that the nature and severity of his injuries have shortened his life expectancy by 10 to 15 years (LF 108). At the time of trial, he was 64 years old, as defendant noted (LF 95).

POINTS RELIED ON

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' ORAL REQUEST TO APPLY §538.220 RSMo (2005) AND ENTERING AN AMENDED JUDGMENT THAT ORDERED PAYMENT OF PLAINTIFF THOMAS THARP'S FUTURE MEDICAL AND FUTURE NON-ECONOMIC DAMAGES OF \$1,500,000 IN PERIODIC INSTALLMENTS BECAUSE §538.220 IS UNENFORCEABLE IN THAT ITS PROVISIONS:

(A) VIOLATE ART. I, §22(a) OF THE MISSOURI CONSTITUTION IN THAT THEY SUBSTANTIALLY INTERFERE WITH THE RIGHT TO TRIAL BY JURY AND DEPRIVE PLAINTIFFS OF SUBSTANTIAL INCIDENTS AND CONSEQUENCES THEREOF (1) BY REQUIRING ENTRY OF A JUDGMENT MATERIALLY DIFFERENT FROM THE VERDICT THAT PROHIBITS THE FUNDAMENTAL RIGHT OF IMMEDIATE EXECUTION UPON THE FULL AMOUNT OF THE DAMAGES AWARDED, AND (2) BY IMPOSING AN ARBITRARY CAP ON THEIR UNPAID DAMAGES BY PROHIBITING RECOVERY OF THE FULL AMOUNT OF FUTURE MEDICAL DAMAGES AWARDED IF PLAINTIFF THOMAS THARP PASSES AWAY BEFORE THOSE ARE FULLY PAID OUT;

State v. Haney, 277 S.W.2d 632 (Mo. 1955)

Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633 (Mo.banc 2012)

Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251 (1988)

State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow, 133 Mo. 500, 36 S.W. 43 (banc 1896)

(B) VIOLATE ART. II, §1 OF THE MISSOURI CONSTITUTION IN THAT THEY ARE AN IMPERMISSIBLE LEGISLATIVE INTERFERENCE WITH AND USURPATION OF POWERS, PREROGATIVES AND FUNCTIONS COMMITTED EXCLUSIVELY TO THE JUDICIAL BRANCH FOR THE REASONS THAT THEY (1) INTERFERE WITH THE JUDICIAL BRANCH'S POWER TO DECIDE ISSUES, PRONOUNCE JUDGMENTS TO CONFORM WITH JURY VERDICTS, AND ENFORCE ITS JUDGMENTS; (2) MANDATE A LEGISLATIVE CAP ON CERTAIN FUTURE DAMAGE AWARDS; (3) DEPRIVE PLAINTIFFS OF THE RIGHT TO JUDICIAL ASSISTANCE TO OBTAIN PROMPT COLLECTION AND FULL SATISFACTION OF A JUDGMENT FOR MONETARY DAMAGES AWARDED BY THE JURY; AND (4) PRONOUNCE PART OF A VALID JUDGMENT AS SATISFIED, THOUGH UNPAID, AND PRECLUDE FURTHER COLLECTION EFFORTS;

Albright v. Fisher, 164 Mo. 56, 64 S.W. 106 (banc 1901)

Chastain v. Chastain, 932 S.W.2d 396 (Mo.banc 1996)

State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228 (Mo.banc 1997)

State v. Haney, 277 S.W.2d 632 (Mo. 1955)

(C) THE PROVISIONS VIOLATE THE “TAKING WITHOUT JUST COMPENSATION” GUARANTEE OF ART. I, §26 OF THE MISSOURI CONSTITUTION IN THAT THEY AUTHORIZE THE INVASION, TAKING, APPROPRIATION OR DIVESTMENT OF PLAINTIFFS’ PRIVATE PROPERTY FOR A PUBLIC USE WITHOUT JUST COMPENSATION FOR THE REASON THAT THEY PRECLUDE PLAINTIFFS FROM EXERCISING THEIR FUNDAMENTAL RIGHTS TO IMMEDIATE EXECUTION ON THEIR VERDICT AND JUDGMENT FOR FUTURE MONETARY DAMAGES AND TO OBTAIN THE FULL AMOUNT THEREOF, COMPEL THEM TO ACCEPT PERIODIC OR INSTALLMENT PAYMENTS WHILE ALLOWING OTHERS TO RETAIN SAID MONEY, AND FAIL EITHER TO PAY THE COMPENSATION DUE AT THE TIME OF THE TAKING OR ELSE TO PERMIT A SUBSEQUENT JURY TRIAL ON THE ISSUE OF FAIR AND JUST COMPENSATION, INCLUDING THE RATE OF INTEREST DURING THE DEPRIVATION;

Hamer v. State Highway Comm’n, 304 S.W.2d 869 (Mo. 1957)

State ex rel. State Highway Comm’n v. Green, 305 S.W.2d 688 (Mo. 1957)

Shade v. Missouri Highway and Transp. Com’n, 69 S.W.3d 503 (Mo.App.W.D. 2001)

State ex rel. N.W. Elec. Power Co-op., Inc. v. Waggoner, 319 S.W.2d 930 (Mo.App.W.D.

1959)

(D) THE PROVISIONS VIOLATE THE PROHIBITION AGAINST ENACTMENT OF SPECIAL LAWS PROVIDING OR CHANGING METHODS FOR THE COLLECTION OF DEBTS OR THE ENFORCING OF JUDGMENTS, CONTAINED IN ART. III, §40(4) OF THE MISSOURI CONSTITUTION IN THAT THEY DEPRIVE PLAINTIFFS OF THEIR FUNDAMENTAL RIGHT TO TRIAL BY JURY, WITH ALL ITS ESSENTIAL INCIDENTS AND CONSEQUENCES BY (1) PERMITTING AND REQUIRING ALTERATION OF THE JUDGMENT ENTERED IN ACCORDANCE WITH THE JURY VERDICT IN CERTAIN MEDICAL MALPRACTICE CASES; (2) PROHIBITING PLAINTIFFS FROM UTILIZING JUDICIAL ENFORCEMENT METHODS FOR IMMEDIATE COLLECTION OF THE FULL AMOUNT OF THE JURY'S DAMAGE AWARD IN THE SAME MANNER AS IN OTHER CIVIL ACTIONS; AND (3) DEPRIVING PLAINTIFFS OF THEIR RIGHT TO RECOVER THE FULL DAMAGE AWARD, ALL WITHOUT A COMPELLING REASON THEREFOR.

State ex rel. Leonardi v. Sherry, 137 S.W.3d 462 (Mo.banc 2004)

Harris v. Missouri Gaming Com'n, 869 S.W.2d 58 (Mo.banc 1994)

Dodson v. Ferrara, 491 S.W.3d 542 (Mo.banc 2016)

State v. Haney, 277 S.W.2d 632 (Mo. 1955)

ARGUMENT

Standard of Review. A statute is presumed to be constitutional and will not be held unconstitutional unless it clearly and undoubtedly contravenes the constitution. Lester v. Sayles, 850 S.W.2d 858, 872 (Mo.banc 1993). A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution. Id. The burden of proof is upon the party claiming that the statute is unconstitutional. Id. Appellate review is *de novo*. Akers v. City of Oak Grove, 246 S.W.3d 916, 919 (Mo.banc 2008).

Introduction. Sec. 538.220 purports to require courts to bar a judgment creditor from employing the fundamental right to immediate enforcement of his verdict with respect to some part of “future damages” (subs. 2); to require his forbearance and his acceptance of periodic payments or installments, together with no post-judgment interest or interest at a rate that can vary significantly from that allowed all other judgment creditors under §408.040 RSMo 2005 or as set by a jury (subs. 2); and to prevent entirely the collection of part of a final judgment should the plaintiff expire during the mandatory delay period (subs. 5).

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS’ ORAL REQUEST TO APPLY §538.220 RSMo (2005) AND ENTERING AN AMENDED JUDGMENT THAT ORDERED PAYMENT OF PLAINTIFF THOMAS THARP’S FUTURE MEDICAL AND FUTURE NON-ECONOMIC DAMAGES OF \$1,500,000 IN PERIODIC INSTALLMENTS BECAUSE §538.220 IS UNENFORCEABLE IN THAT:

(A) ITS PROVISIONS VIOLATE ART. I, §22(a) OF THE MISSOURI CONSTITUTION IN THAT THEY SUBSTANTIALLY INTERFERE WITH THE RIGHT TO TRIAL BY JURY AND DEPRIVE PLAINTIFFS OF SUBSTANTIAL INCIDENTS AND CONSEQUENCES THEREOF (1) BY REQUIRING ENTRY OF A JUDGMENT MATERIALLY DIFFERENT FROM THE VERDICT THAT PROHIBITS THE FUNDAMENTAL RIGHT OF IMMEDIATE EXECUTION UPON THE FULL AMOUNT OF THE DAMAGES AWARDED, AND (2) BY IMPOSING AN ARBITRARY CAP ON THEIR UNPAID DAMAGES BY PROHIBITING RECOVERY OF THE FULL AMOUNT OF FUTURE MEDICAL DAMAGES AWARDED IF PLAINTIFF THOMAS THARP PASSES AWAY BEFORE THOSE ARE FULLY PAID OUT.

Constrained by §538.220.2, the trial court entered an Amended Judgment that forbids plaintiff Thomas Tharp from utilizing the enforcement machinery of the judicial system to seek immediate collection of the full amount of the jury's verdict (less the reduction for the earlier settlement)--a fundamental element of the right of trial by jury at common law--and compels him to wait years to obtain a full recovery, with its attendant risks (LF 115-16; App. A11-A14). The statute places these plaintiffs and other such judgment creditors at the mercy of tortfeasors and their insurers, who could over time wilfully conceal themselves or their assets, pass away, be put into receivership or dissolved, declare bankruptcy or through financial mismanagement deplete the reserves and assets that would have been available

earlier to the creditor.⁴

And by reason of §538.220.5, should Mr. Tharp pass away before the end of that mandatory, extended pay-out period, he will never obtain the full amount of the future medical damages the jury awarded (\$1,000,000). His estate and his heirs (including Mrs. Tharp) are unlikely to collect the portion that remains unpaid at his death unless his “future” medical expenses reached or exceeded that amount by the time of his passing. That amounts to an arbitrary cap on the damages awarded by the jury that decided this case.

Those features of the statute conflict with Missouri’s preservation of the right of trial by jury as it existed at common law. Art. I, §22(a) declares that “the right of trial by jury as heretofore enjoyed shall remain inviolate.” These words are “intended to guarantee a right, not restrict a right.” State ex rel. Diehl v. O’Malley, 95 S.W.3d 82, 84 (Mo.banc 2003). They are, moreover, “a more emphatic statement of the right than the simply stated guarantee written some 30 years earlier as the 7th Amendment to the United States Constitution that ‘ . . . the right of trial by jury shall be preserved, . . . ’ ” Id.

“[T]his Court has stated multiple times that the right [to trial by jury] applied to actions that existed at common law before the adoption of the first constitution, in 1820.”

⁴*See, e.g.*, the mismanagement of PIE Mutual Ins. Co., an Ohio company that formerly sold medical malpractice insurance in Missouri, that led to its liquidation in 1997 in Ohio, detailed by Judge Starcher in his dissent in Verba v. Ghaphery, 210 W.Va. 30, 552 S.E.2d 406, 416 (2001).

Hammons v. Ehney, 924 S.W.2d 843, 849 (Mo.banc 1996). Furthermore, this constitutional guaranty “means 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, 133 Mo. 500, 36 S.W. 43, 48 (banc 1896) (adding emphasis); Lee v. Conran, 213 Mo. 404, 111 S.W. 1151, 1153 (1908).

The incidents and consequences of trial by jury are well-defined. “It is beyond dispute that Missouri law always has recognized that the jury’s role in a civil case is to determine the facts relating to both liability and damages and to enter a verdict accordingly.” Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 639-40 (Mo.banc 2012) (citation omitted); Woodson v. Scott, 20 Mo. 272, 1855 WL 5212 (1855) (“the juries of the country are the most appropriate judges of the amount of injury sustained; and to them is properly assigned the authority, and right to assess the consequent amount of damages therefor”). *See also* Dimick v. Schiedt, 293 U.S. 474, 480, 55 S.Ct. 296, 298 (1935) (at common law “in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it”).

Trial by jury included the right of the prevailing plaintiff to the award of the full measure of fair, just and reasonable damages, both past and future, as determined by the jury upon consideration of a host of factors and proper instructions. Rodefeld v. St. Louis Public Service Co., 275 S.W.2d 256, 262 (Mo. 1955).

Prior to 1820, among the other fundamental attributes, incidents and consequences of the right of trial by jury were entry of a judgment in accordance with the jury verdict and *the judgment creditor's right to immediate enforcement thereof*. As noted in Capital Traction Co. v. Hof, 174 U.S. 1, 13-4, 19 S.Ct. 580, 585 (1899):

“Trial by jury,” in the primary and usual sense of the term at the common law and in the American constitutions, [includes] a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and *issue execution on their verdict*. [Emphasis added.]

Early Missouri cases adhered to that view. See Bank of Missouri v. Anderson, 1 Mo. 244, 1822 WL 1472 (1822); Vaughn v. Scade, 30 Mo. 604, 1860 WL 6183, *2 (1860). A court lacked authority to reach its own verdict in a jury trial.

At common law the right to execution follows immediately upon the rendition of a judgment. 3 W. Blackstone, *Commentaries on the Laws of England* 401 (1769) (“After judgment is entered, *execution* will immediately follow” unless the losing party obtains a new trial or appeals). This Court underscored its fundamental nature:

A judgment is operative from the date of its rendition and the failure of the clerk to perform the ministerial duty of formally entering it upon the record cannot delay its operation for any purpose. *The right to execution follows immediately upon the rendition of judgment*. [Emphasis added.]

State v. Haney, 277 S.W.2d 632, 635 (Mo. 1955); *see also* In re Craig, 130 Mo. 590, 32 S.W. 1121, 1122 (1895).

A verdict is the “definitive answer given by the jury to the court concerning matters of fact committed to the jury for their deliberation and determination.” Delaney v. Gibson, 639 S.W.2d 601, 603 (Mo.banc 1982). “A verdict is the *final* decision of a jury.” Garland v. National Super Markets, Inc., 696 S.W.2d 342, 344 (Mo.App.E.D. 1985). Verdicts are “solemn pronouncements on which the rights of parties are determined.” Crowley v. Rogers, 181 S.W. 434, 437 (K.C.App. 1915).

At common law, “the only effectual and legal verdict is the *public* verdict; in which [the jurors] openly declare to have found the issue for the plaintiff, or for the defendant.” 3 Blackstone at 377 (1769). Thereafter the jury verdict was recorded on the *postea* and the judge rendered the judgment in accordance with the verdict and the applicable law. *Id.* at 386-7.

This ancient practice of rendering a judgment on the verdict was carried through after Missouri’s statehood and is an integral feature of the right of trial by jury to this day. “[B]efore a jury decision is considered final and a ‘verdict’, it must be submitted to the court, accepted by it and assented to by the jury, and recorded by the court.” State ex rel. Vogel v. Campbell, 505 S.W.2d 54, 57 (Mo.banc 1974); Garland v. National Super Markets, Inc., *supra* 696 S.W.2d at 344; Lummi Bay Packing Co. v. Kryder, 263 S.W. 543, 545 (K.C.App. 1924). Those steps occurred here (LF 37, 60-61, 91; Tr. 3; App A7, A11).

“A verdict is the sole basis of the judgment to be entered in a jury case.” Thorne v. Thorne, 350 S.W.2d 754, 757 (Mo. 1961) (emphasis added); Meffert v. Lawson, 315 Mo. 1091, 287 S.W. 610, 612 (1926) (the judgment “must be based upon the verdict”); Lummi Bay Packing Co., supra 263 S.W. at 545 (“the verdict as written and recorded is the basis, and the only basis, of the judgment”); Newton v. St. Louis & S.F.R. Co., 168 Mo.App. 199, 153 S.W. 495, 496 (K.C.App. 1913) (“The judgment must always follow and conform to the verdict”).

Then as now, a court had no authority to amend the jury’s verdict after its discharge in matters of substance or materiality, or to substitute a new verdict. Kahn v. Prahl, 414 S.W.2d 269, 278 (Mo. 1967) (“courts, of course, cannot change a verdict in a matter of substance nor can they do so in effect by substituting their verdict for that of the jury and entering a judgment not supported by the verdict”); Henley v. Arbuckle, 13 Mo. 209, 1850 WL 4172, *2 (1850) (“It will not be claimed, that the courts can substitute their findings for those of the juries”); Poulson v. Collier, 18 Mo.App. 583, 1885 WL 7762, *12 (1885) (“The finding of every material fact the jury must make for themselves. No one can do it for them, any more with their consent than without it.”).

The right to amend a verdict after discharge “is limited to matters of form or clerical errors manifested by the record, and never extends to matters of substance passed on by the jury and essential to the determination of the case and subject to dispute.” Ralston Purina Co. v. Kennedy, 347 S.W.2d 462, 465-6 (Mo.App.S.D. 1961). “[O]nce the verdict is received and

the jury discharged, it is only informalities, and not material matters, that the court will have the power to amend, since otherwise the court would be put in the position of substituting its own findings for those of the jury, and would thereby trespass upon the latter's special province as the body constituted to try the facts." Id.

This essential practice prevented re-examination of the issues of fact by courts and preserved the substance of trial by jury, not just its form. Thus the jury's determination of the rights of the parties is given effect; the injured party is afforded "a pecuniary satisfaction in damages," 3 Blackstone at 116; and a final, enforceable judgment according to law is rendered. State ex rel. Whatley v. Mueller, 288 S.W.2d 405, 410 (Mo.App.E.D. 1956) ("It is elementary that the judgment and its enforcement is the end of litigation, and therefore it is essential that the judgment dispose of the matters at issue so that the parties may be able to ascertain with reasonable certainty the extent to which their rights may be fixed").

The General Assembly may not interfere with the substance of these fundamental elements of the right to trial by jury as they existed in 1820. At common law, the jury's determination of damages affected the remedy, and so the availability of the remedy was a part of the substance of the constitutional right. Watts, 376 S.W.3d at 641; Sofie v. Fibreboard Corp., 112 Wash.2d 636, 771 P.2d 711, 724 (1989). The jury's function cannot be disregarded after the verdict, either in the judicial acts of entering a final judgment in conformity therewith or in providing court officers to aid its enforcement. Watts, at 641-3; Sofie, at 721.

Thus legislation commanding that damages be capped independently of the facts of the case, or that the exercise of the right of execution be delayed, or that it be diminished, cannot pass constitutional scrutiny. Legislative caps were unknown at common law in 1820. Watts, 376 S.W.3d at 639-40 (“The right to trial by jury ‘heretofore enjoyed’ was not subject to legislative limits on damages”). As Watts further noted:

Access to the courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., \$1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at \$450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Id. at 641.

In similar fashion, the Kansas Supreme Court considered a statute capping damages and mandating the purchase of an annuity for the payment of future damages in Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251, 258 (1988). In striking down the statute, it observed:

It also restricts access to whatever recovery is received, through the requirement of annuities. In other words, for a plaintiff who sustains massive injuries and to whom a jury awards \$4,000,000, H.B. 2661 makes the determination that \$1,000,000 is all the plaintiff needs. For a plaintiff who suffers any extreme pain and disfigurement, a limit of \$250,000 is imposed.

When the trial judge enters judgment for less than the jury verdict (as H.B. 2661 directs him to do) and orders an annuity contract, he clearly invades the province of the jury. This is an infringement on the jury's determination of the facts, and, thus, is an infringement on the right to a jury trial.

By enacting §538.220 the legislature has violated the constitution by impairing plaintiffs' right to immediate execution upon their judgment and effectively imposing an arbitrary cap if the injured plaintiff dies before fully recovering the jury's award, regardless of the facts of the case.

(B) THE PROVISIONS VIOLATE ART. II, §1 OF THE MISSOURI CONSTITUTION IN THAT THEY ARE AN IMPERMISSIBLE LEGISLATIVE INTERFERENCE WITH AND USURPATION OF POWERS, PREROGATIVES AND FUNCTIONS COMMITTED EXCLUSIVELY TO THE JUDICIAL BRANCH FOR THE REASONS THAT THEY (1) INTERFERE WITH THE JUDICIAL BRANCH'S POWER TO DECIDE ISSUES, PRONOUNCE JUDGMENTS TO CONFORM WITH JURY VERDICTS, AND ENFORCE ITS JUDGMENTS; (2) MANDATE A LEGISLATIVE CAP ON CERTAIN FUTURE DAMAGE AWARDS; (3) DEPRIVE PLAINTIFFS OF THE RIGHT TO JUDICIAL ASSISTANCE TO OBTAIN PROMPT COLLECTION AND FULL SATISFACTION OF A JUDGMENT FOR MONETARY DAMAGES AWARDED BY THE JURY; AND (4) PRONOUNCE PART OF A VALID JUDGMENT AS SATISFIED, THOUGH UNPAID, AND PRECLUDE FURTHER COLLECTION EFFORTS.

Sec. 1 of Article II of the Missouri Constitution reads:

The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

This Court has frequently observed that the separation of powers is “vital to our form of government” because it “prevent[s] the abuses that can flow from centralization of power.” Coalition for Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125, 132 (Mo.banc 1997) (internal quotations and citations omitted). While “it was not the purpose [of the Constitution] to make a total separation of these three powers[, each branch of government] ought to be kept as separate from and independent from, each other as the nature of free government will admit, or as is consistent with that chain of connection which binds the whole fabric of the Constitution in one indissoluble bond of union and amity.” Id. at 132-3 (internal quotation and citation omitted). This Court long ago observed that the constitution

carefully divides the powers of government into three distinct and named departments; sedulously segregates each from the other; confides each to a separate magistracy; and then, not satisfied with such strict demarkation [*sic*] of the boundaries of their respective jurisdictions, peremptorily forbids either of such departments from passing the prohibitory precincts thus ordained by the exercise of powers properly belonging to either of the others, and then concludes by giving the sole exception to the unbending rule by saying, “except in the instances in this constitution expressly directed or permitted.” . . . Lacking such express direction or express permission, the act done must incontinently be condemned as unwarranted by the constitution. . . . Each

department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and the laws made in pursuance thereof.

Albright v. Fisher, 164 Mo. 56, 64 S.W. 106, 108-9 (banc 1901). “The constitutional demand that the powers of the departments of government remain separate rests on history’s bitter assurance that persons or groups of persons are not to be trusted with unbridled power. . . . Thus, ‘[t]he doctrine of the separation of powers [is not meant to] promote efficiency but to preclude the exercise of arbitrary power.’ ” State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228, 231 (Mo.banc 1997).

Two broad categories of acts that violate the constitutional mandate of separation of powers are recognized: “One branch may interfere impermissibly with the other’s performance of its constitutionally assigned [power] Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power] . . . that more properly is entrusted to another.” Id.

The terms of §§538.220.2 and -.5 violate both categories.

The “judicial power” vested in the courts by the constitution includes the power to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. Chastain v. Chastain, 932 S.W.2d 396, 399 (Mo.banc

1996) (constitution places exclusively in judicial department “the power of courts to decide issues and pronounce and enforce judgments”); Harris v. Pine Cleaners, Inc., 274 S.W.2d 328, 333 (Mo.App.E.D. 1955); Muskrat v. United States, 219 U.S. 346, 355, 31 S.Ct. 250, 253 (1911). “The entry of a judgment remains ‘the quintessential function of a court.’ ” State ex rel. Hilburn v. Staeden, 91 S.W.3d 607, 610 (Mo.banc 2002) (citation omitted). “The rendition of a judgment is the judicial act of the court.” Fleming v. Clark Township of Chariton County, 357 S.W.2d 940, 942 (Mo. 1962).

These inherent powers do not derive from statutory authority. State ex rel. Cain v. Mitchell, 543 S.W.2d 785, 786 (Mo.banc 1976). They confer judicial independence from executive or legislative control. McPherson v. U.S. Physicians Mut. Risk Retention Group, 99 S.W.3d 462, 476 (Mo.App.W.D. 2003).

As noted above, after the jury has been discharged, a court cannot make changes in “matters of substance passed on by the jury and essential to the determination of the case,” Ralston Purina Co. v. Kennedy, supra 347 S.W.2d at 465-6; and cannot substitute a new verdict different from the jury’s findings. Kahn v. Prah, supra 414 S.W.2d at 278. The court must render a judgment that follows and conforms to the verdict. Thorne v. Thorne, supra 350 S.W.2d at 757. A judgment on the verdict gives rise to the right to enforce it immediately through execution. 3 Blackstone at 401; Capital Traction Co. v. Hof, supra 174 U.S. at 14, 19 S.Ct. at 585; State v. Haney, supra 277 S.W.2d at 635. The right and power to enforce its judgments is fundamental to its separate magistracy and stature as a co-equal branch.

While the legislature has discretion to create or abolish causes of action and place reasonable limitations on them (Fust v. Attorney General for the State of Mo., 947 S.W.2d 424, 430-1 (Mo.banc 1997)), still its authority in this realm is not absolute and must be exercised within constitutional bounds.

Enactment of §§538.220.2 and -.5 goes beyond an incidental overlap of powers. It is a direct legislative interference with the constitutionally-assigned power of courts to enter a judgment in conformity with the jury verdict and to provide the means to enforce it. It 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. And it embodies the legislature's assumption of the power to declare a cap on future medical damages in some circumstances despite a jury decision they were fair and just and without regard to the facts of the case; to preclude courts from enforcing judgments; to declare some part of a valid judgment legally uncollectible; and to relieve solvent judgment debtors of legal liability to pay a judgment.

- The statute eliminates the right to immediate enforcement of the judgment with respect to Mr. Tharp's future medical and non-economic damages--\$550,000 are now beyond his immediate reach and he is forced to wait for years to be paid (and forced to bear the risk of non-payment; *see* fn. 4 *supra* p. 22);
- The statute prescribes how and when certain judgment creditors may seek court

assistance in collecting their judgments, and in some cases entirely prohibits execution;

- The statute abrogates a court's right and power to enforce its judgments and its duty to assist judgment creditors in that regard during the mandatory pay-out period, thereby relegating it to an inferior status as a branch of government reliant on legislative permission;

- The statute alters the duty of the court to enter judgment based solely on the verdict by compelling an amended verdict that, by implicit incorporation of the statutory mandate, carries with it a secret reduction in the award of future damages that can spring into existence on the death of the injured plaintiff;

- The statute impairs and might well extinguish the right to recover the full amount of the jury's verdict for future medical damages in the event Mr. Tharp passes away before full recovery is made, since §538.220.5 (acting through the judgment) will cut off additional payment beyond what had been billed at the time of his death, and thereby deny to his estate and his heirs their right to receive those amounts unpaid at this death;

- The statute operates as a legislative remittitur by capping plaintiffs' right to recover the damages specified in the verdict;

- The statute burdens Mr. Tharp's estate and his heirs by forcing them to face some kind of evidentiary inquiry after his death into the nature of his medical treatment in years to come, and possibly more litigation, to sort out whether such treatment was related to the original injuries, how much was billed before his death, and how much is to be paid so that those providers can be paid;

- The statute confers on the legislature extraordinary powers of a super-court able to pronounce part of a valid judgment as satisfied, although unpaid, and beyond further collection efforts.

Judge Wolff's observation about §538.210 resonates equally as to §538.220: it has "displaced . . . the right that the people of Missouri have reserved to themselves, as jurors, to perform a vital role in the adjudication process," thereby undermining a "source of legitimacy for judicial judgments." Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752, 781 (Mo.banc 2010) (Wolff, J., concurring).

No part of the constitution authorizes the judicial branch to materially alter a verdict or substitute a new verdict after the jury's discharge, or withhold the judicial machinery to enforce judgments, or to impose a cap that "operates wholly independent of the facts of the case." Watts, 376 S.W.3d at 640. No reason exists to believe that its framers intended to allow such interference by the legislative branch in its stead.

(C) THE PROVISIONS VIOLATE THE “TAKING WITHOUT JUST COMPENSATION” GUARANTEE OF ART. I, §26 OF THE MISSOURI CONSTITUTION IN THAT THEY AUTHORIZE THE INVASION, TAKING, APPROPRIATION OR DIVESTMENT OF PLAINTIFFS’ PRIVATE PROPERTY FOR A PUBLIC USE WITHOUT JUST COMPENSATION FOR THE REASON THAT THEY PRECLUDE PLAINTIFFS FROM EXERCISING THEIR FUNDAMENTAL RIGHTS TO IMMEDIATE EXECUTION ON THEIR VERDICT AND JUDGMENT FOR FUTURE MONETARY DAMAGES AND TO OBTAIN THE FULL AMOUNT THEREOF, COMPEL THEM TO ACCEPT PERIODIC OR INSTALLMENT PAYMENTS WHILE ALLOWING OTHERS TO RETAIN SAID MONEY, AND FAIL EITHER TO PAY THE COMPENSATION DUE AT THE TIME OF THE TAKING OR ELSE TO PERMIT A SUBSEQUENT JURY TRIAL ON THE ISSUE OF FAIR AND JUST COMPENSATION, INCLUDING THE RATE OF INTEREST DURING THE DEPRIVATION.

Art. I, §26 of the Missouri Constitution states in pertinent part that “private property shall not be taken or damaged for public use without just compensation,” requires that a jury or three-member board of commissioners determine the amount of compensation, and specifies that “the property shall not be disturbed or the propriety rights of the owner therein divested” until the compensation “shall be paid to the owner.”

The jury verdict determined that Thomas Tharp had the right to recover \$1,000,000

in future medical damages and \$500,000 in future non-economic damages from the Surgicenter (LF 60; App A3). Judgment was initially entered accordingly (LF 89-92; App A5-A8).⁵ Mr. Tharp had the fundamental right to execute immediately upon the verdict. State v. Haney, supra 277 S.W.2d at 635.

Secs. 538.220.2 and -.5 mandate substantial changes in plaintiffs' right of execution. Whether explicitly stated or implied therein, the Amended Judgment incorporated the statutory provisions, and both combine to prevent any immediate (or at least prompt) execution proceedings to collect future damages (unless the judgment debtor defaults). They compel Mr. Tharp, with his advancing age and declining health, to wait at least three years while partial payments are made in annual installments, without regard for his need of medical treatment whose costs might, during each waiting period, exceed the amount he is forced to await. And they set up the possibility that some part of Mr. Tharp's future medical damages may never be collectible should he pass away before the full amount has been paid.

When the state does not initiate a direct condemnation action under applicable statutes or court rules, but nonetheless intentionally or accidentally takes private property for public use, the property owners may pursue claims for "inverse condemnation" as a method of receiving just compensation. Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors, 476 S.W.3d 913, 915-6 (Mo.banc 2016). The claimant need not show a physical taking, but rather "there must be an invasion or an appropriation of some valuable property

⁵Applying §537.060, the Amended Judgment properly reduced this amount (LF 115).

right which the [owner] has to the legal and proper use of his property, which invasion or appropriation must directly and specially affect the [owner] to his injury.” Hamer v. State Highway Comm’n, 304 S.W.2d 869, 871 (Mo. 1957). Sec. 538.220 results in the intentional taking of Mr. Tharp’s property within the meaning of Art. I, §26.

The constitutional protections apply equally to the taking of personal property as well as real estate. Shade v. Missouri Highway and Transp. Com’n, 69 S.W.3d 503, 516 (Mo.App.W.D. 2001).

The protections apply equally to temporary as well as permanent deprivations. Heins v. Missouri Hwy. & Transp. Comm’n, 859 S.W.2d 681, 684, 693-4 (Mo.banc 1993), abrogated in part on other grounds by Southers v. City of Farmington, 263 S.W.3d 603 (Mo.banc 2008) (inverse condemnation claim available where state’s construction of overpass allegedly caused water to run off and briefly flood owner’s property); Akers v. City of Oak Grove, supra 246 S.W.3d at 920 (recognizing that “[i]n a temporary taking the government is treated as having occupied the property for a limited amount of time before returning it to the plaintiff”); Byrom v. Little Blue Valley Sewer Dist., 16 S.W.3d 573, 577 (Mo.banc 2000) (discussing measure of compensation “[w]here land is taken, not to be held permanently, but only for temporary use” and “where property, no part of which is taken, is temporarily injured”).

The protections also apply equally to situations where the state directs property to be taken from one private owner and given to another private owner. Eminent domain “may be

exercised by private corporations to the extent and for the purposes authorized by law” and thereby trigger the “taking” predicate. State ex rel. N.W. Elec. Power Co-op., Inc. v. Waggoner, 319 S.W.2d 930, 934 (Mo.App.W.D. 1959). By §538.220, the legislature has authorized and directed courts to allow private persons--here the Surgicenter and its insurer(s)--to retain money already in their possession and prevents plaintiffs from commencing execution to collect all of their future damages.

This Court articulated the *public* purpose for §538.220 in Adams v. Children’s Mercy Hospital, supra 832 S.W.2d at 904-5: “the general goal of preserving adequate, affordable healthcare for all Missourians [in that] spreading future judgment payments over a period of time would reduce costs to insurance companies and reduce insurance premiums, lowering insurance premiums and making medical services less expensive and more available that would otherwise be the case.” That fits squarely within this Court’s view of “public use” articulated in State v. Dolan, 398 S.W.3d 472, 476-8 (Mo.banc 2013); *see also* Kelo v. City of New London, 546 U.S. 469, 125 S.Ct. 2655 (2005) (holding that the City’s use of eminent domain to transfer land from one private owner to another private owner to further economic development constituted a “public use”).

This statute plainly causes the Tharps and other victims of medical malpractice to suffer a special loss or deprivation of property. They are prevented from immediate execution on their verdict and judgment (State v. Haney, supra 277 S.W.2d at 635) to collect future damages, and instead must wait (at least three years and likely longer) while partial payments

are made. Mr. Tharp's life expectancy has been decreased by 10 to 15 years and his health is declining (*see* fn. 3 above); if he needs expensive medical treatment but the installments are insufficient to pay for them, he might have to delay or forego such treatment. If he passes away before all of the future medical damages have been paid out, his estate and his heirs may never receive the unpaid amount (§538.220.5).

When property is taken, the owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken." Akers v. City of Oak Grove, *supra* 246 S.W.3d at 919-20 (citation omitted). The owner is to be paid "just compensation for all that is taken and not for something less." State ex rel. N.W. Elec. Power Co-op, Inc., *supra* 319 S.W.2d at 934 (citations omitted). "Just compensation means full indemnity or remuneration for the loss or damage sustained by the owner of the property taken or injured. Where only a part of the property is condemned the owner is entitled to compensation not only for the part actually taken but for whatever consequential damages may proximately result to the remainder by reason of the taking of a part." *Id.* Just compensation requires the "full and perfect equivalent in money of the property taken." City of St. Louis v. Union Quarry & Constr. Co., 394 S.W.2d 300, 305 (Mo. 1956).

(1) Payment of Funds Prior to Divestment. Art. I, §26 also specifies that "the property shall not be disturbed or the proprietary rights of the owner therein divested" until the compensation as determined by the jury "shall be paid to the owner, or into court for the owner." This provision has been described as "'self-enforcing' and an action may be brought

‘directly thereunder.’ ” Roth v. State Highway Com’n of Missouri, 688 S.W.2d 775, 777 (Mo.App.E.D. 1984) (citation omitted).⁶

Payment of the full value of the property at the time of the taking appears to be standard practice in direct condemnation cases. The legislature could have devised a method by which plaintiffs such as the Tharps would be fully compensated for the temporary loss of their money at the time of the taking--that is, upon entry of a judgment setting out a future payment schedule--except that such a scheme irreconcilably conflicts with the very purpose of delaying such payments. Up-front payment that complies with the constitution cannot coexist with delayed payments of the same money.

Sec. 538.220 does not adopt the usual practice in inverse condemnation cases, either, whereby a post-taking jury trial is conducted to determine damages and the prejudgment interest rate.

Instead, because the amount of future damages is ascertainable from the verdict subject to possible adjustment by the court (as happened hereto to apply a settlement credit), the statute halts the right of execution, leaves the payment schedule entirely to the court’s discretion, and provides a formula to determine the interest rate during the mandatory delay period.

⁶However, res judicata or collateral estoppel likely prevents plaintiffs from commencing an inverse condemnation suit once this appeal has been decided and the issues resolved. Collins v. Hertenstein, 181 S.W.3d 204, 216 (Mo.banc 2006).

(2) Jury Trial. That scheme disregards the language in Art. I, §26--most importantly, the right of trial by jury it guarantees on the issue of “just compensation” that must be paid to plaintiffs as a result of the temporary taking.

Plaintiffs are entitled to consequential damages, including interest⁷ for delayed payment, beyond the sum of future damages not immediately payable or exempted from execution. State ex rel. State Highway Comm’n v. Green, 305 S.W.2d 688, 692 (Mo. 1957). The appropriate interest rate is a *question of fact committed by the mandate in Art. I, §26 to a jury’s determination*, to be included in its verdict. Id.; State ex rel. State Highway Comm’n v. Kendrick, 383 S.W.2d 740, 747 (Mo. 1964). Because the right to have a jury decide the interest rate in inverse condemnation cases derives from this *constitutional* provision (Shade v. Missouri Highway and Transp. Com’n, supra 69 S.W.3d at 512), it follows that statutes setting interest rates (such as §538.220.2, or §408.020, §408.040 and §523.045) cannot displace or override the constitutional mandate and thus cannot control the jury’s verdict. Watts, supra 376 S.W.3d at 641.

⁷This is not “interest” in the commonly accepted sense. Ark.-Mo. Power Co. v. Hamlin, 288 S.W.2d 14, 17 (Mo.App.S.D. 1956). The payment for the delay is “but a substitute or means of measuring the value of the deprivation of the use of the property.” Id.; Akers v. City of Oak Grove, supra 246 S.W.3d at 921 (“Any delay in receiving those proceeds is properly compensable via the award of prejudgment interest. This simply recognizes the time value of money, a basic economic concept.”).

Plaintiffs have not waived the right to a jury trial on their consequential damages and the proper rate of interest--they raised it in post-trial objections and briefing (LF 63-64, 83-84, 117-19). But §538.220.2 purports to take away that right when the rate of interest is in dispute and to vest the trial court with that decision. That violates the express language of Art. I, §26, as construed by numerous court decisions, that juries are constitutionally charged with deciding the interest rate. Green, *supra*; Kendrick, *supra*.

3. Termination of Payments on Death. The provisions of §538.220.5 mandating the termination of future medical damage payments upon the death of the injured plaintiff is another direct violation of Art. I, §26. Mr. Tharp acquired a valuable property right in receiving “just compensation for all that is taken and not for something less” (State ex rel. N.W. Elec. Power Co-op, Inc., *supra* 319 S.W.2d at 934) when the jury verdict was “submitted to the court, accepted by it and assented to by the jury, and recorded by the court.” State ex rel. Vogel v. Campbell, *supra* 505 S.W.2d at 57. Upon his death, that property right will pass to his estate and his heirs under a will or under §474.010 RSMo. Yet the statute purports to divest them (including presumably Mrs. Tharp) of that portion of future medical damages not necessary to enable the estate to satisfy medical expenses that were due and owing at the time of his death. That directly contravenes the constitutional guarantee.

It is not within the power of the General Assembly to invade or appropriate plaintiffs’ right to execute immediately upon the verdict and judgment to obtain possession of the future damages awarded, or to deprive them of a jury trial to determine additional damages for the

mandated delay, or take from them any portion of their full damages in the future, either directly or indirectly, temporarily or otherwise, without requiring payment of just compensation. The legislature cannot suspend this constitutional provision for persons in plaintiffs' shoes. City of St. Louis v. International Harvester Co., 350 S.W.2d 782, 785 (Mo.banc 1961) ("In all condemnation cases, the constitutional mandate as to compensation for the taking of property must be controlling").

(D) THE PROVISIONS VIOLATE THE PROHIBITION AGAINST ENACTMENT OF SPECIAL LAWS PROVIDING OR CHANGING METHODS FOR THE COLLECTION OF DEBTS OR THE ENFORCING OF JUDGMENTS, CONTAINED IN ART. III, §40(4) OF THE MISSOURI CONSTITUTION IN THAT THEY DEPRIVE PLAINTIFFS OF THEIR FUNDAMENTAL RIGHT TO TRIAL BY JURY, WITH ALL ITS ESSENTIAL INCIDENTS AND CONSEQUENCES BY (1) PERMITTING AND REQUIRING ALTERATION OF THE JUDGMENT ENTERED IN ACCORDANCE WITH THE JURY VERDICT IN CERTAIN MEDICAL MALPRACTICE CASES; (2) PROHIBITING PLAINTIFFS FROM UTILIZING JUDICIAL ENFORCEMENT METHODS FOR IMMEDIATE COLLECTION OF THE FULL AMOUNT OF THE JURY'S DAMAGE AWARD IN THE SAME MANNER AS IN OTHER CIVIL ACTIONS; AND (3) DEPRIVING PLAINTIFFS OF THEIR RIGHT TO RECOVER THE FULL DAMAGE AWARD, ALL WITHOUT A COMPELLING REASON THEREFOR.

Art. III, §40(4) prohibits the legislature from passing any special law “providing or changing methods for the collection of debts, or the enforcing of judgments.”

That language confirms the inviolability of the right to trial by jury, including all its incidents and consequences, by protecting judgment creditors from special legislation impairing their enforcement rights established in ancient times as essential elements thereof (State v. Haney, supra 277 S.W.2d at 635). It also tends to reaffirm the separation of powers

doctrine by which courts have the exclusive power to pronounce and enforce judgments (Chastain v. Chastain, *supra* 932 S.W.2d at 399).

Sec. 538.220 interferes with the judicial machinery for pronouncing and collecting debts and enforcing judgments in a certain class of personal injury suits arising from medical malpractice, matters committed exclusively to that branch of government, by (1) requiring the trial court to enter a judgment materially different from the jury verdict by imposing a periodic payment schedule; (2) simultaneously preventing judgment creditors from commencing immediate execution; (3) implicitly barring courts from making available the judicial machinery for enforcing and collecting debts during the extended payment schedule (absent default); (4) placing judgment creditors at the mercy of judgment debtors and their insurers, thereby increasing the risk that full recovery of a valid judgment may never be obtained should the plaintiff pass away before full payment (*see fn. 4 supra* p. 22); and (5) effectively forgiving part of a valid, unpaid judgment for future medical damages under circumstances where the injured plaintiff dies before full recovery.

This statutory scheme alters the defendant's liability for paying judgments, contrary to the verdict and the right of trial by jury as known at common law. If §538.220 did not exist, the Surgicenter's liability would be different. *Cf. Hoskins v. Business Men's Assur.*, 79 S.W.3d 901, 904 (Mo.banc 2002).

"Special law" analysis involves the same principles and considerations employed to determine whether a statute violates "equal protection" guarantees. Doe v. Phillips, 194

S.W.3d 833, 849 (Mo.banc 2006). Accordingly, a law that affects or impinges on a fundamental right explicitly or implicitly protected by the constitution is subject to strict scrutiny. Dodson v. Ferrara, 491 S.W.3d 542, 559 (Mo.banc 2016); In re Norton, 123 S.W.3d 170, 173 (Mo.banc 2003). The state must justify the law by showing that it is necessary to accomplish a compelling state interest, and the court must determine whether the chosen method is narrowly tailored to accomplish that purpose. Id.

Sec. 538.220 must be strictly scrutinized because it creates a special classification of medical malpractice plaintiffs, then deprives them of the full incidents, attributes and consequences of trial by jury. Art. I, §22(a) *guarantees* that right “shall remain inviolate.” State ex rel. Diehl v. O’Malley, *supra* 95 S.W.3d at 84. This explicit guaranty is “a *fundamental* element of our judicial system.” State ex rel. Leonardi v. Sherry, 137 S.W.3d 462, 472 (Mo.banc 2004) (emphasis added).

Thus because §538.220 is a facially special law it is presumed to be unconstitutional. Harris v. Missouri Gaming Com’n, 869 S.W.2d 58, 65 (Mo.banc 1994). “The party defending the facially special statute must demonstrate a ‘substantial justification’ for the special treatment.” Id.

Little time or effort is actually needed to complete the usual next steps of weighing whatever “substantial justification” or “compelling state interest” the Surgicenter identifies against the purposes and benefits of a jury trial in common law civil cases, and examining whether the statute is “narrowly tailored to accomplish” its own goals. In well over a century

of supreme court jurisprudence in common law suits for damages, with the sole exception of Adams, *no statute* can justifiably affect or curtail the right of trial by jury, or impinge upon its incidents, attributes and consequences: “The right to trial by jury, where it applies, is a constitutional right, applies ‘regardless of any statutory provision,’ and is ‘beyond the reach of hostile legislation.’ ” State ex rel. Diehl v. O’Malley, *supra* 95 S.W.3d at 92 (quoting Lee v. Conran, *supra* 111 S.W. at 1153); State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow, *supra* 36 S.W. at 48 (the constitutional language “means that all the substantial incidents and consequences, which pertained to the right of trial by jury, are beyond the reach of hostile legislation”).

CONCLUSION

Sec. 538.220 fails constitutional scrutiny because its terms plainly violate the provisions (a) that guarantee the ancient right of trial by jury in its full and intended substance, incidents and consequences; (b) that maintain the separation of powers between the legislative and judicial branches of government; (c) that guarantee private property shall not be taken for a public use without just compensation as determined by a jury; and (d) that change the methods for the collection of debts or the enforcing of judgments. That part of the trial court’s Amended Judgment giving effect to §538.220 should be vacated and the cause remanded for rendition of a judgment in strict accordance with the jury verdict.

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03; that it contains 11,229 words/979 lines and complies with the word/line limitations contained in Rule 84.06(b); and that one copy of the Brief was served by electronic mail, in pdf format, this 13th day of November, 2017, to T. Michael Ward/Teresa M. Young, Brown & James, P.C., 800 Market St., Ste. 1100, St. Louis, MO 63101.

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