IN THE SUPREME COURT OF MISSOURI

DOUGLAS STEWART, Plaintiff/Respondent, v. KRIKOR O. PARTAMIAN, M.D. and PHOENIX UROLOGY OF ST. JOSEPH, INC., Defendants/Appellants.	)	Case No. SC94120

Appeal from the Circuit Court of Buchannan County, Missouri
Fifth Judicial Circuit, Division 2
The Honorable Wendal C. Judah, Judge

REPLY BRIEF OF APPELLANTS KRIKOR O. PARTAMIAN, M.D. AND PHOENIX UROLOGY OF ST. JOSEPH, INC.

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REPLY STATEMENT OF FACTS

Krikor O. Partamian, M.D. and Phoenix Urology of St. Joseph, Inc. ("Dr. Partamian" and "Phoenix Urology," respectively) provided this Court a "fair and concise statement of the facts relevant to the questions presented . . . without argument" in their initial brief. (Appellants' Br. 2-13). Respondent Douglas Stewart ("Plaintiff"), although not required to do so under Rule 84.04(f), filed a lengthy, and misleading, statement of facts as part of his brief. (Resp't's Br. 17-29). Dr. Partamian and Phoenix Urology address the most egregious distortions contained in Plaintiff's Statement of Facts below.

Dr. Riordan and His Testimony Were a Major Focus of Plaintiff's Case

Dr. Riordan, a former employee of Phoenix Urology, testified in Plaintiff's case-in-chief. Plaintiff's counsel focused extensively on Dr. Riordan's testimony in opening statements, Plaintiff's examination of witnesses and in closing argument. (CTR 34-35, 37, 44, 46-48, 57, 182-185, 314, 668-69, 679-83; Ex. 115, Ex. 116).[1] During Plaintiff's examination of Dr. Partamian, Plaintiff emphasized that Dr. Riordan, Phoenix Urology and Dr. Partamian were in a "contract dispute" that had led to a lawsuit and a "falling out" between the parties. (CTR 184-85). Plaintiff also played to the jury portions of the videotaped transcript of Dr. Riordan's deposition where Dr. Riordan testified there were

1. Documents in the corrected legal file are referred to, by page number, as "CLF." Portions of the corrected transcript are referred to, by page number, "CTR," documents in the supplemental legal file are referred to by page number, as "SLF" and all exhibits are referred to by the number assigned at trial.

"difference in philosophies" between him and Phoenix Urology and that he was terminated by Phoenix Urology for not bringing in enough money. (CTR 215-16; Ex. 115; Ex. 116).

Plaintiff also played for the jury Dr. Riordan's testimony that Dr. Riordan had drained a prostate abscess at the same hospital were Plaintiff was treated a few weeks prior to Plaintiff's treatment and that Dr. Riordan had drained all other prostate abscesses he had encountered in his career. (Ex. 115; Ex. 116). Appellants' objected to Dr. Riordan's testimony on both issues prior to the videotaped deposition being played for the jury and were also granted an order in limine prohibiting testimony of the "personal practice" of any witness and testimony of any "lawsuits or claims" involving any of the Defendants. (CLF 43, 163-66; CTR 4; SLF 159-62).

Extent of Plaintiff's Injuries

Dr. Partamian and Phoenix Urology do not, as Plaintiff implies, argue that Plaintiff has not suffered a serious injury. (Resp't's Br. 63). Rather, the question is what constitutes fair and equitable compensation for Plaintiff's injury. While Plaintiff is infertile, he and his wife, who he met prior to his injury and married *after* his injury, do not plan on having children because his wife had already undergone a hysterectomy *before* they met. (CTR 391). Plaintiff introduced evidence of payment of only $395,033.32 in medical bills and only lost wages of $6,692.75. (CTR 457-58, 668-69, 679-83). Plaintiff made no claim that he would have future medical expenses or any future lost wages. Plaintiff and his wife both also testified that he was still able to engage in normal sexual activity. (CTR 685).

Plaintiff's counsel, during closing argument, recognized that Plaintiff's injuries, although severe, were not the "worst possible case." (CTR 685). Plaintiff argued that "if [he] had completely lost his genitals and not [sic] been able to use his penis at all" the jury ought to have award ten times Plaintiff's medicals, which would be "$3,951,281." (CTR 685). Noting that would not be "fair and just in this case," Plaintiff instead argued for future non-economic damages of $1,975,640.50, and a total award of $3,377,366.27. (CTR 685). Despite Plaintiff's statements regarding the extent of his damages, the jury exceeded Plaintiff's request and awarded almost $1,000,000.00 more in non-economic damages than what Plaintiff himself had requested. (CLF 113, 188).

ARGUMENT

POINT RELIED ON I.

APPELLANTS' CONSTITUTIONAL RIGHT TO TRIAL BY JURY UNDER ART. I, §22(a) OF THE MISSOURI CONSTITUTION WAS DENIED WHEN THE TRIAL COURT FAILED TO CONSIDER REMITTITUR DUE TO §538.300 RSMo.

Standard of Review

Unlike the typical appellate review of a motion for remittitur, which is for an abuse of discretion, this Court must review Dr. Partamian and Phoenix Urology's Point Relied On I *de novo*, as it raises the constitutionality of a state statute. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 637 (Mo. banc 2012). The trial court in this case refused to consider the request for remittitur because § 538.300 RSMo. prohibits the use of remittitur in medical negligence cases. A refusal to exercise discretion is "*automatically*" an abuse of discretion, mandating reversal. *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 35 (Mo. banc 2013).

Remittitur Established Part of Common Law

Remittitur is, and always has been, an established part of the common law in the United States and the state of Missouri. Plaintiff argues remittitur was not part of the common law that Missouri received at the adoption of Missouri's first constitution in 1820. (Resp't's Br., 40-44, 51-53). Plaintiff's claim is demonstratively false. Remittitur was an integral part of the common law prior to the adoption of Missouri's first

constitution and was recognized repeatedly in Missouri jurisprudence prior to the Civil War.

Missouri incorporates the common law as "the rule of action and decision in this state, any custom or usage to the contrary notwithstanding . . ." under § 1.010 RSMo. The common law was already in force in Missouri before Missouri was admitted to United States as a state, as Missouri first adopted the common law in 1816 while still a territory. *Elks Inv. Co. v. Jones*, 187 S.W. 71, 74 (Mo. 1916). In order to determine what the common law in Missouri is, courts are not required to look for "an express decision by an English court, as of 1607 or that approximate period," but are instead to look at decisions of other states as well English authorities from "prior to the Revolution, or subsequently." *Hawkinson v. Johnston*, 122 F.2d 724, 728 (8th Cir. 1941).

Noted commentators on the English common law, including Mansfield, Coke and Blackstone, recognized and supported the use of remittitur as part of the proper functioning of the right to trial by jury prior to and shortly after the American Revolution. *Sunray Oil Corp. v. Allbirtton*, 187 F.2d 475, 480 (5th Cir. 1951). As early as 1774, the state (at that time colony) of Connecticut recognized the use of remittitur to reduce the amount of a judgment entered in too large of an amount. *Thompson v. Alsop*, 1 Root 64, *1 (Conn. Super. Ct. 1774). Immediately after the Revolution, Pennsylvania courts also held that remittitur should be used to reduce an excessive amount of damages awarded to a plaintiff. *Fury v. Stone*, 2 Dall. 184, *2 (Pa. 1792). Similar use of remittitur was approved by the courts of North Carolina, New Jersey, South Carolina, Indiana and, indeed, the United States Supreme Court itself, all prior to Missouri's statehood in 1821.

Arcambel v. Wiseman, 3 U.S. 306 (1796); *Singleton v. Kennedy*, 1 N.C. (Cam & Nor.) 520 (1804); *Johnson v. Van Doren*, 2 N.J.L. 374 (N.J. 1808); *Mooney v. Welsh*, 8 S.C.L. (1 Mill) 133 (S.C. 1817); *Lambert v. Blackman*, 1 Blackf. 59 (Ind. 1820).

The Supreme Court of New Jersey noted in *Johnson* that if a plaintiff recovers "two more than his demand, he may also recover twenty more. The old principle once being broken down, a new practice is let in, it is not to be foreseen the confusion, fraud and injustice it might lead in its train." *Johnson*, 2 N.J.L. at 374. Similarly in *Mooney*, a South Carolina court ordered that an excessive judgment be set aside and that leave be granted for a remittitur to be entered, changing the judgment to the proper amount. *Mooney*, 8 S.L.C. (1 Mill) at 133; *see also Warden v. Nielson*, 5 N.C. (1 Mur.) 275 (1809).

Missouri courts have also long recognized remittitur as part of the common law. Plaintiff incorrectly claims remittitur does not have a long and consistent history as part of Missouri law. (Resp't's Br. 40-44, 48-49). This is simply not true. Even a cursory search for the term "remittitur" in Missouri appellate opinions prior to the Civil War indicates that there are at least 23 cases in which the doctrine of remittitur is mentioned.[2]

[2] *Webb v. Tweedie*, 30 Mo. 488 (1860); *Schilling v. Speck*, 26 Mo. 489 (1858); *Batchelor v. Bess*, 22 Mo. 402 (1856); *Frissell v. Haile*, 18 Mo. 18 (1853); *Hoyt v. Reed*, 16 Mo. 294 (1852); *Barada v. Inhabitants of Carondelet*, 16 Mo. 323 (1852); *Bank of Mo. v. Franciscus*, 15 Mo. 303 (1851); *Haile v. Hill*, 13 Mo. 612 (1850); *Beckwith v. Boyce*, 12 Mo. 440 (1849); *City of St. Louis v. Gurno*, 12 Mo. 414 (1849); *Andrews v.*

Remittitur first appears by name in *Buckner v. Armour*, 1 Mo. 534 (1825). In *Buckner*, this Court noted that an excessive damages award in the circuit court had been "reduced by a remittitur of the plaintiff" to come within the amount of allowable damages. *Id.* at 534-35. Similarly, in *McCallister v. Mullanphy*, 3 Mo. 38 (1831), this Court noted that the trial court appropriately entered a remittitur of an award in favor of the plaintiff, in that case for land, reducing the award in plaintiff's favor to the proper amount. *Id*. at 39. *Atwood v. Gillespie*, 4 Mo. 423 (1836), *Haile v. Hill*, 13 Mo. 612 (1850), and *Schilling v. Speck*, 26 Mo. 489 (1858) all also hold that a trial court award of too large of an amount can be appropriately reduced to the proper amount through the use of remittitur. *Atwood*, 4 Mo. at 425; *Haile*, 13 Mo. at 620; *Schilling*, 26 Mo. at 489.

Plaintiff incorrectly claims that *Hoyt v. Reed*, 16 Mo. 264, is the source of where remittitur "sprang up in Missouri law at the behest of Plaintiffs." (Resp't's Br. 40). Although Plaintiff is at least three decades off the mark as to the date of remittitur's appearance in Missouri law, he is correct that *Hoyt v. Reed* is an important case. As this Court noted in *Hoyt*, the doctrine of remittitur could be used to "avoid a reversal of the

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Ormsbee, 11 Mo. 400 (1848); *Conway v. Campbell*, 11 Mo. 71 (1847); *Harrison v. State*, 10 Mo. 686 (1847); *Hayden v. Sample*, 10 Mo. 215 (1846); *Quinnett v. Washington*, 10 Mo. 53 (1846); *Benosit v. Siter*, 9 Mo. 657 (1845); *Steigers v. Darby*, 8 Mo. 679 (1844); *Hoffstetter v. Blattner*, 8 Mo. 276 (1843); *Steigers v. Gross*, 7 Mo. 261 (1841); *Davidson v. Peck*, 4 Mo. 438 (1836); *Atwood v. Gillespie*, 4 Mo. 423 (1836); *McCallister v. Mullanphy*, 3 Mo. 38 (1831); *Buckner v. Armour*, 1 Mo. 534 (1825).

judgment below, where it has appeared that the recovery has been for more than" should have been award. *Id*. at 301. *Hoyt* is not, however, the first case or alone in holding clearly that remittitur should be used by Missouri courts, as seen from the authorities cited above and in *Hoyt* itself. The holding in *Hoyt* is based upon and cites to an earlier Missouri case, *Johnson v. Robertson*, where this Court reversed a judgment due to an improperly large verdict, but, on the reversal, "let the party remit the excess" amount. *Johnson* 1 Mo. at 615 (1826).

The essential nature of the doctrine of remittitur, as well as its basic outline, are recognizable in these early cases, although the specific practice of how and when remittitur is used has evolved along with the rest common law over the last two hundred plus years. This is not surprising or unusual as the common law, by its very nature, is a dynamic body of law that adapts to the changing circumstances and legal conditions of the civilization it serves. *La Plant v. E.I. Du Pont De Nemours & Co.*, 346 S.W.2d 231, 245 (Mo. App. 1961).

In our modern era, numerous jurisdictions have acknowledged that remittitur is an integral and long-established part of the common law. The "healthy administration of justice requires that, in a proper case, the courts must take action to correct what plainly appears to be an unfair verdict. This authority is an ancient and accepted part of the common law." *Smithy v. Sinclair Refining Co.*, 122 S.E.2d 872, 875 (Va. 1961). Courts have the power, drawn from the common law, to grant remittitur even if no statutory authorization to do so exists under their respective state's statutes. *Tuley v. City of Kansas City*, 843 P.2d 267, 272 (Kan. Ct. App. 1993).

When a statute exists that provides for remittitur, like in Missouri, it is simply the tacit recognition and implied ratification by the legislature of remittitur as "an ancient and accepted part of the common law." *Robinson v. Old Dominion Freight Line, Inc.*, 372 S.E.2d 142, 143-44 (Va. 1988). Remittitur exists "as promoting both the administration of justice and the conclusion of litigation," serving to assist the legal system in avoiding excessive verdicts and providing some uniformity to judgment as well as assisting plaintiffs in avoiding the unnecessary costs and expense of retrial because a verdict, although correct, exceeds the proper amount of damages that should be awarded. *Taylor Mach. Works v. Union Pac. R.R. Co.*, 689 N.E.2d 1057, 1079 (Ill. 1997).

Remittitur Part of the Right to Trial by Jury

Remittitur is part of the right to trial by jury guaranteed to both plaintiffs and defendants under Article I, §22(a) of the Missouri Constitution. The Missouri Constitution guarantees that "the right of trial by jury as heretofore enjoyed shall remain inviolate . . ." and requires that the right to trial by jury be maintained without "change or blemish, pure or unbroken" in the same basic form as available at common law when the Missouri Constitution was adopted in 1820. *Watts*, 376 S.W.3d at 638.

The right to trial by jury under the Missouri Constitution includes "all substantial incidents and consequences that pertain to the right of jury trial at common law" and these "incidents and consequences" must be "preserved in their ancient substantial extent as existed at common law." *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991); *Koltz v. St. Anthony Med. Ctr.*, 311 S.W.3d 752, 776-77 (Mo. banc 2010) (Wolff, J., *concurring*). Remittitur *does not* violate the right to trial by jury, as noted by the United

States Supreme Court and by other federal courts. *Dimick v. Schiedt*, 293 U.S. 474, 482 (1935); *Gilbert v. St. Louis-San Francisco R.R. Co*., 514 F.2d 1277, 1280, 1280-81 (5th Cir. 1975).

Missouri courts have not examined directly, before this case, whether the doctrine of remittitur is part of and integrated into the right to trial by jury guaranteed by Article I, §22(a) of the Missouri Constitution. Other jurisdictions, however, have addressed role that remittitur plays as part of the right to trial by jury and concluded remittitur plays a key role in guaranteeing the effectiveness of the right to trial by jury for both plaintiffs and defendants. When a trial court sets aside a verdict that is excessive, either through a new trial or by remittitur, the court has not acted in "derogation of the right to trial by jury" but has performed "one of the historic safeguards of that right." *Slatton v. Martin K. Eby Constr. Co., Inc.*, 506 F.2d 505, 508 (8th Cir. 1974) (quoting *Altrichter v. Shell Oil Co.*, 263 F.2d 377, 380 (8th Cir. 1959)). The right to trial by jury is the right to a properly functioning jury. *Turner v. Wash. Suburban Sanitary Comm'n*, 158 A.2d 125, 130 (Md. 1960). Remittitur "is as much an incident and corrective of jury trial as the right of the trial court to set aside a verdict on the grounds that it is against the evidence, or against the weight of evidence." *Id.*

Remittitur protects both the right to trial by jury of the defendant against whom an excessive verdict is rendered and the plaintiff, who avoids the costs and expenses of a new trial. Remittitur cannot result in a "loss of a plaintiff's right to a jury trial" as remittitur is only "an alternative to granting a new trial" and the plaintiff retains the power to elect to accept the proposed remittitur or retry the matter. *Crookston v. Fire Ins.*

Exch., 817 P.2d 789, 813 (Utah 1991). Remittitur is the "proper function of a court which is required by controlling law to consider the entire record and to administer right and justice thereon." *Kovacs v. Venetian Sedan Serv., Inc.*, 108 So.2d 611, 612 (Fl. Ct. App. 1959).

The now-legislatively reversed decision in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99 (Mo. banc 1985), does not alter the fact that remittitur is part of the right to trial by jury guaranteed by Article I, §22(a) of the Missouri Constitution. *Firestone* was wrongly decided and, if not already completely repudiated by the Missouri legislature's subsequent actions, should be expressly overruled as part of this Court's decision here.

The *Firestone* Court did not analyze whether or not remittitur was part of the constitutional right to trial by jury guaranteed in the Missouri Constitution and also ignored both over 160 years of Missouri case law and the wealth of authority in the common law tradition in eliminating the doctrine of remittitur. Courts should exercise "judicial restraint and avoid affecting a change when there is not substantial agreement" that change in the common law is needed, something the Court in *Firestone* clearly failed to do. *Bradford v. Union Elec. Co.*, 598 S.W.2d 149, 150 (Mo. App. 1979).

The *Firestone* decision was quickly rejected by federal courts applying Missouri law and completely repudiated by the Missouri legislature, who restored remittitur to the common law via statute. *Hale v. Firestone Rubber & Tire Co.*, 820 F.2d 928, 936 (8th Cir. 1987); §537.068 RSMo. When the repeal of statute or decision abrogating the common law occurs, the common law is automatically reinstated as though the prior

action had not occurred and the topic is again automatically governed by the principles of the common law.[3] *White v. State*, 717 S.W.2d 784, 787 (Ark. 1996); *Makin v. Mack*, 336 A.2d 230, 235 (Del. 1975).

Constitutional Arguments Properly Before this Court

Dr. Partamian and Phoenix Urology's claim that the trial court's refusal to even evaluate their request for remittitur violates their constitutional rights under Article I, §22(a) of the Missouri Constitution is properly before this Court. Plaintiff's brief, in an apparent application of the "kitchen sink" doctrine, claims that Dr. Partamian and Phoenix Urology's constitutional argument was not proper and timely raised, is barred by judicial estoppel and barred by a judicial admission that they allegedly made in their answer to Plaintiff's petition. (Resp't's' Br. 35-38). Each of these three arguments is without merit.

Missouri law requires that a constitutional question must "be presented at the earliest proper moment that good pleading and orderly procedure will admit under the circumstances of the given case." *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011) (quoting *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989)). To raise the constitutional question, a party must specifically designate the provision of the Constitution that has been violated by reference to the article and section

[3] The only exception to this rule appears to be when the legislative rejection of the common law was designed to "cover the whole ground" and remove an entire topic from the common law. *See, e.g.*, *State v. Slaughter*, 70 Mo. 484, 487 (1879).

number, state the facts showing the violation and preserve the constitutional question throughout the appellate process. *Id.* at 712.

Here, Dr. Partamian and Phoenix Urology raised §538.300 RSMo.'s violation of their constitutional right to trial by jury under Article I, §22(a) of the Missouri Constitution as soon as it became relevant in the facts of this case. Remittitur only arises *after* a verdict that is arguable excessive has been entered in favor of a plaintiff. As soon as the verdict in this case was entered in favor of Plaintiff, for approximately a million dollars more than Plaintiff requested in closing arguments, Dr. Partamian and Phoenix Urology filed a request for remittitur and specifically argued that §538.300 RSMo.'s prohibition on the use of remittitur in medical malpractice cases is a violation of the right to trial by jury guaranteed to them under Article I, §22(a) of the Missouri Constitution. They have consistently preserved this argument throughout the appellate process, even going to the extent of filing their appeal directly with this Court.

Similarly, Plaintiff's judicial estoppel and judicial admission arguments are without any merit. The doctrine of judicial estoppel prevents litigants from taking a position in one judicial proceeding that is contrary to one they took in a previous, separate, case. *American Eagle Waste Indus., LLC v. St. Louis Cnty.*, 379 S.W.3d 813, 827-28 (Mo. banc 2012). Plaintiff here is seeking to assert that judicial estoppel exists over generalized statements made in a response to pleadings in *this* same case.

Judicial estoppel only exists to prevent a party from taking a position in one case, and obtaining benefits from that position in that case, and then taking a contrary position to benefit itself in an independent second case. *Banks v. Cent. Trust & Inv. Co.*, 388

S.W.3d 173, 175-76 (Mo. App. 2012). Second, judicial estoppel only prevents a party from asserting contrary *facts* in a second case, not from taking any legal position supported by the facts. *Kansas City v. Martin*, 391 S.W.2d 608, 616 (Mo. App. 1965). The doctrine of judicial estoppel simply has no application when the statement for which a party seeks estoppel is one of law, like it is here, and is not a clear, unequivocal statement of fact. *Brock v. McClure*, 404 S.W.3d 416, 420 (Mo. App. 2013).

Similarly, Dr. Partamian and Phoenix Urology's denial of the allegation in Plaintiff's petition that § 538.300 RSMo. is unconstitutional does not constitute a judicial admission. A judicial admission "requires a specifically pled allegation by one party that is admitted by the other party." *M & I Marshall & Ilsley Bank v. Sader & Garvin, LLC*, 318 S.W.3d 772, 778 (Mo. App. 2010). The allegation contained in Plaintiff's petition is a general allegation regarding the constitutionality of all of § 538.300 RSMo. and contains no specific allegations about the statute's parts or about why they are or are not constitutional. Additionally, allegations of law and conclusory allegations cannot be a basis for a judicial admission. *Frick's Meat Prods. Inc. v. Coil Constr. of Sedalia, Inc.*, 308 S.W. 3d 732, 738 (Mo. App. 2010); *English v. Empire Dist. Elec. Co., Inc.*, 220 S.W. 3d 849, 857, 858 (Mo. App. 2007).

Prohibition of Remittitur in Medical Negligence Cases can be Severed from the Rest of the Statute.

This Court should not declare all of § 538.300 RSMo. unconstitutional and need only declare unconstitutional that portion of statute prohibiting parties in medical malpractice actions from using remittitur. Plaintiff argues that this Court will be forced,

if it rules in Dr. Partamian and Phoenix Urology's favor, to declare all of § 538.300 unconstitutional. (Resp't's Br. 46-47).

> If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed that the legislature would have enacted the valid provisions without the void one[.]

§ 1.140 RSMo. This Court presumes that all the provisions of a statute are severable if one section of a statute is declared unconstitutional. *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996). While this this Court will not and cannot add words to a statute, the remaining sections of a statute will be upheld after separating the invalid provision if the remaining sections are still "a law in all respects complete and susceptible of constitutional enforcement . . . which the legislature would have enacted had it known that the exscinded portions were invalid." *Id.* (quoting *Simpson v. Kilcher*, 749 S.W.2d 386, 393 (Mo. banc 1988)).

There is no valid reason, and none offered by Plaintiff, why the remaining sections of the statute are not still capable of enforcement. The statute simply sets out statutory provisions, by number, that are not to apply in medical malpractice actions. These provisions include procedural and post-judgment issues wholly unrelated to remittitur. Indeed, there is no reason why the legislature would not have enacted the statute anyway had it known the remittitur portion of the statute was unconstitutional.

It is this Court's "obligation to sever the unconstitutional provisions of a statute unless the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon the void provisions that separation is not possible." *Mo. Ass'n of Club Execs. Inc. v. State*, 208 S.W.3d 885, 889 (Mo. banc 2006). The statutory provisions here do not depend upon each other in anyway and the statute in all provisions except that portion prohibiting the use of a remittitur in medical malpractice actions should be upheld and carried into effect to the fullest extent possible. *Gen. Motors Corp. v. Dir. of Revenue*, 981 S.W.2d 561, 568 (Mo. banc 1998).

Verdict in Favor of Plaintiff Exceeds Fair and Reasonable Compensation

Remittitur should have been granted due to the excessive amount of the verdict entered in favor of Plaintiff. As Dr. Partamian and Phoenix Urology have noted in their previous briefs before this Court, the verdict in favor of Plaintiff greatly exceeds the amount allowable in other similar cases. Plaintiff has not, in his brief, questioned or challenged the finding of any of these cases, so Dr. Partamian and Phoenix Urology will not reargue them here. An award of more than a plaintiff requests in closing argument must either be remedied by the entry of a remittitur or serves, by itself, as grounds for an appellate court to reduce the amount of the damages. *McComas v. Covenant Mut. Life Ins. Co. of St. Louis*, 56 Mo. 573, 576-77 (1874); *Coleman v. Tennessee*, 998 F. Supp. 840, 849-50 (W.D. Tenn. 1998).

POINT RELIED ON II.

IT WAS REVERSIBLE ERROR TO ADMIT DR. RIORDAN'S TESTIMONY REGARDING HIS PRIOR TREATMENT OF OTHER PATIENTS WITH PROSTATE ABSCESSES.

The trial Court erred when it allowed Dr. Riordan to testify, via videotaped deposition, regarding his treatment of other, unidentified patients with prostate abscesses. Dr. Riordan testified that he had drained the prostate abscesses of all previous patients he had treated with Plaintiff's condition, including one he treated just weeks prior to Plaintiff's treatment in the same hospital where Plaintiff was being treated. (Ex. 115, 32: 13-33: 13, 43: 22-25; Ex. 116). Dr. Riordan testified that "since graduating medical school" he had treated prostate abscesses "maybe a half dozen times" and that he had drained all prostate abscesses that he had treated. (Ex. 115, 32: 13-33: 13, 33:22-25; Ex. 116).

Dr. Riordan's testimony should not have been admitted for multiple reasons, including because evidence of similar occurrences is only admissible when such occurrences are "sufficiently similar to the injury causing incident so as to outweigh the concerns of undue prejudice and confusion of the issues" and because Dr. Riordan's testimony was used to vary, through discussing a physician's personal practice, the medical standard of care. *Thorton v. Gray Auto. Parts Co.*, 62 S.W.3d 575, 583 (Mo. App. 2001); *Byers v. Cheng*, 238 S.W.3d 717, 729 (Mo. App. 2007); *Dine v. Williams*, 830 S.W.2d 453, 457 (Mo. App. 1992).

Plaintiff's brief essentially admits that the testimony of Dr. Riordan was used to "explain Dr. Riordan's experience," contrasting Dr. Riordan's personal practice with Dr. Partamian's decision not to drain the abscess. (Resp't's Br. 73-74). Plaintiff seeks to excuse his use of this testimony with two (2) arguments. First, Plaintiff claims Dr. Partamian and Phoenix Urology waived any objection they had to the use of the testimony and, second, by claiming that Dr. Riordan's testimony was relevant as it was "presented to show that the option of draining the abscess was raised with Dr. Partamian on May 15, 2009, two days before the critical rupture of the abscess." (Resp't's Br. 75). Neither of these two arguments excuses the trial court's err.

Dr. Partamian and Phoenix Urology properly objected to Dr. Riordan's testimony that he had drained all prior abscesses that he had encountered in his practice, including one a few weeks prior to Plaintiff's treatment at the same hospital. (CLF 149-62). Their concerns were also included in their Motion in Limine, which was granted, and was to prevent any testimony of the "personal practice of any witness in performing medical treatment." (CLF 43). The trial court overruled, however, Dr. Partamian and Phoenix Urology's testimonial objections and allowed Dr. Riordan's deposition to be presented to the jury, via video recording, with the portions included where Dr. Riordan discussed his personal experience and practice with prostate abscesses. (Ex. 115; CTR 217, 389).

Plaintiff's incorrect claim that Dr. Partamian and Phoenix Urology failed to object to the testimony implies that Dr. Partamian and Phoenix Urology had a duty to interrupt the playing of the videotape to the jury by objecting at the very moment during playback of the videotape that the actual objectionable testimony occurred. There is no a law in

Missouri that requires this practice. Only objections to the form of a question must be made at a deposition; all other types of objections including relevancy and deviating from the appropriate standard of care need not be made until trial. *Hackman v. Kindrick*, 882 S.W.2d 157, 159 (Mo. App. 1994); *Russell v. Constantino Enters. Inc.*, 785 S.W.2d 682, 684 (Mo. App. 1999). It is not err to raise objections to testimony contained in videotaped depositions outside the precedence of the jury. *See, e.g., Lauck vs. Price*, 289 S.W.3d 694, 697-98 (Mo. App. 2009); *Wilkins v. Cash Register Serv. Co.*, 518 S.W.2d 746, 745-46 (Mo. App. 1975).

In a medical malpractice case, testimony regarding the negligence of the defendant medical provider must be based upon the standard of care, and not on a physician's personal practice. *Boehm v. Pernoud*, 24 S.W.3d 759, 762 (Mo. App. 2000). "Mere evidence that a doctor's conduct did not measure up to the standards of an individual member of the profession, as opposed to the standards of a profession at large, does not constitute" medical malpractice. *Id*.

Here, Plaintiff has admitted that the sole purpose for Dr. Riordan's testimony was to allow Plaintiff to show that Dr. Riordan had drained all prior prostate abscesses and that he provided this information to Dr. Partamian, which Dr. Partamian rejected. (Resp't's Br. 75-77). Because the admission of Dr. Riordan's testimony, implying a standard of care based on a medical provider's personal practice, was erroneously admitted and would have had the reasonable tendency to influence the jury in Plaintiff's favor, the judgment must be reversed. *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. banc 2004).

POINT RELIED ON III.

DR. RIORDAN'S TESTIMONY REGARDING WHY HE NO LONGER WORKED FOR PHOENIX UROLOGY WAS IRRELEVANT AND PREJUDICIAL, IMPROPERLY IMPLYING TO THE JURY THAT PHOENIX UROLOGY WAS MORE CONCERNED WITH MONEY THAN QUALITY OF PATIENT CARE.

The trial court also erred in allowing Dr. Riordan to testify, over Dr. Partamian and Phoenix Urology's objection, that Dr. Riordan's contract with Phoenix Urology was not renewed because he was not bringing in enough money into the practice. (Ex. 115, 26:12-27:15, 28:9-18; Ex. 116). Dr. Riordan was allowed to testify to the fact he was terminated from Phoenix Urology and Plaintiff used Dr. Riordan's testimony, as a star of Plaintiff's case, to imply that Phoenix Urology was more concerned with money than patient care, or at least more so than Dr. Riordan.

Plaintiff featured Dr. Riordan and his termination from Phoenix Urology, and the lawsuit between Phoenix Urology and Dr. Riordan due to that termination, during his opening statement, during his examination of Dr. Partamian, and even during his closing arguments. (CTR 34-35, 37, 44, 46-48, 58, 183-85, 188-89, 668-69, 679-83). This evidence was irrelevant and improperly introduced solely to make Phoenix Urology appear hypocritical. *Peters v. ContiGroup*, 292 S.W.3d 380, 392-93 (Mo. App. 2009); *Barr vs. Plastic Surgery Consultants, Ltd.*, 760 S.W.2d 585, 587 (Mo. App. 1988); *Conley v. Kaney*, 250 S.W.2d 350, 353 (Mo. 1952).

Plaintiff seeks to excuse the error of admitting of Dr. Riordan's irrelevant and prejudicial testimony by again claiming that Dr. Partamian and Phoenix Urology failed to object. This argument has already been dealt with in detail in response to Plaintiff's argument on Point Relied On II, which is incorporated herein by reference. Dr. Partamian and Phoenix Urology properly objected in written objections prior to the playing of the videotaped testimony before the jury and even included this issue in their pre-trial Motion of Limine. (CLF 43, 163-66; SLF 154; CTC 4).

Plaintiff also claims Dr. Riordan's testimony regarding the reasons for his termination from Phoenix Urology were relevant to the issues of bias and credibility. Dr. Riordan's potential bias was already resolved with his own testimony, without objection, that he had been terminated from Phoenix Urology. Discussing the reasons for Dr. Riordan's termination from Phoenix Urology, however, exceeded what was necessary to show the potential bias and prejudice of the witness, as being adverse to Phoenix Urology, and instead was used to imply improper conduct on the part of Phoenix Urology and potentially Dr. Partamian as an employee of the company. Because the trial Court improperly admitted Dr. Riordan's testimony that he had been terminated from Phoenix Urology for failure to bring in enough money, the judgment should be reversed.

POINT RELIED ON IV.

A NEW TRIAL SHOULD HAVE BEEN GRANTED BECAUSE THE VERDICT WAS EXCESSIVE, EXCEEDED FAIR AND REASON COMPENSATION AND WAS A PRODUCT OF BIAS AND PREJUDICE.

A new trial should have been granted due to the excessive amount of the verdict entered in favor of Plaintiff. As Dr. Partamian and Phoenix Urology have noted in their previous briefs before this Court, the verdict in favor of Plaintiff greatly exceeds the amount allowable in other similar cases. (Appellants' Br. 26-29, 39-40). Because Plaintiff did not address these cases in his response, Dr. Partamian and Phoenix Urology will not reargue them here. In response to Point Relied On IV, Plaintiff makes only one new argument, claiming the fact the jury awarded more, by almost a million dollars, than was asked for by Plaintiff in closing arguments, was not error and cannot justify either remittitur or a new trial.

The fact that the jury awarded almost a million dollars more than Plaintiff asked for in closing arguments alone justifies either setting aside the verdict or entering remittitur. A jury that awards more than a plaintiff's attorney requests in closing arguments is in and of itself sufficient grounds for either ordering a remittitur or a new trial due to the excessive size of the verdict. *Lewis v. Envirotech Corp.*, 674 S.W.2d 105, 113 (Mo. App. 1984). Plaintiff attempts to avoid this clear precedent by citing *Mansfield v. Horner*, 443 S.W.3d 627 (Mo. App. 2014). In *Mansfield*, the Court of Appeals, Western District, allowed a verdict that was for more than Plaintiff had asked for in closing argument to stand, but the defendant on appeal in *Mansfield* had never properly

alleged that any trial error or misconduct caused the verdict to be the product of bias or prejudice. *Id.* at 640-41. Additionally, the defendant had failed to preserve for appellant review the argument that the verdict was excessive due to the fact that the jury awarded more than the Plaintiff's attorney had requested. *Id.* at 642.

Here, Dr. Partamian and Phoenix Urology's argument is clearly preserved, as they have consistently argued that the verdict was excessive, not only in comparison to other similar verdicts, but also due to the fact that the verdict exceeds by almost a million dollars the amount Plaintiff requested during closing arguments. Because the jury's verdict was clearly excessive, and was the product of the errors of introducing Dr. Riordan's testimony regarding why he was terminated from Phoenix Urology and his personal practice of draining all previous prostate abscess he had encountered, producing bias and prejudice in the jury, the judgment in favor of Plaintiff must be reversed.

CONCLUSION

Dr. Partamian and Phoenix Urology's right to trial by jury, guaranteed by the Missouri Constitution, Article I, Section 22(a), is violated by § 538.300 RSMo. The statute unconstitutionally denies all parties, plaintiffs and defendants alike, the ability to use remittitur in medical negligence cases. Remittitur is an integral and long-standing part of both the common law and the right to trial by jury. The section of § 538.300 RSMo. prohibiting the use of remittitur in medical negligence actions must be struck down and severed from the rest of the statute, which should remain in force.

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RULE 84.06 CERTIFICATION

The undersigned certifies that the foregoing brief complies with Supreme Court Rule 84.06(b). According to the word count function of Microsoft Word by which it was prepared, it contains 7,209 words, exclusive of cover, Certificate of Service, the Certification and signature block.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing was served on the following named parties via the Court's electronic filing system, this 31st day of December, 2014:

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