IN THE SUPREME COURT OF MISSOURI

DOUGLAS STEWART, Plaintiff/Respondent, Vs. KRIKOR O. PARTAMIAN, M.D. and PHOENIX UROLOGY OF ST. JOSEPH, INC., Defendants/Appellants.	SC94120

Appeal from the Circuit Court of Buchanan County, Missouri

Fifth Judicial Circuit, Division II, Honorable Weldon C. Judah, Judge

Respondent's Brief

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JURISDICTIONAL STATEMENT

Respondent disputes that jurisdiction is proper in this Court. Appellants denied that § 538.300 R.S.Mo. (2013) was unconstitutional in their answer, failed to raise a constitutional challenge at the earliest possible point in the litigation, and affirmatively sought to "invoke and rely upon all of the provisions of Chapter 538 R.S.Mo.," in their affirmative defenses. (CLF022). The constitutional claim upon which jurisdiction is premised is "merely colorable" and transfer to the Western District Court of Appeals would be proper. However, as there is a constitutional claim advanced this Court may certainly, *ex gratia*, exercise its jurisdiction.

STATEMENT OF FACTS

Procedural Background

Plaintiff Doug Stewart filed suit in the Circuit Court of Buchanan County, Missouri, on June 29, 2012. (CLF011). The Petition alleged medical negligence against Dr. Partamian and Phoenix Urology. (CLF011). Plaintiff alleged that Dr. Partamian and Phoenix Urology, as Dr. Partamian's employer, were negligent in failing to timely drain the Plaintiff's prostate abscess after it was diagnosed on May 11, 2009, leading to the rupture of the abscess six days later. (CLF013, 014-015). As a result of negligently allowing the prostate abscess to rupture, Plaintiff alleged that he suffered necrotizing fasciitis, sepsis, acute respiratory distress syndrome and respiratory failure and damage to his penis resulting in loss of sensation and ability to physically respond to or engage in sexual activity, and that Plaintiff incurred medical expenses and lost wages. (CLF017-018).

In his Petition, Plaintiff alleged that certain provisions of Chapter 538 R.S.Mo. (as implemented by HB 393, 2005) are unconstitutional. (CLF015-16). In answering the lawsuit, both Dr. Partamian and Phoenix Urology specifically denied that the provisions of Chapter 538 R.S.Mo. were unconstitutional. (CLF021). Dr. Partamian and Phoenix Urology - for the first time in their Motion for New Trial - alleged that the provisions of Chapter 538 R.S.Mo.

(2013) as applicable to remittitur in medical negligence cases were unconstitutional. (CLF173).

The jury returned a unanimous verdict for Plaintiff, against the Defendants for violating the standard of care in failing to drain the Plaintiff's prostate abscess on May 13, May 14, May 15, or May 16, 2009. (CLF113, 124).

Damages Evidence

The jury heard evidence proving that as a result of the failure to drain the prostate abscess, the abscess ruptured resulting in Fournier's gangrene and necrotizing fasciitis destroying his urethra with the infection spreading into Doug Stewart's pelvis, scrotum, penis, and perineum. (CTR300-326) Plaintiff was placed on a mechanical ventilator (life support) and suffered multiple surgical procedures. This included peritoneal explorations (to remove necrotic tissue), laparoscopy, a tracheostomy to permit long-term mechanical ventilation (and allow the tube previously inserted into his mouth to be removed), and surgeries to place a wound VAC[1] to treat his infection. (CTR322-326). He was hospitalized until June 18, 2009. (CTR326).

The jury also heard evidence that after his initial release from the hospital, Mr. Stewart was readmitted on June 25, 2009, because he was urinating through his perineum (the area between the rectum and scrotum). (CTR326-32). This mandated placement of a catheter through the penis into

[1] Vacuum Assisted Closure (VAC) is a form of negative pressure wound

the bladder in an attempt to have the urethra heal around the catheter. (CTR326-327). Additional evidence detailed the urethral strictures Mr. Stewart developed because of scar tissue. This required multiple cystoscopy (insertion of catheter into the urethra) procedures by Dr. Partamian to stretch open the strictures to allow Mr. Stewart to urinate. (CTR327-329).

Almost one year later, in April, 2010, he underwent reconstructive surgery at Kansas University Hospital repairing both a hole in his urethra and rebuilding three inches of his urethra with mouth tissue. (CTR329-331). The prostate abscess rupture caused Mr. Stewart permanent and debilitating injuries. He suffers loss of blood flow to the right side of his penis. (CTR327-329). He had the complete loss of his bulbospongiosus muscle surrounding his urethra (CTR332). He has frequent urinary incontinence requiring the use of panty liners (CTR332).

He suffered reproductive injury as well. He has erectile and ejaculation dysfunction (CTR333-334). He suffers from pain on the right side of his scrotum, pain in the perineum, pain in the lower abdomen, pain with erection, deformity of his erection, and burning sensation in the right groin area. (CTR334-335). Doug Stewart's injury has impacted his personality and it upsets him that he is not able to be the man he used to be. (CTR422, 459-460).

Dr. Riordan's Testimony

Dr. Riordan was a treating physician who saw Mr. Stewart on May 15, 2009. (CLF277) He was also then a member of the Defendant group practice. (CLF274) His video deposition was taken before trial and he testified about two issues of concern to Appellants: a prior patient he mentioned in passing, and his contract dispute with the practice group.

The Prior Patient With An Abscess

In his deposition he testified without objection that he had experience in treating prostate abscesses, and that he had treated a half a dozen since leaving residency. (CLF280). He testified that a prostate abscess was a rare condition. (CLF280). A prostate abscess is a medical emergency. (CTR381-382). Treatment of prostate abscess requires antibiotics and if antibiotics fail, then drainage. (CTR125). At the time that Dr. Riordan saw the patient, other physicians caring for Mr. Stewart were asking for the opinion of urology about whether drainage was warranted. (CTR146, 170-171, 181). In this context, on May 15, 2009, Dr. Riordan asked Dr. Partamian about "How about just draining this thing?" (CLF289). Dr. Partamian chose not to drain the abscess and as a result the abscess ruptured on May 17, 2009 (CTR209, 399).

Defendants did not object contemporaneously[2] at trial to the following testimony, and no objection is lodged to the question in the deposition:

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[2] The court overruled Defendants' motion in limine on these issues.

A. And so one of the things that sticks out in my mind is just a few weeks before Mr. Stewart presented, there was another patient of mine that I -- I treated at Heartland. I remember specifically the date 'cause it was the date my daughter was born, April 25th, 2009. I had a patient in the hospital and my wife went into labor and I — I drained the abscess on that same -- same day.

Q. You -- you did what with the abscess?

A. I drained it.

(CLF280). Dr. Riordan also testified that he had a conversation with Dr. Partamian shortly after writing the note on the patient, and it concerned draining Mr. Stewart's abscess:

Q. And, first of all, what prompted that discussion?

A. Well, a- few weeks earlier, as I said, I had had a very similar patient and I had drained the abscess. And I was curious about why he would be pursuing a different — a different treatment option.

Q. And how old was the patient that you had had earlier?

A. I don't remember.

Q. Okay. Young patient, middle-aged patient, older patient, do you have any recollection at all?

A. Young to middle-age, but I don't remember.

(CLF289-290).

The Contract Issue

Because Dr. Riordan was no longer with Phoenix Urology at the time of trial, Plaintiff introduced evidence to explain this and disrupt an allegation of bias in Dr. Riordan's testimony:

Q. (By Mr. Redfearn) Tell me, you would have left Phoenix Urology in what year?

A. I was with Phoenix Urology for three years. And left at the end of my third year of employment, which I believe was around – it was two years ago, so 2011, August 2011

Q. And what was the reason that you decided to leave Phoenix Urology?

A. We had a partnership dispute and we have different philosophies about how to best practice medicine.

Q. Tell me about that. What hap – what happened and tell me the details about that.

A. Well, its complicated and there's actually a separate lawsuit stemming from that, so I can't go into all the details. But it's basically a breach of contract case. And it is a dispute about

what is owed to me because of my partnership status with Phoenix.

Q. Okay. Did you voluntarily leave Phoenix Urology?

A. No.

Q. So – so you – I don't know any other way to put – put it other than you were discharged or fired from – by the group?

A. The group would say that – that my contract was not renewed. But –

Q. Okay.

A. -- Same – same effect, I suppose.

(material omitted)

(CLF279).

Defendants made no objection to this testimony. (CTR427-433,757). Dr. Riordan's testimony suggested there might be an issue with regard to different philosophies of medical practice. He further explained:

Q. (By Mr. Redfearn) My question was did – did they – and I'm not suggesting that you agree with it – but did they provide you with some sort of reason for why they would not renew your contract?

A. They were concerned that I wasn't bringing in enough money to the group. And I disagreed with that because I had met the

productivity bonus – or I had earned a productivity bonus based on the contract they had signed.

(CLF279).

It is only this testimony on the subject of Riordan's departure from Phoenix Urology at Page 28 Lines 9-18 that Defendants ever claimed was inadmissible. And this singular objection was stated by Defendants in the record after the Riordan testimony was admitted. (CLF427-433, CLF163-165)

Dr. Partamian's Testimony

Dr. Partamian testified similarly about the contract dispute:

Q. And apparently there's a contract dispute of some sort between Phoenix Urology and Dr. Riordan; is that correct?

A. That's correct.

Q. And, in fact, there's a lawsuit over that; isn't that true?

A. It's -- yeah, it's in arbitration.

Q. All right. And so there's been somewhat of a falling out between you and Dr. Riordan; is that true? Or do you all --

A. Not between me. It's -- we see each other.

Q. You see each other at family things? I'm sure you probably saw each other over the ---– over Thanksgiving?

A. Holidays, yeah.

(CTR184-185).

Plaintiff's Opening Statement

During the opening statement, Plaintiff's counsel discussed the involvement of Dr. Riordan in the treatment on May 15, 2009, when he saw Mr. Stewart with Dr. Partamian. (CTR034-037). Counsel explained that Dr. Riordan had a family relationship with Dr. Partamian. (CTR034). Counsel explained that Dr. Partamian's son is married to Dr. Riordan's wife's sister. (CTR034). Counsel explained that Dr. Riordan was no longer with the group because they had a contract dispute and a falling out in that regard. (CTR035). Counsel explained that on May 15, 2009, there was a conversation between Dr. Riordan and Dr. Partamian outside the presence of the patient. (CTR037). Counsel explained, without objection, that Dr. Riordan had asked, "Why don't we just go ahead and drain this abscess?" and that Dr. Riordan had explained to Dr. Partamian that he had treated a similar situation a few weeks earlier and he thought that was the way to go. (CTR037).

Plaintiff's Closing Argument

In Plaintiff's closing argument, there is no mention of any of the circumstances of Dr. Riordan leaving Phoenix Urology or any mention of the experience of Dr. Riordan in treating other patients with a prostate abscess. (CTR658-687). Rather, the emphasis was on the fact that the testimony of Dr. Riordan reflected that there was not any discussion between Dr. Riordan and

Dr. Partamian about not taking Mr. Stewart to surgery because of the 'concerning' pulmonary issues, which had become a focus of Dr. Partamian's defense. (CTR668-670).

Plaintiff argued damages detailing the economic damages in the past, past non-economic damages, future non-economic damages, and suggested a specific amount for the verdict. (CTR680-687). Plaintiff's counsel suggested a total verdict of $3,377,366.27. (CTR685). Immediately after suggesting the amount of compensation, Plaintiff's counsel reminded the jury that this was their decision and that they may not agree with counsel's numbers and that the reason we have the jury system is that the jury is uniquely able to understand the value of life and the harm that it does to health and that ultimately the amount of compensation was their decision. (CTR686).

Defendants' Closing Argument

During Defendants' closing argument, Defendants' counsel discussed the testimony of Dr. Riordan. (CTR702-703). Defendants' counsel reminded the jury that the testimony of Dr. Riordan was that even his standard of care is to try antibiotics first. (CTR702). Counsel reminded the jury that he testified that trying antibiotics first is not a different school of thought but an extension of Dr. Riordan's thought and that Dr. Riordan also believed in trying antibiotics first, unless the patient gets worse. (CTR703). Then Counsel stated, "So Dr. Riordan said – and that testimony comes from a man who now

has a lawsuit pending against Phoenix Urology. So he wasn't in here pitching for Dr. Partamian. He was being honest. And he said that's his school of thought, too." (CTR703).

Defendants' counsel in closing argument, never challenged any of the injuries or damages of the Plaintiff. (CTR687-706). The only statement made by Defendants' counsel concerning damages is that, "Now, what happened to Doug Stewart was awful." (CTR689).

Plaintiff's Rebuttal Argument

In rebuttal, Plaintiff's counsel reminded the jury that Dr. Riordan didn't know the outcome on May 15 and that in real time he was asking why don't we drain the abscess. (CTR707). Plaintiff's counsel then went on to remind the jury that Dr. Riordan asked 'why don't we drain the abscess' because as a prudent and careful doctor, he had done that two weeks earlier and he knew you don't wait until it's a disaster; and he would never ever suggest drainage if he thought that the pulmonary issues was an issue. (CTR707-708).

Plaintiff's counsel further reminded the jury that Defendants' counsel did not challenge the numbers on damages or Plaintiff's counsel's justification for them. (CTR710). Plaintiff's counsel reminded the jury that it was their decision to render a fair and impartial verdict for just and fair compensation to balance for the harms and that they had the right to determine damages.

(CTR710). Plaintiff's counsel reminded the jury that they can determine damages that are more, less, or exactly what counsel suggested. (CTR710).

The Verdict

The jury, having heard the evidence and considered the arguments of counsel, then returned a unanimous verdict for a total of $4,300,000. (CLF113). The jury awarded past economic damages in the amount of $401,726.77, past non-economic damages in the amount of $1,500,000, and future non-economic damages in the amount of $2,398,273.23 for a total verdict of $4,300,000. (CLF113). This was based on Mr. Stewart being only 36 years old when he suffered the catastrophic abscess rupture (CTR295) and having a life expectancy of 39.8 years. (CTR473).

After the jury verdict, Defendants filed motions requesting that future damages be paid in periodic or installment payments pursuant to R.S.Mo. 538.020 (CLF109-112), stating that no post judgment interest was available in medical negligence cases pursuant to R.S.Mo. 538.300 (CLF139-145), and requesting that the interest rate on the future damages be limited to .14% pursuant to R.S.Mo. 538.220 (CLF136). On January 13, 2014, the Court entered judgment denying post-judgment interest on the past damages and for post judgment interest on the future damages in the amount of .12%. (CLF168-170).

Post-Trial Motions & Appeal

On February 13, 2014, Defendants filed their Motion for New Trial, Or, In the Alternative, for Remittitur. (CLF171-175). In Defendants' suggestions in support of their motion, Defendants requested remittitur pursuant to R.S.Mo. 537.068 which allows the court to either add to the verdict or reduce the verdict under Rule 78.10 of the Missouri Rules of Civil Procedure. (CLF192-194).

The Trial Court held its hearing on the Motion for New Trial, Or in the Alternative, for Remittitur on March 17, 2014. (CTR755-789). Contrary to the assertion of the Appellants' brief, the trial court did not state that it did not have authority to "construe the Constitution" with respect to the constitutionality of R.S.Mo. 538.300, but rather this was an assertion by Defendants' attorney. (CTR774). Plaintiff's counsel during the oral argument specifically requested the trial judge to address the issue of remittitur notwithstanding whether remittitur is unconstitutional or not. (CTR782-784). After hearing the argument of counsel, the trial judge then took the Defendants' Motion under advisement. (CTR789).

On March 24, 2014, the trial judge denied the Defendants' Motion for new trial and specifically denied the motion for remittitur as provided for by Rule 78.10 (CLF429-430).

This appeal followed.

ARGUMENT

I. REMITTITUR IS ANTITHETICAL TO THE RIGHT TO TRIAL BY JURY, HAS BEEN REMOVED FROM THE COMMON LAW, IS NOT A CORE INCIDENT OF A JURY TRIAL, AND ONLY EXISTS BY STATUTE. THE STATUTES PROVIDE IT DOES NOT APPLY TO MEDICAL NEGLIGENCE ACTIONS. THE RESTRICTION BUILT INTO § 538.300 R.S.MO. (2013) ON APPLYING REMITTITUR IN MEDICAL NEGLIGENCE CASES IS CONSTITUTIONAL AND THE EVIDENCE FULLY SUPPORTS THE ECONOMIC AND NON-ECONOMIC DAMAGES AWARDED UNANIMOUSLY BY THE JURY.

A. Introduction

Remittitur is antithetical to the right to trial by jury. In *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99 (Mo. banc 1985), this Court said that "its application constitutes an invasion of the jury's function by the trial judge." It noted that it was "fraught with confusion and inconsistency." This Court found it had "been questioned since its inception in Missouri as an invasion of a party's right to trial by jury" and abolished it from the common law. *Firestone*, 693 S.W.2d at 110 (underlining added).

Remittitur was not a part of the common law of England in 1791 when the U.S. Constitution was adopted, nor in 1820 when Missouri adopted the common law of England reaching back to 1607. Remittitur arose as part of the common law of Missouri in the 1850s, but under Blackstone's understanding, was arguably obviated when Mo. Const. art. I, § 22(a) was enacted in 1875 – an obviation not announced until *Firestone*.

However one looks at it, to the extent that remittitur was a common law practice in Missouri, it was abolished as a part of Missouri's common law by *Firestone*. It became the law of Missouri again by statute in 1987. But from 1985 forward, remittitur was a creature of statute, governed by rules imposed by the General Assembly and subject to the General Assembly's modification and even abolition of the doctrine.

Against this history, Appellants argue that remittitur is an "incident or circumstance" of a jury trial, guaranteed under Mo. Const. art. I, § 22(a). Indeed, the entire premise of Appellants' argument is that § 538.300. R.S.Mo (2012), prohibiting a trial judge from remitting any portion of the damages awarded by a jury in a medical malpractice case, violates the right to trial by jury under the common law. But other than a passing reference to *Firestone*, Appellants do not make any attempt to explain how a doctrine abolished by this Court's common law authority in *Firestone*, and made statutory by the enactment of § 537.068 R.S.Mo. (2013) is common law component of the right

to trial by jury. Appellant's argument begs the question whether this Court, which has zealously guarded the right to trial by jury throughout its history, itself violated that constitutional guarantee in *Firestone* if remittitur is indeed a part of trial by jury. The question is nearly rhetorical. Remittitur is not a part of the right to trial by jury as *Firestone* makes clear.

Even if the right to jury trial is implicated here, Appellants read the right to trial by jury too broadly. This Court recently made it clear that the right to trial by jury is focused on "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, 640 (Mo. banc 2012) (quoting *Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364, 382 (Mo. banc 2012)). There are a myriad of procedures that impact the ways in which a jury carries out these core functions. These include limitations on voir dire, the number of jurors that must assent to a civil verdict, and even venue. But so long as these do not impair the jury's ability to find liability and assess damages, the right to a jury trial is not implicated.

Obviously, to the extent that a judge impairs the jury's damage-determination function by the exercise of remittitur, the right to jury trial is implicated. But that is not the question in this case; rather, here the legislature determined that remittitur was not available in a medical

negligence case. Far from undermining the jury's damage-determination function, § 538.300 leaves that function untouchable by judicial intervention. It follows that § 538.300 cannot frustrate the right to trial by jury and is thus not unconstitutional on the grounds Appellants assert.

Two final comments implicate this Court's obligation even to decide this constitutional issue. First, Appellants did not raise the constitutional issue at the earliest opportunity. Indeed, Appellants' answer in this case denied that § 538.300 was unconstitutional.

Second, and perhaps more definitively, the trial court in this case was asked to grant remittitur. The trial court believed it was bound by § 538.300 not to grant remittitur. Nevertheless, the court analyzed the remittitur request under Rule 78.10 anyway. The trial court exercised its discretion to deny remittitur, that is to leave the jury's exercise of its core function untouched.

B. Standard of Review

Appellants have misstated the standard of review. While the legal standard is properly stated as an abuse of discretion, the evidentiary standard is different. *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39-40 (Mo. banc 2013). In reviewing a circuit court's order denying a motion for remittitur, the "**proper standard of review is that the evidence is reviewed in 'the light most favorable to the *circuit court's order.' "*** 395

S.W.3d at 39-40 (bold and italics in original). Here the trial court denied the motion for remittitur, and the evidence is viewed in the light most favorable to that order. *Id.*

C. Relevant Constitutional And Statutory Provisions

The Seventh Amendment to the U.S. Constitution, Article I, § 22 of the Missouri Constitution, and two Missouri statutes: § 537.068 and § 538.300 control the disposition of this case.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

In relevant part, Article I, § 22(a) of the Missouri Constitution states:

> That the right of trial by jury as heretofore enjoyed shall remain inviolate; ... that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; ....

Mo. Const. art. I, § 22(a).

§ 537.068 R.S.Mo. (2012), the remittitur statute, provides in relevant part:

> A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages. A court may increase the size of a jury's award if the court finds that the jury's verdict is inadequate because the amount of the verdict is less than fair and reasonable compensation for plaintiff's injuries and damages.

§ 537.068 R.S.Mo. (2012) is constrained, however, by the more specific § 538.300 R.S.Mo. (2013) regarding litigation against health care providers. That statute provides:

> The provisions of section 260.552, sections 537.068 and 537.117, and 537.760 to 537.765, and subsections 2 and 3 of section 408.040 shall not apply to actions under sections 538.205 to 538.230.

D. Waiver By Admission or Judicial Estoppel

1. The Pleadings Upon Which This Case Was Tried Denied § 538.300 Was Unconstitutional

Plaintiff alleged that the entirety of H.B. 393 (2005) (the bill which enacted R.S.Mo. § 538.300 (2005)) was unconstitutional in ¶ 27 of the Petition. (CLF015-016) In answering the Plaintiff's Petition, both Dr.

Partamian and Phoenix Urology specifically **denied** that the provisions of Chapter 538 were unconstitutional. (CLF21, ¶ 4[3]). Pleadings are construed against the pleader and an allegation of fact contained within that pleading is binding on the pleader, *see E.C. Robinson Lumber Co. v. Ladman,* 255 S.W.2d 72, 78 (Mo.App. 1953). While statements in *abandoned* pleadings are mere admissions, "allegations or admissions of fact contained in pleadings upon which a case is tried are binding on the pleader." *Sayers v. Bagcraft Corp. of America, Inc.,* 597 S.W.2d 280, 282 (Mo.App.S.D. 1980)(emphasis added); *Rauch Lumber Co. v. Medallion Development Corp.,* 808 S.W.2d 10 (Mo.App. E.D. 1991); *Wehrli v. Wabash Railroad Co.*, 315 S.W.2d 765, 773 (Mo. 1958), cert. denied, 358 U.S. 932, 79 S.Ct. 321, 3 L.Ed.2d 304 (1959).

2. Appellants Failed To Raise Constitutionality at the Earliest Point

In Dr. Partamian and Phoenix Urology's answer each failed to raise any constitutional objection to § 538.300 R.S.Mo. (2012) as each needed to do in order to raise it at the earliest point and permit the trial court to consider the issue as its pertinence arose during trial. Missouri has long adhered to the

[3] "4. Defendants specifically deny the allegations contained in paragraphs 21, 22, 23, 27, 28, 29, and 30." (¶ 4 Answer, CLF0022; emphasis added).

rule that to preserve for appellate review a claim of constitutional infirmity must be raised at the earliest time consistent with good pleading and orderly procedure. As stated in *Magenheim v. Board of Education of School Dist. of Riverview Gardens,* 340 S.W.2d 619, 621 (Mo. 1960):

> 'To preserve a constitutional question for review here it must be raised at the first opportunity; the sections of the Constitution claimed to have been violated must be specified; the point must be preserved in the motion for new trial, if any; and it must be adequately covered in the briefs."

The constitutional issue cannot be preserved for appellate review by mentioning it for the first time in a motion for new trial. See *State v. Flynn*, 519 S.W.2d 10 (Mo. 1975); *Kelch v. Kelch*, 450 S.W.2d 202 (Mo. 1970); *State v. Anderson*, 375 S.W.2d 116 (Mo. 1964); *Kansas City v. Martin*, 369 S.W.2d 602 (Mo. Ct. App. W.D. 1963). If a party fails to preserve an argument that a statute is constitutionally invalid properly, the issue cannot be considered on appeal. *See State v. Belcher,* 805 S.W.2d 245, 251 (Mo. Ct. App. S.D. 1991).

In the case at bar it is difficult to envision any explanation that would account for why the Appellants, knowing they were trying a medical negligence case, and knowing further that they could be held accountable for significant damages, failed to raise the constitutionality of the statutory unavailability of remittitur in their answer. The constitutional issue

purportedly presented in Appellants' first point is not preserved for appellate review because it was not raised at the earliest point practicable. *Flynn*, 519 S.W.2d at 12.

3. Appellants are Judicially Estopped to Raise the Constitutionality of § 538.300

Not only did Appellants deny that § 538.300 was unconstitutional, they took pains to include that statute's language in their affirmative defenses:

> Further answering, Defendants state they hereby invoke and rely upon all of the provisions of Chapter 538 R.S.Mo., relating to actions against health care providers,

(CLF022)(emphasis added)

A judicial admission is an act done in the course of judicial proceedings that concedes for the purpose of litigation that a certain proposition is true. *Hewitt v. Masters,* 406 S.W.2d 60, 64 (Mo. 1966). Judicial admissions are generally conclusive against the party making them. *Sebree v. Rosen,* 393 S.W.2d 590, 602 (Mo.1965).

Judicial admissions are conclusive in the proceeding where made. *Munday v. Austin,* 358 Mo. 959, 218 S.W.2d 624, 628 (1949). "The doctrine of judicial estoppel exists to prevent parties from playing fast and loose with the court." *State ex rel. KelCor, Inc. v. Nooney Realty Trust, Inc.,* 966 S.W.2d 399,

404 (Mo.App. E.D. 1998). *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 143 (Mo.App. W.D. 2011). Here Appellants' position is clearly inconsistent. Before the trial court they took the position that the statute was constitutional and included § 538.300 in their affirmative defenses. They planned to take full advantage of "all of the provisions" of Chapter 538[4].

In *State ex rel. KelCor, Inc. v. Nooney Realty Trust, Inc.,* 966 S.W.2d 399, 404 (Mo.App. E.D. 1998), the party seeking mandamus relief had taken clearly inconsistent positions in two different courts. Before one it argued that shares of a corporate entity were null and void, and sought to enjoin a shareholder vote. After the "null and void" shares had been purchased by a confederate, it sought to mandate the same vote it had earlier asked to enjoin. The Eastern District held the litigant to be playing "fast and loose" with the courts. *Id.*

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[4] Doubtless Appellants will argue they did not specify § 538.300, but they did lay claim to "all of the provisions" of Chapter 538. Moreover, an ambiguous pleading is to be construed against the pleader and an allegation of fact contained within that pleading is binding on the pleader, *see E.C. Robinson Lumber Co. v. Ladman,* 255 S.W.2d 72, 78 (Mo.App.1953).

In *KelCor*, however, the estopped party at least tried to explain its inconsistent positions. Here, the Appellants have offered no such explanation for their inconsistent positions. As such Appellants have waived any attack on the constitutionality of the statute.

E. A History of Remittitur in Missouri

The doctrine of remittitur sprang up in Missouri law at the behest of plaintiffs in 1852 when the Supreme Court decided *Hoyt v. Reed,* 16 Mo. 294 (1852).[5] There the Court said "Where the plaintiff obtains a verdict for too large an amount, it is proper to allow him to enter a *remittitur* for the excess, to avoid a new trial." *Id.* (italics in original). The doctrine was next employed by the court in *Burdict v. Missouri Pac. Ry. Co.,* 123 Mo. 221, 27 S.W. 453 (1894). Over dissents by three judges, the Court determined that a remittitur was appropriate. Context, however, is important. Justice Black described the situation as follows:

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[5] In *Watts,* 376 S.W.3d at 639, a prior case dating to 1821 was viewed as employing remittitur, however, that case was a straight reversal: "It is the opinion of this Court, that the Circuit Court erred, in rendering judgment for a greater amount than damages laid in the declaration. The judgment must, therefore, be reversed with costs." *Carr v. Edwards*, 1 Mo. 137, 138 (1821), There was no remittitur entered.

> The claim of the defendant is that when the court has reached the conclusion that the damages are excessive the judgment should be reversed, and a new trial ordered, while the plaintiff insists the court should indicate the excess, and allow him to remit it, and take a judgment of affirmance for the residue. There is certainly much conflict in the authorities on this question of practice. It is believed a review of all of them will accomplish no good at this time. Special mention will be made of a few recent decisions only.

Burdict, 27 S.W. at 456. The narrow majority decision sparked a fierce dissent.

> The right to a jury trial in ordinary actions has been supposed to be guaranteed to our citizens from a very early date. Article 13, § 8, Const. 1820; article 1, 4F 17, Const. 1865. At the time when the present constitution took effect that right was conceded by the supreme court in all actions at law, excepting a small class, involving long accounts, wherein a trial by referee was permitted. An important incident to that right is the finality of the decision of the trial jury, if approved by the trial judge, upon all questions of fact, in those actions. It has heretofore been considered the settled construction of the organic law that the

> supreme court has no constitutional authority to review a decision of the trial court upon issues of fact in a case like that at bar.

Id. at 458. Barclay, J., dissenting. While Judge Barclay's dissent went to the power of the Court to insert itself into a jury determination, Judge Gantt's dissent focused on the fact that the judges on the Supreme Court were not possessed of magic scales upon which evidence could be reweighed:

> We have no scales by which we can determine what portion is just, and the result of reason, based upon the evidence, and what part is poisoned with prejudice and passion. We do not think it within our province to assess the damages. When we set aside any part of the verdict, we destroy its integrity; and we have no right to set ourselves up as triors of facts, and render another and different verdict. We think the only logical course, in such cases, is to let the verdict stand, or set it aside, as an entirety.

Id. at 463, (internal quotation omitted) Gantt, J. dissenting. This line of argument was folded into the *Firestone* opinion deftly by Justice Higgins:

> What may have begun with a worthy purpose of bringing uniformity to verdicts and judgments for unliquidated damages has been eroded by added considerations and irreconcilable case by case evaluations.

> Abolishment of the remittitur practice in Missouri does no violence to the power and discretion of trial courts to control jury verdicts. The 1975 revision of Rule 78.01 provides concisely that the trial court may grant a new trial of any issue upon good cause shown, and it may be granted to all or any of the parties and on all or part of the issues after trial by jury, court or master. As the revisers noted, there is no intention to eliminate any of the reasons for which new trials have been granted or to change the law concerning the grounds for granting a new trial. Rule 78.02 continues the authority and discretion of the trial court to grant one new trial on the ground the verdict is against the weight of the evidence. This power and discretion should no longer be adulterated by a remittitur practice which permits the trial court to find error in its trial and excuse the error upon remittitur of a commanded portion of the jury's verdict, only to see the case appealed despite the remittitur, including a charge of error in the amount of remittitur ordered.
>
> The Court concludes that remittitur shall no longer be employed in Missouri.

Firestone, 693 S.W.2d at 110 (internal citation omitted). Importantly, *Firestone* did not declare remittitur unconstitutional, it merely abolished the

common law practice, striking it from the common law in Missouri. Only this Court can declare the common law of Missouri. The legislature, however, may modify or abrogate it, and the legislature had other ideas about the doctrine of remittitur.

F. The Legislative Reenactment of Remittitur

On January 6, 1987, the Final Report of the Missouri Task Force on Liability Insurance suggested to the Missouri General Assembly that remittitur should be reinstated (and additur established) by statute, for the dual purposes of achieving equitable compensation and avoiding the need to retry cases. *Bishop v. Cummines,* 870 S.W.2d 922, 924 n.3 (Mo.App. W.D. 1994) (citing THE MO. TASK FORCE ON LIAB. INS., FINAL REPORT 25 (1987)).

Effective July 1, 1987, the Missouri legislature put remittitur back into state law by statute, § 537.068, R.S.Mo. (2012) as set out in part above. The legislature may modify a common law cause of action, *Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992)[6], or change the common law, *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d

[6] Overruled on other grounds by *Watts v. Lester E. Cox Med. Ctrs.* 376 S.W.3d 633 (Mo. banc 2012).

771 (Mo. banc 2003)[7], as a part of its constitutional powers. Enacting § 537.068 R.S.Mo., the legislature took the now-abolished doctrine of remittitur and created a statutory version. Then, in 2005, when it changed various portions of the state's common law with regard to medical liability, the legislature imposed other conditions on plaintiffs in medical negligence cases. It restricted the right to receive post-judgment interest, imposed on plaintiff the requirement that the plaintiff accept a pay out of future damages by annuity, and as a token attempt at fairness, it removed from the trial court's post-verdict toolbox the doctrine of remittitur[8]. But here is the important point: in modifying the doctrine of remittitur so that it no longer applied to medical negligence cases, the legislature was modifying a doctrine that the legislature had created – the General Assembly was not modifying the common law, because remittitur no longer existed at common law as a result of *Firestone*.

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[7] "However, the legislature has the power to create or abolish causes of action, or limit recovery, as the legislature apparently did here." *Id*. at footnote 7.

[8] Irrespective of whether this was motivated by fairness or not, the long term impact is likely to increase the number of new trials awarded in medical negligence cases since a court can no longer order a remittitur.

Appellants miss the mark when they say that the right to remittitur is a common law component of the right to a jury trial. Even if it once was a common law adjunct to the right to trial by jury, *Firestone* terminated that notion. Remittitur now is a statutory component of post-trial procedure. To the extent that Appellants disregard the history of remittitur in this state, their argument is fatally flawed.

However, if this Court were to conclude that remittitur was a requirement of jury trials, it would be forced to examine the other portions of § 538.300 made up the *quid pro quo* for the legislature's rather odd decision to remove remitittur in medical negligence cases. Because the loss of remitittur was part of a *quid pro quo*, both sides of the this-for-that equation are important to any understanding of whether the legislature would have done one side of the equation without the other. This is a long-winded way of getting a severability.

Appellants seek to strike only that portion of § 538.300 that applies to remittitur. While § 1.140 R.S.Mo. (2013) requires courts to presume severability of invalid provisions of state statutes, severability is proper only if the remaining statutory provisions are neither essential to nor inseparably connected with the invalid provision. *Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. banc 1996).

Here, the potentially valid provisions removing the right of standard judgment interest and prejudgment interest were all enacted at the same time as part of the same package and are separated from each other by commas. They do not appear in different sections. They are so bound together that striking the remittitur portion of the statute means that the Court would be required to declare the entire statute unconstitutional. *Id*., *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708 (Mo. banc 2011); *Hammerschmidt v. Boone County,* 877 S.W.2d 98, 103 (Mo. banc 1994); *See State ex rel. Highway Comm'n v. Thompson,* 323 Mo. 742, 19 S.W.2d 642, 645 (1929).

G. Remittitur is Not A Part of the Right to A Jury Trial

While the Supreme Court in *Firestone* merely abolished the practice of remittitur, it premised its holding on the violence that remittitur does to the jury's factual determination as to the amount of damages. This Court said:

> The doctrine is not a provision of statute or rule in Missouri. It has been impressed by practice on the new trial consideration where its application constitutes an invasion of the jury's function by the trial judge. Such applications have been fraught with confusion and inconsistency. Its application in the appellate courts has been questioned since its inception in Missouri as an

> invasion of a party's right to trial by jury and an assumption of a power to weigh the evidence, a function reserved to the trier(s) of fact.

Firestone, 693 S.W.2d at 110. Importantly, the doctrine has never been analyzed based on the history and constitutionality of the doctrine and its role, not in preserving a right to a jury trial, but superintending it. As the dissents in *Burdict* point out, judges are no better at determining what is fair and rational damages as are jurors[9]. As such remittitur merely supplants the

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[9] It may be impossible to determine the accuracy of jury verdicts. *See, e.g.*, Ellen Sward, THE DECLINE OF THE CIVIL JURY 216 (2001). Accuracy has been tested by comparing judges' verdicts with juries' verdicts but there may be no reason to believe that the judges are right. *See Id.* When judges' and juries' verdicts have been studied there have been different results. Some studies have found remarkable similarity and other studies have found significant differences. *Compare* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002)(finding significant similarity between decisions by judges and juries to award punitive damages), (See Appendix at A-183) *with* Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 916 (1998) (providing empirical results that judges are less likely to impose punitive damages and that greater use of judges would

decision-making of a group of 12 jurors with the views of the trial judge. In essence, the trial judge becomes a super-juror with veto authority over the twelve jurors who attended to their constitutional duty. One commentator noted:

> In both[10] opinions, the court notes the problematic lack of a precise formula for assessing or reviewing damage amounts. Thus, the court underscores the extent to which this decisionmaking function of the judicial role is fundamentally committed to judicial "sense" or "judgment" particular to the facts of any given case. As with other matters of judicial discretion, the use of remittitur and the determination of the

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improve judicial decisions), *and* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 134–36 (2001)(same)(See Appendix at A-122). See also J. Patrick Elsevier, Note, *Out-of-Line: Federal Courts Using Comparability to Review Damage Awards*, 33 GA. L. REV. 243 (1998)(See Appendix at A-158).

[10] *Firestone* and its companion case, *Kenton v. Hyatt Hotels Corp.*, 693 S.W.2d 83, 86 (Mo. banc 1985). *Firestone* abolished the remittitur doctrine, and *Kenton* followed it as precedent.

> proper amount to be remitted calls for a certain element of judicial art or craft-what Karl Llewellyn referred to as "situation sense" or what Aristotle referred to as "practical wisdom." When the highest court of the state throws up its hands and declares that such a fundamentally judicially driven doctrine has been so misapplied or is so incapable of consistent application that it must be removed from the array of a judge's tools, it is necessarily a matter of tremendous significance. Such a decision is of great significance because it reflects on both the role of the judge and the doctrine of remittitur itself.

Sarah M. R. Cravens, *The Brief Demise of Remittitur: The Role of Judges in Shaping Remedies Law*, 42 LOY. L.A. L. REV. 247 (2008)(Footnote 3 inserted; footnotes in article omitted for brevity) (See Appendix at A-11).

Importantly, prior decisions of this Court determined the doctrine of remittitur was constitutional, though the analysis was hardly careful and did not consider the history or the language of Mo. Const. art. I, § 22(a). In affirming a remittitur this Court said:

> The principle upon which this practice is based, as shown by these authorities, is that, when there is no substantial evidence to support a verdict for more than a certain maximum amount, the result may be due to error or mistake of the jury and not

> passion or prejudice. When that is the situation, the Court, in determining the maximum amount authorized by the evidence, does not award or fix the damages but only says that if the jury had given such maximum amount then its verdict could have properly been permitted to stand. It is, therefore, proper to permit the plaintiff to elect between accepting a judgment for such amount, by remitting the excess, or having a new trial.

Counts v. Thompson, 359 Mo. 485, 222 S.W.2d 487, 502-03 (Mo. banc 1949). *Counts* ignored the plain language of Article I, § 22(a) and the fact that the right to trial by jury guarantee has been in place since 1820[11]. Article I, § 22(a) was written into the Missouri Constitution in 1875[12]. It specifically guarantees the right to trial by jury "as heretofore enjoyed." Although there are cases from the 1850s approving the practice of remittitur, i.e., *Hoyt v. Reed*, 16 Mo. 294 (1852), *See Klotz v. St. Anthony's Medical Center,* 311 S.W.3d 752, 760 (Mo. banc 2010); and *Watts*, 376 S.W.3d at 637, none of these cases

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[11] The phrase "heretofore enjoyed" means that "[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted" in 1820. *State ex rel. Diehl v. O'Malley,* 95 S.W.3d 82, 85 (Mo. banc 2003).

[12] It was originally in the Constitution of 1820 as Article 28. Subsequent revisions have left it numbered as Article 22(a).

were part of the common law when Missouri adopted what is now Article I, § 22(a) in the Constitution of 1820. The intent of the drafters, and the intent this Court has held fast to in its application of jurisprudence under Article I, § 22(a), was to hold the jury's determination of factual issues "inviolate." Remittitur conflicts with this, and thus was arguably overruled because "the legislature is presumed to know the state of the law when enacting a statute." *Scoggins v. Timmerman,* 886 S.W.2d 135, 137 (Mo.App. W.D.1994). *But see, Klotz*, 311 S.W.3d at 760 (reaching a different conclusion on the subject of remittitur).

More importantly, the doctrine is antithetical to the plain language of the Seventh Amendment. Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment,* 64 OHIO ST. L.J. 731 (2003)(See Appendix at A-36). The Seventh Amendment uniquely requires that the re-examination of facts determined by a jury should be only according to the "rules of the common law." U.S. Const. amend VII. A review of the text of the Seventh Amendment's re-examination clause, as well as the Supreme Court jurisprudence on the Seventh Amendment, suggests that the English common law in 1791 should determine the constitutionality of remittitur. Thomas, at 731.

Yet, English courts did not employ remittitur to reduce verdicts. *Id.* Accordingly, it can be argued that remittitur is unconstitutional. *Id.* Even

using an evolving interpretation of the common law in the re-examination clause the result is the same; remittitur is unconstitutional. *Id.* Under an interpretation of the common law as evolving, for remittitur to be constitutional, the plaintiff must have the option of taking a new trial as an alternative to accepting the remittitur. But in truth, this is not an "option." *Id*. The trial judge, in imposing remittitur, has already determined the upward limit of damages it will affirm, so that if the trier of fact determines that the plaintiff is deserving of more in a second trial, the law of the case has already set the highest benchmark for the damages. There is effectively no "option." *Id.*

Thus, there exists a serious question as to the constitutionality under Article I, § 22(a) of judges substituting their factual determination on damages for that of the jury's factual determination of damages in direct contravention of the right to trial by jury. For one thing, there are simply no guidelines and each trial court is afforded wide-ranging discretion without objective standards to guide the exercise of that discretion.

H. There is No Logical Basis Upon Which To Conclude That *Watts* or *Sanders* Stands For the Proposition That The Right To A Jury Trial Requires Superintending The Jury's Factual Determination Through Remittitur

This Court has recognized the shaky foundation upon which remittitur rests:

> Although early Missouri cases approved of judicial remittitur, there are cases that have held that judicial remittitur is improper. For instance, in *Gurley v. Mo. Pac.,* 104 Mo. 211, 16 S.W. 11, 17 (1891), the Court refused to remit the damages in a personal injury case because, "[w]hen we set aside any part of the verdict, we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and different verdict." *Gurley* stated that if a jury verdict clearly was based on passion or prejudice, the proper remedy was to set it aside in its entirety, but that absent such passion or prejudice, it should be upheld. *Id.* Likewise, in *Rodney v. St. Louis S.W. Ry.,* 127 Mo. 676, 30 S.W. 150, 150 (1895), and again in *Firestone v. Crown Ctr. Redevelopment Corp.,* 693 S.W.2d 99, 110 (Mo. banc 1985), this Court held that judicial remittitur was not a valid exercise of judicial power.
>
> Although the precedent regarding judicial remittitur is inconsistent precedent, the inconsistency stems from a long-standing reluctance in the common law to tamper with the jury's constitutional role as the finder of fact.

Watts. v. Lester E. Cox Med. Ctrs. 376 S.W.3d 633, 639 (Mo. banc 2012).

The statutory cap imposed by the legislature on statutory actions for damages and upheld by this Court in *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012) at least had the benefit of being published and constant. Yet this Court overturned that statutory cap when imposed on common law causes of action on the basis of Article I, § 22(a) in *Watts*,

The cap on punitive damages imposed by R.S.Mo. § 510.265 (2012) was also plain, definite, and not subject to the recollections and life experiences of the trial judge. This Court extended *Watts'* holding in *Lewellen v. Franklin*, 441 S.W.3d 136, (Mo. banc 2014)("this Court holds that the mandatory reduction of Ms. Lewellen's punitive damages award against Mr. Franklin under section 510.265 violates Ms. Lewellen's right to a trial by jury as guaranteed by article I, section 22(a) of the Missouri Constitution"). This Court was correct to do so in both cases, and did so under Article I, § 22(a) because these caps directly interfered with the jury's determination of damages.

As recognized by the cited *Watts*, judicial remittitur is a judicial tampering with the factual findings of the jury. While it has existed under Missouri law, it has not been an integral part of the jury process because it occurs after the jury's fact finding, and only upon motion. It occurs separate

and apart from the jury process. More importantly, it superintends the jury process.

As such, remittitur is not a component of the right to trial by jury, but a separate judicial check on the verdict that requires the judge – in his role as the arbiter of the law – to determine if the evidence supports the factual determination. *Wiley v. Homfeld*, 307 S.W.3d 145, 148 (Mo.App. W.D. 2009)[13]("Entering remittitur where the jury's verdict is supported by the evidence would obviously be an abuse of discretion as it assumes authority not granted to the court by § 537.068.") Yet, in spite of the teachings of *Watts, Wiley* and *Lewellen*, Appellants here seek to employ the reasoning of these cases backwards – using cases that hold that legislative attempts to rein in damages with arbitrary caps are unconstitutional in derogation of Article I, § 22(a) – to suggest that a statutory remittitur doctrine that permits judges to substitute their singular view of the appropriateness of damages for that of the jury is somehow a component of the common law right to a jury trial. If that was not enough of a head-scratcher, Appellants contend further that as a component of that common law, any change to the statutory doctrine is unconstitutional based on *Watts*.

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[13] Overruled with respect to the standard of review only in *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39-40 (Mo. banc 2013).

In the context of remittitur, the upper end determination of what amount of damages exceeds fair compensation is itself a moving target, varying from case to case. This Court's decision in *Firestone* noted in footnote 4 how myopic and unpredictable remittitur can be:

> As a recent example, this case was tried in Jackson County September 21, 1983; *Kenton v. Hyatt Hotels, Corp.,* et al., ––– S.W.2d –––– (Mo. banc 1985), No. 66839, was previously tried in Jackson County June 30, 1983. Both cases were tried before seasoned trial judges. The remittitur ordered in this case was 15 percent of a $15,000,000 verdict; the remittitur ordered in the prior case was 6¼ percent of a $4,000,000 verdict. Both plaintiffs sustained serious injuries and both produced substantial evidence to support the jury awards of fair and reasonable compensation for their injuries.

Firestone, 693 S.W.2d at 110, ftnt. 4.

Other scholars have written that the remittitur doctrine violates the reexamination clause of the Seventh Amendment. Thomas, at 731. And this Court abolished it because it could not be applied in a manner consistent with the role of the jury and because it has "been fraught with confusion and inconsistency." *Firestone*, 693 S.W.2d at 110. Were it not for the action of the legislature, there would be no doctrine of remittitur in Missouri. Thus, the

idea that the legislature's removal of this practice from medical negligence cases somehow impinges on the right to trial by jury, when the trial judge's function in remittitur is to override the jury's factual determination is itself an exercise in tortured logic.

One reason Appellants wish to hang their hat on *Watts*, however, is their failure to understand the dicta found in the case at 376 S.W.3d at 640. There, in the context of what limits would be appropriate from the standpoint of statutorily-created remittitur this Court observed "Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case." This sentence described the right to jury trials generally, not the right as specifically applied to medical negligence causes of action. *Watts* neither explicitly nor implicitly found § 538.300 R.S.Mo. (2013) unconstitutional. Because neither party in *Watts* challenged the applicability of R.S.Mo. § 538.300 (indeed, defendant there sought relief under its limitation on interest rates – *id.* at 637) the fact that judicial remittitur was statutorily abolished in medical negligence cases was not before the Court, and this Court did not have to reach the issue of remittitur in *Watts*. However, as is clear from this Court's jurisprudence, the legislature has the statutory authority to abolish or modify common law causes of action, and the power to create causes of action, and thus the Legislature's action in modifying its statutorily-created right of remittitur such that it does not apply

in medical negligence cases is proper. *Adams*, 832 S.W.2d 898; *Etling*, 92 S.W.3d 771.

I. Not An Incident or Consequence

In their briefing Appellants state "[t]he constitutional right to a trial by jury necessarily includes within its scope all the "incidents of a jury trial – and the methods for controlling jury verdicts – at common law in 1820." (App. Br. at 20). Appellants cited Judge Wolff's concurrence in *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 776 (Mo. banc 2010) for this proposition. *Klotz*, in turn, cites *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003) for this bit of dicta. But the part about "the methods for controlling jury verdicts" while present in the dicta from Judge Wolff's concurrence is <u>not present</u> in *Diehl*. In fact, it is not present in any case discussing the "incidents of a jury trial" dating back to 1896.

In *State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow*, 133 Mo. 500, 36 S.W. 43 (banc 1896), this Court held that a "special jury" (as opposed to a common jury) must be selected under the rules specified at common law because "section 28 of our bill of rights declares 'that the right of trial by jury as heretofore enjoyed, shall remain inviolate,' which 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 existing at common law." *Id.* at 48. *Withrow*

dealt with the procedure for selecting the jury – an incident to trial by jury – and thus was within the ambit of the constitutional protection. *Id.*

State v. Hamey, 168 Mo. 167, 67 S.W. 620 (banc 1902) involved the right to a trial by and the common law practice of the jury prescribing the sentence for a particular crime. After a statutory change the defendant sought to have the jury assess punishment, and when the court imposed sentence, appealed. This Court said:

> Now, it is conceded our laws secure to the defendant in a prosecution under this section 1838 a trial by jury, with every common–law incident and protection. These, briefly, were: First. The jury must be 12 men indifferent between the prisoner and the commonwealth. To secure this, challenges must be allowed. Second. The jury must be summoned from the vicinage where the crime is supposed to have been committed. This gives the accused on the trial the benefit of his own good character and standing with his neighbors. Third. The jury must unanimously concur in the verdict. Fourth. The jurors must be left free to act in accordance with the dictates of their own judgment. As the right and duty devolved upon the court at common law to assess the punishment, it is plain this statute does not violate the common–law jury trial, in leaving the punishment to the court.

Id. at 623. The "incidents" of a jury trial were set out, and do not comport with the assertions of the Appellants here.

Similarly, in *State v. Hadley* , 815 S.W.2d 422 (Mo. banc 1991) the issue was the provision in § 494.495 R.S.Mo. (1990) that permitted the jury, once empaneled, to be allowed to separate except in capital cases. Defendant challenged the failure to keep the jury sequestered as a violation of his right to a jury trial. This Court said:

> The procedural amenities of the common law relating to management of the jury during the course of a trial are not essential elements of the common law right to jury trial. Unless there is a showing that a statute on its face or as applied impinges on one or more of the recognized elements of the common law right to a trial by jury, statutory procedures regarding jury management are valid. In this particular case the defendant has failed to demonstrate that § 494.495 violates any of those elements.

Id. at 425-26. All these cases[14] show that the "incidents and consequences" referred to in the case law are narrowly drawn and strictly construed to be

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[14] Although *Sanders v. Ahmed* 364 S.W.3d 195 (Mo. banc 2012) touches upon the "substantial incidents" of a jury trial, it does not define them. Suffice

those things essential to the fairness of the jury. The doctrine of remittitur is never mentioned as a "core incident of the right to trial by jury" as asserted by Appellants. (App. Br. at 20). This makes sense because remittitur only arises by motion (so it is not a part of every jury trial), is committed to the sound discretion of the trial judge (so it invokes the judicial function, not the jury's fact-finding function), and it superintends the fact-finding on damages by the jury, which is clearly outside the guarantee of the right to jury trial.

J. The Trial Court Properly Exercised Its Discretion To Deny Remittitur

The evidence presented with regard to damages to Plaintiff in this case was, in a word, "awful." The Defendants' trial counsel admitted to the jury that "what happened to Doug Stewart was awful." (CTR689). A 36-year-old man developed an abscess that was improperly treated and caused severe necrotizing injury. Mr. Stewart suffered a permanent loss of blood flow in his penis. (CTR328). Large portions of penile tissue were killed by necrotizing fasciitis. (CTR314-315). The bulbospongiosus muscle was destroyed. (CTR332). His urethra was destroyed requiring much of it to be replaced.

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it to say that no case in Missouri has ever held that remittitur is a substantial incident of a jury trial. *Firestone* definitively determined the contrary by abolishing it.

(CTR316). He had destruction of tissue in his peritoneum and between his anus and scrotum and that left him with permanent pain on the right side of his scrotum. (CTR334-335). He lost 28 days of his life to a coma. (CTR442). When he woke up he was on a mechanical ventilator controlling his every breath and was being fed by a tube. (CTR407-408). He had to learn to walk anew. (CTR445). He had a catheter in his urethra for 53 days, had strictures that interfered with his ability to urinate. (CTR327). He had a suprapubic catheter for two months. (CTR454). In total he lost almost a year of his life to the negligence of the Defendants. To this day he still has urinary incontinence and erectile dysfunction. If all these were not bad enough, he has lost the simple dignity of being able to hold his urine. He has lost the self-esteem that comes from being able to have normal sexual relations with his now-wife, Mary. He doesn't feel like a man. At 39 years old he has many of the same problems that a man of 80 has, and it is the direct result of the Defendants' negligence.

Appellants, however, demonstrate a glaring lack of compassion in their arguments. Appellants, a urologist and a group practice of urologists apparently find the continuing humiliation and emasculation of a relatively young adult male, and the destruction of his ability to engage in the most intimate of human acts, of little value in the damages equation.

> Here the jury's verdict is for approximately ten times the plaintiff's true economic losses and should be reduced. To say otherwise is to put an undue emphasis on injury to one limited part of Plaintiff's body, which is shared by less than half the human species, that can still be used for all its essential functions, does not require Plaintiff to receive additional specialized medical treatment, and does not interfere with his ability to obtain an income or engage in hobbies and recreational activities.

(App. Br. at 28). Little polite can be said about this argument, beyond that it invokes a callous indifference to that which poets and scripture alike elevate to the most pure expression of human communication.

Appellants further err in when they claim that Judge, Judah "failed to conduct any meaningful analysis of [defendants'] request for remittitur." (App. Br. at 25). The Trial Court's order belies this. The trial court notes that it took judicial notice of its file, including all the motions and memoranda in support. (CLF429-30) It notes the grounds the defendants sought remittitur upon, including their claims of excessive verdicts and verdicts unsupported by the evidence. The Court then noted: "Upon review of the allegations of error aforesaid in light of the record and being fully informed, the Court does

not find good cause has been shown to grant the relief sought by Defendants…." (CLF429-30).

Importantly, the Trial Court's order makes reference to the motion for remittitur "as provided for by Rule 78.10" and does not appear to focus or hold directly that remittitur was foreclosed by § 538.300 R.S.Mo. Instead, a proper reading of the order suggests the trial court weighed the facts and evidence presented at trial and found that even if remittitur was not foreclosed by § 538.300, it was improper under the evidence because the jury verdict was well-supported.

K. The Jury Properly Weighed the Evidence

Courts are properly reluctant to relieve defendants of the burden of their decision to try a case. "Once [litigants] place their fate in the hands of the jury, then they should be prepared for the result . . . . They cannot expect the court to extricate them in all cases where the award is higher or lower than hoped for or anticipated." *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1301 (8th Cir. 1987).

Defendants sought remittitur based on the claims of error they imagine the Trial Court made during the trial. Even assuming that § 538.300 is unconstitutional – a point Respondent does not concede – § 537.068, R.S.Mo.

(2012) allows a judicial decision as to whether the jury's verdict exceeds fair and reasonable compensation for the Plaintiff's injuries and damages.

Section 537.068 provides:

> A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive *because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages*. . . .

(Emphasis added).

Generally, the issue of damages is left to the discretion of the jury. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 448 (Mo. banc 1998); *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo. App. E.D. 1995). "The jury is vested with a broad discretion in fixing fair and reasonable compensation to an injured party . . . ." *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 109 (Mo. banc 1985). In Missouri, "a jury is entitled to consider certain intangibles which do not lend themselves to precise calculation, such as past and future pain, suffering, effect on life-style, embarrassment, humiliation, and economic loss." *Callahan v. Cardinal Glennon Hosp.,* 863 S.W. 2d 852, 872 (Mo. banc 1993) (internal quotations omitted). Missouri expressly recognizes that a jury "is in the best position" to determine and apportion damages based on all of those tangible and intangible factors." *Id.* Accordingly, this Court

allows the jury "virtually unfettered" discretion to provide awards over a "large range". *Id.* (emphasis added). For this reason, a trial court may not interfere with the jury's determination of damages unless it is convinced that the verdict exceeds fair and reasonable compensation for Plaintiff's injuries and damages. *Fust,* 913 S.W.2d at 49. A trial court may "interfere only when the verdict is so excessive it shocks the conscience of the court…." *Emery,* 976 S.W.2d at 448. In reviewing whether a verdict is excessive, this Court is "limited to a consideration of the evidence which supports the verdict excluding that which disaffirms it." *Redfield v. Beverly Health and Rehabilitations Services, Inc.*, 42 S.W.3d 703, 712 (Mo.App. E.D. 2001) (internal quotation omitted).

No precise formula exists for determining whether a verdict is excessive. *Willman v. Wall*, 13 S.W.3d 694, 699 (Mo.App. W.D. 2000). Each case must be considered on its own facts. *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 211 (Mo. banc 1991). Moreover, the amount of damages "will not be disturbed on appeal absent an abuse of discretion so grossly excessive that it shocks the conscience and convinces the court that both the trial judge and the jury have abused their discretion." *King v. Unidynamics Corp.*, 943 S.W.2d 262, 268 (Mo.App. E.D. 1997) (emphasis added).

Appellants cite scant authority or reason for their proposition that the award of the jury is so excessive as to necessitate a new trial or remittitur. The

fact that Appellants are unhappy with the jury's verdict is not sufficient argument to warrant such drastic measures under the law.

L. Conclusion

This Court should affirm the trial court.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING PLAINTIFF TO EXPLAIN THE BASIS FOR DR. RIORDAN'S EXPERIENCE AND THE BASIS OF HIS COMMENT TO DR. PARTAMIAN.

A. Standard of Review

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006). The admission or exclusion of evidence, especially expert evidence, is a matter of trial court discretion. *Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co.*, 168 S.W.3d 488 (Mo.App. E.D. 2005); *IMR Corp. v. Hemphill,* 926 S.W.2d 542, 546 (Mo.App. E.D. 1996). Missouri appellate courts review only for a manifest abuse of discretion. *Id.* A ruling within the trial court's discretion is presumed correct and the appellant bears the burden of showing the trial court abused its discretion and that they have been prejudiced by the abuse. *Id.*

"This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion." *Forest*, 183 S.W.3d at 223. "[T]hat discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id.,* (quoting *State v. Gonzales*, 153 S.W.3d 311, 312 (Mo. banc 2005)). A trial court judgment involving errors in the admission of evidence will "result in reversal only if there is

substantial and glaring injustice." *Alberswerth v. Alberswerth,* 184 S.W.3d 81, 100 (Mo. Ct. App. W.D. 2006) (quoting *Legg v. Certain Underwriters at Lloyd's of London*, 18 S.W.3d 379, 386 (Mo.App. W.D. 1999). Without a clear showing of an abuse of discretion, the Court will not interfere with the trial court's ruling. *Lauck v. Price*, 289 S.W.3d 694 (Mo.App. E.D. 2009). Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial. *Id.* The improper admission of evidence requires reversal only if such evidence was clearly and unmistakably prejudicial. *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010); *Dunn v. St. Louis–San Francisco Ry. Co.,* 621 S.W.2d 245, 252 (Mo. banc 1981); *Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co.*, 168 S.W.3d 488 (Mo.App. E.D. 2005).

B. Appellants' Objection is Waived

1. Background and Context

Deconstructed, Appellants' Point II says this: The trial court erred by letting Dr. Riordan discuss the treatment of an unidentified patient with a prostate abscess because Dr. Riordan's testimony (as a treating physician) conflicted with the testimony of the Plaintiff's expert witness and articulated the wrong standard of care. Appellants argument depends for its force on Appellants lifting testimony from context to make it seem as though Dr. Riordan went on a frolic by opining generally about other unidentified

patients and comparing the care those patients received to Mr. Stewart's care. The context gives a different understanding.

Dr. Riordan treated Mr. Stewart on May 15, 2009. (CLF284). Dr. Riordan was also, at that time, a member of the Defendant group practice. (CLF274). He prepared the progress note for May 15, 2009. (CLF284). Dr. Riordan was seeing Mr. Stewart with Dr. Partamian to assess the need for drainage of the abscess. (CLF288). In his deposition he testified without objection that he had experience in treating prostate abscesses, and that he had treated a half a dozen since leaving residency. (CLF280). He testified that a prostate abscess was a rare condition. (CLF280).

2. The Actual Testimony

When the subject moved to Mr. Stewart's care, Respondent asked if Dr. Riordan's experience was primarily from his residency, and Dr. Riordan explained his affirmative answer (without any objection as to form, foundation, or propriety of the evidentiary standard) in the deposition. Over the *relevance* objection (CLF048) of the Defendants set out solely in a motion in limine[15], Dr. Riordan testified:

> A. And so one of the things that sticks out in my mind is just a few weeks before Mr. Stewart presented, there was another

[15] No objection was recorded in the transcript at trial.

patient of mine that I – I treated at Heartland. I remember specifically the date 'cause it was the date my daughter was born, April 25th, 2009. I had a patient in the hospital and my wife went into labor and I — I drained the abscess on that same – same day.

Q. You – you did what with the abscess?

A . I drained it.

(CLF280). Dr. Riordan also testified (CLF289-90) that he had a conversation with Dr. Partamian shortly after writing the note on the patient, and it concerned draining Mr. Stewart's abscess:

Q. And, first of all, what prompted that discussion?

A. Well, a- few weeks earlier, as I said, I had had a very similar patient and I had drained the abscess. And I was curious about why he would be pursuing a different — a different treatment option.

Q. And how old was the patient that you had had earlier?

A. I don't remember.

Q. Okay. Young patient, middle-aged patient, older patient, do you have any recollection at all?

A. Young to middle-age, but I don't remember.

(CLF289-90). Again, the Appellants made relevance objections only in their motion in limine, and no actual objection was ever made at trial (or preserved in the transcript) that went to an improper standard for testimony, or that the testimony constituted opinions concerning the proper treatment of Mr. Stewart by Dr. Partamian. There was no objection to the form of the question at the deposition. Moreover, the testimony went to explain Dr. Riordan's experience as the basis for his question to Dr. Partamian about whether the abscess should be drained.

3. Waiver by Failure to Object

Failure to make objections to the form of the question have constituted waiver under Missouri law since at least 1847. In *Glasgow v. Ridgeley*, 11 Mo. 34 (1847) this Court said:

> The objections to the leading character of the interrogatories propounded to the deponent, Willey, came too late at the trial. Had the objections been made at the time, the party taking his deposition might have framed his interrogatories so as to have avoided the objections.

Id. at 40.

That rule has been followed consistently since. *See Hoyberg v. Henske*, 153 Mo. 63, 55 S.W. 83, (1899); *Lauck v. Price*, 289 S.W.3d 694 (Mo.App. E.D. 2009). Moreover, the use of depositions in court proceedings is governed by

Rule 57.07. See also *Hemeyer v. Wilson*, 59 S.W.3d 574, 580 (Mo.App. W.D. 2001). Certain objections to deposed testimony are waived if not made before or during the deposition under Rule 57.07(4):

> (4) *Regarding Conduct During the Deposition.* An objection to the competency, relevancy, or materiality of testimony is not waived by failure to object before or during the deposition. Errors and irregularities in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind that might be cured if promptly presented are waived unless seasonable objection thereto is made during the deposition.

Rule 57.07(b)(4); See *Hemeyer*, 59 S.W.3d at 580. The purpose of this rule is "to give questioning counsel an opportunity to rephrase the question, lay a better foundation, or clarify the question so that evidence will not be rejected at trial because of inadvertent omissions or careless questions." *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 210 (Mo. banc 1991).

Just as there is no mention of any objection in the deposition, neither is there an objection to the testimony offered during the video deposition being played for the jury. The only record of any exception to this testimony is found in the motion in limine. (CLF048). Yet, the trial court's ruling on a

motion in limine is a preliminary ruling on the admissibility of evidence and is subject to change throughout the course of trial. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 646 (Mo. banc 1997). "Therefore, 'a complaint about a trial court's in limine ruling preserves nothing for appellate review.' " *Smith v. Associated Natural Gas Co.*, 7 S.W.3d 530, 536 (Mo.App. S.D. 1999) (quoting *Sullivan v. Spears*, 871 S.W.2d 75, 76 (Mo.App. W.D. 1994)). The motion in limine, in and of itself, preserves nothing for appeal. *State v. Purlee*, 839 S.W.2d 584, 592 (Mo. banc 1992). An objection must be made at trial when the evidence is offered in order to preserve the issue for appellate review. *State v. Holt*, 758 S.W.2d 182, 185 (Mo.App. E.D. 1988).

Having never followed up on the motion in limine by making an objection on the record to preserve the issue for appellate review, this entire point is subject to waiver. *Id.*

C. Relevance of Dr. Riordan's Testimony Concerning His Experience in Treating Prostate Abscess

Dr. Riordan's testimony 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. Dr. Riordan's experience in treating prostate abscesses was relevant to explain his qualifications as a urologist in dealing with treatment of a prostate abscess and to provide context as to why he would raise the issue of draining the abscess. Relevant

evidence is evidence that tends to prove or disprove a fact that is at issue or of consequence. *Mengwasser v. Anthony Kempker Trucking, Inc.*, 312 S.W.3d 368, 372 (Mo.App. W.D. 2010); See also *Westermann v. Shogren*, 392 S.W.3d 465 (Mo.App. W.D. 2012). The background and experience of Dr. Riordan with the treatment of a prostate abscess was relevant to the credibility of Dr. Riordan's suggestion to Dr. Partamian that they proceed to drain the Plaintiff's abscess. It was necessary for the jury to understand the background and experience of Dr. Riordan in order to assess the propriety of his suggestion of draining the abscess at that particular point in time. To aid the trier of fact, in order for the opinion of Dr. Riordan that drainage of the prostate abscess should be considered, it is necessary to establish his knowledge, skill, experience, training, or education. *Allen v. Grebe*, 950 S.W.2d 563, 567 (Mo.App. S.D. 1997); *Byers v. Cheng*, 238 S.W.3d 717, 729 (Mo. Ct. App. E.D. 2007) (Stating, "An expert may testify to an opinion based on his or her personal experience….).

The Appellants assert that Dr. Riordan's testimony concerning his treatment of prostate abscesses implied that in all cases prostate abscesses must be drained, instead of first treated with antibiotics. (App. Br. at 34). This contention is, in fact, contrary to the testimony of Dr. Riordan where he clearly testified that the standard of care required antibiotic treatment first, and only after antibiotics fail, drainage. Dr. Riordan never testified that all

prostate abscesses must be drained. This testimony was consistent with all of the testimony by experts in the case, Moreover, Dr. Riordan testified that he considered Dr. Partamian's decision that he wanted to pursue antibiotics to be reasonable. The testimony of Dr. Riordan was considered so favorable on the standard of care to the Defendants that at trial Defendants' counsel relied on the testimony of Dr. Riordan in his closing argument for the defense. (CTR702-703*).*

Furthermore, the subject conversation between Dr. Riordan and Dr. Partamian about draining Doug Stewart's abscess is relevant to rebut a material defense presented by the Defendants throughout trial. In opening statement, Defendants' counsel told the jury that Doug Stewart was "between a rock and a hard place". The defense asserted that once Doug Stewart started having lung problems on May 14th, Defendant Dr. Partamian thought it would be dangerous to his life to operate. (CTR78-79). This was the primary defense designed to explain Defendant's decision not to drain the abscess prior to May 17th; Dr. Partamian believed that Stewart's pulmonary condition had become so bad that the benefits of surgery were outweighed by the risks of the surgery. (CTR079-80). Given this defense, the subject conversation about draining the abscess on May 15th became highly relevant because at that time no pulmonary issues had presented.

D. This Was Not Testimony of Other Similar Incidents

Appellants contend that the testimony set out above at CLF280 and CLF289-90 was evidence of "other similar incidents." (App. Br. at 31). A review of the testimony set out above shows this is not the case. Leaving aside the lack of an objection to the testimony, the only specifics mentioned by the witness are the patient's approximate age. Dr. Riordan did not testify at length or place undue emphasis on this prior experience. He simply testified about his experience in treating prostatic abscesses.

Importantly, there were no comparisons between the prior case mentioned by Dr. Riordan and the case of Mr. Stewart. There was no attempt made to say they were similar. No particulars about the patient's course were mentioned. There was no comparison of the causative agents or bacteria. There was no testimony that the prior patient's case was "another similar incident," and even if it was, it did not involve "other similar incidents" by Dr. Partamian.[16] Dr. Riordan did not testify that he started antibiotics in the

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[16] To qualify as an "other similar incident" with respect to negligence, the case would have required a nexus to Dr. Partamian's prior care to be relevant. By analogy, notice of other similar incidents affecting only Ford vechicles could not be used as notice of the same defect in GM vehicles. Dr. Riordan's care was not at issue, and thus his treatment of other patients with prostate abscesses was not testimony about "other similar incidents." It was simply

earlier case and they failed, or that he believed based on the prior cases that earlier and more aggressive surgery was the standard of care. His testimony, as set out above, is to the contrary. This was not testimony about "other similar incidents."

The cases cited by the Appellants regarding Dr. Riordan's testimony are inapplicable.

The Appellants cite *Thornton v. Gray Auto. Parts Co.*, 62 S.W.3d 575, 583 (Mo. Ct. App. W.D. 2001) for the proposition that evidence of other incidents must be similar. This case is distinguishable because in a products liability action the admission of other incidents to prove a defect must meet the similarity standard. Here, the treatment by Dr. Riordan was not admitted to establish the negligence of Dr. Partamian and this is so especially when Dr. Riordan testified that he felt that the decision by Dr. Partamian to continue antibiotics was reasonable.

The Appellants also cite *Yingling v. Hartwig*, 925 S.W.2d 952 (Mo. Ct. App. W.D. 1996). There, the defendant introduced evidence through its IME physician to testify that people in litigation tend to have subjective complaints considerably longer. This evidence was admitted to support the

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testimony providing the background necessary for the jury to understand Dr. Riordan's experience.

opinion of the IME physician for the defendant that the plaintiff was not continuing to suffer from her injuries. The court held that statements about unidentified people with unidentified injuries and complaints are irrelevant to prove whether the plaintiff continued to suffer from her injuries.

In this case, there was absolutely no testimony by Dr. Riordan that, because he had chosen to drain the prostate abscess in other patients that he had treated, the standard of care required Dr. Partamian to drain the prostate abscess of Mr. Stewart.

The Appellants cite *Deveney v. Smith*, 812 S.W.2d 810 (Mo Ct. App. W.D. 1991). In *Deveney*, the plaintiff introduced evidence of other patients negligently treated by the defendant to show that the defendant was negligent in the treatment of the plaintiff. In the present case, the testimony of Dr. Riordan explaining his background and experience did not introduce any evidence of other patients asserted to have been treated negligently by Dr. Partamian.

The Appellants further cite a litany of cases that simply stand for the proposition that in order for the plaintiff to make a submissible case of medical malpractice, there must be testimony from an expert that establishes that the defendants violated the requisite standard of care. (App. Br., at 33-34). In this case, Dr. Riordan's testimony was not presented by the Plaintiff to establish the standard of care. Rather, the testimony was presented to

establish the issue of drainage as an alternative treatment being communicated to Dr. Partamian on May 15, 2009, before the abscess ruptured, and the lack of Dr. Partamian's concern about the patient's pulmonary status at that point. Dr. Riordan's testimony shows no more than that at a time prior to the advent of pulmonary issues, Dr. Partamian was asked to consider and rejected the option to drain the abscess. Others testified that this violated the standard of care.

E. Appellants' Relevance Objection was Overruled

Appellants argue that there was no relevance as to the standard of care in Dr. Riordan's off-hand mention of his prior treatment of patients with abscesses and his personal preference toward earlier surgical intervention. (App. Br. at 32). Again, there was no timely or contemporaneous objection of this nature. And again, the testimony was never offered to show standard of care, and Dr. Riordan was not called on standard of care. In fact, Appellants themselves offered Dr. Riordan's testimony to shore up their own testimony regarding the standard of care:

> Q. (By [defense counsel] Mr. Aylward) Sort of a final question. The way Dr. Partamian explained his thought process to you about how he wanted to treat this abscess is a – is a manner of treating it that you understand is used by other doctors in the same or similar circumstances, true?

(Objection deleted)

A. It – it's – it's a very simple approach. With hindsight, you know, I think it's easy to question it, but...

Q. (By Mr.Aylward) But you know it's the way other doctors treat prostatic abscesses is my point?

(Objection deleted)

A. Yeah the standard is antibiotic therapy. And then, if that fails, drainage. And I think that the limit is how you determine when that's failed and –

Q. (By Mr. Aylward) And do you know –

A. That's one of the issues in this case, which is probably for others to decide.

(Content Omitted)

Q. (By Mr. Aylward) You know about this treatment choice to treat a prostatic abscess with antibiotics first and then if that's not successful, then surgical drainage, you know about that treatment choice from your own education and training and from the medical research you did yourself, true?

A. Yes, like I said, my personal preference is toward more early aggressive surgical intervention, but I know of the other acceptable treatment options as well.

MR. AYLWARD: Okay. Thank you Doctor. That's all I have.

(CLF0327-28).

In this portion of the deposition the Appellants introduced into evidence Dr. Riordan's personal preferences for Appellants own use. They did it to shore up their own standard of care testimony. It is difficult to see how the sections quoted create undue prejudice against Appellants when Appellants introduced effectively the same testimony about Dr. Riordan's personal preferences in their own case.

More importantly, Dr. Riordan's testimony on his experience with prior surgical abscesses was instrumental to the jury understanding the reason and basis for his suggestion to Dr. Partamian of surgical intervention in this case on May 15, as well as evaluating his credibility as a surgeon and physician. The fact that he did not attack Dr. Partamian on the standard of care, and in fact acknowledged that the standard of care required antibiotic treatment first is sufficient to deprive Appellants' point of any force.

F. No Prejudice Because No Comparison

Appellants also make a bare claim of prejudice without any showing that the very limited mention of other surgically-drained abscesses had any impact on the jury. There was one mention of Riordan's treatment of other abscesses during Plaintiff's rebuttal closing argument. (CTR707). That mention was in response to argument by Appellants that Dr. Riordan

recognized the standard of care was to start antibiotics first[17]. (CTR702). Comparing other cases involving surgical treatment was not a theme of the Respondent's closing argument. Yet Appellants never explain the evidentiary basis for their claim that Dr. Riordan's testimony "prejudiced the jury against Dr. Partamian and Phoenix Urology." (App. Br. at 32). They even admit that "there was absolutely no evidence concerning these other cases." (App. Br. at 32). In other words, there was nothing for the jury to compare. How then, given this absence of evidence, could the mention of Dr. Riordan's prior care in any way impact the consideration of the jury?

Thus Appellants' bare claims of prejudice, devoid as they are of evidentiary support and a logical nexus to the verdict, fail.

G. Conclusion

Dr. Riordan's testimony about the other surgical abscess he drained was not specific, did not mention comparisons, and was never objected to during the deposition. Dr. Riordan's testimony was relevant to his experience and to rebut a key defense. The sole objection to the testimony was to relevance and is found solely in the motion in limine, not in the trial

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[17] There was never any question that the standard of care required the physicians to try antibiotics first. The issue was whether the standard of care was breached after antibiotic therapy failed.

transcript contemporaneous to the playing of the deposition. Appellants waived any error that might have been present, but more importantly, the evidence was relevant on the issues and properly received, and caused no prejudice.

III. DR. RIORDAN'S TESTIMONY ABOUT THE NATURE OF THE DISPUTE BETWEEN HIM AND THE GROUP PRACTICE WAS NECESSARY TO EXPLAIN ANY BIAS OR PREJUDICE THAT THE DEFENDANTS MIGHT HAVE USED TO IMPEACH THE TESTIMONY OF DR. RIORDAN. THE TESTIMONY WAS NOT PREJUDICIAL AND WAS PROPERLY ADMITTED.

A. Standard of Review

Respondent incorporates by reference his discussion of the standard of review from Point II.

B. Waiver

Respondent incorporates by reference the argument from Point II with regard to waiver and the failure to make contemporaneous objections to the evidence in that a motion in limine preserves nothing for review, and no contemporaneous objections were made to the videotaped deposition at the time it was played at trial. See Respondent's Point II, *supra*.

C. The Explanation of the Contractual Dispute Went to the Bias of the Witness and Was Properly Admitted.

Appellants argument with respect to the testimony about why Dr. Riordan left the Phoenix Urology practice suffers from a logical disconnect. Dr. Riordan's status as a former employee opened him up to attack based on

possible bias and prejudice against the Defendant group practice that had terminated his employment. His prior employment status had the potential to damage Plaintiff as Dr. Riordan could have appeared as the classic "disgruntled employee" at trial. Because Dr. Riordan was subject to impeachment based on his ongoing lawsuit and his separation from the practice, it was necessary to explain to the jury why the separation came about. This is because at the time of the events at issue in the case, Dr. Riordan was employed by the group practice, and at the time of trial he was no longer employed there.

1. Issues of Bias and Credibility

Dr. Riordan's contract was not renewed. (CLF279). He believed that was a breach of his contract, and he sued the practice. (CLF279) Thus, by the time of the events at trial, Dr. Riordan had crossed swords with Phoenix Urology. Dr. Riordan was asked to testify about factual matters in the case, and was subject to impeachment on cross-examination because (a) he had been involuntarily separated from the practice; and (b) he had sued the practice. Thus, there was a possibility that a jury might think that any favorable testimony that Dr. Riordan gave was motivated out of spite rather than fact or science.

This raised the issue of the bias of the witness. Since the Defendants would want to get into evidence the fact that Dr. Riordan had sued them, and

was at sword-point with them, his bias was a relevant issue. In fact, Defendants' counsel so stated at the hearing on the Motion for New Trial. (CTR758).

As to witnesses, credibility is always at issue, as is bias. *Mitchell v. Kardesch*, 313 S.W.3d 667, 674-5 (Mo. banc 2010). This because "it is well-settled that "the interest or bias of a witness and his relation to or feeling toward a party are never irrelevant matters." *Mitchell*, 313 S.W.3d at 676 (internal quotation omitted) (emphasis added). Cross-examination about any issue, regardless of its materiality to the substantive issues at trial, is permissible if it shows the bias or interest of the witness because a witness's bias or interest could affect the reliability of the witness's testimony on any issue. *Id.*

Thus, even though the nature of the dispute between the witness, Dr. Riordan and the Defendants was not relevant to the issues in the case, it was relevant to their views and feelings toward each other, and to the motivations of the witness to testify. Allowing the Defendants to get into evidence the fact that Dr. Riordan had been involuntarily separated from employment with the group, but not to be able to explain what happened from the witness' point of view (that he was terminated for financial reasons unrelated to his medical/surgical performance) would have allowed the jury to speculate on why he was no longer with the Defendant group practice, and perhaps to

speculate that he was no longer there for reasons directly related to his care or his testimony in the case. In other words, the jury could as easily have speculated that Dr. Riordan's questioning of Dr. Partamian about surgical drainage of Plaintiff's abscess was the very reason he was terminated. This would have been far more toxic to Appellants' case than the fact that he was terminated because of issues related to the contract and his financial performance.

2. Dr. Riordan Was Not The Star of the Show

Appellants are incorrect when they claim that Plaintiff made Dr. Riordan the "star" of the case. Appellants misstate the record when they claim that "Plaintiff mentioned Dr. Riordan, his termination from Phoenix Urology and the lawsuit prominently and repeatedly during his opening." (App. Br. at 37). In fact, in searching through the electronic transcript, this Court will find three times when the issue of the contract arises. The first is once in Plaintiff's opening statement. It is the only time the contract issue is mentioned in opening statement, and Plaintiff said: "And they are -- he's no longer with the group, Dr. Riordan isn't. They had a contract dispute and a falling out in that regard." (CTR034-035).

The second mention of the contract dispute occurred during Dr. Partamian's testimony:

Q. And apparently there's a contract dispute of some sort between Phoenix Urology and Dr. Riordan; is that correct?

A. That's correct.

Q. And, in fact, there's a lawsuit over that; isn't that true?

A. It's -- yeah, it's in arbitration.

Q. All right. And so there's been somewhat of a falling out between you and Dr. Riordan; is that true? Or do you all --

A. Not between me. It's -- we see each other.

Q. You see each other at family things? I'm sure you probably saw each other over the ---– over Thanksgiving?

A. Holidays, yeah.

(CTR184-85).

Then, for the third instance, during the videotaped testimony of Dr. Riordan, the following testimony is given:

Q. (By Mr. Redfearn) Tell me, you would have left Phoenix Urology in what year?

A. I was with Phoenix Urology for three years. And left at the end of my third year of employment, which I believe was around – it was two years ago, so 2011, August 2011.

Q. And what was the reason that you decided to leave Phoenix Urology?

A. We had a partnership dispute and we have different philosophies about how to best practice medicine.

Q. Tell me about that. What hap – what happened and tell me the details about that.

A. Well, its complicated and there's actually a separate lawsuit stemming from that, so I can't go into all the details. But it's basically a breach of contract case. And it is a dispute about what is owed to me because of my partnership status with Phoenix.

Q. Okay. Did you voluntarily leave Phoenix Urology?

A. No.

Q. So – so you – I don't know any other way to put – put it other than you were discharged or fired from – by the group?

A. The group would say that – that my contract was not renewed. But –

Q. Okay.

A. -- Same – same effect, I suppose.

(material omitted)

(CLF279). Defendant had no issue with the testimony above[18]. (CTR427-433, 757). Dr. Riordan's discussion about philosophies regarding the practice of medicine made it appear that the departure was related to issues regarding the best practice of medicine. Plaintiff needed to flesh that out a bit.

> Q. (By Mr. Redfearn) My question was did – did they – and I'm not suggesting that you agree with it – but did they provide you with some sort of reason for why they would not renew your contract?
>
> A. They were concerned that I wasn't bringing in enough money to the group. And I disagreed with that because I had met the productivity bonus – or I had earned a productivity bonus based on the contract they had signed.

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[18] During the hearing on Defendants' Motion for New Trial, Defendants' counsel stated: "There was a passage on page 28 of Dr. Riordan's videotaped deposition which was played to the jury without any objection from me wherein Dr. Riordan explained that he was no longer with the group, that there had been a parting of the ways. He described it as philosophical differences, and said there was a breach of contract lawsuit pending." (CTR757-58)(underlining added).

.

(CLF279).

Dr. Riordan's answers did not dwell on money, or even imply that "Phoenix Urology was more concerned with money than patient care." (App. Br. at 37). It simply put some flesh on the bones of the breach of contract litigation so that the jury could understand that any disagreement between the parties was related to the contract issues –and not to the practice of medicine.

D. Not An Issue On Closing Argument

Appellants also strain credulity by claiming that Plaintiff "returned to this theme again in closing argument." (App. Br. at 37). In fact, Plaintiff did not even mention the contract dispute in closing argument – the Defendants did. The mention of the contract dispute came in Mr. Aylward's closing for Defendants when he said:

> So Dr. Riordan said -- and that testimony comes from a man who now has a lawsuit pending against Phoenix Urology. So he wasn't in here pitching for Dr. Partamian. He was being honest. And he said that's his school of thought, too.

(CTR703). While this argument shows the lack of merit of Appellants' Point II, it also shows that the only mention of Dr. Riordan's contract issue in closing was by the Appellants, who took full advantage of the issue to show

how honest Dr. Riordan was when he was testifying favorably on their case. Thus, it is difficult to envision a situation where this creates prejudice against the Appellants here. They used the information in their closing, and yet they complain – without merit – that Plaintiff somehow created prejudice with it. Other than the mentions laid out above from the transcript and legal file, no emphasis was placed on the contract dispute and it was not used to argue that the Appellants were more interested in money than in patient care. Appellants' point is without merit and should be overruled.

E. Conclusion

Appellants never timely objected to the admission of the testimony of Dr. Riordan on the subject of why he was terminated from Phoenix Urology. (CLF757, CTR217, 386, 427). Any claim of error is waived. Even if not waived, the evidence was admissible as explanatory of any bias that Dr. Riordan may have had. Appellants badly misstated the record in arguing that they suffered prejudice from the admission of the evidence behind the contract dispute as it was not repeatedly mentioned during opening, or referred to in closing except by Appellants. This point should be denied.

IV. THE JURY PROPERLY WEIGHED THE EVIDENCE, PROPERLY EVALUATED MR. STEWART'S GRIEVOUS INJURIES, AND AWARDED DAMAGES CONSISTENT WITH THE EVIDENCE. THE AWARD IS IN LINE WITH OTHER DAMAGE AWARDS IN OTHER CASES AND IS NOT SUBJECT TO REVERSAL ON ANY GROUNDS.

A. Standard of Review

"The jury is given a large amount of deference in determining a party's injuries." *McGathey v. Davis,* 281 S.W.3d 312, 320 (Mo. Ct. App. W.D. 2009). This Court will not disturb a jury's verdict in assessing damages unless it is grossly excessive or inadequate. *Barnett v. La Societe Anonyme Turbomeca France,* 963 S.W.2d 639, 656 (Mo. Ct. App. W.D. 1997). "Since the appellate court does not weigh the evidence, it is limited to inquiring whether the jury's verdict is supported by substantial evidence, or in other words, 'whether the amount of the verdict is responsive to the evidence on the issue of damages.' " *Heins Implement Co. v. Missouri Hwy. & Transp. Comm'n,* 859 S.W.2d 681, 692 (Mo. banc 1993) (quoting *Nichols v. Blake,* 395 S.W.2d 136, 141 (Mo. 1965)). The trial court may find passion and prejudice by the jury from the excessiveness of the verdict alone – as noted by Appellants. *White v. St. Louis-San Francisco Ry. Co.,* 602 S.W.2d 748, 754 (Mo. Ct. App. E.D. 1980). However, when the trial court has made no such finding, the appellate court will defer

to the trial court and will not make a finding of passion or prejudice from the amount of the verdict alone. *Id. See also, Anderson v. Burlington Northern R. Co.*, 700 S.W.2d 469 (Mo. Ct. App. E.D. 1985). "Missouri appellate courts no longer engage in close scrutiny of the amounts awarded by juries for personal injuries since the trial court is in a much better position than we are to assess the verdict." *Henderson v. Fields,* 68 S.W.3d 455, 485 (Mo. Ct. App. W.D. 2001) (quoting *Lay v. P & G Health Care, Inc.,* 37 S.W.3d 310, 333 (Mo. Ct. App. W.D. 2000)). In determining whether a verdict is excessive, no precise formula exists. *Seabaugh v. Milde Farms, Inc.,* 816 S.W.2d 202, 211 (Mo. banc 1991). Each case must be examined on its own facts. *Id.* A verdict is deemed excessive when it exceeds fair and reasonable compensation for the plaintiff's loss or damages. *Johnson v. Allstate Indem. Co.,* 278 S.W.3d 228, 236 (Mo. Ct. App. E.D. 2009). This Court's review of the evidence is limited to the evidence that supports the verdict, and the Court excludes the evidence that disaffirms it. *Coggins v. Laclede Gas Co.,* 37 S.W.3d 335, 343 (Mo. Ct. App. E.D. 2000). Only when the verdict is manifestly unjust will this Court exercise its power to interfere with the judgment. *Strong v. American Cyanamid Co.,* 261 S.W.3d 493, 521 (Mo. Ct. App. E.D. 2007).

To show passion and prejudice by the jury, the complaining party cannot simply direct the appellate court to the size of the verdict alone. *Maldonado v. Gateway Hotel Holdings, LLC*, 154 S.W.3d 303, 311 (Mo. Ct. App.

E.D. 2003). Instead that party must show that some error was committed during the trial. *Id.* That showing precedes any analysis of the size of the verdict. *Id.*

More importantly, the party challenging the verdict as excessive must first show that the verdict, viewed in the light most favorable to the prevailing party, was glaringly unwarranted. *Id.* Second, that party must show trial error or misconduct by the prevailing party that was responsible for producing actual passion or prejudice. *Maldonado*, 154 S.W.3d at 311.

A trial court has broad discretion in ordering or denying remittitur because the ruling is based upon the weight of the evidence, and the trial court is in the best position to weigh the evidence. *Evans v. FirstFleet, Inc.,* 345 S.W.3d 297 (Mo. Ct. App. S.D. 2011); *Barnett,* 963 S.W.2d at 656. A trial court's decision on remittitur is reviewed for abuse of discretion. *Evans*, 345 S.W.3d at 302. *Collier v. City of Oak Grove,* 246 S.W.3d 923, 925 (Mo. banc 2008). A trial court is said to have abused its discretion when its ruling is against the logic of the circumstances and shows a lack of consideration. *Burrows v. Union Pac. R.R. Co.,* 218 S.W.3d 527, 533 (Mo. Ct. App. E.D. 2007). However, where reasonable persons could differ on the propriety of the ruling, it cannot be said that the trial court abused its discretion. *Id.*

In determining whether a compensatory damage award is excessive, the court should consider the evidence in the case and the verdict in light of

several factors: (1) loss of income, present and future; (2) medical expenses; (3) the plaintiff's age; (4) the nature and extent of the plaintiff's injuries; (5) economic factors; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and trial court to appraise the plaintiff's injuries and other damages." *Maldonado*, 154 S.W.3d at 311-312.

B. No Trial Court Error

For the reasons set out in Points II and III, *supra*, there is no trial court error. No error was committed, and more importantly, no error was preserved with respect to the evidence admitted. At the outset Appellants' claim fails.

C. No Evidence of Error or Argument Producing Passion or Prejudice

The supposed trial court errors that Appellants claim caused jury passion and prejudice do not exist, as noted above. Even if viewed as error, however, these purported evidentiary issues are free of the kind of emotion that might incite passion and prejudice. There are two purported claims of error: the testimony regarding the prior patient, and the testimony about the contract issue. Neither produced passion or prejudice.

Appellants claim that the evidence of Dr. Riordan's question to Dr. Partamian, motivated by a prior experience with a prostatic abscess, should

not have been admitted. Admission was proper as discussed in Point II. But even if this had been error, the testimony itself is rather bland:

> A. And so one of the things that sticks out in my mind is just a few weeks before Mr. Stewart presented, there was another patient of mine that I -- I treated at Heartland. I remember specifically the date 'cause it was the date my daughter was born, April 25th, 2009. I had a patient in the hospital and my wife went into labor and I — I drained the abscess on that same -- same day.
>
> Q. You -- you did what with the abscess?
>
> A. I drained it.

(CLF280). There was no objection by Defendants to the question at the time it was asked, and there was no contemporaneous objection at trial before the playing of Dr. Riordan's deposition. But this statement is now asserted by the Appellants to have "inflamed" the jury. It is a rather absurd claim frankly.

Appellants also complain that Dr. Riordan testified that he had a conversation with Dr. Partamian shortly after writing a medical progress note on the Plaintiff, and it concerned draining Mr. Stewart's abscess:

> Q. And, first of all, what prompted that discussion?
>
> A. Well, a- few weeks earlier, as I said, I had had a very similar patient and I had drained the abscess. And I was curious

about why he would be pursuing a different — a different treatment option.

Q. And how old was the patient that you had had earlier?

A. I don't remember.

Q. Okay. Young patient, middle-aged patient, older patient, do you have any recollection at all?

A. Young to middle-age, but I don't remember.

(CLF289-290). This is testimony for which there is no contemporaneous objection. It is not damning evidence of negligence, nor is it the kind of smoking gun testimony that paints Appellants as crass or insensitive. It is merely the explanation for why Dr. Riordan asked Dr. Partamian about draining the abscess. Again, there is nothing here that would incite passion or prejudice.

Similarly Dr. Riordan's testimony about why he was involuntarily separated from the practice does not paint a target on the Defendant practice group, nor does it come close to implying that the Defendant had an improper motive aimed at profit over patients. And as noted in Point III, only Appellants mentioned the contract issue in closing argument (CTR703).

As set out in Points II and III above, it was not error to admit this testimony. The brief mention of the prior patient was for no purpose other than educating the jury about Dr. Riordan's experience, and was not played

up during either opening or closing by Respondent. The brief mention of the contract dispute in opening statement merely laid the groundwork for admission of the evidence. Respondent never argued the evidence was important on any issue. It went to Dr. Riordan's bias and feelings toward a party, and as such was relevant and admissible. *Mitchell v. Kardesch*, 313 S.W.3d 667, 674-5 (Mo. banc 2010).

D. The Unanimous Verdict Is Not Excessive

As stated in the Defendants' closing argument, "what happened to Doug Stewart was awful." (CTR689).

Indeed, the evidence bears out Defendants' own lawyer on this score. The jury returned a unanimous verdict for past economic damages to Doug Stewart in the amount of $401,726.77, equaling the evidenced amount of lost income admitted without objection by the Defendants and the amount paid to satisfy the medical bills admitted without objection by the Defendants. (CLF113, CTR457-458).

The jury returned a unanimous verdict for past non-economic damages to Doug Stewart in the amount of $1,500,000. (CLF113). Non-economic damages were defined by the instructions as non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life. (CLF106). The jury had been presented with evidence proving that as a result of the failure to drain the

prostate abscess, the abscess ruptured resulting in Fournier's gangrene and necrotizing fasciitis destroying his urethra with the infection spreading into Plaintiff Doug Stewart's pelvis, scrotum, penis, and perineum.

Plaintiff had to be placed on a ventilator and undergo multiple surgical procedures and hospitalization until June 18, 2009. (CTR300-326). The evidence presented to the jury showed that Mr. Stewart had no memory from May 11 until June 8, 2009 – missing nearly a month of his life. (CTR442). At the time that he woke up, he still had a machine to help him breathe, a feeding tube, and a tracheal tube. (CTR407-408). He was scared, could barely move, had no strength, and was still on a ventilator. (CTR442). He had an incision in his perineum behind the scrotum back to the anus and one above his pubic bone that required dressing changes that were painful. (CTR443). He had a feeding tube into his stomach that was uncomfortable. (CTR444).

When he was discharged from the first hospitalization he was unable to walk without a walker. (CTR445). After being discharged from the hospital, he had wounds located in the peritoneum and the pubic bone and an incision for his tracheal tube that required bandage changes at least two or three times a day that were very painful. (CTR412-413, 445-446). He had to be readmitted to the hospital just days after his discharge, because he started urinating through the hole in his perineum that required a catheter to be placed in his urethra that was extremely painful. (CTR327, 448).

Mr. Stewart was required to have a catheter in his urethra until July or August 2009 and when it was removed he was left with erectile dysfunction. (CTR449). Having a catheter in his urethra for extended periods of time was very uncomfortable. (CTR449). Mr. Stewart suffered from erectile dysfunction as a result of the damage to his penis caused by the infections. (CTR328). After the catheter was removed, Mr. Stewart developed strictures in his urethra where the urethra was necrotic. (CTR327). He was required to undergo multiple procedures by Defendant Dr. Partamian about every six weeks where a cystoscopy was inserted into his urethra to stretch the urethra open. (CTR327, 452). He was also found to have a hole in the urethra that was located in his prostate that required him to once again have a suprapubic catheter inserted into his bladder for approximately two months, which made him unhappy and embarrassed. (CTR329-330, 453-454).

Mr. Stewart then had to undergo urethral reconstruction surgery resulting in urinary incontinence requiring him to wear panty liners and to be unable to have ejaculate. (CTR330-332, 455). Mr. Stewart also lost the muscle that surrounds his urethra. (CTR332-333). Mr. Stewart did not complete his medical treatment until about July 2010. (CTR329, 454-455).

The jury was also presented with evidence of non-economic damages that are permanent and will last for the rest of his life. The jury learned that the life expectancy for Mr. Stewart is 39.8 years. (CTR473). Mr. Stewart was

newly engaged to his now wife, Mary Stewart. (CTR391, 415). Mr. Stewart now has erections that are distorted, disturbed, and difficult to achieve which is a permanent injury. (CTR328). Mr. Stewart is unable to get a full erection which causes him to not feel like a complete man. (CTR451). Mr. Stewart has pain with erections and is unable to have any ejaculate during intercourse. (CTR458). When Mr. Stewart does get an erection it is not as hard as it was before his injury. (CTR417). The erectile dysfunction bothers Mr. Stewart a lot because he does not feel like he's able to do his husbandly part of the relationship. (CTR417). Thus his sex life has been devastated. While Appellants view this as unimportant, because Doug Stewart did not plan on having children, the seven women and five men on the jury did not find it to be unimportant at all.

As a result of the urethral reconstruction surgery, Mr. Stewart has urinary incontinence that requires him to wear panty liners. (CTR330-331). Mr. Stewart suffers urine leakage whenever he squats down, picks up something heavy, flexes his core muscles, or places any pressure on the peritoneum. (CTR455). Mr. Stewart has to wear panty liners every day and has to change them every day and feels embarrassed about the panty liners. (CTR456).

Mr. Stewart has permanent pain on the right side of his scrotum, pain in his perineum, pain in his lower abdomen, pain with erections and a

burning sensation in his right groin. (CTR333-334). The pain is constant and Mr. Stewart has pain every day that ranges from a 2-1/2 to 3 on a good day and 9 or 10 on a bad day. (CTR458-459). The injuries have had an impact on his current activities especially any activities that involve twisting. (CTR458). His injuries have limited his activities in getting up off of the floor, climbing a ladder, lifting anything too heavy, and any other activities that will cause him to leak. (CTR421).

The injury has also changed his personality. (CTR459-460, 422). He used to be a jokester and now is withdrawn and feels upset that he is not the man that he used to be. (CTR422). Mr. Stewart is scared that his injuries will get worse and that the leakage will get worse and that the pain will get worse. (CTR460). His wife worries that he will never get over everything that has happened to him. (CTR422).

E. No Error In Awarding More Than Suggested

Appellants seem convinced that because the jury gave a verdict larger than the number suggested by Plaintiff's counsel in closing argument, the verdict is excessive. They continually view counsel's suggestions of a number as a mandate to the jury when it was anything but that. This is what Plaintiff's counsel said during closing:

> But, you know, you're the boss. These are your decisions. You may sit there and say "5"? "You think it's only a 5"? You may

> consider it to be a lot worse, or you may not consider it to be the same. You may not agree with my numbers. You know, that's why you're here. We have calculators that calculate lost wages and medical expenses. But we have the jury system, because you all uniquely understand the value of life and the harm that it does to health. And so that's why you're here, and that's why we're asking you to make that decision. It's your decision.

(CTR686). In this case, even the defense lawyer acknowledged that what happened was awful. The case was defended on liability, not on damages. In fact the only mention of damages by defense counsel was the statement to the effect that "what happened was awful." (CTR689). Defendants did not propose different damage numbers in their closing argument. (CTR688-704). And they did not bring forth evidence that Stewart's injuries were less severe than the record discloses. The fact that the total damage award exceeds the amount requested by counsel during closing argument does not establish that the damage award is excessive. *Mansfield v. Horner*, ___ S.W.3d ___, 2014 WL 2724854, at 10 (Mo. Ct. App. W.D. 2014). Our "… case law has consistently held that a jury is free to award damages above what is requested." *Id*.

On appeal this Court's review of the evidence is limited to the evidence that supports the verdict, and it excludes the evidence that disaffirms it. *Coggins,* 37 S.W.3d at 343. On that basis it can surely conclude that the jury's

verdict is demonstrative of the severity of Mr. Stewart's injuries, the impact on his activities of daily living, and the pain and humiliation he will endure for the remainder of his life. This is not an excessive verdict.

F. The Award Is Consistent With Other Affirmed Verdicts

The jury verdict in this case is also reasonable when viewed in light of the awards approved in comparable cases. In *Evans*, 345 S.W.3d at 302-303, the evidence was that the decedent had a life expectancy of 18.2 years and that the economic damages to the survivors were less than $2,500 per year. 345 S.W.3d at 304. Even though the economic damages would amount to only about $45,000, the Court of Appeals approved a jury verdict of $1,000,000, which was 22 times the economic damages. There have been other cases in Missouri that have upheld compensatory damage awards to injured plaintiffs that exceed the verdict in this case:

- *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 856-57 (Mo. banc 1993) (Missouri Supreme Court upholding a $16,000,000 compensatory damage award entered in favor of a plaintiff who alleged that treatment by a physician allowed plaintiff to contract polio; finding that the verdict was not excessive and did not warrant remittitur);
- *Maldonado v. Gateway Hotel Holdings*, 154 S.W.3d 303, 311-12 (Mo. Ct. App. E.D. 2003) (Appellate court upholding a trial court ruling that denied a defendant's motion for remittitur in regard to a $13.7 million

verdict in favor of a 23-year-old boxer who sustained brain damage in a fight);

- *Cole v. Goodyear Tire & Rubber Co.*, 967 S.W.2d 176, 187-188 (Mo. Ct. App. E.D. 1998) (The appellate court finding that denial of remittitur in verdict of $7,800,000 was not excessive for plaintiff who had sustained a life-threatening injury, even though the compensatory damage award exceeded economic damages by $3.2 million);
- *Coggins v. Laclede Gas Co.*, 37 S.W.3d 335, 343-344 (Mo. Ct. App. E.D. 2000) (The appellate court affirming a denial of remittitur on a wrongful death verdict in the amount of $4.5 million in damages);
- *Burrows v. Union Pacific Railroad Co.*, 218 S.W.3d 527, 540-541 (Mo. Ct. App. E.D. 2007) (Appellate court affirming trial court's denial of remittitur of a jury verdict for $5,000,000 in compensatory damages in a railroad injury case);
- *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 36-37 (Mo. Ct. App. E.D. 2013) (Appellate court affirming denial of remittitur of jury verdict of $4,000,000 for 4 wrongful death claims in compensatory damages);
- *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126, 141 (Mo. Ct. App. E.D. 1999) (Appellate court holding that remittitur was not warranted to reduce compensatory damage award in the amount of $5,000,000 in

personal injury action where the plaintiff was injured during bungee jumping);

- *Lay v. P & G Health Care, Inc.*, 37 S.W.3d 310, 332-333 (Mo. Ct. App. W.D. 2000) (Appellate court upholding the denial of remittitur finding that evidence supported jury award of $9,252,500 in favor of elevator and dumbwaiter repairman who suffered head injuries when a dumbwaiter fell on him);
- *Lopez v. Three Rivers Electric Co-op, Inc.*, 92 S.W.3d 165, 175-176 (Mo. Ct. App. E.D. 2003) (Appellate court approved the trial court's refusal of remittitur finding that damages of $11,000,000 for death of flight engineer was not excessive and that damages of $10,000,000 for death of pilot were not excessive in a helicopter crash);
- *Martin v. Survivair Respirators, Inc.*, 298 S.W.3d 23, 35-36 (Mo. Ct. App. E.D. 2009) (Appellate court finding that compensatory damage award of $12,000,000 for the death of a firefighter was not so excessive as to require remittitur or new trial); and,
- *Mansfield v. Horner*, ___ S.W.3d ___, 2014 WL 2724854 at *5-6 (Appellate Court finding that compensatory damage award of $8,650,000 with economic damages of $645,020 was not excessive).

G. Conclusion

There were no trial court errors. There was no passion or prejudice. The jury properly weighed the evidence. There is simply no basis in law or fact to find that the verdict here is excessive. This point should be denied.

CONCLUSION

There is no basis upon which to reverse the Trial Court's sound exercise of judgment. This Court need not even reach the constitutional question because it was not preserved and because the Appellants have taken inconsistent positions on the statute, both trying to gain its advantage as well as denying its burdens. The history of remittitur and this Court's decision in *Firestone v. Crown Center Redevelopment Corp.,* 693 S.W.2d 99 (Mo. banc 1985) provides all the legal rationale necessary to deny the constitutional point.

Mr. Stewart suffered horrendous injuries to his urinary tract and genitalia. His life is forever altered. The jury unanimously awarded more than the amount suggested by Plaintiff's counsel, but not so much as to indicate either passion or prejudice. There was no error in the admission of evidence, and even if there had been, such evidence was used by the Appellants to buttress their case, and thus could not have been prejudicial.

For all these reasons the judgment of the Trial Court must be affirmed.

Dated: December 1, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

The undersigned certifies that this brief complies with the word limitations found in Rule 84.06(b) in that the brief contains 22,370 words. The word count was obtained from Microsoft Word.

Brief and Appendix were scanned and certified as virus free by Norton Antivirus.

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CERTIFICATE OF SERVICE

I certify that in filing this document with the MO Supreme Court through the electronic filing system an electronic copy of this document and Appendix was served on counsel named below on this 1st day of December, 2014.

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